COUR INTERNATIONALE DE JUSTICE

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AFFAIRE RELATIVE AU MANDAT D'ARRÊT DU 11 AVRIL 2000

(RÉPUBLIQUE DÉMOCRATIQUE DU CONGO c. BELGIQUE)

DEMANDE EN INDICATION DE MESURES CONSERVATOIRES

ORDONNANCE DU 8 DÉCEMBRE 2000

2000

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING THE ARREST WARRANT OF 11 APRIL 2000

(DEMOCRATIC REPUBLIC OF THE CONGO *v.* BELGIUM)

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

ORDER OF 8 DECEMBER 2000

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CASE CONCERNING THE ARREST WARRANT OF 11 APRIL 2000

(DEMOCRATIC REPUBLIC OF THE CONGO *v.* BELGIUM)

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

ORDER

Present: *President* GUILLAUME; *Vice-President* SHI; *Judges* ODA, BEDJAOUI, RANJEVA, HERCZEGH, FLEISCHHAUER, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOIJMANS, REZEK, AL-KHASAWNEH, BUERGENTHAL; *Judges* ad hoc BULA-BULA, VAN DEN WYNGAERT; *Registrar* COUVREUR.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 41 and 48 of the Statute of the Court and to Articles 73 and 74 of the Rules of Court,

Makes the following Order:

1. Whereas, by Application filed in the Registry of the Court on 17 October 2000, the Democratic Republic of the Congo (hereinafter "the Congo") instituted proceedings against the Kingdom of Belgium (hereinafter "Belgium") for

> "violation of the principle that a State may not exercise its authority on the territory of another State and of the principle of sovereign equality among all Members of the Organization of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations"

and for

> "violation of the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State, as recognized by the jurisprudence of the Court and following from Article 41, paragraph 2, of the Vienna Convention of 18 April 1961 on Diplomatic Relations";

2. Whereas, in that Application, the Congo relies, as basis for the Court's jurisdiction, on the fact that "Belgium has accepted the jurisdiction of the Court and [that], in so far as may be required, the present Application signifies acceptance of that jurisdiction by the Democratic Republic of the Congo";

3. Whereas, in the above-mentioned Application, the Congo refers to an

> "international arrest warrant issued on 11 April 2000 by a Belgian investigating judge . . . against the Minister for Foreign Affairs in office of the Democratic Republic of the Congo . . ., seeking his provisional detention pending a request for extradition to Belgium for alleged crimes constituting 'serious violations of international humanitarian law'";

and whereas the Congo points out that,

> "under the very terms of the arrest warrant, the investigating judge claims jurisdiction in respect of offences purportedly committed on the territory of the Democratic Republic of the Congo by a national of that State, without any allegation that the victims were of Belgian nationality or that these acts constituted violations of the security or dignity of the Kingdom of Belgium";

4. Whereas the Congo refers in its Application to certain provisions of the Belgian "Law of 16 June 1993, as amended by the Law of 10 February 1999, concerning the punishment of serious violations of international humanitarian law"; whereas the Congo contends that

> "Article 5, paragraph 2, . . . is manifestly in breach of international law in so far as it claims to derogate from diplomatic immunity, as is the arrest warrant issued pursuant thereto against the Minister for Foreign Affairs of a sovereign State";

and whereas it further contends that Article 7 "establishes the universal applicability of the Law and the universal jurisdiction of the Belgian courts in respect of 'serious violations of international humanitarian law', without even making such applicability and jurisdiction conditional on

the presence of the accused on Belgian territory", and that this Article, and "the arrest warrant issued by the Belgian investigating judge . . .[,] are in breach of international law";

