DISSENTING OPINION OF JUDGE VAN DEN WYNGAERT

Immunities under customary international law ¾ Not applicable to Minister for Foreign Affairs ¾ Principle of international accountability for war crimes and crimes against humanity ¾ Role of civil society in the formation of opinio juris *¾ Impunity ¾ Extraterritorial jurisdiction for war crimes and crimes against humanity ¾ Universal jurisdiction for such crimes ¾* "Lotus" *test applied to such crimes ¾ Prescriptive jurisdiction ¾ Rome Statute for an International Criminal Court ¾ Complementarity principle ¾ Internationally wrongful act ¾ Enforcement jurisdiction ¾ (International) arrest warrants ¾ Remedies before the International Court of Justice ¾ Abuse of immunities and Pandora's box.*

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I. INTRODUCTORY OBSERVATIONS

1. I have voted against paragraphs (2) and (3) of the *dispositif* of this Judgment. International law grants no immunity from criminal process to incumbent Foreign Ministers suspected of war crimes and crimes against humanity. There is no evidence for the proposition that a State is under an obligation to grant immunity from criminal process to an incumbent Foreign Minister under customary international law. By issuing and circulating the warrant, Belgium may have acted contrary to international comity. It has not, however, acted in violation of an international legal obligation (Judgment, para. 78 (2)).

Surely, the warrant based on charges of war crimes and crimes against humanity, cannot infringe rules on immunity *today*, given the fact that Mr. Yerodia has now ceased to be a Foreign Minister and has become an ordinary citizen. Therefore, the Court is wrong when it finds, in the last part of its *dispositif*, that Belgium must cancel the arrest warrant and so inform the authorities to which the warrant was circulated (Judgment, para. 78 (3)).

I will develop the reasons for this dissenting view below. Before doing so, I wish to make some general introductory observations.

2. The case was about an arrest warrant based on acts allegedly committed by Mr. Yerodia in 1998 when he was not yet a Minister. These acts included various speeches inciting racial hatred, particularly virulent remarks, allegedly having the effect of inciting the population to attack Tutsi residents in Kinshasa, dragnet searches, manhunts and lynchings. Following complaints of a number of victims who had fled to Belgium, a criminal investigation was initiated in 1998, which eventually, in April 2000, led to the arrest warrant against Mr. Yerodia, who had meanwhile become a Minister for Foreign Affairs in the Congo. This warrant was not enforced when Mr. Yerodia visited Belgium on an official visit in June 2000, and Belgium, although it circulated the warrant internationally via an Interpol Green Notice, did not request Mr. Yerodia's extradition as long as he was in office. The request for an Interpol Red Notice was only made in 2001, *after* Mr. Yerodia had ceased to be a Minister.

3. Belgium has, at present, very broad legislation that allows victims of alleged war crimes and crimes against humanity to institute criminal proceedings in its courts. This triggers negative reactions in some circles, while inviting acclaim in others. Belgium's conduct (by its Parliament,

judiciary and executive powers) may show a lack of *international courtesy*. Even if this were true, it does not follow that Belgium actually violated (customary or conventional) international law. *Political wisdom* may command a change in Belgian legislation, as has been proposed in various circles[1]. *Judicial wisdom* may lead to a more restrictive application of the present statute, and may result from proceedings that are pending before the Belgian courts[2]. This does not mean that Belgium has acted in violation of international law by applying it in the case of Mr. Yerodia. I see no evidence for the existence of such a norm, not in conventional or in customary international law for the reasons set out below[3].

4. The Judgment is shorter than expected because the Court, which was invited by the Parties to narrow the dispute, did not decide the question of (universal) jurisdiction, and has only decided the question of immunity from jurisdiction, even though, logically the question of jurisdiction would have preceded that of immunity[4]. In addition, the Judgment is very brief in its reasoning and analysis of the arguments of the Parties. Some of these arguments were not addressed, others in a very succinct manner, certainly in comparison with recent judgments of national[5] and international courts[6] on issues that are comparable to those that were before the International Court of Justice.

5. This case was to be a test case, probably the first opportunity for the International Court of Justice to address a number of questions that have not been considered since the famous *"Lotus"* case of the Permanent Court of International Justice in 1927[7].

In technical terms, the dispute was about an arrest warrant against an incumbent Foreign Minister. The warrant was, however, based on charges of war crimes and crimes against humanity, which the Court even fails to mention in the *dispositif*. In a more principled way, the case was

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[1]The Belgian Foreign Minister, the Belgian Minister of Justice, and the Chairman of the Foreign Affairs Commission House of Representatives, have made public statements in which they called for a revision of the Belgian Act of 1993/1999. The Government referred the matter to the Parliament, where a bill was introduced in Dec. 2001 (*Proposition de loi modifiant, sur le plan de la procédure, la loi du 16 juin 1993 relative à la répression des violations graves du droit international humanitaire, Doc. Parl. Chambre 2001-2002*, No. 1568/001, available at http://www.lachambre.be/documents_parlementaires.html).

[2]A. Winants, *Le Ministère Public et le droit pénal international, Discours prononcé à l'occasion de l'audience solennelle de rentrée de la Cour d'Appel de Bruxelles du 3 septembre 2001*, p. 45.

[3]*Infra*, paras. 11 *et seq.*

[4]See further *infra*, para. 41.

[5]Prominent examples are the *Pinochet* cases in Spain and the United Kingdom (*Audiencia Nacional, Auto de la Sala de lo Penal de la Audiencia Nacional confirmando la jurisdicción de España para conocer de los crímenes de genocidio y terrorismo cometidos durante la dictadura chilena*, 5 Nov. 1998, http://www.derechos.org/nizkor/chile/juicio/audi.html; R. *v.* Bow Street Metropolitan Stipendiary Magistrate and others, *ex parte* Pinochet Ungarte, 24 Mar. 1999, *All. ER* (1999), p. 97), the *Qaddafi* case in France (Cour de Cassation, 13 Mar. 2001, http://courdecassation.fr/agenda/arrets/arrets/00-87215.htm) and the *Bouterse* case in the Netherlands (Hof Amsterdam, nr. R 97/163/12 Sv and R 97/176/12 Sv, 20 Nov. 2000; Hoge Raad, Strafkamer, Zaaknr. 00749/01 CW 2323, 18 Sep. 2001, http://www.rechtspraak.nl).

[6]ECHR (European Commission of Human Rights), Al-Adsani *v.* United Kingdom, 21 Nov. 2001, http://www.echr.coe.int.

[7]*"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10.*

about how far States can or must go when implementing modern international criminal law. It was about the question what international law requires or allows States to do as "agents" of the international community when they are confronted with complaints of victims of such crimes, given the fact that international criminal courts will not be able to judge *all* international crimes. It was about balancing two divergent interests in modern international (criminal) law: the need of international accountability for such crimes as torture, terrorism, war crimes and crimes against humanity and the principle of sovereign equality of States, which presupposes a system of immunities.

6. The Court has not addressed the dispute from this perspective and has instead focused on the very narrow question of immunities of incumbent Foreign Ministers. In failing to address the dispute from a more principled perspective, the International Court of Justice has missed an excellent opportunity to contribute to the development of modern international criminal law.

Yet international criminal law is becoming a very important branch of international law. This is manifested in conventions, in judicial decisions of national courts, international criminal tribunals and of international human rights courts, in the writings of scholars and in the activities of civil society. There is a wealth of authority on concepts such as universal jurisdiction, immunity from jurisdiction and international accountability for war crimes and crimes against humanity[8]. It is surprising that the International Court of Justice does not use the term international criminal law and does not acknowledge the existence of these authorities.

7. Although, as a matter of logic, the question of jurisdiction comes first[9], I will follow the chronology of the reasoning of the Judgment and deal with immunities first.

II. IMMUNITIES

8. The Court starts by observing that, in the absence of a general text defining the immunities of Ministers for Foreign Affairs, it is on the basis of customary international law that it must decide the questions relating to the immunities of Ministers for Foreign Affairs raised by the present case (Judgment, para. 52 *in fine*). It immediately continues by stating that "In customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States" (Judgment, para. 53). The Court then compares the functions of Foreign Ministers with those of Ambassadors and other diplomatic agents on the one hand, and those of Heads of State and Heads of Governments on the other, whereupon it reaches the following conclusion (Judgment, para. 54):

> "The Court accordingly concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties."

[8] See further *infra*, footnote 98.

[9] *Infra*, para. 41.

9. On the other hand, the Court, looking at State practice in the field of war crimes and crimes against humanity (Judgment, para. 58), decides that:

> "It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity."

10. I disagree with the reasoning of the Court, which can be summarized as follows: *(a)* there is a rule of customary international law granting "full" immunity to incumbent Foreign Ministers (Judgment, para. 54), and *(b)* there is no rule of customary international law departing from this rule in the case of war crimes and crimes against humanity (Judgment, para. 58). Both propositions are wrong.

First, there is no rule of customary international law protecting incumbent Foreign Ministers against criminal prosecution. International comity and political wisdom may command restraint, but there is no obligation under positive international law on States to refrain from exercising jurisdiction in the case of incumbent Foreign Ministers suspected of war crimes and crimes against humanity.

Secondly, international law does not prohibit, but instead encourages States to investigate allegations of war crimes and crimes against humanity, even if the alleged perpetrator holds an official position in another State.

Consequently, Belgium has not violated an obligation under international law by issuing and internationally circulating the arrest warrant against Mr. Yerodia. I will explain the reasons for this conclusion in the following two paragraphs.

1. There is no rule of customary international law granting immunity to incumbent Foreign Ministers

11. I disagree with the proposition that incumbent Foreign Ministers enjoy immunities on the basis of customary international law for the simple reason that there is no evidence in support of this proposition. Before reaching this conclusion, the Court should have examined whether there is a rule of customary international law to this effect. It is not sufficient to compare the *rationale* for the protection from suit in the case of diplomats, Heads of State and Foreign Ministers to draw the conclusion that there is a rule of customary international law protecting Foreign Ministers: identifying a common *raison d'être* for a protective rule is one thing, elevating this protective rule to the status of customary international law is quite another thing. The Court should have first examined whether the conditions for the formation of a rule of customary law were fulfilled in the case of incumbent Foreign Ministers. In a surprisingly short decision, the Court immediately reaches the conclusion that such a rule exists. A more rigorous approach would have been highly desirable.

12. In the brevity of its reasoning, the Court disregards its own case law on the subject on the formation of customary international law. In order to constitute a rule of customary international law, there must be evidence of state practice *(usus)* and *opinio juris* to the effect that this rule exists.

In one of the leading precedents on the formation of customary international law, the *Continental Shelf* case, the Court stated the following:

> "Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremony and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty."[10]

In the *Nicaragua* case, the Court held that:

> "Bound as it is by Article 38 of its Statute to apply, *inter alia*, international custom 'as evidence of a general practice accepted as law', the Court may not disregard the essential role played by general practice . . . The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice."[11]

13. In the present case, there is no settled practice *(usus)* about the postulated "full" immunity of Foreign Ministers to which the International Court of Justice refers in paragraph 54 of its present Judgment. There may be limited State practice about immunities for current[12] or former Heads of State[13] in national courts, but there is no such practice about Foreign Ministers. On the contrary, the practice rather seems to be that there are hardly any examples of Foreign Ministers being granted immunity in foreign jurisdictions[14]. Why this is so is a matter of speculation. The question, however, is what to infer from this "negative practice". Is this the expression of an *opinio juris* to the effect that international law prohibits criminal proceedings or, concomitantly, that Belgium is under an international obligation to refrain from instituting such proceedings against an incumbent Foreign Minister?

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[10] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 44, para. 77.

[11] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, pp. 97-98.

[12] Cour de Cassation (Fr.), 13 Mar. 2001 (Qaddafi).

[13] R. *v.* Bow Street Metropolitan Stipendiary Magistrate and others, *ex parte* Pinochet Ungarte, 25 Nov. 1998, *All. ER* (1998), p. 897.

[14] Only one case has been brought to the attention of the Court: Chong Boon Kim *v.* Kim Yong Shik and David Kim, Circuit Court (First Circuit), 9 Sep. 1963, *AJIL* 1964, pp. 186-187. This case was about an incumbent Foreign Minister against whom process was served while he was on an *official visit* in the United States (see para. 1 of the "Suggestion of Interest Submitted on behalf of the United States", *ibid.*). Another case where immunity was recognised, not of a Minister but of a prince, was in the case of Kilroy *v.* Windsor (Prince Charles, Prince of Wales), District Court, 7 Dec. 1978, *International Law Reports*, Vol. 81, 1990, pp. 605-607. In that case, the judge observes:

> "The Attorney-General . . . has determined that the Prince of Wales is immune from suit in this matter and has filed a 'suggestion of immunity' with the Court . . . [T]he doctrine, being based on foreign policy considerations and the Executive's desire to maintain amiable relations with foreign States, applies with even more force to live persons representing a foreign nation *on an official visit*." (Emphasis added.)

A "negative practice" of States, consisting in their abstaining from instituting criminal proceedings, cannot, in itself, be seen as evidence of an *opinio juris*. Abstinence may be explained by many other reasons, including courtesy, political considerations, practical concerns and lack of extraterritorial criminal jurisdiction[15]. Only if this abstention was based on a conscious decision of the States in question can this practice generate customary international law. An important precedent is the 1927 *"Lotus"* case, where the French Government argued that there was a rule of customary international law to the effect that Turkey was *not* entitled to institute criminal proceedings with regard to offences committed by foreigners abroad[16]. The Permanent Court of International Justice rejected this argument and held:

> "Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstance alleged by the Agent for the French Government, it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom"[17].

14. In the present case, the Judgment of the International Court of Justice proceeds from a mere analogy with immunities for diplomatic agents and Heads of State. Yet, as Sir Arthur Watts observes in his lectures published in the *Recueil des Cours de l'Académie de droit international* on the legal position in international law of Heads of States, Heads of Governments and Foreign Ministers: "analogy is not always a reliable basis on which to build rules of law"[18]. Professor Joe Verhoeven, in his report on the same subject for the Institut de droit international likewise makes the point that courts and legal writers, while comparing the different categories, usually refrain from making "une analogie pure et simple"[19].

