International criminal law — Jurisdiction — Universal — Whether exercise of universal jurisdiction *in absentia* consistent with international law — Issue and international circulation of arrest warrant — Relationship between jurisdiction and immunities — Distinction between immunity from jurisdiction and impunity — War crimes — Crimes against humanity

State immunity — Jurisdictional immunities — Foreign minister — Purpose of immunities — Whether immunities of Head of State and diplomatic agents relevant to determining immunities of incumbent foreign minister — Whether incumbent foreign minister enjoying full immunity from criminal prosecution and inviolability during period of office — Whether official and private acts covered during term of office — Whether immunity remaining after person concerned has ceased to hold office — Whether exception to immunity in cases where person accused of war crimes and crimes against humanity — Issue and international circulation of arrest warrant — Whether violating immunity even if warrant not enforced

International Court of Justice — Jurisdiction — Optional Clause — Statute of the Court, Article 36(2) — Declaration accepting jurisdiction of the Court — Date at which jurisdiction to be established — Definition of a legal dispute — Existence of a legal dispute concerning arrest warrant — Whether events subsequent to act instituting proceedings depriving Court of jurisdiction

International Court of Justice — Admissibility — Date at which question of admissibility to be determined — Effect of events which occurred after the filing of Application — Whether dispute transformed into one of a radically different character — Whether adjudication would seriously jeopardize principle of procedural fairness and administration of justice — Whether Application deprived of object — Whether request for provisional measures deprived of object

International Court of Justice — Procedure — Claim in Application instituting proceedings not made in final submissions — Effect of *non ultra petita* rule — Whether Court permitted to rule on withdrawn claim in operative part of Judgment — Whether Court permitted to consider elements of withdrawn claim in reaching decision

International Court of Justice — Provisional measures of protection — Requirement of *prima facie* jurisdiction — Object of provisional measures — Preservation of respective rights of the Parties pending decision on the merits — Criteria for indication of provisional measures — Risk of irreparable prejudice to rights — Urgency — Whether provisional measures required in circumstances of case

Case Concerning the Arrest Warrant of 11 April 2000

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

International Court of Justice

Request for the Indication of Provisional Measures.[1] 8 *December* 2000

Judgment.[2] 14 *February* 2002

(Guillaume, *President*; Shi, *Vice-President*; Oda, Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh and Buergenthal, *Judges*; Bula-Bula[3] and Van den Wyngaert,[4] *Judges* ad hoc)

Summary: *The facts*:—In 1998 the Belgian authorities commenced an investigation into acts allegedly committed by Mr Abdulaye Yerodia Ndombasi in the Democratic Republic of the Congo ("the Congo") on 4 and 27 August 1998 following a series of complaints by twelve Belgian residents, five of whom were Belgian nationals, who had fled the Congo to Belgium.[5] Following the investigation, on 11 April 2000 a judge of the Brussels *Tribunal de première instance* issued an arrest warrant *in absentia*[6] against Mr Yerodia, who had by that time been appointed Minister for Foreign Affairs of the Government of the Congo. The arrest warrant charged Mr Yerodia with offences

[1] The Congo was represented by HE Mr Jacques Masangu-a-Mwanza, *Agent*; Mr Jacques Vergès and HE Mr Ntumba Luaba Lumu. Belgium was represented by Mr Jan Devadder, *Agent*; Mr Daniel Bethlehem and Mr Eric David.

[2] The Congo was represented by HE Mr Jacques Masangu-a-Mwanza, *as Agent*; HE Mr Ngele Masudi, Maître Kosisaka Kombe, Mr François Rigaux, Ms Monique Chemillier-Gendreau, Mr Pierre d'Argent, *as Counsel and Advocates.* Belgium was represented by Mr Jan Devadder, *as Agent*; Mr Daniel Bethlehem and Mr Eric David, *as Counsel and Advocates.*

[3] Judge *ad hoc* designated by the Congo. [4] Judge *ad hoc* designated by Belgium.