5. Whereas, in that same Application, the Congo refers to

> "a number of multilateral conventions for the suppression of specifically defined offences (torture and other cruel, inhuman or degrading treatment or punishment; terrorism; breaches of the rules on the physical protection of nuclear materials; unlawful acts against the safety of maritime navigation; unlawful seizure of aircraft; unlawful acts of violence at airports) [which] provide for universal jurisdiction of the States parties to them";

and whereas the Congo points out that those conventions "make [such universal] jurisdiction conditional on the perpetrator's presence on the territory of the prosecuting State"; and whereas it concludes that "[t]hese, then, are exceptional heads of jurisdiction, which derive their compliance with international law solely from the treaties which provide for them [, and which] are not part of general international law";

6. Whereas the Congo contends in that Application that "[t]here is nothing in [general international law], as it currently stands, to admit of the notion that a further exception has to be generally recognized, in regard to war crimes or crimes against humanity"; whereas the Congo explains that

> "[d]oubtless certain States, in adopting laws designed to bring their legislation into line with *United Nations Security Council resolutions 827 of 25 May 1993 and 955 of 8 November 1994*, establishing *international tribunals for the prosecution of*, respectively, *persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991* and *persons responsible for acts of genocide or other serious violations of international humanitarian law committed in 1994 in the territory of Rwanda and as far as Rwandan citizens are concerned, responsible for such violations committed in the territory of neighbouring States*, extended their jurisdiction in respect of the crimes thus defined to cases other than those where either the persons responsible or the victims were their own nationals",

but adds that "such provisions are in no way materially comparable with Article 7 of the Belgian Law"; and whereas the Congo contends that

> "the above-mentioned Security Council resolutions constitute interference in the affairs of sovereign States whose sole justification is the mission of maintaining peace and international security vested in the United Nations, to which, moreover, the preamble to those resolutions expressly refers, and which, of course, no State may usurp",

and that, "while the Security Council attributes to national courts jurisdiction concurrent with that of the international tribunals — subject to

the primacy of the latter — to try the crimes which it defines, it lays down no criterion for such jurisdiction", and "establishes no derogation from the rules of criminal jurisdiction recognized by international law";

7. Whereas in Section II of the Application the decision requested of the Court by the Congo reads as follows:

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

8. Whereas on 17 October 2000, immediately after the filing of the Application, the Congo submitted to the Court a request for the indication of a provisional measure, citing paragraph 1 of Article 41 of the Statute of the Court;

9. Whereas, in that request for the indication of a provisional measure, the Congo states that "the disputed arrest warrant effectively bars the Minister for Foreign Affairs of the Democratic Republic of the Congo from leaving that State in order to go to any other State which his duties require him to visit and, hence, from carrying out those duties";

10. Whereas, in the said request for the indication of a provisional measure, the Congo contends that "[t]he two essential conditions for the indication of a provisional measure according to the jurisprudence of the Court, namely urgency and the existence of irreparable prejudice, are clearly satisfied in this case";

11. Whereas the Congo specifies in its request that it "seeks an order for the immediate discharge of the disputed arrest warrant";

12. Whereas on 17 October 2000, the date on which the Application and the request for the indication of a provisional measure were received in the Registry, the Registrar notified the Belgian Government of the filing of those documents; and whereas on 18 October 2000 the Registrar sent the Belgian Government certified copies of the Application and of the request in accordance with Article 40, paragraph 2, of the Statute, and Articles 38, paragraph 4, and 73, paragraph 2, of the Rules of Court;

13. Whereas, pending the notifications required by Article 40, paragraph 3, of the Statute and Article 42 of the Rules of Court, by transmittal of the printed bilingual version of the Application both to the member States of the United Nations and to the other States entitled to appear before the Court, the Registrar on 20 October 2000 informed

those States of the filing of the Application and of its subject-matter, and of the filing of the request for the indication of a provisional measure;

14. Whereas, on 20 October 2000, the Registrar informed the Parties that the President of the Court had fixed 20 November 2000 as the date for the opening of the oral proceedings provided for in Article 74, paragraph 3, of the Rules of Court, during which they could submit their observations on the request for the indication of a provisional measure;

