# International Court of Justice

## Arrest Warrant of 11 April 2000

## (Democratic Republic of the Congo v. Belgium)

## Counter Memorial of the

## Kingdom of Belgium

**28 September 2001**

# INTRODUCTION

**0.1** By an Application dated 17 October 2000 filed with the Registry of the Court, the Democratic Republic of the Congo ("DRC") instituted proceedings against the Kingdom of Belgium ("Belgium") alleging that, in consequence of the issue of an arrest warrant by a Belgian Judge against the Minister for Foreign Affairs of the DRC, Belgium is in violation of "the principle that a State may not exercise [its authority] on the territory of another State …, of the principle of sovereign equality among all Members of the United Nations", and of the "immunity of the Minister of Foreign Affairs of a sovereign State".[1] The Application requests the Court to declare that "*Belgium shall annul the international arrest warrant issued on 11 April 2000 … against the Minister for Foreign Affairs in office of the Democratic Republic of the Congo, Mr. Abdulaye Yerodia Ndombasi*".[2] Setting out the grounds on which the claim is based, the Application states (A) that the universal jurisdiction provided for by the Belgium law under which the arrest warrant was issued, as well as the arrest warrant itself, are in breach of international law, and (B) that "[t]he *non-recognition* … of the *immunity of a Minister for Foreign Affairs* in office is contrary to international case-law …, to customary law and to international courtesy …"[3]

**0.2** Addressing the jurisdiction of the Court, the Application states that "Belgium has accepted the jurisdiction of the Court and, in so far as may be required, the present Application signifies acceptance of that jurisdiction by the Democratic Republic of the Congo".[4]

**0.3** Contemporaneously with its Application instituting proceedings, the DRC also filed a *Request for the Indication of Provisional Measures* by which it asked the Court to order "la mainlevée immédiate du mandat d'arrêt litigieux" (the immediate discharge of the disputed arrest warrant).[5]

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[1] *Application Instituting Proceedings, 17 October 2000* ("Application"), at Part I(1) and (2).
[2] *Application*, at Part II (emphasis in the original).
[3] *Application*, at Part IV(A) and (B) respectively (emphasis in the original).
[4] *Application*, at Part V.
[5] *Demande d'indication d'une mesure conservatoire* ("Provisional Measures Request"), at paragraph 2. (Translation by the Registry, CR 2000/32, 20 November 2000, at p.5).

**0.4** In accordance with Article 31 of the *Statute* and Article 35 of the *Rules of Court* ("Rules"), Belgium, by a letter to the Court dated 30 October 2000, notified the Court of its intention to choose a Judge *ad hoc* and nominated Ms Christine Van den Wyngaert, a Belgian national and Professor of Law at the University of Antwerp, for purposes of the case. The DRC nominated Mr Sayeman Bula-Bula, a DRC national and Professor of Law at the University of Kinshasa, as Judge *ad hoc* for purposes of the case.

**0.5** The Court held hearings on the DRC's request for the indication of provisional measures on 20 – 23 November 2000. In the course of the hearings, the DRC referred to the Declarations by Belgium and the DRC under Article 36(2) of the *Statute of the Court* ("Statute") as constituting the basis of the Court's jurisdiction in the case. The Belgian Declaration under Article 36(2) of the *Statute* is dated 17 June 1958.[6] The DRC Declaration under Article 36(2) of the *Statute* is dated 8 February 1989.[7]

**0.6** On 20 November 2000, coinciding with the opening of the oral pleadings on the DRC's request for the indication of provisional measures, a cabinet reshuffle took place in the DRC. As a result of this reshuffle, Mr Yerodia Ndombasi, the subject of the arrest warrant, ceased to exercise the functions of Minister for Foreign Affairs of the DRC and was appointed Minister of National Education.[8]

**0.7** By an Order of 8 December 2000, the Court rejected the DRC's request for the indication of provisional measures. The basis of the Order was the Court's determination that, in view of the cabinet reshuffle of 20 November 2000, it had "not been established that irreparable prejudice might be caused in the immediate future to the Congo's rights nor that the degree of urgency is such that those rights need to be protected by the indication of provisional measures".[9]

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[6] **Annex 1.**
[7] **Annex 2.**
[8] Order of the Court of 8 December 2000 on the Request for the Indication of Provisional Measures ("Provisional Measures Order"), at paragraph 51. Also Memorial of the Democratic Republic of the Congo, 15 May 2001 ("DRC Memorial"), at paragraph 11.
[9] *Provisional Measures Order*, at paragraph 72.

**0.8** In the course of the provisional measures hearing, Belgium contended that, in consequence of the cabinet reshuffle, the DRC Application had been rendered without object and accordingly requested the Court to remove the case from its List. Noting that the arrest warrant had not been withdrawn "and still relates to the same individual, notwithstanding the new ministerial duties that he is performing",[10] the Court, however, concluded that

> "the Congo's Application has not at the present time been deprived of its object; and whereas it cannot therefore accede to Belgium's request for the case to be removed from the List at this stage of the proceedings".[11]

**0.9** The Court further observed that it was "desirable that the issues before the Court should be determined as soon as possible … [and that] it is therefore appropriate to ensure that a decision on the Congo's Application be reached with all expedition".[12]

**0.10** By an Order of 13 December 2000, the Court noted the agreement of the Parties

> "that the written pleadings in this case would comprise, in that order, a Memorial of the Democratic Republic of the Congo and a Counter-Memorial of the Kingdom of Belgium, and that those pleadings would address both issues of jurisdiction and admissibility and the merits".[13]

**0.11** The Court went on to fix 15 March 2001 for the filing of the Memorial by the DRC and 31 May 2001 for the filing of the Belgian Counter-Memorial.

**0.12** Subsequent to the Court's Order of 13 December 2000, the time-limits for the filing of the pleadings of the Parties were extended by Orders of 14 March 2001 and 12 April 2001 to 17 May 2001 for the filing of the Memorial of the DRC and 17 September for the filing of the Belgian Counter-Memorial.

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[10] *Provisional Measures Order*, at paragraph 56.
[11] *Provisional Measures Order*, at paragraph 57.
[12] *Provisional Measures Order*, at paragraph 76.
[13] Order of 13 December 2000.

**0.13** Pursuant to the Court's Order of 12 April 2001, the DRC filed its Memorial in this case dated 15 May 2001.

**0.14** Consequent upon the filing of the DRC Memorial, and in the light of certain factors mentioned in that Memorial, Belgium, by letter dated 14 June 2001, requested the Court to vary the procedure laid down in its earlier Orders and permit the conduct of a preliminary phase of proceedings in accordance with the Court's usual procedure. The principal factor highlighted by Belgium relevant to this request was that, according to the information contained in the DRC's Memorial, Mr Yerodia Ndombasi, the subject of the arrest warrant, was no longer a member of the Government of the DRC. In respect of this development, Belgium observed that

> "[t]his new fact has important implications for this case. It raises questions of jurisdiction and admissibility, on grounds *inter alia* that the case as presented in the Congo's Memorial differs on important points from the case as presented in the Congo's Application instituting proceedings, and that the case is now moot. It also suggests that the need for expedition is less pressing."[14]

**0.15** Belgium further noted that, in the light of this development, it envisaged formulating objections to jurisdiction and admissibility.

**0.16** Taking account of the views of the Parties, the Court, by Order of 27 June 2001, rejected Belgium's request to submit preliminary objections involving suspension of proceedings on the merits. The Court, however, extended the time-limit for the filing of Belgium's Counter-Memorial to 28 September 2001.

**0.17** The present Counter-Memorial of the Kingdom of Belgium is filed pursuant to the Court's Order of 27 June 2001. As indicated in its letter to the Court of 14 June 2001, and pursuant to the Court's Orders of 13 December 2000 and 27 June 2001, the Counter-Memorial both sets out objections to jurisdiction and admissibility and addresses the merits of the DRC's case.

[14] Order of 27 June 2001.

**0.18** As formulated in its Application instituting proceedings, the essence of the DRC's case is that the assertion of jurisdiction by a Belgian Judge over offences allegedly committed in the DRC by a DRC national, without any allegation that the victims were of Belgian nationality or that the acts constituted violations of the security or dignity of Belgium, is a violation of the DRC's sovereignty. More particularly, the DRC contends that the issuing of an arrest warrant by a Belgian Judge against the Minister for Foreign Affairs in office of the DRC constitutes a breach of international law.

**0.19** Noting that "ce grief et ces demandes diffèrent quelque peu de ceux et celles qui furent formulés dans sa requête introductive",[15] the DRC has reformulated its case in its Memorial in the following terms:

> "L'émission et la diffusion internationale du mandat d'arrêt du 11 avril 2000 par un organe de l'État belge procèdent, ainsi qu'il sera démontré ci-après, d'au moins une violation du droit international dont la R.D.C. est victime: la violation de la règle de droit international coutumier relative à l'inviolabilité et l'immunité pénale absolues des ministres des affaires étrangères en fonction."[16]

**0.20** Consequent upon this revised formulation, the DRC requests the Court to adjudge and declare *inter alia*

> "[q]u'en émettant et en diffusant internationalement le mandat d'arrêt du 11 avril 2000 délivré à charge de Monsieur Abdulaye Yerodia Ndombasi, la Belgique a violé, à l'encontre de la R.D.C., la règle de droit international coutumier relative à l'inviolabilité et l'immunité pénale absolues des ministres des Affaires étrangères en fonction".[17]

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[15] "… this grievance and these requests differ slightly from those which were formulated in the Application instituting proceedings." (DRC Memorial, at paragraph 8; unofficial translation by Belgium)

[16] "The issue and international transmission of the Arrest Warrant of 11 April 2000 by an authority of the Belgian State stems from at least one infringement of international law, as will be demonstrated below, of which the DRC is the victim: the violation of the rule of customary international law and criminal immunity of Ministers for Foreign Affairs in office." (DRC Memorial, at paragraph 6; unofficial translation by Belgium)

[17] "[t]hat by issuing and internationally transmitting the Arrest Warrant of 11 April 2000 issued against Mr Abdulaye Yerodia Ndombasi, Belgium violated, to the prejudice of the DRC, the rule of customary international law on the complete inviolability and immunity of the Minister for Foreign Affairs in office". (DRC Memorial, at paragraph 97(1); unofficial translation by Belgium)

**0.21** The DRC further requests the Court to adjudge and declare that Belgium is required to withdraw and annul the arrest warrant and that all States, including Belgium, are prohibited from enforcing it.[18]

**0.22** Notwithstanding the reformulation of the DRC's case, both the DRC's Application and its Memorial make clear that the central element of its allegations against Belgium is that Belgium is in breach of international law by the issuing and international transmission of an arrest warrant against the DRC's Minister for Foreign Affairs in office.

**0.23** Following the constitution of the new Congolese Government of President Joseph Kabila on 14 April 2001, "M. Abdoulaye Yerodia n'apparaît plus sur la liste des membres de ce gouvernement".[19] Mr Yerodia Ndombasi, the subject of the arrest warrant, is accordingly, at this point, neither Minister for Foreign Affairs of the DRC nor a member of the DRC Government occupying any other ministerial position. The central and critical element of the DRC's allegations against Belgium is thus no longer operative.

**0.24** In the light of this development, as well as the reformulation of the DRC's case in its Memorial, Belgium contends that the Court lacks jurisdiction in this case and/or that the application is inadmissible. These issues are addressed fully in Part II of this Counter-Memorial. By way of summary on these matters, Belgium contends, in addition or in the alternative:

(a) in the light of the fact that Mr Yerodia Ndombasi is no longer either Minister for Foreign Affairs of the DRC or a minister occupying any other position in the DRC Government, that there is no longer a "dispute" between the Parties within the meaning of this term in the Optional Clause Declarations of the Parties and the Court accordingly lacks jurisdiction in this case;

[18] DRC Memorial, at paragraph 97.
[19] "Mr Adoulaye Yerodia no longer appears on the list of the members of this government". (DRC Memorial, at paragraph 11; unofficial translation by Belgium)

(b) in the light of the fact that Mr Yerodia Ndombasi is no longer either Minister for Foreign Affairs of the DRC or a minister occupying any other position in the DRC Government, that the case is now without object and the Court should accordingly decline to proceed to judgment on the merits of the case;

(c) that the case as it now stands is materially different to that set out in the DRC's Application instituting proceedings and that the Court accordingly lacks jurisdiction in the case and/or that the application is inadmissible;

(d) in the light of the new circumstances concerning Mr Yerodia Ndombasi, that the case has assumed the character of an action of diplomatic protection but one in which the individual being protected has failed to exhaust local remedies, and that the Court accordingly lacks jurisdiction in the case and/or that the application is inadmissible.

**0.25** Separately from the preceding, and in the event that the Court decides that it does have jurisdiction in this case and that the application is admissible, Belgium relies on the *non ultra petita* rule as limiting the jurisdiction of the Court to those issues that are the subject of the DRC's final submissions.

**0.26** By way of summary, Belgium's principal submissions on the issues of substance raised by the DRC are as follows:

(a) the character of the arrest warrant is such that it neither infringes the sovereignty of, nor creates any obligations for, the DRC;

(b) the assertion of jurisdiction by the Belgian Judge pursuant of the relevant Belgian legislation is consistent with international law in that:

(i) it is based on the connection of the complainant civil parties to Belgium by reason of nationality and/or residence;

(ii) it is consistent with the obligations upon High Contracting Parties to the Fourth *Geneva Convention Relative to the Protection of Civilian*

*Persons in Time of War* of 1949 (*"Fourth Geneva Convention"*)[20] – and, in particular, Article 146 and 147 thereof – which the applicable Belgian legislation was designed to implement;

(iii) it is consistent with principles of customary international law permitting States to exercise universal jurisdiction over *inter alia* war crimes and crimes and humanity;

(c) while Ministers for Foreign Affairs in office are in general immune from suit before the courts of a foreign State, such immunity applies only in respect of their official conduct for purposes of enabling them to carry out their official functions. It does not avail such persons in their private capacity or when they are acting other than in the performance of their official functions;

(d) immunity does not in any event avail Ministers for Foreign Affairs in office alleged to have committed war crimes or crimes against humanity;

(e) the arrest warrant explicitly recognises that had Mr Yerodia Ndombasi, in his role as DRC Foreign Minister, visited Belgium on the basis of an invitation and in his official capacity, he could not have been arrested;

(f) whatever the Court's conclusions on the merits of the case, key elements of the remedies requested by the DRC in its final submissions fall outside the accepted judicial function of the Court and should not accordingly be the subject of any judgment by the Court.

**0.27** These submissions are addressed in detail in Part III of this Counter-Memorial. The scheme of this Counter-Memorial is thus as follows:

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|---|---|---|
| Part I | – | Background and Preliminary Issues |
| Part II | – | Objections to Jurisdiction and Admissibility |
| Part III | – | Merits |

[20] 75 UNTS 31.

Conclusions

Final Submissions

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# PART I

# BACKGROUND AND PRELIMINARY ISSUES

**1.1** This Part of the Belgian Counter-Memorial addresses a number of background and preliminary issues relevant to the submissions that follow in Part II, on jurisdiction and admissibility, and Part III, on the merits of the DRC's case. Specifically, this Part addresses the following:

A. Factual and legal background

B. The DRC's case

C. The position of Mr Yerodia Ndombasi at the material times

## A. Factual and legal background

**1.2** To the extent material, the facts and elements of law relevant to the present proceedings are set out in the substantive parts of this Counter-Memorial addressing in detail the arguments advanced by the DRC. For convenience, the essential facts underlying the case and certain relevant elements of law may be summarised at this point as follows.

**1.3** In November 1998, various complaints were lodged with a Belgian investigating Judge, Judge Damien Vandermeersch, at the Brussels Court of First Instance concerning certain events that took place in the DRC in August 1998. Of the 12 complainants, five were of Belgian nationality. All of the complainants were resident in Belgium.

**1.4** Following detailed investigation into the matter, the Judge concluded that there were strong and sufficient grounds for initiating proceedings before the Belgian courts in respect of the matters complained of. Accordingly, on 11 April 2000, he issued an arrest warrant in absentia naming Mr Abdulaye Yerodia Ndombasi, at the time Minister for Foreign Affairs of the DRC, in respect of certain acts alleged to

have been committed in August 1998.[21] At the time of the alleged commission of the acts in question, Mr Yerodia Ndombasi was the Director of the Office of President Laurent-Désiré Kabila.

**1.5** The arrest warrant charges Mr Yerodia Ndombasi, as perpetrator or co-perpetrator, with two counts: (a) crimes constituting grave breaches of the Geneva Conventions of 1949 and the additional protocols to these conventions, and (b) crimes against humanity.[22] Both categories of crimes were criminalized as a matter of Belgian law by an Act of 16 June 1993, as amended by an Act of 10 February 1999, concerning the punishment of grave breaches of international humanitarian law.[23] It may be recalled, in this regard, that Article 146 of the *Fourth Geneva Convention* provides *inter alia*:

> "The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.
>
> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. …
>
> Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article."[24]

**1.6** Article 147 of the *Fourth Geneva Convention* defines "grave breaches" as including *inter alia* the following acts: wilful killing, torture or inhuman treatment, wilfully causing great suffering or serious injury to body or health.[25]

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[21] Mandat d'Arrêt International par défaut, 11 Avril 2000 ("Arrest Warrant"), at **Annex 3** (unofficial translation by Belgium).
[22] Arrest Warrant, at pp.2–3 (**Annex 3**).
[23] **Annex 4** (unofficial translation as reproduced in *International Legal Materials*).
[24] Articles 146–147, *Fourth Geneva Convention*, at **Annex 5**.
[25] At **Annex 5**. The provisions in Articles 146–147 of the *Fourth Geneva Convention* are broadly common to all four of the Geneva Conventions. See Articles 49–50, *First Convention*; Articles 50–51, *Second Convention*; and Articles 129–130, *Third Convention*.

**1.7** The arrest warrant was transmitted to the DRC on 7 June 2000. As the warrant concerned acts alleged to have been committed in the DRC by one of its nationals, there were subsequently exchanges between the relevant authorities of the two States at various stages with a view to ascertaining whether the dossier could be handed over to the DRC authorities for further investigation and action. Nothing has so far come of these exchanges. Belgium has from the outset made clear its willingness to hand the matter over to the DRC authorities for further action.

**1.8** As part of these exchanges, Belgium has at various points made enquiries of the DRC about the possibility of extradition. However, as no appropriate extradition agreement exists between Belgium and the DRC, and as the DRC does not extradite its nationals, Belgium has not at any point made a formal request to the DRC for the extradition of Mr Yerodia Ndombasi.

**1.9** At the point that the arrest warrant was transmitted to the DRC, it was also transmitted to Interpol. Through Interpol, the warrant was circulated internationally. The warrant was not, however, at the time, the subject of an Interpol Red Notice, ie, a provisional request to third States to arrest the person named with a view to extradition.[26]

**1.10** The facts underlying the allegations against Mr Yerodia Ndombasi and the decision of the Judge to issue the arrest warrant are set out in detail in the warrant itself.[27] It is not necessary to go into these facts at this point, although relevant aspects will be addressed briefly in Part III below. Likewise, there is no need to go into the wider circumstances prevailing in the DRC at the time of the events in question.[28]

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[26] In the light of the fact that Mr Yerodia Ndombasi no longer occupies a position in the DRC Government, the Belgian National Central Bureau ("NCB") of Interpol addressed a request to Interpol to issue a Red Notice in respect of Mr Yerodia Ndombasi on 12 September 2001. At time of writing, a Red Notice had not been issued. The effect of a Red Notice is determined by the municipal law of each State. Whereas in some States a Red Notice will serve as a sufficient basis for the provisional arrest of the named person, in others it will not, serving merely to alert the relevant authorities of that State that the person concerned is the subject of an arrest warrant. In the case of the DRC, a Red Notice is not a sufficient basis for the provisional arrest of a suspect. This matter is addressed further in Chapter One of Part III below.

[27] **Annex 3**.

[28] These matters were the subject of comment by Belgium during the course of the provisional measures phase (see CR 2000/33, at pp.9–17).

**1.11** Given the official position of Mr Yerodia Ndombasi as Minister for Foreign Affairs of the DRC at the point at which the arrest warrant was issued – although not at the point at which the acts in question were alleged to have been committed – the arrest warrant addresses the issue of immunity from execution in some detail *inter alia* as follows:

> "**Official immunity**
>
> In terms of section 5(3) of the Act of 16 June 1993 as amended by the Act of 10 February 1999, the immunity attaching to the official capacity of a person does not prevent prosecutions on the grounds of a crime against humanitarian law. …
>
> The wording of this provision is borrowed from article 27(2) of the Statute of the International Criminal Court, which provides:
>
> > 'Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.'
>
> Before the coming into force of the Act of 10 February 1999, the view was taken that the immunity conferred on Heads of State did not apply in questions of crimes under international law, such as war crimes, crimes against peace, crimes of genocide or crimes against humanity …
>
> Although these arguments have been upheld to justify the absence of any recognition of immunity for a former head of state, they also assume a relevance for responsible persons who are in office.
>
> According to the opinion of the Minister of Justice, expressed at the time of the legislation's passage through parliament, the rule of the non-relevance of immunities from jurisdiction and enforcement introduced by the Act of 10 February 1999 already existed previously in international law, which forms an integral part of the Belgian legal system …
>
> 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.
>
> However, the rule of the absence of immunity under humanitarian law seems to us to require to be tempered as regards immunity from enforcement. Beyond the question of the extent of the protection

> that a private individual who holds an official capacity enjoys, sight must not be lost of the fact that the immunity conferred on the representatives of a State is not so much to protect the private individual but first and foremost the State of which he is a representative. This immunity, customary in origin, is founded on the principle that a State has no jurisdiction to judge another State ('*par in parem non habet iuridictionem*'). By virtue of the general principle of fairness in legal action, in our view, an immunity from enforcement must be accorded to all representatives of a State that are welcomed onto the territory of Belgium as such (on 'official visits'). Welcoming such a foreign personality as an official representative of a sovereign State puts at stake not only relations between individuals but also relations between States. On this line of thinking, it includes an undertaking by the host State and its various components not to take coercive measures against its guest, and the invitation may not become a pretext [for] having the party in question fall into what would then be labelled an ambush. In the contrary case, failure to adhere to this undertaking could entail the host State being liable at an international level."[29]

**1.12** As this extract makes clear, the investigating Judge distinguished explicitly, on the face of the arrest warrant, between immunity from jurisdiction and immunity from enforcement in the case of representatives of foreign States who visit Belgium on the basis of an official invitation. In such circumstances, the warrant makes clear that the person concerned would be immune from enforcement in Belgium. Other States are likely to follow the same principle.

**1.13** Contending that Belgium is in violation of the principle that a State may not exercise its authority on the territory of another State, of the principle of sovereign equality of States, and of the immunity of its Minister for Foreign Affairs, the DRC initiated proceedings against Belgium before the International Court of Justice on 17 October 2000.

**1.14** On 13 September 2000, lawyers acting on behalf of Mr Yerodia Ndombasi applied to the Brussels *chambre du conseil* to have access to the dossier of complaints submitted to Judge Vandermeersch. The application was found to be admissible but was rejected on the merits by decision of the *chambre du conseil* on 12 October 2000. The decision of the *chambre* was appealed to the Brussels *chambre des mises en*

[29] Arrest Warrant, at pp.58–63; unofficial translation by Belgium, for original French text, please see pp.21-23 of the Mandat d'Arrêt. **(Annex 3)**.

*accusation* on 23 October 2000. After hearing argument, the *chambre des mises en accusation* upheld the decision of the *chambre du conseil* denying access to the dossier on 12 March 2001 on the grounds that (a) in the circumstances, access to the dossier could result in reprisals being taken against the complainants, against others heard during the course of the investigation, or against members of their families still living in the DRC, and (b) the Applicant was fully aware of the allegations against him following the issuing of the arrest warrant and the commencement of proceedings by the DRC before the International Court of Justice.[30]

**1.15** Contrary to the submissions made during the provisional measures phase of the proceedings,[31] Belgium knows of no application by Mr Yerodia Ndombasi in his personal capacity seeking the annulment of the arrest warrant. As will be addressed further in Part II of this Counter-Memorial, and contrary to what is stated in the DRC Memorial,[32] it would be open to a person who is the subject of an arrest warrant issued by a Belgian investigating judge to challenge the issuing of that warrant on grounds of, *inter alia*, the lack of jurisdiction on the part of the judge in question.

[30] The Decision of the Brussels *chambre des mises en accusation* is appended as Annex 16 to the DRC Memorial.
[31] CR 2000/32, at p.19.
[32] DRC Memorial, at paragraph 56.

## B. The DRC's case

**1.16** As has already been observed, since the filing of the DRC's Application on 17 October 2000 the case has undergone something of a metamorphosis, both factually and legally. Mr Yerodia Ndombasi is no longer Minister for Foreign Affairs of the DRC, nor a minister occupying any other position in the DRC Government. The manner in which the DRC's claim against Belgium has been formulated has also changed, as has been expressly acknowledged by the DRC in its Memorial.[33]

**1.17** As will be addressed in Part II of this Counter-Memorial, the change in the factual circumstances underlying the case formulated in the DRC's Application is such that the case is now without object. To proceed further with it, in the light of these developments, would turn the adjudicatory function of the Court into an exercise focused on issues *in abstracto*. The change in the factual circumstances underlying the case has also fundamentally altered the character of the case from one involving an alleged breach by Belgium against the DRC directly to one involving the assertion of a claim by the DRC on behalf of one of its nationals. Given the failure of the individual concerned to pursue available remedies before the Belgium courts, Belgium contends that the Court lacks jurisdiction in the case and/or that the case is inadmissible.

**1.18** Distinct from the change in the factual circumstances underlying the case, the DRC has also reformulated its claims in law. As now formulated in its Memorial, the DRC's case both has little connection to the prevailing factual situation and is materially different in important respects to that formulated in its Application instituting proceedings. By reference to well-established principles in the case-law of the Court, Belgium contends that, in consequence of these factors, the Court lacks jurisdiction in this case and/or that the application is inadmissible.

**1.19** As a necessary prelude to an examination of these issues of jurisdiction and admissibility, it is necessary to identify the essential character of the DRC's case as

[33] DRC Memorial, at paragraph 8.

formulated in its Application instituting proceedings, in the course of the provisional measures phase of the proceedings and, most recently, in its Memorial.

### *1. The DRC's Application instituting proceedings*

**1.20** The DRC's Application instituting proceedings was filed with the Court on 17 October 2000. Addressing the "Nature of the Claim", the DRC formulated its case in the following terms:

> *"The Court is requested to declare that the Kingdom of Belgium shall annul the international arrest warrant issued on 11 April 2000 by a Belgian investigating judge, Mr. Vandermeersch, of the Brussels tribunal de première instance against the Minister for Foreign Affairs in office of the Democratic Republic of the Congo, Mr. Adbulaye Yerodia Ndombasi, seeking his provisional detention pending a request for extradition to Belgium for alleged crimes constituting 'serious violations of international humanitarian law', that warrant having been circulated by the judge to all States, including the Democratic Republic of the Congo, which received it on 12 July 2000."*[34]

**1.21** The alleged "Legal Grounds" underlying the claim were stated to be the violation of the principle that a State may not exercise its authority on the territory of another State, the violation of the principle of the sovereign equality of Members of the United Nations, and the "[v]iolation of the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State".[35]

**1.22** The "Statement of Facts" set out in the Application asserts *inter alia* that

- the arrest warrant fails to note the "*current capacity* [of Mr Yerodia Ndombasi] *as Minister for Foreign Affairs*";[36]

- the investigating judge claims jurisdiction in respect of offences purportedly committed on the territory of the DRC by a DRC national

[34] Application, at Part II (emphasis in the original).
[35] Application, at Part I.
[36] Application, at Part III(A) (emphasis in the original).

"*without any allegation that the victims were of Belgian nationality or that these acts constituted violations of the security or dignity*" of Belgium;[37] and

- this unlimited jurisdiction which Belgium confers upon itself has "*no basis of territorial or* in personam *jurisdiction, nor any jurisdiction based on the protection of the security or dignity*" of Belgium.[38]

**1.23** Finally, the detailed "Statement of the Grounds on Which the Claim is Based" contends *inter alia* that

- "[t]he *universal jurisdiction* that the Belgian State attributes to itself … contravenes international jurisprudence";[39]

- "[t]he *non-recognition* … of the *immunity of a Minister for Foreign Affairs* in office is contrary to international case-law …, to customary law and to international courtesy, [which] accord to a Minister for Foreign Affairs, the representative of the State on behalf of which he acts, diplomatic privileges and immunities";[40] and

- the Belgian law in question "*is manifestly in breach of international law in so far as it claims to derogate from diplomatic immunity, as is the arrest warrant issued pursuant thereto against the Minister for Foreign Affairs of a sovereign State*".[41]

**1.24** As these highlighted elements of the DRC's Application describe, the case formulated in the Application focuses on two central allegations: first, that the exercise of jurisdiction by the Belgian Judge was excessive and contrary to international law, and, second, that the issuing of an arrest warrant "*against the Minister for Foreign Affairs in office*" of the DRC was a violation of international

[37] Application, at Part III(A) (emphasis in the original).
[38] Application, at Part III(B)(3) (emphasis in the original).
[39] Application, at Part IV(A)(1) (emphasis in the original).
[40] Application, at Part IV(B) (emphasis in the original).
[41] Application, at Part IV(B) (emphasis in the original).

law. As is clear from the repeated references to the position of Ministers for Foreign Affairs throughout the Application, the central focus of the case was the official position of Mr Yerodia Ndombasi as the Minister for Foreign Affairs of the DRC.

### *2. The provisional measures phase*

**1.25** The provisional measures phase of the proceedings can be described relatively briefly. The DRC's request for the indication of provisional measures was cast in the briefest of terms. There was, however, no mistaking the centrality to the case of the position of Mr Yerodia Ndombasi as the incumbent Minister for Foreign Affairs of the DRC. The point is clearly illustrated by the statement in the DRC's *Provisional Measures Request* of the harm said to be suffered by the DRC in consequence of the issuing of the arrest warrant:

> "… le mandat d'arrêt litigieux interdit pratiquement au ministre des affaires étrangères de la République démocratique du Congo de sortir de cet Etat pour se rendre en tout autre Etat où sa mission l'appelle et, par conséquent, d'accomplir cette mission. Or les conséquences de cet éloignement du représentant qualifié de l'Etat congolais démocratique pendant un temps indéterminé sont, par essence, de celles que l'on ne répare pas."[42]

**1.26** As has already been described, coinciding with the opening of the oral pleadings in the provisional measures phase, Mr Yerodia Ndombasi was moved from the position of Minister for Foreign Affairs to become Minister for National Education. In its *Provisional Measures Order*, the Court concluded that this change of circumstances was not such "at the present time" as to deprive the DRC's Application of its object or to require that the case be removed from the Court's List "at this stage of the proceedings".[43] Central to the Court's reasoning on this matter was the appreciation that the arrest warrant had not been withdrawn and related to the

[42] "… the contested arrest warrant in practice prevents the Minister for Foreign Affairs of the Democratic Republic of the Congo from leaving that State to travel to any other State where his duties require him to go and thus prevent him from performing those duties. The consequences of this lack of contact with the authorised representative of the Democratic Congolese State for an indeterminate period are essentially quite irreparable." (*Provisional Measures Request*, at paragraph 4; unofficial translation by Belgium).

[43] *Provisional Measures Order*, at paragraph 57.

same individual "notwithstanding the new ministerial duties that he is performing".[44] In so stating, the Court implicitly accepted that the DRC contention made in the course of oral argument – to the effect that "*any minister* sent by his or her State to represent it abroad … also enjoys, *sensu lato*, privileges and immunities"[45] – was an arguable proposition that, subject to the Court having jurisdiction in the matter, should be addressed on the merits.

**1.27** This aspect notwithstanding, what is abundantly clear from the provisional measures phase is the pivotal dimension to the DRC's case of the ministerial position of Mr Yerodia Ndombasi. The point was explicitly made in the opening remarks of counsel to the DRC:

> "… Mr President, I should like to make a preliminary remark. Neither the present request for the indication of a provisional measure, not the Application whereby the Democratic Republic of the Congo seised the Court of the merits of the dispute between itself and the Kingdom of Belgium, seeks to make any claim whatever on the basis of the diplomatic protection of one of its nationals.
>
> In his personal capacity, H.E. Mr. Yerodia Ndombasi has submitted to the Belgian courts an application for the annulment of the arrest warrant issued against him by Judge Vandermeersch. Those proceedings are entirely separate from the present discussion and, whatever legal incongruities they may have presented, they must remain so.
>
> *The purpose of these proceedings by the Democratic Republic of the Congo is altogether different. It is to make good the breaches of international law affecting the Congolese State in the exercise of its sovereign prerogatives in diplomatic matters. The Congo is attacking the arrest warrant issued by the Belgian judge because it is directed not at Mr. Yerodia Ndombasi as such, but at the office of the Minister for Foreign Affairs of the sovereign State of the Congo.*"[46]

[44] *Provisional Measures Order*, at paragraph 56.
[45] CR 2000/34 (translation), at p.8 (emphasis added). Also, *Provisional Measures Order*, at paragraph 59.
[46] CR 2000/32 (translation), at pp.14–15 (pp.18–19 in the original; emphasis added). As has already been observed, Belgium knows of no application by Mr Yerodia Ndombasi in his personal capacity seeking the annulment of the arrest warrant. See further paragraphs 1.14–1.15 above.

**1.28** The consequences of the changed circumstances of Mr Yerodia Ndombasi's position are addressed in Part II of this Counter-Memorial. For present purposes, Belgium simply observes that the official ministerial position of Mr Yerodia Ndombasi constituted the very basis of the DRC's claim.

**1.29** The pivotal dimension to the DRC's case of the official position of Mr Yerodia Ndombasi was reaffirmed repeatedly in the course of the DRC's submissions during the provisional measures phase of the case. Even following the cabinet reshuffle which saw Mr Yerodia Ndombasi become Minister for National Education, the DRC's focus remained firmly on his official governmental position as the continuing *raison d'être* of the case. The following observations made on behalf of the DRC in the latter round of its provisional measures submissions illustrate the point.

> "The international status of the Minister for Foreign Affairs is governed by the principle that he should be treated in the same way as a foreign Head of State in so far as immunity and inviolability are concerned.
>
> …
>
> However, should this immunity be confined to foreign Heads of State and Ministers for Foreign Affairs or International Co-operation? In fact, any minister sent by his or her State to represent it abroad, deals with other States or international organisations and, where necessary, enter into commitments on behalf of that State, also enjoys, *sensu lato*, privileges and immunities. Moreover, that is the price paid or to be paid for the widening, technical nature and the growing complexity of international relations. With regard to Mr Yerodia, yesterday Minister for Foreign Affairs, today Minister of Education in the new Congolese Government, there is no getting away from the fact that in such a field where the Democratic Republic of the Congo's present is being managed and its future prepared, he will be called upon to travel, to respond to invitations from abroad, to attend international meetings in connection with Unesco, ACP-European Union co-operation (the epicentre of which is Brussels), the OAU and *Francophonie*, to name but a few. He will often be called upon to be sent as the plenipotentiary personal representative of the Head of State to represent him abroad. In connection with such activities, where he will have to represent the Congolese Government, he will undoubtedly be entitled to benefit from the principle of being treated in the same way as the Head of

> State, the Head of Government or the Minister for Foreign Affairs …"[47]

**1.30** The Court's *Provisional Measures Order* reflected the appreciation that it was the official capacity of the subject of the arrest warrant that was central to the case. Thus, the Court explicitly noted the DRC's observations that it was attacking the arrest warrant because it was "directed not at Mr Yerodia Ndombasi in his personal capacity, but at the office of Minister for Foreign Affairs".[48] More particularly, as has already been observed, the Court, in rejecting Belgium's request that the case be removed from the Court's List, emphasised "the new ministerial duties that [Mr Yerodia Ndombasi] is performing".[49]

**1.31** Belgium highlights these elements of the provisional measures phase of the case not to suggest that they are in some way binding upon the Court. The matters addressed during that phase of the proceedings are not now in issue. However, the appreciation – of both Parties[50] and of the Court – that the official ministerial position of Mr Yerodia Ndombasi constituted the very basis of the DRC's claim is material to the question of the admissibility of the application given that Mr Yerodia Ndombasi now no longer occupies any official position as a member of the DRC Government. This matter is addressed fully in Part II below.

### *3. The DRC's Memorial*

#### *(a) Preliminary matters and the reformulation of the DRC's case*

**1.32** Mr Yerodia Ndombasi ceased to be Minister for Foreign Affairs of the DRC on 20 November 2000, at which time he was appointed Minister for National Education. Following the constitution of the new Congolese Government of President Joseph Kabila on 14 April 2001, Mr Yerodia Ndombasi ceased altogether to be a member of that government.[51] At the point of the filing of the DRC's Memorial with

[47] CR 2000/34 (translation), at pp.7–8.
[48] *Provisional Measures Order*, at paragraph 19.
[49] *Provisional Measures Order*, at paragraph 56.
[50] Belgium's position on this matter is set out in CR 2000/35, at paragraphs 18–30 of the submissions by Mr Bethlehem.
[51] *DRC Memorial*, at paragraph 11.

the Court, Mr Yerodia Ndombasi did not therefore occupy any official position in the DRC Government.

**1.33** The introductory part of the DRC's Memorial sets out the violations of international law alleged to have been committed by Belgium as well as the issues addressed subsequently in the Memorial in support of the DRC's claim. The statement of alleged violations and the requests made of the Court are interesting for their departure from the way in which the case was formulated in the DRC's Application. Thus, the statement of alleged violation provides as follows:

> "L'émission et la diffusion internationale du mandat d'arrêt du 11 avril 2000 par un organe de l'État belge procèdent, ainsi qu'il sera démontré ci-après, d'au moins une violation du droit international don't la R.D.C. est victime: la violation de la règle de droit international coutumier relative à l'inviolabilité et l'immunité pénale absolues des ministres des affaires étrangères en fonction."[52]

**1.34** Two aspects of this formulation may be noted. First, notwithstanding that Mr Yerodia Ndombasi no longer occupies any position as a member of the DRC Government, the DRC's case continues to be framed in terms of allegations that Belgium is in violation of the immunity of Ministers for Foreign Affairs in office. The case as formulated in the DRC's Memorial, in other words, bears no connection whatever to the prevailing situation of fact. Second, in contrast to the Application instituting proceedings, no mention is here made of allegations of an excessive exercise of jurisdiction by the Belgian Judge issuing the arrest warrant. Although this latter element is addressed in the course of the Memorial as part of the DRC's argument on the question of the immunity of Ministers for Foreign Affairs, it is pointedly not the subject of any of the DRC's submissions or requests to the Court, all of which hinge on the alleged violation of international law by Belgium in consequence of the issuing and transmission of the arrest warrant against the DRC Minister for Foreign Affairs in office.[53]

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[52] "The issue and international transmission of the Arrest Warrant of 11 April 2000 by an authority of the Belgian State stems from at least one infringement of international law, as will be demonstrated below, of which the DRC is the victim: the violation of the rule of customary international law and criminal immunity of Ministers for Foreign Affairs in office." (DRC Memorial, at paragraph 6; unofficial translation by Belgium)

**1.35** That this latter element of the jurisdiction of the Belgian Judge to issue the arrest warrant is no longer a central part of the DRC's case is confirmed by the characterisation of the nature of the dispute between the Parties in the DRC's Memorial where the DRC suggests that, by addressing the issue of immunity, the Court can avoid addressing the issue of jurisdiction, and that it may prefer to do so.[54]

*(b) The jurisdiction of the Court and the existence and nature of the dispute*

**1.36** In contrast to its Application in which the basis of the Court's jurisdiction relied upon by the DRC was not explicitly stated, the DRC, in its Memorial, expressly invokes the respective Declarations of the Parties under Article 36(2) of the *Statute* as founding the jurisdiction of the Court. These Declarations, both cast in wide terms, confer jurisdiction on the Court in the case of all "legal disputes". The operative part of the Belgian Declaration, dated 17 June 1958, provides as follows:

> "I declare on behalf of the Belgian Government that I recognise as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice, in conformity with Article 36, paragraph 2, of the Statute of the Court, in legal disputes arising after 13 July 1948 concerning situations or facts subsequent to that date, except those in regard to which the parties have agreed or may agree to have recourse to another method of pacific settlement."

**1.37** The operative part of the DRC's Optional Clause Declaration, dated 8 February 1989, provides as follows:

> "… in accordance with Article 36, paragraph 2, of the Statute of the International Court of Justice:
>
> The Executive Council of the [DRC] recognises as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
>
> (a) the interpretation of a treaty;
> (b) any question of international law;

[53] See *DRC Memorial*, at paragraph 97.
[54] *DRC Memorial*, at paragraph 15.

(c) the existence of any fact which, if established, would constitute a breach of an international obligation;
(d) the nature or extent of the reparation to be made for the breach of an international obligation."

**1.38** Addressing the existence and nature of the legal dispute between the Parties over which the Court is said to have jurisdiction, the DRC characterises the dispute *inter alia* in the following terms:

> "Il existe entre les Parties un différend juridique ayant pour objet la compétence des autorités judiciares d'un État pour mettre en accusation un membre du gouvernement d'un autre État et, notamment, le ministre des Affaires étrangères de cet État. …
>
> Entre les États comparaissant devant la Cour il existe donc un différend clairement ciblé qui a pour objet les limites dans lesquelles le droit international enferme l'exercice de la compétence pénale internationale. Sur cette question chacun des deux États adopte une position qui dépasse largement la défense ou la promotion d'un intérêt égoïste. D'un côté, tout en se plaignant à juste titre de l'atteinte infligée à sa souveraineté en la personne d'un membre de son gouvernement, l'État demandeur entend faire prévaloir un principe essentiel à l'existence de relations réglées entre nations civilisées, à savoir le respect de l'immunité des personnes chargées de conduire ces relations. D'un autre côté, l'État défendeur prétend donner la préférence à ce qu'il présente comme une règle nouvelle, insuffisamment attestée, de l'ordonnancement international, à savoir l'obligation de contribuer à une répression effective des crimes de droit international humanitaire."[55]

**1.39** As this extract makes clear, the essential character of the legal dispute between the Parties identified by the DRC concerns the immunity of persons responsible for conducting the international relations of a State.

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[55] "There is a legal dispute between the Parties concerning the power of the judicial authorities of one State to accuse a member of the government of another State and more particularly the Minister for Foreign Affairs of that State. …

Between the States appearing before the Court there is … a clearly targeted legal dispute the object of which lies in the limits that international law puts on the exercise of international criminal jurisdiction. On this question, each of the two States has adopted a position that goes well beyond the defence or promotion of self-centred interest. One side, while right pleading an infringement of its sovereignty in the person of a member of its government, the plaintiff State avails itself of a principle essential to the existence of regulated relations between civilised nations, which is the respect of the immunity of persons responsible for conducting those relations. On the other side, the defendant State chose to give preference to what it has presented as a new, insufficiently attested, rule of international

**1.40** As will be addressed further in Part II of this Counter-Memorial, Belgium contends that, in consequence of the changed circumstances at the heart of this case, there is no longer a "legal dispute" between the DRC and Belgium within the meaning of this term in the Optional Clause Declarations of the Parties. While a difference of opinion clearly remains between the Parties on the scope and content of international law in this area, that difference of opinion has become a matter of abstract, rather than practical, importance. The continued prosecution of this case by the DRC in the light of the changed circumstances at its heart has become an exercise in seeking an advisory opinion from the Court on the scope and content of international law. Whatever may be the perceived benefits of such a course, the case no longer concerns an extant dispute between the Parties. The Court accordingly, by reference to its own jurisprudence, lacks jurisdiction under the Optional Clause Declarations of the Parties in this case.

*(c) The substance of the case*

**1.41** The substance of the DRC's case can be described relatively briefly. The DRC's contentions on the merits are divided between two main substantive parts of its Memorial, the Second Part, which addresses various issues under the heading *International Law and Internal Law*, and the Third Part, which addresses the *Rules of International Law Applicable to the Dispute Between the Parties*. The Fourth Part then briefly summarises elements of the DRC's case and sets out the remedies requested by the DRC of the Court. The DRC's final submissions are then stated formally in the Memorial's *Conclusions*.

**1.42** The Second Part of the Memorial, dealing with issues of international and internal law, addresses at some length various aspects of Belgian municipal law and the place therein of international law. Thus, the DRC addresses the doctrine of monism and the precedence accorded by Belgium to international law.[56] It goes on to address in detail the methodology applicable to the interpretation of the Belgian Law of 16 June 1993, as amended by the Law of 10 February 1999, as well as its

order which is the obligation to contribute to effective repression of violations of international humanitarian law." (*DRC Memorial*, at paragraphs 13 and 16; unofficial translation by Belgium)

[56] At Deuxième Partie, Chapitre II.

meaning.[57] Finally, it addresses the duty of the investigating judge to verify whether he has jurisdiction in any given case.[58]

**1.43** These sections are interesting. They are not, however, material to the case before the Court. This point, indeed, is implicitly acknowledged in the opening chapter of the Second Part in which it is stated "[l]a Partie demanderesse n'a pas l'intention de solliciter de la Cour une décision sur le problème des rapports de système entre le droit international et droit interne".[59]

**1.44** Two observations are nevertheless warranted on this material. First, the issues addressed in the Second Part of the DRC Memorial are issues properly directed to, and eminently suitable to be addressed by, a Belgian court. Whether ultimately correct on the law or not, detailed argument is made in this Part to the effect that the investigating judge erred when issuing the arrest warrant, as a matter of both the substance and procedure of Belgian law. In Belgium's contention, these are issues that would properly be addressed to a Belgian court and should have been addressed to such a court as a condition precedent to the initiation of the present case before the International Court of Justice. Particularly in the light of the changed circumstances at the heart of this case, the DRC itself, in this Part of its Memorial, makes the case for the existence of local remedies.