[5] The relevant acts included various "racial hate speeches" reported in the media that allegedly had the effect of inciting the civilian population to attack and murder Tutsi residents in Kinshasa. It was not contested by Belgium that the acts in question had not resulted in harm to any Belgian nationals.

[6] Mr Yerodia was not in Belgium at the time that the arrest warrant was issued and circulated.

under Article 7 of the Belgian Law of 16 June 1993 as amended by the Law of 10 February 1999 ("the Belgian Law of 1993/1999"), which provided that crimes which would incur punishment as grave breaches of the Geneva Conventions of 12 August 1949 and of the Additional Protocols thereto, and serious violations of international humanitarian law, were punishable under Belgian law. Article 5 of the Belgian Law of 1993/1999 stated *inter alia* that Article 7 applied notwithstanding immunity attaching to the official capacity of a person. The warrant provided that it was not to be executed against Mr Yerodia at any time when he was on an official visit to Belgium. The arrest warrant was circulated to all States via the International Criminal Police Commission ("Interpol") Green Notice system in June 2000.

On 17 October 2000, the Congo instituted proceedings against Belgium in the International Court of Justice claiming that Belgium had violated the principle of the sovereign equality of States and the principle that a State may not exercise its authority in the territory of another State. The Congo also maintained that Article 5 of the Belgian Law violated the diplomatic immunity of a Minister for Foreign Affairs.[7] At the same time, the Congo submitted a request for the indication of provisional measures seeking an order for the immediate discharge of the arrest warrant. In reply, Belgium challenged the jurisdiction of the Court to entertain the claims brought by the Congo, maintaining that there was no legal dispute in existence between the Parties. Belgium also maintained that the Application by the Congo was inadmissible on account *inter alia* of being rendered moot by reason of developments subsequent to the filing of the Application, in particular the outcome of a ministerial reshuffle in the Congo on 20 November 2000 whereby Mr Yerodia had been moved to the post of Minister for Education.

With respect to the request by the Congo for the indication of provisional measures, Belgium argued that the request had been rendered moot and should be removed from the Court List in light of the above-mentioned developments that took place after the filing of the request.

The Court delivered its Order on Provisional Measures on 8 December 2000, rejecting Belgium's claim that the application by the Congo had become moot and rejecting also the Congo's request for the indication of a provisional measure.

Order of 8 December 2000

Held:—(1) (unanimously) The request that the case be removed from the Court List was rejected (para. 78).

[7] However, in its submission in its Memorial, and in its final submissions at the close of oral proceedings, the Congo invoked only the ground that the non-recognition of the immunity of a Minister of Foreign Affairs in office under the Belgian Law of 1993/1999 violated the rule of international law concerning the absolute inviolability and immunity from criminal process of an incumbent foreign minister.

(a) The Court had the power to remove from its list a case upon which it appeared certain that the Court would not be able to adjudicate on the merits. Mootness of the Application was one of the grounds which might lead the Court to remove a case from its list (paras. 55-6).

(b) The Application was not deprived of its object following the ministerial reshuffle, since the disputed arrest warrant remained operative and related to the same individual (paras. 56-7).

(c) The request for the indication of a provisional measure had not been deprived of its object by reason of the ministerial reshuffle (para. 60).

(2) (by fifteen votes to two, Judge Rezek and Judge *ad hoc* Bula-Bula dissenting) The circumstances of the case were not such as to require the exercise of the power under Article 41 of the Statute to indicate provisional measures (para. 78).

(a) The declarations made by the Parties pursuant to Article 36(2) of the Statute of the Court constituted a prima facie basis for jurisdiction (para. 68).

(b) The invocation of declarations during the second round of oral argument was not likely seriously to jeopardize the principle of procedural fairness and the sound administration of justice (para. 63).