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[15]In some States, for example, the United States, victims of extraterritorial human rights abuses can bring *civil* actions before the Courts. See, for example, the *Karadzic* case (Kadic *v.* Karadzic, 70 F. 3d 232 (2d Cir. 1995)). There are many examples of civil suits against incumbent or former Heads of State, which often arose from criminal offences. Prominent examples are the *Aristeguieta* case (Jimenez *v.* Aristeguieta, *ILR* 1962, p. 353), the *Aristide* case (Lafontant *v.* Aristide, WL 20798 (EDNY), noted in *AJIL* 1994, pp. 528-532), the *Marcos* cases (Estate of Silme G. Domingo *v.* Ferdinand Marcos, No. C82-1055V, *AJIL* 1983, p. 305: Republic of the Philippines *v.* Marcos and Others (1986), *ILR* 81, p. 581 and Republic of the Philippines *v.* Marcos and others, 1987, 1988, *ILR* 81, pp. 609 and 642) and the *Duvalier* case (Jean-Juste *v.* Duvalier, No. 86-0459 Civ (US District Court, SD Fla.), *AJIL* 1988, p. 594), all mentioned and discussed by Watts (A. Watts, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers", *Recueil des Cours de l'Académie de droit international*, 1994, III, pp. 54 *et seq.*). See also the American *1996 Antiterrorism and Effective Death Penalty Act* which amended the *Foreign Sovereign Immunities Act* (FSIA), including a new exception to State immunity in case of torture for civil claims. See J. F. Murphy, "Civil liability for the Commission of International Crimes as an Alternative to Criminal Prosecution", *Harvard Human Rights Journal*, 1999, pp. 1-56.

[16]See also *infra*, para. 48.

[17]*"Lotus"*, *supra*, footnote 7, p. 28. For a commentary, see McGibbon, "Customary international law and acquiescence", *BYBIL*, 1957, p. 129.

[18]A. Watts, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers", *Recueil des Cours de l'Académie de droit international* 1994, III, p. 40.

[19]J. Verhoeven, "L'immunité de juridiction et d'exécution des chefs d'Etat et anciens chefs d'Etat", *Report of the 13th Commission of the Institut de droit international*, p. 46, para. 18.

15. There are fundamental differences between the circumstances of diplomatic agents, Heads of State and Foreign Ministers. The circumstances of *diplomatic agents* are comparable, but not the same as those of Foreign Ministers. Under the 1961 Vienna Convention on Diplomatic Relations[20], diplomatic agents enjoy immunity from the criminal jurisdiction of the receiving State. However, diplomats reside and exercise their functions on the territory of the receiving States whereas Ministers normally reside in the State where they exercise their functions. Receiving States may decide whether or not to accredit foreign diplomats and may always declare them *persona non grata*. Consequently, they have a "say" in what persons they accept as a representative of the other State[21]. They do not have the same opportunity vis-à-vis Cabinet Ministers, who are appointed by their governments as part of their sovereign prerogatives.

16. Likewise, there may be an analogy between *Heads of State*, who probably enjoy immunity under customary international law[22], and Foreign Ministers. But the two cannot be assimilated for the only reason that their functions may be compared. Both represent the State, but Foreign Ministers do not "impersonate" the State in the same way as Heads of State, who are the State's alter ego. State practice concerning immunities of (incumbent and former) Heads of State[23] does not, *per se*, apply to Foreign Ministers. There is no State practice evidencing an *opinio juris* on this point.

17. Whereas the International Law Commission (ILC), in its mission to codify and progressively develop international law, has managed to codify customary international law in the case of diplomatic and consular agents[24], it has not achieved the same result regarding Heads of State or Foreign Ministers. It is noteworthy that the International Law Commission's Special Rapporteur on Jurisdictional Immunities of States and their Property, in his 1989 report, expressed the view that privileges and immunities enjoyed by Foreign Ministers are granted on the basis of comity rather than on the basis of established rules of international law[25]. This, according to Sir Arthur Watts, may explain why doubts as to the extent of jurisdictional immunities of Heads of Government and Foreign Ministers under customary international law have survived in the final version of the International Law Commission's 1991 Draft Articles on Jurisdictional Immunities of States and their Property[26], which in Article 3, paragraph 2, only refer to Heads of State, not to Foreign Ministers.

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[20]Convention on Diplomatic Relations, Vienna, 18 Apr. 1961, United Nations, *Treaty Series (UNTS)*, Vol. 500, p. 95.

[21]See, for example, the Danish hesitations concerning the accreditation of a new ambassador for Israel in 2001, after a new government had come to power in that State: *The Copenhagen Post*, 29 July 2001; *The Copenhagen Post*, 31 July 2001; *The Copenhagen Post*, 24 Aug. 2001 and "Prosecution of New Ambassador?", *The Copenhagen Post*, 7 Nov. 2001 (all available on the Internet: http://cphpost.periskop.dk).

[22]In civil and administrative proceedings this immunity is, however, not absolute. See A. Watts, *op. cit.*, pp. 36 and 54. See also *supra*, footnote 15.

[23]See *supra*, footnotes 12 and 13.

[24]Convention on Diplomatic Relations, Vienna, 18 Apr. 1961, *UNTS*, Vol. 500, p. 95 and Convention on Consular Relations, Vienna, 24 Apr. 1963, *UNTS*, Vol. 596, p. 262.

[25]*YILC* 1989, Vol. II (2), Part 2, para. 146.

[26]A. Watts, *op. cit.*, p. 107.

In the field of the criminal law regarding international core crimes such as war crimes and crimes against humanity, the International Law Commission clearly adopts a restrictive view on immunities, which is reflected in Article 7 of the 1996 Draft Code of Offences against the Peace and Security of Mankind. These Articles are intended to apply, not only to *international* criminal courts, but also to *national* authorities exercising jurisdiction (Art. 8 of the Draft Code) or co-operating mutually by extraditing or prosecuting alleged perpetrators of international crimes (Art. 9 of the Draft Code). I will further develop this when addressing the problem of immunities for incumbent Foreign Ministers charged with war crimes and crimes against humanity[27].

18. The only text of conventional international law, which may be of relevance to answer this question of the protection of Foreign Ministers, is the 1969 Convention on Special Missions[28]. Article 21 of this Convention clearly distinguishes between Heads of State (para. 1) and Foreign Ministers (para. 2):

> "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
>
> 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 . . ."

Legal opinion is divided on the question to what extent this Convention may be considered a codification of customary international law[29]. This Convention has not been ratified by the Parties to the dispute. It links the "facilities, privileges and immunities" of Foreign Ministers' *official visits* (when they take part in a special mission of the sending State). There may be some political wisdom in the proposition that a Foreign Minister should be accorded the same privileges and immunities as a Head of State, but this may be a matter of courtesy, and does not necessarily lead to the conclusion that there is a rule of customary international law to this effect. It certainly does not follow from the text of the Special Missions Convention. Applying this to the dispute between the Democratic Republic of the Congo and Belgium, the only conclusion that follows from the Special Missions Convention, were it to be applicable between the two States concerned, is that an arrest warrant against an incumbent Foreign Minister cannot be enforced when he is on an official visit (immunity from execution)[30].

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[27]See *infra*, paras. 24 *et seq.* and particularly para. 32.

[28]United Nations Convention on Special Missions, New York, 16 Dec. 1969, Ann. to UNGA res. 2530 (XXIV) of 8 Dec. 1969.

[29]J. Salmon observes that the limited number of ratifications of the Convention can be explained because of the fact that the Convention sets all special missions on the same footing, according the same privileges and immunities to Heads of State on a official visit and to the members of an administrative commission which comes negotiating over technical issues. See J. Salmon, *Manuel de droit diplomatique*, Brussels, Bruylant, 1994, p. 546.

[30]See also *infra*, para. 75 (inviolability).

19. Another international Convention that mentions Foreign Ministers is the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons[31]. This Convention indeed defines "internationally protected persons" so as to include Heads of State, Heads of Government and Foreign Ministers and other representatives of the State, and may hereby create the impression that the different categories mentioned can be assimilated (Art. 1). This assimilation, however, is not relevant for the purposes of the present dispute. The 1973 Convention is not about immunities from criminal proceedings in another State, but about the protection of the high foreign officials it enumerates when they are *victims* of certain acts of terrorism such as murder, kidnapping or other attacks on their person or liberty (Art. 2). It is not about procedural protections for these persons when they are themselves accused of being *perpetrators* of war crimes and crimes against humanity.

20. There is hardly any support in legal doctrine for the International Court of Justice's postulated analogy between Foreign Ministers and Heads of State on the subject of immunities. Oppenheim and Lauterpacht write: "members of a Government have not the exceptional position of Heads of States . . ."[32]. This view is shared by A. Cavaglieri[33], P. Cahier[34], J. Salmon[35], B. S. Murty[36] and J. S. Erice Y. O'Shea[37].

Sir Arthur Watts is adamant in observing that principle "suggests that a head of government or Foreign Minister who visits another State *for official purposes* is immune from legal process *while there*"[38]. Commenting further on the question of "private visits", he writes:

> "Although it may well be that a Head of State, when on a private visit to another State, still enjoys certain privileges and immunities, it is much less likely that the same is true of heads of governments and foreign ministers. Although they may be accorded certain special treatment by the host State, this is more likely to be a matter of courtesy and respect for the seniority of the visitor, than a reflection of any belief that such a treatment is required by international law."[39]

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[31]Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, New York, 14 Dec. 1973, 78 *UNTS*, p. 277.

[32]L. Oppenheim, and H. Lauterpacht, (eds.), *International Law, a Treatise*, Vol. I, 1955, p. 358. See also the 1992 Edition (by Jennings and Watts) at p. 1046.

[33]A. Cavaglieri, *Corso di Diritto Internazionale*, Second Edition, pp. 321-322.

[34]P. Cahier, *Le droit diplomatique contemporain*, 1964, pp. 359-360.

[35]J. Salmon, *Manuel de droit diplomatique*, 1994, p. 539.

[36]B. S. Murty, *The International Law of Diplomacy*, 1989, pp. 333-334.

[37]J. S. de Erice Y O'Shea, *Derecho Diplomatico*, 1954, pp. 377-378.

[38]A. Watts, *op. cit.*, p. 106 (emphasis added). See also p. 54 "So far as concerns criminal proceedings, a Head of State's immunity is generally accepted as being *absolute*, as it is for ambassadors, and as provided in Article 31 (1) of the Convention on Special Missions for Heads of States coming within its scope."

[39]A. Watts, *op. cit.*, pp. 109.

21. More recently, the Institut de droit international, at its 2001 Vancouver session, addressed the question of the immunity of Heads of State and Heads of Government. The draft resolution explicitly assimilated Heads of Government *and* Foreign Ministers with Heads of State in Article 14, entitled "Le Chef de gouvernement et le ministre des Affaires étrangères". This draft Article does not appear in the final version of the Institut de droit international resolution. The final resolution only mentions Heads of Government, not Foreign Ministers. The least one can conclude from this difference between the draft resolution and the final text is that the distinguished members of the Institut considered, but did not decide to place Foreign Ministers on the same footing as Heads of State[40].

The reasons behind the final version of the resolution are not clear. It may or may not reflect the Institut de droit international's view that there is no customary international law rule that assimilates Heads of State and Foreign Ministers. Whatever may be the Institut de droit international's reasons, it was a wise decision. Proceeding to assimilations of the kind proposed in the draft resolution would dramatically increase the number of persons that enjoy international immunity from jurisdiction. There would be a potential for abuse. *Male fide* governments could appoint suspects of serious human rights violations to cabinet posts in order to shelter them from prosecution in third States.

22. Victims of such violations bringing legal action against such persons in third States would face the obstacle of immunity from jurisdiction. Today, they may, by virtue of the application of the principle contained in Article 21 of the 1969 Special Missions Convention[41], face the obstacle of immunity from execution while the Minister is on an official visit, but they would not be barred from bringing an action altogether. Taking immunities further than this may even lead to conflict with international human rights rules as appears from the recent *Al-Adsani* case of the European Court of Human Rights[42].

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[40]See the Report of J. Verhoeven, *supra,* footnote 19 (draft resolutions) and the final resolutions adopted at the Vancouver meeting on 26 Aug. 2001 (publication in the *Yearbook* of the Institute forthcoming). See further H. Fox, "The Resolution of the Institute of International Law on the Immunities of Heads of State and Government", *ICLQ* 2002, p. 119-125.

[41]*Supra*, para. 18.

[42]ECHR, Al-Adsani *v.* United Kingdom, 21 Nov. 2001, http://www.echr.coe.int. In that case, the Applicant, a Kuwaiti/British national, claimed to have been the victim of serious human rights violations (torture) in Kuwait by agents of the Government of Kuwait. In the United Kingdom, he complained about the fact that he had been denied access to court in Britain because the courts refused to entertain his complaint on the basis of the 1978 State Immunity Act. Previous cases before the ECHR had usually arisen from human rights violations committed on the territory of the respondent State and related to acts of torture allegedly committed by the authorities of the respondent State itself, not by the authorities of third States. Therefore, the question of international immunities did not arise. In the *Al-Adsani* case, the alleged human rights violation was committed abroad, by authorities of another State and so the question of immunity did arise. The ECHR (with a 9/8 majority), has rejected Mr. Al-Adsani's application and held that there has been no violation of Article 6, paragraph 1, of the Convention (right of access to court). However, the decision was reached with a narrow majority (9/8 and 8 dissenting opinions) and was itself very narrow: it only decided the question of immunities in a *civil* proceeding, leaving the question as to the application of immunities in a *criminal* proceeding unanswered. Dissenting judges, Judges Rozakis and Caflisch joined by Judges Wildhaber, Costa, Cabral Barreto and Vajiæ and also Loucaides read the decision of the majority as implying that the court would have found a violation had the proceedings in the United Kingdom been criminal proceedings against an individual for an alleged act of torture (para. 60 of the judgment, as interpreted by the dissenting judges in para. 4 of their opinion).