**1.45** Second, the issues of Belgian municipal law addressed in the Second Part of the DRC Memorial suggest that the proper function of the International Court of Justice is to strike down or annul national legislation or other measures that the Court concludes is inconsistent with international law. The point is reinforced by the DRC's request that the Court require Belgium to withdraw and annul the disputed arrest warrant.

**1.46** In Belgium's submission, this appreciation of the function of the International Court of Justice is mistaken. The role and function of the Court is to

[57] At Deuxième Partie, Chapitre III.
[58] At Deuxième Partie, Chapitre IV
[59] "The Plaintiff does not intend to solicit a ruling from the Court on the problem of the relations between the international legal system and national law." (DRC Memorial, at paragraph 20; unofficial translation by Belgium)

decide issues of international law that come before it and in respect of which it has jurisdiction. Pursuant to Article 94(1) of the United Nations Charter and Article 59 of the *Statute* of the Court, parties to a case before the Court are obliged to comply with the decision of the Court in that case. How a State chooses to comply with a decision of the Court – within a range of options that may be available to it for doing so – is, however, a matter for the State concerned. This issue is addressed further in Chapter Six of Part III of this Counter-Memorial in connection with the remedies requested by the DRC.

**1.47** The Third Part of the DRC's Memorial contains the main detail of the DRC's submissions in this case. It is subtitled "L'atteinte portée à l'inviolabilité et l'immunité pénale absolues du ministre des Affaires étrangères et violation des droits souverains de la R.D.C."[60] A number of elements of this Part may usefully be highlighted.

**1.48** First, this Part is divided into five chapters. Chapter I affirms that Mr Yerodia Ndombasi was Minister for Foreign Affairs of the DRC at the point at which the arrest warrant was issued. It also affirms that he became Minister for National Education on 20 November 2000. It further states that he ceased to occupy any ministerial position within the DRC Government from 15 April 2001. It does <u>not</u> state, however, that he did not occupy any ministerial position at the time at which the acts alleged in the arrest warrant were said to have been committed. As previously noted, at that point in time, Mr Yerodia Ndombasi was Director of the Office of President Laurent-Désiré Kabila.

**1.49** Second, Chapters II – IV address in detail various aspects of the law relating to the immunity of Ministers for Foreign Affairs. Nothing material is said about the immunities that may or may not attach to other ministerial offices of State. The point is made that immunities are related to the performance of the function of the Minister for Foreign Affairs.[61] It is argued that Ministers for Foreign Affairs in office are

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[60] "The infringement of the complete inviolability and immunity of the Minister for Foreign Affairs and violation of the sovereign rights of the DRC." (DRC Memorial, Troisième Partie, at p.28; unofficial translation by Belgium)

[61] DRC Memorial, at paragraph 47.

immune from any restrictive measures.[62] It is further argued that the immunity of the Minister for Foreign Affairs is restricted simply by the issuing of an arrest warrant.[63]

**1.50** The prejudice alleged to have been caused to the DRC is addressed, as is the effect of the arrest warrant *in Belgian law*.[64] Nowhere, however, is there any suggestion that either the DRC or third States are *obliged* to act in response to the Belgian warrant. As has already been observed, the issuing and transmission of the arrest warrant created no obligation for the DRC. Nor, in the absence of a formal extradition request, against the background of some relevant commitment to extradite, would the issuing and transmission of the warrant have created any obligation for any other State.

**1.51** Third, the contention is advanced that there is no exception to the complete inviolability and immunity of Ministers for Foreign Affairs even in the case of allegations concerning the commission of international crimes.[65] As regards this matter, it is stated that this is "[l]e point de divergence le plus fondamental entre la R.D.C. et la Belgique".[66]

**1.52** Finally, Chapter V of the Third Part addresses the issue of universal jurisdiction.[67] The contentions here advanced are that Belgium is not under an obligation to assume jurisdiction in respect of the crimes alleged, that it is not certain ("il n'est pas certain") that international law allows Belgium to do what it is doing, and that, in any case, Belgium's acts infringe the sovereign rights of the DRC.[68] Significantly, however, the only discussion of the contention that Belgium is in violation of the sovereignty of the DRC is through a reference back to the prejudice alleged to have been caused to the DRC by the issuing of the arrest warrant.[69] As has already been observed, however, the DRC Memorial at no point addresses the binding

[62] DRC Memorial, at paragraphs 49–50.
[63] DRC Memorial, at paragraph 51.
[64] DRC Memorial, at paragraphs 52–57.

[65] DRC Memorial, at paragraphs 58–73.
[66] "[t]he most fundamental point of divergence between the DRC and Belgium". (DRC Memorial, at paragraph 58; unofficial translation by Belgium)
[67] DRC Memorial, at paragraphs 74–92.
[68] DRC Memorial, at paragraph 74.
[69] DRC Memorial, at paragraph 92. See also paragraphs 52 *et seq*.

effect of the arrest warrant *vis-à-vis* either the DRC or third States. As has already been noted, the issuing and transmission of the arrest warrant created no obligation for the DRC. Nor, in the circumstances, did it create any obligation for any other State.

*(d) The remedies requested and the DRC's final submissions*

**1.53** The remedies requested of the Court by the DRC are addressed in Part Four of the DRC's Memorial and then formally restated, as required by Article 49(1) of the Court's *Rules*, by way of final submissions. These are as follows:

> "1. Qu'en émettant et en diffusant internationalement le mandat d'arrêt du 11 avril 2000 délivré à charge de Monsieur Abdulaye Yerodia Ndombasi, la Belgique a violé, à l'encontre de la R.D.C., la règle de droit international coutumier relative à l'inviolabilité et l'immunité pénale absolues des ministres des Affaires étrangères en fonction;
>
> 2. Que la constatation solennele par la Cour du caractère illicite de ce fait constitue une forme adéqaute de satisfaction permettant de réparer le dommage moral qui en découle dans le chef de la R.D.C.;
>
> 3. Que la violation du droit international don't procèdent l'émission et la diffusion internationale du mandat d'arrêt du 11 avril 2000 interdit à tout État, en ce compris la Belgique, d'y donner suite;
>
> 4. Que la Belgique est tenue de retirer et mettre à néant le mandat d'arrêt du 11 avril 2000 et de faire savoir auprès des autorités étrangères auxquelles ledit mandat fut diffusé qu'elle renonce à solliciter leur coopération pour l'exécution de ce mandat illicite suite à l'arrêt de la Cour."[70]

**1.54** Three brief observations are warranted on the remedies requested of the Court by the DRC and their formulation. First, the remedies requested relate solely to the allegation that Belgium violated the immunities of the Minister for Foreign Affairs in office of the DRC. The Court is not requested to address by way of judgment the allegations concerning the jurisdiction of the Belgian judge to issue the arrest warrant distinct from any question of immunity. Second, the damage allegedly suffered by

[70] "1. That by issuing and internationally transmitting the Arrest Warrant of 11 April 2000 issued against Mr Abdulaye Yerodia Ndombasi, Belgium violated, to the prejudice of the DRC, the rule of customary international law on the complete inviolability and immunity of the Minister for Foreign Affairs in office; 2. That the solemn declaration by the Court of the illicit nature of this act constitutes an adequate form of satisfaction to compensate the moral damages that resulted therefrom for the DRC; 3. That the violation of international law from which the issue and international transmission of the Arrest Warrant of 11 April 2000 proceeds prohibits any State, including Belgium, from enforcing it; 4. That Belgium is required to withdraw and annul the Arrest Warrant of 11 April 2000 and to inform the foreign authorities to which the warrant has been transmitted that it renounces petitioning their

the DRC in consequence of the issuing and transmission of the arrest warrant is here described as moral damage ("dommage moral"). This contrasts with the rather unspecific allegations of wider prejudice suffered by the DRC made in the body of the Memorial. Third, and closely associated with the preceding point, the DRC is not seeking financial or compensatory damages of any sort for actual harm alleged to have been suffered.

**1.55** The significance of these points is twofold. They confirm that the central pivot of the DRC's case remains the question of the immunities of Ministers for Foreign Affairs. More significantly, they attest to the fact that, in consequence of the change of circumstances at the very heart of the case, the case has in reality been transformed into a request for an advisory opinion on a matter of law on which Belgian and the DRC disagree. The matter is now entirely abstract. There is no suggestion of actual damage suffered by the DRC in the past. The case is now purely concerned with the clarification of the law. As will be addressed in Part II, in the absence of a dispute between States of a real, practical nature which requires resolution by the Court, differences of view between States on the scope and content of international law is part of the dynamic process of law-making in the international community and is not a matter appropriate to the adjudicatory functions of the Court in the abstract.

### *4. Conclusions*

**1.56** This case began on 17 October 2000 as a claim by the DRC that its sovereignty had been infringed and the immunity of its Minister for Foreign Affairs violated as a result of the issue and transmission of an arrest warrant by a Belgian judge. The case has evolved significantly since then. First, the subject of the arrest warrant was relieved of the position of Minister for Foreign Affairs whereupon the claim was expressed to hinge on the immunity of ministers of State more generally. Now, given that the subject of the arrest warrant no longer occupies any ministerial position in the DRC Government, the case has been refashioned as a retrospective claim for the infringement of the immunity of the Minister for Foreign Affairs at some

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assistance for the enforcement of this illicit warrant in view of the Court's judgment." (DRC

point in the past. The damage alleged to have been suffered is described as moral damage. The claim relating to the jurisdiction of the Belgian judge has become a peripheral element of argument and one which is not the subject of any request of the Court.

**1.57** The case, therefore, in reality, has become a request for the clarification of the law in the abstract. The dispute alleged has become an abstract difference of view about certain issues of law rather than a matter of practical moment which is in need of resolution by the Court. The case as now formulated has no connection to the prevailing factual situation. As will be addressed in Part II of this Counter-Memorial, Belgium contends therefore that, in the light of these developments, the Court lacks jurisdiction in this case and/or that the application is inadmissible.

## C. The position of Mr Yerodia Ndombasi at the material times

**1.58** Before leaving this Part, it may be helpful simply to identify the position of Mr Yerodia Ndombasi at all the material times. From the information available to Belgium, the position is as follows:

- Mr Yerodia Ndombasi was Director of the Office of President Laurent-Désiré Kabila from 20 January 1998 until 14 December 1999. It was during this period that he is alleged to have committed the acts that are the subject of the arrest warrant;

- Mr Yerodia Ndombasi became Minister for Foreign Affairs of the DRC on 15 December 1999, a post that he held until 19 November 2000.[71] This period coincides with the commencement of proceedings by the DRC against Belgium before the Court;

- from 20 November 2000 to 14 April 2001, Mr Yerodia Ndombasi was Minister of National Education of the DRC; and

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Memorial, at paragraph 97; unofficial translation by Belgium)

- since 15 April 2001 and the constitution of the new DRC Government of President Joseph Kabila, Mr Yerodia Ndombasi has not occupied any position in the Government of the DRC. This period coincides with the filing of the Memorial of the DRC.

* * *

[71] At paragraph 45 of its Memorial, the DRC indicates that Mr Yerodia Ndombasi *exercised the functions* of Minister for Foreign Affairs of the DRC from 15 March 2000 until 20 November 2000. Nothing material hinges on the discrepancy between the Parties on this matter.

# PART II

# OBJECTIONS TO JURISDICTION AND ADMISSIBILITY

**2.1** As has already been intimated, Belgium contends that the Court lacks jurisdiction in this case and/or that the application is inadmissible. In support of this contention, Belgium advances four principal submissions and a fifth, ancillary submission. The principal submissions may be summarised as follows:

***First submission***

That, in the light of the fact that Mr Yerodia Ndombasi is no longer either Minister for Foreign Affairs of the DRC or a minister occupying any other position in the DRC Government, there is no longer a dispute between the Parties within the meaning of this term in the Optional Clause Declarations of the Parties and that the Court accordingly lacks jurisdiction in this case.

***Second submission***

That, in the light of the fact that Mr Yerodia Ndombasi is no longer either Minister for Foreign Affairs of the DRC or a minister occupying any other position in the DRC Government, the case is now without object and the Court should accordingly decline to proceed to judgment on the merits of the case.

***Third submission***

That the case as it now stands is materially different to that set out in the DRC's Application instituting proceedings and that the Court accordingly lacks jurisdiction in the case and/or the application is inadmissible.

***Fourth submission***

That, in the light of the new circumstances concerning Mr Yerodia Ndombasi, the case has assumed the character of an action of diplomatic protection but one in which the individual being protected has failed to exhaust local remedies, and that the Court accordingly lacks jurisdiction in the case and/or that the application is inadmissible.

**2.2** These submissions, though overlapping on certain elements – notably as regards the first and second submission – are distinct and are advanced in the alternative. They are addressed in turn below.

**2.3** In the event that the Court decides that it does have jurisdiction in this case and that the application is admissible, Belgium submits, as an ancillary matter, that the *non ultra petita* rule operates to limit the jurisdiction of the Court to those issues that are the subject of the DRC's final submissions.

## A. First submission: there is no longer a dispute between the Parties

**2.4** The Optional Clause Declarations of the Parties under Article 36(2) of the Court's *Statute* give the Court jurisdiction in the case of "legal disputes" that may be submitted to it.[72] The language of "legal dispute", reflecting the express wording of Article 36(2), is common to many such Declarations and has been the subject of comment by both the International Court and the Permanent Court before it on numerous occasions. Thus, in the *Mavrommatis Palestine Concessions* case, the Permanent Court defined a dispute as "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons".[73] This language has been echoed subsequently by the International Court with only minor variation. Thus, in the *East Timor* case, the Court recalled that "a dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between parties".[74]

**2.5** The Court has also had occasion to give other guidance on the matter. Thus, for example, the Court has indicated that the question of whether a dispute exists "is a matter for objective determination"[75] by reference to all the relevant material relating to the case.[76] It has also observed that

[72] Both Declarations are subject to various conditions which are not material for present purposes. The Declarations are set out at paragraphs 1.36–1.37 above.
[73] *Mavrommatis Palestine Concessions*, PCIJ, Series A, No.2 (1924), p.11.
[74] *East Timor (Portugal v. Australia)*, Judgment, ICJ Reports 1995, p.90, at paragraph 22.
[75] *Case Concerning the Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* ("Headquarters Agreement Advisory Opinion"), ICJ Reports 1988, p.12, at paragraph 35.
[76] *Fisheries Jurisdiction (Spain v. Canada)*, ICJ Reports 1998, p.432, at paragraphs 29–30.

> "it is not sufficient for one party to a contentious case to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence. Nor is it adequate to show that the interests of the two parties to such a case are in conflict. It must be shown that the claim of one party is opposed by the other."[77]

**2.6** Belgium does not contest that a legal dispute existed between the DRC and Belgium at the point at which the DRC filed its Application instituting proceedings. That legal dispute related to a disagreement on a point of law between the Parties, the issue in contention being the entitlement, as a matter of international law, of the Belgian investigating judge to issue an arrest warrant naming the Minister for Foreign Affairs in office of the DRC on charges of grave breaches of the *Geneva Conventions* and crimes against humanity.

**2.7** For purposes of the jurisdiction of the Court, the question is not, however, whether a legal dispute did exist. It is whether a legal dispute does exist. It is not a question of critical dates and whether the Court was properly seised. Belgium accepts that it was. It is a question of whether there continues to be a "concrete case" involving an "actual controversy"[78] at the point at which the Court is called upon to give judgment on the merits. As the Court observed in the *Nuclear Tests* cases:

> "The Court, as a court of law, is called upon to resolve existing disputes between States. … The dispute brought before it must therefore continue to exist at the time when the Court makes its decision."[79]

**2.8** It is not Belgium's intention here to stand on trite or technical points of law. It is clear that there was a dispute between the Parties when the DRC filed its Application instituting proceedings. But for certain shortcomings relating to the imprecision with which the case, and the jurisdiction of the Court, were stated in that Application – which are no longer material – the Court was properly seised by that

[77] *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, ICJ Reports 1962, p.319, at p.328. Also, *Headquarters Agreement Advisory Opinion*, supra, at paragraph 35.
[78] *Case Concerning Northern Cameroons (Cameroon v. United Kingdom)*, Preliminary Objections, ICJ Reports 1963, p.15, at pp.33–34.

Application. The question, however, is whether, in the light of the quite fundamental changes in the circumstances at the very heart of the DRC's case, there continues to be a "concrete dispute" in respect of which the Court can properly be said to have jurisdiction pursuant to the Optional Clause Declarations of the Parties.[80]

**2.9** This question is not abstract and without wider ramifications. The issues of law at the centre of this case raise matters of considerable importance which go to the development of the international legal order in the area of individual criminal responsibility. Belgium takes a particular view of the role of national courts and procedures in this process. It considers that this view is permitted by international law. Other States may take a different view.[81] Is it to be the case, however, that any State which disagrees with Belgium on this matter is to be free to initiate proceedings before the Court alleging a dispute, regardless of whether there is an "actual controversy" amounting to a "concrete dispute", with the view of obtaining an advisory opinion from the Court on the matter? This cannot be so. As will be addressed further below, the adjudicatory function of the Court requires, in Belgium's submission, that a dispute with which the Court is seised is and remains a real, concrete dispute; a live controversy requiring practical resolution. Any other interpretation of the term "dispute" would extend the adjudicatory role of the Court into the area of advisory opinions. This is not the scheme of the *Statute*.

**2.10** The point was cogently made by the Court in the *Nuclear Tests* cases:

> "It does not enter into the adjudicatory functions of the Court to deal with issues *in abstracto*, once it has reached the conclusion that the merits of the case no longer fall to be determined. The object of the claim having clearly disappeared, there is nothing on which to give judgment."[82]

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[79] *Nuclear Tests Cases (Australia v. France; New Zealand v. France)*, ICJ Reports 1974, pp.253 and 457 respectively ("Nuclear Tests cases"), at paragraphs 55 and 58 respectively.

[80] There is also the closely related point of whether, even if the Court does have jurisdiction in the case, the issue is one in respect of which it would be appropriate for the Court to proceed to judgment on the merits. This question is the subject of Belgium's *Second Submission* addressed below.

[81] Although, on the evidence available, such States appear to be in the distinct minority. This element is addressed in Part III below.

[82] *Nuclear Tests* cases, supra, at paragraphs 59 and 62 respectively.

**2.11** The point was made in similar terms in the *Northern Cameroons* case, although in language that straddled the issues of jurisdiction and admissibility, as follows:

> "The Court must discharge the duty to which it has already called attention – the duty to safeguard the judicial function. Whether or not at the moment the Application was filed there was jurisdiction in the Court to adjudicate upon the dispute submitted to it, circumstances that have since arisen render any adjudication devoid of purpose. Under these conditions, for the Court to proceed further in the case would not, in its opinion, be a proper discharge of its duties."[83]

**2.12** In the light of these observations, the question is whether there continues to be a concrete dispute between the Parties in respect of which the Court can properly be said to have jurisdiction. Belgium contends that there does not. What remains, following the changed circumstances in the position of Mr Yerodia Ndombasi, is a difference of view between the DRC and Belgium on the law relating to the immunity of Ministers for Foreign Affairs in respect of allegations of war crimes and crimes against humanity. Deprived of practical content by the change in circumstances, this difference of view is, however, now a matter of abstract concern.

**2.13** The centrality to the DRC's case of the official governmental position of Mr Yerodia Ndombasi was fully addressed in the preceding part of this Counter-Memorial. There is accordingly no need to go over the issue in any detail at this point. For convenience, however, it may be helpful to recall that the position of Mr Yerodia Ndombasi as Minister for Foreign Affairs of the DRC was central to the DRC's Application instituting proceedings. The ministerial position of the subject of the arrest warrant was expressly stated to be the continuing *raison d'être* of the case during the provisional measures phase. The immunity of Ministers for Foreign Affairs is the central pivot of the DRC Memorial. It is also the critical point on which the DRC has requested the Court to adjudicate.

[83] *Northern Cameroons* case, supra, at p.38.

**2.14** As was observed in the discussion on the remedies requested by, and the final submissions of, the DRC in the preceding part of this Counter-Memorial, the abstract nature of the DRC's case is reinforced by its characterisation of the damage allegedly suffered as "moral damages" and the absence of any request for compensatory damages.[84] In this regard, it may be recalled that the absence of claim for compensatory damages was an element in the decision of the Court in the Australian *Nuclear Tests* application that the dispute in that case had become abstract and, accordingly, fell outside of the adjudicatory functions of the Court.[85]

**2.15** The point does not need to be laboured further. In Belgium's contention, the change in circumstances at the heart of this case has deprived the case of both its practical content and purpose. The dispute, real at the point at which the Court was seised, has ceased to have any concrete dimension requiring practical resolution. Belgium contends that, in consequence, there is no longer a "legal dispute" between the Parties within the meaning of this term in the Parties' Optional Clause Declarations. As a matter of law, the Court accordingly lacks jurisdiction in this case.

## B. Second submission: the case is now without object

**2.16** Distinct from the preceding submission, in the event that the Court concludes that there continues to be a legal dispute between the Parties which falls within the jurisdiction of the Court, Belgium contends that that dispute is now without object in view of the fact that Mr Yerodia Ndombasi no longer occupies any ministerial position in the DRC Government. In the language of the Court, this change in circumstances renders any adjudication "devoid of purpose".[86] The Court should accordingly decline to proceed to judgment on the merits of the case. Although this submission raises similar issues to those addressed in the previous section, it goes to the discretion of the Court in the exercise of its judicial function.

**2.17** The distinction between the formal question of the jurisdiction of the Court in any given case and the exercise by the Court of its judicial function is well-

[84] See paragraphs 1.53–1.55 above.
[85] *Nuclear Tests* cases, *supra*, p.253, at paragraph 53.
[86] *Northern Cameroons* case, *supra*, at p.38; *Nuclear Tests* cases, *supra*, at paragraph 23.

established in the Court's jurisprudence. In the *Nottebohm* case, for example, the Court observed that "the seising of the Court is one thing, the administration of justice is another".[87] The distinction was elaborated upon in the *Frontier Dispute (Burkina Faso v. Mali)* in the following terms:

> "[i]n the Chamber's opinion, it should first be recalled that there is a distinction between the question of the jurisdiction conferred upon it … and the question whether 'the adjudication sought by the Applicant is one which the Court's judicial function permits it to give', a question considered by the Court in the case concerning the *Northern Cameroons*, among others (*I.C.J. Reports 1963*, p.31). As it also stated in that case, 'even if the Court, when seised, finds that it has jurisdiction, the Court is not compelled in every case to exercise that jurisdiction (*ibid.*, p.29)."[88]

**2.18** This distinction was central to the decisions of the Court in both the *Northern Cameroons* case and the *Nuclear Tests* cases as well as having arisen for consideration in a number of other cases before both the International Court and the Permanent Court.[89]

**2.19** The decisions of the Court in the *Northern Cameroons* and *Nuclear Tests* cases are particularly on point as regards the present proceedings and warrant closer examination.

**2.20** As is well-known, in the *Northern Cameroons* case, following the filing of the Application instituting proceedings by Cameroon against the United Kingdom alleging that the United Kingdom had failed to respect certain obligations flowing from the Trusteeship Agreement concerning Northern Cameroons, the UN General Assembly decided to terminate the Trusteeship Agreement. In developing its arguments before the Court subsequent to this decision, the Applicant indicated that it did not ask the Court to revise or reverse the conclusions of the General Assembly but simply "to appreciate certain facts and to reach conclusions on those facts".[90]

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[87] *Nottebohm Case (Liechtenstein v. Guatemala)*, Preliminary Objections, ICJ Reports 1953, p.111, at p.122.
[88] *Case Concerning the Frontier Dispute (Burkina Faso and Mali)*, ICJ Reports 1986, p.554, at paragraph 45.
[89] For example, the *Free Zones* case, PCIJ, Series A, No.22 and Series A/B, No.46.

**2.21** In the light of the changed circumstances at the heart of that case, the Court declined to proceed to render a judgment on the merits of the issue. In so doing, it set out a number of principles of general application relating to the exercise of the judicial function which are directly pertinent to the present proceedings. Thus, as has already been observed in the preceding section of this Part, the Court noted that "it may pronounce judgment only in connection with *concrete cases where there exists at the time of the adjudication an actual controversy* involving a conflict of legal interests between the parties".[91]

**2.22** The Court went on to note that the Applicant's claim in that case was for a declaratory judgment. It continued in terms that merit recitation in detail.

> "That the Court may, in an appropriate case, make a declaratory judgment is indisputable. The Court has, however, already indicated that even if, when seised of an Application, the Court finds that it has jurisdiction, it is not obliged to exercise it in all cases. If the Court is satisfied, whatever the nature of the relief claimed, that to adjudicate on the merits of an Application would be inconsistent with its judicial function, it should refuse to do so.
>
> …
>
> … it is not the function of a court merely to provide a basis for political action if no question of actual legal rights is involved. Whenever the Court adjudicates on the merits of a dispute, one or the other party, or both parties, as a factual matter, are in a position to take some retroactive or prospective action or avoidance of action, which would constitute a compliance with the Court's judgment or a defiance thereof. That is not the situation here.
>
> … circumstances that have since [the filing of the Application] arisen render any adjudication devoid of purpose. Under these conditions, for the Court to proceed further in the case would not, in its opinion, be a proper discharge of its duties.
>
> … Any judgment which the Court might pronounce would be without object."[92]

**2.23** The circumstances of the present case are not, of course, *ad idem* with those in the *Northern Cameroons* case. On the essential elements of the two cases relevant

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[90] *Northern Cameroons* case, *supra*, at p.32.
[91] *Northern Cameroons* case, *supra*, at pp.33–34 (emphasis added).

to a decision of the Court, however, they are not that far apart. In the *Northern Cameroons* case, the Court was properly seised by the Applicant in respect of a dispute that was concrete at the time of the Application instituting proceedings. So too in this case. In the *Northern Cameroons* case, circumstances subsequent to the filing of the Application fundamentally altered the practical dimension of the proceedings. This, too, is the situation in the present proceedings. In the *Northern Cameroons* case, the supervening circumstances rendered any adjudication on the merits devoid of practical purpose. Belgium contends that this is the situation in the present case as well. This issue is addressed further below. In the *Northern Cameroons* case, a judgment of the Court on the merits might have provided some guidance on the law for the future relevant to the performance of trusteeship obligations. The same will no doubt be argued by the Applicant in this case with regard to the law relating to the immunity of Ministers for Foreign Affairs in office. Finally, in the *Northern Cameroons* case, despite the issues of abstract principle that remained in contention between the parties, the Court declined to give a judgment on the merits on the ground that to do so would be without object. Belgium submits that the Court should adopt the same approach in the present case.

**2.24** The circumstances of, and decision of the Court in, the *Nuclear Tests* cases further support Belgium's submissions in the present case. As is well known, the Applications by Australia and New Zealand in those cases concerned French atmospheric nuclear testing in the South Pacific. The Applications requested a declaration from the Court to the effect that the carrying out of further atmospheric nuclear tests in the South Pacific would be inconsistent with international law. Subsequent to the filing of the Applications, a number of authoritative statements were made on behalf of the French Government which the Court considered expressed an intention on the part of France to cease atmospheric nuclear testing following the series of tests in which it was then engaged.

**2.25** In the light of these statements, the Court concluded that the object of the claim had disappeared and that it was no part of the adjudicatory function of the Court

[92] *Northern Cameroons* case, *supra*, at pp.37–38.

to deal with issues *in abstracto*.[93] The Court accordingly declined to proceed to judgment in the matter. Its reasoning in doing so is material to the present case.

**2.26** The Court first recalled that it possessed an "inherent jurisdiction" enabling it to take such decisions as may be required *inter alia* to ensure the "inherent limitations on the exercise of the judicial function".[94] It proceeded thereafter to address its function as a court of law in terms that have already been touched upon but which are particularly germane to the present proceedings.

> "The Court, as a court of law, is called upon to resolve *existing disputes* between States. Thus the existence of a dispute is the primary condition for the Court to exercise its judicial function; it is not sufficient for one party to assert that there is a dispute, since 'whether there exists an international dispute is a matter for objective determination' by the Court (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase), Advisory Opinion, I.C.J. Reports 1950*, p.74). *The dispute before it must therefore continue to exist at the time when the Court makes its decision.* It must not fail to take cognisance of a situation in which the dispute has disappeared because the object of the claim has been achieved by other means. …
>
> The Court has in the past indicated considerations which would lead it to decline to give judgment. The present case is one in which 'circumstances that have … arisen render any adjudication devoid of purpose' (*Northern Cameroons, Judgment, I.C.J. Reports 1963*, p.38). The Court therefore sees no reason to allow the continuance of proceedings which it knows are bound to be fruitless. *While judicial settlement may provide a path to international harmony in circumstances of conflict, it is none the less true that the needless continuance of litigation is an obstacle to such harmony.*
>
> Thus the Court finds that no further pronouncement is required in the present case. It does not enter into the adjudicatory function of the Court to deal with issues *in abstracto*, once it has reached the conclusion that the merits of the case no longer fall to be determined. The object of the claim having clearly disappeared, there is nothing on which to give judgment."[95]

**2.27** As with the *Northern Cameroons* case, the circumstances of the present case are not *ad idem* with the *Nuclear Tests* cases. In particular, in the *Nuclear Tests* cases

[93] *Nuclear Tests* cases, *supra*, at paragraphs 59 and 62 respectively.
[94] *Nuclear Tests* cases, *supra*, at paragraph 23 respectively.
[95] *Nuclear Tests* cases, *supra*, at paragraphs 55–59 and 58–62 respectively (emphasis added).

the Court concluded that, in consequence of the official statements made on behalf of the Respondent in that case, the Applicants' objective had been achieved. In contrast, in the present case, the supervening facts relate to a change in circumstances at the heart of the case to do with the position of the Applicant. This notwithstanding, there are important elements in common between the two sets of proceedings which suggest that the principles laid down by the Court in the *Nuclear Tests* cases would be appropriately applied in the present case.

**2.28** One such element was the contention in the *Nuclear Tests* cases that, even though the Applicants' objectives had been achieved, a judgment of the Court might still be of value because, if it upheld the Applicants' contentions, "it would reinforce the position of the Applicant[s] by affirming the obligation of the Respondent."[96] The proposition, in other words, was that a judgment of the Court might serve some purpose in clarifying the law notwithstanding that the Applicants' objectives had been achieved. The Court rejected this contention, however, noting that "the dispute having disappeared, the claim advanced by [the Applicants] no longer has any object. It follows that any further finding would have no *raison d'être*."[97] The Court thus considered that clarification of the law for the future was not a sufficient ground for proceeding to judgment in circumstances in which to do so would have no practical effect.

**2.29** A second element emerging from the *Nuclear Tests* cases was the Court's appreciation of the limits of the judicial function as something not to be exercised in the adjudication of abstract issues notwithstanding that it may have jurisdiction to do so – "[t]he dispute brought before it must … continue to exist at the time when the Court makes its decision."[98]

**2.30** A third element of note was the Court's appreciation that to proceed with litigation that had been commenced in isolation of the wider context of relations between the parties was not necessarily conducive to harmonious relations – "[w]hile judicial settlement may provide a path to international harmony in circumstances of

[96] *Nuclear Tests* cases, *supra*, at paragraphs 56 and 59 respectively.
[97] *Nuclear Tests* cases, *supra*, at paragraphs 56 and 59 respectively.
[98] *Nuclear Tests* cases, *supra*, at paragraphs 55 and 58 respectively.

conflict, it is nonetheless true that the needless continuance of litigation is an obstacle to such harmony."[99]

**2.31** Finally, it may be observed that the Court's appreciation, in the *Nuclear Tests* cases, of issues that had been in contention between the parties at the commencement of the proceedings but that had subsequently become issues *in abstracto*, and accordingly no longer fell to be determined by the Court, hinged not on whether there was an on-going difference of views between the parties but on whether determination by the Court would have any practical utility. Clarification of the law for the future, or the reinforcing of the position of one or other party to the dispute, were not objectives that required the Court to proceed to a judgment in circumstances in which the essential concrete substance of the dispute had ceased to exist.[100]

**2.32** The question, against this background, is whether the issues at the heart of the present case remain concrete issues in contention between the Parties or whether they have become abstract questions on which a determination by the Court would serve no practical purpose. In Belgium's contention, the response to this enquiry is manifest. In the light of the change in circumstances at the heart of this case, the issues raised by the case have, for all practical purposes, become abstract questions the resolution of which no longer has any object. Belgium would go further. In Belgium's contention, in the absence of a continuing concrete dispute between the Parties on the matters in question, for the Court to proceed to a judgment on the merits could be positively counter-productive.

**2.33** As was addressed in detail in Part I of this Counter-Memorial, the DRC case has from the outset been predicated on the ministerial position of the subject of the arrest warrant. This was the way in which the Application instituting proceedings was framed. The ministerial position of Mr Yerodia Ndombasi was explicitly declared by the DRC to be the continuing *raison d'être* of the case during the provisional measures phase of the proceedings. The entire focus of the DRC Memorial has also been directed towards this issue.

[99] *Nuclear Tests* cases, *supra*, at paragraphs 58 and 61 respectively.

**2.34** It will no doubt be argued that the case as reformulated in the DRC Memorial addresses the allegation that Belgium was in breach of international law as a result of the issuing and transmission of the arrest warrant and that a declaration to this effect is a continuing and legitimate object of the proceedings. The reality of the matter, however, is quite different. As has already been observed, the DRC is not seeking compensatory damages and does not allege such damage. The DRC seeks the withdrawal and annulment of the arrest warrant by order of the Court on the grounds that the warrant was issued in violation of the immunity of the Minister for Foreign Affairs. The issue and transmission of the arrest warrant were not, however, predicated on the position of person named therein as Minister for Foreign Affairs. Nor is the person concerned now the Minister for Foreign Affairs. There is thus no longer any basis for these requests of the Court by the DRC even assuming *arguendo* that the case as presented by the DRC has any merit.

**2.35** The remaining request of the Court is for a declaration that Belgium, by issuing and transmitting the warrant violated the immunity of the Minister for Foreign Affairs of the DRC. This element, however, falls about as clearly as it is possible to fall within the principles enunciated by the Court in the *Northern Cameroons* and *Nuclear Tests* cases. In the circumstances, a judgment by the Court on the merits could only have two possible purposes. It could either be directed towards the clarification of the law in this area for the future. Or it could be designed to reinforce the position of one or other Party. In either case, for the Court to proceed to a judgment on the merits would be to turn the adjudicatory function of the Court into advisory proceedings. Both such purposes were clearly rejected by the Court in the *Northern Cameroons* and *Nuclear Tests* cases as providing an insufficient *raison d'être* for it to proceed to a judgment on the merits. The principle in these cases apply with equal force in the present case.

**2.36** A further dimension may also be mentioned. As is commonly appreciated, and as is addressed further in Part III of this Counter-Memorial, the abstract issues of law raised by this case go to the heart of the debate about individual responsibility for the commission of international crimes. Although this issue has deep roots in

[100] *Nuclear Tests* cases, *supra*, at paragraphs 56–59 and 59–62 respectively.

international law – as Part III makes clear – debate about the scope and application of principles that emerged from instruments such as the *Nuremberg Charter* has become caught up more recently in wider developments relating to jurisdiction over, and immunities in respect of, acts of torture, the legal basis of the competence of the tribunals established by the UN Security Council to address atrocities committed in the former Yugoslavia, Rwanda and Sierra Leone, and the adoption of the *Statute* of the International Criminal Court and its anticipated entry into force in the near future.

**2.37** Against this background, a judgment of the Court on the merits in this case would – no matter in what direction that judgment was to go – inevitably influence the course of this debate. Two related questions are thus relevant. First, would it be appropriate, in circumstances in which there is no longer a concrete dimension to the dispute before it, for the Court to render, in the context of bilateral adjudicatory proceedings, what would in effect be an advisory opinion on matters on which the wider international community has an interest? Second, in the absence of a subsisting concrete dispute or an appropriate request for an advisory opinion, would it in any event be appropriate for the Court to address such matters given that this would place the Court in a quasi-legislative role as opposed to an adjudicatory or declaratory role?

**2.38** In Belgium's view, in appropriate circumstances, the Court has a centrally important role to play in the adjudication of concrete disputes between States. In Belgium's submission, however, given the absence of a subsisting concrete dispute between the Parties which is in need of practical resolution, it would go beyond the adjudicatory function of the Court to address the matters raised in the present case by way of a judgment on the merits. Belgium accordingly contends that, in the light of the fact that Mr Yerodia Ndombasi is no longer either Minister for Foreign Affairs of the DRC or a minister occupying any other position in the DRC Government, the case is now without object and the Court should accordingly decline to proceed to judgment on the merits of the case.

## C. Third submission: the case as it now stands is materially different to that set out in the DRC's Application instituting proceedings

**2.39** Article 40(1) of the *Statute* of the Court requires that the "subject of the dispute" must be indicated in the Application instituting proceedings. Article 38(2) of the Court's *Rules* goes on to provide that "the precise nature of the claim" must be specified in the Application. The object of these provisions is to require that, from the point at which proceedings are commenced, the subject of the dispute is specified with sufficient clarity to allow the Respondent, the Court and third States to have a clear appreciation of the nature of the dispute.

**2.40** The importance of such clarity and precision in the initiation of proceedings within the scheme of the administration of justice has been affirmed repeatedly by the Court. Thus, for example, referring to these provisions of the *Statute* and the *Rules*, the Court, in the *Fisheries Jurisdiction* case, observed as follows:

> "In a number of instances in the past the Court has had occasion to refer to these provisions. It has characterised them as 'essential from the point of view of legal security and the good administration of justice' and, on this basis, has held inadmissible new claims, formulated during the course of proceedings which, if they had been entertained, would have transformed the subject of the dispute originally brought before it under the terms of the Application (*Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992,* pp.266–267; see also *Prince von Pless Administration, Order of 4 February 1933, P.C.I.J., Series A/B, No.52,* p.14, and *Société Commerciale de Belgique, Judgment, 1939, P.C.I.J., Series A/B, No.78,* p.173)."[101]

**2.41** Implicit in this requirement of clarity and precision in the initiation of legal proceedings is also necessarily its corollary. It would be contrary to legal security and the good administration of justice for an applicant to continue with legal proceedings in circumstances in which the factual dimension on which the Application instituting proceedings was based had changed fundamentally. The prejudice to the respondent in such circumstances would be of the same order as in the case of the transformation of the subject of the dispute during the course of proceedings. The case would assume an artificial character. The respondent would be uncertain, until the very last moment, of the substance of the case against it. The *raison d'être* of the case would cease to be the resolution of a dispute between the parties and become one of the

[101] *Fisheries Jurisdiction (Spain v. Canada), supra*, at paragraph 29.

abstract consideration of legal principle. Typically, in municipal proceedings, an applicant who wishes to continue with a case in such circumstances, is required to apply to amend its statement of claim so that the nature of the case in issue will be clear to all involved.

**2.42** In the present case, the underlying factual dimension of the case now before the Court is materially different to that set out in the DRC's Application instituting proceedings. Yet, in essence, as presented in its Memorial, the DRC is proceeding as if the issues at the core of its initial complaint remain unchanged. The case has been reformulated as regards issues of law and requests to the Court. Yet no account is taken of the quite fundamental changes at the heart of the case.

**2.43** In its concluding submissions to the Court during the provisional measures phase, Belgium argued that the changed circumstances of Mr Yerodia Ndombasi's reassignment as Minister of National Education "so fundamentally alter the case initiated by the Democratic Republic of Congo's Application of 17 October 2000 that this completely undermines the legal and procedural basis of any further proceedings pursuant to the Application."[102] Belgium proceeded to draw attention to the Court's jurisprudence on Article 40(1) of the *Statute* and Article 38(2) of the *Rules* (as noted above), concluding as follows:

> "The Application initiating the case of which these proceedings are a part is fundamentally incapable, as a matter of settled law, of sustaining a claim based on the changed circumstances of Mr Yerodia Ndombasi's move from the position of the Democratic Republic of the Congo Foreign Minister."[103]

**2.44** The Court, in its *Provisional Measures Order*, concluded that the new ministerial duties being performed by Mr Yerodia Ndombasi as Minister for National Education meant that the case had not, at that point, been deprived of its object.[104]

[102] CR 2000/35, at paragraph 21 of the submissions of Mr Bethlehem.
[103] CR 2000/35, at paragraph 29 of the submissions of Mr Bethlehem.
[104] *Provisional Measures Order*, at paragraphs 56–57.

**2.45** Since that point, Mr Yerodia Ndombasi has ceased to be a member of the DRC Government altogether. This circumstances arose well before the DRC filed its Memorial with the Court. Yet, the very essence of the DRC's case remains the allegation that Belgium is in violation of international law for having issued and transmitted an arrest warrant naming the Minister for Foreign Affairs of the DRC.

**2.46** When the DRC filed its Application instituting proceedings on 17 October 2000, Belgium was faced with a claim concerning the immunities of the Minister for Foreign Affairs of the DRC. On 20 November 2000, in the midst of the provisional measures phase, that claim – by the express assertion of the DRC – metamorphosed into a claim concerning the immunities of a Minister for National Education. On 15 April 2001, following the constitution of the new Government of the DRC and the absence therefrom of Mr Yerodia Ndombasi, that claim appeared to have become entirely moot. A month later, with the filing of the DRC Memorial, the claim was resurrected alleging that, in consequence of the issuing and transmission of the arrest warrant against the DRC Minister for Foreign Affairs, Belgium is in violation of international law. Belgium may perhaps be excused for wondering what the next twist in the proceedings will be.

**2.47** In the light of these developments, the question that arises is why the DRC has persisted in formulating its case by reference to the immunities of its Minister for Foreign Affairs. The answer appears to be self-evident. Given the terms of the Application instituting proceedings, any transformation of the case away from this central fact would almost inevitably have resulted in the case being declared inadmissible. Belgium, indeed, signalled clearly during the provisional measures phase that it would be advancing argument to this effect. The continuing focus of the case on the immunity of the DRC Minister for Foreign Affairs therefore appears simply to be a device to avoid the problems of admissibility that would inevitably have arisen had the case been reformulated to reflect accurately the prevailing factual situation.

**2.48** The question for the Court now is whether, by such a device, the DRC is to be permitted to present a case which for all practical purposes is materially different in its underlying factual component to the case presented in its initial Application.

Belgium contends that this should not be permitted. Legal security and the good administration of justice requires that the clarity and precision required of an applicant in its Application instituting proceedings should also be required of an applicant as regards the manner in which the case is continued. Any other approach would be both contrary to principle and the sound administration of justice and would open the door for the conduct of proceedings in a manner that would unfairly prejudice the Respondent.

**2.49** The Court, in a number of areas, has recently taken steps to ensure that the adjudicatory process works more efficiently and to greater legal effect. Time limits have been shortened. Exceptional procedures – as in the present case – have been introduced. Provisional measures orders have been declared to be binding.[105] Belgium contends that, consistent with these developments, the Court should signal clearly that the sound administration of justice precludes the continuation of proceedings in circumstances in which the underlying factual dimension at the heart of the case has changed fundamentally since the filing of the Application instituting proceedings. In such circumstances, if an applicant wishes to pursue a matter, it should be required to initiate proceedings afresh or, at the very least, to apply to the Court for permission to amend its initial Application, such a procedure admitting of observations by the respondent.

**2.50** Against this background, Belgium contends that, in view of the fact that the underlying factual dimension of the case now before the Court is materially different to that set out in the DRC's Application instituting proceedings, the Court lacks jurisdiction in the case and/or the application is inadmissible.

[105] *LeGrand (Germany v. United States)*, 27 June 2001, unpublished, ICJ General List No.104.

## D. Fourth submission: the case has assumed the character of an action of diplomatic protection but local remedies have not been exhausted

**2.51** During the course of the provisional measures phase of the proceedings,[106] and again in its Memorial,[107] the DRC asserted that it had not initiated the proceedings in the exercise of a right of diplomatic protection. Insofar as the original Application, and the facts underlying it, addressed the position of the Minister for Foreign Affairs in office of the DRC, Belgium accepts that the DRC proceeded in respect of a matter with which it had a direct legal interest. The position, however, changed fundamentally on 15 April 2001, the point at which Mr Yerodia Ndombasi ceased to be a member of the Government of the DRC. From this point, the case, in important respects, assumed the character of an action of diplomatic protection.

**2.52** As has already been addressed, the principal focus of the DRC Memorial remains the immunities of Ministers for Foreign Affairs. The DRC's requests of the Court, however, raise issues that fall squarely within the realm of an action of diplomatic protection. Thus, notwithstanding that the issue and transmission of the arrest warrant was not predicated on the ministerial status of Mr Yerodia Ndombasi, and that he no longer occupies a ministerial position within the Government of the DRC, the DRC has requested of the Court a declaration *inter alia* (a) that the arrest warrant cannot be enforced, whether by Belgium or by any other State, and (b) that Belgium is required to withdraw and annul the arrest warrant.[108]

**2.53** Given the present status of Mr Yerodia Ndombasi as a private citizen, these requests go beyond matters on which the DRC has a direct and independent interest. Properly characterised, these requests concern the legal effect of an arrest warrant charging a private citizen of the DRC with war crimes and crimes against humanity. In other words, they address matters which, although of <u>indirect</u> concern to the DRC through its national, do not engage the interest of the DRC independently of the position of its national. Indeed, this element illustrates an inconsistency at the very heart of the DRC's case. On the one hand, the DRC purports to pursue the interests of

[106] CR 2000/32, at pp.19–20.
[107] DRC Memorial, at paragraph 56.
[108] DRC Memorial, at paragraph 97(3) and (4).

the State. On the other hand, however, its requests of the Court are focused on the interests of one of its nationals in his private capacity.