15. Whereas, by a letter dated 30 October 2000, Belgium appointed an agent and added that it

> "reserve[d] the right to raise any objections, in due time, to admissibility or to the Court's jurisdiction, in accordance with the relevant procedure and with Article 79 of the Rules of Court, and nothing in the procedural conduct of Belgium concerning the request for indication of provisional measures should be construed as implying any waiver of this right or confirmation of the Court's jurisdiction";

16. Whereas, since the Court includes upon the Bench no judge of the nationality of the Parties, each of the latter proceeded, in the exercise of the right conferred upon it by Article 31, paragraph 3, of the Statute, to choose a judge *ad hoc* in the case; whereas the Congo chose for that purpose Mr. Sayeman Bula-Bula, and Belgium Ms Christine Van den Wyngaert;

17. Whereas, at the four public hearings held on 20, 21, 22 and 23 November 2000, oral observations were submitted on the request for the indication of a provisional measure:

On behalf of the Congo:

by H.E. Mr. Jacques Masangu-a-Mwanza, *Agent*,
Mr. Jacques Vergès,
H.E. Mr. Ntumba Luaba Lumu;

On behalf of Belgium:

by Mr. Jan Devadder, *Agent*,
Mr. Daniel Bethlehem,
Mr. Eric David;

and whereas at the hearings a question was asked on behalf of the Court by the President, to which an oral reply was given;

* *

18. Whereas, at the hearing of 20 November 2000, the Congo essentially reiterated the line of argument developed in its Application and in its request for the indication of a provisional measure; whereas it referred also to Article 12 of the Preliminary Title of the Belgian Code of Criminal Procedure (entitled "Prosecution for crimes or offences *(délits)* committed outside the territory of the Kingdom") and pointed out that,

according to that provision, "prosecution of the violations dealt with in this chapter shall take place only if the accused is found in Belgium"; whereas it maintained that the Belgian investigating judge, in an order rendered in another case, had

> "considered that Article 7 of the Law of 16 June 1993 derogate[d] from Article 12 of the Preliminary Title of the Code of Criminal Procedure and [did] not therefore make the jurisdiction of Belgian courts conditional on the person in question being found on the territory of the Kingdom";

whereas the Congo stated that

> "[i]t [was] clearly this unlimited jurisdiction which the Belgian State would confer upon itself if this judge's interpretation of the Law were correct which explain[ed] the issue of the arrest warrant against H.E. Mr. Yerodia Ndombasi, against whom it [was] patently evident that no basis of territorial or *in personam* jurisdiction, nor any jurisdiction based on the protection of the security or dignity of the Kingdom of Belgium, could have been invoked";

and whereas the Congo observed that "[s]ince the issue of the warrant, the Belgian Government ha[d] not disavowed this interpretation";

19. Whereas at the hearings the Congo stressed that neither its Application instituting proceedings nor its request for the indication of a provisional measure had sought "to make any claim whatever on the basis of the diplomatic protection of one of its nationals", but rather "to make good the breaches of international law affecting the Congolese State in the exercise of its sovereign prerogatives in diplomatic matters"; and whereas it explained that "[t]he Congo [was] attacking the arrest warrant issued by the Belgian judge because it [was] directed not at Mr. Yerodia Ndombasi in his personal capacity, but at the office of Minister for Foreign Affairs";

20. Whereas at the hearings the Congo stated that "[t]he object of provisional measures [was], according to the Court's case-law, 'to preserve the respective rights of the parties pending the decision of the Court'" and that "the need for such preservation [was] subject to two essential conditions, namely urgency and the existence of irreparable prejudice"; whereas the Congo argued, with regard to the requirement of urgency, that "while certain States consider[ed] that this warrant [could not] be enforced . . . and the Minister for Foreign Affairs ha[d] in fact been able to travel to certain of those States, and to the headquarters of the United Nations, this [did] not apply to other States", and that "he thus [could not] visit any State to which his duties [might] call him and, as a result . . . [was] unable to carry out those duties in a proper manner"; and whereas it contended, with regard to the requirement of irreparable prejudice, that "[t]he consequences of excluding the qualified representative of the Democratic Republic of the Congo from the international arena for an undetermined period of time [were], by their very nature, consequences which are irreparable" and that