23. I conclude that the International Court of Justice, by deciding that incumbent Foreign Ministers enjoy *full* immunity from foreign criminal jurisdiction (Judgment, para. 54), has reached a conclusion which has no basis in positive international law. Before reaching this conclusion, the Court should have satisfied itself of the existence of *usus* and *opinio juris*. There is neither State practice nor *opinio juris* establishing an international custom to this effect. There is no treaty on the subject and there is no legal opinion in favour of this proposition. The Court's conclusion is reached without regard to the general tendency toward the restriction of immunity of the State officials (including even Heads of State), not only in the field of private and commercial law where the *par in parem* principle has become more and more restricted and deprived of its mystique[43], but also in the field of criminal law, when there are allegations of serious international crimes[44]. Belgium may have acted contrary to international comity, but has not infringed international law. The Judgment is therefore based on flawed reasoning.

2. Incumbent Foreign Ministers are not immune from the jurisdiction of other States when charged with war crimes and crimes against humanity

24. On the subject of war crimes and crimes against humanity, the Court reaches the following decision: it holds that it is unable to decide that there exists under customary international law any form of exception to the rule according immunity from criminal process and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity (Judgment, para. 58, first alinea).

It goes on by observing that there is nothing in the rules concerning the immunity or the criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals that enables it to find that such an exception exists under customary international law before national criminal tribunals (Judgment, para. 58, second alinea).

This immunity, it concludes, "remain[s] opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions" (Judgment, para. 59 *in fine*).

25. I strongly disagree with these propositions. To start with, as set out above, the Court starts from a flawed premise, assuming that incumbent Foreign Ministers enjoy full immunity from jurisdiction under customary international law. This premise taints the rest of the reasoning. It leads to another flaw in the reasoning: in order to "counterbalance" the postulated customary international law rule of "full immunity", there needs to be evidence of another customary international law rule that would negate the first rule. It would need to be established that the principle of international accountability has also reached the status of customary international law.

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[43] *Supra*, footnote 22.

[44] *Infra*, paras. 24 *et seq.*

The Court finds no evidence for the existence of such a rule in the limited sources it considers[45] and concludes that there is a violation of the first rule, the rule of immunity.

26. Immunity from criminal process, the International Court of Justice emphasizes, does not mean the impunity of a Foreign Minister for crimes that he may have committed, however serious they may be. It goes on by making two points showing its adherence to this principle: *(a)* jurisdictional immunity, being procedural in nature, is not the same as criminal responsibility, which is a question of substantive law and the person to whom jurisdictional immunity applies is not exonerated from all criminal responsibility (Judgment, para. 60); *(b)* immunities enjoyed by an incumbent Foreign Minister under international law do not represent a bar to criminal prosecution in four sets of circumstances, which the Court further examines (Judgment, para. 61).

This is a highly unsatisfactory rebuttal of the arguments in favour of international accountability for war crimes and crimes against humanity, which moreover disregards the higher order of the norms that belong to the latter category. I will address both points in the next two subparagraphs below. Before doing so, I wish to make a general comment on the approach of the Court.

27. Apart from being wrong in law, the Court is wrong for another reason. The more fundamental problem lies in its general approach, that disregards the whole recent movement in modern international criminal law towards recognition of the principle of individual accountability for international core crimes. The Court does not completely ignore this, but it takes an extremely minimalist approach by adopting a very narrow interpretation of the "no immunity-clauses" in international instruments.

Yet, there are many codifications of this principle in various sources of law, including the Nuremberg Principles[46] and Article IV of the Genocide Convention[47]. In addition, there are several United Nations resolutions[48] and reports[49] on the subject of international accountability for war crimes and crimes against humanity.

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[45]In para. 58 of the Judgment, the Court only refers to instruments that are relevant for *international* criminal tribunals (the statutes of the Nuremberg and the Tokyo tribunals, statutes of the *ad hoc* criminal tribunals and the Rome Statute for an International Criminal Court). But there are also other instruments that are of relevance, and that refer to the jurisdiction of *national* tribunals. A prominent example is Control Council Law No. 10 (Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, *Official Gazette of the Control Council for Germany*, No. 3, Berlin, 31 Jan. 1946. See also Art. 7 of the 1996 ILC Draft Code of Offences against the Peace and Security of Mankind.

[46]Nuremberg Principles, Geneva, 29 July 1950, UNGAOR, 5th Session, Supp. No. 12, United Nations doc. A/1316 (1950).

[47]Convention on the Prevention and Suppression of the Crime of Genocide, Paris, 9 Dec. 1948, *UNTS*, Vol. 78, p. 277. See also Art. 7 of the Nuremberg Charter (Charter of the International Military Tribunal, London, 8 Aug. 1945, *UNTS*, Vol. 82, p. 279); Art. 6 of the Tokyo Charter (Charter of the Military Tribunal for the Far East, Tokyo, 19 Jan. 1946, *TIAS*, No. 1589); Art. II (4) of the Control Council Law No. 10 (Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, Berlin, 20 Dec. 1945, *Official Gazette of the Control Council for Germany*, No. 3, Berlin, 31 Jan. 1946); Art. 7, para. 2, of the ICTY Statute (Statute of the International Tribunal for the Former Yugoslavia, New York, 25 May 1993, *ILM* 1993, p. 1192); Art. 6, para. 2, of the ICTR Statute (Statute of the International Tribunal for Rwanda, New York, 8 Nov. 1994, *ILM* 1994, p. 1598); Art. 7 of the 1996 ILC Draft Code of Offences against the Peace and Security of Mankind (Draft Code of Crimes against the Peace and Security of Mankind, Geneva, 5 July 1996, *YILC* 1996, Vol. II (2)) and Art. 27 of the Rome Statute for an International Criminal Court (Statute of the International Criminal Court, Rome, 17 July 1998, *ILM* 1998, p. 999).

[48]See, for example, Sub-Commission on Human Rights, Res. 2000/24, *Role of Universal or Extraterritorial Competence in Preventive Action against Impunity*, 18 Aug. 2000, E/CN.4/SUB.2/RES/2000/24; Commission on Human Rights, Res. 2000/68, *Impunity*, 27 Apr. 2000, E/CN.4/RES/2000/68; Commission on Human Rights, Res. 2000/70, *Impunity*, 25 Apr. 2001, E/CN.4/RES/2000/70 (taking note of Sub-Commission Res. 2000/24).

In legal doctrine, there is a plethora of recent scholarly writings on the subject[50]. Major scholarly organizations, including the International Law Association[51] and the Institut de droit international have adopted resolutions[52] and newly established think tanks, such as the drafters of the "Princeton principles"[53] and of the "Cairo principles"[54] have made statements on the issue. Advocacy organizations, such as Amnesty International[55], Avocats sans Frontières[56], Human Rights Watch, The International Federation of Human Rights Leagues (FIDH) and the International Commission of Jurists[57], have taken clear positions on the subject of international accountability[58]. This may be seen as the opinion of *civil society*, an opinion that cannot be completely discounted in

[49]Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Administration of Justice and the Human Rights of Detainees, Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political), Revised final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119*, 2 Oct. 1997, E/CN.4/Sub.2/1997/20/Rev.1; Commission on Human Rights, *Civil and political rights, including the questions of: independence of the judiciary, administration of justice, impunity, The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final report of the Special rapporteur, Mr. M. Cherif Bassiouni, submitted in accordance with Commission res. 1999/33*, E/CN.4/2000/62.

[50]See infra, footnote 98.

[51]International Law Association (Committee on International Human Rights Law and Practice), *Final Report on the Exercise of Universal Jurisdiction in respect of Gross Human Rights Offences*, 2000.

[52]See also the *Institut de droit international*'s Resolution of Santiago de Compostela, 13 Sep. 1989, commented by G. Sperduti, "Protection of human rights and the principle of non-intervention in the domestic concerns of States. Rapport provisoire", *Yearbook of the Institute of International Law*, Session of Santiago de Compostela, 1989, Vol. 63, Part I, pp. 309-351.

[53]Princeton Project on Universal Jurisdiction, *The Princeton Principles on Universal Jurisdiction*, 23 July 2001, with a foreword by Mary Robinson, United Nations High Commissioner for Human Rights, http://www.princeton.edu/~lapa/unive_jur.pdf. See M. C. Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice", *Virginia Journal of International Law*, 2001, Vol. 42, pp. 1-100.

[54]Africa Legal Aid (AFLA), *Preliminary Draft of the Cairo Guiding Principles on Universal Jurisdiction in Respect of Gross Human Rights Offenses: An African Perspective*, Cairo, 31 July 2001, http://www.afla.unimaas.nl/en/act/univjurisd/preliminaryprinciples.htm.

[55]Amnesty International, *Universal Jurisdiction. The Duty of States to Enact and Implement Legislation*, Sep. 2001, AI Index IOR 53/2001.

[56]Avocats sans frontières, "Débat sur la loi relative à la répression des violations graves de droit international humanitaire", discussion paper of 14 Oct. 2001, available on http://www.asf.be.

[57]K. Roth, "The Case For Universal Jurisdiction", *Foreign Affairs*, Sep./Oct. 2001, responding to an article written by an ex Minister of Foreign Affairs in the same review (Henry Kissinger, "The Pitfalls of Universal Jurisdiction", *Foreign Affairs*, July/Aug. 2001).

[58]See the joint Press Report of Human Rights Watch, the International Federation of Human Rights Leagues and the International Commission of Jurists, "Rights Group Supports Belgium's Universal Jurisdiction Law", 16 Nov. 2000, available at http://www.hrw.org/press/2000/11/world-court.htm or http://www.icj.org/press/press01/english/belgium11.htm. See also the efforts of the International Committee of the Red Cross in promoting the adoption of international instruments on international humanitarian law and its support of national implementation efforts (http://www.icrc.org/eng/advisory_service_ihl; http://www.icrc.org/eng/ihl).

the formation of customary international law today. In several cases, civil society organizations have set in motion a process that ripened into international conventions[59]. Well-known examples are the 1968 Convention on the Non Applicability of Statutory Limitations to War Crimes and Crimes against Humanity[60], which can be traced back to efforts of the International Association of Penal law, the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, probably triggered by Amnesty International's Campaign against Torture, the 1997 Treaty banning Landmines[61], to which the International Campaign to Ban Landmines gave a considerable impetus[62] and the 1998 Statute for the International Criminal Court, which was promoted by a coalition of non-governmental organizations.

28. The Court fails to acknowledge this development, and does not discuss the relevant sources. Instead, it adopts a formalistic reasoning, examining whether there is, under customary international law, an international crimes exception to the — wrongly postulated — rule of immunity for incumbent Ministers under customary international law (Judgment, para. 58). By adopting this approach, the Court implicitly establishes a hierarchy between the rules on immunity (protecting incumbent former Ministers) and the rules on international accountability (calling for the investigation of charges against incumbent Foreign Ministers charged with war crimes and crimes against humanity).

By elevating the former rules to the level of customary international law in the first part of its reasoning, and finding that the latter have failed to reach the same status in the second part of its reasoning, the Court does not need to give further consideration to the status of the principle of international accountability under international law. As a result, the Court does not further examine the status of the principle of international accountability. Other courts, for example the House of Lords in the *Pinochet* case[63] and the European Court of Human Rights in the *Al-Adsani* case[64], have given more thought and consideration to the balancing of the relative normative status of international *ius cogens* crimes and immunities.

Questions concerning international accountability for war crimes and crimes against humanity and that were not addressed by the International Court of Justice include the following. Can international accountability for such crimes be considered to be a general principle of law in the sense of Article 38 of the Court's Statute? Should the Court, in reaching its conclusion that

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[59]M. C. Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice", *Virginia Journal of International Law*, 2001, Vol. 42, p. 92.

[60]Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity, New York, 26 Nov. 1968, *ILM* 1969, p. 68.

[61]Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction, Oslo, 18 Sep. 1997, *ILM* 1997, p. 1507.

[62]The International Campaign to Ban Landmines (ICBL) is a coalition of non-governmental organisations, with Handicap International, Human Rights Watch, Medico International, Mines Advisory Group, Physicians for Human Rights, and Vietnam Veterans of America Foundation as founding members.

[63]R. *v.* Bow Street Metropolitan Stipendiary Magistrate and others, *ex parte* Pinochet Ungarte, 24 Mar. 1999, *All. ER* (1999), p. 97.

[64]*Al-Adsani* case: ECHR, Al-Adsani *v.* United Kingdom, 21 Nov. 2001, http://www.echr.coe.int.

there is no international crimes exception to immunities under international law, not have given more consideration to the factor that war crimes and crimes against humanity have, by many, been considered to be customary international law crimes[65]? Should it not have considered the proposition of writers who suggest that war crimes and crimes against humanity are *ius cogens* crimes[66], which, if it were correct, would only enhance the contrast between the status of the rules punishing these crimes and the rules protecting suspects on the ground of immunities for incumbent Foreign Ministers, which are probably not part of *ius cogens*[67].

Having made these general introductory observations, I will now turn to the two specific propositions of the International Court of Justice referred to above, i.e., the distinction between substantive and procedural defences and the idea that immunities are not a bar to prosecution[68].

(a) The distinction between immunity as a procedural defence and immunity as a substantive defence is not relevant for the purposes of this dispute

29. The distinction between jurisdictional immunity and criminal responsibility of course exists in all legal systems in the world, but is not an argument in support of the proposition that incumbent Foreign Ministers cannot be subject to the jurisdiction of other States when they are suspected of war crimes and crimes against humanity. There are a host of sources, including the 1948 Genocide Convention[69], the 1996 International Law Commission's Draft Code of Offences against the Peace and Security of Mankind[70], the Statutes of the *ad hoc* international criminal tribunals[71] and the Rome Statute for an International Criminal Court[72]. All these sources confirm

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[65]See: American Law Institute, *Restatement of the Law Third. The Foreign Relations Law of the United States*, St. Paul, Minn., American Law Institute Publishers, Vol. 1, para. 404, Comment; M. C. Bassiouni, *Crimes Against Humanity in International Criminal Law*, The Hague, Kluwer Law International, 1999, p. 610; T. Meron, *Human Rights and Humanitarian Norms As Customary Law*, Oxford, Clarendon Press, 1989, p. 263; T. Meron, "International Criminalization of Internal Atrocities", *AJIL* 1995, p. 558; A. H. J. Swart, *De berechting van internationale misdrijven*, Deventer, Gouda Quint, 1996, p. 7; ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, *Tadic*, paras. 96-127 and 134 (common Art. 3).