**2.54** The principle is well-established in international law that, before a State can adopt the cause of one of its nationals in international proceedings, that national must first have exhausted the available local remedies in the State whose acts are being challenged. The Court, in the *Interhandel* case, put the matter in the following terms:

> "The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system."[109]

**2.55** Anticipating, no doubt, that Belgium would raise the issue of the non-exhaustion of local remedies, the DRC addresses the matter pre-emptively in its Memorial contending essentially that, in the case of an arrest warrant issued *in absentia* (as in the present case), there are no means available to the person named therein to challenge the warrant prior to arrest and imprisonment.[110]

**2.56** The Memorial continues:

> "Dans le droit de la procedure pénale belge, la seule possibilité de contester le mandat d'arrêt avant l'arrestation de la personne qui y est visée est de solliciter du juge d'instruction puis, en cas de refus, d'une juridiction d'instruction supérieure, un nouvel acte d'instruction après avoir pris connaissance du dossier d'instruction. Toutefois, le simple accès à ce dossier fut refusé par le juge Vandermeersch à Monsieur Yerodia par ordonnance du 12 octobre 2000. Cette ordonnance fut confirmée par l'arrêt du 12 mars 2001 prononcé par la Chambre des mises en accusation de la Cour d'appel de Bruxelles, sur conclusions conformes du Premier Avocat général. Il est donc clair que, du point de vue de toutes les autorités judiciares belges, le mandat d'arrêt ne pourrait pas être levé et serait

[109] *Interhandel Case (Switzerland v. United States of America)*, ICJ Reports 1959, p.6, at p.27.
[110] DRC Memorial, at paragraph 56.

> conforme au droit international, ce qu'a d'ailleurs soutenu la Partie défenderesse lors des plaidoiries relatives à la demande d'indication de mesures conservatoires."[111]

**2.57** A number of observations on this statement are warranted. First, as was addressed in Part I of this Counter-Memorial,[112] the Brussels Court of Appeal gave two reasons for refusing Mr Yerodia Ndombasi access to the dossier: (a) there was concern that access to the dossier could result in reprisals being taken against the complainants and others; (b) the Applicant was in fact fully aware of the allegations made against him following the issuing of the arrest warrant.

**2.58** Second, an application for access to the dossier is entirely distinct from an application challenging the issue of an arrest warrant on grounds of a lack of jurisdiction on the part of the investigating judge. As has already been stated, Belgium knows of no application by Mr Yerodia Ndombasi seeking the annulment of the arrest warrant.

**2.59** Third, Belgium is unaware even of any enquiry made by or on behalf of Mr Yerodia Ndombasi to any Belgian authority – whether the courts, the Office of the Prosecutor, the Ministry of Justice or the Ministry of Foreign Affairs – concerning a challenge to the arrest warrant on grounds of the lack of jurisdiction of the judge concerned or on any other ground.

**2.60** Turning to the law relevant to the application of the local remedies rule, the matter was addressed most recently by the Court in the *Elettronica Sicula* case ("ELSI").[113] Two principles of general application emerge from this decision:

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[111] "Under Belgian criminal proceedings, the only possibility to challenge an Arrest Warrant before the arrest of the person who is referred to in it, is to apply to the juge d'instruction and then, in the case of refusal, to a higher investigative competence, for a new investigative act after having consulted the investigating file. However, Mr Yerodia was refused simple access to the file by Judge Vandermeersch by an order of 12 October 2000. This order was confirmed by a ruling of 12 April 2001 given by the Chambre de mises en accusation of the Court of Appeal of Brussels, in keeping with the conclusions of the First Advocate General. It is clear, therefore, from the standpoint of all Belgian judicial authorities, that the Arrest Warrant could not be voided and was considered in compliance with international law, which, moreover, the defendants argued in the pleadings on an indication for provisional measures." (DRC Memorial, at paragraph 56; unofficial translation by Belgium)

[112] See paragraphs 1.14–1.15 above.

(a) the local remedies rule does not require that a claim be presented to the municipal courts in a form, and with arguments, suited to an international tribunal, applying different law to different parties;[114] and

(b) it is for the party alleging the failure to exhaust local remedies to adduce evidence of the existence of a remedy which the foreign national concerned failed to pursue.[115]

**2.61** Going beyond these principles, the application of the local remedies rule was addressed at length by the 1956 Arbitration Commission in the *Ambatielos Claim (Greece v. United Kingdom)* in terms that merit fairly full repetition:

> "The [local remedies] rule thus invoked by the United Kingdom Government is well established in international law. Nor is its existence contested by the Greek Government. It means that the State against which an international action is brought for injuries suffered by private individuals has the right to resist such an action if the persons alleged to have been injured have not first exhausted all the remedies available to them under the municipal law of that State. The defendant State has the right to demand that full advantage shall have been taken of all local remedies before the matters in dispute are taken up on the international level by the State of which the persons alleged to have been injured are nationals.
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> In order to contend successfully that international proceedings are inadmissible, the defendant State must prove the existence, in its system of internal law, of remedies which have not been used. The views expressed by writers and in judicial precedents, however, coincide in that the existence of remedies which are obviously ineffective is held not to be sufficient to justify the application of the rule. Remedies which could not rectify the situation cannot be relied upon by the defendant State as precluding an international action.
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> …
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> Although this question has hardly been studied by writers and although it does not seem, hitherto, to have been the subject of judicial decisions, it is hardly possible to limit the scope of the rule of prior exhaustion of local remedies to recourse to local courts.

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[113] *Case Concerning Elettronica Sicula SpA (ELSI) (United States of America v. Italy)*, ICJ Reports 1989, p.15.
[114] *ELSI*, *supra*, at paragraph 59.
[115] *ELSI*, *supra*, at paragraph 62.

> *The rule requires that 'local remedies' shall have been exhausted before an international action can be brought. These 'local remedies' include not only reference to the courts and tribunals, but also the use of the procedural facilities which municipal law makes available to litigants before such courts and tribunals. It is the whole system of legal protection, as provided by municipal law, which must have been put to the test before a State, as the protector of its nationals, can prosecute the claim on the international plane.* …
>
> It is clear, however, that it cannot be strained too far. Taken literally, it would imply that the fact of having neglected to make use of some means of procedure – even one which is not important to the defence of the action – would suffice to allow a defendant State to claim that local remedies have not been exhausted, and that, therefore, an international action cannot be brought. This would confer on the rule of the prior exhaustion of local remedies a scope which is unacceptable.
>
> In the view of the Commission the non-utilisation of certain means of procedure can be accepted as constituting a gap in the exhaustion of local remedies only if the use of these means of procedure were essential to establish the claimant's case before the municipal courts."[116]

**2.62** Beyond this statement of the law, other principles relevant to the application of the local remedies are conveniently summarised by Sir Robert Jennings and Sir Arthur Watts in *Oppenheim's International Law*. Particular mention may be made of two further principles germane to the present case:

(a) the local remedies rule requires that recourse should be had to all legal remedies available under the local law which are in principle capable of providing an effective and sufficient means of redressing the wrongs alleged to have been committed even if those remedies may be regarded as of an extraordinary nature;[117]

[116] *Ambatielos Claim (Greece v. United Kingdom)*, Award of the Commission of Arbitration, 6 March 1956, 23 *International Law Reports* p.306, at pp.334–336 (emphasis added).
[117] Jennings and Watts, *Oppenheim's International Law* (9th ed., 1992), at p.524, note 6. See also *Nielsen v. Government of Denmark* (1959) 28 *International Law Reports* p.210.

(b) where the respondent has shown that local remedies do exist, it is for the applicant to show that they were exhausted or were inadequate.[118]

**2.63** In summary of the preceding, the principles of law relevant to the application of the local remedies rules which are germane to the present proceedings can be stated as follows:

(a) it is for Belgium to adduce evidence of the existence of a remedy which Mr Yerodia Ndombasi has failed to pursue;

(b) such a remedy is not restricted to proceedings before the Belgian courts but extends to the whole system of legal protection provided by municipal law, including procedural facilities, which are capable of providing an effective and sufficient means of redressing the wrongs alleged;

(c) once Belgium has adduce sufficient evidence to show that a local remedy meeting the preceding criteria does exist, it will be for the DRC to show that that remedy was exhausted or inadequate.

**2.64** Against this background, Belgium contends that Mr Yerodia Ndombasi has indeed failed to exhaust at least one avenue of potential redress in Belgium which, if successful on the merits, would have provided an effective and sufficient means of redressing the wrongs alleged to have been committed.

**2.65** As a matter of accepted practice under Belgian criminal law, persons who are the subject of criminal investigation and/or of an arrest warrant issued by an investigating judge may submit a legal memorandum to the judge concerned contesting the jurisdiction of the judge and the validity of any warrant said to have been issued in excess of jurisdiction. The judge is not compelled to take the arguments so raised into account. If, however, he considers that the arguments raised address issues of importance going to his jurisdiction or to the admissibility of the application, he must submit the matter to the court for resolution.

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[118] *Oppenheim's International Law*, *supra*, at p.526. See also the *Velasquez Rodriguez* case (1989), 28 *International Legal Materials* p.291.

**2.66** As has become well know publicly, there is an unresolved anomaly to the Belgian Law of 1993, as amended by the Law of 1999, pursuant to which the arrest warrant was issued. This pertains to the possible application to that Law of Article 12, paragraph one, of the Belgian *Code of Criminal Procedure*. This provides, as a general rule relating to criminal prosecutions, that any prosecution of offences can only proceed if the accused is found in Belgium. The relevant text is as follows:

> "Sauf dans les cas prévus aux articles 6, nos 1 et 2, 10, nos 1 et 2, ainsi qu'à l'article 10*bis*, la pour-suite des infractions dont il s'agit dans le présent chapitre n'aura lieu que si l'inculpé est trouvé en Belgique."[119]

**2.67** The question of whether Article 12, paragraph one, applies to the Law of 1993, as amended, is uncertain. Strong arguments have been advanced in public debate on both sides of the question. The matter has not so far been determined by the Belgian courts.

**2.68** It is not necessary to go into the detail of this debate for present purposes. What is clear, however, is that, were the Belgian courts to uphold the application of this provision to the Law of 1993, as amended, it would preclude the issuing of arrest warrants in circumstances in which the person concerned was not found in Belgium. This is the case regarding the arrest warrant naming Mr Yerodia Ndombasi. In any event, this is not, however, a matter that is relevant before the Court.

**2.69** What is also material to the present proceedings is that this very question has in fact been raised – and raised publicly – with the Belgian investigating judge in another case currently being addressed under the Law of 1993 concerning allegations made against the current Prime Minister of Israel, Ariel Sharon. Legal counsel acting on behalf of Mr Sharon has argued *inter alia* that, Article 12, paragraph one, of the

[119] "Except in the cases provided for in Articles 6, nos. 1 and 2, 10, nos. 1 and 2 and in Article 10*bis*, prosecution for violations that are the subject of this chapter will take place only if the accused is found in Belgium." *Le titre préliminaire de la Loi du 17 avril 1878 du Code de procédure pénale*, Article 12, paragraph 1 (unofficial translation by Belgium). **(Annex 6)** Articles 6, 10 and 10*bis* referred to in this provision concern acts against the safety of the State, the counterfeiting of Belgian currency and the unlawful avoidance of miltary service. (The *titre préliminaire du Code de procédure pénale* is a part of

*Code of Criminal Procedure* is applicable to the Law of 1993, as amended, and that the investigating judge accordingly lacks jurisdiction as the person concerned is not in Belgium. The matter is currently under consideration by the investigating judge in that case. At the point at which this Counter-Memorial is being finalised, there is every indication that the judge will refer the matter to the court for determination. In the interests of justice, and as the validity of the arrest warrant issued against Mr Yerodia Ndombasi would be effected by a determination of the court in the case of the complaint against Mr Sharon, it is likely that the Prosecutor will join the case of Mr Yerodia Ndombasi *proprio motu* to that of Mr Sharon before the court.

**2.70** In Belgium's contention, it was from the outset open to Mr Yerodia Ndombasi, in his personal capacity, to challenge the jurisdiction of the investigating judge by reference to Article 12, paragraph one, of the *Code of Criminal Procedure*. In the course of such submissions to the judge, it would further have been open to Mr Yerodia Ndombasi to adduce arguments based on international law supporting the application of the principle of territorial jurisdiction reflected in Article 12, paragraph one, to the Law of 1993, as amended.

**2.71** While the likely outcome of such a procedure is not certain – and is ultimately a matter for the Belgian courts rather than the Government – it is clear that there was from the outset at least one domestic procedure available to Mr Yerodia Ndombasi that he failed to pursue. Indeed, not only did he fail to pursue this procedure, but there is no suggestion of any serious enquiry having been made at all as to the existence of local remedies.

**2.72** As Belgium has repeatedly observed, the fact that Mr Yerodia Ndombasi no longer occupies any official position within the Government of the DRC has radically transformed this case. As it currently stands, the case can be viewed in one of two ways. It either concerns abstract issues relating to the immunities of Ministers for Foreign Affairs. Or it is in practice an action of diplomatic protection by the DRC in respect of one of its nationals. As was observed at the outset of this section, two of the requests made of the Court by the DRC in the final submissions of its Memorial in

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the *Code d'instruction criminelle*. For reasons of simplicity, reference will be made to the "Code of

practice concern the legal effect of an arrest warrant issued against a private citizen of the DRC. In Belgium's contention, a condition precedent to the jurisdiction of the Court and/or the admissibility of the application in such circumstances is that the person concerned should first have exhausted all available local remedies capable of providing an effective and sufficient means of redressing the wrongs alleged to have been committed.

**2.73** As shown above, Mr Yerodia Ndombasi has not exhausted the avenues of effective potential redress available as a matter of Belgian law and procedure. Belgium accordingly contends that the Court lacks jurisdiction in the present case brought by the DRC and/or that the application is inadmissible.

## E. Fifth submission: the *non ultra petita* rule limits the jurisdiction of the Court to those issues that are the subject of the DRC's final submissions

**2.74** As an ancillary matter, in the event that the Court decides that it does have jurisdiction in this case and that the application is admissible, Belgium contends that the *non ultra petita* rule operates to limit the jurisdiction of the Court to those issues that are the subject of the DRC's final submissions. The point can be made relatively briefly.

**2.75** The *non ultra petita* rule – first applied by the Court in its *Corfu Channel (Assessment of Compensation)* Judgment[120] – was expressed by the Court in the *Asylum (Interpretation)* case in the following terms:

> "… 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."[121]

**2.76** The principle has subsequently been reiterated and applied by the Court in a number of other cases. In the *Barcelona Traction* case, for example, the Court held

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Criminal Procedure".)

[120] *Corfu Channel (Assessment of Compensation)*, ICJ Reports 1949, at p.249.

that it was "not open to the Court to go beyond the claim as formulated by the Belgian Government".[122]

**2.77** Commenting on this rule, Shabtai Rosenne has observed that,

> "[w]hile not disputing the view that the *non ultra petita* rule may properly be regarded as one of procedure, in international litigation it is also appropriate to regard it as an aspect of jurisdiction. As such, however, it has a quantitative and not a qualitative effect. 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."[123]

**2.78** As was observed in Part I of this Counter-Memorial, the claim formulated in the DRC Memorial departs in important respects from the way in which that claim was expressed in its Application instituting proceedings. More significantly, for present purposes, the requests made of the Court in the final submissions set out in DRC Memorial are confined to certain aspects of the case as argued in that Memorial. In particular, the DRC's final submissions do not make any request of the Court concerning the scope and content of the law relating to universal jurisdiction. As Belgium has already observed,[124] the DRC suggested explicitly in its Memorial that the Court could avoid addressing the issue of jurisdiction and that it may prefer to do so.

**2.79** In the event that the Court decides – contrary to Belgium's earlier submissions in this Part – that it does have jurisdiction in this case and that the application is admissible, Belgium contends that the *non ultra petita* rule operates to limit the jurisdiction of the Court to those elements that are the subject of the DRC's final submissions. As the Court observed in the *Asylum (Interpretation)* case, it is the duty of the Court to abstain from deciding points not included in the final submissions of the parties.

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[121] *Request for Interpretation of the Judgment of November 20, 1950, in the Asylum Case*, ICJ Reports 1950, p.395, at p.402.
[122] *Barcelona Traction, Light and Power Company (Belgium v. Spain)*, ICJ Reports 1970, p.3, at paragraph 49.
[123] Rosenne, *The Law and Practice of the International Court, 1920–1996* (3rd ed, 1997), v. II, at p.595.
[124] See paragraphs 1.34–1.35 above.

## F. Conclusions in respect of this Part

**2.80** By way of summary of this Part, Belgium contends that the Court lacks jurisdiction in this case and/or that the application is inadmissible on a number of alternative grounds as follows:

(a) that there is no longer a "dispute" between the Parties within the meaning of this term in the Parties' Optional Clause Declarations;

(b) that the case is now without object;

(c) that the case as it now stands is materially different to that set out in the DRC's Application instituting proceedings; and

(d) that the case has assumed the character of an action of diplomatic protection but that local remedies have not been exhausted.

**2.81** In the event that, contrary to these submissions, the Court decides that it does have jurisdiction in this case and that the application is admissible, Belgium contends that the *non ultra petita* rule operates to limit the jurisdiction of the Court to those elements that are the subject of the DRC's final submissions.

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## CHAPTER ONE

## THE CHARACTER OF THE ARREST WARRANT IS SUCH THAT IT NEITHER INFRINGES THE SOVEREIGNTY OF, NOR CREATES OBLIGATIONS FOR, THE DRC

**3.1.1** The legal and jurisdictional bases of the arrest warrant, in both Belgian and international law, are addressed in detail in the following chapter in this Part. As will there be shown, the arrest warrant, while issued pursuant to Belgian municipal law, is fully consistent with accepted principles of international law concerning the assertion by States of jurisdiction over war crimes and crimes against humanity. It will further be shown, in Chapter Three of this Part, that the warrant is fully consistent with international law even if considered solely by reference to customary principles of universality. Finally, as will be shown in Chapters Four and Five, principles of international law relating to the immunity of Ministers for Foreign Affairs do not preclude the issuing and transmission of an arrest warrant in circumstances in which the allegations in question concern grave breaches of the Geneva Conventions of 1949, and the Additional Protocols thereto, or crimes against humanity. In the light of these submissions, the allegations by the DRC that the issuing and transmission of the arrest warrant amounted to a violation of international law have no substance.

**3.1.2** Separately from the preceding, the character of the arrest warrant and the legal consequences that flow therefrom also warrant comment. The central point is that the character of the arrest warrant is such that it neither infringes the sovereignty of, nor creates obligations for, the DRC. The matter has already been addressed in passing in Part I above.[125] It was also the subject of comment in the Declaration to the *Provisional Measures Order* in this case by Judge *ad hoc* Van den Wyngaert.[126]

[125] See paragraph 1.9 and footnote 26.
[126] *Provisional Measures Order*, Declaration by Judge *ad hoc* Van den Wyngaert, at paragraph 2.

**3.1.3** The arrest warrant of 11 April 2000 is a national arrest warrant. Although, subject to its terms,[127] it is enforceable in Belgium without further requirements, it is not automatically enforceable in third States. For this to occur, the arrest warrant must first be validated by the appropriate authorities of the putative arresting State. This is a matter of the internal law of the State concerned, subject to any relevant and applicable international commitments (such as an extradition agreement between the States concerned) and a request for extradition. In the absence of a request for extradition, or an indication that such a request is pending, and a binding international commitment to act thereon, a third State is under no obligation to act to enforce an arrest warrant issued by another State.

**3.1.4** As has previously been observed, the arrest warrant of 11 April 2000 was transmitted by Belgium to the DRC on 7 June 2000. There is, however, no extradition agreement between Belgium and the DRC covering offences of the kind alleged and, accordingly, Belgium did not, and has not at any point since, formally requested the extradition of Mr Yerodia Ndombasi to Belgium.[128]

**3.1.5** In early June 2000, at the point at which the arrest warrant was transmitted to the DRC, it was also transmitted to Interpol. Through Interpol, the warrant was circulated internationally. It was <u>not</u>, however, the subject of an Interpol Red Notice. This point requires emphasis.

**3.1.6** A Red Notice, sometimes referred to as an Interpol Wanted Notice, is a formal document issued by Interpol at the request of the Interpol National Central Bureau ("NCB") of the State concerned identifying a person whose arrest is requested with a view to extradition. It is required to contain detailed and specific information about the person concerned and the facts alleged including description, identity particulars (such as name, place and date of birth, photographs and fingerprints, if available, occupation, identity document numbers, etc), the facts alleged, charges, arrest warrant details and other relevant judicial information. A 1998 explanatory

[127] Notably concerning the exception, noted in paragraph 1.11 above, in the case of the presence of Mr Yerodia Ndombasi in Belgium on an official governmental visit.

[128] The only binding commitment relating to extradition applicable between the two States is pursuant to the *Torture Convention* of 1984 to which both are party. As the offences alleged in the arrest warrant do not include torture, the Convention does not apply in the circumstances.

note on Red Notices prepared by the Interpol General Secretariat is attached hereto as **Annex 7**.

**3.1.7** As this explanatory note indicates, paper copies of Red Notices are sent by mail to all NCBs.

> "It is then up to the NCBs to take the appropriate steps – in conformity with their legislation and regulations – to inform their national police and immigration authorities (particularly border posts and airports) that an individual is wanted at international level. Some NCBs are empowered to record names from red notices in a national file of wanted persons. Red notices are also recorded in the ASF (Automated Search Facility) so that NCBs, and any national police forces connected to the database, can access red notices directly."[129]

**3.1.8** The legal status of Red Notices as a matter of national law was recently the subject of a major study by Interpol. The results of this study were set out in Report No.8 prepared by the Interpol General Secretariat and adopted by the Interpol General Assembly at its 66th Session in New Delhi in October 1997.[130] The background to this study, and a summary of its conclusions, are set out in the 1998 explanatory note referred to above.[131]

**3.1.9** As Report No.8 describes, 65 of the 178 countries and territories which are members of Interpol indicated that, as a matter of their national laws and regulations, it was possible to make a provisional arrest on the bass of a Red Notice. In such cases, a Red Notice thus effectively amounts to a *request for provisional arrest*.

**3.1.10** A *request for provisional arrest* is not the same as a request for extradition. Rather, it is a document requesting that a wanted person be arrested pending the transmittal of a formal request for extradition. A request for extradition, in contrast, is a formal document sent by one State to another, usually through diplomatic channels, requesting the surrender to the requesting State of a named person found on the

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[129] *Interpol Red Notices*, ICPO-Interpol General Secretariat, (1998) *International Criminal Police Review* No.468, at p.2 **(Annex 7)**.
[130] Report No.8, ICPO-Interpol General Assembly, 66th Session, New Delhi, 15–21 October 1997, AGN/66/RAP/8, as amended by Resolution No.AGN/66/RES/7 **(Annex 8)**.
[131] See paragraph 3.1.6 above and **Annex 7**.

territory of the requested State for purposes of either standing trial for an offence he or she is alleged to have committed or to serve a penal sentence already pronounced on him or her. A request for extradition must be accompanied by all the documents required to allow the relevant authorities of the requested State to decide, on the basis of its national laws and international obligations, whether to agree to or refuse extradition.

**3.1.11** As Belgium understands the position, having made enquiries on the matter (including with Interpol), the DRC does not regard a Red Notice as a request for provisional arrest. Additionally, as has just been observed, Red Notices do not in any circumstances amount to a formal request for extradition. As has also been observed, Belgium has not at any point made a formal request to the DRC for the extradition of Mr Yerodia Ndombasi. Nor, for completeness, it may be added, has Belgium addressed a request for the extradition of Mr Yerodia Ndombasi to any other State.

**3.1.12** As will be apparent from the preceding, the character of the arrest warrant of 11 April 2000 is such that it has neither infringed the sovereignty of, nor created any obligation for, the DRC. Indeed, both at the point that it was issued and today, 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 to a formal request for extradition.

**3.1.13** As was observed in Part I,[132] in the light of the changed circumstances of Mr Yerodia Ndombasi, the Belgian *National Central Bureau* of Interpol addressed a request to Interpol to issue a Red Notice in respect of Mr Yerodia Ndombasi on 12 September 2001, ie, some five months after Mr Yerodia Ndombasi ceased to be a member of the DRC Government.[133] At the point at which this Counter-Memorial is being finalised, a Red Notice had still not, however, been issued. Given the effect of

[132] At paragraph 1.9 and footnote 26.
[133] **Annex 8**.

Red Notices in the DRC, even were a Red Notice to be issued, it would neither infringe the sovereignty of, nor create any obligation for, the DRC.

**3.1.14** As regards the 65 members of Interpol that have indicated that a Red Notice would permit the provisional arrest of a named person, the issuing of a Red Notice in this matter would still require a positive act of the validation by the relevant authorities of the State concerned in accordance with their national laws and regulations. Even in such cases, therefore, there is no automaticity in the effect of the Red Notice.

**3.1.15** On the basis of the preceding, Belgium contends that the character of the arrest warrant of 11 April 2000 is such that it has neither infringed the sovereignty of, nor created obligations for, the DRC.

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## CHAPTER TWO

## THE LEGAL AND JURISDICTIONAL BASES OF THE ARREST WARRANT

**3.2.1** The legal and jurisdictional bases of the arrest warrant issued against Mr Yerodia Ndombasi will be addressed in the light of:

- the Law of 16 June 1993,[134] as amended by the Law of 10 February 1999;[135]
- the charges against Mr Yerodia Ndombasi;
- the law governing the jurisdiction of the Belgian investigating judge.

### A. The Law of 16 June 1993, as amended by the Law of 10 February 1999

**3.2.2** On 16 June 1993, the Belgian Parliament adopted the "loi relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I and II of 8 June 1977, additionnels à ces Conventions".[136]

**3.2.3** Initially, this Law had no purpose other than to adapt Belgian law to the requirements of the *Geneva Conventions* of 1949 and the *First Additional Protocol* of 1997. It is recalled[137] that, indeed, the *Geneva Conventions*, in common Article 49/50/129/146, require the High Contracting Parties to the Conventions:[138]

> "to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any

[134] *Moniteur belge*, 5 August 1993.
[135] *Moniteur belge*, 23 March 1999.
[136] *Law concerning punishment of grave breaches of the Geneva International Conventions of 12 August 1949 and to Protocols I and II of 8 June 1977, Additional to these Conventions.* **(Annex 4)**
[137] These points were addressed by Belgium in the course of the provisional measures phase of the case (see CR 2000/33, 21 November 2000, at pp19-22, paragraphs 4–13).
[138] At **Annex 5**.

> of the grave breaches of the present Convention defined in the following Article."

**3.2.4** The obligation for High Contracting Parties to the Conventions to adapt their legislation for the purpose of criminally punishing serious violations of the Geneva Conventions was extended by the first Additional Protocol to the violations defined thereby. Article 85(1) of the *First Additional Protocol* provides:

> "The provisions of the [four Geneva] Conventions relating to the repression of breaches and grave breaches, supplemented by this Section, shall apply to the repression of breaches and grave breaches of this Protocol."

**3.2.5** As is emphasised in the document stating the grounds of the draft law submitted by the Government in 1990, this proposal simply aimed to enable Belgium to adapt its criminal legislation to the provisions referred to above, in keeping with its commitments further to the ratification of the *Geneva Conventions* and the *First Additional Protocol*.[139]

**3.2.6** On certain points, the Law of 1993 went further than the *stricto sensu* requirements of the *Geneva Conventions* and the *First Additional Protocol*. This was particularly the case with regard to the extension of the scope of application of the law to crimes committed in non-international armed conflicts. It is known that the concept of a "war crime" is traditionally limited to grave breaches of international humanitarian law committed in an international armed conflict. By extending the scope of application of the accusations provided by the Law of 1993 to the most serious breaches of the *Second Additional Protocol* – those corresponding to "grave breaches" referred to by the *Geneva Conventions* and the *First Additional Protocol* – the legislature intended to criminally punish acts committed in non-international armed conflicts.

**3.2.7** That which might have appeared as a form of audacity was rapidly confirmed in practice and in jurisprudence, as the following examples testify:

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[139] *Documents parlementaires, Sénat*, 1990-1991, n° 1317/1, in *Pasinomie*, 1993, p.1836. **(Annex 10)**

- in 1994, the Security Council, in creating the International Criminal Tribunal for Rwanda ("ICTR"),[140] gave it jurisdiction to investigate "serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977";[141]

- on 2 October 1995, the appeals chamber of the International Criminal Tribunal for the former Yugoslavia ("ICTY") considered that international customary law recognised individual criminal responsibility for violations of humanitarian law committed in domestic armed conflicts.[142] The Belgian Law referred to above was, moreover, cited as an example of the application of this custom;[143]

- in 1996, in its Draft *Code of Crimes Against the Peace and Security of Mankind*, the International Law Commission ("ILC") included in its list of war crimes a number of acts "committed in violation of international humanitarian law applicable in armed conflict not of an international character";[144]

- the *Statute* of the International Criminal Court ("ICC") adopted in Rome on 17 July 1999 in turn considers a certain number of actions committed in a non-international armed conflict to be war crimes.[145]

**3.2.8** In its Memorial, the DRC, while affirming that this extension of competence "ne répond ... à aucune obligation conventionnelle particulière",[146] nevertheless refrains from challenging the legality of this extension of jurisdiction. Belgium takes note of this.

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[140] S/RES/955, 8 November 1994.
[141] International Criminal Tribunal for Rwanda, *Statute*, at Article 4.
[142] ICTY, *Tadic*, Case No.IT-94-1-AR72, 2 October 1995, at paragraphs 128–142.
[143] *Ibid.*, at paragraph 132.
[144] Draft Article 20(f), *ILC Report*, 1996, UN Doc.A/51/10, p.135, at 140–143.
[145] ICC *Statute*, Articles 8(2)(c)–(f).
[146] "does not correspond to any particular conventional obligation". (DRC Memorial, at paragraph 77; unofficial translation by Belgium).

**3.2.9** The Law of 1993 presents two other aspects which particularly concern this case. On the one hand, in Article 7, it provides for the universal jurisdiction of the Belgian judge for the crimes that it stipulates. On the other hand, the document stating the grounds of the draft law shows that a crime stipulated by the Law can be brought before the Belgian courts even if the alleged perpetrator of the act in question is not found on Belgian territory.[147]

**3.2.10** As concerns the principle of universal jurisdiction, the DRC does not challenge Belgium's right to include this in its legislation. During the provisional measures phase of the case, Belgium demonstrated that Belgium has complied fully with its international obligations by stipulating universal jurisdiction in its Law of 1993. As the DRC does not challenge this point in its Memorial, Belgium will refrain from repeating what it said at that time.[148]

**3.2.11** Conversely, the DRC challenges Belgium's right to exercise this jurisdiction with regard to a person who is not found on Belgian territory. This point will be addressed further below. For the moment it is enough to observe that the extra-territorial nature of the acts with which Mr Yerodia Ndombasi is charged, and his foreign nationality, are not an obstacle to the application of the Law of 1993.

**3.2.12** The Law of 10 February 1999 amended the Law of 1993 by, on the one hand, extending the jurisdiction *ratione materiae* of the law to the crime of genocide and crimes against humanity[149] and, on the other hand, by providing that "[l]'immunité attachée à la qualité officielle d'une personne n'empêche pas l'application de la présente loi."[150]

**3.2.13** These amendments result from the combined will of certain Members of Parliament and of the Government. The former wanted to introduce the accusation provided by the *Convention on the punishment of the crime of genocide* of 9 December 1948 into Belgian law, a Convention that had been binding on Belgium

[147] *Documents parlementaires, Sénat*, 1990–1991, n° 1317/1, *Pasinomie*, 1993, p.1842. **(Annex 10)**
[148] See further, CR 2000/33, 21 Nov. 2000, at pp.19–20, paragraphs 7–8.
[149] New Article 1(1) and (2).
[150] "the immunity associated with the official capacity of a person does not prevent the application of this law" (new Article 5(3); unofficial translation).

since 5 September 1951.[151] For the authors of the draft amendment, it was necessary to be able to prosecute under the Convention a number of "*génocidaires rwandais*" (Rwandan perpetrators of genocide) who had taken refuge in Belgium.[152] The introduction of the amendment also corresponded to a symbolic and educational concern: prosecuting people for homicide is one thing, prosecuting them for genocide is something else.[153] Society needed to be made aware of the horror of the act so as to prevent its reoccurrence.[154]

**3.2.14** As for the Government, it approved this initiative and wanted to take the opportunity to start to adapt the law to the ICC *Statute*. With this in mind, it added the accusation of crimes against humanity (stipulated in Article 7 of the ICC *Statute*) and the exclusion of immunity for perpetrators of acts stipulated in that law (provided under Article 27 of the ICC *Statute*) to the draft amendment submitted by the Members of Parliament.[155]

**3.2.15** The amendments to the Law of 1993 were adopted on 10 February 1999 and the Law of 1993 changed its name to be called thereafter "loi relative à la répression des violations graves de droit international humanitaire".[156]

**3.2.16** Insofar as the acts charged against Mr Yerodia Ndombasi were covered by the Law of 1993/1999, the investigating judge had grounds to open a (preliminary) investigation into the complaints. In keeping with common law, if the investigation made it possible to conclude that there was serious evidence of guilt,[157] and if the acts in question were "de nature à entraîner pour l'inculpé un emprisonnement correctionnel principal d'un an ou une peine plus grave",[158] the investigating judge had grounds to issue to an arrest warrant against Mr Yerodia Ndombasi.

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[151] Loi d'approbation du 26 juin 1951 (Law relating to the approval of treaties), *Moniteur belge*, 11 January 1952.
[152] *Documents parlementaires, Sénat*, 1997-1998, 16 October 1997, n° 1-749/1, p.2. **(Annex 11)**
[153] *Ibid.*, at p.3.
[154] *Ibid.*
[155] *Ibid.*, 1998-1999, 1 December 1998, n° 1-749/2, pp.4–5. **(Annex 12)**
[156] Law on the punishment of grave breaches of international humanitarian law.
[157] See Code d'instruction criminelle (*Code of Criminal Procedure*), Art. 61 *bis*: "The investigating judge proceeds to charge any person against whom there is serious evidence of guilt...." (unofficial translation by Belgium).
[158] "Such that they would result in … a principle criminal incarceration of the accused of one year or a more serious sentence". (Article 16(1) de la Loi du 20 juillet 1990 relative à la détention préventive

## B. The charges against Mr Yerodia Ndombasi

**3.2.17** By an arrest warrant issued on 11 April 2000, the Belgian investigating judge, Judge Damien Vandermeersch, charged Mr Yerodia Ndombasi with violations covered by the Law of 1993. Belgium takes the liberty of repeating the elements that it has already brought before the Court in oral pleadings on the request for an indication of provisional measures lodged by the DRC.[159]

**3.2.18** It must be observed that this warrant is not the result of a personal initiative. Belgian criminal procedure stipulates that an investigating judge can only adjudicate validly after acts are brought before him for which an arrest warrant could be issued.[160] In this case, charges by the King's Prosecutor of Brussels, on the one hand, and, on the other hand, complaints by private citizens, some of whom were referred to by name in the arrest warrant, and others not for reasons of safety, had been referred to the Judge. Of the twelve persons filing complaints, five were of Belgian nationality and seven of Congolese nationality. All were domiciled in Belgium. Eight of the complainants had filed complaints for injuries that they considered were incurred specifically because they belong to a Tutsi ethnic group.

**3.2.19** What were the acts that led the investigating judge to issue the arrest warrant? The warrant notes that on 4 and 27 August 1998, Mr Yerodia Ndombasi, who was at the time Director of the Office of President Laurent Kabila, gave various public speeches quoted in the media inciting ethnic hatred, speeches which led to the massacre of several hundred people, mostly of Tutsi origin.

**3.2.20** Without taking any stand as to the guilt or innocence of Mr Yerodia Ndombasi – this is not the role of the Belgian Government – Belgium would only observe that the alleged acts in question were serious. Mr Yerodia Ndombasi notably

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(Law of 20 July 1990 on preventive detention), *Moniteur belge*, 14 August 1990 (unofficial translation by Belgium).

[159] CR 2000/33, 21 November 2000, at pp.23–27, paragraphs 14–20.

[160] Bosly, H.-D. and Vandermeersch, D., *Droit de la procédure pénale*, Brugge, La Charte, 1999, p.488.

declared at a press conference on 27 August 1998 about those whom he considered responsible for the unrest in the Congo:

> "Pour nous, ce sont des déchets et c'est même des microbes qu'il faut qu'on éradique avec méthode. Nous sommes décidés à utiliser la médication la plus efficace."[161]

**3.2.21** Already, on 4 August 1998, according to testimony quoted in the warrant, Mr Yerodia Ndombasi had spoken on RTNC radio about "de vermine qu'il fallait éradiquer avec méthode".[162]

**3.2.22** The arrest warrant, referring to many witnesses, describes what happened at that point. Here are a few meaningful extracts of the testimony that fills several pages of the arrest warrant:[163]

- according to witness B.A., "la réaction ne s'est pas fait attendre. Il y a eu des emprisonnements, des arrestations et des massacres de personnes d'origine tutsi ";[164]

- according to witness C.B., "Des barrages ont été placés dans les quartiers populaires, des chasses à l'homme ont été organisées. De nombreux suspects ont été arrêtés par la population et mis à mort par le supplice du collier";[165]

- Belgian television journalists on the spot stated: "C'est une chasse aux rebelles, aux tutsis, aux Rwandais, c'est une chasse à l'homme.";[166]

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[161] "For us, they are rubbish, and even microbes have to be eradicated methodically. We have decided to use the most effective medication." International Arrest Warrant, p.15 (unofficial translation by Belgium). **(Annex 3)**.
[162] "vermin that had to be eradicated methodically." *Ibid.* at p.16 (unofficial translation by Belgium).
[163] *Ibid.*, at pp.16 – 30.

[164] "[t]here was no waiting for the reaction [to the speech]. People were put in gaol, there were arrests and massacres of people of Tutsi origin" *Ibid.*, at p.19 (unofficial translation by Belgium).
[165] "[r]oad blocks were set up in populated districts, manhunts were organised. Numerous suspects were arrested by the people and put to death by being necklaced." *Ibid.*, at p.20 (unofficial translation by Belgium).
[166] "[i]t's a hunt for rebels, Tutsis, Rwandans; it's a manhunt" *Ibid.*, at p.24 (unofficial translation by Belgium).

- an individual questioned by those journalists told them: "Nous sommes déterminés, jusqu'au dernier enfant, pour écraser les tutsis, les Rwandais et les Ougandais";[167]

- according to an Amnesty International report, "Des mises à mort de tutsi et d'autres personnes considérées comme des sympathisants du RCD sont signalées depuis le début du mois d'août 1998."[168]

**3.2.23** There is no point in going on with this list, which suggests that, apart from the war between the DRC and the Rwandan and Ugandan forces, atrocities were clearly committed against Tutsis at the time of the offending speeches because they belonged to that ethnic group.

**3.2.24** Even so, and without prejudice to the conclusions that could be reached by a tribunal about the arrest warrant, Belgium would only observe that the warrant does not ignore the defence's arguments raised by the accused, who maintains "qu'il n'a pas prononcé le mots tutsi mais qu'il visait les rebelles".[169] For his part, the DRC Minister for Human Rights also suggested, in the text cited above, that the speeches by Mr Yerodia Ndombasi were nothing more than "un appel légitime à la résistance populaire contre les envahisseurs qu'ils soient d'origine tutsi ou pas".[170]

**3.2.25** The DRC's Memorial repeats this attempt to legitimise the speeches in question. It underlines "le caractère tenu de l'accusation" [171] against Mr Yerodia Ndombasi, the absence by the Belgian authorities of a "mise en contexte" "historique" ou "culturelle"[172], an abusive interpretation of the words pronounced.

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[167] "[w]e are determined, to the last child, to wipe out the Tutsis, the Rwandans and the Ugandans." *Ibid.*, at p.25 (unofficial translation by Belgium).
[168] "[k]illings of Tutsis and other persons regarded as DRC sympathisers have been reported since the start of the month of August 1998." *Ibid.*, at p.26 (unofficial translation by Belgium).
[169] "that he did not mention the word Tutsi but that they [the comments] were directed at the rebels" *Ibid.*, at p.31 (unofficial translation by Belgium).
[170] "a legitimate call to the people to resist the invaders whether they were of Tutsi origin or not" (unofficial translation by Belgium). CR 2000/33, 21 September 2000, p. 25 at paragraph 18.
[171] "the tenuous nature of the accusation", DRC Memorial, at paragraph 57. (unofficial translation by Belgium)
[172] "put into" the "historical" or "cultural" context, *Ibid.* (unofficial translation by Belgium)

**3.2.26** The arrest warrant deals with these defences by describing the context in which the speeches were made. According to the testimony put forward in this respect, they were made in the general context of a hunt for Tutsis. For example, a *Human Rights Watch* report cited in the warrant stated as follows:

> "Lorsque le gouvernement congolais fut attaqué au mois d'août, certains officiels de haut rang encouragèrent les comportements de haine raciale et firent naître parmi la population un sentiment de peur vis-à-vis des Congolais d'origine tutsi, qu'ils relièrent aux Rwandais, aux Burundais et même aux Ougandais, membres selon eux de la famille ethnique plus large tutsi-hima. En appelant à ce qu'ils appelèrent 'l'auto-défense populaire', ils encouragèrent en fait les Congolais à s'attaquer aux tutsi et à ceux qui, simplement, 'avaient l'air' d'être des tutsis."[173]

**3.2.27** The warrant also cites a report by the African Association for the Defence of Human Rights where one can read:

> "A partir du mois d'août, les membres du gouvernement, particulièrement, le directeur de cabinet du chef de l'Etat, M. Yerodia, ainsi que le ministre de l'information, Didier Mumengi, ont usé des média nationaux pour appeler au meurtre des tutsi à Kinshasa. […] A Bunia, la radio nationale a carrément demandé à la population de prendre les machettes, les houes pour tuer les tutsi habitant le district d'Ituri"[174]

**3.2.28** An Agence France Presse release dated 25 August 1998, quoted in the arrest warrant, reported the following words by President Laurent Kabila:

> "Les agresseurs sont identifiés. C'est une guerre injuste imposée à un peuple souverain. Le peuple doit se mobiliser. Cela est important parce qu'il faut écraser l'ennemi. Les Congolais doivent se battre sur tous les fronts. La guerre peut être longue. Dans les

[173] "When the Congolese government was attacked in August, some important officials fostered popular hatred and fear of Congolese of Tutsi origin, whom they linked with Rwandans, Burundians, and even Ugandans said to constitute part of a larger Tutsi-Hima cluster of peoples. In calling for so-called 'popular self-defence', they encouraged other Congolese to attack Tutsi or those thought to look like Tutsi." International Arrest Warrant, p.12 (unofficial translation by Belgium) **(Annex 3)**

[174] "As from the month of August, the members of the government, in particular the director of the office of the head of state, Mr Yerodia, together with the Minister for Information, Didier Mumengi, have used the national media to call for the murder of Tutsis in Kinshasa. The authorities have invited the population, through the official media, 'to treat the enemy like a virus, a mosquito and as garbage, that has to be wiped out with determination and resolution'. In Bunia, the national radio station openly demanded that the population take up machetes and hoes to kill the Tutsis living in the district of Ituri**."** *Ibid.*, pp.14-15 (unofficial translation of Belgium)

> villages, les gens doivent prendre les armes, les armes traditionnelles, les flèches et les lances pour écraser l'ennemi sinon on va être l'esclave des tutsi."[175]

**3.2.29** The warrant also cites a report of 8 February 1999 by the United Nations Commission on Human Rights, which asserted that:

> " La riposte du gouvernement à la rébellion a été violente. Ce qui est particulièrement grave, c'est l'incitation à la haine contre les tutsi (considérés comme 'des virus, des moustiques, des ordures' qu'il fallait éliminer) […]."[176]

**3.2.30** From the legal standpoint, the arrest warrant observes that the speeches imputed to the person in question constitute incitement to commit certain violations under the Law of 1993, including "wilfully causing great suffering and serious injury to the body, health" (Article 1(3)) and crimes against humanity (Article 1(2)). The Law of 1993 incriminates not only incitement (Article 4, 3rd item), but also failure to take action to prevent the occurrence of the events incriminated by the law (Article 4, 5th item).[177] This relates not only to these direct appeals to massacre launched by Mr Yerodia Ndombasi, but also to the absence of notification of the obligation to protect the persons captured. As these acts are incriminated by the law, and as several complaints had been brought before the investigating judge, he believed that he was justified in issuing the arrest warrant against the alleged perpetrator of these acts.