"the request of the Democratic Republic of the Congo relie[d] on the precedent constituted . . . by the Order of 15 December 1979 *(United States Diplomatic and Consular Staff . . . in Tehran)*, in which the Court held that the violation of diplomatic immunity created a situation requiring the indication of a provisional measure";

21. Whereas at the hearings the Congo also pleaded the "seriousness of the substantive legal grounds of the Application"; and whereas, to that end, it reiterated the arguments put forward in its Application; and whereas it added that

"[t]he Court [was] not asked at present to determine the merits of these grounds of law, but to note that they [were] serious and [that they] justif[ied] steps to ensure that the *capitis deminutio* which a Belgian judge ha[d] sought to inflict on the Democratic Republic of the Congo, and for which the Kingdom of Belgium [was] answerable, should cease";

*

22. Whereas, at the hearing of 21 November 2000, the Agent of Belgium, in his preliminary statement, made the following observation: "[a]ccording to our information, Mr. Yerodia is today no longer Minister for Foreign Affairs of the Congo";

23. Whereas at the hearings Belgium referred to what it considers to be "the historical context of the events which took place in the Democratic Republic of the Congo and the reactions of the international community"; whereas it cited in this connection, on the one hand, the "massive and systematic violations of human rights and international humanitarian law" that had characterized the events that took place in the Great Lakes region and, on the other, the relevant resolutions adopted by the United Nations Security Council; whereas it cited in particular resolution 1291 (2000) of 24 February 2000, pursuant to which the Council:

"14. *Condemns* all massacres carried out in and around the territory of the Democratic Republic of the Congo, and *urges* that an international investigation into all such events be carried out with a view to bringing to justice those responsible"

and

"15. *Calls on* all parties to the conflict in the Democratic Republic of the Congo to protect human rights and respect international humanitarian law and the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, and *calls* on all parties to refrain from or cease any support to, or association with, those suspected of involvement in the crime of genocide, crimes against humanity or war crimes, and to bring to justice those responsible,

> and facilitate measures in accordance with international law to ensure accountability for violations of international humanitarian law";

and whereas Belgium observed that "[J]udge [Vandermeersch] was acting within the framework of action urged on the international community by the Security Council";

24. Whereas at the hearings Belgium contended that "the [Belgian] Law of 1993 and its 1999 amendments merely adapt[ed] Belgian domestic law to the obligations undertaken by Belgium at international level"; whereas it stated that "Article 7 of the Law . . . enshrine[d] the universal jurisdiction of the Belgian courts" and that "[t]his jurisdiction . . . [was] entirely consistent with the second paragraph of the Article common to the four 1949 Geneva Conventions (Articles 49, 50, 129 and 146 respectively)"; whereas it observed that

> "[t]he amendments made on 10 February 1999 to the 1993 Law [were] largely confined to bringing two offences within the scope *ratione materiae* of the law: crimes against humanity and genocide";

and whereas Belgium explained that

> "the extension to crimes against humanity and the crime of genocide of the universal jurisdiction already provided for in Article 7 of the 1993 Law . . . merely represent[ed] the incorporation into domestic law of an obligation long recognized in general international law";

and whereas Belgium referred to an "element introduced by the Law of 1999 . . . [namely] the refusal of any immunity for the representative of the State, whatever his or her rank, if he or she is implicated in one of the crimes provided for in the Law"; whereas it contended that

> "the lawmakers [had] merely transcribe[d] into legislation a rule dating back to the Statute of the Nuremberg Tribunal . . ., or even to the Treaty of Versailles regarding committal for trial of the former Emperor of Germany and of the perpetrators of war crimes in 1914-1918";

and whereas Belgium argued that

> "[t]his rule [had] subsequently [been] confirmed by the Nuremberg Tribunal itself in its Judgment of 1946, then in the statute of the Tokyo Tribunal . . ., then in the Convention on the Prevention and Punishment of the Crime of Genocide . . ., by the International Law Commission, both in their formulation of the Nuremberg principles and in the 1996 Draft Code of Offences against the Peace and Security of Mankind . . ., not to mention the Statutes of the International Criminal Tribunals . . ., of the International Criminal Court . . . and, very recently, of the Special Court for Sierra Leone";