[66]M. C. Bassiouni, "International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*", 59 *Law and Contemporary Problems*, 1996, pp. 63-74; M. C. Bassiouni, *Crimes against Humanity in International Criminal Law*, The Hague, Kluwer Law International, 1999, pp. 210-217; C. J. R. Dugard, *Opinion In: Re Bouterse*, para. 4.5.5, to be consulted at: http://www.icj.org/objectives/opinion.htm; K. C. Randall, "Universal Jurisdiction Under International Law", *Texas Law Review*, 1988, pp. 829-832; ICTY, Judgment, 10 Dec. 1998, *Furundzija*, para. 153 (torture).

[67]See the conclusion of Professor J. Verhoeven in his Vancouver report for the Institut de droit international, *supra*, footnote 19, p. 70.

[68]See also *supra*, para. 26.

[69]Convention on the Prevention and Suppression of the Crime of Genocide, Paris, 9 Dec. 1948, *UNTS*, Vol. 78, p. 277.

[70]"Draft Code of Crimes against the Peace and Security of Mankind", *ILCR* 1996, United Nations doc. 1/51/10.

[71]Statute of the International Tribunal for the former Yugoslavia, New York, 25 May 1993, *ILM* 1993, p. 1192; Statute of the International Tribunal for Rwanda, 8 Nov. 1994, *ILM* 1994, p. 1598.

[72]Rome Statute of the International Criminal Court, Rome, 17 July 1998, *ILM* 1998, p. 999.

the proposition contained in the Principle 3 of the Nuremberg principles[73] which states: "The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law".

30. The Congo argued that these sources only address substantive immunities, not procedural immunities and that therefore they offer no exception to the principle that incumbent Foreign Ministers are immune from the jurisdiction of other States. Although some authorities seem to support this view[74], most authorities do not mention the distinction at all and even reject it.

31. Principle 3 of the Nuremberg principles (and the subsequent codifications of this principle), in addition to addressing the issue of (procedural or substantive) immunities, deals with the *attribution* of criminal acts to individuals. International crimes are indeed not committed by abstract entities, but by individuals who, in many cases, may act on behalf of the State[75]. Sir Arthur Watts very pertinently writes:

> "States are artificial legal persons: they can only act through the institutions and agencies of the State, which means, ultimately, through its officials and other individuals acting on behalf of the State. For international conduct which is so serious as to be tainted with criminality to be regarded as attributable only to the impersonal State and not to the individuals who ordered or perpetrated it is both unrealistic and offensive to common notions of justice."[76]

At the heart of Principle 3 is the debate about individual versus State responsibility, not the discussion about the procedural or substantive nature of the protection for government officials. This can only mean that, where international crimes such as war crimes and crimes against humanity are concerned, immunity cannot block investigations or prosecutions to such crimes, regardless of whether such proceedings are brought before national or before international courts.

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[73] *Supra*, footnote 46.

[74] See e.g., Principle 5 of *The Princeton Principles on Universal Jurisdiction*. The Commentary states that "There is an extremely important distinction, however, between 'substantive' and 'procedural' immunity", but goes on by saying that "None of these statutes [Nuremberg, ICTY, ICTR] addresses the issue of procedural immunity." (*supra*, footnote 53, pp. 48-51).

[75] See the Judgment of the International Military Tribunal for the Trial of German Major War Criminals, *Nuremberg Trial Proceedings*, Vol. 22, p. 466 "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."

[76] A. Watts, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers", *Recueil des Cours de l'Académie de droit international*, 1994, III, p. 82.

32. Article 7 of the International Law Commission's 1996 Draft Code of Crimes against the Peace and Security of Mankind[77], which is intended to apply to both national and international criminal courts, only confirms this interpretation. In its Commentary to this Article, the International Law Commission states:

> "The absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive immunity or defence. It would be paradoxical to prevent an individual from invoking his official position to avoid responsibility for a crime only to permit him to invoke this same consideration to avoid the consequences of this responsibility."[78]

33. In adopting the view that the non-impunity clauses in the relevant international instruments only address substantive, not procedural immunities, the International Court of Justice has adopted a purely doctrinal proposition, which is not based on customary or conventional international law or on national practice and which is not supported by a substantial part of legal doctrine. It is particularly unfortunate that the International Court of Justice adopts this position without giving reasons.

***(b)* The Court's proposition that immunity does not necessarily lead to impunity is wrong**

34. I now turn to the Court's proposition that immunities protecting an incumbent Foreign Minister under international law are not a bar to criminal prosecution in certain circumstances, which the Court enumerates. The Court mentions four cases where an incumbent or former Minister for Foreign Affairs can, despite his immunities under customary international law, be prosecuted: (1) he can be prosecuted in his own country; (2) he can be prosecuted in other States if the State whom he represents waives immunity; (3) he can be prosecuted after he ceases being a Minister for Foreign Affairs; and (4) he can be prosecuted before an international court (Judgment, para. 61).

In theory, the Court may be right: immunity and impunity are not synonymous and the two concepts should therefore not be conflated. In practice, however, immunity leads to *de facto* impunity. All four cases mentioned by the Court are highly hypothetical.

35. Prosecution in the *first two cases* presupposes a willingness of the State which appointed the person as a Foreign Minister to investigate and prosecute allegations against him domestically or to lift immunity in order to allow another State to do the same.

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[77] See also *supra*, para. 17.

[78] Draft Code of Crimes against the Peace and Security of Mankind, *ILCR* 1996, United Nations doc. A/51/10, at p. 41.

This, however, is the core of the problem of impunity: where national authorities are not willing or able to investigate or prosecute, the crime goes unpunished. And this is precisely what happened in the case of Mr. Yerodia. The Congo accused Belgium of exercising universal jurisdiction *in absentia* against an incumbent Foreign Minister, but it had itself omitted to exercise its jurisdiction *in presentia* in the case of Mr. Yerodia, thus infringing the Geneva Conventions and not complying with a host of United Nations resolutions to this effect[79].

The Congo was ill placed when accusing Belgium of exercising universal jurisdiction in the case of Mr. Yerodia. If the Congo had acted appropriately, by investigating charges of war crimes and crimes against humanity allegedly committed by Mr. Yerodia in the Congo, there would have been no need for Belgium to proceed with the case. Belgium repeatedly declared, and again emphasized in its opening and closing statements[80] before the Court, that it had tried to transfer the *dossier* to the Congo, in order to have the case investigated and prosecuted by the authorities of the Congo. Nowhere does the Congo mention that it has investigated the allegations of war crimes and crimes against humanity against Mr. Yerodia. Counsel for the Congo even perceived this Belgian initiative as an improper pressure on the Congo[81], as if it were adding insult to injury.

The Congo did not come to the Court with clean hands[82]. In blaming Belgium for investigating and prosecuting allegations of international crimes that it was obliged to investigate and prosecute itself, the Congo acts in bad faith. It pretends to be offended and morally injured by Belgium by suggesting that Belgium's exercise of "excessive universal jurisdiction" (Judgment, para. 42) was incompatible with its dignity. However, as Sir Hersch Lauterpacht observed in 1951, "the dignity of a foreign state may suffer more from an appeal to immunity than from a denial of it"[83]. The International Court of Justice should at least have made it explicit that the Congo should have taken up the matter itself.

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[79] *Supra*, footnotes 48 and 49.

[80] CR 2001/8, para. 5; CR 2001/11, paras. 3 and 11.

[81] CR 2001/10, p. 7.

[82] G. Fitzmaurice, "The General Principles of International Law Considered from the standpoint of the Rule of Law", *Recueil des Cours de l'Académie de droit international* 1957, II (Vol. 92), p. 119 writes:

> "'He who comes to equity for relief must come with clean hands.' Thus a State which is guilty of illegal conduct may be deprived of the necessary *locus standi in judicio* for complaining of corresponding illegalities on the part of other States, especially if these were consequential on or were embarked upon in order to counter its own illegality — in short were provoked by it."

See also S. M. Schwebel, "Clean Hands in the Court", in Brown, E. Weiss, *et al.* (eds.), *The World Bank, International Financial Institutions, and the Development of International Law*, American Society of International Law, 1999, pp. 74-78 and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, dissenting opinion of Judge Schwebel, pp. 382-384 and 392-394.

[83] H. Lauterpacht, "The Problem of Jurisdictional Immunities of Foreign States", *BYBIL*, 1951, p. 232.

36. The *third case* mentioned by the Court in support of its proposition that immunity does not necessarily lead to impunity is where the person has ceased to be a Foreign Minister (Judgment, para. 61, "Thirdly"). In that case, he or she will no longer enjoy all of the immunities accorded by international law in other States. The Court adds that the lifting of full immunity, in this case, is only for "acts committed prior or subsequent to his or her period of office". For acts committed during that period of office, immunity is only lifted "for acts committed during that period of office in a private capacity". Whether war crimes and crimes against humanity fall into this category the Court does not say[84].

It is highly regrettable that the International Court of Justice has not, like the House of Lords in the *Pinochet* case, qualified this statement[85]. It could and indeed should have added that war crimes and crimes against humanity can never fall into this category. Some crimes under international law (e.g., certain acts of genocide and of aggression) can, for practical purposes, only be committed with the means and mechanisms of a State and as part of a State policy. They cannot, from that perspective, be anything other than "official" acts. Immunity should never apply to crimes under international law, neither before international courts nor national courts. I am in full agreement with the statement of Lord Steyn in the first *Pinochet* case, where he observed that:

> "It follows that when Hitler ordered the 'final solution' his act must be regarded as an official act deriving from the exercise of his functions as head of state. That is where the reasoning of the Divisional Court inexorably leads."[86]

The International Court of Justice should have made it clearer that its Judgment can never lead to this conclusion and that such acts can never be covered by immunity.

37. The *fourth case* of "non-impunity" envisaged by the Court is that incumbent or former Foreign Ministers can be prosecuted before "certain international criminal courts, where they have jurisdiction" (Judgment, para. 61, "Fourthly").

The Court grossly overestimates the role an international criminal court can play in cases where the State on whose territory the crimes were committed or whose national is suspected of the crime are not willing to prosecute. The current *ad hoc* international criminal tribunals would only have jurisdiction over incumbent Foreign Ministers accused of war crimes and crimes against humanity in so far as the charges would emerge from a situation for which they are competent, i.e., the conflict in the former Yugoslavia and the conflict in Rwanda.

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[84]See also para. 55 of the Judgment, where the Court says that, from the perspective of his "full immunity", no distinction can be drawn between acts performed by a Minister of Foreign Affairs in an "official capacity" and those claimed to have been performed in a "private capacity".

[85]See *supra*, footnotes 12 and 13.

[86]R. *v.* Bow Street Metropolitan Stipendiary Magistrate and others, *ex parte* Pinochet Ugarte, 25 Nov. 1998, *All. ER* (1998) 4, p. 945.

The jurisdiction of an International Criminal Court, set up by the Rome Statute, is moreover conditioned by the principle of complementarity: primary responsibility for adjudicating war crimes and crimes against humanity lies with the States. The International Criminal Court will only be able to act if States which have jurisdiction are unwilling or unable genuinely to carry out investigation or prosecution (Art. 17).

And even where such willingness exists, the International Criminal Court, like the *ad hoc* international tribunals, will not be able to deal with *all* crimes that come under its jurisdiction. The International Criminal Court will not have the capacity for that, and there will always be a need for States to investigate and prosecute core crimes[87]. These States include, but are not limited to, national and territorial States. Especially in the case of sham trials, there will still be a need for third States to investigate and prosecute[88].

Not *all* international crimes will be justiciable before the permanent International Criminal Court. It will only be competent to try cases arising from criminal behaviour occurring *after* the entry into force of the Rome Statute. In addition, there is uncertainty as to whether certain acts of international terrorism or certain gross human rights violations in non-international armed conflicts would come under the jurisdiction of the Court. Professor Tomuschat has rightly observed that it would be a "fatal mistake" to assert that, in the absence of an international criminal court having jurisdiction, Heads of State and Foreign Ministers suspected of such crimes would only be justiciable in their own States, and nowhere else[89].

38. My conclusion on this point is the following: the Court's arguments in support of its proposition that immunity does not, in fact, amount to impunity, are very unconvincing.

3. Conclusion

39. My general conclusion on the question of immunity[90] is as follows: the immunity of an incumbent Minister for Foreign Affairs, if any, is not based on customary international law but at most on international comity. It certainly is not "full" or absolute and does not apply to war crimes and crimes against humanity.

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[87]See for example the trial of four Rwandan citizens by a Criminal Court in Brussels: *Cour d'Assises de l'Arrondissement Administratif de Bruxelles-Capitale, Arrêt du 8 juin 2001*, not published.

[88]See also *infra*, para. 65.

[89]C. Tomuschat, Intervention at the Institut de droit international's meeting in Vancouver, Aug. 2001, commenting on the draft resolution on Immunities from jurisdiction and Execution of Heads of State and of Government in International law, and giving the example of Iraqi dictator *Sadam Hussein*: Report of the 13th Commission of the Institut de droit international, Vancouver, 2001, p. 94, see further *supra*, footnote 19 and corresponding text.

[90]On the subject of inviolability, see *infra*, para. 75.

III. UNIVERSAL JURISDICTION

40. Initially, when the Congo introduced its request for the indication of a provisional measure in 2000, the dispute addressed two questions: *(a) universal jurisdiction* for war crimes and crimes against humanity; and *(b) immunities* for incumbent Foreign Ministers charged with such crimes (see Judgment, paras. 1 and 42.). In the proceedings on the merits in 2001, the Congo reduced its case to the second point only (see Judgment, paras. 10-12), with no objection from Belgium, which even asked the Court not to judge *ultra petita* (Judgment, para. 41). The Court could, for that reason, not have made a ruling on the question of universal jurisdiction in general.