**3.2.31** The DRC observes, however, that the "causal relation between those words and certain unspeakable acts of violence directed against the Tutsi minority" is not established. Independently of the fact that the Court is not an appellate court for decisions taken by national judicial authorities,[178] it must nevertheless be recalled, to

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[175] "The aggressors have been identified. This is an unjust war imposed on a sovereign people. The people must mobilise. That is important because the enemy has to be wiped out. ... The people of Congo have to fight on all fronts. The war may be long. In the villages, people must take up arms, the traditional arms, arrows and spears, to wipe out the enemy, otherwise we are going to be the slaves of the Tutsis." *Ibid*., pp.22-23 (unofficial translation of Belgium)

[176] "The government's riposte to the rebellion was violent. What is particularly serious is the incitement of hatred against the Tutsis (regarded as 'viruses, mosquitoes, garbage', which had to be eliminated) ..." *Ibid.*, p.27 (unofficial translation by Belgium)

[177] *Ibid.* pp.48–54.

[178] *Vienna Convention on Consular Relations*, Order of 9 April 1998, ICJ Reports 1998, p.12, at paragraph 38; *LaGrand*, Order of 3 March 1999, ICJ Reports 1999, p.15, at paragraph 25.

put the situation in a correct perspective, that the law also punishes incitement "même non-suivie d'effet".[179]

**3.2.32** At the time of the issue of the arrest warrant, the investigating judge also took account of the questions of immunity of jurisdiction resulting from the indictment of a Minister by rejecting the possibility of the arrest of Mr Yerodia Ndombasi if he were to come to Belgium in response to an official invitation of the Belgian government. In such circumstances, an invitation would imply that Belgium had renounced the execution of the warrant for the duration of the official visit and the judicial authority could not disregard this without entailing the international responsibility of the Belgian State[180] given the principle of indivisibility of powers of the State in this field.[181]

**3.2.33** These questions are no longer applicable today, since Mr Yerodia Ndombasi no longer holds a ministerial office in the DRC government.

**3.2.34** In any case, in April 2000, the investigating judge believed that he had sufficient elements to conclude that Mr Yerodia Ndombasi had committed the acts that were imputed to him, that these acts fell under the scope of the Law of 1993/1999, and that they were sufficiently serious, to justify issuing an arrest warrant against the alleged perpetrator.

## C. The law governing the jurisdiction of the investigating judge

**3.2.35** Although all of the complainants were domiciled in Belgium, and five were of Belgian nationality, the investigating judge relied on universal jurisdiction provided for in Article 7 of the Law of 1993/1999. The judge would not have founded his action on the passive personal competence stipulated in Belgian law[182]

[179] "not having an effect" (as per Article 4 de la Loi du 16 juin 1993; unofficial translation by Belgium).

[180] International Arrest Warrant, p.63 **(Annex 3)**.

[181] *Draft Articles of the ILC on the Responsibility of States*, Art. 6, *YILC*, 1973, v.II, pp.197-201: in the same vein, *Draft Articles provisionally adopted by the Drafting Committee in the Second Reading*, Art. 5, UN Doc. A/CN.4/L.600, 21 August 2000.

[182] Article 10 du *titre préliminaire de la Loi du 17 avril 1878 du Code de procédure pénale* provides: "Pourra être poursuivi en Belgique l'étranger qui aura commis hors du territoire du Royaume ... 5° Un

because the exercise of that law is subject to the presence of the accused on Belgian territory.[183] As a result, the jurisdiction exercised by the investigating magistrate is universal jurisdiction and it is founded on the text of the law.

**3.2.36** The DRC challenges the exercise of this jurisdiction with regard to a person who is not found on Belgian territory, but surprisingly, although it devotes nearly one-fourth of its Memorial to trying to demonstrate this point,[184] it does not formally ask the Court to rule on the question.[185]

**3.2.37** While noting the fact that the DRC does not ask the Court anything on these points, Belgium nevertheless briefly meets the arguments given by the DRC and will show that the universal jurisdiction provided by the Law of 1993 is not in violation of any rule of international law. These issues are addressed in the following chapter of this Part.

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crime contre un ressortissant belge, si le fait est punissable en vertu de la législation du pays où il a été commis d'une peine dont le maximum dépasse cinq ans de privation de liberté."

[183] *Ibid.*, Article 12(1).

[184] DRC Memorial, at paragraphs 47–61.

[185] DRC Memorial, at paragraphs 93 and 97.

## CHAPTER THREE

## INTERNATIONAL LAW ALLOWS UNIVERSAL JURISDICTION *IN ABSTENTIA*

**3.3.1** Traditionally, universal jurisdiction is defined as the aptitude of the judge to investigate an offence wherever the offence was committed and whatever the nationality of the perpetrator or of the victim. According to H. Donnedieu de Vabres:

> "le système de la *répression universelle*, ou de *l'universalité du droit de punir* est celui qui attribue vocation aux tribunaux répressifs de tous les Etats pour connaître d'un crime commis par un individu quelconque, en quelque pays que ce soit."[186]

**3.3.2** It is not necessary to go into further detail on this jurisdiction which is not challenged in itself in the DRC Memorial. The reproach that the DRC particularly makes to Belgium is the exercise of universal jurisdiction against someone who is not found on Belgian territory. The DRC Memorial states:

> "La question qui se pose dès lors est de savoir si l'Etat belge est tenu, en droit international, d'exercer une compétence 'unversivelle' aussi élargie, c'est-à-dire une compétence prétendant s'exercer même à l'encontre de personnes qui ne se trouveraient pas sur le territoire national."[187]

**3.3.3** Two questions arise in respect of this matter:

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[186] "the system of universal punishment or the universality of the right to punish is that which gives criminal courts of all States the role of prosecuting a crime committed by any individual, in any country whatsoever" (unofficial translation by Belgium), Donnedieu de Vabres, H. "Le système de la répression universelle", *Rev. dr. int. pr*., 1922-1923, p.533, See also La Pradelle, G. de, "La compétence universelle", in *Droit international pénal*, s/ la dir. de H. Ascensio, E. Decaux and A. Pellet, Paris, Pédone, 2000, p.905.

[187] "The question that arises under these circumstances is to know whether the Belgian State is required, under international law, to exercise such a broad 'universal' criminal competence, referring to competence that claims to have exercise even against persons who were not found on the national territory." (DRC Memorial, at paragraph 75; unofficial translation by Belgium).

(a) Does international law *oblige* Belgium to exercise universal jurisdiction with regard to the alleged perpetrator of a violation falling under the scope of the Law of 1993/1999 who is not found on Belgian territory?

(b) If not, does international law *permit* Belgium to exercise universal jurisdiction with regard to the alleged perpetrator of a violation falling under the scope of the Law of 1993/1999 who is not found on Belgian territory?

## A. Does international law *oblige* Belgium to exercise universal jurisdiction in the circumstances in issue?

**3.3.4** According to the DRC, Belgium claimed it was *obliged* to exercise universal jurisdiction with regard to the alleged perpetrator of a violation falling under the scope of the Law of 1993/1999 even though he is not found on Belgian territory. The DRC Memorial states:

> "C'est en vain que la Partie défenderesse tenterait de justifier la violation des droits souverains de la RDC démontrée ci-dessus en invoquant l'obligation (voy. le compte rendu de l'audience du 21 novembre 2000, §§ 11 et s., *per* E. David) dans laquelle est [*sic* — il faut sans doute lire " elle "] se trouverait d'exercer une compétence pénale 'universelle' "[188]

**3.3.5** In fact, in paragraph 11 of the pleadings quoted by the DRC, Belgium purely and simply recalled that by declaring the principle of universal jurisdiction, Article 7 of the Law of 1993/1999 only responded to a general obligation stipulated in international law:

> "Regarding the extension to crimes against humanity and the crime of genocide of the universal jurisdiction provided for in Article 7 of the 1993 law, this again merely represents the incorporation into domestic law of an obligation long since recognised in general international law. It suffices to recall specific resolutions of the General Assembly of the United Nations (resolution 2840 (XXVI) of 18 December 1971, paragraph 4; resolution 3074 (XXVIII) of 3

[188] "In vain would the defendant attempt to justify the violation of DRC's sovereign rights as demonstrated above by invoking an alleged obligation (see the report of the hearing of 21 November 2000, paragraph 11 and thereafter *per* E. David) to exercise a 'universal' criminal competence." *Ibid.* p 47 at paragraph 74.

> December 1973, paragraph 1) and of the Economic and Social Council (resolution 1986/65 of 29 May 1989, Principle 18); or indeed the Nuremberg principles adduced by the International Law Commission (Principles I and VI), and the Commission's Draft Code of Offences against the Peace and Security of Mankind (Article 9); or the Statute of the International Criminal Court (preambular paragraphs 4-6), and the jurisprudence of the Court, which held in its Judgment of 11 July 1996 that:
>
> > 'the rights and obligations enshrined by the [1948 Genocide] Convention are rights and obligations *erga omnes*. The Court notes that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention'. (ICJ Reports 1996, p.616, paragraph 31)"

**3.3.6** Nothing in this quotation shows that Belgium argued that it was obliged to prosecute someone not found on its territory. This was simply a reminder of the texts which set down the obligation of prosecution in general.[189] These texts were recalled only to show that the adoption of the Law of 1993/1999[190] corresponded to an international obligation. It was not claimed that these texts *required* Belgium to prosecute someone in *another country*.

**3.3.7** Moreover, the DRC itself recognises the existence of an obligation to prosecute war crimes when it writes:

> "S'il n'est pas contestable que ce texte [l'art. 49/50/129/146 commun aux CG de 1949] emporte une *obligation* de réprimer pénalement les crimes énoncés par ces conventions indépendamment de la nationalité de leur auteur, il est cependant difficile de considérer que cette *obligation* ne serait pas limitée au cas où les personnes accusées seraient trouvées sur le territoire de l'Etat ainsi *obligé*." [191]

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[189] See van Elst, R., "Implementing Universal Jurisdiction over Grave Breaches of the Geneva Conventions", (2000) 13 *Leiden J.I.L.* 815.

[190] Referred to by one author as "a valuable model for countries that so far have failed to meet their obligation" to give themselves the means to punish grave breaches of international humanitarian law". *Ibid.*, at p.825.

[191] "Although it cannot be challenged that this text (common Articles 49/50/129/146, Geneva Conventions of 1949) includes an *obligation* to criminally prosecute crimes listed in these conventions, independently of the nationality of the perpetrator, it is nevertheless difficult to consider that this *obligation* is not limited to cases where the accused persons are found on the territory of the State that is so *obliged*." *Ibid.*, at paragraph 76 (emphasis added).

**3.3.8** Conversely, the DRC voices doubts about the existence of such an obligation for third States for the crime of genocide and for crimes against humanity. Although the question is not the subject of a formal conclusion of the DRC, Belgium nevertheless feels that it should treat this subject for the sake of the respect that it owes to judicial truth, its opponent and the Court.

**3.3.9** In the case of genocide, the DRC, voicing a narrow interpretation of the Convention of 9 December 1948, considers that the obligation to prosecute belongs to the State "*loci delicti*" only.[192] It recognises, however, that in its Judgment of 11 July 1996, the Court observed that the Convention of 1948 set down "rights and obligations *erga omnes*" and that:

> "the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention".[193]

**3.3.10** The DRC nevertheless deduces that the Court simply wanted to say that, wherever the persons accused of genocide may be found, they can be criminally prosecuted subject to the condition that the State where the acts of genocide were committed (or the future International Criminal Court) so requests. The DRC writes:

> " […] les personnes accusées de ce crime [de génocide] ne sont nulle part, en aucun territoire étatique, à l'abri de poursuites pénales dirigées contre elles *à l'initiative de l'Etat* loci delicti, ou de la cour criminelle internationale dont la convention de 1948 envisageait déjà l'institution. "[194]

**3.3.11** One wonders, first, where the DRC found in the Judgment of 11 July 1996 that prosecution for genocide depended exclusively on the "initiative" of the State where the genocide took place. One then wonders how the DRC can reconcile an obligation to prosecute *erga omnes, not* limited territorially, with the so-called subordination of this obligation to an initiative of the State of the genocide. One

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[192] *Ibid.*, at paragraph 78.

[193] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Reports 1996, p.616, paragraph 31.

[194] "… persons accused of this crime [genocide] are nowhere safe from criminal prosecution, in the territory of any State, directed against them *at the initiative of the State* loci delicti or the International Criminal Court, whose institution was already envisaged in the 1948 Convention." DRC Memorial, at paragraph 78; unofficial translation by Belgium (emphasis added).

wonders, finally, what the coherence would be today of a similar limitation of the rule with the obligation to prosecute that is recognised, moreover, for war crimes. For example, for the murder of a prisoner of war – a war crime according to Article 130 of the *Third Geneva Convention* – the DRC admits that every state should punish this, but for the destruction of an entire people, third States could not punish this as long as the State where the massacre took place had not taken the initiative to request it. This shows that the DRC's reasoning has no foundation.

**3.3.12** For punishment of crimes against humanity, the DRC begins by observing that "aucune disposition conventionnelle spécifique n'existe à propos du point évoqué".[195] Need it be recalled that international law is not limited to treaties, and that custom – particularly that which results from resolutions adopted by the organs of the United Nations and cited by Belgium at the proceedings on provisional measures[196] – is also part of international law?

**3.3.13** Nor does the DRC retain the preamble of the *Statute* of the ICC. Quoting paragraph 6 of the Preamble – that stipulates "that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes"[197] – the DRC considers that

> " Cette disposition, énoncée sous forme d'un 'rappel', ne saurait toutefois servir de preuve à l'existence d'une obligation qui pèserait indistinctement sur tout Etat de réprimer ces crimes […]"[198]

**3.3.14** Why cannot this provision prove the existence of an obligation to punish crimes against humanity? First of all, according to the DRC, this is because it is found in a treaty which is not yet in effect.[199]

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[195] "no specific conventional provision exists on the point in reference". *Ibid*, at paragraph 79.
[196] CR 2000/33, 21 November 2000, at p.21, paragraph 11. These included the following resolutions: A/RES/2840 (XXVI), 18 December 1971, at paragraph 4; A/RES/3074 (XXVIII), 3 December 1973, at paragraph 1; E/RES/1986/65, 29 May 1989, at principle 18. **(Supplementary Annex 93)**
[197] (**Supplemenary Annex 92)**
[198] "This provision, set down in the form of a 'reminder', cannot, nevertheless, serve as proof of the existence of an obligation that weighs indistinctly on any State to punish these crimes". DRC Memorial, at paragraph 79 (unofficial translation by Belgium).
[199] *Ibid*

**3.3.15** The argument is clearly moot. As is recalled moreover by the DRC, the States Parties to the ICC *Statute* must refrain from acts which would deprive a treaty of its object and purpose.[200] But above all, it is not because the treaty is not in force that its standards do not have an effect under custom (*Vienna Convention on the Law of Treaties, 1969*, Article 38).[201] *A fortiori* this is the case when States have taken the trouble to "recall" the rule. In general, a rule that does not yet exist is not "recalled".

**3.3.16** In the Kadafi case, it was on the basis of this paragraph of the Preamble of the ICC *Statute* that the *chambre d'accusation* of the *Cour d'Appel* of Paris concluded "qu'il est du devoir des Etats l'ayant ratifié[e] de juger les crimes internationaux".[202] It is true that this judgment was overturned by the French *Cour de Cassation*, but not as concerns this point.

**3.3.17** The customary nature of the rule – that being the duty of each State to prosecute perpetrators of crimes under international law[203] – finds additional confirmation in the fourth and fifth paragraphs of the Preamble of the ICC *Statute* which stipulate:

> "*Affirming* that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution *must* be ensured by taking measures at the *national* level and by enhancing international cooperation,
>
> *Determined* to *put an end to impunity* for the perpetrators of these crimes and thus to contribute to the prevention of such crimes."[204]

**3.3.18** Punishment which "must be ensured ... at the national level"; a determination to "put an end to impunity". These terms testify to the *opinio juris* of the Rome diplomatic conference with regard to the existence of an obligation to prosecute that is the duty of every State.

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[200] *Ibid*, at paragraph 91 (referring to Article 18 of the *Vienna Convention on the Law of Treaties*).
[201] See *Military and paramilitary activities in and against Nicaragua,* ICJ Reports 1986, pp.95-96 at paragraph 178.
[202] "it is the duty of States having ratified it, to judge international crimes" (unofficial translation by Belgium) Chambre d'accusation de la Cour d'appel de Paris, judgment, 20 October 2000, at p.8. **(Annex 49)**
[203] See paragraph 3.3.13.

[204] Empahsis added. **(Supplementary Annex 92).**

**3.3.19** The DRC advances a second argument however. The paragraph quoted from the Preamble, does not, in its opinion, entail a general obligation for states to prosecute because the *Statute* "uses the concept of the 'State which has jurisdiction over it (the case)' (Article 17)". This argument is as moot as the previous one. The preamble "recalls" the general obligations of international law binding "each State" whereas Article 17 quoted by the DRC lists the particular procedures of the principle of complementarity and can, of course, refer only to the States Party to the *Statute*. It is entirely artificial to try to make a rapprochement between the sixth consideration in the Preamble and Article 17 to then conclude that one must be interpreted in light of the other.

**3.3.20** The DRC again affirms that the Security Council resolutions and the declarations of its President requesting prosecution for those responsible for crimes committed in the DRC are addressed only "aux Etats de la région impliqués dans le conflit, et uniquement à eux".[205] In reality, if among these texts, certain specifically refer to the States in the region,[206] others refer, in a very general way, to the prosecution of perpetrators of grave breaches of international humanitarian law and are in no way limited only to the States in the region.[207] This type of request is moreover fully in compliance with the practice of the Security Council. Thus, with regard to the events in Rwanda in 1994, the Security Council

> "*Urge[d]* States to arrest and detain, in accordance with their national law and with the relevant standards of international law, pending prosecution by the International Tribunal for Rwanda or by the appropriate national authorities, persons found within their

[205] "States of the region involved in the conflict, and exclusively to them" DRC Memorial, at paragraph 85 (unofficial translation by Belgium).

[206] Declaration of the President of the Security Council, 11 December 1998, S/PRST/1998/36, 7th paragraph **(Supplementary Annex 83)**; see also S/RES/1291, 24 February 2000: "The Security Council … 15. *Calls on* all parties to the conflict in the Democratic Republic of the Congo ... to bring to justice those responsible …" **(Supplementary Annex 85)**

[207] Declaration of the President of the Security Council, 31 August 1998, S/PRST/1998/26, 4th paragraph provides: "The Council reaffirms that all persons who commit or order the commission of grave breaches of the above-mentioned instruments are individually responsible in respect of such breaches." **(Supplementary Annex 82)**; see also, S/RES/1234, 9 April 1999: "The Security Council … *Condemns* all massacres carried out on the territory of the Democratic Republic of the Congo and *calls for* an international investigation into all such events, … with a view to bringing to justice those responsible …" **(Supplementary Annex 84)**; and in the same vein S/RES/1291, 24 February 2000, at paragraph 14 **(Supplementary Annex 85)**; S/RES/1304, 16 June 2000, at paragraph 13; these texts in no way limit their scope to the States in the region. **(Supplementary Annex 86)**

> territory against whom there is sufficient evidence that they were responsible for acts within the jurisdiction of the International Tribunal for Rwanda."[208]

**3.3.21** Contrary to the DRC claims, the Security Council does not therefore limit the obligation to prosecute perpetrators of war crimes, crimes against humanity or crimes of genocide only to the States of the region where these events took place. Again recently, the Security Council observed, in a very general way:

> "... that it is up to the Member States *first of all* to prevent genocide, crimes against humanity and war crimes and *to put an end to the impunity* enjoyed by their perpetrators".[209]

**3.3.22** In conclusion, and without referring to other points that are purely academic,[210] it can be observed that the DRC has in no way countered, nor even weakened, the argument presented by Belgium in the provisional measures, according to which all States must contribute to the punishment of grave breaches of international humanitarian law, be they war crimes, crimes against humanity and, of course, the crime of genocide.

**3.3.23** This obligation of universal punishment is a simple fact that Belgium has done nothing less than to observe. Given that this obligation appears in several rules of international law, Belgium entirely agrees with the DRC in concluding, as it does, that

> "une norme de droit international commandant l'exercice de la compétence dite 'universelle' pourrait contrebalancer et *même primer la norme protectrice des immunités*"[211]

**3.3.24** Given that such a standard does exist, as has just been shown[212] – and that the DRC itself recognises this in the case of war crimes[213] – Belgium has already

[208] S/RES/978, 27 February 1995, at paragraph 1.
[209] S/RES/1366, 30 August 2001, preamble, 17th paragraph (emphasis added).
[210] See for example the unusual interpretation given to Article 105 of the *Montego Bay Convention on the Law of the Sea*, DRC Memorial, at paragraph 84.
[211] "indeed, only a standard of international law governing the exercise of the so-called 'universal' jurisdiction could counterbalance and *even take precedence over the protective rule of immunity*", DRC Memorial, at paragraph 15. (Unofficial translation by Belgium (emphasis added))
[212] See paragraphs 3.3.7 to 3.3.16 above.
[213] See paragraph 3.3.7 above.

noted what the DRC affirms: *the existence of a rule imposing the exercise of universal jurisdiction has precedence over the rule of immunity.*

**3.3.25** There remains the question of the prosecution of a person accused of grave breaches of international humanitarian law who is not found on the territory of the State. Contrary to the DRC suggestion over more than eight pages of its Memorial,[214] Belgium repeats that it has never claimed that international law *obliges* it to prosecute in a case of this kind, and it would be curious to see the DRC quote a single extract of the pleadings of 21/23 November 2000 which says anything to the contrary. It is therefore unnecessary to discuss this point given that Belgium recognises with the DRC that international law does not include a provision explicitly obliging the States to prosecute a person who is not found on their territory.

**B. Does international law *permit* Belgium to exercise universal jurisdiction in the circumstances in issue?**

**3.3.26** On this point, which is the subject of an important divergence between Belgium and the DRC, the Applicant is considerably less voluble; it is barely five pages, although the question is crucial.

**3.3.27** Be that as it may, Belgium will begin by examining the legal foundation of this jurisdiction **(I)**. Thereafter, Belgium will address the argument of the DRC **(II)**.

***I. The legal foundation of the exercise of universal jurisdiction* in absentia**

**3.3.28** As has already been addressed, pursuant to Belgium law, Belgium has the right to investigate grave breaches of international humanitarian law even when the presumptive perpetrator is not found on Belgian territory.[215] This prerogative, which does not violate any rule of law of international law *(a)*, appears as one of the means to fight impunity accepted in both the international *(b)* and internal practice of States *(c)*. These issues are addressed in turn below.

[214] *Ibid.*, pp.47-56.
[215] See paragraph 3.2.9 above.

*(a) An investigation and/or prosecution by default does not violate any rule of international law*

**3.3.29** No rule of international law prohibits States from opening an investigation against someone who is not on their territory. As was stated by the PCIJ in the *Lotus* case:

> "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 the 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."[216]

**3.3.30** This extract perfectly describes the Belgian position in respect of the events in issue in this case. They took place abroad. The alleged perpetrator is outside the country. And, no specific rule of international law prohibits Belgium from extending its jurisdiction to these events. The right recognised by the Permanent Court, moreover, is in no way limited to the field of application *ratione loci* of the law itself. The Court referred, not only to the "law" of the forum State but also to its "jurisdiction". But the word "jurisdiction" covers any exercise of justice on the territory of the forum state, whether this is the investigation of an act or prosecution by default.

**3.3.31** In the light of the *Lotus* case, Belgium was therefore permitted to investigate the events charged against Mr Yerodia Ndombasi and to issue the arrest warrant against him.

[216] *Lotus*, Judgment of 7 September 1927, PCIJ Reports, Series A, No.9, at p.19.

**3.3.32** Belgium does not claim that States are permitted to adopt just any legislation. All legislation must comply with the rules of international law which bind the State that adopts it. Moreover, in the case of a law having an extraterritorial character, it must be reasonable[217] and not infringe on the principle of non-intervention.[218]

**3.3.33** The Belgian Law of 1993/1999 in issue in this case is not in violation of the principle of non-intervention. On the contrary, it corresponds to the international trend to fight impunity as witnessed in the texts quoted above.[219]

**3.3.34** Already in 1950, the representative of Belgium to the 6th Commission of the UN General Assembly on the deliberations on the "Principles of Nuremberg", affirmed, without being contradicted, that the *Nuremberg Judgment* had established the principle according to which a war criminal could be condemned by default:

> "The Nürnberg trial has established the principle that a war criminal can be tried *in absentia*".[220]

**3.3.35** Belgium no doubt referred to the fact that the Nuremberg International Military Tribunal condemned Martin Bormann by default.[221]

*(b) An investigation and/or prosecution by default against the alleged perpetrator of serious violations of international humanitarian law is accepted in international practice as a means of fighting impunity*

**3.3.36** Contrary to certain modern conventions on international criminal law, international law regulates judicial procedures for the repression of grave breaches of international humanitarian law only very briefly. The *Convention on the crime of genocide*, 1948, the *Geneva Conventions*, 1949, and the resolutions adopted in the United Nations leave States relatively free to act as they see fit against the

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[217] Higgins, R., "The Legal Bases of Jurisdiction", *in Extra-territorial Application of Laws and Responses thereto*, ed. by C.J. Olmstead, ILA and ESC, 1984, p.12
[218] See the reaction of the EC to certain American laws, *ILM*, 1982, p.895; 1996, pp.397-400.
[219] See paragraphs 3.3.7 to 3.3.21 above.
[220] 235th Meeting of the Sixth Committee of the UN General Assembly, 8 November 1950, p. 162, paragraph 38 **(Annex 37)**

perpetrators of crimes defined by these texts. This freedom of action of the States is consistent with the context of the *dictum* in the *Lotus* case referred to above.[222]

**3.3.37** If modern conventions on international criminal law are more specific as to repressive procedures, they do not prevent prosecution by default. Since the adoption of the *Hague Convention for suppression of the unlawful seizure of aircraft* of 16 December 1970, most conventions adopted subsequently, if not all, provide in quite a similar way:

- first, for a principle of universal jurisdiction generally founded on the alternative *aut dedere aut judicare*. States party to the convention need only prosecute the alleged perpetrator of the violation if it does not extradite him to another State party to the convention who so requests;[223]

- subsequently, a protective clause which provides that the convention does not rule out any criminal jurisdiction exercised in compliance with national laws.[224] In other words, the extraterritorial jurisdiction that Belgium retains is fully in compliance with the practice of most conventions on international criminal law adopted since 1970.

**3.3.38** The DRC concedes that this type of clause suggests that "le droit international général ne paraît pas formellement interdire une telle affirmation de compétence 'universelle' aussi élargie."[225] The DRC, as we will see, nevertheless

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[221] *Judgment*, 30 September – 1 October 1946, *Trial, Official Documents*, I., p. 367.
[222] See paragraph 3.3.29.
[223] See, for example, the *Hague Convention for the suppression of unlawful seizure of aircraft*, 1970, at Article 4(2); the *Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, 1971, at Article 5(2); the *UN Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, 1973, at Article 3(3); the *International Convention against the Taking of Hostages*, 1979, at Article 5(3); the *UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1984, at Article 5(2). See also Guillaume, G., "La compétence universelle – Formes anciennes et nouvelles", in *Mélanges Levasseur*, Paris, Litec, 1992, at pp.33-34; Buergenthal, Th. and Maier, H.G., *Public International Law in a Nutshell*, St. Paul, Minn., West Publ., 1990, pp. 172-173; Van den Wyngaert, C., *Strafrecht en strafprocesrecht in hoofdlijnen*, Antwerpen, Maklu, 1999, pp.127-128.
[224] *Ibid.*, *Hague Convention* at Art. 4(3); *Montreal Convention* at Art. 5(3), etc.
[225] "general international law does not seem to formally prohibit this affirmation of such a broad 'universal' competence". DRC Memorial, at paragraph 86 (unofficial translation by Belgium).

concludes that this jurisdiction is illicit, without fear of being incoherent with the implications of the wording of such a clause.

**3.3.39** It should be recalled that these provisions were based on the text of Article 3(3) of the *Tokyo Convention on offences and certain other acts committed aboard aircraft* of 14 September 1963. Yet, the history of this provision demonstrates that the drafters intended it to have as broad a scope of application as possible. At the time of the preparations in Geneva in 1956 on the competences of the States for breaches committed on board aircraft, the legal subcommittee of ICAO wanted to establish a priority in respect of the exercise of:[226] the State of registration of the aircraft, the State where it landed, the State of nationality of the perpetrator or of the victim, the State in whose airspace the violation was committed, etc. It seems that this objective was abandoned quite soon, as by 1958, in Montreal, the subcommittee had already accepted that no claim of jurisdiction by a state founded on its national law should be set aside.[227] This was proposed in the Draft Convention presented by the Subcommittee.

**3.3.40** The concern of the parties was to adopt as broad a scope of basis of jurisdiction as possible was confirmed at the time of the Tokyo Conference. The initial draft text proposed to the conference stated:

> "This article does not preclude any charge for criminal prosecution that a State may have incorporated in its national laws."[228]

Italy criticised this text, observing that the expression "incorporated in its national laws" was too restrictive and that the expression "this article" should be replaced by "this convention" to show that it was not that provision, but the entire convention that should not exclude any internal criminal jurisdiction.[229] Yugoslavia seconded the Italian proposal observing that the Convention's preclusion of any internal competence existing in the laws of a State Party to the Convention was to be

[226] ICAO, International Conference of Air Law, Tokyo, 1963, v. II, French Doc. No. OACI 8565-LC/152-2, p.31. **(Annex 14)**
[227] *Ibid.* at pp.46-47 and 60-61.
[228] *Ibid.* at p.46.
[229] *Ibid.* at p.2. **(Annex 14)**

avoided.[230] Canada also considered competences that a state might adopt after ratification should not be excluded.[231] Article 3(3) in its final form was written in view of all these comments:

> "This Convention does not exclude any criminal jurisdiction exercised in accordance with national law."[232]

**3.3.41** The background of the adoption of this text and its reproduction in other instruments thus consecrate the validity of *all* national criminal jurisdictions in the fields covered by these instruments.

*(c) An investigation and/or prosecution by default are largely accepted in the internal practice of the States*

**3.3.42** The internal practice of States confirms the possibility of opening a prosecution or conducting a trial by default. We will not go into the possibilities of trying (and condemning) by default because the DRC's petition does not concern the trial itself, but will only address the opening of an investigation or initiation of a prosecution by default. It can nevertheless be observed that the principle of a trial by default is recognised by a good number of States in the Roman civil law system (including Belgium and France).[233] If a trial can take place in the absence of the accused, *a fortiori*, prosecution can be initiated in his absence.

**3.3.43** As concerns the opening of a prosecution by default and/or the opening of an investigation in the absence of the accused, this is a practice exercised by all judicial systems in the world.[234] If one could never open a preliminary inquiry, an investigation or initiate a public prosecution against a fugitive or accused unless he is found on the territory of the prosecuting State, it would suffice for the accused to

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[230] *Ibid.*, Procès verbaux, v. I, at pp.116 and 228. **(Annex 13)**
[231] *Ibid.*, at p.116.
[232] *Ibid.*.
[233] See paragraphs 3.3.46 to 3.3.47 below.
[234] In Belgian law, the Law of Preventive Detention of 20 July 1990, Article 34(1): "Lorsque l'inculpé est fugitif ou latitant or lorsqu'il y a lieu de demander son extradition, le juge d'instruction peut décerner un mandat d'arrêt par défaut." ("when the accused is fugitive or absent or when it is appropriate to request his extradition, the investigating judge can issue an arrest warrant in default"; unofficial translation by Belgium). See Van den Wyngaert, C. *Strafrecht en strafprocesrecht,* Antwerpen, Maklu, 1998, at p.862.

leave the territory where he is traced and he would never have to worry since the public action could not be initiated in his absence. This is clearly absurd. In addition, punishment would be singularly jeopardised if the judicial system had to wait for the presence of the accused on the territory of jurisdiction to begin to work on his dossier.

**3.3.44** One may reply that a distinction must be made between a case where an offence is committed on the territory of the prosecuting State and an offence is committed in another country. Only the latter would require the presence of the accused on the territory of the prosecuting State to open an investigation or to initiate a prosecution. Conversely, for the former, justice would be founded in taking action even in the absence of the accused.

**3.3.45** Practice generally concurs with this. This is the case for Belgium in respect of many offences. In the terms of Article 12, paragraph one, of the *Code of Criminal Procedure*, offences committed outside the country cannot give rise to investigation or prosecution unless the alleged perpetrator is found in Belgium.[235]

**3.3.46** Well-established exceptions do exist, however. For example, in the case of crimes and offences committed abroad by a Belgian or a foreigner that are directed against the security of the State or against "public trust" (such as the counterfeiting of money or other papers, seals or stamps of the State), prosecution can take place even if the accused is not found on Belgian territory.[236] There are other, more marginal, exceptions.[237] All these exceptions are traditional. They are found in the legislation of a large number of States.

**3.3.47** By way of example, reference can be made to the Italian criminal code,[238] the German criminal code,[239] which imposes no condition of territoriality for

[235] *Code of Criminal Procedure*, titre préliminaire, Article 12: "Sauf dans les cas prévus aux articles 6, n$^{os}$ 1 et 2, 10 n$^{os}$ 1 et 2 , ainsi qu'à l'article 10 *bis*, la poursuite des infractions dont il s'agit dans le présent chapitre n'aura lieu que si l'inculpé est trouvé en Belgique." ("Except in the cases provided for in articles 6, nos. 1 and 2, 10 nos. 1 and 2, and in article 10*bis*, prosecution for violations that are the subject of this chapter will take place only if the accused is found in Belgium"; unofficial translation by Belgium). **(Annex 6)**
[236] *Ibid.*, Art. 6, 10 and 12.
[237] *Ibid.* Art. 10 *bis* and 12.
[238] *Codice penale*, at Articles 7, 8 and 10 combined. **(Annex 15)**
[239] *Strafgesetzbuch*, Article 5. **(Annex 16)**

competence,[240] the French criminal code,[241] the Spanish law on the organisation of the judiciary,[242] and the Dutch criminal code.[243]

**3.3.48** These exceptions or their application have never given rise to any difficulty in international relations. This proves that, as such, nothing prohibits the State from prosecuting foreigners for offences committed outside the country when these foreigners are not on the territory of the prosecuting State. This is a simple question of national choice which falls within the sovereignty of the State. *A fortiori*, this must be the case when the offences in question are not only violations of national law but of international law as well.

**3.3.49** The *ratio legis* of the rule, according to which the accused must, in certain cases, be present on the territory of the State for that state to be able to prosecute him for acts committed outside the country, confirms that the source of this limitation, that the State imposes on itself, must not be sought in a hypothetical international *opinio juris*. The rule in fact corresponds only to considerations of practical convenience or opportunity and not to any "feeling of complying to that which is equivalent to an (international) legal obligation".[244] It is considered, indeed, that a criminal offence committed outside the country against a private citizen does not disturb the social order of the State of jurisdiction in the same way as if it is committed on its territory. This offence therefore does not *a priori* justify the opening of an investigation and/or prosecution. This is not the case, however, if the alleged perpetrator of the offence is found on the territory of the State of jurisdiction because his presence and his impunity would then be, "une cause de danger, de désordre, et de scandale".[245] Conversely, when the offence is directed against the State itself, or against certain signs of its authority (currency, seals, stamps, etc.), the seriousness of the act requires

[240] Vander Beken, T., *Forumkeuze in het internationale strafrecht*, Antwerpen, Maklu, 1999, at p.138, paragraph 405.
[241] Articles 113–6 to 113–12 (concerning offences committed outside the territory of the Republic), combined with Articles 689 and 689-1 of the French criminal procedure code. **(Annexes 17** *and* **18)**
[242] *Ley organica 6/1985 de 1 de julio, del poder judicial*, Article 23(3). **(Annex 19)**
[243] *Wetboek van strafrecht*, Article 4(1)–(4). **(Annex 20)**
[244] *North Sea Continental Shelf* cases, ICJ Report 1969, at p 44.
[245] "a cause of danger, disorder, and scandal". Franchimont, M., Jacobs, A., and Masset, A., *Manuel de procédure pénale*, Ed. coll. Sc. de la Faculté de droit de Liège, 1989, at p.1064. (unofficial tranlation by Belgium)

immediate repressive action independent of the presence of the perpetrator on the territory of the jeopardised State.

**3.3.50** The *travaux préparatoires* of Article 12, paragraph one, of the Belgian *Code of Criminal Procedure* is enlightening on this subject. One reads in the document outlining the grounds for this text, which dates back to 1877:

> "Quand le délit commis hors du territoire d'un Etat est dirigé *contre cet Etat lui-même, contre sa sûreté* intérieure ou extérieure, *contre sa fortune publique*, cet Etat a un intérêt évident à la répression, car il est directement et personnellement attaqué. Dans ce cas aussi, il importe peu que le coupable soit un national ou un étranger ; qu'il soit saisi sur le territoire ou qu'il se tienne au dehors. L'absence du coupable peut rendre plus difficile l'action de la justice, mais cette circonstance n'influe en rien sur le droit de l'Etat.
>
> Au contraire, quand il s'agit de délits commis à l'étranger *contre des particuliers*, l'Etat, hors du territoire duquel ces délits ont été commis, n'a plus un intérêt *immédiat* à la répression ; cet intérêt ne naît que de la présence du coupable.
>
> C'est le retour du coupable dans sa patrie qui constitue l'outrage à la loi nationale. Ce retour justifie l'action de la justice, car l'impunité du coupable au milieu de ses concitoyens serait une cause de trouble, de mauvais exemple et de scandale pour l'autorité du droit."[246]

**3.3.51** If an ordinary criminal offence committed in a foreign State does not mobilise the judicial system of another State except insofar as an offence becomes a source of disorder for the latter, it can be understood why the Belgian legislature, like that of many other states, has provided for exceptions to the requirement of the

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[246] "When the offence committed outside the territory of the State is directed against this State itself, against its internal or external security, against its public fortune, this State has an obvious interest in repression, because it is directly and personally attacked. In this case too, it hardly matters whether the guilty party is a national or a foreigner; whether he is arrested on the territory or is found outside. The absence of the guilty party can make the legal action more difficult, but this circumstance has no influence on the right of the State.

On the contrary, when the offences were committed outside the country *against private citizens*, the State, outside of whose territory the offences were committed, no longer has an *immediate* interest in the oppression; this interest is only created by the presence of the guilty party.

The return of the guilty party to his native country is what constitutes violation of national law. This return justifies legal action, because impunity of the guilty party among his fellow citizens would be a cause of disorder, bad example and scandal for the legal authority." (Unofficial translation by Belgium) *Documents parlementaires.*, Chambre, n° 70, 23 janvier 1877, p.19 **(Annex 21)**; see also, Rapport Thonissen, *ibid.*, n° 143, 11 mai 1877, pp.19-20. **(Annex 22)**

presence of the alleged perpetrator, notably, for offences such as violations of the security or public trust of the state.

**3.3.52** That which holds for violations of the fundamental interests of the State must hold *a fortiori* for violations of the fundamental interests of the international community, and more particularly, for those pertaining to violations of the most elementary human rights.

**3.3.53** Thus, war crimes, crimes against humanity and the crime of genocide trouble the entire international community and are not exclusively associated with one territory. As the *chambre d'accusation* of the *Cour d'appel* of Lyon stated in the *Barbie* case, these crimes belong to "un ordre répressif auquel la notion de frontière ... [est] fondamentalement étrangère".[247] Where the crimes were committed matters little. By their gravity and the violation they represent for the international order, these crimes are considered to have been committed on the territory of every State. This conclusion is moreover coherent with the *erga omnes* nature of the rules governing their punishment.[248] The social disorder is no longer only national. It is universal. In such cases, it is vain to try to find a *ratione loci* limit in international law for the punishment of crimes which are among those that offend "the conscience of the world".[249]

**3.3.54** State practice confirms this. Thus, the Luxembourg Law of 9 January 1985 on the punishment of serious breaches to the Geneva Conventions of 12 August 1949, provides in Article 10:

> "Tout individu, qui a commis, hors du territoire du Grand-Duché, une infraction prévue par la présente loi peut être poursuivi au Grand-Duché encore qu'il n'y soit pas trouvé."[250]

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[247] "a repressive order to which the concept of a border ... [is] fundamentally foreign" (unofficial translation by Belgium). 8 July 1983, *JDI*, 1983, starting at p.779, note Edelman.
[248] See paragraph 3.3.5 above.
[249] *Nuremberg International Military Tribunal*, Judgement of 30 September – 1 October 1946, Off. Doc., T.1, p.231.

[250] "Every individual, who has committed an offence, outside the territory of the Grand-Duchy, a violation covered by the present law, can be prosecuted in the Grand Duchy even if he is not found here." (unofficial translation by Belgium). Cited in Amnesty International, *Study on Universal Jurisdiction*, September 2001, v.1, Ch.4, Part B, at p.26.

**3.3.55** Article 7 of the Italian penal code permits the prosecution of foreigners who commit, outside Italy, offences contrary to international conventions binding upon Italy even if that foreigner is not found on Italian territory.[251]

**3.3.56** In New Zealand, section 8(1) of the *International Crimes and International Criminal Court Act 2000* provides:

> "Proceedings may be brought for an offence---
> ...
>
> (c) against section 9 [genocide] or section 10 [crimes against humanity] or section 11 [war crimes] regardless of
>
> (i) the nationality or citizenship of the person accused; or
> (ii) whether or not any act forming part of the offence occurred in New Zealand; or
> (iii) whether or not the person accused was in New Zealand at the time that the act constituting the offence occurred or at the time a decision was made to charge the person with an offence."[252]

**3.3.57** In a substantial recently published study of comparative law on universal jurisdiction, Amnesty International reviewed the legislation of some 125 States which admit this competence for matters of war crimes and crimes against humanity. In a number of cases, the study observes that the exercise of universal jurisdiction requires the presence of the accused on the territory of the prosecuting State. In other cases, it does not specify whether this presence is necessary or not. In a third category of cases, it expressly comments that presence within the jurisdiction is not required to initiate prosecution. For example:

- Bolivia – with regard to Article 1(7) of the *Codigó Penal* (Penal Code) giving national courts universal competence for crimes that the Bolivian State has undertaken by convention to punish, the study observes that

[251] Antolisei, F., *Manuale di diritto penale*, Milano, Guiffrè, 1997, pp.122-123. **(Annex 23)**
[252] Cited in Amnesty International, *op.cit.*, September 2001, v.1, Ch.4, Part B, at p.40 fn.181.

"[t]here is no requirement in Art. 1(7) that a suspect be in Bolivia before a prosecutor can initiate an investigation…";[253]

- Burundi – with regard to Article 4 of the *Décret-Loi No. 1/6 du 4 April 1981 portant réforme du code pénal, art. 4* on crimes committed outside the country, the study observes that "it may be possible to charge a person suspected of a crime abroad who is outside the country, but no further proceedings to prosecute the person may occur until the person is found in Burundi";[254]

- El Salvador – with regard to Article 10 of the 1998 *Código Penal* (Penal Code), the study observes that it "does not require that the suspect be in El Salvador";[255]

- Peru – with regard to Article 2(5) of the Peruvian 1998 *Código Penal* (Penal Code) which provides for universal competence of Peruvian courts for acts established as crimes by international treaties, the study observes that "[t]here is no express requirement in this article that the suspect be in the territory in order to open an investigation.";[256]

- Switzerland – with regard to the provisions of the *Code pénal militaire suisse* (Swiss Military Penal Code), the study observes that "[t]here is no express requirement … that the suspect be in Switzerland to open a criminal investigation, although the normal practice is that prosecutors will not open a criminal investigation unless the suspect is believed to be in Switzerland."[257]

**3.3.58** To come up with a comprehensive picture, it would of course be necessary to examine the laws on criminal procedure of every State. Nevertheless, the preceding is

[253] *Ibid.*, Amnesty International, Part A, at p.28.
[254] "Decree-law No. 1/6 of 4 April 1981 reforming the Penal Code, Art.4." (unofficial translation by Belgium); cited in Amnesty International, *Ibid.*, at p.35.
[255] *Ibid.*, at p.68.
[256] *Ibid.*, Part B, at p.49; Art. 2(5) provides: "Peruvian law shall be applicable to any offence committed abroad when: … (5) it is an offence which Peru is obliged to punish under the terms of international treaties".
[257] *Ibid.*, at p.77.

an interesting sample of legislation that does not correspond to the simplistic image that the DRC tries to give to international legal reality.

**3.3.59** This practice notwithstanding, the DRC nevertheless challenges Belgium's right to open an inquiry or to initiate prosecution by default in the name of the *opinio juris* that in the DRC's opinion allegedly emerges from certain national legislation. For this purpose, it refers to two laws – those of Canada and of France – that limit the exercise of the criminal jurisdiction of these States with regard to certain serious violations of international humanitarian law to the case where the perpetrator of these violations is found on their territory.[258]

**3.3.60** It may be observed that, in adopting this approach, the DRC shows no *opinio juris*. It simply notes that two States have chosen to prosecute the perpetrator of these acts only when that person is found in their territory. The DRC does not cite a single extract in the *travaux préparatoires* of these two laws showing that these States do not want to open an investigation or initiate prosecution *in absentia* in the name of any prohibition in international law.