(c) The power of the Court to indicate provisional measures under Article 41 of the Statute of the Court had as its object to preserve the respective rights of the parties pending the decision of the Court. Such measures were justified only in a case of urgency. It had not been established that irreparable prejudice might be caused in the immediate future to the Congo's rights. Nor was the degree of urgency such that those rights required protection by the indication of provisional measures (paras. 69-72).

(d) It was not necessary to examine Belgium's further argument that the provisional measure relating to the discharge of the arrest warrant sought by the Congo was identical to that sought by it in the merits (para. 73).

Declaration of Judge Oda: (1) The case should have been removed from the Court List since it was moot from the outset and there was no legal dispute susceptible to the Court's jurisdiction. The issue of the existence of a legal dispute should be dealt with prior to a decision on whether the Court has jurisdiction. Requests for interim protection provided the ideal opportunity to deal with such questions as pre-preliminary questions (pp. 33-6).

(2) The belief by the Congo that the accused would be arrested in consequence of the arrest warrant did not amount to a legal claim and could not constitute a basis for the exercise of the jurisdiction of the Court (pp. 36-7).

Declaration of Judge Ranjeva: A final and expeditious determination of all the issues by the Court with the Parties' full cooperation was the most appropriate form of provisional measures, as reflected in paragraph 76 of the Order (p. 37).

Separate Opinion of Judge Koroma: There was some doubt whether the Court had taken adequate account both of the effect of the issue of the arrest

warrant on sovereign rights and of the extent of the injury which might have been caused to the interests of the Congo. It would have been useful had the Court included, within the confines of the Order, a call to the Parties not to take steps capable of prejudicing the rights claimed or of further aggravating the dispute (pp. 38-9).

Separate Opinion of Judge Parra-Aranguren: The Court should not have taken into account the invocation by the Congo of its own Optional Clause declaration as a new basis for the jurisdiction of the Court in the second round of oral argument. It could not be concluded that the invocation by the Congo of its Optional Clause declaration in the second round would not seriously jeopardize the principle of procedural fairness and the sound administration of justice. The Court's approach in the present case departed from the position adopted by the Court in previous decisions (pp. 39-43).

Dissenting Opinion of Judge Rezek: The Congo's claim that the issue of the arrest warrant amounted to a violation of its sovereign rights was prima facie valid. In determining the degree of urgency, the Court should have ascertained whether the indication of provisional measures would have been likely to cause prejudice no less serious than that sought to be remedied on a provisional basis. Suspending the effects of the arrest warrant until a ruling on the merits would not have had any major drawbacks (pp. 43-4).

Dissenting Opinion of Judge ad hoc *Bula-Bula*: (1) The request for provisional measures had not been deprived of its object by reason of the appointment of the person concerned to the portfolio of Minister for Education (pp. 45-8).

(2) It would have been appropriate for the Court to indicate a provisional measure ordering the suspension of the arrest warrant. In determining the urgency of the situation, the Court should have taken account of the tragic events afflicting the Congo. The Congo suffered irreparable prejudice from the issue of the arrest warrant in terms of moral damage, prejudice to international prerogative rights, indirect material and physical damage and human injury. The magnitude of damage changed, but persisted in lesser proportion, after the person concerned was appointed as Minister for Education (pp. 48-55).

Declaration of Judge ad hoc *Van den Wyngaert*: (1) The Court was correct in rejecting the request for provisional measures. There was no irreparable prejudice to the rights claimed by the Congo and the measures requested were not justified by urgency (p. 156).

(2) International law was uncertain as to how the obligation to prosecute and punish core crimes of international criminal law should be realized in practice, particularly in the absence of supranational enforcement mechanisms and where reliance was placed upon the domestic prosecution of such crimes (pp. 56-60).

In September 2001, Belgium requested that an Interpol Red Notice be issued in respect of Mr Yerodia in order to secure his provisional arrest pending a request for extradition to Belgium.[8] At the time of the request to Interpol, Mr Yerodia had ceased to hold any ministerial office in the Congo following the formation of a new government.