41. For their own reasons, the Parties thus invited the International Court of Justice to shortcut its decision and to address the question of the immunity from jurisdiction only. The Court, conceding that, as a matter of logic, the second ground should be addressed only once there has been a determination in respect of the first, nevertheless decided to address the second question only. It addressed this question assuming, for the purposes of its reasoning, that Belgium had jurisdiction under international law to issue and circulate the arrest warrant (Judgment, para. 46 *in fine*).

42. While the Parties did not request a general ruling, they nevertheless developed extensive arguments on the subject of (universal) jurisdiction. The International Court of Justice, though it was not asked to rule on this point in its *dispositif*, could and should nevertheless have addressed this question as part of its reasoning. It confines itself to observing "jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction" (Judgment, para. 59, first sentence). It goes on by observing that various international conventions impose an obligation on States either to extradite or to prosecute, "requiring them to extend their criminal jurisdiction", but immediately adds that "such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs" (Judgment, para. 59, second sentence).

Adopting this narrow perspective, the Court does, again, not need to look at instruments giving effect to the principle of international accountability for war crimes and crimes against humanity. Yet most of the arguments of either Party to this dispute were based on these instruments. By not touching the subject of (universal) jurisdiction at all, the Court did not reply to these arguments and leaves the questions unanswered. I wish to briefly address them here.

43. The Congo accused Belgium of the "exercise of an *excessive* universal jurisdiction" (Judgment, para. 42; emphasis added) because, apart from infringing the rules on international immunities, Belgium's legislation on universal jurisdiction can be applied regardless of the presence of the offender on Belgian territory. This flows from Article 7 of the Belgian Act concerning the Punishment of Grave Breaches of International Humanitarian Law (hereinafter

1993/1999 Act)[91]. The Congo found that this was excessive because Belgium in fact exercised its jurisdiction *in absentia* by issuing the arrest warrant of 11 September 2000 in the absence of Mr. Yerodia.

To this accusation, Belgium answered it was entitled to assert jurisdiction in the present case because international law does not prohibit and even permits States to exercise extraterritorial jurisdiction for war crimes and crimes against humanity.

44. There is no generally accepted definition of universal jurisdiction in conventional or customary international law. States that have incorporated the principle in their domestic legislation have done so in very different ways[92]. Although there are many examples of States exercising extraterritorial jurisdiction for international crimes such as war crimes and crimes against humanity and torture, it may often be on other jurisdictional grounds such as the nationality of the victim. A prominent example was the *Eichmann* case which was in fact based, not on universal jurisdiction but on passive personality[93]. In the Spanish *Pinochet* case, an important connecting factor was the Spanish nationality of some of the victims[94]. Likewise, in the case against Mr. Yerodia, some of the complainants were of Belgian nationality[95], even if there were,

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[91]Loi du 16 juin 1993 relative à la répression des violations graves du droit international humanitaire, *Moniteur belge* 5 août 1993, as amended by Loi du 10 février 1999, *Moniteur belge* 23 mars 1999; an English translation has been published in *ILM* 1999, pp. 921-925. See generally: A. Andries, C. Van den Wyngaert, E. David, and J. Verhaegen, "Commentaire de la loi du 16 juin 1993 relative à la répression des infractions graves au droit international humanitaire", *Rev. Dr. Pén.*, 1994, pp. 1114-1184; E. David, "La loi belge sur les crimes de guerre", *RBDI*, 1995, pp. 668-684; P. d'Argent, "La loi du 10 février 1999 relative à la répression des violations graves du droit international humanitaire", *Journal des Tribunaux* 1999, pp. 549-555; L. Reydams, "Universal Jurisdiction over Attrocities in Rwanda: Theory and Practice", *European Journal of Crime, Criminal Law and Criminal Justice*, 1996, pp. 18-47; D. Vandermeersch, "La répression en droit belge des crimes de droit international", *RIDP*, 1997, pp. 1093-1135; Vandermeersch, "Les poursuites et le jugement des infractions de droit international humanitaire en droit belge" in D. H. Bosly *et al.*, *Actualité du droit international humanitaire*, Bruxelles, La Charte, 2001, pp. 123-180; J. Verhoeven, "Vers un ordre répressif universel? Quelques observations", *Annuaire Français de Droit International*, 1999, pp. 55-71.

[92]For a survey of the implementation of the principle of universal jurisdiction for international crimes in different countries, see, *inter alia*: Amnesty International, *Universal Jurisdiction. The Duty of States to Enact and Implement Legislation*, Sep. 2001, AI Index IOR 53/2001; International Law Association (Committee on International Human Rights Law and Practice), *Final Report on the Exercise of Universal Jurisdiction in respect of Gross Human Rights Offences*, Ann., 2000; Redress, *Universal Jurisdiction in Europe. Criminal prosecutions in Europe since 1990 for war crimes, crimes against humanity, torture and genocide*, 30 June 1999: http://www.redress.org/inpract.html; see also "Crimes internationaux et juridictions nationales" to be published by the Presses Universitaires de France (in print).

[93]Attorney-General of the Government of Israel *v.* Eichmann, 36 *ILR* 1961 p. 5. See also US *v.* Yunis (No. 2), District Court, DC, 12 Feb. 1988, *ILR* 1990, Vol. 82, p. 343; Court of Appeals, DC, 29 January 1991, *ILM* 1991, Vol. 3, p. 403.

[94]*Audiencia Nacional, Auto de la Sala de lo Penal de la Audiencia Nacional confirmando la jurisdicción de España para conocer de los crímenes de genocidio y terrorismo cometidos durante la dictadura chilena, 5 Nov. 1998*, http://www.derechos.org/nizkor/chile/juicio/audi.html. See also M. Marquez Carrasco and J. A. Fernandez, "Spanish National Court, Criminal Division (Plenary Session). Case 19/97, 4 Nov. 1998, Case 1/98, 5 Nov. 1998", *AJIL* 1999, pp. 690-696.

[95]CR 2001/8, p. 16.

apparently, no Belgian nationals that were victims[96] of the *violence* that allegedly resulted from the hate speeches of which Mr. Yerodia was suspected (Judgment, para. 15)[97].

45. Much has been written in legal doctrine about universal jurisdiction. Many views exist as to its legal meaning[98] and its legal status under international law[99]. This is not the place to discuss them. What matters for the present dispute is the way in which Belgium has codified universal jurisdiction in its domestic legislation and whether it is, as applied in the case of Mr. Yerodia, compatible with international law.

Article 7 of the 1993/1999 Belgian Act, which is at the centre of the dispute, states the following: "The Belgian courts shall be competent to deal with breaches provided for in the present Act, irrespective of where such breaches have been committed . . ."[100].

46. Despite uncertainties that may exist concerning the definition of universal jurisdiction, one thing is very clear: the *ratio legis* of universal jurisdiction is based on the international reprobation for certain very serious crimes such as war crimes and crimes against humanity. Its *raison d'être* is to avoid impunity, to prevent suspects of such crimes finding a safe haven in third

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[96]Some confusion arose over the difference between the notion of "victim" and the notion of "complainant" *(partie civile)*. Belgian law does not provide an *actio popularis*, but only allows victims and their relatives to trigger criminal investigations through the procedure of a formal complaint *(constitution de partie civile)*. On the Belgian system, see C. Van den Wyngaert, "Belgium", in C. Van den Wyngaert, *et al.* (ed.), *Criminal Procedure Systems in the Member States of the European Community*, Butterworth, 1993.

[97]The notion "victim" is wider than the *direct* victim of the crime only, and also includes indirect victims (e.g. the relatives of the assassinated person in the case of murder). Moreover, for crimes such as those with which Mr. Yerodia has been charged (incitement to war crimes and crimes against humanity), death or injury of the (direct) victim is not a constituent element of the crime. Not only those who were effectively killed or injured after the alleged hate speeches are victims, but all persons against whom the incitements were directed, including the victims of Belgian nationality who brought the case before the Belgian investigating judge by lodging a *constitution de partie civile* action. By focusing on the victims of the *violence* in para. 15 of the Judgment, the International Court of Justice seems to adopt a very narrow definition of the notion of victim.

[98]For a very thorough recent analysis of the various positions, diachronically and synchronically, see M. Henzelin, *Le principe de l'universalité en droit pénal international. Droit et obligation pour les Etats de poursuivre et juger selon le principe de l'universalité*, Brussel, Bruylant, 2000, p. 527. Other recent publications are M. C. Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice", *Virginia Journal of International Law* 2001, Vol. 42, pp. 1-100; L. Benavides, "The Universal Jurisdiction Principle", *Annuario Mexicano de Derecho Internacional* 2001, pp. 20-96; J. I. Charney, "International Criminal Law and the Role of Domestic Courts", *AJIL* 2001, pp. 120-124; G. de La Pradelle, "La Compétence Universelle", in H. Ascensio, *et al*. (eds.), *Droit International Pénal*, Paris, A. Pedone, 2000, pp. 905-918; A. Hays Butler, "Universal Jurisdiction: A Review of the Literature", *Criminal Law Forum* 2000, pp. 353-373; R. van Elst, "Implementing Universal Jurisdiction over Grave Breaches of the Geneva Conventions", *LJIL* 2000, pp. 815-854. See also the proceedings of the symposium on Universal Jurisdiction: myths, realities, and prospects, *New England Law Review* 2001, Vol. 35.

[99]For example, some writers hold the view that an independent theory of universal jurisdiction exists with respect to *jus cogens* international crimes. See, for example, M. C. Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice", *Virginia Journal of International Law*, 2001, Vol. 42, p. 28.

[100]"Les juridictions belges sont compétentes pour connaître des infractions prévues à la présente loi, indépendamment du lieu où celles-ci auront été commises." See footnote 91 for further reference.

countries. Scholarly organizations that participated in the debate have emphasized this, for example in the Princeton principles[101], the Cairo principles[102] and the Kamminga report on behalf of the International Law Association[103].

47. It may not have been the International Court of Justice's task to define universal jurisdiction in abstract terms. What it should, however, have considered is the following question: was Belgium under international law, entitled to assert *extraterritorial* jurisdiction against Mr. Yerodia (apart from the question of immunity) in the present case? The Court did not consider this question at all.

1. Universal jurisdiction for war crimes and crimes against humanity is compatible with the "*Lotus*" test

48. The leading case on the question of extraterritorial jurisdiction is the 1927 "*Lotus*" case. In that case, the Permanent Court of International Justice was asked to decide a dispute between France and Turkey, which arose from a criminal proceeding in Turkey against a French national. This person, the captain of a French ship, was accused of involuntary manslaughter causing Turkish casualties after a collision between his ship and a Turkish ship on the high seas. Like in the present dispute, the question was whether the respondent State, Turkey, was entitled to conduct criminal proceedings against a foreign national for crimes committed outside Turkey. France argued that Turkey was not entitled to prosecute the French national before its domestic courts because there was no permission, and indeed a prohibition under customary international law for a State to assume extraterritorial jurisdiction. Turkey argued that it was entitled to exercise jurisdiction under international law.

49. The Permanent Court of International Justice decided that there was no rule of conventional or customary international law prohibiting Turkey from asserting jurisdiction over facts committed outside Turkey. It started by saying that, as a matter of principle, jurisdiction is territorial and that a State cannot exercise jurisdiction outside its territory without a permission derived from international custom or from a convention. It however immediately added a qualification to this principle in a famous dictum that students of international law know very well:

> "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 . . . 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 or acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable."[104]

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[101] *Supra*, footnote 53.

[102] *Supra*, footnote 54.

[103] *Supra*, footnote 51.

[104] *"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 19.

A distinction must be made between prescriptive jurisdiction and enforcement jurisdiction. The above-mentioned *dictum* concerns *prescriptive jurisdiction*: it is about what a State may do *on its own territory* when investigating and prosecuting crimes committed abroad, not about what a State may do on the territory of other States when prosecuting such crimes. Obviously, a State has no *enforcement jurisdiction* outside its territory: a State may, failing permission to the contrary, not exercise its power on the territory of another State. This is "the first and foremost restriction imposed by international law upon a State"[105]. In other words, the permissive rule only applies to prescriptive jurisdiction, not to enforcement jurisdiction: failing a prohibition, State A *may*, on its own territory, prosecute offences committed in State B *(permissive rule)*; failing a permission, State A *may not* act on the territory of State B.

50. Does the arrest warrant of 11 April 2000 come under the first species of jurisdiction, under the second, or under both? In other words: has Belgium, by asserting jurisdiction in the form of the issuing and circulation of an arrest warrant on charges of war crimes and crimes against humanity against a foreign national for crimes committed abroad, engaged in prescriptive jurisdiction, in enforcement jurisdiction, or in both?

Given the fact that the warrant has never been enforced, the dispute is in the first place about prescriptive jurisdiction. However, the title of the warrant ("*international* arrest warrant") gave rise to questions about enforcement jurisdiction also.

I believe that Belgium, by issuing and circulating the warrant, violated neither the rules on prescriptive jurisdiction nor the rules on enforcement jurisdiction. My views on enforcement jurisdiction will be part of my reasoning in Section IV, where I will consider whether there was an internationally wrongful act in the present case[106]. In the present Section, I will deal with prescriptive jurisdiction. I will measure the statutory provision that is at the centre of the dispute, Article 7 of the 1993/1999 Belgian Act, against the yardstick of the *"Lotus"* test on *prescriptive* jurisdiction.

51. It follows from the *"Lotus"* case that a State has the right to provide extraterritorial jurisdiction on its territory unless there is a prohibition under international law. I believe that there is *no prohibition* under international law to enact legislation allowing it to investigate and prosecute war crimes and crimes against humanity committed abroad.

It has often been argued, not without reason, that the *"Lotus"* test is too liberal and that, given the growing complexity of contemporary international intercourse, a more restrictive approach should be adopted today[107]. In the *Nuclear Weapons* case, there were two groups of

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[105] *Ibid.*, p. 18.