**3.3.61** However, the DRC refers to the rejection by the French National Assembly of an amendment that would have made it possible to prosecute in France the crimes referred to by the ICTY *Statute* in the event that their perpetrator was not found on the French territory but in circumstances in which the victims were domiciled there. The DRC sees in the rejection of this amendment,

> "l'*opinio juris* du législateur français qui tient l'exercice d'une compétence 'universelle' en l'absence de la présence [*sic*] de l'accusé sur le territoire national pour abusive." [259]

**3.3.62** It is particularly interesting to verify whether, as the DRC affirms, this amendment was rejected due to an *opinio juris* of the French legislature which

[258] DRC Memorial, at paragraphs 88-89.
[259] "the *opinio juris* of the French legislature considers that the exercise of a 'universal' competence in the absence of the presence of accused Party on the national territory is abusive." *Ibid.*, at paragraph 88 (unofficial translation by Belgium).

considered that the exercise of a "compétence 'universelle' en l'absence de la présence [*sic*] de l'accusé sur le territoire national pour abusive."[260]

**3.3.63** The real situation is much more prosaic. The amendment was rejected exclusively for practical reasons having to do with the risk of overloading the case list of the *Tribunal de Grande Instance* of Paris. The French Minister responsible for relations with the National Assembly explained his opposition to the amendment proposed by Mr Picotin, the rapporteur of the draft law, as follows:

> "En effet, si l'on retenait sa proposition [d'amendement], nombre des 4000 victimes vivant en France déposeraient plainte, pour la plupart devant le tribunal de grande instance de Paris. Cela provoquerait un embouteillage considérable qui aboutirait à l'effet inverse de celui recherché, car certaines exactions qui pourraient être sanctionnées ne le seraient jamais à cause de cet encombrement artificiel.
> …
> Nous sommes donc là face à un problème pratique"[261]

**3.3.64** As for Canada, the situation is much more subtle than the DRC describes. Although it is true that Article 8 of the law on crimes against humanity and war crimes of 29 June 2000 limits prosecution against a foreigner alleged to have perpetrated a crime under the law, in the event that this person is found in Canada after the violation, Article 9(1) accepts that a prosecution may be opened "whether or not the person is in Canada".[262] Canadian law therefore does indeed authorise the opening of public prosecution *in abstentia.*

**3.3.65** In addition to the *Pinochet* case, several important precedents drawn from national practice confirm the right of the forum State to exercise universal jurisdiction for acts committed outside the country by a foreigner who was found outside the country at the time prosecution was initiated.

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[260] "universal competence in the absence of the accused on the national territory is abusive" *Ibid.* (Unofficial translation by Belgium)

[261] "Indeed, if this proposal [for an amendment] is retained, many of the 4000 victims living in France would file a complaint for the most part with the *Tribunal de Grande Instance* of Paris. This would cause a considerable bottleneck which would finally have an effect opposite to the one sought, because certain exactions that could be sanctioned never would be because of this artificial overload. ... We are therefore faced with a practical problem." *Journal Officiel de l'Assemblée nationale*, 20 décembre 1994, 2e séance, p.9446 (unofficial translation by Belgium). **(Annex 24)**

[262] *Crimes Against Humanity and War Crimes Act*, 2000, c.24. **(Annex 25)**

**3.3.66** When Israel petitioned the United States to extradite John Demjanjuk for war crimes that he was alleged to have committed in Poland during the Second World War, it did no more than act on a judicial investigation carried out *in abstentia* against a foreigner for acts committed in another country against foreigners. This action did not raise particular judicial difficulty for either Israel or the United States, the latter of which agreed to extradite the person in question. In its Decision of 31 October 1985 rejecting the appeal lodged by Demjanjuk against the Judgment of the District Court concluding that he could be extradited to Israel, the 6th Circuit Court of Appeal notably affirmed:

> "Israel is seeking to enforce its criminal law for the punishment of Nazis and Nazi collaborators for crimes universally recognized and condemned by the community of nations. The fact that Demjanjuk is charged with committing these acts in Poland does not deprive Israel of authority to bring him to trial.
>
> Further, the fact that the State of Israel was not in existence when Demjanjuk allegedly committed the offenses is no bar to Israel's exercising jurisdiction under the universality principle. When proceeding on that jurisdictional premise, neither the nationality of the accused or the victim(s), nor the location of the crime is significant. The underlying assumption is that the crimes are offenses against the law of nations or against humanity and that the prosecuting nation is acting for all nations. This being so, Israel *or any other nation*, regardless of its status in 1942 or 1943, may undertake to vindicate the interest of all nations by seeking to punish the perpetrators of such crimes."[263]

**3.3.67** In the *Bouterse* case (referred to by Belgium during the provisional measures phase of the case),[264] two Dutch citizens launched an action in the Netherlands against a decision of the Dutch public prosecutor not to prosecute a senior officer of Surinam, Lieutenant Colonel Bouterse. Lt-Col. Bouterse was alleged to have commanded the soldiers who, in December 1982 in Panamaribo, arrested, tortured and executed 15 persons (legal specialists, teachers, businessmen, trade union representatives, journalists and officers) considered to be a threat to the military authority of Bouterse.

[263] *Demjanjuk v. Petrovsky*, 79 ILR 534, at pp.545-546 (emphasis added). **(Annex 26)**
[264] CR 2000/35, 23 November 2000, in the submission of M. David, at paragraph 2.

Fourteen of the victims were citizens of Surinam. The 15th was a Dutch national.[265] The Dutch complainants in the case were respectively the brother of one of the victims and the nephew of two other victims.[266]

**3.3.68** In a decision dated 3 March 2000, the Court of Appeal of Amsterdam justified the admissibility of the action, in spite of its extra-territorial character, on a number of grounds as follows:

> "The Netherlands has close historic ties with Surinam. A large number of people of Surinamese origin [are] living in the Netherlands. The events in December 1982 shocked not only this group but also society at large in the Netherlands. There are indications that at least one of the victims and possibly more had Dutch nationality. Finally, the complainants, who are relatives of two of the victims, live in the Netherlands. As a prosecution elsewhere in the world cannot be expected in the foreseeable future, as explained above, they have now applied to the most appropriate authorities. Prosecution in the Netherlands would be appropriate on all these grounds."[267]

**3.3.69** It is striking to observe to what extent most of the criteria referred to by the Court of Appeal of Amsterdam to justify the *forum conveniens* are found in the decision of the Belgian investigating judge to investigate complaints directed against the subject of the arrest warrant in the present case: the Belgian nationality of some of the complainants, who also consider themselves to be victims; the residence of these persons in Belgium; the presence of a large Congolese community in Belgium; the shock caused in Belgium by the acts alleged to have been committed by Mr Yerodia Ndombasi; the foreseeable absence of a more appropriate jurisdiction to try the violation.

**3.3.70** As concerns more specifically the exercise of universal competence *in absentia*, the Amsterdam Court of Appeal, in its Judgment on the merits of 20 November 2000, simply observed that customary international law acknowledged

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[265] *In re Bouterse*, Expert Opinion of Prof. C.J. Dugard, 7 July 2000, p.1 at paragraphs 1.1–1.3 **(Annex 29)**. On this case see also Kooijmans, P.H., *Internationaal publiek recht in vogelvlucht*, Tjeenk Willink, 2000, at p.56.

[266] *In re Bouterse, Beslissing van Het Gerechtshof* (Decision of the Court of Appeal), 3 March 2000, at paragraph 3.1. **(Annex 30)**

[267] *Ibid.*, at paragraph 4.2. **(Annex 30)**

such competence in the case of crimes against humanity, that the exercise of such competence did not require the victims to be nationals of the prosecuting state, and that nothing in the report of the expert appointed by the Court of Appeal (Professor John Dugard) excluded the exercise of this competence *in absentia*:

> "5.2 The Court of Appeal also shares the view of the expert:
>
> … that as customary international law stood in 1982, a State had competence to exercise extraterritorial (universal) criminal jurisdiction over a person accused of a crime against humanity when that person was not a national of the State concerned.
>
> 5.3 The Court of Appeals also understands from the report of the expert that it is not necessary for the exercise of jurisdiction that the victim should be a national of the prosecuting State or that the victims are nationals of the prosecuting State, although such a connecting factor – as in the present case where the complainants are relatives of the victims – would strengthen the basis for the exercise of jurisdiction.
>
> 5.4 The Court of Appeal has found insufficient grounds in the report of the expert to conclude that prosecution of Bouterse in the Netherlands would not be *possible and admissible in accordance with the criteria of customary international law as long as he is not in the Netherlands*."[268]

**3.3.71** This statement could not be clearer. The Court appointed Expert, Professor Dugard, observed as concerns the presence of the accused on the territory of the prosecuting State as a criterion for initiating prosecution:

> "It is not clear whether this requirement [the presence of the accused in the forum State] prevents a State in whose territory the offender is not present from requesting extradition of the offender from a state in whose territory the offender is present, but which elects not to try him itself, when the sole basis for the exercise of jurisdiction is the principle of universality. Some have argued that it is objectionable to allow extradition requests of this kind as this would permit a particular state to act as 'policeman' of the world by requesting extradition of torturers from any country. This objection was not raised in the Pinochet proceedings and a number of English courts were prepared to entertain a request from Spain to exercise jurisdiction on grounds of universality.

[268] *Ibid.*, Judgment of 20 November 2000, at paragraphs 5.2-5.4 (emphasis added). **(Annex 30)**

> (fn. In *Spain v Pinochet (Bow street Magistrate's Court*, 8 October 1999) *the extraditing magistrate was satisfied that the principle of universality gave Spain jurisdiction in this case*. Article 7 of the European Convention on Extradition, under which Pinochet's extradition was ordered, permits extradition where both the requesting and requested State recognise the principle of universal jurisdiction in the case in question).
>
> A State that requests extradition of a torturer would probably be wise to stress the presence of some connecting factor between it and the crime to ensure that this objection would not be raised against it."[269]

**3.3.71a** In its decision of 18 September 2001, the *Hoge Raad* of the Netherlands, however, did not go so far. It corrected the decision of the Court of Appeal once having observed that the *Torture Convention* did not oblige the Netherlands to exercise jurisdiction other than the one provided for by the *Convention* (territorial jurisdiction, personal jurisdiction, and universal jurisdiction if the accused is present in the territory of the forum state). Furthermore, it recognised that the intention of the Dutch legislature was to confine the jurisdiction of the Dutch judge to matters coming within the purview the *Convention* only. Nevertheless, the *Hoge Raad* did not call into question the above reasoning of the appellate Court.[270] More specifically, it does hold that international law prohibits States to exercise a broader jurisdiction.[271]

**3.3.72** In the case of Spain, in addition to the *Pinochet* case, reference may be made to the investigation opened in the 1990s by Judge Garzon concerning 98 dossiers on Argentine citizens for their participation in crimes alleged to have been committed during the Argentine dictatorship of 1976 – 1983. The *Cavallo* case took place in this context. In this case, Ricardo Miguel Cavallo was accused by Judge Garzon of acts of genocide, torture and terrorism. Cavallo was arrested on 24 August 2000 in Cancun, Mexico. On 12 September 2000, Spain, after a favourable decision of the *Audiencia Nacional*, [272] petitioned Mexico for his extradition. On 12 January 2001, a Mexican

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[269] *In re Bouterse*, Expert Opinion of Prof. C.J. Dugard, 7 July 2000, at paragraph 5.6.5. (emphasis added) **(Annex 29)**

[270] See paragraph 3.3.70 above.

[271] *In re Bouterse*, judgment of 18 September 2001, at paragraph 8, especially 8.2, 8.4 and 8.5. **(Annex 31)**

[272] *Cavallo, Audiencia Nacional, Auto solicitando la extradición de Ricardo Miguel Cavallo*, 12 September 2000 (Spanish extradition order by the *Audiencienci Nacional*; French translated extracts certified by Belgium). **(Annex 27)**

judge decided to authorise the extradition to Spain.[273] On 2 February 2001, the Mexican government agreed to extradite Cavallo to Spain. This decision is now on appeal before the Mexican supreme court. Whatever the final decision, the case illustrates recognition, by Spain and Mexico, of the right to prosecute *in absentia*.

**3.3.73** By way of further example, an investigation was opened in Germany with regard to a Dutch national, Dost, on charges of trafficking in narcotics in Arnhem in the Netherlands. On the basis of Article 6(5) of the *Strafgesetzbuch* – which provides for the universal competence on the part of a German judge without any requirement that the perpetrator should be present on the territory of the State prosecuting the case – the case was investigated. In this example, the person concerned was not in Germany and the charges against him concerned acts alleged to have been committed outside the country.[274]

**3.3.74** In conclusion, there is no shortage of sources to confirm the right of the State to open an investigation *in abstentia*. The DRC is unable to quote a single source affirming that international law only authorises the initiation of an investigation or prosecution by default when the crime is committed on the territory of the prosecuting State and that it prohibits such action when the crime is committed elsewhere. In fact, international law, which recognises the principle of universal jurisdiction in the case of grave breaches of international humanitarian law, in no way prohibits the exercise of this competence *in absentia*. This follows from differences in systems of criminal law. Some apply strict territoriality whereas others exercise extraterritorial jurisdiction to varying degrees. This explains the tolerance of modern conventions on international criminal law with regard to jurisdictions not provided for in these instruments.[275] It is not possible, therefore, to deduce from the international law rules that would limit the extra-territorial competence of States in the case that the alleged perpetrator of an extra-territorial breach would be on the territory of the forum State. Such rules do not therefore exist at this time.

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[273] *Texto de las conclusiones del Juez natural sobre la poible extradicion de Miguel Angel Cavallo a España*, 12 January 2001 (Conclusions by the Mexican *Juez natural* regarding the potential extradition of Cavallo; French translated extracts certified by Belgium). **(Annex 27)**

[274] See Vander Beken, T., *Forumkeuze in het internationaal strafrecht*, Anterwerpen, Maklu, 1999, at p.165. **(Annex 28)**

## *II. Additional arguments of the DRC in opposition to the exercise of universal jurisdiction* in abstentia

**3.3.75** The DRC further challenges the exercise of universal competence *in absentia* on grounds of the risk of multiple prosecutions *(a)* and by reference to rules of the ICC *(b)*. Each of these arguments is addressed in turn.

**3.3.76** Independently of the arguments that have just been set down and which justify the opening of an investigation in Belgium in respect of the allegations against Mr Yerodia Ndombasi, it will be seen that none of the additional arguments presented by the DRC stand up to analysis.

### *(a) The alleged risk of multiple prosecutions*

**3.3.77** The authors of the DRC Memorial express a fear that the exercise of universal jurisdiction by default could result in a 'monstrous cacophony'. They sing a common tune, but international law is not a perfect four-part harmony.[276] As has already been seen, however, international law accepts positive conflicts of jurisdiction. These are inherent in a society of juridically equal sovereign States juxtaposed to one another.

**3.3.78** Moreover the risk of such conflicts does not result only from universal jurisdiction. All forms of extraterritorial jurisdiction (active personal, passive personal, real, multi-territorial) can lead to this. Today, with the development of cross-border criminality, the same offence could give rise to prosecution in many different States. As things stand at present, international law does not preclude this.

**3.3.79** The *travaux préparatoires* of the *Tokyo Convention on offences committed on board aircraft* of 14 September 1963 are instructive on the subject.[277] It was believed that the initial intention to establish a priority in respect of the exercise of competencies of different States concerned by breaches committed on board aircraft

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[275] See paragraph 3.3.37 above.
[276] On this, see the interview with MJ Verhoeven in *Vif – L'Express*, 18 May 2001.
[277] ICAO Doc. 8565-LC/152/2, Documents, II at pp.31 *et seq.* **(Annex 14)**

was soon abandoned.[278] Italy, however, recalled the matter during the Tokyo Conference, and the principle remained in the final text.[279]

**3.3.80** The risk of a positive conflict of jurisdictions is in any event theoretical for two reasons. First, national courts and case lists are already sufficiently full and States are hardly likely to be inclined to prosecute alleged perpetrators of offences that are so much more difficult to investigate because they were committed in another country. Second, national law, like international law, provides remedies in the event of overlapping jurisdictions, notably by the application of the *non bis in idem* rule.[280] The risk of multiple prosecutions is therefore small.

*(b) The alleged incompatibility of the Law of 1993/1999 with the ICC* Statute

**3.3.81** According to the DRC, the implementation of universal jurisdiction set down in the Law of 1993/1999 would hinder the exercise of jurisdiction by the future ICC because ICC jurisdiction is complementary to that of states (ICC *Statute*, Articles 1 and 17) but Belgium would always be competent for offences provided for in the *Statute*.[281]

**3.3.82** This argument does not hold. Independently of the principle of the opportunity of prosecution which does not require Belgian justice to act on all violations of international humanitarian law committed in the world, the text of the *Statute* itself answers this objection: the ICC can initiate proceedings on any offence provided for in its Statute insofar as the State normally having jurisdiction is incapable of truly exercising its jurisdiction. Article 17 of the *Statute* provides:

> "1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

[278] *Ibid.*, Article 3(1) at p.46, see above, paragraphs 3.3.39 and 3.3.40.
[279] *Ibid.*, LC/152-1, *Procès Verbaux*, at p.115 **(Annex 13)**
[280] This is found, for example, in Article 13, of the Belgian *Code de procédure pénale, titre préliminaire* **(Annex 6)**; and in Article 54 of the *Schengen Convention on the gradual elimination of border controls* of 19 June 1990, which provides: "A person who has been finally judged by a Contracting Party may not be prosecuted by another Contracting Party for the same offences provided that, where he is sentenced, the sentence has been served or is currently being served or can no longer be carried out under the sentencing laws of the Contracting Party."; see also *Charter of Fundamental Rights of the European Union*, 9 December 2000, Art.50 in *DAI*, 2001, at p.49.
[281] DRC Memorial, at paragraph 91.

> (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, *unless the State* is unwilling or *unable genuinely to carry out the investigation* or prosecution;
> ...
>
> 3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is *unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings*."[282]

**3.3.83** The terms of Article 17 are perfectly clear. It is not because Belgian law allows an investigation or prosecution *in absentia* that Belgium will be able to "genuinely carry out the prosecution" and to obtain the "necessary evidence and testimony or to carry out the prosecution". If Belgium proves unable to seriously investigate the case, the very text of paragraphs 1(a) and 3 of Article 17 show that the ICC will be perfectly able to do so.

**3.3.84** In conclusion, the universal jurisdiction provided for by the Belgian Law of 1993/1999 infringes no standard of international law. It falls into the framework of the sovereignty of States as referred to in the *Lotus* case. It is confirmed by international practice which takes account of the great diversity of criminal legislation and jurisdiction that the States adopt. It is not unique in the world and did not raise international protest at the time that it was enacted. It is no more singular than any other form of criminal jurisdiction exercised *in absentia* for acts committed outside the territory of the State concerned, a competence broadly accepted by international practice.

* * *

[282] ICC *Statute*, Article 17 (emphasis added).

## CHAPTER FOUR

## THE LAW RELATING TO THE IMMUNITY OF MINISTERS FOR FOREIGN AFFAIRS

**3.4.1** The central contention in the DRC's case is that Belgium is in breach of international law because it has violated the customary international law immunities that attach to Ministers for Foreign Affairs in office. In Belgium's contention, this argument overlooks a quite fundamental development in international law in recent times that goes to the core of the present case, as well as a number of other key elements of the applicable law. While, ordinarily and as a matter of general proposition, Ministers for Foreign Affairs are immune from suit before the courts of foreign states, and the persons of Ministers for Foreign Affairs are inviolable, this is subject to an important caveat. As Sir Arthur Watts observed in his recent study on *The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers*:

> "As with Heads of State, so too it is now accepted that heads of governments and foreign ministers bear a personal responsibility in international law for those international acts which are so serious as to constitute international crimes. This acceptance has sprung primarily from the judgment of the International Military Tribunal at Nuremberg, and the principle of the international responsibility of individuals has now been incorporated into numerous international instruments."[283]

**3.4.2** As well as the issue of personal responsibility for international crimes, also germane to the present proceedings is the increasingly widely held appreciation that the special privileges and immunities that avail those representing states are accorded "to enable them to carry out their functions".[284] Implicit in this appreciation is the proposition that the scope and application of these privileges and immunities are limited to circumstances involving the performance by the person concerned of official functions. In other words, privileges and immunities that attach to Ministers

[283] Watts, A., *The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers*, (1994-III) *Recueil des cours*, Volume 247, at p.111.
[284] Watts, *supra*, at p.103.

for Foreign Affairs to enable them to carry out their official functions do not avail such persons in their private capacity or when they are acting otherwise than in the performance of their official functions.

**3.4.3** Also relevant to the present proceedings is the uncontroversial proposition that

> "[u]pon loss of office a former head of government or foreign minister resumes again the position of a private person, and is as such entitled to no special protection under international law. In particular, their immunity from jurisdiction ceases, even in respect of their private acts committed while they held office (or earlier) and in respect of which they might while in office have benefited from immunity."[285]

**3.4.4** By reference to the preceding, a number of propositions relating to the immunity of Ministers for Foreign Affairs germane to the present case may be simply stated:

(a) Ministers for Foreign Affairs in office are in general immune from suit before the courts of a foreign State;

(b) by way of exception to the general rule, Ministers for Foreign Affairs in office bear personal responsibility for acts they are alleged to have committed which are so serious as to constitute international crimes. Such acts include *inter alia* grave breaches of the *Geneva Conventions* of 1949 and the *Additional Protocols* thereto of 1977, and crimes against humanity;

(c) by way of further exception to the general rule, the immunity that avails Ministers for Foreign Affairs in office applies in respect of their official conduct for purposes of enabling them to carry out their official functions. It

[285] Watts, *supra*, at p.112. For completeness, the passage in question continues: "But even after a head of government or foreign minister ceases to hold office, immunity continues to subsist in respect of official acts performed in the exercise of their functions." This element is not in contention in the present case as their is no suggestion that the acts that Mr Yerodia Ndombasi is alleged to have committed constituted official acts.

does not avail such persons in their private capacity or when they are acting otherwise than in the performance of their official functions;

(d) upon loss of office, a former Minister for Foreign Affairs is no longer entitled to immunity as regards any conduct other than official acts performed in the exercise of his or her functions while Minister for Foreign Affairs.

**3.4.5** The law and practice relating to the immunity from suit of Ministers for Foreign Affairs in office in the case of allegations of grave breaches of international humanitarian law and crimes against humanity is addressed in detail in the following chapter in this Part. The object of the present chapter is simply, and briefly, to set that discussion in context by sketching the broad contours of the law in this area.

**3.4.6** The law relevant to immunities of Ministers for Foreign Affairs is largely customary in origin, although, depending on the circumstances and the parties involved, it may also have a conventional basis. The principal conventional source in this area is the UN *Convention on Special Missions* of 1969 ("Special Missions Convention") which entered into force in 1985.[286] Neither Belgium nor the DRC are, however, party to this Convention. It may, nevertheless, be a useful point of reference on certain matters of principle which are commonly accepted as having a basis in customary international law. Other instruments setting out principles on the immunity of other State representatives may also be relevant. A particularly useful general commentary on the law in this area is the recent study by Sir Arthur Watts referred to above on *The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers*.

**3.4.7** In general, discussion of the immunities that attach to the office of Ministers for Foreign Affairs proceeds by reference to the wider review of immunities that attach to the offices of Head of State, Head of Government and Minister for Foreign Affairs. As the review of the law by Sir Arthur Watts makes clear, holders of these offices of State are commonly considered to be in a special position as regards

privileges and immunities as it is through these offices that a State normally conducts its foreign relations. While this does not preclude privileges and immunities attaching to other offices of State, the scope of such privileges and immunities are more likely to require determination on a case-by-case basis. In contrast, as is commonly known, there is a presumption that Heads of State, Heads of Government and Ministers for Foreign Affairs possess, simply by virtue of their office, full powers to act on behalf of the State they represent.[287]

**3.4.8** While the position of Heads of State, Heads of Government and Ministers for Foreign Affairs are frequently addressed together as regards the question of privileges and immunities – a practice that is followed in chapter 5 below – an important distinction must be drawn between the position of Heads of State, on the one hand, and of Heads of Government and Ministers for Foreign Affairs, on the other. Whereas Heads of State are commonly perceived as occupying a privileged position as a result of their personal identification with the State, ie, simply by virtue of their office, Heads of Government and Ministers for Foreign Affairs occupy a special position in consequence of the *functions* they perform. This distinction, an amalgam of the old notion of the Sovereign as the State – "*L'Etat, c'est moi*", as Louis XIV is reputed to have said – and the more recent trend away from absolute immunities in favour of immunities linked to functional considerations, remains important today. Whereas the privileges and immunities of Heads of State are predicated on both form (the status of the office) and substance (the functions performed), the privileges and immunities that avail Heads of Government and Ministers for Foreign Affairs are, to a significant degree, predicated on substance only. While, therefore, the scope of the immunities of Ministers for Foreign Affairs is commonly discussed by reference to the law applicable to Heads of State, the application of the law in the case of Ministers for Foreign Affairs is circumscribed by what is necessary to enable the person concerned to perform his or her functions.[288]

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[286] UN *Convention on Special Missions*, Annex to UNGA Resolution 2530 (XXIV) of 8 December 1969. **(Annex 32)**

[287] See, for example, Article 7(2)(a) of the *Vienna Convention on the Law of Treaties, 1969*.

[288] The distinction between the position of a Head of State, on the one hand, and a Head of Government or Minister for Foreign Affairs, on the other, is widely apparent and accepted. The two categories are, for example, addressed separately by Sir Arthur Watts in the commentary noted above. The *Special Mission Convention*, likewise, addresses the two categories separately; in Article 21(1) and 21(2) respectively.

**3.4.9** This issue is addressed by Sir Arthur Watts in the following terms:

> "As representatives of their States, of high seniority and rank, heads of government and foreign ministers are, in their official capacities, in principle entitled in international law to special respect and protection from other States. However, several considerations need to be borne in mind when translating the principle into practice.
>
> The first is that heads of governments and foreign ministers, although senior and important figures, do not symbolise or personify their States in the way that Heads of State do. Accordingly, they do not enjoy in international law any entitlement to special treatment by virtue of qualities of sovereignty or majesty attaching to them personally.
>
> Second, in contemporary international law specially favourable treatment is in general (and notwithstanding the exception which appears to be accepted in view of the very special position of Heads of State) accorded to State representatives where that is necessary to enable them to carry out their functions. ...
>
> Functional considerations, which are now accepted as the true basis for privileges and immunities accorded in respect of resident diplomatic missions, are in principle as applicable to temporary visits by heads of governments and foreign ministers for the conduct of official business as they are to resident diplomatic missions."[289]

**3.4.10** That the privileges and immunities that attach to a Minister for Foreign Affairs are limited by reference to functional considerations is also evident from the approach adopted by the *Special Missions Convention*. Thus, while the persons of the representatives of the sending State in the special mission are declared to be inviolable,[290] and such representatives "shall enjoy immunity from the criminal jurisdiction of the receiving State,[291] the whole focus of the Convention is on privileges and immunities that are limited by reference to function. Thus, the very notion of a "special mission" – which would include a mission lead by, or including, the Minister for Foreign Affairs – is defined in functional terms:

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[289] Watts, *supra*, at pp.102–103.

[290] See Article 29. **(Annex 32)**

[291] See Article 31. **(Annex 32)**

> "a 'special mission' is a temporary mission, representing the State, which is sent by one State to another State with the consent of the latter for the purpose of dealing with it on specific questions or of performing in relation to it a specific task".[292]

**3.4.11** Pursuant to Article 11 of the Convention, the Ministry of Foreign Affairs of the receiving State is to be notified of the termination of the functions of the special mission. The point at which the functions of a special mission come to an end is addressed in detail in Article 20 of the Convention. As regards the commencement of functions, Article 13(1) provides that "[t]he functions of a special mission shall commence as soon as the mission enters into official contact" with the appropriate authority of the receiving State.

**3.4.12** As already noted, the Convention provides expressly both that the persons of the representatives of the sending State in the special mission shall be inviolable and that they shall enjoy immunity from the criminal jurisdiction of the receiving State. The status of Heads of State and other persons of high rank leading or taking part in a special mission is further addressed in Article 21 in the following terms:

> "1. The Head of the sending State, when he leads a special mission, shall enjoy in the receiving State or in a third State the facilities, privileges and immunities accorded by international law to Heads of State on an official visit.
>
> 2. The Head of the Government, the Minister for Foreign Affairs and other persons of high rank, when they take part in a special mission of the sending State, shall enjoy in the receiving State or in a third State, in addition to what is granted by the present Convention, the facilities, privileges and immunities accorded by international law."

**3.4.13** As will be apparent, there is a degree of circularity in this text for present purposes given that it refers back to general international law. What is material, however, is not so much the absence of detail on the privileges and immunities that may subsist as a matter of general international law but the approach of the Convention on the question of the duration of such privileges and immunities. This is addressed in Article 43 of the Convention *inter alia* as follows:

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[292] Article 1(a). **(Annex 32)**

> "1. Every member of the special mission shall enjoy the privileges and immunities to which he is entitled from the moment he enters the territory of the receiving State *for the purposes of performing his functions in the special mission* or, if he is already in its territory, from the moment when his appointment is notified to the Ministry of Foreign Affairs or such other organ of the receiving State as may be agreed.
>
> 2. *When the functions of a member of the special mission have come to an end*, his privileges and immunities shall normally cease at the moment when he leaves the territory of the receiving State, or on the expiry of a reasonable period in which to do so, but shall subsist until that time, even in the case of armed conflict. However, *in respect of acts performed by such a member in the exercise of his functions, immunity shall continue to subsist*."[293]

**3.4.14** As these provisions make clear, privileges and immunities avail members of a special mission only for the duration of the mission, which in turn is defined in functional terms.

**3.4.15** The functional nature of the immunities that attach to Ministers for Foreign Affairs in office is important for purposes of the present proceedings independently of the issue of limitations on immunity in circumstances of allegations of grave breaches of international humanitarian law or crimes against humanity. The reason for this is that the DRC is proceeding on the basis that all that needs to be established for purposes of its case is that Ministers for Foreign Affairs in office are immune from suit before the courts of foreign States. If so, the implicit presumption advanced is that they will be immune from suit for all purposes. The position, however, is rather more complex. Even were the Court to uphold, contrary to Belgium's submissions, the immunity of Mr Yerodia Ndombasi *qua* Minister for Foreign Affairs of the DRC in the circumstances in issue, it would not follow that he would have been immune, even when in office, as regards conduct of a private nature or otherwise than in the performance of his official functions. The "private shopping trip" example given by Belgium during the provisional measures phase of the proceedings would still operate.

[293] **Annex 32.** (emphasis added).

**3.4.16** Needless-to-say, as is clear from the principles set out at the start of this chapter, now that Mr Yerodia Ndombasi is no longer Minister for Foreign Affairs of the DRC, he does not benefit from the privileges and immunities that attach to that office.

**3.4.17** The personal responsibility of Ministers for Foreign Affairs for serious violations of international humanitarian law that they are alleged to have committed, and the consequences that flow therefrom for the question of immunity, are addressed in detail in the following chapter of this Part. By way of foundation for that discussion, the following observation by Sir Arthur Watts in respect of the position of Heads of State may be noted. As the generality of the observation suggests, it is relevant also to the position of Ministers for Foreign Affairs.

> "A Head of State's position in international law is not solely a matter of his powers and the privileges and immunities to which he is entitled. A Head of State can also engage the responsibility of both his State and himself under international law.
>
> ...
>
> The idea that individuals who commit international crimes are *internationally* accountable for them has now become an accepted part of international law. Problems in this area – such as the non-existence of any standing international tribunal to have jurisdiction over such crimes, and the lack of agreement as to what acts are internationally criminal for this purpose – have not affected the general acceptance of the principle of individual responsibility for international criminal conduct.
>
> ...
>
> Provisions like those adopted in the Nuremberg Charter have been repeated in subsequent general international instruments, and, most recently, are included in Article 11, as provisionally adopted in 1988, of the International Law Commission's draft Code of Crimes against the Peace and Security of Mankind.
>
> ...
>
> It can no longer be doubted that as a matter of general customary international law a Head of State will personally be liable to be

> called to account if there is sufficient evidence that he authorised or perpetrated such serious international crimes."[294]

**3.4.18** As regards the acts of Heads of Government and Ministers for Foreign Affairs, Sir Arthur went on to observe as follows:

> "The official acts of a head of government or of a foreign minister are attributable to the State so as, if the circumstances warrant, to make the State responsible for them.
>
> The position is different as regards acts which they may perform in their private capacities (which may include acts performed in a political capacity – eg, as leader of a political party – so long as that capacity can be differentiated from their official capacities as senior members of the government). For their private acts the State bears no greater legal responsibility than it bears in respect of acts of private persons which may happen to cause internationally injurious consequences.
>
> As with Heads of State, so too it is now accepted that heads of governments and foreign ministers bear a personal responsibility in international law for those international acts which are so serious as to constitute international crimes. This acceptance has sprung primarily from the judgment of the International Military Tribunal at Nuremberg, and the principle of the international responsibility of individuals has now been incorporated into numerous international instruments.
>
> The various instruments include in some cases express provision to the effect that that individual responsibility exists even though the person concerned holds a senior office of State. The language used varies slightly, but in the context in which they were adopted there is no room for doubting that such provisions clearly embrace holders of such offices as heads of governments and foreign ministers. The Nuremberg Tribunal, it may be recalled, included amongst those tried and convicted the former foreign minister of Germany (von Ribbentrop)."[295]

**3.4.19** One concluding point warrants comment. As a general approach, both international and national law concerning the immunity of State representatives address immunity from jurisdiction and immunity from execution or enforcement as separate issues. For example, Article 31 of the *Special Missions Convention* addresses immunity from criminal jurisdiction in paragraph (1), immunity from civil

[294] Watts, *supra*, at pp.81–84.

jurisdiction in paragraph (2) and, separately, immunity from measures of execution in paragraph (4). The same approach is adopted in respect of diplomatic agents in Article 31 of the *Vienna Convention on Diplomatic Relations* of 1961.[296]

**3.4.20** In Belgium's contention, there may be exceptional circumstances in which the functional considerations that underlie the immunities that avail Ministers for Foreign Affairs in office will require recognition of an extensive immunity from *enforcement* in foreign States. The general and commonly endorsed trend towards restrictive immunity, as well as principle in the pursuit of those alleged to have committed serious violations of international humanitarian law, requires, however, that claims to immunity from jurisdiction in such circumstances be firmly rejected.

* * *

[295] Watts, *supra*, at pp.111–112.
[296] 500 *UNTS* 95.

## CHAPTER FIVE

## INTERNATIONAL LAW EXCLUDES IMMUNITY IN THE CASE OF PROSECUTION FOR SERIOUS CRIMES OF INTERNATIONAL HUMANITARIAN LAW

**3.5.1** As has just been seen, Belgium does not challenge the fact that the members of a foreign government in office benefit from immunity. But whereas the DRC affirms that this immunity is absolute,[297] Belgium contends that there are exceptions in the event of crimes under international humanitarian law.

**3.5.2** In the case at hand, Belgium considers that even on this particular point, the DRC's petition is pointless, not only because it has become purely academic since Mr Yerodia Ndombasi is no longer a minister, but also because the argumentation of the DRC itself leads to this conclusion. Belgium will begin by demonstrating that point (section A) which, as we know, is already secondary compared to the general inadmissibility of the DRC petition. It will therefore deal with the substance of the question of immunities of high foreign representatives (section B) in a *still* more subsidiary capacity.

### A. The DRC's petition concerning the immunity of Mr Yerodia Ndombasi is pointless

**3.5.3** In the provisional measures phase, Belgium showed that in the event of the execution of the arrest warrant by a third State, the infringement of criminal immunity – supposing that it exists in this case, *quod non* – would have been the act of that State and not of Belgium.[298] The DRC recognises that the execution of the arrest warrant by a third State would entail the responsibility of that State, but this would not exempt Belgium from its responsibility in the illicit act of transmitting the warrant:

> "Le comportement de ces autorités tierces ne serait en effet jamais que la suite logique de la délivrance du mandat d'arrêt, que la

[297] DRC Memorial, at paragraphs 49-51, 54, 61.
[298] CR 2000/33, 21 November 2000, at paragraphs 36-40.

> Belgique sollicite par la diffusion internationale qui en est faite. En d'autres termes, le mandat d'arrêt du 11 avril 2000 demeure en toute hypothèse la cause du fait illicite complémentaire et distinct que réaliserait un Etat tiers par la collaboration que pourrait [*sic*] apporter certains de ses organes et agents à l'exécution de ce mandat d'arrêt […]."[299]

**3.5.4** This extract shows that the DRC recognises that any collaboration of a third State in the execution of the arrest warrant would allegedly embody an infringement of international law in its own right by that State. This confirms what Belgium said in the provisional measures phase concerning the accountability of a third State for its participation in the execution of the arrest warrant. By executing the arrest warrant, the third State would engage *its own responsibility* if, as the DRC claims, the execution of the warrant is an infringement of international law.

**3.5.5** The DRC adds that no third State has acted on the arrest warrant and that this shows the existence of a custom sanctioning the absolute criminal immunity of a high foreign representative:

> "Aucun Etat n'ayant à ce jour donné suite à ce mandat d'arrêt, il ne faut pas s'interroger plus avant sur la responsabilité spécifique qui pourrait en résulter dans le chef de l'Etat qui l'exécute, ni sur la manière dont elle devrait s'articuler par rapport à celle, en quelque sorte originaire, de l'Etat belge. Le fait qu'aucun Etat n'a à ce jour donné suite au mandat d'arrêt du 11 avril 2000 est toutefois le signe de l'*opinio juris* dominante suivant laquelle tout ministre des Affaires étrangères en exercice bénéficie d'une inviolabilité et d'une immunité pénale absolues, ainsi qu'il fut rappelé ci-avant"[300]

**3.5.6** Belgium will refrain from discussing here the *opinio juris* argument belonging to the substance of the case, to which Belgium will come back later. At

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[299] "The behaviour of the authorities of third States would in fact only be a logical follow-up of the issue of the arrest warrant that Belgium has solicited by the international transmission it enacted. In other words, the arrest warrant of 11 April 2000 remains, in all cases, the cause of the complementary and separate illicit act that a third State might effect by the collaboration of some of its authorities and agents in the execution of the arrest warrant ..." DRC Memorial, at paragraph 55 (unofficial translation provided by Belgium).

[300] "As no State has to date enforced this arrest warrant, there is no need to go further into the specific responsibility that might result for the State that enforces it, nor on the way that responsibility would be interconnected with that of the Belgian State which is the originating authority so to speak. The fact that no State has to date enforced the arrest warrant of 11 April 2000 is, however, a sign of the dominant *opinio juris* maintaining that any Minister of Foreign Affairs in office benefits from complete

this point, it is enough to observe the following. If no third State has acted on the arrest warrant, and if this refusal to take action were the expression of a dominant *opinio juris*, as the DRC affirms, then it is hard to see what the DRC is complaining about, since, in its opinion, Mr Yerodia Ndombasi's criminal immunity is recognised by third States. The DRC's argument is in contradiction with what it maintains elsewhere:

> "[…] la diffusion internationale du mandat d'arrêt fait automatiquement échapper au contrôle des autorités belges l'exécution de celui-ci. […] l'entrave au libre exercice des fonctions internationales que constitue la crainte d'une arrestation demeure entière hors de la Belgique […]."[301]

**3.5.7** However, the DRC's fears are vain since the third States would not have acted on the arrest warrant, and under these circumstances, the DRC's petition to have Belgium condemned for the extraterritorial effects of the arrest warrant and the alleged infringement of Mr Yerodia Ndombasi's criminal immunity not only no longer serve any purpose, but in fact never did. It would suffice, indeed, for Mr Yerodia Ndombasi to refrain from coming to Belgium given that, as the DRC affirms, no State has to date enforced the arrest warrant of 11 April 2000. The DRC's petition thus has no practical scope and the complaint of the alleged infringement of Mr Yerodia Ndombasi's immunity becomes moot.

**3.5.8** On this point, the DRC thus agrees with Belgium. If a State had executed the arrest warrant, it might infringe Mr Yerodia Ndombasi's criminal immunity – *quod non* as we will see hereinafter – but in any case, the party directly responsible for that infringement would have been that State and not Belgium. Since Mr Yerodia Ndombasi was never arrested anywhere and since, according to the DRC, no State is prepared to carry out the warrant, any attempt to understand the scope of this petition is fruitless.

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inviolability and immunity, as recalled above." DRC Memorial, at paragraph 55 (unofficial translation provided by Belgium).

[301] "... international transmission of the arrest warrant automatically takes the execution of the warrant out of the hands of the Belgian authorities ... [T]he obstacle to free exercise of the Minister's international functions that the fear of arrest it constitutes is still entirely applicable outside of Belgium ..." DRC Memorial, at paragraph 54 (unofficial translation provided by Belgium).

## B. As a subsidiary argument, the DRC's petition concerning the immunity of Mr Yerodia Ndombasi is groundless

**3.5.9** If the Court were to consider that the DRC's petition is admissible as concerns its argumentation, Belgium will demonstrate in the following pages the legal justification of the refusal of immunity to persons suspected of having committed grave breaches of international humanitarian law and will answer the DRC's arguments that deal directly with this ***(I)***. It will thereafter turn to address the other arguments presented by the DRC in favour of absolute immunity of the members of foreign governments in power ***(II)***.

### *I. Foundation for the refusal of immunity to persons suspected of serious crimes of international humanitarian law*

**3.5.10** Article 5(3) of the Law of 1993/1999 provides:

> "L'immunité attachée à la qualité officielle d'une personne n'empêche pas l'application de la présente loi."[302]

**3.5.11** The explanatory statement to this amendment to the Law of 1993 introduced by the Law of 1999 states that the amendment:

> "introduit explicitement une règle établie de droit international humanitaire, rappelée récemment de façon absolue à l'art. 27 du Statut de Rome."[303]

**3.5.12** Further on, the government indicates that this amendment

> "vise à confirmer explicitement la règle de la non-pertinence des immunités de juridiction et d'exécution dans le cadre de

[302] "The immunity associated with the official capacity of the person does not prevent the application of this law." (Unofficial translation) **(Annex 4)**

[303] "explicitly introduces a rule established in international humanitarian law, recalled recently in an absolute way by Article 27 of the Rome Statute." *Documents parlementaires, Senat*, 1998-1999, n° 1 – 749/3, at p.14 (unofficial translation by Belgium). **(Annex 12)**

> l'application de la loi, mais cette règle existe déjà en droit international, qui fait partie intégrante de l'ordre juridique belge."[304]

**3.5.13** In other words, when the Belgian government introduced this amendment, it did so with the conviction of acting in perfect compliance with international law. In fact, international sources are not lacking to show that the head of State or a member of his government does not benefit from immunity when accused of having committed crimes under international humanitarian law.

**3.5.14** There are many such sources – conventional *(a)*, national *(b)*, juridical *(c)*, and the writings of publicists *(d)*. Each will be examined in turn. Belgium begs the Court to excuse the long list of texts which will follow, but the assertion that immunity of members of foreign governments is absolute and without exception obliges Belgium to explain why it holds another standpoint.

*(a) Conventional sources excluding the immunity of alleged perpetrators of a serious crimes of international humanitarian law*

**3.5.15** Belgium will present here not only the text of conventions *stricto sensu* but also the texts of secondary legislation (resolutions of United Nations bodies) and of international agreements that can be assimilated to treaties according to Article 2 (a) of the Vienna Convention on the Law of Treaties.

[304] "aims to explicitly confirm the rule of non-pertinence of immunity of jurisdiction and execution in the context of the application of the law, but this rule already exists in international law, which is an integral part of the Belgian judicial order." *Ibid.*, at p.21(unofficial translation by Belgium).

*(i) The Treaty of Versailles of 1919*

**3.5.16** Implicitly, the Treaty of Versailles of 28 June 1919, by Article 227, excluded immunity of the Emperor of Germany by prosecuting him before a special international tribunal "for supreme offence against the international morality and sanctity of Treaties".

**3.5.17** The preparatory work for this provision shows that the States were perfectly aware of the fact they were excluding immunity normally recognised for foreign sovereigns. Yet the United States was strongly opposed to this idea. In its opinion, William II could not be judged "en raison de l'immunité de mise en accusation et de poursuites dont jouit un monarque chef d'Etat, selon le droit public de tous les pays civilisés et selon le droit commun des nations".[305] To this position, which the United States maintained throughout the entire work done on criminal liability, Great Britain answered vigorously that immunity should not be considered "comme un fait acqui" ("as an acquired fact"), that Heads of State are not "au-dessus de la loi quand ils commettent un acte criminel" ("above the law when they commit a criminal act"), and that one can "les traduire en justice." ("bring them to justice") [306]

**3.5.18** France went further by observing that the acts charged against the Emperor of Germany:

> "sont de nature telle qu'ils mettent celui qui les a déchaînés sous la règle directe du droit international. Lorsque le droit international proclame que tel ou tel acte est répréhensible, il s'adresse à tout le monde et non pas seulement à de malheureux petits soldats, à des chefs plus ou moins élevés dans la hiérarchie, mais à tous ceux qui prennent part aux hostilités, et il n'y a personne qui soit en dehors de ces règles: l'Empereur lui-même, le chef le plus élevé de l'Empire ne peut pas éviter la responsabilité qui pèse sur lui." [307]

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[305] "due to the immunity from accusation and prosecution enjoyed by a monarch head of State, according to the public law of all civilized countries and according to the common law of nations." *La paix de Versailles, in* La documentation internationale, Paris, 1930, éd. Internat, v.III, p. 332 (unofficial translation by Belgium) **(Annex 33)**

[306] *Ibid*; see also see p.440 (unofficial translation by Belgium). **(Annex 33)**

[307] "are such that they put the one who unleashed them directly under the rule of international law. When international law proclaims that a given act is reprehensible, this is addressed to everyone and not just to unfortunate little soldiers, to leaders higher or lower in the hierarchy, but to all those who take part in the hostilities, and there is no one to whom these rules do not apply: the Emperor himself,

**3.5.19** It is interesting to note that in these declarations, the refusal of immunity was based not on the international nature of the court charged with judging William II – the solution finally adopted – but on the internationally criminal nature of the acts that were charged against him. The American position remained isolated. None of the other States taking part in the deliberations of the Treaty of Versailles (Belgium, Greece, Japan, Poland, Romania, Serbia) supported it.