Judgment of 14 February 2002

Held:—(1) (by fifteen votes to one, Judge Oda dissenting) The Court had jurisdiction to entertain the Application made by the Congo which was admissible and had not been rendered moot (paras. 44 and 78).

(a) The jurisdiction of the Court had to be determined at the time that the act instituting proceedings was filed. Events that occurred subsequent to that date might have had the effect of rendering a case moot, but could not deprive the Court of jurisdiction. At the date that the Congo's application instituting the proceedings was filed, each of the Parties was bound by declarations accepting the compulsory jurisdiction of the Court. The reservations contained in the declarations were not applicable to the present case. There was a legal dispute between the Parties in existence at the time of the filing of the Application (paras. 26-8, 44 and 78).

(b) The Application by the Congo was not without object and accordingly the case was not moot. Events occurring subsequent to the filing of an application could render the application without object such that the Court was not called upon to render a decision. However, the changes which had occurred did not put an end to the dispute in the present case and did not deprive the Application of object (para. 32).

(c) Questions of admissibility had to be determined by reference to the date of the filing of the Application. The events that occurred subsequent to the filing of the Application did not have the effect of transforming the dispute into one of a different character. The continuation of the proceedings did not undermine Belgium's ability to prepare its defence, nor did it place at risk the sound administration of justice. The change in the professional position of Mr Yerodia did not transform the character of the dispute into an action for diplomatic protection. At no time did the Congo seek to invoke the personal rights of the person concerned. Accordingly, Belgium could not rely upon the rule on exhaustion of local remedies to contest admissibility. In view of the final form of the Congo's submissions, the Court was precluded from ruling on the question of whether the issue of the arrest warrant based on the exercise of universal jurisdiction complied with rules and principles of international law governing the jurisdiction of national courts.

[8] A Red Notice may be issued by Interpol to seek the arrest with a view to the extradition of a person wanted, based on an arrest warrant. In the present case, Interpol responded to Belgium on 27 September 2001 with a request for additional information. No Red Notice had been issued by Interpol at the time the Court delivered the Judgment in the case.

However, the *non ultra petita* rule did not preclude the Court from addressing certain legal points in its reasoning where necessary or desirable (paras. 32-43 and 78).

(2) (by thirteen votes to three, Judges Oda, Al-Khasawneh and Judge *ad hoc* Van den Wyngaert dissenting) The issue of the arrest warrant and its international circulation constituted violations of international obligations owed by Belgium to the Congo in that they failed to respect the immunity from criminal jurisdiction and the inviolability which a foreign minister enjoyed under international law.

(a) A Minister for Foreign Affairs enjoyed full immunity from criminal prosecution and inviolability throughout his period of office. The immunities accorded to foreign ministers were not accorded for their personal benefit, but rather to ensure the effective performance of their functions on behalf of their respective States (paras. 53-4).

(b) The immunity and inviolability enjoyed by a Minister for Foreign Affairs applied in respect of both official and private acts and in respect of acts performed before he assumed office as well as those occurring during the period of office (para. 55).

(c) There was no exception to the rule according immunity where the person concerned was suspected of having committed war crimes or crimes against humanity. However, a foreign minister did not enjoy impunity. Jurisdictional immunity could not operate to exonerate a person from criminal responsibility (paras. 57-60).

(d) The immunities enjoyed by a foreign minister did not bar criminal prosecution in their own country or if their State waived immunity in proceedings before a foreign court. After a foreign minister left office the courts of another State which had jurisdiction could try the former minister for acts committed prior to holding office and in respect of private acts committed whilst in office. In addition, an incumbent or former foreign minister might be subject to criminal proceedings before certain international criminal courts and tribunals where they had jurisdiction (para. 61).

(e) The issue and international circulation of an arrest warrant violated the immunity of an incumbent Minister for Foreign Affairs, irrespective of whether it significantly interfered with his diplomatic activity. The arrest warrant remained unlawful notwithstanding that the person concerned had subsequently ceased to be Minister for Foreign Affairs (paras. 70-6).