[106] See *infra*, paras. 68 *et seq.*

[107] Cf. American Law Institute, Restatement (Third) Foreign Relations Law of the United States, (1987), pp. 235-236; I. Cameron, *The Protective Principle of International Criminal Jurisdiction*, Aldershot, Dartmouth, 1994, p. 319; F. A. Mann, "The Doctrine of Jurisdiction in International Law", *Recueil des Cours de l'Académie de droit international* Vol. 111, 1964, I, p. 35; R. Higgins, *Problems and Process. International Law and How We Use It*, Oxford, Clarendon Press, 1994, p. 77. See also Council of Europe, *Extraterritorial jurisdiction in criminal matters*, Strasbourg, 1990, pp. 20 *et seq.*

States each giving a different interpretation of *"Lotus"* on this point[108] and President Bedjaoui, in his separate opinion, expressed hesitations about *"Lotus"*[109]. Even under the more restrictive view, Belgian legislation stands. There is ample evidence in support of the proposition that international law clearly *permits* States to provide extraterritorial jurisdiction for such crimes.

I will give reasons for both propositions in the next paragraphs. I believe that *(a)* international law does *not prohibit* universal jurisdiction for war crimes and crimes against humanity *(b)* clearly permits it.

(a) International law does not prohibit universal jurisdiction for war crimes and crimes against humanity

52. The Congo argued that the very concept of universal jurisdiction presupposes the presence of the defendant on the territory of the prosecuting State. Universal jurisdiction *in absentia*, it submitted, was contrary to international law. This proposition needs to be assessed in the light of conventional and customary international law and of legal doctrine.

53. As a preliminary observation, I wish to make a linguistic comment. The term "universal jurisdiction" does not necessarily mean that the suspect should be present on the territory of the prosecuting State. Assuming the presence of the accused, as some authors do, does not necessarily mean that it is a legal requirement. The term may be ambiguous, but precisely for that reason one should refrain from jumping to conclusions. The Latin maxims that are sometimes used, and that seem to suggest that the offender must be present *(judex deprehensionis ¾ ubi te invenero ibi te judicabo)* have no legal value and do not necessarily coincide with universal jurisdiction.

54. There is no rule of *conventional international law* to the effect that universal jurisdiction *in absentia* is prohibited. The most important legal basis, in the case of universal jurisdiction for war crimes is Article 146 of the IVth Geneva Convention of 1949[110], which lays down the principle *aut dedere aut judicare*[111]. A textual interpretation of this Article does not logically presuppose the presence of the offender, as the Congo tries to show. The Congo's reasoning in this respect is

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[108] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports* 1996, pp. 16-17, para. 21.

[109] *I.C.J. Reports 1996*, p. 270, para. 12.

[110] Convention relative to the Protection of Civilian Persons in Time of War, Geneva, 12 Aug. 1949, *UNTS*, Vol. 75, p. 287. See also Art. 49 Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 Aug. 1949, *UNTS*, Vol. 75, p. 31; Art. 50 Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 Aug. 1949, *UNTS*, Vol. 75, p. 85; Art. 129 Convention relative to the Treatment of Prisoners of War, Geneva, 12 Aug. 1949, *UNTS*, Vol. 75, p. 135; Art. 85 (1) Protocol Additional (I) to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflicts, Geneva, 8 June 1977, *UNGAOR*, doc. A/32/144, 15 Aug. 1977.

[111] See further *infra*, para. 62.

interesting from a doctrinal point of view, but does not logically follow from the text. For war crimes, the 1949 Geneva Conventions, which are almost universally ratified and could be considered to encompass more than mere treaty obligations due to this very wide acceptance, do not require the presence of the suspect. Reading into Article 146 of the IVth Geneva Convention a limitation on a State's right to exercise universal jurisdiction would fly in the face of a *teleological interpretation* of the Geneva Conventions. The purpose of these Conventions, obviously, is not to restrict the jurisdiction of States for crimes under international law.

55. There is no *customary international law* to this effect either. The Congo submits there is a State practice, evidencing an *opinio juris* asserting that universal jurisdiction, *per se*, requires the presence of the offender on the territory of the prosecuting State. Many national systems giving effect to the obligation *aut dedere aut judicare* and/or the Rome Statute for an International Criminal Court indeed require the presence of the offender. This appears from legislation[112] and from a number of national decisions including the Danish *Saric* case[113], the French *Javor* case [114] and the German *Jorgic* case[115]. However, there are also examples of national systems that do not require the presence of the offender on the territory of the prosecuting State[116]. Governments and national courts in the same State may hold different opinions on the same question, which makes it even more difficult to identify the *opinio juris* in that State[117].

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[112]See, e.g., the Swiss Penal Code, Art. 6bis, 1; the French Penal Code, Art. 689-1; the Canadian Crimes against Humanity and War Crimes Act (2000), Art. 8.

[113]Public Prosecutor *v.* T., Supreme Court (Hojesteret), Judgment, 15 Aug. 1995, *Ugeskrift for Retsvaesen*, 1995, p. 838, reported in *Yearbook of International Humanitarian Law*, 1998, p. 431 and in R. Maison, "Les premiers cas d'application des dispositions pénales des Conventions de Genève: commentaire des affaires danoise et française", *EJIL* 1995, p. 260.

[114]Cour de Cassation (Fr.), 26 Mar. 1996, *Bull. Crim.*, 1996, pp. 379-382.

[115]Bundesgerichtshof 30 Apr. 1999, 3 StR 215/98, *NStZ* 1999, p. 396. See also the critical note (*Anmerkung*) by Ambos, *ibid*., pp. 405-406, who doesn't share the view of the judges that a "legitimizing link" is required to allow Germany to exercise its jurisdiction over crimes perpetrated outside its territory by foreigners against foreigners, even if these amount to serious crimes under international law (*in casu* genocide). In a recent judgment concerning the application of the Geneva Conventions, the Court, however, decided that such a link was not required, since German jurisdiction was grounded on a binding norm of international law instituting a duty to prosecute, so there could hardly be a violation of the principle of non-intervention (Bundesgerichtshof, 21 Feb. 2001, 3 StR 372/00, retrievable on http://www.hrr-strafrecht.de).

[116]See, for example, the prosecutions instituted in Spain on the basis of Art. 23.4 of the *Ley Orgánica del Poder Judicial* (Law 6/1985 of 1 July 1985 on the Judicial Power) against Senator Pinochet and other South-American suspects whose extradition was requested. In New Zealand, proceedings may be brought for international "core crimes" regardless of whether or not the person accused was in New Zealand at the time a decision was made to charge the person with an offence (Sec. 8, (1) *(c)* (iii) of the International Crimes and International Criminal Court Act 2000).

[117]The German Government very recently reached agreement on a text for an "International Crimes Code" (*Völkerstrafgesetzbuch*) (see Bundesministerium der Justiz, *Mitteillung für die Presse 02/02*, Berlin, 16 Jan. 2002). The new code would allow the German Public Ministry to prosecute cases without any link to Germany and without the presence of the offender on the national territory. The Prosecutor would only be obliged to defer prosecution in such a case when an International Court or the Courts of a State basing its jurisdiction on territoriality or personality were in fact prosecuting the suspect (see: Bundesministerium der Justiz, Entwurf eines Gesetzes zur Einführung des Völkerstrafgesetzbuches, pp. 19 and 89, to be consulted on the Internet: http://www.bmj.bund.de/images/11222.pdf).

And even where national law requires the presence of the offender, this is not necessarily the expression of an *opinio juris* to the effect that this is a requirement under international law. National decisions should be read with much caution. In the *Bouterse* case, for example, the Dutch Supreme Court did not state that the requirement of the presence of the suspect was a requirement under international law, but only under domestic law. It found that, *under Dutch law*, there was no such jurisdiction to prosecute Mr. Bouterse but did not say that exercising such jurisdiction would be contrary to *international law*. In fact, the Supreme Court did *not* follow the Advocate General's submission on this point[118].

56. The "*Lotus"* case is not only an authority on jurisdiction, but also on the formation of customary international law as was set out above. A "negative practice" of States, consisting in their abstaining from instituting criminal proceedings, cannot, in itself, be seen as evidence of an *opinio juris*. Only if this abstinence was based on a conscious decision of the States in question can this practice generate customary international law[119]. As in the case of immunities, such abstinence may be attributed to other factors than the existence of an *opinio juris*. There may be good political or practical reasons for a State not to assert jurisdiction in the absence of the offender.

It may be *politically* inconvenient to have such a wide jurisdiction because it is not conducive to international relations and national public opinion may not approve of trials against foreigners for crimes committed abroad. This does not, however, make such trials illegal under international law.

A *practical* consideration may be the difficulty in obtaining the evidence in trials of extraterritorial crimes. Another practical reason may be that States are afraid of overburdening their court system. This was stated by the Court of Appeal in the United Kingdom in the *Al-Adsani* case[120] and seems to have been an explicit reason for the Assemblée nationale in France to refrain from introducing universal jurisdiction *in absentia* when adopting universal jurisdiction over the crimes falling within the Statute of the Yugoslavia Tribunal[121]. The concern for a linkage with the national order thus seems to be more of a pragmatic than of a juridical nature. It is not, therefore, necessarily the expression of an *opinio juris* to the effect that this form of universal jurisdiction is contrary to international law.

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[118]See *supra*, footnote 5. The Court of Appeal of Amsterdam had, in its judgment of 20 Nov. 2000, decided, *inter alia*, that Mr. Bouterse could be prosecuted *in absentia* on charges of torture (facts committed in Surinam in 1982). This decision was reversed by the Dutch Supreme Court on 18 Sep. 2001, *inter alia* on the point of the exercise of universal jurisdiction *in absentia*. The submissions of the Dutch Advocate General are attached to the judgment of the Supreme Court, *loc. cit*., paras. 113-137 and especially para. 138.

[119]See *supra*, para. 13.

[120]ECHR, Al-Adsani *v.* United Kingdom, 21 Nov. 2001, para. 18 and the concurring opinions of Judges Pellonpää and Bratza, retrievable at: http://www.echr.coe.int. See the discussion in Marks, "Torture and the Jurisdictional Immunities of Foreign States", *CLJ* 1997, pp. 8-10.

[121]See *Journal Officiel de l'Assemblée nationale*, 20 décembre 1994, 2e séance, p. 9446.

57. There is a massive literature of learned scholarly writings on the subject of universal jurisdiction[122]. I confine myself to three studies, which emanate from groups of scholars: the Princeton principles[123], the Cairo principles[124] and the Kamminga report on behalf of the ILA[125], and look at one point: do the authors support the Congo's proposition that universal jurisdiction *in absentia* is contrary to international law? The answer is: no[126].

58. I conclude that there is no conventional or customary international law or legal doctrine in support of the proposition that (universal) jurisdiction for war crimes and crimes against humanity can only be exercised if the defendant is present on the territory of the prosecuting State.

(b) International law permits universal jurisdiction for war crimes and crimes against humanity

59. International law clearly permits universal jurisdiction for war crimes and crimes against humanity. For both crimes, permission under international law exists. For crimes *against humanity*, there is no clear treaty provision on the subject but it is accepted that, at least in the case of genocide, States are entitled to assert extraterritorial jurisdiction[127]. In the case of *war crimes*, however, there is specific conventional international law in support of the proposition that States are entitled to assert jurisdiction over acts committed abroad: the relevant provision is Article 146 of the IVth Geneva Convention[128], which lays down the principle *aut dedere aut judicare* for war crimes committed against civilians[129].

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[122]For recent sources see *supra*, footnote 98.

[123]*Supra*, footnote 53.

[124]*Supra*, footnote 54.

[125]*Supra*, footnote 51.

[126]Although the wording of Princeton Principle 1 (2) may appear somewhat confusing, the authors definitely did not want to prevent a State from initiating the criminal process, conducting an investigation, issuing an indictment or requesting extradition when the accused is not present, as is confirmed by Principle 1 (3). See the Commentary on the Princeton Principles at p. 44.

[127]On the subject of genocide and the Genocide Convention of 1948, the International Court of Justice held that "the rights and obligations enshrined by the Convention are 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" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, I.C.J. Reports 1996* (II), p. 616, para. 31.

[128]See supra, footnote 110.

[129]See International Committee of the Red Cross, *National Enforcement of International Humanitarian Law: Universal Jurisdiction Over War Crimes*, retrievable at: http://www.icrc.org/; R. van Elst, "Implementing Universal Jurisdiction over Grave Breaches of the Geneva Conventions", *LJIL* 2000, pp. 815-854.

From the perspective of the drafting history of international criminal law conventions, this is probably one of the first codifications of this principle, which, in legal doctrine, goes back at least to Hugo Grotius but has probably much older roots[130]. However, it had not been codified in conventional international law until 1949. There are older Conventions such as the 1926 Slavery Convention[131] or the 1929 Convention on Counterfeiting[132], which require States to lay down rules on *jurisdiction* but which do not provide an *aut dedere aut judicare* obligation. The 1949 Conventions are probably the first to lay down this principle in an article that is meant to cover both jurisdiction and prosecution.

Subsequent Conventions have refined this way of drafting and have laid down distinctive provisions on *jurisdiction* on the one hand and on prosecution *(aut dedere aut judicare)* on the other. Examples are the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (Arts. 4 and 7 respectively)[133] and the 1984 Convention against Torture (Arts. 5 and 7 respectively)[134].

60. In order to assess the "permissibility" of universal jurisdiction for international crimes, it is important to distinguish between *jurisdiction* clauses and *prosecution (aut dedere aut judicare)* clauses in international criminal law conventions.

61. The *jurisdiction* clauses in these Conventions usually oblige States to provide extraterritorial jurisdiction, but do not exclude States from exercising jurisdiction under their national laws. Even where they do not provide universal jurisdiction, they do not exclude it either, nor do they require States to refrain from providing this form of jurisdiction under their domestic law. The standard formulation of this idea is that "[t]his Convention does not exclude any criminal jurisdiction exercised in accordance with national law". This formula can be found in a host of Conventions, including the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (Art. 4, para. 3) and the 1984 Convention against Torture (Art. 5, para. 3).