**3.5.20** William II's trial never took place. The Netherlands, which was not a Party to the Treaty of Versailles, refused to hand over William II to the Allied and Associated Powers on grounds of the political nature of the acts alleged against him.[308] While the Treaty of Versailles implicitly excluded the immunity of the German Head of State and that the acts charged against him were Acts of State,[309] it is significant that the Netherlands, although not a Party to this treaty, did not challenge this point since they did not refer to the immunity of the former Head of State to reject the request for extradition.[310]

*(ii) The Statutes of international criminal jurisdictions*

**3.5.21** The Statutes of international criminal jurisdictions all exclude immunity of the members of governments accused of crimes against peace, war crimes, crimes against humanity or the crime of genocide. For example, Article 7 of the *Charter of the International Military Tribunal of Nuremberg*, annexed to the *London Agreement* of 8 August 1945, provides:

> "The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be

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the highest leader of the Empire, cannot avoid the liability that weighs on him." *Ibid* , at p.336 (unofficial translation by Belgium).

[308] The DRC affirms that the extradition of William II "ne fut jamais formellement requise par les puissances alliées", ("was never formally requested by the Allied powers") DRC Memorial, p. 25, fn 2. Please see Kiss, A.C., however, who writes: "Conformément aux dispositions du traité, les puissances alliées et associées ont adressé 'au Gouvernement des Pays-Bas une requête le priant de livrer l'ancien empereur entre leurs mains pour qu'il soit jugé'. ("In conformity with the Treaty's provisions, the Allied and Associated powers sent 'a request to the Government of the Netherlands asking it to hand over the ex-emperor in order to judge him'.") see Kiss, A.C., *Répertoire de la pratique française du droit international public*, Paris, CNRS, 1966, v.II, n°1126.

[309] Lombois, C., *Droit pénal international*, Paris, Thémis, 1979, p.110, at paragraph 105.

[310] Kiss, *op. cit.*, fn. 2.

> considered as freeing them from responsibility or mitigating punishment."[311]

**3.5.22** In his report to the President of the United States, Justice Jackson referred to "the obsolete doctrine that a head of State is immune from legal liability". He then continued:

> "There is more than a suspicion that this idea is a relic of the doctrine of the divine right of kings. It is, in any event, inconsistent with the position we take toward our own officials, who are frequently brought to court at the suit of citizens who allege their rights to have been invaded. We do not accept the paradox that legal responsibility should be the least where power is the greatest. We stand on the principle of responsible government declared some three centuries ago to King James by Lord Chief Justice Coke, who proclaimed that even a King is still 'under God and the law'.
>
> With the doctrine of immunity of a head of state usually is coupled another, that orders from an official superior protect one who obeys them. It will be noticed that the combination of these two doctrines means that nobody is responsible. Society as modernly organised cannot tolerate so broad an area of official irresponsibility."[312]

**3.5.23** Article 6 of the Charter of the International Military Tribunal for the Far East, approved on 19 January 1946 by the Supreme Commander of the Allied Forces in the Far East, addresses the issue in similar terms:

> "Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires."[313]

**3.5.24** Other, more recent instruments, which address the issue in similar terms include:

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[311] **Supplementary Annex 88.**
[312] Report to the President by Mr. Justice Jackson, 6 June 1945, in Jackson, J. R., *International Conference on Military Trials, London 1945*, Washington, 1949, pp.46-47.
[313] **Supplementary Annex 89**

- Article 7(2) of the *Statute* of the International Tribunal for the former Yugoslavia:

> "The official position of any accused person, whether as head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment."[314]

- Article 6(2) of the *Statute* of the International Tribunal for Rwanda:

> "The official position of any accused person, whether as head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment."[315]

- Article 27 of the ICC *Statute* of 17 July 1998:[316]

> "1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
>
> 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."[317]

**3.5.25** The DRC considers that these instruments are not significant in the present context as:

- international criminal jurisdictions enjoy jurisdiction which are not transposable to national courts – "… les personnes jugées par ces tribunaux avaient cessé, à ce moment, d'exercer leurs fonctions officielles" ;[318]

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[314] S/RES/827, 25 May 1993. **(Supplementary Annex 90)**
[315] S/RES/955, 8 November 1994. **(Supplementary Annex 91)**
[316] Ratified by Belgium on 23 June 2000; signed by the DRC on 8 September 2000.
[317] **(Supplementary Annex 92)**
[318] "... the persons judged by these courts had ceased, at the time, to exercise their official functions" DRC Memorial, at paragraphs 42 and 67 (unofficial translation by Belgian).

- the ICC *Statute* is said to concern only States party to it and the text of certain of its provisions confirms that it does not authorise a State to infringe on the principle of immunity of Heads of State and members of foreign governments.[319]

These arguments will be considered in turn.

**3.5.26** Claiming that the national courts of a State cannot invoke the international rules provided for an international criminal court is a postulate. These rules are a part of practice. As from the time this practice appears to be an expression of custom, nothing prevents national courts from invoking them, as the DRC remarks itself from a general point of view, when it deals with the place of international custom in Belgian law.[320] However, as will be seen further, the exclusion of immunity of persons accused of the most serious violations of international humanitarian law, is among the "principles of Nuremberg" drawn by the ICL and by the General Assembly of the United Nations. It consequently corresponds to the *opinio juris* of States.

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

**3.5.28** The argument based on the fact that the defendants cited before international criminal courts did not in any case exercise official functions at the time of the trial, is not significant.

**3.5.29** If the defendants had lost all official capacity at the time they appeared before the international military tribunals, again it was unnecessary to stipulate in the statutes that immunity could not constitute an argument of defence. By so saying, the States indicated that immunity which normally continues for actions associated with

[319] DRC Memorial, at paragraph 42.

the office – *in casu*, the crimes in question had in fact been committed in the context of the duties of the defendants – was not admissible for such crimes. The fact that these were international tribunals and not national courts does not decrease the interest of these precedents because the argument of immunity was not rejected on the basis of the international nature of these courts, but simply due to the horror of the crimes in question. If the horror of the crime justifies the exclusion of immunity, it matters little whether the question arises before an international court or a national court. Before both, the same cause should produce the same effects.

**3.5.30** The DRC's argument, moreover, confirms Belgium's current position. If the cessation of official duties is what justifies that the person holding them can be brought to court, the DRC then recognises that nothing opposes the prosecution of Mr Yerodia Ndombasi today.

**3.5.31** With respect to the ICC *Statute*, it is true that it concerns persons who are nationals of the States party to the *Statute* or nationals who have committed crimes in the territory of those States and that the exclusion of immunity is applicable in the mutual relations of the States Party to the *Statute*. Even limited to the States Party to the Statute (and to States which have accepted the competence of the ICC without having ratified the Statute Article 12 § 2 and without prejudice to the hypothesis that all United Nations Member States are bound by the rule when the ICC is referred to directly by the Security Council, as per Article 13 of the *Statute*), the rule nevertheless proves that the seriousness of some acts excludes the application of any immunity for their perpetrator.

**3.5.32** The fact that the rule is set down in the *Statute* of an international court does not mean that it does not concern national courts, and this is true for several reasons.

(1) if it is true that the terms of Article 27(2) seem to be limited to the ICC alone,[321] conversely, Article 27(1) has a very general field of application;

[320] DRC Memorial, at paragraphs 25-26, 70.
[321] DRC Memorial, at paragraph 70.

(2) Article 27 must, in addition, be read taking into account the entire *Statute*, and particularly paragraphs 4 to 6 of the Preamble which require all States to prosecute the crimes listed in the *Statute*. Thus, as the DRC itself stated, the existence of a standard imposing the exercise of universal jurisdiction has *precedence* over the rule of immunity;[322]

(3) if the immunity of the members of foreign governments were not removed for the prosecution of the crimes set down in the *Statute*, the principle of complementarity would be unnecessary in most cases. Insofar as the jurisdiction of the ICC is limited to "the most serious crimes" (Article 1) and presenting a certain magnitude (Article 6, 7(1) and 8(1)), these crimes consequently are mostly imputable to the highest State authorities. If these authorities could argue the immunity traditionally recognised for the members of foreign governments, they would only be subject to prosecution in their State of origin and the subsidiary role of the Court would be effective only under this hypothesis. Conversely, the other States could never prosecute these crimes and the role of the Court, rather than being complementary, would become principal – which does not correspond to the intention of the authors of the *Statute*;

(4) the Venice Commission – an expert advisory body established by the Committee of Ministers of the Council of Europe on 10 May 1990[323] – meeting in its 45th plenary session in Venice on 15–16 December 2000, observed as follows:

> "States may provide in their national law that the national courts shall be competent to try a leader who has committed crimes within the jurisdiction of the International Criminal Court. This is possible because of the Statute is based on the principle of complementarity, but whatever solution is adopted, perpetrators of such crimes cannot plead immunity"[324]

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[322] See paragraph 3.5.23 above.

[323] Resolution 909(6); see www.venice.coe.int/site/iterfact/english.htm. See also Article 3 of the *Statute* of the Commission.

[324] *Report on Constitutional Issues Raised by the Ratification of the Rome Statute of the ICC*, note 13 **(Annex 34)**

**3.5.33** For these reasons, Article 27 of the ICC *Statute* shows that the immunity of the members of foreign governments cannot be an obstacle to criminal prosecution for crimes listed in the Statute, before whichever court the case may be brought.

**3.5.34** The DRC further maintains that Article 98(1) of the *Statute* justifies recognition of immunity of the alleged perpetrator of the crimes listed in the *Statute* despite the very clear terms of Article 27.[325] The argument is weak. Article 98(1), entitled "Cooperation with respect to waiver of immunity and consent to surrender", is found in Chapter IX of the *Statute* which concerns international cooperation and judicial assistance. It can only concern persons not accused of crimes listed in the *Statute*. If the person in question is charged with one of these crimes, Article 27 should apply. In addition, by specifying that the petitioned State cannot act in a way incompatible with the international obligations incumbent on it with regard to immunity, Article 98(1) clearly lets it be understood that the petitioned State does not infringe these obligations if it remits to the Court a person accused of the crimes provided for by the *Statute* since international law, in general, and Article 27, in particular, excludes immunity in such a case. This is the only way to reconcile the meaning of the two provisions and to maintain their effectiveness.[326]

**3.5.35** Literature confirms that Article 98 is in no way intended to reduce the scope of Article 27. For example, K. Prost and A. Schlunck comment as follows:

> "[Article 98] does not accord an immunity from prosecution to individuals, which the Court may seek to prosecute. Article 27 makes it clear that no such immunity is available. This particular article does not reduce the effect of Article 27 in any way. A person sought for arrest for prosecution by the Court cannot claim an immunity based on official capacity nor does such capacity effect the jurisdiction of the Court over the person."[327]

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[325] DRC Memorial, at paragraph 70.

[326] See *Maritime delimitation and territorial questions between Qatar and Bahrain*, ICJ Reports 1995, p.19.

[327] In O. Triffterer (*ed.*), *Commentary on the Rome Statute of the International Criminal Court*, Baden Baden, Nomos, 1999, p.1132. **(Annex 35)**

**3.5.36** On the hypothesis that Article 98(1) concerns a State not Party to the ICC *Statute*, the same reasoning applies. Once international customary law as it is disclosed in the many sources listed in this chapter – among others paragraphs 4–6 of the Preamble of the ICC *Statute* of the ICC[328] – excludes the immunity of persons accused of crimes provided for under the *Statute*, the State petitioned to co-operate with the ICC or with a State Party to the *Statute* that does not take account of the immunity of the alleged perpetrator of such a crime, does not act in a way incompatible with its international obligations. The contrary in fact is true. That State is only fulfilling its international obligations to co-operate with the punishment of the acts for which the person in question is accused.

**3.5.37** Generally speaking, the distinction between States party to the Statute, States having accepted the jurisdiction of the ICC, and States not Party to the *Statute* has only a limited scope since the Security Council, acting in virtue of Chapter VII of the Charter, can defer "a situation in which one or more of such crimes appear to have been committed" to the Prosecutor (*Statute*, Article 13(b)).[329] In this case, *any* United Nations Member State would be concerned, whether it is or is not party to the *Statute*. To meet this situation, it is logical to exclude, in general terms, the criminal immunity of high foreign representatives for crimes referred to by the ICC *Statute*.

**3.5.38** It is true that the Belgian law goes further to the extent that it also applies outside of the hypothesis mentioned above. But this is in compliance with international law as a whole as it appears in the sources cited in this Counter-Memorial.

*(iii) Law No. 10 of the Allied Control Authority*

**3.5.39** On 20 December 1945, the Allied Control Authority that administrated Germany adopted Law No.10 on the punishment of persons guilty of war crimes, crimes against peace and crimes against humanity. Although in this case the text was called a "law", it is similar to an international agreement since that "law" was adopted by an agreement of the four Powers administrating Germany at the end of the Second

[328] See paragraph 3.5.32 above.

World War. Article (4) provides, in terms that are more or less the same as the Statutes of the international criminal courts referred to above, as follows:

> "The official position of any person, whether as head of State or as a responsible official in a Government Department, does not free him from responsibility for a crime or entitle him to mitigation of punishment."[330]

**3.5.40** It is observed that this text applied both to prosecution before *national* courts, those being German courts,[331] and before foreign courts established in Germany. According to the Preamble of this text, the idea was to establish a uniform legal basis to prosecute war criminals in Germany:

> "In order to give effect to the terms of the Moscow Declaration of 30 October 1943 and the London Agreement of 8 August 1945, and the Charter issued pursuant thereto and in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal, the Control Council enacts as follows …"[332]

**3.5.41** The fact that the rule provided for the international criminal courts has been included for its application in the national legal order of a State by the occupying Powers proves that, contrary to what is affirmed by the DRC, the rule is indifferent to the international or national nature of the courts that apply it; the seriousness of the act justifying its application is all that counts. The DRC did not refer to this text.

*(iv) Convention on the Prevention and Punishment of the crime of Genocide*

**3.5.42** Article 4 of the Convention on Genocide of 9 December 1948 provides:[333]

> "Persons committing genocide or any of the other acts enumerated in Article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."[334]

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[329] **Supplementary Annex 92**.
[330] Text in Bassiouni, C., *International Criminal Law*, New York, Dovvs Ferry, 1987, III, at p.130. **(Annex 36)**
[331] Lombois C., *Droit pénal international*, Paris, Thémis, 1979, p.145 at paragraph 137.
[332] Bassiouni, *op. cit.*, III, at p.130. **(Annex 36)**
[333] Ratified by Belgium and the DRC, respectively on 6 December 1951 and 31 May 1962 (by succession)

**3.5.43** This provision clearly leads to the exclusion of immunity of persons who are normally found to benefit from it *qualitate sua*. Like Law No.10, this provision is meant to apply in the internal legal order of the States Party to the Convention. It again confirms that the rule of exclusion of immunity for perpetrators of war crimes, crimes against humanity and the crime of genocide applies, independently of the question as to whether a national or an international court is applying it.

**3.5.44** Only one State – the Philippines – expressed reservations about this article.[335] However, even here, three other States – Australia, Brazil and Norway – objected to these reservations.[336]

**3.5.45** The DRC Memorial did not discuss Article 4 of the Convention of 1948 although it was among those quoted by Belgium in the provisional measures phase.[337]

*(v) Resolutions of the U.N. organs*

**3.5.46** Already on 11 December 1946, the U.N. General Assembly adopted Resolution 95 (I) in which it set down the principles derived from the *Statute* and the Judgment of the Nuremberg International Military Tribunal ("IMT"). The Assembly, by this Resolution,

> "*confirm[ed]* the principles of international law recognised by the Statute of the Nuremberg Tribunal and by the judgment of that Court."[338]

**3.5.47** Among these principles appears the exclusion of immunity of agents of the State, whatever their rank in the State hierarchy, for crimes against peace, war crimes or crimes against humanity, as is set down in both the *Statute* of the Nuremberg IMT[339] and in the Tribunal's Judgment.[340] As we know, these principles were

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[334] **Supplementary Annex 87.**
[335] See *Traités multilatéraux deposés auprès du Secrétaire general, Etat au 31 déc. 1999*, I, UN Doc. ST/LEG/SER.E/18, p. 98.
[336] *Ibid*., pp.99-100
[337] CR 2000/33, 21 November 2000, p.22.
[338] **Supplementary Annex 93**.
[339] See paragraph 3.5.21 above.
[340] See paragraph 3.5.61 below.

subsequently codified in 1950 by the International Law Commission[341] which affirmed in Principle III:

> "The fact that a person who committed an act which constitutes a crime under international law acted as a head of State or responsible Government official does not relieve him from responsibility under international law."[342]

**3.5.48** These principles were discussed again by the Sixth Committee of the UN General Assembly which unanimously adopted certain paragraphs of the Preamble of what was to become Resolution 488 (V) of 12 December 1950 ("Formulation of the Nuremberg principles"), and notably the second paragraph which recalls that:

> "the G.A. by its Res. 95 (I) of 11 December 1946, unanimously confirmed the principles of international law recognised by the Statute of the Nuremberg Tribunal and by the judgment of that tribunal".[343]

**3.5.49** As concerns Principle III more specifically,[344] the representative of Belgium observed at the time that this

> "was based on a supremely just idea that the person who was the head of state should be the first to bear the responsibility and to suffer the penalty to which he was liable under international law in order to ensure that war criminals would receive their just punishment."[345]

**3.5.50** The DRC Memorial did not discuss the deliberations of the U.N. General Assembly.

**3.5.51** On 24 May 1989, the U.N. Economic and Social Council adopted the "Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions". Principle 19 of this text provides:

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[341] See paragraph 3.5.105 below.
[342] **Supplementary Annex 95**.
[343] 239th Meeting of the 6th Committee of the UN General Assembly, 5th Session, at paragraph 43.
[344] See paragraph 3.5.47 above.
[345] *Ibid.*, 235th Session, 8 Nov. 1950, at paragraph 44. **(Annex 37)**

> "In no circumstances, including a state of war, siege or other public emergency, shall blanket immunity from prosecution be granted to any person allegedly involved in extra-legal, arbitrary or summary executions."[346]

**3.5.52** In its Resolution 44/159 of 15 December 1989, the U.N. General Assembly *welcomed* with satisfaction these Principles.[347]

**3.5.53** The DRC Memorial does not discuss these texts although they were produced by Belgium in the proceedings on a request for provisional measures.

**3.5.54** On 14 October 1994, the Chairman of the Security Council declared in its name:

> "The Council reaffirms that all those responsible for grave breaches of international humanitarian law and acts of genocide must be brought to justice. It underlines that the persons who participated in such acts "cannot achieve immunity from prosecution" by fleeing the country [ ...]. In this context, the Council is currently examining the recommendations of the Commission of experts on the creation of an international court and it intends to make haste on this question."[348]

**3.5.55** For Morris and Scharf, this declaration is an illustration of the rule that criminal immunity is incompatible with the obligation to prosecute perpetrators of serious crimes under international humanitarian law.[349]

*(b) National sources excluding the immunity of alleged perpetrators of serious crimes of international humanitarian law*

**3.5.56** National laws that exclude the immunity of leaders who have committed crimes against international humanitarian law are scarce, although they exist and have not been challenged. Thus, following the Second World War, Article VIII of the Chinese Law of 24 October 1946 provided that the following circumstances:

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[346] **Supplementary Annex 93**.
[347] *Ibid.*
[348] S/PRST/1994/59, 14 October 1994. **(Annex 38)**
[349] *The International Criminal Tribunal for Rwanda*, Irvington-on-Hudson, New York, Transnational Publications, 1998, p.289; see paragraph 3.5.131 above. **(Annex 39)**

> "… do not in themselves relieve the perpetrator from penal liability for war crimes:
> …
> (2) that crimes were committed as a result of official duty;
> (3) that crimes were committed in pursuance of the policy of the offender's government;
> …"[350]

**3.5.57** Similarly, Article II(4) of the Luxembourg Law of 2 August 1947 provides:

> "In no instances can the application of the laws mentioned in Article 1 be set aside under the pretext that the authors or co-authors of, or the accomplices in, the offences acted in the capacity of an official, a soldier or an agent in the service of the enemy …"[351]

**3.5.58** The Council of Europe's Steering Committee for Human Rights asked its members about certain paragraphs of Recommendation 1327 (1997) adopted by the Parliamentary Assembly of the Council of Europe. For the public international law service of the Swiss Federal Department for Foreign Affairs, the punishment of "grave breaches of human rights", "being of an imperative nature", must prevail over the immunity of Article 31 of the Vienna Convention of 1961.[352] Switzerland observed that in the *Golder* case, the European Court of Human Rights stated that Article 6 of the *European Convention on Human Rights* did not affect the system of diplomatic immunity, but added:

> "Ce respect du principe de l'immunité diplomatique ne doit cependant pas conduire à vider l'art. 6 CEDH de son contenu [réf. omise]. Ainsi, l'on pourrait admettre qu'un agent diplomatique soit actionné pénalement devant un tribunal suisse malgré son immunité de juridiction pénale, à la condition que la victime ne soit pas en mesure d'obtenir la levée de l'immunité de cet agent et que l'accusation porte sur une violation grave des droits de l'homme."[353]

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[350] Text in *Law Reports of Trials of War Criminals*, London, 1949, XIV, p.157 and 1950, XV, at p.161. **(Annex 40)**

[351] *Ibid.* **(Annex 40)**

[352] Caflisch, L., "La pratique suisse en matière de droit international public 1998", RSDIE, 1999, p.689. **(Annex 41)**

[353] "Compliance with the principle of diplomatic immunity must not, however, result in the annulment of the content of Article 6 ECHR. Thus, one can admit that a diplomatic agent can be brought before a Swiss criminal court despite his criminal immunity, subject to the condition that the victim is not in a

**3.5.59** Further to an investigation by the Council of Europe on the implementation of the ICC *Statute* in national law, certain States have, incidentally, affirmed that the rule of immunity of the Head of State does not apply in the case of grave crimes such as those for which the ICC is competent. Thus, the following is statement was made in a declaration of the Norwegian Government to the *Storting* (Parliament) on the ratification of the ICC *Statute*:

> "L'évolution du droit tend elle aussi à faire que les chefs d'Etat ne peuvent plus bénéficier de l'immunité pour les crimes les plus graves."[354]

**3.5.60** Poland stated in the same Council of Europe study:

> "responsibility of state officials under international law, regardless of their office and function (including crimes covered by the jurisdiction of the Court) constitutes a clearly binding norm of the customary international law as formed on the basis of the Nuremberg rules and subsequent international practice (the Pinochet case)."[355]

*(c) International jurisprudence addressing the immunity of alleged perpetrators of serious crimes of international humanitarian law*

**3.5.61** International case-law clearly affirms the principle of exclusion of the immunity of the agent of a foreign State for crimes in international humanitarian law. Thus, the Nuremberg IMT declared:

> "The principle of international law, which under certain circumstances protects the representative of a State, cannot apply to acts condemned as crimes by international law. The perpetrators of these acts cannot refer to their official capacity to escape the normal procedure or to protect themselves from punishment."[356]

**3.5.62** This passage is important from two standpoints:

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position to obtain relief of immunity of the agent and that the accusation deals with a grave breach of human rights." *Ibid.*, at pp.689-690 (unofficial translation by Belgium).

[354] "Evolution of law also tends to make it so that heads of State can no longer benefit from immunity for the most serious crimes" Proposition n° 24 (1999-2000) to the *Storting* (unofficial translation by Belgium). **(Annex 42)**

[355] Progress Report by Poland, 7 August 2001, Consult/ICC (2001) 22, at p.4. **(Annex 43)**

- it is entirely general and takes no account of whether the acts in question are judged by an international or national court;

- whereas Article 7 of the *Statute* of the Nuremberg IMT (like the corresponding provisions of other international criminal tribunals), considered literally, seems only to disregard the official capacity of the accused as grounds for excuse or justification with regard to the substance of the question, and not as a procedural exception, the extract quoted above from the Judgment of the Tribunal clearly shows that immunity is disregarded both as a procedural exception – "[t]he perpetrators of such acts cannot refer to their official capacity to escape the normal *procedure*" – and as a possible excuse or justification – "[t]he authors of these acts cannot invoke their official capacity to ... *protect themselves from punishment*" (emphasis added).

**3.5.63** The DRC recognises that the official capacity of the accused is not grounds for exemption from criminal liability or for a reduction of sentence,[357] but denies that the criminal violation of international humanitarian law that is imputed to the accused can justify an exception to his criminal immunity. The extract of the Judgment of the Nuremberg Tribunal quoted above answers this objection very clearly. The DRC refrained from discussing this, although this extract was also among those quoted by Belgium in the phase on provisional measures.[358]

**3.5.64** The Tokyo IMT confirmed the principles established by the Nuremberg IMT. Among the exceptions raised by the Japanese defendants, one of them stated:

> "War is the act of a nation for which there is no individual responsibility under international law."[359]

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[356] Judgments of 30 Sept. and 1 Oct. 1946, Off. Doc., v. I, p.235, **(Annex 94)**.
[357] DRC Memorial, at paragraphs 59-60.
[358] CR 2000/33, 21 November 2000, at p.22.
[359] Text in Röling and Ruter (ed.), *The Toyko Judgement*, Amstedam University Press, 1977, vol. I, at p.27 (p. 24 of the original text). **(Annex 44)**

**3.5.65** In dismissing the argument, the Tribunal recalled and approved various parts of the Nuremberg Judgment, notably the extract quoted above.[360] The Tribunal declared:

> "With the foregoing opinions of the Nuremberg Tribunal and the reasoning by which they are reached this Tribunal is in complete accord. They embody complete answers to the first four of the grounds urged by the defence as set forth above. In view of the fact that in all material respects the Charters of this Tribunal and the Nuremberg Tribunal are identical, this Tribunal prefers to express its unqualified adherence to the relevant opinions of the Nuremberg Tribunal rather than by reasoning the matters anew in somewhat different language to open the door to controversy by way of conflicting interpretations of the two statements of opinions."[361]

**3.5.66** Thus the Tribunal rejected the exception founded on the diplomatic capacity of General Oshima, Ambassador of Japan to Berlin from 1939 to 1945, who was among the defendants:

> "Oshima's special defence is that in connection with his activities in Germany he is protected by diplomatic immunity and is exempt from prosecution. Diplomatic privilege does not import immunity from legal liability, but only exemption from trial by the Courts of the State to which an Ambassador is accredited. In any event, this immunity has no relation to crimes against international law charged before a tribunal having jurisdiction. The Tribunal rejects this special defence."[362]

**3.5.67** The case-law of the ICTY comes to similar conclusions. For example in the *Furundzija* case, a Chamber of the ICTY concluded:

> "Individuals are personally responsible, whatever their official position, even if they are heads of State or government ministers".[363]

**3.5.68** It went on to add that the provisions of the ICTY *Statute* which exclude the immunity of State agents "are indisputably declaratory of international customary law".[364]

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[360] See paragraph 3.5.61 above.
[361] *Ibid*., p.28 (p. 26 of the original text). **(Annex 44)**
[362] *Ibid*., p.456 (p. 1189 of the original text). **(Annex 44)**
[363] ICTY, *Furundzija*, Case no. IT-95-17/1-T, 10 December 1998, at paragraph 140. **(Annex 45)** See also Dupuy, P.-M., "Crimes et immunités ou dans quelle mesure la nature des premiers empêche l'exercice des secondes?", *RGDIP*, 1999, at p.292.
[364] *Ibid*., *Furundzija* **(Annex 45)** See also ICTY *Statute*, Article 7(2) and ICTR *Statute*, Article 6(2).

**3.5.69** In the *Kunarac* case, another Chamber of the ICTY affirmed in turn:

> "Likewise, the doctrine of 'act of State', by which an individual would be shielded from criminal responsibility for an act he or she committed in the name of or as an agent of a state, is no defence under international criminal law. This has been the case since the Second World War, if not before. Articles 1 and 7 of the Statute make it clear that the identity and official status of the perpetrator is irrelevant insofar as it relates to accountability."[365]

**3.5.70** Even if the Chamber refers to Article 1 and 7 of its *Statute*, the proposition is clearly of a general nature and is in no way limited to cases of persons prosecuted before an international criminal court.

**3.5.71** As regards national jurisprudence, the *Eichmann* case illustrates this principle. The defendant in that case pleaded an Act of State. This was rejected by the Supreme Court of Israel by reference to Article 4 of the *Genocide Convention* and the principles of Nuremberg which had become "part of the law of nations and must be regarded as having been rooted in it also in the past".[366] For the District Court of Jerusalem, this provision "affirm[ed] a principle recognised by all civilised nations".[367] The Israel Supreme Court went on to add on the same point:

> "The very contention that the systematic extermination of masses of helpless human beings by a Government or regime could constitute 'an act of State' appears to be an insult to reason and a mockery of law and justice."[368]

**3.5.72** Other national judicial decisions are along the same lines. Although several of them deal with civil cases, they are nevertheless significant. This holds for the application by the American case law of the *Alien Tort Claims Act* of 1789 to persons who, having occupied important State functions, claim to benefit from the *act of State doctrine* in this capacity. It may be recalled that the *Alien Tort Claims Act* allows any

[365] ICTY, *Kunarac, Kovac* and *Vukovic*, Case nos. IT-96-23-T and IT-96-23/1-T, 22 February 2001, at paragraph 494. **(Annex 46)**
[366] 36 *ILR* at p.311, 29 May 1962.
[367] 36 *ILR*, at p.48, 12 Dec. 1961.
[368] *Ibid*., p.312.

foreigner who considers himself to be the victim of a violation of international law to claim compensation before the American courts:

> "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[369]

**3.5.73** Although this is a question of civil proceedings and the person against whom the claim is filed would argue the doctrine of an *act of State* rather than that of immunity, the reasoning of judges in cases brought under this Act rejecting the act of State doctrine due to the *international* illegality of the acts in question applies equally to please of immunity in criminal courts. The acts to which the law applies – torture, massacre, etc – confirm the validity *in casu* of reasoning by analogy.

**3.5.74** In the *Suarez-Mazon* case, the defendant, a former commander of the first Army Corps which had control of the province of Buenos Aires at the time of the siege in Argentina in 1976-1979, objected to the application of the act of State doctrine in a civil suit filed against him by Argentine citizens in the United States on the basis of the *Alien Tort Claims Act* claiming compensation for acts of torture, arbitrary detention and summary executions committed against them and members of their family at that time. For the American District Court, the acts referred to by the *Alien Tort Claims Act* may have been "official",

> "[b]ut this is not necessarily the governmental and public action contemplated by the act of State doctrine."[370]

**3.5.75** The Court added that if this doctrine had to be applied to all acts of State, the *Alien Tort Claims Act* could never be applied:

> "These allegations of officials for purpose of § 1350 [the Alien Tort Claims Act in the U.S. code] do not necessarily require application of the act of state doctrine. Indeed, since violations of the law of nations virtually all involve acts practiced, encouraged or condemned by states, defendant's arguments would in effect

[369] 28 U.S. Code § 1350 (1988)
[370] *Forti* v. *Suarez-Mason* (U.S. Distr. Crt., N.D. Col.), 6 Oct. 1987, 95 *ILR* at p. 638.

> preclude litigation under § 1350 for torts (...) committed in violation of the law of nations.[371]

**3.5.76** In the *Karadzic* and *Barayagwiza* cases, the American courts considered that the *Alien Tort Claims Act* enabled them to prosecute acts of genocide, whether or not they were committed by a State or in the name of State.[372] Thus, with regard to acts of genocide imputed to the first defendant, the Court of Appeal declared:

> "… we doubt that the acts of even a state official, taken in violation of a fundamental law and wholly unratified by that nation's government, could properly be characterised as an act of state."[373]

**3.5.77** In the *Noriega* case – which involved criminal proceedings against General Noriega of Panama – the defendant also argued that the acts that were charged against him were not subject to American jurisdiction under the *act of State doctrine* as this prohibited the judge from adjudicating on the legality of acts of a foreign government. The court, however, rejected the plea observing that it did not see how

> "Noriega's alleged drug trafficking and protection of money launderers could conceivably constitute public action taken on behalf of the Panamanian State".[374]

**3.5.78** In the *Marcos* case, an American Court of Appeal considered that torture, forced disappearance and extra-judicial executions imputed to the former Filipino dictator violated the *jus cogens*[375] and "were clearly outside his authority as President".[376] Consequently, they were not "the acts of an agency or instrumentality of a foreign state within the meaning of [the US Foreign Sovereign Immunities Act]".[377]

**3.5.79** The same reasoning was used with regard to a former defence Minister of Guatemala, Gramajo, who invoked the Foreign Sovereign Immunities Act ("FSIA")

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[371] *Ibid*.
[372] (US CA, 2nd Cir.), 13 Oct. 1995, *ILM*, 1995, at p.1602, and 104 *ILR* at p. 135; (US Distr. Crt., NYED), 9 Apr. 1996, 107 *ILR* at p.459.
[373] *Idid.* 104 *ILR* at p.163.
[374] (US Distr. Crt., SDFla.) 8 June 1990, 99 *ILR* at p.164.
[375] *Hilao v. Marcos* (US CA, 9th Cir.), 16 June 1994, 104 *ILR* at p. 126.
[376] *Ibid*., p.125.
[377] *Ibid.*

to counter a suit for compensation filed before an American court by a person who had been tortured by the services of that minister. For the judge, these acts "exceed[ed] anything that might be considered to have been lawfully within the scope of Gramajo's official authority". Consequently, even if the FSIA applied to civil servants, the minister could not benefit from it.[378]

**3.5.80** These decisions show again that the horror of certain acts and their international illegality is the reason for excluding the immunity of State agents who are responsible for them.

**3.5.81** In the *Pinochet* case, it will be remembered that the House of Lords reversed the decision of the *Divisional Court* which on 28 October 1998, had upheld the immunity from jurisdiction claimed by the former Chilean dictator.[379] In its decision of 25 November 1998, the Chamber of the Lords set aside the immunity on the grounds of the fact that Pinochet was not in function any longer, and that, if he kept this immunity only for the acts committed in the exercise of his functions, the facts that were reproached to him, could not be assimilated to the acts of the function. In its second (and definitive) Judgment on the matter, of 24 March 1999, the House of Lords decided by a majority of six to one that General Pinochet could not benefit from immunity as regards acts of torture committed after 8 December 1988 when the UN *Convention Against Torture* of 10 December 1984 entered into force for the United Kingdom.[380]

**3.5.82** Among the justifications given by the Lords for rejecting General Pinochet's claim to immunity of jurisdiction were a number of US cases referred to above.[381] These may be summarised as follows:

- international instruments – such as the ILC *Draft Code of Crimes Against the Peace and Security of Mankind* and the *Statutes* of the ICTY, ICTR and ICC

[378] *Xuncax v. Gramajo* (US Distr. Crt., DMass.), 12 April 1995, 104 *ILR* at p.176.
[379] *ILM*, 1999, at pp.70-90, 3 Nov. 1998.
[380] For a reasoned criticism of this *ratione temporis* limitation, see Cosnard, M., "Quelques observations sur les décisions de la Chambre de Lords du 25 novembre 1998 et du 24 mars 1999 dans l'aff. Pinochet", *RGDIP*, 1999, at pp.325-328.
[381] See paragraphs 3.5.74 *et seq.* above.

– rejected immunity of jurisdiction for crimes against peace, war crimes and crimes against humanity;[382]

- although a former Head of State continues to benefit from immunity *ratione personae* for official acts, acts of torture can in no way be assimilated to such acts given that torture is not only prohibited but is also a violation of international law:

> "The alleged acts of torture by Senator Pinochet were carried out under colour of his position as head of state, but they cannot be regarded as functions of head of state under international law when international law expressly prohibits torture as a measure which a state can employ in any circumstances whatsoever and has made it an international crime".[383]
>
> "International Law cannot be supposed to have established a crime having the character of a *jus cogens* and at the same time to have provided an immunity which is co-extensive with the obligation it seeks to impose".[384]
>
> "Had the Genocide Convention not contained this provision [Article 4], an issue could have been raised as to whether the jurisdiction conferred by the Convention was subject to state immunity *ratione materiae*. Would international law have required a court to grant immunity to a defendant upon his demonstrating that he was acting in an official capacity? In my view it plainly could not. I do not reach that conclusion on the ground that assisting in genocide can never be a function of a state official. I reach that conclusion on the simple basis that no established rule of international law requires state immunity *ratione materiae* to be accorded in respect of prosecution for an international crime. International crimes and extra-territorial jurisdiction in relation to them are both new arrivals in the field of public international law. I do not believe that state immunity *ratione materiae* can co-exist with them. The exercise of extra-territorial jurisdiction overrides the principle that one state will not intervene in the internal affairs of another. It does so because, where international crime is concerned, that principle cannot prevail. An international crime is as offensive, if not more offensive, to the international community when committed under colour of office. Once extra-territorial jurisdiction is established, it

[382] House of Lords, 24 March 1999, *op. cit.*, Lord Hutton, at pp.634 *et seq*, and Lord Millett, at p.647.
[383] *Ibid*., Lord Hutton, at p.638; see also pp.639, 642.
[384] *Ibid*., Lord Millet, at p.651.

> makes no sense to exclude from it acts done in an official capacity."[385]

- as regards the argument that immunity was necessary to protect official capacity, some Lords stated that the argument:

> "can hardly be prayed in aid to support the availability of the immunity in respect of criminal activities prohibited by international law".[386]

> "I do not believe that those functions [the official functions of a former head of state], as a matter of statutory interpretation, extend to actions that are prohibited as criminal under international law."[387]

- the prohibition of torture is a *jus cogens* rule. The *ratione materiae* immunity of former Heads of State is therefore incompatible with the Convention against Torture. By definition, the torturer is a State agent and it would be absurd to prosecute him if the Head of State for whom he was acting could not be prosecuted:

> "… if the former head of state has immunity, the man most responsible will escape liability while his inferiors (the chiefs of police, junior army officers) who carried out his orders will be liable. I find it impossible to accept that this was the intention."[388]

Lord Browne-Wilkinson added that the *Convention Against Torture* refers only to State agents. It could therefore never apply if the immunity of those agents had to be recognised, and this was certainly not the aim of the Convention:

> "Under the Convention the international crime of torture can only be committed by an official or someone in an official capacity. They would all be entitled to immunity. It would follow that there can be no case outside Chile in which a successful prosecution for torture can be brought unless the

[385] *Ibid*., Lord Phillips of Worth Matravers, at p.661.
[386] *Ibid*., Lord Millett, at p.645; see also p.646.
[387] *Ibid*., Lord Phillips of Worth Matravers, at p.663.
[388] *Ibid*., Lord Browne-Wilkinson, at p.594.

> State of Chile is prepared to waive its right to its official immunity. Therefore the whole elaborate structure of universal jurisdiction over torture committed by officials is rendered abortive and one of the main objectives of the Torture Convention – to provide a system under which there is no safe haven for torturers – will have been frustrated. In my judgment all these factors together demonstrate that the notion of continued immunity for ex-heads of state is inconsistent with the provisions of the Torture Convention."[389]

Even if the judge's reasoning is confined to the case of former Heads of State, it is also applicable, as such, to the case of high foreign representatives in power. Other Lords put forward similar reasoning.[390]

**3.5.83** Although the DRC also referred to the *Pinochet* case, it of course refrained from quoting the above extracts. Its Memorial refers to a passage by "Lord Browe-Wilkinson dont l'opinion forma la majorité de la Cour", and who declared that the Head of State benefits from "complete immunity".[391] In fact, the judge in question simply referred to the general rule, and this reference is that much less significant for the "complete criminal immunity" defended by the DRC[392] in that, as has just been addressed,[393] the judge belonged to the majority which recognised that Pinochet's claim to immunity[394] should be rejected. The DRC insists on the fact that, in the decision of the Chamber of the Lords of 25 November 1999, Lord Nicholls had acknowledged the immunity of an acting Head of State. But the DRC forgets that Lord Nicholls concluded that Pinochet was not entitled to plead this immunity:

> "From this time on [*Nuremberg*], no head of State could have been in any doubt about his potential personal liability if he participated in acts regarded by international law as crimes against humanity. […] Even such a broad principle [the act of State doctrine], however would not assist Senator Pinochet. In the same way as acts of torture and hostage-taking stand outside the limited immunity afforded to a former head of state by section 20 [of the State Immunity Act 1978], because those acts cannot be regarded

[389] *Ibid.*, at pp.594-595.
[390] *Ibid*., Lord Saville of Newdigate at p.643; Lord Phillips of Worth Matravers, at p.661; see also but more indirectly, Lord Hutton , at p.639.
[391] ("Lord Browe-Wilkinson, whose opinion expressed the majority of the Court") DRC Memorial, at paragraph 63 (unofficial translation by Belgium).
[392] DRC Memorial, at paragraphs 50-51 and 62.
[393] See paragraph 3.5.82 above.
[394] *Op. cit.*, *ILM*, 1999, at p.595.

> by international law as a function of a head of state, so far a similar reason Senator Pinochet cannot bring himself within any such broad principle applicable to state officials. Acts of torture and hostage-taking, outlawed as they are by international law, cannot be attributed to the state to the exclusion of personal liability."[395]

As to Lord Steyn, he affirmed in this decision:

> "[…] the development of international law since the Second World War justifies the conclusion that by the time of the 1973 *coup d'Etat*, and certainly ever since, international law condemned genocide, torture, hostage taking and crimes against humanity (during an armed conflict or in peace time) as international crimes deserving of punishment. Given this state of international law, it seems to me difficult to maintain that the commission of such high crimes may amount to acts performed in the exercise of functions of a Head of State."[396]

**3.5.84** The DRC could have referred to the opinions of other judges who, in the Judgment of 24 March 1999, while considering that Pinochet did not benefit from immunity *ratione materiae*, nevertheless reserved the case of immunity *ratione personae,* that being the immunity of a Head of State in power.[397] In Belgium, this reservation is not founded, given the international rules recalled above, on the exclusion of immunity for crimes of international humanitarian law, rules which make no distinction at all between immunity *ratione materiae* and immunity *ratione personae*.

**3.5.85** An important point must nevertheless be made. Belgium accepts that the fact of being *in office* for a Head of State could entitle him to a certain immunity, but this would not be an objective immunity opposable *erga omnes*. It would be nothing but the expression of acceptance by the State of jurisdiction to host, for one reason or another, the Head of State in question. This would entail the renunciation by the State of jurisdiction as regards the prosecution of the Head of State for the duration of his visit. This is a different situation to that which will be considered further below.

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[395] *Regina v. Bartle, ex parte Pinochet, ILM*, 1998, pp. 1333-1334.
[396] *Ibid*., p. 1337.
[397] *Ibid.*, Lord Hope of Craighead, at p.626; Lord Millett, at p.644; Lord Phillips of Worth Matravers, at p.653.

**3.5.86** In Belgium, when complaints were filed against General Pinochet, the investigating judge before whom the matter was brought justified his jurisdiction, and dismissed the claims based on immunity of jurisdiction for acts in an official capacity, on grounds of the gravity of the acts with which the General was charged and without taking account of the fact that the accused was no longer in office:

> "En ce qui concerne la personne ayant le statut d'ancien chef d'Etat, elle cesse de jouir des immunités conférées à l'exercice de sa fonction lorsque celle-ci prend fin. Elle continue cependant à jouir des immunités pour tous les actes accomplis dans l'exercice de ses fonctions de chef d'Etat pour autant que cette immunité ne soit pas levée par l'Etat d'envoi
>
> Si les crimes reprochés actuellement à Monsieur Pinochet devaient être considérés comme établis, on ne saurait cependant considérer qu'ils aient été accomplis dans le cadre de ses fonctions : de tels actes criminels ne peuvent être censés rentrer dans l'exercice normal des fonctions d'un chef d'Etat, dont l'une des missions consiste précisément à assurer la protection de ses concitoyens.
>
> …
>
> 'La protection que le droit international assure aux représentants de l'Etat ne saurait s'appliquer à des actes criminels. Les auteurs de ces actes ne peuvent invoquer leur qualité officielle pour se soustraire à la procédure normale et se mettre à l'abri du châtiment'." [398]

**3.5.87** The DRC sets great store by the Judgment given by the French *Cour de Cassation* in the *Qadafi* case on 13 March 2001.[399] In that case, the court overturned the decision of the *chambre d'accusation* of the Court of Appeal of Paris ruling that an investigation should be made of complaints lodged against Colonel Qadafi for his

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[398] "As concerns a person having the status of a former Head of State, he or she ceases to enjoy immunity conferred on the exercise of that function when those duties terminate. He or she continues, however, to enjoy immunity for all acts carried out in the exercise of his or her duties of the head of State insofar as that immunity is not removed by the State of which he or she is an envoy.

If the crimes alleged against Mr. Pinochet should be considered to be founded, it could not nevertheless be considered that they were carried out in the context of his duties: such criminal acts cannot be considered as falling under the normal exercise of the duties of a head of State, whose assignments specifically include among other things ensuring the protection of its citizens.