25. Whereas at the hearings Belgium stated that "the arrest warrant [had] not [been] issued simply on the personal initiative of the judge"; whereas it explained that "the investigating judge had been seised, on the one hand, of an application by the Brussels Public Prosecutor and, on the other, of complaints from private individuals"; whereas Belgium stated that "[i]t appear[ed] from information obtained from the Brussels Public Prosecutor's office that, of the 12 complainants, five [were] of Belgian nationality and seven of Congolese nationality", and that "[a]ll [were] resident in Belgium"; and whereas Belgium stressed that "there exist[ed] clear and reasonable links between the acts in question and Belgium, through the nationality or residence of the victims of those acts";

26. Whereas at the hearings Belgium referred to the fact that

> "[t]he warrant state[d] that, on 4 and 27 August 1998, Mr. Yerodia Ndombasi, then President Kabila's Principal Private Secretary, [had] made various public speeches broadcast by the media and inciting racial hatred, which speeches are alleged to have contributed to the massacre of several hundred persons, mainly of Tutsi origin",

and that "[t]hose facts [were] cited in . . . United Nations reports"; and whereas Belgium further stated that "the investigating judge [had taken] full account of the context in which the words of Mr. Yerodia Ndombasi [had been] spoken";

27. Whereas at the hearings Belgium observed as follows:

> "[t]he investigating judge . . . took account of the issues of immunity arising from the indictment of a Minister by dispelling any notion that Mr. Yerodia Ndombasi would be arrested immediately if he came to Belgium at the official invitation of the Belgian Government: the invitation would in fact imply that Belgium waived the right to have the warrant enforced for the duration of the official stay, and the judicial authorities could not disregard that without incurring the international responsibility of the Belgian State . . .";

and whereas it added that, "*[m]utatis mutandis*, the same would be the case if Mr. Yerodia Ndombasi were to visit or pass through Belgium in response to an invitation addressed to him by an international organization of which Belgium was a member";

28. Whereas at the hearings Belgium acknowledged that if Mr. Yerodia Ndombasi were arrested, "his right to personal liberty would . . . be affected"; whereas it argued that "[h]owever, since the violation of Mr. Yerodia Ndombasi's right would occur in the course of ordinary criminal proceedings, this would be an exception to that right admitted by all the various instruments for the safeguard of the rights of the individual"; whereas Belgium accordingly concluded that "[s]ince no right has been violated, the Congo cannot claim that the infringement of Mr. Yerodia Ndombasi's liberty is a violation of international law which directly affects the Congo"; and whereas it added that Mr. Yerodia Ndombasi's

status as Minister "[did] nothing to change this conclusion", since "[t]he fact that an individual ha[d] the status of representative of a State [did not entitle him to] violate the law, whether it be domestic or international";

29. Whereas at the hearings Belgium stated that "an international arrest warrant . . . [could] only produce compulsory effects on the territory of a foreign State if the latter agree[d] to assist in its enforcement"; that "the two States [were] not bound by any specific bilateral treaty on extradition or judicial co-operation", and that "[t]he extraterritorial effects of the warrant [were] thus entirely conditional on the willingness of the requested State, in this case the Congo, to act upon it or not"; and whereas Belgium argued that "the issue of the arrest warrant [was] a means of helping the Congo to exercise a right which . . . [was] also an obligation for the Congo, namely that of arresting and prosecuting Mr. Yerodia Ndombasi in the Congolese courts on account of the acts with which he [was] charged";