(3) (by ten votes to six, Judges Oda, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Judge *ad hoc* Van den Wyngaert dissenting) Belgium was required to cancel the arrest warrant by means of its own choosing and inform the authorities to whom the warrant was circulated. The declaration of illegality on its own was insufficient to provide sufficient reparation to the Congo in that it would not wipe out the consequences of the illegal act and re-establish the situation that would have in all probability existed had the act not occurred. No further remedy beyond the cancellation of the arrest warrant was required. In particular, it was not appropriate for the Court to indicate the implications

for third States when ruling on a dispute between Belgium and the Congo (paras. 76-7).

Separate Opinion of President Guillaume: The Court should have addressed certain aspects of the question of universal jurisdiction in the reasoning for its decision. International law did not provide a basis for the exercise of universal jurisdiction *in absentia*. States might exercise universal jurisdiction in cases of piracy and subsidiary universal jurisdiction in respect of certain crimes provided for by various conventions where the offender was present on their territory. Under international law, States were not permitted to confer universal jurisdiction on their domestic courts where the author of an offence was not present on their territory (pp. 90-101).

Dissenting Opinion of Judge Oda: (1) The Court should have dismissed the Application by the Congo since there existed at the time of the filing of the Application no legal dispute in terms of Article 36(2) of the Statute. The Congo's opposition to the Belgian Law of 1993/1999 and to certain acts taken by Belgium pursuant to it could not be regarded as a dispute or a legal dispute (pp. 101-4).

(2) The law was not sufficiently developed to enable the Court to provide guidance on the scope of universal jurisdiction (pp. 104-7).

(3) The issuance of the arrest warrant was of little significance. Belgium did not cause any injury to the Congo since no action was taken against the person concerned pursuant to the arrest warrant (pp. 107 and 109).

Declaration of Judge Ranjeva: The Court should not have avoided addressing the question of universal jurisdiction. The only traditional example of universal jurisdiction was piracy. This was not based on the seriousness of the offence, but rather on the harm done to the international system of State jurisdiction. Territoriality remained a core condition for jurisdiction under international law, notwithstanding the modern trend towards a more functional approach in the service of combating international crimes. Developments in treaty-based criminal law, including the obligation to punish in the 1949 Geneva Conventions and the 1948 Genocide Convention, had not resulted in recognition of universal jurisdiction *in absentia* (pp. 109-14).

Separate Opinion of Judge Koroma: (1) The finding that the issue and circulation of the arrest warrant violated customary international law and the immunity of the person concerned was justified because the immunity of a foreign minister was a functional necessity and reflected the fact that increasingly a foreign minister represented the State, even though the position was not analogous to a Head of State (pp. 115-17).

(2) The scope of universal jurisdiction was continuing to evolve. Universal jurisdiction was available for piracy and for certain crimes, such as war crimes and crimes against humanity, including the slave trade and genocide (pp. 117-18).

Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal: (1) The Court was not barred from examining the legitimacy of Belgium's invocation of universal jurisdiction by the *non ultra petita* rule. The Court should have followed the logic of its findings in the *Certain Expenses* case and found it appropriate to deal with the question of whether the issuance and circulation of the arrest warrant by Belgium based on universal jurisdiction was unlawful before making a finding on immunities (pp. 119-24).

(2) State practice was neutral as to the exercise of universal jurisdiction. There were indications that a universal criminal jurisdiction for certain international crimes was not regarded as unlawful. A State might choose to exercise a universal jurisdiction *in absentia* provided certain safeguards were put in place to maintain stable inter-state relations. This required that universal jurisdiction be exercised only in respect of the most heinous international crimes and also that no criminal jurisdiction might be exercised which failed to respect the inviolability or infringed the immunities of the person concerned (pp. 124-40).