62. The *prosecution* clauses *(aut dedere aut judicare)*, however, sometimes link the prosecution obligation to extradition, in the sense that a State's duty to prosecute a suspect only exists "if it does not extradite him". Examples are Article 7 of the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft and Article 7 of the 1984 Convention against Torture. This, however, does not mean that prosecution is *only* possible in cases where extradition has been refused.

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[130]G. Guillaume, "La compétence universelle. Formes anciennes et nouvelles", X, *Mélanges offerts à Georges Levasseur*, Parijs, Editions Litec, 1992, p. 27.

[131]Slavery Convention, Geneva, 25 Sep. 1926, 60 League of Nations, *Treaty Series (LNTS)*, p. 253.

[132]International Convention for the Suppression of Counterfeiting Currency, Geneva, 20 Apr 1929, *LNTS*, p. 371, para. 112.

[133]Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 Dec. 1970, *ILM* 1971, p. 134.

[134]Convention against Torture and other Cruel, Inhuman of Degrading Treatment of Punishment, New York, 10 Dec. 1984, *ILM* 1984, p. 1027, with changes in *ILM* 1985, p. 535.

Surely, this formula cannot be read into Article 146 of the IVth Geneva Convention which according to some authors even prioritizes prosecution over extradition: *primo prosequi, secundo dedere*[135]. Even if one adopts the doctrinal viewpoint that the notion of universal jurisdiction assumes the presence of the offender, there is nothing in Article 146 that warrants the conclusion that this is an actual requirement.[136].

2. Universal jurisdiction is not contrary to the complementarity principle in the Statute for an International Criminal Court

63. Some argue that, in the light of the Rome Statute for an International Criminal Court, it will be for the International Criminal Court, and not for States acting on the basis of universal jurisdiction, to prosecute suspects of war crimes and crimes against humanity. National statutes providing universal jurisdiction, like the Belgian Statute, would be contrary to this new philosophy and could paralyse the International Criminal Court. This was also the proposition of the Congo in the present dispute[137].

64. This proposition is wrong. The Rome Statute does not prohibit universal jurisdiction. It would be absurd to read the Rome Statute in such a way that it limits the jurisdiction for core crimes to either the national State or the territorial State or the International Criminal Court. The relevant clauses are about the preconditions for the International Criminal Court to exercise jurisdiction (Art. 17, Rome Statute — the complementarity principle), and cannot be construed as containing a general limitation for third States to investigate and prosecute core crimes. Surely, the Rome Statute does not preclude third States (other than the territorial State and the State of nationality) from exercising universal jurisdiction. The preamble, which unequivocally states the objective of avoiding impunity, does not allow this inference. In addition, the *opinio juris*, as it appears from United Nations resolutions[138], focuses on impunity, individual accountability and the responsibility of *all* States to punish core crimes.

65. An important practical element is that the International Criminal Court will not be able to deal with *all* crimes; there will still be a need for States to investigate and prosecute core crimes. These States include, but are not limited to, national and territorial States. As observed previously, there will still be a need for third States to investigate and prosecute, especially in the case of sham trials. Also, the International Criminal Court will not have jurisdiction over crimes committed before the entry into force of its Statute (Art. 11, Rome Statute). In the absence of other mechanisms for the prosecution of these crimes, such as national courts exercising universal jurisdiction, this would leave an unacceptable source of impunity[139].

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[135]The Geneva Conventions of 1949 are unique in that they provide a mechanism which goes further than the *"aut dedere, aut judicare"* model and which can be described as *"aut judicare, aut dedere"*, or, even more poignantly, as *"primo prosequi, secundo dedere"*. See, respectively, R. van Elst, *loc. cit.*, pp. 818-819; M. Henzelin, *op. cit.*, p. 353, para. 1112.

[136]See M. Henzelin, *op. cit.*, p. 354, para. 1113.

[137]See Memorial of the Congo, p. 59, "Obligation de ne pas priver le Statut de la C.P.I. de son objet et de son but".

[138]See footnotes 48 and 49.

[139]See also *supra*, para. 37.

66. The Rome Statute does not establish a *new* legal basis for third States to introduce universal jurisdiction. It does not prohibit it but does not authorize it either. This means that, as far as crimes in the Rome Statute are concerned (war crimes, crimes against humanity, genocide and in the future perhaps aggression and other crimes), pre-existing sources of international law retain their importance.

3. Conclusion

67. Article 7 of Belgium's 1993/1999 Act, giving effect to the principle of universal jurisdiction regarding war crimes and crimes against humanity, is not contrary to international law. International law does not prohibit States from asserting prescriptive jurisdiction of this kind. On the contrary, international law permits and even encourages States to assert this form of jurisdiction in order to ensure that suspects of war crimes and crimes against humanity do not find safe havens. It is not in conflict with the principle of complementarity in the Statute for an International Criminal Court.

IV. EXISTENCE OF AN INTERNATIONALLY WRONGFUL ACT

68. Having concluded that incumbent Ministers for Foreign Affairs are fully immune from foreign criminal jurisdiction (Judgment, para. 54), even if charged with war crimes and crimes against humanity (Judgment, para. 58), the International Court of Justice examines whether the issuing and circulating of the warrant of 11 April 2000 constituted a violation of those rules. On the subject of the *issuance* and the *circulation* of the warrant respectively, the Court concludes:

> "that the issue of the warrant constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of that Minister and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law.
>
> . . . . . .
>
> that the circulation of the warrant, whether or not it significantly interfered with Mr. Yerodia's diplomatic activity, constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law." (Judgment, paras. 70-71.)

69. As stated at the outset, I find it highly regrettable that neither of these crucial sentences in the Court's reasoning mention the fact that the arrest warrant was about war crimes and crimes against humanity. The *dispositif* (para. 78 (2)) also fails to mention this fact.

70. I disagree with the conclusion that there was a violation of an obligation of Belgium towards the Congo, because I reject its premise. Mr. Yerodia was not immune from Belgian jurisdiction for war crimes and crimes against humanity for the reasons set out above. As set out

before, this may be contrary to international courtesy, but there is no rule of customary or conventional international law granting immunity to incumbent Foreign Ministers who are suspected of war crimes and crimes against humanity.

71. Moreover, Mr. Yerodia was never actually arrested in Belgium, and there is no evidence that he was hindered in the exercise of his functions in third countries. Linking the foregoing with my observations on the question of universal jurisdiction in the preceding section of my dissenting opinion, I wish to distinguish between the two different "acts" that, in the International Court of Justice's Judgment, constitute a violation of customary international law: on the one hand, the *issuing* of the disputed arrest warrant, on the other its *circulation*.

1. The *issuance* of the disputed arrest warrant in Belgium was not in violation of international law

72. Mr. Yerodia was never arrested, either when he visited Belgium officially in June 2000[140] or thereafter. Had it applied the only relevant provision of conventional international law to the dispute, Article 21, paragraph 2, of the Special Missions Convention, the Court could not have reached its decision. According to this article, Foreign Ministers "when they take part in a special mission of the sending State, shall enjoy in the receiving State or in third State, in addition to what is granted by the present Convention, the facilities, privileges and immunities accorded by international law"[141]. In the present dispute, this could only lead to the conclusion that there was no violation: the warrant was never executed, either in Belgium, or in third countries.

73. Belgium accepted, as a matter of international courtesy, that the warrant could not be executed against Mr. Yerodia were he to have visited Belgium officially (immunity from execution, Judgment, para. 49). This was explicitly mentioned in the warrant: the warrant was not enforceable and was in fact not served on him or executed when Mr. Yerodia came to *Belgium* on an official visit in June 2001. Belgium thus respected the principle, contained in Article 21 of the Special Missions Convention that is not a statement of customary international law but only of international courtesy[142].

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[140]Mr. Yerodia's visit to Belgium is not mentioned in the judgment because the parties were rather unclear on this point. Yet, it seems that Mr. Yerodia effectively visited Belgium on 17 June 2000. This was reported in the media (see the statement by the Minister of Foreign Affairs in *De Standaard*, 7 July 2000) and also in a question that was put in Parliament to the Minister of Justice. See Question orale de M. Tony Van Parys au ministre de la Justice sur "l'intervention politique du gouvernement dans le dossier à charge du ministre congolais des Affaires étrangères, M. Yerodia", *Chambre des représentants de la Belgique, Compte Rendu Intégral avec compte rendu analytique*, Commission de la Justice, 14 Nov. 2000, CRIV 50 COM 294, p. 12. Despite the fact that this fact is not, as such, recorded in the documents that were before the International Court of Justice, I believe the Court could have taken judicial notice of it.

[141]*Supra*, para. 18.

[142]See the statement of the International Law Commission's special rapporteur, referred to *supra*, para. 17.

74. These are the only *objective elements* the Court should have looked at. The *subjective* elements, i.e., whether the warrant had a psychological effect on Mr. Yerodia or whether it was perceived as offensive by the Congo (cf. the term *iniuria* used by Maître Rigaux throughout his pleadings in October 2001[143] and the term *capitis diminutio* used by Maître Vergès during his pleadings in November 2000[144]) was irrelevant for the dispute. The warrant only had a potential legal effect on Mr. Yerodia as a private person in case he would have visited Belgium privately, *quod non*.

75. In its *dispositif* (Judgment, para. 78 (2)), the Court finds that Belgium failed to respect the immunity from criminal jurisdiction *and inviolability* for incumbent Foreign Ministers. I have already explained why, in my opinion, there has been no infringement of the rules on *immunity* from criminal jurisdiction. I find it hard to see how, *in addition* (the Court using the word "and"), Belgium could have infringed the *inviolability* of Mr Yerodia by the mere issuance of a warrant that was never enforced.

The Judgment does not explain what is meant by the word "inviolability", and simply juxtaposes it to the word "immunity". This may give rise to confusion. Does the Court put the *mere issuance* of an order on the same footing as the *actual enforcement* of the order? Would this also mean that the mere act of investigating criminal charges against a Foreign Minister would be contrary to the principle of inviolability?

Surely, in the case of diplomatic agents, who enjoy absolute immunity and inviolability under the 1961 Vienna Convention on Diplomatic Relations[145], allegations of criminal offences may be investigated as long as the agent is not interrogated or served with an order to appear. This view is clearly stated by Jean Salmon[146]. Jonathan Brown notes that, in the case of a diplomat, the issuance of a charge or summons is probably contrary to the diplomat's *immunity*, whereas its execution would be likely to infringe the agent's *inviolability*[147].

If the Court's *dispositif* were to interpreted as to mean that mere investigations of criminal charges against Foreign Ministers would infringe their *inviolability*, the implication would be that Foreign Ministers enjoy greater protection than diplomatic agents under the Vienna Convention. This would clearly go beyond what is accepted under international law in the case of diplomats.

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[143]CR 2001/5, p. 14.

[144]CR 2000/32.

[145]Convention on Diplomatic Relations, Vienna, 18 Apr. 1961, *UNTS*, Vol. 500, p. 95.

[146]J. Salmon, *Manuel de droit diplomatique*, Brussels, Bruylant, 1994, p. 304.

[147]J. Brown, "Diplomatic immunity: State Practice Under the Vienna Convention on Diplomatic Relations", 37 *ICLQ* 1988, p. 53.

2. The *international circulation* of the disputed arrest warrant was not in violation of international law

76. The question of the circulation of the warrant may be somewhat different, because it might be argued that circulating a warrant internationally brings it within the realm of *enforcement* jurisdiction, which, under the "*Lotus"* test, is in principle prohibited. Under that test, States can only act on the territory of other States if there is permission to this effect in international law. This is the "first and foremost restriction" that international law imposes on States[148].

77. Even if one would accept, together with the Court, the premise there is a rule under customary law protecting Foreign Ministers suspected of war crimes and crimes against humanity from the criminal process of other States, it still remains to be established that Belgium actually infringed this rule by asserting enforcement jurisdiction. Much confusion arose from the title that was given to the warrant, which was called "*international* arrest warrant" on the document issued by the Belgian judge. However, this is a very misleading term both under Belgian law and under international law. International arrest warrants do not exist as a special category under Belgian law. It is true that the title of the document was misleading, but giving a document a misleading name does not actually mean that this document also has the effect that it suggests it has.

78. The term *international* arrest warrant is misleading, in that it suggests that arrest warrants can be enforced in third countries without the validation of the local authorities. This is not the case: there is always a need for a validation by the authorities of the State where the person, mentioned in the warrant, is found. Accordingly, the Belgian arrest warrant against Mr. Yerodia, even after being circulated in the Interpol system, could not be automatically enforced in all Interpol member States. It may have caused an inconvenience that was perceived as offensive by Mr. Yerodia or by the Congolese authorities. It is not *per se* a limitation of the Congolese Foreign Minister's right to travel and to exercise his functions.

I know of no State that automatically enforces arrest warrants issued in other States, not even in regional frameworks such as the European Union. Indeed, the discussions concerning the *European arrest warrant* were about introducing something that does not exist at present: a rule by which member States of the European Union would automatically enforce each other's arrest warrants[149]. At present, warrants of the kind that the Belgian judge issued in the case of Mr. Yerodia are not automatically enforceable in Europe.

In inter-State relations, the proper way for States to obtain the presence of offenders who are not on their territory is through the process of *extradition*. The discussion about the legal effect of the Belgian arrest warrant in third States has to be seen from that perspective. When a judge issues an arrest warrant against a suspect whom he believes to be abroad, this warrant may lead to an

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[148] *Supra*, para. 49.

[149] See the *Proposal for a Council Framework Decision on the European Arrest Warrant and the Surrender Procedures between the Member States*, COM(2001)522, available on the Internet: http://europa.eu.int/eur-lex/en/com/pdf/2001/en_501PC0522.pdf. An amended version can be found in: Council of the European Union, Outcome of proceedings, 10 Dec. 2001, 14867/1/01 REV 1 COPEN 79 CATS 50.

extradition request. This is not automatic: it is up to the Government whether or not to request extradition[150]. Extradition requests are often preceded by a request for *provisional arrest for the purposes of extradition.* This is what the *Interpol Red Notices* are about. Red Notices are issued by Interpol on the request of a State which wishes to have the person named in the warrant provisionally arrested in a third State for the purposes of extradition. Not all States, however, give this effect to an Interpol Red Notice[151].