30. Whereas at the hearings Belgium argued as follows:

> "the Belgian arrest warrant is no more enforceable directly on the territory of a third State than it is on the territory of the Congo. In both cases, the assistance of the authorities of the country concerned is indispensable; the arrest warrant is enforceable against the person concerned abroad only if the host State agrees to execute it. In such a case it would therefore not be Belgium which would be infringing Mr. Yerodia Ndombasi's liberty, but the requested third State";

31. Whereas Belgium stated at the hearings that "a request for the indication of provisional measures . . . is an exceptional procedure", that it implies that the Court has prima facie jurisdiction, and that

> "[i]t is, as the jurisprudence of the Court makes clear, a question of whether provisional measures are necessary in the circumstances — whether there is a serious risk of irreparable damage to the rights which may subsequently be adjudged by the Court to belong to either Party";

32. Whereas, at the hearings, Belgium argued with regard to the question of the Court's jurisdiction that the Application

> "ma[de] no reference to any specific basis of jurisdiction[,] [did] not refer to any bilateral or multilateral treaty providing for the jurisdiction of the Court pursuant to Article 36, paragraph 1, of the Statute [and] [did] not advance optional clause declarations by the Parties as a basis of jurisdiction";

and whereas Belgium accordingly concluded that "the Court should reject the Democratic Republic of the Congo's request for provisional measures"; and whereas it added that, "in the light of the Democratic Republic of the Congo's formulation on jurisdiction and for the avoid-

ance of doubt, [it] . . . reserve[d] [its] position on the question of jurisdiction and admissibility";

33. Whereas, with regard to the question of the rights to be preserved, Belgium argued at the hearings that "[t]he prerequisite . . . [was] that the rights which the applicant [sought] to preserve through the provisional measure procedure must not be illusory, must be the subject of the dispute in the proceedings on the merits and must in some manner be under threat by the action of which the applicant complains"; whereas it stated that in the present case "the 'right' claimed to be in need of preservation by the indication of provisional measures [was] the 'right' of the Democratic Republic of the Congo's Foreign Minister to travel abroad on governmental business"; whereas it added the following:

> "Diplomatic discourse of course requires that representatives of States have the ability to travel abroad in the conduct of affairs of State. The point is that foreign travel is not a *right*. It is a function . . . of diplomatic discourse . . . It requires the consent of the receiving State";

and whereas it concluded that

> "[t]he Democratic Republic of the Congo ha[d] not made out a case for the existence of a right [the preservation of which, it was claimed,] require[d] the indication of provisional measures . . . [and that] the Court should dismiss, on this ground . . . the Democratic Republic of the Congo's Application for provisional measures";

34. Whereas, with regard to the requirement of irreparable prejudice, Belgium asserted *inter alia* at the hearings that "the test [was] . . . not inconvenience, not hardship, not irritation", that "[t]he issue . . . [was] whether there [was] a real risk of irreparable prejudice to the rights of the Democratic Republic of the Congo", and that "[t]he events of the past 24 hours, during the course of which Mr. Yerodia Ndombasi ceased to be the Foreign Minister, indicate[d] firmly that there [was] no risk of irreparable prejudice to [those] rights"; whereas it maintained that "[w]e [were] presented with virtually no evidence of any prejudice having occurred to the rights of the Democratic Republic of the Congo since 11 April (or 12 July) 2000" and that "[t]here [was] not even any suggestion that Mr. Ndombasi [had] been much inconvenienced"; and whereas it submitted, accordingly, that the Court "should dismiss the Democratic Republic of the Congo's request for provisional measures . . . on this ground";

35. Whereas, with regard to the requirement of urgency, Belgium contended at the hearings that "[e]ven before the cabinet reshuffle . . ., which saw Mr. Ndombasi moved to the education portfolio, there was no issue of urgency"; and whereas it stated the following:

> "The reality was that the arrest warrant was issued on 11 April 2000. The Democratic Republic of the Congo has known about it since at least 12 July 2000. To the point of the filing of the Demo-