The protection that international law grants to representatives of the State cannot apply to criminal acts. The perpetrators of these acts cannot argue their official capacity to be exempt from normal prosecution and to escape punishment (IMT of Nuremberg, 1 October 1946, quoted in J. Salmon, *Manuel de droit diplomatique*, Bruylant 1994, at pp.602-603; unofficial translation by Belgium; Court Order of 4 November 1998, *RDPC*, 1999, at p.278; Unofficial translation by Belgium; see also Bosly and Labrin, *J.T.*, 1999, and the critical note by Verhoeven, at p.308.

[399] DRC Memorial, at paragraph 64.

alleged involvement in the bombing which resulted in the destruction of the UTA aircraft over Niger in September 1989.

**3.5.88** Before examining the judgment of the *Cour de Cassation*, it will be helpful to recall what the *chambre d'accusation* of the Court of Appeal of Paris had said. Based notably on the *Statutes* of the international criminal courts, it concluded that these sources showed:

> "la volonté de la communauté internationale de poursuivre les faits les plus graves, y compris lorsqu'ils sont commis par un chef d'Etat dans l'exercice de ses fonctions, dès lors que ceux-ci constituent des crimes internationaux, contraires aux exigences de la conscience universelle."[400]

**3.5.89** For the *chambre d'accusation*, the ICC *Statute*, as well as the *Pinochet* case in the United Kingdom and the *Noriega* case in the United States, were:

> "la preuve d'une pratique générale acceptée par tous, y compris la France, comme étant le droit, selon laquelle l'immunité ne couvre que les actes de puissance publique ou d'administration publique accomplis par le chef de l'Etat, à condition qu'ils ne soient pas considérés comme des crimes internationaux."[401]

**3.5.90** Although the decision of the *chambre d'accusation* was subsequently overturned, it nevertheless shows that, in the opinion of the judges, there are exceptions in international law to the immunity of a Head of State in office.

**3.5.91** We will see that this is also the case for the French *Cour de Cassation* and that the only point of disagreement lies in the identification of the crimes on which the exceptions to immunity can be founded.

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[400] "the determination of the international community to prosecute the most serious acts, including when they are committed by a head of State in the exercise of his functions, when these constitute international crimes, contrary to demands of universal conscience" Judgment of 20 Oct. 2000 (unofficial translation by Belgium). **(Annex 49)**

[401] "the proof of a practice generally accepted by all, including France, as being the law, according to which immunity only covers acts of public power or public administration carried out by the head of State under the condition that they are not considered international crimes." (unofficial translation by Belgium). *Ibid.*

**3.5.92** As regards the *Cour de Cassation*, two grounds of this Judgment are important:

> "Attendu que la coutume internationale s'oppose à ce que les chefs d'Etat en exercice puissent, en l'absence de dispositions internationales contraires s'imposant aux parties concernées, faire l'objet de poursuites devant les juridictions pénales d'un Etat étranger;
> ...
> Mais attendu qu'en prononçant ainsi [rejet de l'immunité par la chambre d'accusation pour des faits de complicité de terrorisme], alors qu'en l'état du droit international, le crime dénoncé, quelle qu'en soit la gravité, ne relève pas des exceptions au principe de l'immunité de juridiction des chefs d'Etat étrangers en exercice, la chambre d'accusation a méconnu le principe susvisé; ..."[402]

**3.5.93** Independently of the fact that this Judgment has been criticised in the literature,[403] simply reading the grounds reproduced above, shows that, contrary to that which is maintained by the DRC, the Judgment does not confirm "qu'un chef d'Etat en exercice bénéfice d'une inviolabilité et d'une immunité pénale absolues, même en cas d'accusation de crime de droit international."[404] On the contrary, the *Cour de Cassation* explicitly recognised in the second item of the grounds quoted above that there are exceptions to the principle of the immunity of jurisdiction of foreign Head to State in power, but that they do not include acts of terrorism.[405] Formally speaking, this reasoning corresponds to reality since most texts which provide for the immunity of jurisdiction of a Head of State in office concern *only* crimes against peace and the gravest breaches of international humanitarian law, ie, war crimes, crimes against humanity and the crime of genocide.[406] They do not, however, expressly apply to acts of terrorism.

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[402] "Whereas international custom is opposed to the prosecution of Heads of States in power by the criminal courts of a foreign State, in the absence of international provisions to the contrary that bind the parties concerned; …
But whereas, by ruling in this way [rejection of immunity by the *chambre d'accusation* for acts of complicity with terrorism], with respect to international law, the charge, however serious it may be, is not among the exceptions to the principle of immunity of a foreign head of State in power, the *chambre d'accusation* has failed to recognize the above principle; ..." (unofficial translation by Belgium) *Ibid.*

[403] Cassese, A., *International Law*, Oxford University Press, 2001, p. 260. **(Annex 47)** See also Zappala, S;, "Do Heads of State in Office enjoy immunity from jurisdiction for international crimes?", *EJIL*, 2001, pp. 595-612 **(Annex 48)**.

[404] "that a head of State in office benefits from complete inviolability and immunity, even in the case of accusation of international crime." DRC Memorial, at paragraph 62 (unofficial translation by Belgium).

[405] Zappala, *loc. cit.*, at pp.601 and 604. **(Annex 48)**

[406] See paragraphs 3.5.14 *et seq.* above.

**3.5.94** The memorial lodged to support the *pourvoi en cassation* in the Qadafi case, filed on 14 November 2000 by the Federal Prosecutor of the Court of Appeal of Paris, confirmed the above. The Prosecutor recognised that conventional international law excludes the immunity of Heads of State for crimes falling under the *Statutes* of international criminal courts but observed that these do not extend the exclusion of immunity to terrorism. In keeping with the principle of the restrictive interpretation of criminal law, it could not therefore be argued that immunity ceased to apply in cases other than those stipulated by conventional international law. He stated notably that prosecution before international criminal courts was only possible "parce que des dispositions expresses avaient été prises en ce sens par les conventions ou résolutions ayant créé ces tribunaux".[407]

**3.5.95** The Prosecutor further observed, however:

> "Sans doute l'évolution du droit pénal international tend-elle, conformément à la position adoptée par une partie des Etats, à restreindre la portée des immunités traditionnellement admises. Mais ces restrictions sont, comme toujours en matière pénale, d'interprétation stricte."[408]

**3.5.96** It can be observed that at no time did the Prosecutor claim to limit the exclusion of immunity to international criminal courts alone. He based the exclusion of immunity on the existence of conventional sources, not on the international nature of the courts in question.

**3.5.97** In his conclusions lodged at the hearing of 27 February 2001, the *Avocat général* included these arguments while also developing others.[409] He appears notably to admit that certain rules of *jus cogens*, such as the prohibition of torture or genocide, could take precedence over the customary rule of immunity of the Head of State and he only rejected the argument because the references to *jus cogens* were to

[407] "because of express provisions provided by the conventions or resolutions that created the tribunals". (Unofficial translation by Belgium) (Unpublished). **(Annex 50)**

[408] "No doubt the evolution of international criminal law tends to restrict the scope of traditionally accepted immunity, in keeping with the position adopted by some of the States. However, these restrictions, as always in criminal matters, are to be interpreted strictly." (Unofficial translation by Belgium) (Unpublished). **(Annex 50)**

be found in the *Vienna Convention on the Law of Treaties* and France is not a party to this Convention. *A contrario*, the *Avocat général* would have admitted the argument had France been party to the Convention.[410]

**3.5.98** The DRC, however, develops the following argument. It considers that the second ground of the *Qadafi* case must be read in the light of the first which affirms that international custom excludes all criminal prosecution of a Head of State in office in the absence of international provisions to the contrary binding the parties concerned. For the DRC, these terms refer to conventional provisions and not rules of custom, because, by the phrase "s'imposant aux parties concernées" ("binding on the parties concerned"), the *Cour de cassation* "fait immanquablement allusion à l'effet relatif des conventions internationales" ("necessarily alludes to the relative effect of international conventions").[411] Apparently, the DRC considers that the relativity of international law is limited exclusively to conventional law and it appears to ignore the many examples of the application of the relativity of international custom.[412] The argument is therefore moot and the Judgment of the French *Cour de Cassation*, read in the light both of the ordinary meaning of the terms in question and the Prosecutor's presentation, does indeed confirm the existence of exceptions to the principle of immunity for acting Heads of State.

**3.5.99** In addition to the *Pinochet* and *Qadafi* cases which confirm Belgium's viewpoint, the DRC also quotes four cases which, in its opinion, constitute "des précédents bien établis" recognising "qu'un chef d'Etat bénéficie d'une inviolabilité et d'une immunité pénale absolues, même en cas d'accusation de crime de droit international."[413] Although the cases cited by the DRC – cases which are simply indicated by a footnote in the text,[414] viz., *Baccheli, Honecker, Arafat* and *Marcos* – affirm in a very general way, in one sentence, that the Head of State benefits from

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[409] *Ibid.* at pp. 511 and 515. **(Annex 50)**
[410] *Ibid.*, p. 514.
[411] DRC Memorial, at paragraph 64 (unofficial translation by Belgium).
[412] *E.g. Lotus*, PCIJ, Series A, n° 10, p.28; *Asylum Case*, ICJ Reports 1950, p.276; *Norwegian Fisheries*, ICJ Reports 1951, p.116; *Rights of Passage*, ICJ Reports *1959*, p.39.
[413] "well-established precedents … that a head of State in office benefits from complete inviolability and immunity, even in the case of accusation of international crime." (Unofficial translation by Belgium) DRC Memorial, at paragraph 62.

immunity of criminal jurisdiction, none of them is significant since they do not concern allegations, even implicitly, of crimes of international humanitarian law. Moreover, none refers to the instruments and the precedents cited above.[415]

**3.5.100** Case law concerning diplomatic immunities also tends to confirm that diplomatic immunity does not protect the holder in the event of a crime against peace, a war crime or a crime against humanity. Thus, in the case of Otto Abetz, who claimed to be the representative of the *Reich* with the Vichy government, the French *Cour de Cassation* observed that the point was not proven and that:

> "… the Ordinance of 28 August 1944 concerning the punishment of war crimes excludes by its very object the application of a rule of municipal or of international law the effect of which would be to make a prosecution subject to preliminary authorisation of the Government of the country to which the accused belongs." [416]

**3.5.101** Similarly, in the case of *In re Best*, a representative of the *Reich* in occupied Denmark who was prosecuted for war crimes and who claimed that he was entitled to diplomatic immunity, the Supreme Court of Denmark declared that Law No 395 of 12 July 1946 on the punishment of war crimes applied to perpetrators of those crimes no matter whether they benefited from diplomatic immunity at the time the crimes were committed:

> "Statute n° 395 of July 12, 1946, must, according to its wording, as well as its purpose, be considered as including all foreigners in German service, irrespective of whether or not they enjoyed diplomatic immunity at the time when they committed the offences referred to in the statute. Hence it follows that the rules of international law governing immunity cannot be relied upon for the benefit of any of the accused."[417]

*(d) The writings of publicists excluding the immunity of alleged perpetrators of serious crimes of international humanitarian law*

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[414] *Ibid*., citing *Bacchelli* v. *Commune di Bologna* (Cass. It.), 20 February 1978, (1978-79) IYIL 137, at note L.C.; *Honecker* (BGH), 14 December 1984, 80 *ILR* 366 ; *Ric. Arafat e altro, Foro it* (Cass. It), 28 June 1985, 1986, II, p. 279; *Marcos* (Trib.féd. suisse), 1 December 1989, 102 *ILR* 201.
[415] See paragraph 3.5.15 *et seq.* above.
[416] *In re Abetz* (Cass. fr. crim.), 17 *ILR* 279, 28 July 1950; also in *RCDIP*, 1951, p.478 **(Annex 51)**.
[417] *In re Best and Others* (Dk. SC), 17 March 1950, 17 *ILR* 437. **(Annex 52)**

**3.5.102** There is nothing new in the recognition in literature of the exclusion of criminal immunity of an agent of a foreign State, even if he is the Sovereign of that

State, for serious crimes under international humanitarian law. Vattel, for example, referred to this already in the 18th century. He began by recalling the general principle according to which "no foreign power can declare itself judge of conduct" of another State. He went on to observe that "the Spanish violate all rules when they declare themselves entitled to judge the Inca Athualpa". But he added immediately:

> "If this prince had violated the law of Nations in their regard they [the Spanish] would have been right in punishing him. But they accused him of having put to death certain of his own subjects, of having had several wives, etc., things for which he was not responsible to them; and, as the crowning point of their injustice, they condemned him by the laws of Spain."[418]

**3.5.103** This passage illustrates to a large extent what has already been said. The rule is the application of *par in parem*. The exception is the case of a grave breach of international law.

**3.5.104** Today, the most eminent literature confirms the principle of rejecting criminal immunity for crimes under international humanitarian law. This is addressed below, first, by reference to the work of the International Law Commission and the Institut de Droit International *(i)*, and second, to other authors *(ii)*.

*(i) Deliberations of the International Law Commission and the Institut de Droit International*

**3.5.105** Already in 1950, the ILC recognised the principle according to which the official capacity in which the agent of foreign State (Head of State or government minister) acts does not constitute grounds justifying a crime against peace, a war crime or a crime against humanity. It stated this both in the context of the development of the *Nuremberg Principles* and in the context of its various proposals

for a code of crimes against peace and security of mankind. These texts are sufficiently important to warrant citation here *in extenso*:

- Principle 3, *Principles of Nuremberg* of 1950:

> "The fact that a person committed an act which constitutes a crime under international law acted as a head of State or responsible Government official does not relieve him from responsibility under international law."[419]

- Article 3, *Draft Code of Crimes Against Peace and Security of Mankind* of 1951:

> "The fact that a person acted as a head of State or responsible government official does not relieve him from responsibility for committing any of the offences defined in this Code."[420]

- Article 3, *Draft Code of Crimes Against Peace and Security of Mankind* of 1954:

> "Le fait que l'auteur a agi en qualité de chef d'Etat ou de gouvernement ne l'exonère pas de la responsabilité encourue pour avoir commis l'un des crimes définis dans le présent code."[421]

- Article 13, *Draft Code of Crimes Against Peace and Security of Mankind* of 1991:

> "La qualité officielle de l'auteur d'un crime contre la paix et la sécurité de l'humanité, et notamment le fait qu'il a agi en qualité de chef d'Etat ou de gouvernement ne l'exonère pas de sa responsabilité pénale."[422]

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[418] Vattel, *The Law of Nations or the Principles of Natural Law*, 1758, Book II, chap. IV, at § 55. **(Annex 53)**

[419] **Supplementary Annex 95.**

[420] *YILC 1951*, II, p.137.

[421] "The fact that the perpetrator acted in the capacity of Head of State or of government does not exonerate him from responsibility for having committed one of the crimes defined in the present code." ILC Report 1954, UN doc. A/2693, at p.12 (unofficial translation by Belgium).

[422] "The official position of an individual who commits a crime against the peace and security of mankind, even if he acted and as a Head of State or government, does not exonerate him of criminal responsibility and is not a reason to mitigate punishment." ILC Report 1991, UN doc. A/46/10, at p.264 (unofficial translation by Belgium). **(Annex 54)**

- Article 7, *Draft Code of Crimes Against Peace and Security of Mankind* of 1996:

> "The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment."[423]

**3.5.106**

As will be evident, except for a few details in the wording, the text in essence has not varied since 1950.

**3.5.107** The DRC, as has been said, does not challenge the rule according to which the official capacity of the accused at the time of the acts does not constitute grounds for exoneration of liability. It persists, however, in seeing this only as a rejection of the *substantial* exception that could be raised by a defendant at the time of trial.[424] It also persists, conversely, in thinking that this exception has no effect on the *procedural* exception of the immunity of foreign State agents from criminal suit.[425] The work of the ILC, however, leaves no doubt about the fact that the exception covers both the substance and the procedure, ie, the exclusion of official capacity as a ground of excuse or justification as well as of the *immunity* of the State agent.

**3.5.108** Thus, already in 1949, on the discussion of the Nuremberg principles, Scelle proposed an amendment to the text addressing the official capacity of the defendant. The draft text proposed by the Commission said:

> "The official position of an individual as head of State or responsible official does not free him from responsibility or mitigate punishment."[426]

**3.5.109** The amended text proposed by Scelle was as follows:

> "The office of head of state, ruler or civil servant, does not confer any immunity in penal matters nor mitigate responsibility."[427]

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[423] ILC Report 1996, UN doc. 1/51/10, at p.56. **(Annex 55)**
[424] DRC Memorial, at paragraph 59–60.
[425] See paragraph 3.5.61 *et seq.* above.
[426] *YILC* 1949, at p.183, paragraph 9.

**3.5.110** Scelle's text had the merit of clearly covering both aspects of the exception based on the defendant's official capacity: the question of an agent's "immunity" *stricto sensu* and that of liability as regards the substance of the case. The amendment was, however, rejected due to the fact that it corresponded to a text on which the Commission was working elsewhere:

> "The Chairman said that that paragraph corresponded to paragraph 3 provisionally adopted by the Commission, according to which the official position of a head of State or responsible civil servant did not confer any immunity in penal matters nor mitigate responsibility."[428]

**3.5.111** In other words, the Commission considered, from the start, that the wording of the rule rejecting any exception based on the official capacity of the defendant covered both the question of liability with regard to the substance and any argument based on the immunity of the State agent.

**3.5.112** The Commission's position has not varied. In 1996, the Commission commented specifically on the fact that senior civil servants who had committed crimes against peace and security of mankind could not escape their liability as a result of their official capacity:

> "It would be paradoxical if individuals who in some ways are the most responsible for the crimes to which the Code refers, could invoke the sovereignty of the State and *take refuge behind the immunity that their functions confer on them*, all the more so since these are odious crimes that distress the conscience of mankind, violate some of the most fundamental rules of international law and threaten international peace and security." [429]

**3.5.113** The Commission went on to say:

> "The object of Article 7 is to prevent an individual who has committed a crime against peace and security of mankind from invoking his official capacity as a circumstance exempting him from any liability *or conferring an immunity of any kind*, even while he

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[427] *Ibid*. at p.206.
[428] *Ibid.*, at p.212.
[429] *ILC Report* 1996, UN doc.1/51/10, at p.57 (Emphasis added).

> maintains that the acts constituting crimes were committed in the context of the exercise of his duties. ... The Nuremberg Tribunal in addition recognized in its judgment that the perpetrator of a crime under international law cannot refer to his official capacity *to escape from the normal procedure* or protect himself from punishment. *The absence of any procedural immunity giving relief from prosecution* or punishment in the context of the appropriate judicial procedure constitutes an essential corollary to the absence of any substantial immunity or any justifying act ..."[430]

**3.5.114** The ILC concluded with a sentence that replies very precisely to the artificial distinction that the DRC claims to find in international law between an exception drawn from the official capacity of the perpetrator of the crime as a justification of a crime under international law – *ratione materiae* immunity, the rejection of which is accepted by the DRC – and the procedural exception based on the *ratione personae immunity* of the perpetrator:

> "It would be paradoxical if the person in question could not invoke his official capacity to exempt himself from criminal liability but could invoke it to protect himself against the consequences of the liability."[431]

**3.5.115** The DRC refrained from discussing the work of the ILC in this field although Belgium referred to it in the phase on the request for provisional measures.[432]

**3.5.116** The Institut de Droit International has also addressed the question of immunity of Heads of State. On 26 August 2001, at its meeting in Vancouver, it adopted a Resolution by 31 votes in favour, none against and 6 abstentions on "Immunities of jurisdiction and execution of the head of State or government in international law". While Article 2 of the Resolution enshrines the principle of the immunity from criminal jurisdiction of a foreign Head of State, whatever the gravity of the offence charged, Article 11 reserves not only the case of obligations arising under the UN *Charter* and the *Statutes* of international criminal courts, but also that of rules concerning crimes under international law. These two provisions are worded as follows:

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[430] *Ibid.* at p.59 (Emphasis added).
[431] *Ibid.*

> "Article 2: En matière pénale, le chef d'Etat bénéficie de l'immunité de juridiction devant le tribunal d'un Etat étranger pour toute infraction qu'il aurait pu commettre quelle qu'en soit la gravité."
>
> "Article 11(1): Les dispositions de la présente résolution ne font pas obstacle
>
> (a) aux obligations qui découlent de la Charte des Nations Unies;
>
> (b) à celles qui résultent des statuts des tribunaux pénaux internationaux ainsi que de celui, pour les Etats qui y sont parties, de la Cour pénale internationale.
>
> (2) Les dispositions de la présente résolution ne préjugent pas :
>
> (a) des règles déterminant la compétence du tribunal devant lequel l'immunité est soulevée;
>
> (b) des règles relatives à la détermination des crimes de droit international;
>
> (c) des obligations de coopération qui pèsent en ces matières sur les Etats.
>
> (3) Rien dans la présente résolution n'implique ni ne laisse entendre qu'un chef d'Etat jouisse d'une immunité devant un tribunal international à compétence universelle ou régionale."[433]

**3.5.117** The Institut does not affirm, as does the ILC, that the immunity of a foreign Head of State is excluded in the event of crimes under international humanitarian law. Implicitly, it nevertheless observes that immunity of a foreign Head of State or Government could not be effective in the case of a crime under international law. It may also be observed that the Resolution addresses foreign Heads of State and Heads of Government. It does not address immunities that may be recognised for "other members of the government by reason of their official functions". The resolution could not therefore be invoked to the benefit of Mr Yerodia Ndombasi – whether at the time of the issue of the arrest warrant of 11 April 2000 or *a fortiori* today, since he is no longer occupies an official capacity.

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[432] CR 2000/33, 21 November 2000, at p.22.

[433] "Article 2: In criminal matters, the Head of State is immune from the jurisdiction of a foreign tribunal for all crimes that he may have committed despite their seriousness

Article 11(1): The provisions of the present resolution do not preclude: (a) obligations pursuant to the *Charter* of the United Nations; (b) obligations arising out of international criminal statutes, including the International Criminal Court, for the States that are party.

(2) The provisions of the present resolution do not prejudice: (a) the jurisdictional rules of the tribunal before which immunity has been raised; (b) the rules on defining crimes under international law; (c) States' obligations to co-operate on these matters.

(3) Nothing in the present resolution implies or leads to the understanding that a Head of State is entitled to immunity from an international tribunal with universal or regional jurisdiction.", Resolution 13f, 26 August 2001 (unofficial translation by Belgium). **(Annex 56)**

*(ii) Other sources*

**3.5.118** Notwithstanding the preceding, the DRC affirms that the most accepted doctrine supports the principle of absolute criminal immunity of an agent of a foreign State.

**3.5.119** This affirmation, which appears in the DRC Memorial after the analysis of the Judgments of the House of Lords in the *Pinochet* case and the French *Cour de Cassation* in the *Qadafi* case, calls for four comments:

(1) contrary to the DRC's contention, the two cases referred to do not show in any way that Ministers for Foreign Affairs benefit from immunity in the case of allegations of grave breaches of international humanitarian law. On the contrary, exactly the opposite is the case;[434]

(2) the literature quoted by the DRC cannot *approve* the *Pinochet* and the *Qadafi* decisions since it precedes this case-law;[435]

(3) the literature is in any case not pertinent. Specifically, as has already been observed, the studies quoted by the DRC limit themselves to affirming the principle of criminal immunity of high foreign representatives in a general way without addressing the question of the maintenance of immunity in the event of allegations of grave breaches of international humanitarian law;

(4) where the sources cited by the DRC do refer to crimes under international humanitarian law, they, quite to the contrary, tend to endorse the exclusion of immunity. For example, the DRC quotes an extract of the *Manuel de droit diplomatique* by Professor Salmon recalling the criminal immunity of foreign sovereigns and ministers but it omits to refer to another passage where the

[434] See paragraphs 3.5.81 *et seq.* and 3.5.87 *et seq.* above.
[435] *E.g. Völkerrecht* by G. Damn, 1964; *Le droit diplomatique* by Ph. Cahier, 1984; *Universelles Völkerrecht* by Vedross and Simma, 1985; *Statenimmunität und Gerichtszwang* by Damian, 1994; *Satow's Guide to Diplomatic Practice*, 1994; Sir Arthur Watts' course at The Hague Academy of International Law, 1994; and *Manuel de droit diplomatique* by J. Salmon, 1994.

same author observes: "qu'il convient de réserver la question de grands criminels de guerre" and goes on to refer to a number of the texts and precedents noted above.[436] Similarly, Sir Arthur Watts, quoted by the DRC, affirms that the Head of State enjoys absolute criminal immunity but goes on to make a reservation in the case of certain international crimes:

> "However, this immunity, while absolute at least as regards the ordinary domestic criminal law of other States, has to be qualified in respect of certain international crimes, such as war crimes."[437]

The same holds true for the reference to the observations to Alland who, after having quoted the *Pinochet* case, concludes:

> "En effet, il convient d'ajouter que dans tous les cas, quelle que soit la fonction exercée, il ne saurait y avoir d'immunité pour les crimes internationaux. Cela a été clairement affirmé en 1946 par le Tribunal militaire international de Nuremberg (*Jug. Nur.*, p. 235). Le statut des deux tribunaux pénaux internationaux actuels et celui de la future Cour pénale internationale ont confirmé le rejet de toute immunité pour les quatre grands crimes contre la paix et la sécurité internationale : le crime d'agression, les crimes de guerre, le crime contre l'humanité, le génocide."[438]

Another author quoted by the DRC, Ruth Wedgwood, does indeed discuss the *Pinochet* case but does not directly deal with the question of immunity of a Head of State or other government representatives accused of serious crimes of international humanitarian law.[439] The reference is not therefore pertinent for present purposes.

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[436] "reservations must be made for the question of major war criminals". Salmon, J. *Manuel de droit diplomatique*, Brussels, Bruylant, 1994, at pp.603-664. (unofficial translation by Belgium) **(Annex 57)**

[437] Watts, Sir A., "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers", *RCADI*, 1994, T. 247, p.54.

[438] "Indeed, it must be added that in all cases, whatever the office held, there can be no immunity for international crimes. This was clearly affirmed in 1946 by the International Military Tribunal of Nuremberg (*Jug. Nur.* p. 235). The statutes of the two current international criminal tribunals and that of the future international criminal court have confirmed the rejection of any immunity for the four major crimes against peace, and international security: the crime of aggression, war crimes, crime against humanity and genocide." (Unofficial translation by Belgium) *Droit international public*, s/ la dir. de D. Alland, Paris, PUF, 2000, at p.159. **(Annex 58)**

[439] See paragraphs 3.5.15 *et seq.* above.

**3.5.120** Many other authors exclude the immunity of the agent of a foreign State alleged to have committed grave breaches of international humanitarian law. Not only the two World Wars but more recent events have occasioned affirmations of this type.

**3.5.121** Thus, in 1917, Mérignhac wrote on crimes committed during the First World War as follows:

> "Quant aux auteurs des faits dits collectifs, on les retrouvera, aussi bien que ceux des faits individuels, à la condition de vouloir nettement atteindre les coupables, si haut placés soient-ils: chefs d'Etat, chanceliers, ministres, généraux, commandants d'armées ou de troupes, qui ont donné les ordres de commettre les faits collectifs incriminés. … Il suffira donc de rechercher ceux qui ont donné les ordres et les ont exécutés, *sans souci d'une prétendue inviolabilité diplomatique* que personne ne comprendrait."[440]

**3.5.122** While he entertained doubts about the pertinence of the charges against Kaiser Wilhelm II for an offence described in Article 227 of the *Treaty of Versailles* as an "offence to international morals", Garner nevertheless observed that:

> "It may be argued with reason that the exemption accorded to reigning sovereigns was never intended to shield and protect from punishment heads of States responsible for such crimes and offences against the rights of nations as those with which the German Emperor was charged."[441]

**3.5.123** After the Second World War, Donnedieu de Vabres, commenting on the *Otto Abetz* case, noted that the international legal order emerging from the League of Nations and the Yalta, Moscow and London agreements:

> "concerne un domaine où l'universalité de la répression, l'interdépendance des souverainetés, qui en résulte, ont dépouillé

[440] "As for perpetrators of collective acts, they will be found, like those of individual acts, if we are determined to get to the guilty parties, however highly placed they may be: Heads of State, chancellors, ministers, generals, commanders of the army or troops, who gave orders to commit the incriminated collective acts. ... It suffices to seek those who gave the orders and who carried them out, *without worrying about any alleged diplomatic immunity* that no one would understand." Merignhac, A., "De la sanction des infractions au droit des gens commises au cours de la guerre européenne par les Empires du centre", *RGDIP*, 1917, at p.49. (Unofficial translation by Belgium) (Emphasis added) **(Annex 59)**

[441] Garner, J. W., *International Law and the World War*, London, 1920, at p 495. **(Annex 60)**

> l'impunité des actes d'Etat et l'immunité des agents diplomatiques de leur raison d'être."[442]

**3.5.124** It is also interesting to read what was written, in the same period, by an author that the DRC cites in its favour and that it refers to as an "eminent internationalist".[443] This is Henri Rolin, then a Senator in the Belgian Parliament. In his 1951 report on the deliberations of the Foreign Affairs Commission of the Belgian Senate on the approval of the 1948 *Genocide Convention* he wrote, with regard to the prosecution of a foreign Head of State and the immunity that attaches to him under international law:

> "Mais il est admis qu'elle [l'immunité] ne peut être invoquée par les chefs d'Etat violant le droit des gens."[444]

**3.5.125** In the 8th edition of the *Oppenheim's International Law*, H. Lauterpacht observed that individuals have international obligations and that, consequently, they are answerable for the crimes under international law that they commit. In this case, the benefit from immunity of any kind is excluded for war crimes or crimes against humanity:

> "In particular, the entire law of war is based on the assumption that its commands are binding not only upon States but also upon their nationals … To that extent no innovation was implied in the Charter annexed to the Agreement of August 8, 1945 … as it decreed individual responsibility for war crimes proper and for what is described as crimes against humanity."[445]
>
> "The State and those acting on its behalf, bear criminal responsibility for such violations of international law as by reason of their gravity, their ruthlessness, and their contempt for human life place them within the category of criminal acts as generally understood in the law of civilised countries. Thus if the Government of a State were to order the wholesale massacre of

[442] "concerns a field where the universality of punishment, the interdependence of sovereignties, which results from it, have stripped the impunity of Acts of State and the immunity of diplomatic agents of any reason for existing." Obs. s/ Cass. fr., 28 juillet 1950, *RCDIP*, 1951, at p.484. (Unofficial translation by Belgium) **(Annex 61)**

[443] DRC Memorial, at paragraph 78.

[444] "But it is accepted that it [immunity] cannot be invoked by Heads of State violating international law." *Documents Parlementaires*, Sénate, 1950-1951, 24 May 1951, n° 286, at p. 2 (Unofficial translation by Belgium).

[445] Lauterpacht, H., *International Law A Treatise by L. Oppenheim*, London, 1955, Vol. I, at p.341, paragraph 153a.

> aliens resident within its territory the responsibility of the State and of the individuals responsible for the ordering and the execution of the outrage would be of a criminal character. … Yet it is impossible to admit that individuals by grouping themselves into States and thus increasing immeasurably their potentialities for evil, can confer upon themselves a degree of immunity from criminal liability and its consequences which they do not enjoy when acting in isolation."[446]

**3.5.126** In 1980, Ch. Rousseau observed, referring to Article 227 of the *Treaty of Versailles* and the Judgment of the Nuremberg IMT:

> "Le principe [de l'immunité absolue du chef de l'Etat] doit être considéré aujourd'hui comme abandonné dans le cas où une violation du droit international est imputable à un chef de l'Etat."[447]

**3.5.127** In 1982, Van Bogaert affirmed similarly:

> "De immuniteit [van een staatshoofd] … kan ook niet meer worden ingeroepen bij een vervolging wegens schuld aan *oorlogsmisdaden*. Dit spruit voort uit artikel 7 van het 'Nürnberg Charter' van 8 augustus 1945 en artikel 6 van het 'Tokyo Charter'."[448]

**3.5.128** In the *Al-Adsani* case, the petitioner had unsuccessfully filed civil proceedings against Kuwait before the British courts alleging torture inflicted on him by agents of Kuwait. In this case, the English Court of Appeal affirmed:

> "… no State or sovereign immunity should be accorded even under the State Immunity Act in respect of acts which it is alleged are properly to be described as torture in contravention of public international law."[449]

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[446] *Ibid.*, at pp.355-357, paragraph 156b. These extracts were also cited by the Jerusalem District Court in the *Eichmann* case of 12 December 1961, 36 *ILR*, p.47. The first two sentences of the second paragraph have been reproduced in the 9th edition (1992) of *Oppenheim's International Law* edited by Jennings and Watts at paragraph 157 and the spirit of the remainder of the text may be found at paragraph 148. **(Annex 62)**

[447] "The principle [of the absolute immunity of the Head of State] must be considered as having been abandoned today where a violation of international law is imputable to a Head of State." (Unofficial translation by Belgium) Rousseau, Ch., *Droit international public*, Paris, Sirey, 1980, IV, at p.125. **(Annex 63)**

[448] "The immunity [of a Head of State] ... can no longer be invoked in the case of a prosecution for war crimes. This results from Article 7 of the Statute of Nuremberg of 8 August 1945 and Article 6 of the Statue of Tokyo." Van Bogaert, E., *Volkenrecht*, Antwerpen, Kluwer, 1982, at pp.348-349 (translation by Belgium). **(Annex 64)**

**3.5.129** The immunity of Kuwait was nevertheless accepted because the acts in question had been committed outside the United Kingdom and the *State Immunity Act* only provided an exception for certain categories of crimes committed in the United Kingdom. Dr. Michael Byers criticised the acceptance of immunity in this case because of the *jus cogens* nature of the prohibition of torture in the following terms:

> "It has been established that customary international law is part of English law and that English courts are not bound by the doctrine of *stare decisis* when applying rules of customary international law. It is also widely accepted that *jus cogens* rules are rules of customary international law which have effects additional to those identified in the 1969 Vienna Convention on the Law of Treaties. English courts, when dealing with questions in respect of which the legislator has not spoken, should therefore take into account the development of the concept of *jus cogens* and the fact that certain rules of customary international law now possess a *jus cogens* character. In cases involving torture outside the United Kingdom, the *jus cogens* character of the prohibition against torture may have rendered void any rule of customary international law which might otherwise have required English courts, when applying the common law of State immunity, to grant immunity to foreign States".[450]

**3.5.130** The author refers to a decision of the Court of Appeal of New Zealand in 1996 and, in particular, the following passage by the President of that Court:

> "One can speculate that the law may gradually but steadily develop, perhaps first excepting from sovereign immunity atrocities or the use of weapons of mass destruction, perhaps ultimately going on to except acts of war not authorised by the United Nations."[451]

**3.5.131** Mrs. V. Morris, a member of the UN Bureau of Legal Affairs since 1989, and Professor M. Scharf, Legal Adviser to the US Department of State from 1989 to 1993, were closely associated with the preparation of the ICC *Statute*.[452] They commented on the question of the immunity of foreign Heads of State for grave breaches of international humanitarian law, without any consideration of whether a

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[449] *Al-Adsani* v. *Governement of Kuwait and Others* (England, CA), 21 January 1994, 100 *ILR* 465., at p.471. **(Annex 65)**

[450] Byers, M., "Decisions of British Courts during 1996 Involving Questions of Public or Private International Law", 1996 *BYIL*, at pp.539-540. **(Annex 66)**

[451] *Ibid*.

[452] See the preface written by the former Prosecutor for the ICTY, Judge Goldstone, in *The International Criminal Tribunal for Rwanda*, Irvington-on-Hudson, N.Y., Transnational Publ., 1998, at pp.xi-xii. **(Annex 39)**

prosecution was to take place before an international or national criminal court, in the following terms:

> "The notion of conferring immunity for crimes under international law would be inconsistent with the very nature of these crimes for four reasons. First, these crimes violate peremptory norms of general international law (*jus cogens*) which have been 'accepted and recognised by the international community as a whole as norm from which no derogation is permitted' (Vienna Convention on the Law of Treaties, 23 May 1969, Article 53 …). These norms are intended to protect the fundamental interests of the international community as a whole. Therefore the standard of conduct is absolute. …
>
> Second, the notion of immunity is inconsistent with the direct applicability of the principle of individual criminal responsibility and punishment for crimes under international [*sic*] by virtue of international law notwithstanding the absence of any corresponding national law or the presence of any conflicting national law. … The notion of conferring immunity for war crimes or crimes against humanity would be inconsistent with the principle of individual criminal responsibility recognised in the Nuremberg Charter and Judgment which represent the very core of the Nuremberg precedent. The fundamental purpose of these principles is *to remove any possibility of immunity for persons responsible for such crimes*, from the most junior officer acting under the orders of a superior to the most senior government officials acting in their official capacity, including the head of State.
>
> Third, no single State or group of States is competent to negate a peremptory norm of general international law (*jus cogens*) which 'can be modified only by a subsequent norm of general international law having the same character'. … The *erga omnes* character of the prohibition of crimes under international law is reflected in the jurisdictional competence of all States to prosecute and punish any individual who violates such a norm without consideration of the usual requirements for the exercise of the national criminal jurisdiction of a State …
>
> Fourth and finally, the conferral of immunity would be inconsistent with the absolute character of the procedural obligation of States to prosecute and punish persons responsible for war crimes or genocide recognised in the Geneva Conventions and the Genocide Convention, respectively. … The fact that these obligations have often been honored in the breach does not erode the legal force of the norms. …
>
> No State has the authority to unilaterally preclude by a grant of immunity another State from exercising its criminal jurisdiction

> with respect to a crime under its national law or a crime under international law."[453]

**3.5.132** As a result of the *Pinochet* case, several authors clearly affirmed incompatibility of absolute immunity of high foreign representatives implicated in infringements of elementary human rights as part of the rule of the absolute respect of such rights. Thus, for Prof. Bainchi:

> "Ultimately, any argument based on state sovereignty is inherently flawed. First, external scrutiny of state action as regards human rights is permitted under contemporary standards of international law and sovereignty can no longer be invoked to justify human rights abuses. Secondly, and perhaps most importantly, human rights atrocities cannot be qualified as sovereign acts: international law cannot regard as sovereign those acts which are not merely a violation of it, but constitute an attack against its very foundation and predominant values (see also Higgins … 'Acts in the exercise of sovereign authority (*acta jure imperii*) are those which can only be performed by states, but not by private persons. Property deprivation might fall in this category; torture would not.' ['The Role of Domestic Courts in the Enforcement of international Human Rights: The United Kingdom', *in* B. Conforti and F. Francioni (eds), *Enforcing International Human Rights Before Domestic Courts*, 1997, p.53]). Finally, the characterisation of the prohibition of torture and other egregious violations of human rights as *jus cogens* norms should have the consequence of trumping a plea of state immunity by states and states officials in civil proceedings as well. As a matter of international law, there is no doubt that *jus cogens* norms, because of their higher status, must prevail over other international rules, including jurisdictional immunities.[454]

For J.M. Sears:

> "Most convincingly, the Law Lords indicated that it would be wholly inconsistent with international law (and common sense) to allow heads of state to go unpunished for state acts of torture when junior officials would be liable. … [G]iven the inconsistency which necessarily results from the exemption of heads of state from responsibility for torture, which by definition requires action in an official capacity, this author believes the view of the majority of Lords to be correct. In this vein, the overwhelming adoption of the

[453] *Ibid*, at pp.285-290. **(Annex 39)** Both Scharf and Morris have repeated and expanded on the point that they had already developed in *An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia*, Irvington-on-Hudson, N.Y., Transnational Publ., 1995, at pp.112-115.
[454] Bianchi, A "Immunity versus Human Rights: the *Pinochet* Case", (1999) *EJIL*, at p.265. **(Annex 67)**

> Rome Statute is a very positive sign that, Cold War politics now aside, states can get down to serious business in enforcing the Nuremberg principles. The efforts of one *ad hoc* tribunal are contributing in large part to this development."[455]

For S. Villalpando:

> "… la condamnation suprême des crimes contre l'humanité et le principe d'universalité pour sa répression paraissent incompatibles avec la défense fondée sur l'immunité."[456]

For C.M. Chinkin, who, however, limits her analysis to the case of a former Head of State, the *Pinochet* Judgment

> "represents the globalisation of human rights law through the affirmation that the consequences of, and jurisdiction over, gross violations are not limited to the state in which they (mostly) occur, or of that of nationality of the majority of the victims. It validates the assertion that torture is always unacceptable and unjustifiable on any grounds and provides a memorial to the thousands who did not survive. Further, obligations incurred by human rights treaties, such as the Torture Convention, can be enforced extraterritorially, a blow to those regimes (such as that of Pinochet himself) that cynically become bound by these treaties with contemptuous disregard for their requirements."[457]

**3.5.133** Professor E. Decaux writes that the charge of torture in the 1984 UN *Convention Against Torture* (Articles 2, 4-7), and the obligation to prosecute the perpetrator of forced disappearance set down in the UN General Assembly Declaration of 18 December 1992,[458] implies the exclusion of any form of immunity for the perpetrator of such acts:

> "Mais l'esprit de ces textes est clair, ils visent à écarter toute forme d'impunité et donc d'immunité pour le chef de l'Etat."[459]

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[455] Sears, J.M., "Confronting the 'Culture of Impunity': Immunity of Heads of State from Nuremberg to *ex parte Pinochet*", (1999) *GYIL*, at p.144. **(Annex 68)**

[456] "... the supreme combination of crimes against humanity and the principle of the universality of its repression seem incompatible with a defense based on immunity." Villalpando, S., *supra.*, at p.424. (Unofficial translation by Belgium) **(Annex 69)**

[457] Chinkin, C.M., "International Decisions", (1999) *AJIL*, at p.711. **(Annex 70)**

[458] A/RES/47/133, 18 December 1992, at Article 14.

[459] "but the spirit of these texts is clear, they aim to eliminate any form of impunity and therefore immunity for the head of State." Decaux, E., "Les gouvernants", in *Droit international pénal*, s/ la dir.

**3.5.134** He concludes his analysis referring to the *Pinochet* case in the following terms:

> "C'est cette nature du crime qui empêche toute immunité, et non le fait que le chef de l'Etat aurait quitté le pouvoir ou que son crime serait privatisé, voire banalisé."[460]

**3.5.135** P. Burns and S. McBurney, after analysing the pertinent provisions of the *Statutes* of international criminal courts, conclude:

> "State courts which function as the domestic agents of these regimes, notably within the pending ICC regime, can also exercise such a jurisdiction without the constraint of pleas of immunity."[461]

**3.5.136** Professor Antonio Cassese, former President of the ICTY, has observed that Heads of State benefit from immunity of jurisdiction in foreign States for acts carried out in their official capacity but that "this privilege does not apply when they are accused of international crimes, and they may be brought to justice for such crimes".[462] Noting that all this is found in the *Statute* of the ICTY and the ICC, he concludes:

> "As these treaty rules or provisions of 'legislative' acts adopted by the SC have been borne out by State practice, it is safe to contend that they have turned into customary law."[463]

**3.5.137** Based on the various sources that exclude the immunity of foreign Heads of State for grave breaches of international humanitarian law,[464] and on the 'Principles'

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de H. Ascensio, E. Decaux et A. Pellet, Paris, Pédone, 2000, p.192, at paragraph 28 (Unofficial translation by Belgium).

[460] "The nature of the crime is what prevents any immunity, not the fact that the head of State has left power or that his crime has been privatised, or made ordinary." *Ibid*, at p.199, paragraph 48 (Unofficial translation by Belgium).