Requests for the provisional arrest are, in turn, often preceded by an *international tracing request*, which aims at localizing the person named in the arrest warrant. This "communication" does not have the effect of a Red Notice, and does not include a request for the provisional arrest of the person named in the warrant. Some countries may refuse access to a person whose name has been circulated in the Interpol system or against whom a Red Notice has been requested. This is, however, a question of domestic law.

States may also prohibit the official visits of persons who are suspected of international crimes refusing a visa, or by refusing accreditation if such persons are proposed for a diplomatic function[152], but this, again, is a domestic matter for third States to consider, and not an automatic consequence of a judge's arrest warrant.

79. In the case of Mr. Yerodia, Belgium communicated the warrant to Interpol (end of June 2000), but did not request an Interpol Red Notice until September 2001, which was when Mr. Yerodia had ceased to be a Minister. It follows that Belgium never requested any country to arrest Mr. Yerodia provisionally for the purposes of extradition while he was a Foreign Minister. The Congo claims that Mr. Yerodia was, in fact, restricted in his movements as a result of the Belgian arrest warrant. Yet, it fails to adduce evidence to prove this point. It appears, on the contrary, that Mr. Yerodia has made a number of foreign travels after the warrant had been circulated in the Interpol system (2000), including an official visit to the United Nations. During the hearings, it was said that, when attending this United Nations Conference in New York, Mr. Yerodia chose the shortest way between the airport and the United Nations building, because he feared being arrested[153]. This fear, which he may have had, was based on psychological, not on legal grounds. Under the 1969 Special Missions Convention, he could not be arrested in third countries when on an official visit. On his official visits in third States, no coercive action was taken against him on the basis of the Belgian warrant.

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[150]Often, governments refrain from requesting extradition for political reasons, as was shown in the case of Mr. Ocalan, where Germany decided not to proceed to request Mr. Ocalan's extradition from Italy. See Press Reports: "Bonn stellt Auslieferungsersuchen für Öcalan zurück", *Frankfurter Allgemeine*, 21 Nov. 1998 and "Die Bundesregierung verzichtet endgültig auf die Auslieferung des Kurdenführers Öcalan", *Frankfurter Allgemeine*, 28 Nov. 1998.

[151]Interpol, Secretariat général, *Rapport sur la valeur juridique des notices rouges*, ICPO — Interpol — General Assembly, 66th Session, New Delhi, 15-21 Oct. 1997, AGN/66/RAP/8, No. 8 Red Notices, as amended pursuant to res. No. AGN/66/RES/7.

[152]See the Danish hesitations concerning the accreditation of an Ambassador for Israel, *supra*, footnote 21.

[153]CR 2001/10/20.

3. Conclusion

80. The warrant could not be and was not executed in the country where it was *issued* (Belgium) or in the countries to which it was *circulated*. The warrant was not executed *in Belgium* when Mr. Yerodia visited Belgium officially in June 2000. Belgium did not lodge an extradition request to *third countries* or a request for the provisional arrest for the purposes of extradition. The warrant was not an "international arrest warrant", despite the language used by the Belgian judge. It could and did not have this effect, neither in Belgium nor in third countries. The allegedly wrongful act was a purely domestic act, with no *actual* extraterritorial effect.

V. REMEDIES

81. On the subject of remedies, the Congo asked the Court for two different actions: *(a)* a declaratory judgment to the effect that the warrant and its circulation through Interpol was contrary to international law and *(b)* a decision to the effect that Belgium should withdraw the warrant and its circulation. The Court granted both requests: it decided *(a)* that the issue and international circulation of the arrest warrant were in breach of a legal obligation of Belgium towards the Congo (Judgment, para. 78 (2) of the *dispositif*) and *(b)* that Belgium must, by means of its own choosing, cancel the arrest warrant and so inform the authorities to whom the warrant was issued (Judgment, para. 78 (3) of the *dispositif*).

82. I have, in Sections II (Immunities), III (Jurisdiction) and IV (Existence of an internationally wrongful act) of my dissenting opinion, given the reasons why I voted against paragraph 78 (2) of the *dispositif* relating to the illegality, under international law, of the arrest warrant: I believe that Belgium was not, under positive international law, obliged to grant immunity to Mr. Yerodia on suspicions of war crimes and crimes against humanity and, moreover, I believe that Belgium was perfectly entitled to assert extraterritorial jurisdiction against Mr. Yerodia for such crimes.

83. I still need to give reasons for my vote against paragraph 78 (3) of the *dispositif*, calling for the cancellation and the "decirculation" of the disputed arrest warrant. Even assuming, *arguendo*, that the arrest warrant was illegal in the year 2000, it was no longer illegal on the moment when the Court gave Judgment in this case. Belgium's alleged breach of an international obligation did not have a continuing character: it may have lasted as long as Mr. Yerodia was in

office, but it did not continue in time thereafter[154]. For that reason, I believe the International Court of Justice cannot ask Belgium to cancel and "de-circulate" an act that is not illegal today.

84. In its Counter-Memorial and pleadings, Belgium formulated three preliminary objections based on Mr. Yerodia's change of position. It argued that, due to Mr. Yerodia's ceasing to be a Minister today, the Court *(a)* no longer had jurisdiction to try the case, *(b)* that the case had become moot, and *(c)* that the Congo's Application was inadmissible. The Court dismissed all these preliminary objections.

I voted with the Court on these three points. I agree with the Court that Belgium was wrong on the points of *jurisdiction* and *admissibility*. There is well-established case law to the effect that the Court's jurisdiction to adjudicate a case and the admissibility of the Application must be determined on the date on which the Application was filed (when Mr. Yerodia was still a Minister), not on the date of the Judgment (when Mr. Yerodia had ceased to be a Minister). This follows from several precedents, the most important of which is the *Lockerbie* case[155]. I therefore agree with paragraph 78 (1) *(B)* and *(D)* of the Judgment.

I was, however, more hesitant on the subject of *mootness*, where the Court held that the Congo's Application was "not without object" (Judgment, para. 78 (1) *(C)*). It does not follow from *Lockerbie* that the question of mootness must be assessed on the date of the filing of the application[156]. An event subsequent to the filing of an application can still render a case moot. The question therefore was whether, given the fact that Mr. Yerodia is no longer a Foreign Minister today, there was still a case for the respondent State to answer. I think there was, for the following reason: it is not because an allegedly illegal act has ceased to continue in time that the illegality disappears. From that perspective, I think the case was not moot. This, however, is only true for the Congo's first claim (a declaratory Judgment solemnly declaring the illegality of Belgium's act). However, I think the case might have been moot regarding the Congo's second claim, given the fact that Mr. Yerodia is no longer a Minister today.

If there was an infringement of international law in the year 2000 (which I do not think exists, for the reasons set out above), it has certainly ceased to exist today. Belgium's alleged breach of an international obligation, if such an obligation existed — which I doubt — was in any event a breach of an obligation not of a continuing character. If the Court would take its own reasoning about immunities to its logical conclusion (the temporal linkage between the protection

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[154]See Art. 14 of the 2001 ILC Draft Articles on State Responsibility, United Nations doc. A/CN.4/L.602/Rev.1, concerning the extension in time of the breach of an international obligation, which states the following:

> "1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.
>
> 2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation . . ."

[155]*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, I.C.J. Reports 1998*, p. 23, para. 38 (jurisdiction) and p. 26, para. 44 (admissibility). See further, S. Rosenne, *The Law and Practice of the International Court, 1920-1996*, Vol. II, The Hague, Martinus Nijhoff Publishers, 1997, pp. 521-522.

[156]In the *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom)* case the Court only decided on the points of jurisdiction (*ibid., Preliminary Objections, I.C.J. Reports 1998*, p. 30, para. 53 (1)) and admissibility (*ibid.*, para. 53 (2)), not on mootness (*ibid.*, p. 31, para. 53 (3)). The *ratio decidendi* for paras. 53 (1) and (2) is that the relevant date for the assessment of both jurisdiction and admissibility are the date of the filing of the Application. The Court did not make such a statement in relation to mootness.

of immunities and the function of the Foreign Minister), then it should have reached the conclusion that the Congo's third and fourth submissions should have been rejected. This is why I have voted with the Court on paragraph 78 (1) *(C)* concerning Belgium's preliminary objection regarding mootness, but against the Court on paragraph 78 (3) of the *dispositif*.

I also believe, assuming again that there has been an infringement of an international obligation by Belgium, that the declaratory part of the Judgment should have sufficed as reparation for the moral injury suffered by Congo. If there *was* an act constituting an infringement, which I do not believe exists (a Belgian arrest warrant that was not contrary to customary international law and that was moreover never enforced), it was trivial in comparison with the Congo's failure to comply with its obligation under Article 146 of the IVth Geneva Convention (investigating and prosecuting charges of war crimes and crimes against humanity committed on its territory). The Congo did not come to the International Court with clean hands[157], and its Application should have been rejected. *De minimis non curat lex*[158].

VI. FINAL OBSERVATIONS

85. For the reasons set out in this opinion, I think the International Court of Justice has erred in finding that there is a rule of customary international law protecting incumbent Foreign Ministers suspected of war crimes and crimes against humanity from the criminal process in other States. No such rule of customary international law exists. The Court has not engaged in the balancing exercise that was crucial for the present dispute. Adopting a minimist and formalistic approach, the Court has *de facto* balanced in favour of the interests of States in conducting international relations, not the international community's interest in asserting international accountability of State officials suspected of war crimes and crimes against humanity.

86. The Belgian 1993/1999 Act may go too far and it may be politically wise to provide procedural restrictions for foreign dignitaries or to restrict the exercise of universal jurisdiction. Proposals to this effect are under study in Belgium. Belgium may be naive in trying to be a forerunner in the suppression of international crimes and in substantiating the view that, where the territorial State fails to take action, it is the responsibility of third States to offer a forum to victims. It may be politically wrong in its efforts to transpose the "sham trial" exception to complementarity in the Rome Statute for an International Criminal Court (Art. 17)[159] into *"aut dedere aut judicare"* situations. However, the question that was before the Court was not whether Belgium is naive or has acted in a politically wise manner or whether international comity would command a stricter application of universal jurisdiction or a greater respect for foreign dignitaries. The question was whether Belgium had violated an obligation under international law to refrain from issuing and circulating an arrest warrant on charges of war crimes and crimes against humanity against an incumbent Foreign Minister.

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[157] See *supra*, para. 35.

[158] This expression is not synonymous to *de minimis non curat praetor* in civil law systems. See *Black's Law Dictionary*, West Publishing Co.

[159] See supra, para. 37.

87. An implicit consideration behind this Judgment may have been a concern for abuse and chaos, arising from the risk of States asserting unbridled universal jurisdiction and engaging in abusive prosecutions against incumbent Foreign Ministers of other States and thus paralysing the functioning of these States. The *"monstrous cacophony"* argument[160], was very present in the Congo's Memorial and pleadings. The argument can be summarized as follows: if a State would prosecute members of foreign governments without respecting their immunities, chaos will be the result; likewise, if States exercise unbridled universal jurisdiction without any point of linkage to the domestic legal order, there is a danger for political tensions between States.

In the present dispute, there was no allegation of abuse of process on the part of Belgium. Criminal proceedings against Mr. Yerodia were not frivolous or abusive. The warrant was issued after two years of criminal investigations and there were no allegations that the investigating judge who issued it acted on false factual evidence. The accusation that Belgium applied its War Crimes Statute in an offensive and discriminatory manner against a Congolese Foreign Minister was manifestly ill founded. Belgium, rightly or wrongly, wishes to act as an agent of the world community by allowing complaints brought by foreign victims of serious human rights abuses committed abroad. Since the infamous *Dutroux* case (a case of child molestation attracting great media attention in the late 1990s), Belgium has amended its laws in order to improve victims' procedural rights, without discriminating between Belgian and foreign victims. In doing so, Belgium has also opened its courts to victims bringing charges based on war crimes and crimes against humanity committed abroad. This new legislation has been applied, not only in the case against Mr. Yerodia but also in cases against Mr. Pinochet, Mr. Sharon, Mr. Rafzanjani, Mr. Hissen Habré, Mr. Fidel Castro, etc. It would therefore be wrong to say that the War Crimes Statute has been applied against a Congolese national in a discriminatory way.

In the abstract, the chaos argument may be pertinent. This risk may exist, and the Court could have legitimately warned against this risk in its Judgment without necessarily reaching the conclusion that a rule of customary international law exists to the effect of granting immunity to Foreign Ministers. However, granting immunities to incumbent Foreign Ministers may open the door to other sorts of abuse. It dramatically increases the number of persons that enjoy international immunity from jurisdiction. Recognizing immunities for other members of government is just one step further: in present-day society, all cabinet members represent their countries in various meetings. If Foreign Ministers need immunities to perform their functions, why not grant immunities to other cabinet members as well? The International Court of Justice does not state this, but doesn't this flow from its reasoning leading to the conclusion that Foreign Ministers are immune? The rationale for assimilating Foreign Ministers with diplomatic agents and Heads of State, which is at the centre of the Court's reasoning, also exists for other Ministers who represent the State officially, for example, Ministers of Education who have to attend UNESCO conferences in New York or other Ministers receiving honorary doctorates abroad. *Male*

[160] J. Verhoeven, "M. Pinochet, la coutume internationale et la compétence universelle", *Journal des Tribunaux*, 1999, p. 315; J. Verhoeven, "Vers un ordre répressif universel? Quelques observations", *AFDI* 1999, p. 55.

fide governments may appoint persons to cabinet posts in order to shelter them from prosecutions on charges of international crimes. Perhaps the International Court of Justice, in its effort to close one box of Pandora for fear of chaos and abuse, has opened another one: that of granting immunity and thus *de facto* impunity to an increasing number of government officials.

(Signed) Christine VAN DEN WYNGAERT.