> cratic Republic of the Congo's Application on 17 October 2000, there was no suggestion of any urgency . . . Belgium would have contended yesterday that the request for provisional measures did not meet the requirement of urgency: this is even clearer today, in circumstances in which Mr. Ndombasi is no longer the Foreign Minister";

and whereas it accordingly requested the Court "to dismiss the request on this ground";

36. Whereas at the hearings Belgium further stated that "the relief sought by the Democratic Republic of the Congo brought by way of provisional measures [was] identical to the relief which it [sought] on the merits of its claim, namely, the immediate cancellation of the arrest warrant"; and whereas it referred to the Order made by the Permanent Court of International Justice on 21 November 1927 in the case concerning the *Factory at Chorzów (P.C.I.J., Series A, No. 12*, p. 10), in order to support its argument that "[t]he exceptional nature of the provisional measures procedure [did] not admit of an interim judgment granting the relief requested in the Application";

37. Whereas at the hearings Belgium stated that it "[did] not see any risk of a significant deterioration in relations between Belgium and the Democratic Republic of the Congo such as to warrant provisional measures [being indicated *propriu motu*]";

38. Whereas at the hearings Belgium observed that "there [was] a long history of Security Council and wider United Nations involvement in the Democratic Republic of the Congo in respect of the type of circumstances that [were] the subject of the arrest warrant" and that "the whole thrust of [the United Nations] involvement . . . in the relevant events in the Democratic Republic of the Congo militate[d] very strongly indeed against any indication of provisional measures along the lines requested by [the Congo]";

39. Whereas Belgium nevertheless concluded its first round of oral argument by stating that it

> "would not object were the Court to decide, in exercise of its power under either paragraph 1 or paragraph 2 of Article 75 of the Court's Rules, to indicate provisional measures which called upon the Parties jointly, in good faith, to address the difficulties caused by the issuance of the arrest warrant with a view to achieving a resolution to the dispute in a manner that [was] consistent with their obligations under international law, including Security Council resolutions 1234 (1999) and 1291 (2000)";

*

40. Whereas, at the hearing of 22 November 2000, in its second round of oral argument, the Congo contended that "[t]he international status of the Minister for Foreign Affairs [was] governed by the principle that he should be assimilated to a foreign Head of State in so far as immunity

and inviolability [were] concerned" and that "any minister sent by his or her State to represent it abroad, deal with other States or international organizations and, where necessary, enter into commitments on behalf of that State, also enjoy[ed], *sensu lato*, privileges and immunities"; whereas it pointed out that

> "[w]ith regard to Mr. Yerodia, yesterday Minister for Foreign Affairs, today Minister of Education in the new Congolese Government, . . . he [would] be called upon to travel, to respond to invitations from abroad, to attend international meetings . . ."

and that "[h]e [would] often be called upon to be sent as the plenipotentiary personal representative of the Head of State to represent him abroad"; and whereas the Congo added that in this capacity Mr. Yerodia Ndombasi "[would] undoubtedly be entitled to benefit from the principle of assimilation to the Head of State, the Head of Government or the Minister for Foreign Affairs, as [might] be presumed from Article 7, paragraph 2 *(c)*, of the 1969 Vienna Convention on the Law of Treaties";

41. Whereas, at that hearing, the Congo claimed that "the international arrest warrant in dispute contravene[d] the 'principle of non-retroactivity'"; whereas in support of this claim it cited Article 2, paragraph 1, of the Belgian Penal Code, and also the 1966 International Covenant on Civil and Political Rights and the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms;

42. Whereas, at that same hearing, the Congo contended that "[p]rima facie, the Court's jurisdiction [could] not be contested" and

> "derive[d] clearly from the optional declarations recognizing as compulsory the jurisdiction of the Court made by the Kingdom of Belgium and the Democratic Republic of the Congo on 3 April 1958 and 8 February 1989, respectively, . . . and which appear[ed] to contain no reservation";