(3) A foreign minister enjoyed full immunity during official visits in performance of his functions and must not be subject to measures that would prevent the effective performance of the functions of a foreign minister. It was unclear whether a foreign minister enjoyed immunity during private travels and the scope of any such immunity (pp. 140-4).

(4) The immunity enjoyed by a foreign minister persisted only for so long as the person concerned remained in office and it continued to shield that person thereafter only in respect of "official acts". There was growing State practice favouring the view that serious international crimes could not be characterized as official acts since they were neither normal State acts nor acts that a State alone could perform (pp. 144-5).

(5) The issuance of the arrest warrant infringed the inviolability to which the person concerned was entitled, whenever and wherever engaged in the functions required, by his office (p. 144).

(6) The Court should not have ordered Belgium to cancel the arrest warrant as a remedy. The issuance and circulation of the arrest warrant did not constitute a continuing illegality. The illegal consequences attaching to the arrest warrant ceased as soon as the person concerned ceased to be Minister for Foreign Affairs. No restoration of the *status quo ante* was possible given that the person concerned was no longer Minister for Foreign Affairs (pp. 145-6).

Separate Opinion of Judge Rezek: The Belgian court lacked jurisdiction to conduct the criminal proceedings in the present case. Universal jurisdiction was a subsidiary form of jurisdiction. The exercise of such jurisdiction was predicated upon the presence of the person concerned on the territory of the forum State (pp. 146-9).

Dissenting Opinion of Judge Al-Khasawneh: (1) Immunity was by definition an exception from the general rule of personal legal responsibility and

accountability, and, as such, must be narrowly defined. The effective combating of grave crimes had arguably assumed the status of *jus cogens*, reflecting recognition by the international community of the vital community interests and values it sought to protect and enhance. When this hierarchically higher norm came into conflict with the rules on immunity, it should prevail (pp. 150-3).

(2) The Court did not satisfactorily address the issue of the immunity of an incumbent foreign minister becoming *de facto* impunity for criminal conduct purportedly undertaken in pursuance of State policy. In this respect, the Court had made an artificial distinction between immunity as a substantive defence on the one hand and immunity as a procedural defence on the other hand, which would lead to paradoxical results in practice (p. 152).

(3) The nature and extent of immunity from criminal process enjoyed by foreign ministers was unclear. The immunities of foreign ministers could not be assimilated to diplomatic representatives, since foreign ministers were not subject to the same conditions as diplomatic representatives. Nor could they be assimilated to a Head of State, since foreign ministers did not personify the State in the way that Heads of State did (pp. 150-1).

(4) A foreign minister was entitled to immunity from enforcement when on official mission when the unhindered conduct of diplomacy would suffer if the case were otherwise. The mere opening of a criminal investigation did not constitute interference with the conduct of diplomacy. The arrest warrant issued by Belgium went further than an investigation and might be viewed as an enforcement measure, but did not breach obligations owed to the Congo (pp. 151-2).

Separate Opinion of Judge ad hoc *Bula-Bula*: (1) The Judgment of the Court codified and developed the law of immunities. The Court implicitly rejected the claim to jurisdiction advanced by Belgium and settled the legal relationship between universal jurisdiction and immunities in favour of immunities (pp. 154 and 189).

(2) Under customary international law foreign ministers enjoyed inviolability and immunity from criminal prosecution. The immunity was functional in nature. The conferral of such immunity did not equate to impunity since criminal responsibility remained intact (pp. 168-77).

(3) The Congo suffered *de facto* as a result of the issue and circulation of the arrest warrant. The arrest warrant caused prejudice to the Congo's sovereign prerogatives, discredited the Congo internationally and injured the dignity of the Congo (pp. 177-90).

Dissenting Opinion of Judge ad hoc *Van den Wyngaert*: (1) The Court had ruled correctly on the issues of jurisdiction and admissibility. The Court's finding regarding mootness was correct also with respect to the claim advanced by the Congo that the act of issuing the arrest warrant was illegal. The case may have been moot also regarding the second claim advanced by the Congo (p. 235).