[461] Burns, P. and McBurney, S., "Impunity and the United Nations Convention against Torture: A Shadow Play without an Ending", in *Torture as Tort*, ed. by C. Scott, Oxford – Portland, Hart Publ., 2001, p.280. **(Annex 71)**

[462] Cassese, A. *International Law*, Oxford Univ. Press, 2001, at p.260. **(Annex 47)**

[463] *Ibid.*

[464] See paragraph 3.5.15 *et seq.* above.

of prevention of extra-judicial executions adopted by the UN Economic and Social Council in 1989,[465] H. Duffy writes:

> "These Principles may provide further indication of *opinio juris* concerning the non-applicability of immunity to the gravest international crimes. In summary, were constitutional immunity provisions interpreted to guarantee absolute immunity from domestic prosecutions and surrender to the ICC, they would contradict already established international obligations. …
>
> To the extent that immunities were intended to enable the beneficiary to carry out his or her functions unhindered, they should not protect those who perpetrate criminal acts. Crimes do not constitute the official functions of any parliamentarian, government official or head of state and therefore fall outside of the scope of immunity."[466]

**3.5.138** In an in-depth analysis of the immunity of foreign Heads of State in the event of a crime under international law, Professor S. Zappalà develops a theory very similar to the Belgian stance. He makes the distinction between the "functional" immunity of Heads of State and their "personal" immunity. It is clear that the former is not applicable in the case of crimes under international law given the existence of a customary rule excluding it. This customary rule is found notably in the *Statutes* of international criminal courts. Zappalà goes on to state:

> "… there is a compelling argument supporting the conclusion that international crimes are an exception to functional immunity from jurisdiction under customary international law. The inclusion of this principle in the Statutes of the UN ad hoc Tribunals (ICTY and ICTR; and also in the Statute of the Special Court for Sierra Leone) cannot be considered simply as a treaty stipulation. Were one to accept this is only a treaty-based principle, one would have to perforce conclude that the Tribunals are enjoined or allowed to apply retroactive law. In other words, if – before the adoption of the Statutes – the irrelevance of official capacity had not already been a rule of customary law, Heads of State and other senior state officials accused of crimes under the Statutes might not be considered responsible for acts committed at any time prior to the adoption of the statutes themselves. Otherwise, the *nullum crimen sine lege* principle would be breached."[467]

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[465] See paragraph 3.5.51 above.
[466] Duffy, H., "National Constitutional Compatibility and the International Criminal Court", (2001) *Duke JCIL*, at pp.30-31. **(Annex 72)**
[467] Zappala, *loc. cit.*, at pp.602-603. **(Annex 48)**

**3.5.139** The absence of functional immunity, according to the author, does not exclude the existence of personal immunity, even for crimes under international law. However, this does not necessarily exclude the prosecution against the person in question, or even measures of execution, as long as the person in question is aware of the risk that he runs by coming to the territory of the foreign State:

> "… personal (diplomatic) immunity should certainly be recognised for official visits, including the case of international crimes. … for private visits, a more elaborate solution is needed. … foreign Heads of State – because they generally represent their nations in external relations – should not be arrested even if they are on a private visit unless it can be proved that the competent authorities of the state exercising jurisdiction (or a competent international body) do not (or no longer) consider that Head of State an appropriate counterpart in international relations. … In other words, a Head of State should not be taken by surprise, and a sort of warning that he or she may be not welcome in a foreign country should be required."[468]

**3.5.140** This seems to have been the case when Mr Yerodia Ndombasi was informed by certain States, when he applied to them for a visa, that he could be arrested if he came to their territory.[469] This was a way of saying to Mr Yerodia Ndombasi that his capacity as minister would not be recognised. The author concludes:

> "At this stage of development of international criminal law one must conclude that functional immunity cannot be granted to state officials that have committed crimes under customary international law. This exception to the principle of functional immunity must equally apply to Heads of State. On the other hand, the personal immunity of Heads of State from jurisdiction always covers official visits abroad. Additionally, private visits are also protected, although to a more limited extent. As to the latter, one might go so far as to suggest that restrictions to personal immunity may be imposed by a state, if it were proven that the state whose jurisdiction is triggered has refused to accept the Head of State concerned as a counterpart in foreign relations."[470]

**3.5.141** Fundamentally, even if this study makes the distinction between the functional immunity and personal immunity of foreign representatives – a distinction which is not to be found in positive international law – it leads to conclusions close to

[468] *Ibid.*, at p.606.
[469] DRC Memorial at paragraph 52.

those defended by Belgium in the present case: recognition of the immunity of a foreign government minister, who is nevertheless liable for serious crimes under international humanitarian law, in the event of an invitation of that person by the State where prosecution has been undertaken (so-called "personal" immunity); no immunity in the event of a private visit, subject to that party knowing of the existence of prosecution against him.

**3.5.142** In a similar field – that of the *Act of State doctrine* – the American Law Institute affirmed, in the *Third Restatement of the Foreign Relations Law of the United States*:

> "A claim arising out of an alleged violation of fundamental human rights – for instance, a claim on behalf of a victim of torture or genocide – would (if otherwise sustainable) probably not be defeated by the act of state doctrine since the accepted international law of human rights is well established and contemplates external scrutiny of such acts."[471]

**3.5.143** Belgian literature is split on these questions, particularly at the time of the order made on 6 November 1988 by Judge Vandermeersch in the *Pinochet* case.[472] If two authors (J. Verhoeven[473] and P. d'Argent[474]) criticise this ruling and declare that they are in favour of maintaining immunity of jurisdiction of a foreign Head of State, even in the case of serious breaches of international humanitarian law, nearly ten others entirely approved the ruling.

**3.5.144** The criticism of the ruling is based essentially on the fact that the immunity of Heads of State is a customary rule, that there is no practice to the contrary,[475] and

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[470] *Op cit.*., Zappala, at p.611.
[471] The American Law Institute, *Restatement of the Law (Third) : the Foreign Relations Law of the United States*, St. Paul, American Law Institute Publ., 1987, at §443, comment "c"; **(Annex 73)** see also *Sharon* v. *Time, Inc.* (US Dist. Crt., SDNY), 12 November 1984, 599 *F.Supp.*, at p.552; **(Annex 74)** and Bühler, M., "The Emperor's New Clothes: Defabricating the Myth of 'Act of State' in Anglo-Canadian Law", in *Torture as Tort*, *op. cit.*, p.363. **(Annex 75)**
[472] *Pinochet*, (Civ. Brussels), Judgment of 6 November 1998, *JT* 1999, at pp.308-311; observations by J. Verhoeven; *RDPC*, 1999, at pp.278-290, and the note J.B. Labrin and H. D. Bosly; see paragraph 3.5.86 above.
[473] *Ibid.*, Verhoeven, J., at p.312; DRC Memorial, Annex 15.
[474] D'Argent, P., "La loi du 10 février 1999 relative à la répression des violations graves du droit international humanitaire", *J.T.*, 1999, at p.552 ; DRC Memorial, Annex 14.
[475] *Op. cit.*, Verhoeven, J., at p.312; DRC Memorial, Annex 15.

that the Statutes of international criminal tribunals only concern those tribunals and are not transposable to national courts.[476]

**3.5.145** To the contrary, L. Weerts and A. Weyembergh, who refer to traditional sources on exclusion of immunity,[477] consider that the refusal of immunity to Pinochet was legally founded:

> "International customary law indisputably establishes this exception to the principle of sovereign immunity for war crimes, crimes against peace or against humanity."[478]

**3.5.146** Weyembergh developed the above conclusion and showed that the absence of practice does not question the customary rule excluding immunity of a Head of State accused of serious crimes of international humanitarian law. The material element of the custom is not limited to the absence of practice. It also resides in repeated affirmations of the rule:

> "Il est erroné d'affirmer que l'exception à l'immunité des chefs d'Etat n'est pas coutumière parce que, n'ayant jamais débouché sur une condamnation pénale d'un chef d'Etat, l'élément matériel fait défaut. En effet, l'élément matériel ne consiste pas uniquement dans la condamnation pénale d'un chef d'Etat. La règle est de plus en plus souvent rappelée par les Etats. De simples mises en accusation, comme celle de Guillaume II par le Traité de Versailles ou des demandes d'extradition comme celles adressées par plusieurs juges de pays différents à l'égard de Pinochet sont aussi des éléments matériels à prendre en compte, de même que les décisions précitées rendues par certaines juridictions internationales, l'arrêt de la Chambre des Lords du 25 novembre 1998 et les statuts des Tribunaux *ad hoc* et de la Cour pénale internationale où l'exception à l'immunité des chefs d'Etat est répétée."[479]

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[476] *Op. cit., at p.552 ;* DRC Memorial, Annex 14.
[477] See paragraphs 3.5.15 *et seq.* above.
[478] Weerts, L. and Weyembergh, A., (1999) 2 YIHL at p.337.
[479] "It is a mistake to affirm that the exception to immunity of Heads of State is not customary because, since it has never resulted in a criminal condemnation of a Head of State, the material element is missing. Indeed, the material element does not consist exclusively of the criminal condemnation of a Head of State. The rule is recalled more and more often by States. Simple charges, such as those against William II by the Treaty of Versailles or petitions for extradition like the ones addressed by several judges of different countries with regard to Pinochet are also material elements to be taken into account, along with the above-mentioned rulings of several international jurisdictions, the judgment of the House of Lords of 25 November 1998 and the Statutes of the *ad hoc* Tribunals and the International Criminal Court where the exception to the immunity of Heads of State is repeated." Weyembergh, A.,

**3.5.147** J.B. Labrin and H.-D. Bosly, without analysing the special case of immunity, approve the ruling on the whole:

> "L'ordonnance publiée ci-dessus, dont la motivation constitue un modèle de précision et de pertinence s'inscrit dans cette évolution positive du droit international. Elle mérite d'être approuvée sans réserve."[480]

**3.5.148** For Naert, in the absence of a treaty expressly excluding the immunity of a Head of State, States now have the choice of granting or refusing immunity in the event of crimes against humanity:

> "Internationale instrumenten inzake misdaden tegen de menselijkheid sluiten meestal immuniteit van staatshoofden uit. Op nationaal vlak kan men m. i. stellen dat, wanneer er geen verdrag van toepassing is, staten nu de keuze hebben."[481]

**3.5.149** In a long collective study, Goffin, Denis, Chapaux, Magasich and Goldman observe that the classical sources of exclusion of the immunity of a Head of State in the event of grave breaches of international humanitarian law justify the reasoning that underlies the ruling:

> "L'ensemble de ces précédents [statuts des juridictions pénales internationales, textes CDI, etc] ainsi que leur caractère obligatoire établissent à suffisance l'existence d'une coutume. Contrairement à ce que d'aucuns ont soutenu, le fait qu'ils se rapportent essentiellement à des juridictions internationales est sans incidence. La règle coutumière est en effet claire: la qualité officielle de l'auteur ne l'exonère pas de sa responsabilité pénale qu'il soit traduit ou non devant une juridiction pénale internationale. Par application de la règle *international law is part of the law of the*

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"Sur l'ordonnance du juge d'instruction Vandermeersch rendue dans l'affaire *Pinochet* le 6 novembre 1998", *RBDI*, 1999, at pp.190-191. (Unofficial translation by Belgium) **(Annex 77)**

[480] "The published order here above, the grounds for which are a model of accuracy and pertinence, is in line with the positive evolution of international law. It deserves to be approved without reserve." Obs. s/ Civ. Brussels, Judgment of 6 November 1998, *Pinochet*, (Unofficial translation by Belgium). **(Annex 76)**

[481] "International instruments relating to crimes against humanity generally exclude the immunity of Heads of State. On a national level, one can consider that in the absence of an applicable treaty, the States now have the choice." (unofficial translation by Belgium). Naert, F., "Zijn (ex-)staatshoofden immuun inzake misdaden tegen de menselijkheid? Kanttekeningen bij de zaak Pinochet" (Les ex-chefs d'Etat bénéficient-ils de l'immunité en ce qui concerne des crimes contre l'humanité ? Remarques sur l'aff. Pinochet), *R.W.*, 1998-1999, at p.1505. **(Annex 78)**

> *land*, cette règle coutumière fait partie du droit interne belge sans qu'il soit nécessaire de l'y recevoir par un procédé formel quelconque."[482]

**3.5.150** These examples show that when the literature that focuses on criminal immunity of high foreign representatives, not in general, but in the particular case of serious crimes under international humanitarian law, it tends to recognise that this immunity does not protect the perpetrator of such crimes. There are of course those who disagree. But it is remarkable to observe to what extent those who argue in favour of absolute immunity never seriously examine the sources that exclude this immunity in the event of grave breaches of international humanitarian law.

**3.5.151** In conclusion, the DRC may claim that the exception "au régime des immunités pénales des chefs d'Etat étrangers et des personnes assimilées" is "en réalité inexistante".[483] However, all the texts, positions and decisions mentioned support the contrary conclusion. The principle of the "absolute" immunity from criminal proceedings of such these persons is non-existent in cases – fortunately, fairly rare in practice – in which high representatives are alleged to have committed serious crimes under international humanitarian law. Practice, case law and literature all demonstrate that the immunity that normally avails such persons ceases in view of the higher values of the struggle against impunity for certain crimes and the respect of the most elementary rule of law.

### *II. The DRC's other arguments in favour of the absolute immunity of the members of foreign governments in office*

[482] "All of these precedents [statutes of international criminal jurisdictions, ILC texts, etc.] and their mandatory nature sufficiently establish the existence of a custom. Contrary to what some have maintained, the fact that they refer essentially to international jurisdictions has no incidence. The customary rule is indeed clear: the official capacity of the perpetrator does not exempt him from criminal liability whether he is or is not brought before an international criminal court. By application of the rule *international law is part of the law of the land*, this customary rule is part of Belgian national law without having to be adopted by a formal process of any kind." Goffin, Denis, Chapaux, Magasich and Goldman, "La mise en œuvre du droit pénal international dans l'ordre juridique belge: perspectives au regard de l'ordonnance du 6 novembre 1998", *Rev. dr. étr.*, 1999, at p.427. (Unofficial translaytion by Belgium) **(Annex 79)**

[483] "to the scheme of criminal immunity of Heads of foreign States and persons assimilated" … "in reality non-existent", DRC Memorial, at paragraph 60 (unofficial translation by Belgium).

**3.5.152** A number of other arguments were advanced in the DRC Memorial in favour of the absolute immunity of members of foreign governments in office. As not all are relevant to the dispute at hand, Belgium will limit itself to addressing those arguments that the DRC has particularly emphasised.

**3.5.153** These arguments can be grouped around the following main ideas:

- the immunity of high foreign representatives would be an objective rule imposed upon Belgium *(a)*;

- the Belgian national legal order would be opposed to any recognition of immunity once the investigating judge has issued the arrest warrant *(b)*;

- recognising immunity of a high foreign representative who has been accused of serious crimes under international humanitarian law would be contradictory with the *jus cogens* nature of these crimes *(c)*; and

- the absence of execution of the arrest warrant by the States shows that *opinio juris* supports absolute immunity from criminal jurisdiction of high foreign representatives *(d)*.

*(a) The immunity of high foreign representatives is an objective rule imposed upon Belgium*

**3.5.154** At the provisional measures phase, Belgium stated that, pursuant to the express terms of the arrest warrant,[484] the warrant took account of the immunity of the high foreign representative because it could not be executed in the event that Mr Yerodia Ndombasi was invited to come to Belgium by the Belgian Government or by an international organisation of which Belgium is a member. Under such circumstances, indeed, the most elementary fairness would require the judge to refrain from arresting someone so invited.[485]

**3.5.155** This account of the immunity of a high foreign representative who is nevertheless under investigation, has been criticised by the DRC on the ground that Belgium seems to subordinate recognition of the immunity of a high foreign representative to its own appreciation alone, whereas this immunity is imposed on all States who host the high foreign representative. This is allegedly a rule of customary international law which does not depend in any way on the consent of State to accept the high foreign representative on its territory. The DRC notably states:

> "Ensuite, et plus fondamentalement, l'argument témoigne de la mauvaise compréhension qu'ont les autorités belges de ce qu'est l'inviolabilité et l'immunité pénale absolues des hauts représentants des Etats étrangers. L'argument donne en effet à penser que ce serait la Belgique qui, en quelque sorte, 'distribuerait', accorderait ces privilèges d'inviolabilité et d'immunité aux hauts dignitaires étrangers invités. Rien ne saurait être plus erroné … L'existence de ces privilèges ne dépend nullement du consentement qui serait donné par une autorité étrangère à leur déplacement dans cet Etat … La vérité est que tout Etat invitant un chef d'Etat, un Permier ministre, un misistre des Affaires étrangères … est tenu de respecter l'inviolabilité et l'immunité pénale absolues qui est la leur en droit international coutumier."[486]

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[484] CR 2000/33, 21 November 2000, at p.27.
[485] CR 2000/33, 21 November 2000, at p.27, paragraph 21.
[486] "Finally, and more fundamentally, the [Belgian] argument demonstrates a misunderstanding by Belgian authorities of the absolute inviolability and immunity of the high representatives of foreign States. The argument gives the impression that Belgium is the one that 'distributes' so to speak, or grants these privileges of inviolability and immunity to the foreign dignitaries invited. Nothing could be more erroneous ... The existence of these privileges in no way depends on the consent given by foreign authority to the travel in the State ... The truth is that any State that invites a Head of State, a Prime Minister, the Minister of Foreign Affairs ... is bound to respect the complete inviolability and

**3.5.156** The DRC's argument amounts to saying that Belgium cannot subject the immunity of a high foreign representative to its appreciation. Such immunity is allegedly an objective rule imposed upon Belgium. This claim calls for the following responses.

(1) The DRC's argument is based on the presupposition that the immunity from criminal process of a high foreign representative is absolute and without exception. As described above, however, this is not the case. Both customary and conventional international law establish an exception to such immunity in the case of a person accused of serious crimes under international humanitarian law;[487]

(2) If the immunity of a high foreign representative is not therefore an obstacle to the arrest of a high foreign official accused of serious crimes under international humanitarian law, nevertheless the investigating judge is always free not to execute an arrest warrant in keeping with the *broad power of appreciation* that he has in this matter. Article 16 of the Loi du 20 juillet 1990 on preventive detention is very clear.[488] In the case of "absolute necessity for security, and for offences of a certain gravity the investigating judge *can* issue an arrest warrant" (emphasis added). This is a decision that he takes on the basis of all the elements of the investigation.[489] In addition, pursuant to Article 25 of the above-mentioned Law of 1990, the investigating judge is authorised "to give relief from the arrest warrant".[490] Furthermore, "this power can be exercised at any time of the investigation without any restriction".[491]

An official invitation to Mr Yerodia Ndombasi to come to Belgium would be an element prompting the investigating judge to suspend the effects of the

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immunity that belongs to them under international customary law." (Unofficial translation by Belgium) DRC Memorial, at paragraph 54.

[487] See paragraphs 3.5.15 *et seq.* above.

[488] **Annex 96**

[489] See. Art. 16 § 2 of the Law of 20 July 1990. **(Annex 96)**

[490] *Ibid.*

[491] Bosly, H.-D. and Vandermeersch, D., *Droit de la procédure pénale*, Bruges, La Charte, 1999, at p.532.

arrest warrant – *in casu*, the investigating judge considers that he would engage Belgium's responsibility if he were to arrest Mr Yerodia Ndombasi in circumstances in which he had been officially invited to Belgium. In fact, were Mr Yerodia Ndombasi to have been invited to Belgium to discuss, for example, cooperation between the two countries, he would have been entitled to believe that he would not be arrested in virtue of the principles of good faith. By arresting Mr Yerodia Ndombasi in such circumstances, the investigating judge would betray the implicit commitment made by Belgium that Mr Yerodia Ndombasi would not be arrested. The investigating judge would thus engage the responsibility of Belgium with regard to the unity of the State in international law.[492] There are precedents. In the *Schnoebelé* case of 1887, a French police commissioner was invited by a German counterpart to confer with him and was arrested as soon as he crossed the border. Bismarck ordered his immediate release:

> "en se basant sur le principe du droit des gens, d'après lequel il faut toujours considérer comme un véritable sauf-conduit l'invitation qui entraîne une traversée de la frontière dans le but de régler des questions administratives entre deux Etats voisins. Il n'est pas croyable que le fonctionnaire allemand ait donné rendez-vous à M. Schnoebelé pour rendre possible l'arrestation de celui-ci."[493]

This is similar to the situation whereby someone comes to negotiate with the enemy under the cover of a flag of truce in an armed conflict. By accepting this negotiation, the enemy recognises the inviolability of the negotiator, even if he is guilty of the worst crimes. Such immunity is all the more justified in that it is limited in duration. Once it has ended and the negotiator has returned to his lines, the immunity that he enjoyed ceases to be effective.

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[492] Proposal for articles of the ILC on liability of States, Art. 6. *Ann.CDI*, 1973, II, pp. 197-201 ; in the same vein, proposal of articles provisionally adopted by the editorial committee in a 2nd reading, Art. 5, *ILC Report*, 2000. See further CR 2000/33, 21 November 2000, at p.27, paragraph 21.

[493] "based on the principle of human rights, according to which an invitation entailing crossing the border to settle administrative questions between two neighbouring States must always be considered as a veritable safe-conduct. It is not credible that a German civil servant could have given an appointment to Mr. Schnoebelé to make his arrest possible." Cited in Travers, M., "Arrestations en cas de venue involontaire sur le territoire", *RDI privé et dr. pénal internat.*, 1917, at p.639 (Unofficial translation by Belgium).

(3) In any case, it is not accurate to think that the immunity of a high foreign representative is an objective right valid *erga omnes*. Examples (one of which is quoted by the DRC itself[494]) show that this is not the case. If immunity is not recognised for persons such as Yasser Arafat or General Noriega, this is because governments, respectively Italian[495] and American,[496] did not recognise their capacity as Heads of State.

Another example, also quoted by the DRC,[497] reasons along the same lines. This is the case of a Peruvian officer accused in 1997 by a Peruvian civil servant of torture. Together with three colleagues, he was sentenced to 8 years in prison by a Peruvian court but was released a year later. In March 2000, he was invited by the Inter-American Commission on Human Rights to take part in a hearing in Washington on phone tapping. He was then arrested by the FBI at Houston airport with a view to possible prosecution for acts of torture. The Department of Justice having consulted the State Department, decided that the officer:

> "was entitled to immunity from prosecution as a diplomatic representative of his government present in the United States *for an official appearance before an international organisation*."[498]

In other words, just as Belgium has observed with regard to the immunity that it recognises were Mr Yerodia Ndombasi to have been officially invited by the Belgian Government or by an international organisation of which Belgium is a member, the United States refrained from prosecuting the person in question given that he was the official guest of the Inter-American Commission of Human Rights in Washington.

[494] DRC Memorial, at paragraph 40, fn.1.
[495] Cass. it., 28 June1985, *R.G.D.I.P.*, 1988, pp. 534-537 and *IYIL*, 1986-1987, pp. 295-298.
[496] U.S. Distr. Crt., S. D. Fla., 8 June 1990, 99 *ILR*, pp.161-162.
[497] DRC Memorial, at paragraph 68.
[498] "Contemporary Practice of the United States" (2000) *AJIL*, at pp.535-536 (emphasis added).

> If it is inaccurate to say that the criminal immunity of a high foreign representative is absolute, it is also moot to say that, in the hypothesis that it does not apply, the forum State is prohibited from making it effective.

*(b) The Belgian national legal order is opposed to any recognition of immunity once the investigating judge has issued the arrest warrant*

**3.5.157** This is the DRC's answer to Belgium's affirmation, in the provisional measures phase, that Mr Yerodia Ndombasi would not be prosecuted if he were officially invited to Belgium by the Belgian government or by an international organisation of which Belgium is a member .[499]

**3.5.158** For the DRC, this hypothesis is impossible to imagine because the principle of separation of powers would be opposed to the suspension of the effects of the arrest warrant by the Belgian investigating judge further to an invitation addressed by the Belgian Government to Mr Yerodia Ndombasi. The DRC contends that the Belgian "argument"

> "is a very surprising one. On one hand, it is intrinsically contradictory in that it ignores, which is particularly surprising, the principle of the separation of powers which is however set down in the Belgian Constitution. There is no need to dwell on this question, except to underline that Belgium advances a supposed 'escape clause' that its own national legal order does not allow it to apply."[500]

**3.5.159** As regards this reasoning of the DRC:

(1) Is this in fact an argument and to what is it an answer? Belgium limited itself to saying that it could recognise criminal immunity for Mr Yerodia Ndombasi under the restrictive hypothesis of an official invitation to come to Belgium. This recognition should at least partially satisfy the DRC since it wants Mr Yerodia Ndombasi's immunity to be recognised. The dispute between the DRC and Belgium is thus reduced to the condition that Belgium

[499] CR 2000/33, 21 November 2000, at p.27, paragraph 21.
[500] DRC Memorial, at paragraph 54. See also paragraph 63.

does not recognise this immunity. Where Belgium does recognise the immunity of the person in question, there is no dispute and the DRC's reasoning has no purpose.

Only insofar as it is considered that the DRC's reasoning has a practical purpose – *quod non* – need its content be addressed.

(2) What the DRC refers to as the Belgian "argument" was simply a clarification. Belgium nevertheless wants to clarify any misunderstanding about what it said. There is no question of jeopardising the separation of powers. The Belgium Government has never claimed that it could prohibit the investigating judge from executing the arrest warrant or, reciprocally, that the investigating judge could order the Government to grant immunity to Mr Yerodia Ndombasi. The investigating judge simply stated that he would not execute the arrest warrant in the event that Mr Yerodia Ndombasi were to be officially invited to come to Belgium for the reasons stated above.[501]

The principle of the separation of powers is therefore intact. Indeed, more so than if, for example, the executive of a State, in order to obtain extradition of someone sought by its judicial system, undertakes to say that it will not apply capital punishment. This practice is nevertheless accepted in many democratic States, including Belgium,[502] and has never created any particular difficulty as concerns respect of the principle of separation of powers. The DRC's argument is thus ineffective.

*(c) Recognising immunity of a high foreign representative who has been accused of crimes under international humanitarian law would be contradictory with the* jus cogens *nature of the repression of these crimes*

**3.5.160** The DRC considers that Belgium contradicts itself by affirming, on the one hand, that punishment of crimes under international humanitarian law is a *jus cogens*

[501] See paragraph 3.5.157 at subparagraph (2).

rule, and on the other, that it would recognise Mr Yerodia Ndombasi's immunity should he be officially invited to come to Belgium:

> "It is hard to understand that Belgium can unilaterally grant that which it maintains *jus cogens* prohibits."[503]

**3.5.161** Again two remarks:

(1) As in the previous case, the practical utility of the DRC's reasoning can be questioned. If it considers that Belgium cannot question Mr Yerodia Ndombasi's practical immunity, and if Belgium accepts this immunity under the particular case of an official invitation, there is no dispute to be settled, at least in this case, and the claim by the DRC against Belgium becomes purely academic.

For the same reasons as in the previous case, only insofar as the DRC's reasoning has some practical purpose – *quod non* – need its content be considered.

(2) Belgium has never affirmed that the punishment of crimes under international humanitarian law was a *jus cogens* obligation insofar as those crimes were committed *outside* its territory and by persons who were not found on its territory. Conversely, Belgium considers that, if these crimes were committed on its territory or if their perpetrator were found on Belgian territory, Belgium, like all other States confronted with the situation, would be obliged to prosecute these crimes.

This obligation to prosecute is similar to a *jus cogens* obligation in view of the gravity of the crimes, the universality of the rules which provide for their punishment, the strength with which the obligation is affirmed and their

[502] See the Belgian law on extradition of 15 March 1874, amended on 31 July 1985, art. 1 § 2, 3e item.; along the same lines, the European Extradition Convention of 12 December 1957, Art. 11.; The Benelux Treaty for Extradition and Judicial Assistance of 27 June 1962, Art. 10; etc.
[503] DRC Memorial, at paragraph 54.

> relation with the obligation to insure the most elementary rules of human rights.[504]
>
> On this point, however, Belgium agrees with the DRC in saying that immunity does not mean impunity.[505] If States must prosecute crimes under international humanitarian law, nowhere is it said that they must do so *hic et nunc*. There is, therefore, no contradiction with positive international law should the investigating judge refrain from executing an arrest warrant issued against Mr Yerodia Ndombasi in the event that he were to be officially invited to come to Belgium. *In casu*, charges would not be dropped or voided but simply suspended. Belgium would not be in breach of its imperative obligation to prosecute.

*(d) The absence of execution of the arrest warrant by third States shows that* opinio juris *supports absolute criminal immunity of a high foreign representative*

**3.5.162** As Belgium observed at the beginning of this chapter, the DRC has stated that no State has acted on the arrest warrant and that this shows the existence of a custom sanctioning the absolute criminal immunity of a high foreign representative. We recall what the DRC said in its Memorial:

> "Aucun Etat n'ayant à ce jour donné suite à ce mandat d'arrêt, il ne faut pas s'interroger plus avant sur la responsabilité spécifique qui pourrait en résulter dans le chef de l'Etat qui l'exécute, ni sur la manière dont celle-ci devrait s'articuler par rapport à celle, en qulque sorte originaire, de l'Etat belge. Le fait qu'aucun Etat n'a à ce jour donné suite au mandat d'arrêt du 11 avril 2000 est toutefois le signe de l'*opinio juris* dominante suivant laquelle tout ministre des Affaires étrangères en exercice bénéfice d'une inviolabilité et d'une immunité pénale absolues, ainsi qu'il fut rappelé ci-avant."[506]

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[504] See Chapter 3.

[505] DRC Memorial, at paragraph 73.

[506] "As no State has to date enforced this Arrest Warrant, there is no need to go further into the specific responsibility that might result for the State that enforces it, nor on the way that responsibility would be interconnected with that of the Belgian State which is the originating authority so to speak. The fact that no State has to date enforced the Arrest Warrant of 11 April 2000 is, however, a sign of the dominant *opinio juris* maintaining that any Minister of Foreign Affairs in office benefits from complete inviolability and immunity, as recalled above." DRC Memorial, paragraph 55 (Unofficial translation by Belgium).

**3.5.163** As has already been observed, this argument logically leads to the inadmissibility of the DRC's request.[507] If no State has acted on the arrest warrant, and if this refusal to act on it is the expression of the dominant *opinio juris*, it is hard to see what the DRC is complaining about, since, Mr Yerodia Ndombasi's immunity would be recognised in all third States.

**3.5.164** If, on the contrary, certain third States had been willing to execute the arrest warrant, *opinio juris* would consequently not be what the DRC supposes. In fact, to the knowledge of Belgium, it seems that Mr Yerodia Ndombasi, on applying for a visa to go to two countries, learned that he ran the risk of being arrested as a result of the arrest warrant issued against him by Belgium. This, moreover, is what the DRC itself hints when it writes that the arrest warrant "obligea le ministre Yerodia à emprunter des voies parfois moins directes pour voyager".[508] Consequently, the claim that there is *opinio juris*, which is demonstrated by the fact that the arrest warrant was not acted upon by other States is not founded.

**3.5.165** In conclusion, Belgium observes that

- the submission by the DRC that the criminal immunity of a high representative is absolute and is imposed on States does not take account of exceptions to this immunity stipulated for serious crimes under international humanitarian law. It is also contradicted by the practice of States which shows that States reserve the right to assess the legal situation of the person who relies on immunity;[509]

- the submission that immunity could not be recognised for Mr Yerodia Ndombasi by the Belgian investigating judge, despite what he declares in the arrest warrant, due to the separation of powers, is an argument that has no practical purpose for the dispute. Even if the argument of the DRC were admissible – *quod non* –- it would still be pointless since the power of the Belgian investigating judge in no way encroaches on that of the Government

[507] See paragraph 3.5.3 to 3.3.8 above.
[508] "obliged Minister Yerodia to use less direct itineraries for travel" DRC Memorial, at paragraph 52 (unofficial translation by Belgium).

and vice versa. Therefore, there is no jeopardy to the principle of the separation of powers;[510]

- the submission that immunity could not be recognised for Mr Yerodia Ndombasi by the investigating judge as a result of the *jus cogens* nature of the obligation to prosecute crimes under international humanitarian law is also an argument with no practical purpose, since it refutes what the DRC precisely claims. Even if the argument of the DRC were admissible – *quod non* – it is moot in any case due to the fact that nothing prohibits the investigating judge from including the procedures for execution of the acts he adopts;[511]

- by affirming that no State has acted on the arrest warrant for reasons of custom, the DRC again shows that the case is without practical purpose since it would suffice for Mr Yerodia Ndombasi simply to stay out of Belgium.[512] However, the fact that certain States seem to be willing to execute the arrest warrant undermines the DRC's argument on the existence of *opinio juris* favourable to absolute criminal immunity of a high foreign representative.[513] Therefore, even accepting that the DRC's petition has a practical purpose – *quod non* – it is without foundation.

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[509] See paragraphs 3.5.154 to 3.5.156 above.
[510] See paragraphs 3.5.157 to 3.5.159 above.
[511] See paragraphs 3.5.157 to 3.5.159 above.
[512] See paragraphs 3.5.7 and 3.5.163 above.
[513] See paragraph 3.5.164 above.

# CHAPTER SIX

## THE REMEDIES REQUESTED OF THE COURT BY THE DRC FALL OUTSIDE THE ACCEPTED JUDICIAL FUNCTION OF THE COURT

**3.6.1** The DRC requests of the Court are set out in its final submissions in paragraph 97 of its Memorial as follows:

> "1. Qu'en émettant et en diffusant internationalement le mandat d'arrêt du 11 avril 2000 délivré à charge de Monsieur Abdulaye Yerodia Ndombasi, la Belgique a violé, à l'encontre de la R.D.C., la règle de droit international coutumier relative à l'inviolabilité et l'immunité pénale absolues des ministres des Affaires étrangères en fonction;
>
> 2. Que la constatation solennele par la Cour du caractère illicite de ce fait constitue une forme adéquate de satisfaction permettant de réparer le dommage moral qui en découle dans le chef de la R.D.C.;
>
> 3. Que la violation du droit international dont procèdent l'émission et la diffusion internationale du mandat d'arrêt du 11 avril 2000 interdit à tout État, en ce compris la Belgique, d'y donner suite;
>
> 4. Que la Belgique est tenue de retirer et metre à néant le mandat d'arrêt du 11 avril 2000 et de faire savoir auprès des autorités étrangères auxquelles ledit mandat fut diffusé qu'elle renonce à solliciter leur cooperation pour l'exécution de ce mandat illicite suite à l'arrêt de la Cour."[514]

**3.6.2** As has already been observed,[515] the remedies requested relate solely in one way or another to the allegation that Belgium violated the immunities of the Minister

[514] "1. That by issuing and internationally transmitting the Arrest Warrant of 11 April 2000 issued against Mr Abdulaye Yerodia Ndombasi, Belgium violated, to the prejudice of the DRC, the rule of customary international law on the complete inviolability and immunity of the Minister for Foreign Affairs in office; 2. That the solemn declaration by the Court of the illicit nature of this act constitutes an adequate form of satisfaction to compensate the moral damages that resulted therefrom for the DRC; 3. That the violation of international law from which the issue and international transmission of the Arrest Warrant of 11 April 2000 proceeds prohibits any State, including Belgium, from enforcing it; 4. That Belgium is required to withdraw and annul the Arrest Warrant of 11 April 2000 and to inform the foreign authorities to which the warrant has been transmitted that it renounces petitioning their assistance for the enforcement of this illicit warrant in view of the Court's judgment." (DRC Memorial, at paragraph 97; unofficial translation by Belgium)

[515] See paragraphs 1.54–1.55 above.

for Foreign Affairs of the DRC. As has also been observed in the context of Belgium's submission on admissibility,[516] given that Mr Yerodia Ndombasi is no longer either Minister for Foreign Affairs of the DRC or a member of the DRC Government occupying any other ministerial position, the third and fourth requests by the DRC in practice concern the legal effect of the arrest warrant of 11 April 2000 as regards a private citizen of the DRC.

**3.6.3** The issue addressed in the present section is different and can be addressed briefly. It is whether requests to the Court to order the withdrawal and annulment of a measure of domestic law, and the restraint of both Belgium and other States as regards the execution of that measure, fall properly within the accepted judicial function of the Court. The issue is therefore one of a subsidiary nature which would only fall to be addressed in the event that the Court, contrary to Belgium's submission, were to decide that Belgium was in breach of international law as regards the issuing and transmission of the arrest warrant.

**3.6.4** It is Belgium's contention that the third and fourth requests to the Court by the DRC fall outside the accepted judicial function of the Court and should not be the subject of any judgment by the Court.

**3.6.5** The adjudication of disputes by international courts and tribunals rests on an accepted, though seldom articulated, division of competence between the court or tribunal in question and the States whose interests are in contention. It is the function of the court or tribunal to declare the law. It is for the State concerned to give effect to the law as so declared.[517] An integral part of the adjudicatory process is the obligation on States participating in the process to give effect to the decision that

[516] See paragraphs 3.52–3.53 above.

[517] Although, subject to the discussion that follows concerning the function of the Court, the general point may be made simply by way of proposition, it may be helpful to observe that the issue arises quite commonly for consideration in the context of the practice of other international, or supranational, courts or tribunals. Thus, for example, the European Court of Justice frequently refers the distinct roles of the courts and tribunals (and governments) of the Member States of the European Union to give effect to European Community law, and its own role of interpreting that law. By way of further example, the Members of the World Trade Organisation are required, by the Dispute Settlement Understanding which is integral to that agreement, to comply with the recommendations and rulings of WTO panels and the Appellate Body as adopted by the WTO Dispute Settlement Body. While the effectiveness of such compliance may be scrutinised in accordance with procedures specially laid down

emerges therefrom. In the case of the Court, that obligation is laid down in Article 94(1) of the UN *Charter* and is reflected in Article 59 of the Court's *Statute*. Article 94(2) of the *Charter* goes on to establish a mechanism for the enforcement of decisions of the Court by the Security Council.[518]

**3.6.6** A number of reasons are apparent for this division of competence. First, it is not for a court or tribunal to assume that its decisions will not be complied with. Indeed, were such an assumption to be made, it would call into question the very *raison d'être* of the decision in the first place. Second, there may be a number of ways in which a State could comply with a decision of a court or tribunal directed to it. The choice between those various ways of compliance is one for the State to make. Third, the division of competence reflects a balance between the role of courts and tribunals to declare the law, the responsibility of States to comply with decisions directed to them, and the sovereignty of States to organise their affairs as they choose subject only to the obligation to comply with the law.

**3.6.7** Although the matter has not arisen frequently for consideration by the Court, it has been the subject of comment. In the *Haya de la Torre* case, for example, the principal request to the Court was to determine the manner in which Peru was required to give effect to the Court's Judgment of 20 November 1950. Declining this request, the Court stated as follows:

> "The Court observes that the Judgment confined itself, in this connection, to defining the legal relations between the Parties. It did not give any directions to the Parties, and entails for them only the obligation of compliance therewith. The interrogative form in which they have formulated their Submissions shows that they desire that the Court should make a choice amongst the various courses by which the asylum may be terminated. But these choices are conditioned by facts and by possibilities which, to a very large extent, the Parties alone are in a position to appreciate. A choice amongst them could not be based on legal considerations, but only

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for this purpose once a reasonable period for compliance has passed, the decision of how to comply is a matter for the Member concerned.

[518] Article 94 of the *Charter* provides: "1. Each Member of the United Nations undertakes to comply with a decision of the International Court of Justice in any case to which it is a party. 2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."

> on considerations of practicability or of political expediency; it is not part of the Court's judicial function to make such a choice.
>
> …
>
> Having thus defined in accordance with the Havana Convention the legal relations between the Parties with regard to the matters referred to it, the Court has completed its task. It is unable to give any practical advice as to the various courses which might be followed with a view to terminating the asylum, since, by doing so, it would depart from its judicial function."[519]

**3.6.8** As is clear from this extract, the Court was of the view that the question of how to comply with a judgment of the Court was a matter for the party concerned and fell outside of the accepted judicial function of the Court. The fact that a range of possible options for compliance could be contemplated reinforced this appreciation.

**3.6.9** The Court addressed the matter in similar terms in the *Northern Cameroons* case, although in circumstances which ultimately led to it declining to give judgment on the ground that to do so would be devoid of purpose. On the question of compliance, the Court stated:

> "As the Court said in the *Haya de la Torre* case, it cannot concern itself with the choice among various practical steps which a State may take to comply with a judgment. It may also be agreed, as Counsel for Applicant suggested, that after a judgment is rendered, the use which the successful party makes of the judgment is a matter which lies on the political and not the judicial plane."[520]

**3.6.10** In Belgium's contention, the import of these decisions is clear. If, contrary to its submissions, the Court were to decide that Belgium was in breach of international law by the issuing and transmission of the arrest warrant, the manner in which Belgium would comply with the Judgment of the Court would be a matter for Belgium to decide. A number of avenues of compliance may be open. Compliance may involve issues of domestic constitutional and penal law of wider consequence. As the Court has recognised in the jurisprudence just referred to, it is not within the function of the Court to advise parties on the question of compliance.

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[519] *Haya de la Torre (Colombia v. Peru)*, ICJ Reports 1951, p.71, at pp.78–82.
[520] *Northern Cameroons* case, *supra*, at p.37.

**3.6.11** In Belgium's contention, the third and fourth requests addressed to the Court in the final submissions in the DRC Memorial raise questions of compliance with a putative judgment of the Court on the merits. They should not therefore be entertained by the Court.

* * *

## CONCLUSIONS

**10.1** For the reasons set out in Part II of this Counter-Memorial, Belgium contends, as a preliminary matter, that the Court lacks jurisdiction in this case and/or that the application by the DRC against Belgium is inadmissible. For ease of reference, Belgium's principal submissions on jurisdiction and admissibility may be summarised as follows:

> **First Submission** *(Part II: paragraphs 2.4 – 2.15)*
>
> That, in the light of the fact that Mr Yerodia Ndombasi is no longer either Minister for Foreign Affairs of the DRC or a minister occupying any other position in the DRC Government, there is no longer a "legal dispute" between the Parties within the meaning of this term in the Optional Clause Declarations of the Parties and that the Court accordingly lacks jurisdiction in this case.
>
> **Second Submission** *(Part II: paragraphs 2.16 – 2.38)*
>
> That, in the light of the fact that Mr Yerodia Ndombasi is no longer either Minister for Foreign Affairs of the DRC or a minister occupying any other position in the DRC Government, the case is now without object and the Court should accordingly decline to proceed to judgment on the merits of the case.
>
> **Third Submission** *(Part II: paragraphs 2.39 – 2.50)*
>
> That the case as it now stands is materially different to that set out in the DRC's Application instituting proceedings and that the Court accordingly lacks jurisdiction in the case and/or the application is inadmissible.
>
> **Fourth Submission** *(Part II: paragraphs 2.51 – 2.73)*
>
> That, in the light of the new circumstances concerning Mr Yerodia Ndombasi, the case has assumed the character of an action of diplomatic protection but one in which the individual being protected has failed to exhaust local remedies, and that the Court accordingly lacks jurisdiction in the case and/or that the application is inadmissible.

**10.2** In the event that the Court decides that it does have jurisdiction in this case and that the application is admissible, Belgium contends, by way of a **fifth**

**submission**, that the *non ultra petita* rule operates to limit the jurisdiction of the Court to those issues that are the subject of the DRC's final submissions *(Part II: paragraphs 2.74 – 2.79)*.

**10.3** If, contrary to Belgium's preliminary objections to the jurisdiction of the Court and the admissibility of the application, the Court concludes that it does have jurisdiction in this case and that the application is admissible, Belgium contends that the DRC case is unfounded on the merits. For ease of reference, Belgium's principal submissions on the merits of the case may be summarised as follows:

> **First Submission** *(Part III, Chapter One)*
>
> That the character of the arrest warrant of 11 April 2000 is such that it neither infringes the sovereignty of, nor creates any obligations for, the DRC.
>
> **Second Submission** *(Part III, Chapters Two and Three)*
>
> That the assertion of jurisdiction by the Belgium Judge pursuant of the relevant Belgian legislation is consistent with international law in that:
>
> - it is based on the connection of the complainant civil parties to Belgium by reason of nationality and/or residence;
> - it is consistent with the obligations upon High Contracting Parties to the *Fourth Geneva Convention*;
> - it is consistent with principles of customary international law permitting States to exercise universal jurisdiction over war crimes and crimes and humanity.
>
> **Third Submission** *(Part III, Chapter Four)*
>
> That the immunity that attaches to Ministers for Foreign Affairs in office applies for purposes of enabling them to carry out their official functions and not in respect of conduct undertaken in their private capacity or other than in the performance of their official functions.
>
> **Fourth Submission** *(Part III, Chapter Five)*
>
> That immunity does not avail persons in official capacity alleged to have committed war crimes or crimes against humanity.

**Fifth Submission** *(Part III, Chapter Six)*

That, whatever the Court's conclusions on the merits of the case, key elements of the remedies requested by the DRC in its final submissions fall outside the accepted judicial function of the Court and should not accordingly be the subject of any judgment by the Court.

**10.4** By reference to these submissions, Belgium requests the Court to reject the claim of the DRC on the merits of the case and to dismiss the application.

* * *

## SUBMISSIONS

**11.1** For the reasons stated in Part II of this Counter-Memorial, Belgium requests the Court, as a preliminary matter, to adjudge and declare that the Court lacks jurisdiction in this case and/or that the application by the Democratic Republic of the Congo against Belgium is inadmissible.

**11.2** If, contrary to the preceding submission, the Court concludes that it does have jurisdiction in this case and that the application by the Democratic Republic of the Congo is admissible, Belgium requests the Court to reject the submissions of the Democratic Republic of the Congo on the merits of the case and to dismiss the application.

Jan Devadder
Agent of the Kingdom of Belgium

28 September 2001

# LIST OF ANNEXES

*The annexes to the Belgian Counter-Memorial are produced in three volumes.* ***Volume I*** *contains documents 1 - 28.* ***Volume II*** *contains documents 29 - 80. A third volume, with the exception of the final document, contains* ***Supplementary Annexes*** *extracted from the bundle that was submitted to the Court at the time of the provisional measures phase of the case. Where documents have been readily available in both French and English, the French text of the document is followed by the English text. Where this has not been possible, the documents are reproduced in either French or English as the case may be. Where the original of a document is in a language other than French or English, the original language version is annexed together with a translation into French certified by Belgium as accurate in accordance with Article 51(3) of the Court's* Rules.

**Annex** **Document**

**Volumes I and II**

1. Déclaration belge faite en application de l'Article 36(2) du *Statut*, le 17 juin 1958
   *Belgian Declaration under Article 36(2) of the* Statute, *17 June 1958*

2. Déclaration de la RDC faite en application de l'Article 36(2) du *Statut*, le 8 février 1989
   *DRC Declaration under Article 36(2) of the* Statute, *8 February 1989*

3. Mandat d'arrêt international par défaut, du 11 avril 2000
   *International Arrest Warrant by default (unofficial English translation by Belgium)*

4. BELGIQUE, Loi du 16 juin 1993 relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocolles I et II du 8 juin 1977, additionnels à ces conventions, modifiée par la loi du 19 février 1999, relative à la répression des violations graves de droit international humanitaire
   *Belgian Act of 16 June 1993 Concerning the Punishment of Grave Breaches of the Geneva Conventions of 12 August 1949 and their*

*Additional Protocols I and II of 18 June 1977, as modified by the Act of 10 February 1999 Concerning the Punishment of Grave Breaches of International Humanitarian law (Unofficial consolidated English text, and commentary, published in 38 I.L.M. 918 (1999))*

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