43. Whereas, at the said hearing, the Congo made the following statement:

> "the Democratic Republic of the Congo requests the Court to order Belgium to comply with international law; to cease and desist from any conduct which might exacerbate the dispute with the Democratic Republic of the Congo; specifically, to discharge the international arrest warrant issued against Minister Yerodia.
>
> Generally, the Democratic Republic of the Congo requests the Court, on the basis of Article 75, paragraphs 1 and 2, of the Rules of Court, to indicate measures which consist, *inter alia*, in urging both Parties — Belgium in particular, and the Democratic Republic of the Congo — to adopt a course of conduct which will prevent the continuation, aggravation and extension of the dispute, in particular by eliminating the main cause of this dispute";

44. Whereas, at the conclusion of its second round of oral argument, the Congo asked the Court

> "to decide this case, having regard to the readiness of both Parties to seek a friendly settlement by diplomatic means, and . . . by persuading the Belgian judge, Mr. Vandermeersch, to withdraw his international arrest warrant";

*

45. Whereas, at the hearing of 23 November 2000, in its second round of oral argument, Belgium stated that it objected "to the invocation of a basis of jurisdiction . . . in the second round of oral arguments"; and whereas, citing the jurisprudence of the Court, it observed that "such action at this late stage, when it is not accepted by the other party, seriously jeopardizes the principle of procedural fairness and the sound administration of justice";

46. Whereas, at that hearing, Belgium contended that "[I]t [was] not accurate to characterize [its optional clause declaration] as 'without limitation'"; whereas it pointed out that "[i]n its operative part, [the said declaration] exclude[d] [the Court's] jurisdiction in respect of disputes 'to which the parties have agreed or may agree to have recourse to another method of pacific settlement'"; and whereas Belgium asserted that "the issue of the arrest warrant was actively being discussed at the very highest levels between [the two States] at the point at which the Foreign Minister of the Democratic Republic of the Congo authorized Maître Vergès to bring the claim";

47. Whereas, at that same hearing, Belgium argued, with regard to the conditions of irreparable prejudice and urgency, that

> "[t]he Cabinet reshuffle which [had] led to the appointment of a new Minister for Foreign Affairs comprehensively undermine[d] any residual claim . . . to irreparable prejudice based on constraints on travel by the Foreign Minister",

and that "the [said] Cabinet reshuffle . . . also comprehensively undermine[d] any residual claim that there [might] have been concerning urgency";

48. Whereas, at the said hearing, Belgium, referring to the above-mentioned Cabinet reshuffle, claimed that this change in circumstances rendered the request for a provisional measure without object and should lead the Court, in the interests of the sound administration of justice, to remove the case from the List;

49. Whereas, at that hearing, Belgium again referred to what it had said in its first round of oral argument concerning a call by the Court to the Parties (see paragraph 39 above); and whereas it observed in this connection that "[t]he statements of the Vice-Minister of Justice and Parliamentary Affairs of the Democratic Republic of the Congo seemed . . . to support such an approach"; and whereas Belgium added that it

"regret[ted] any impression, which might be created by these proceedings before the Court, that [it was] in a situation of conflict with the Democratic Republic of the Congo"; and whereas it asserted that "there [was] no risk of a deterioration of relations between the two countries";

50. Whereas, at the conclusion of its second round of oral argument, Belgium made the following submissions:

> "The Kingdom of Belgium asks that it may please the Court to refuse the request for the indication of provisional measures submitted by the Democratic Republic of the Congo in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)* and not indicate the provisional measures which are the subject of the request by the Democratic Republic of the Congo.
>
> The Kingdom of Belgium asks that it may please the Court to remove from its List the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)* brought by the Democratic Republic of the Congo against Belgium by Application dated 17 October 2000";

* * *

51. Whereas in the course of the present proceedings, the Court was informed by Belgium that on 20 November 2000 a Cabinet reshuffle had taken place in the Congo, as a result of which Mr. Yerodia Ndombasi, the subject of the arrest warrant of 11 April 2000, had ceased to exercise the functions of Minister for Foreign Affairs and had been charged with those of Minister of Education; and whereas this information was confirmed by the Congo;

52. Whereas Belgium contended that, because of this, the Congo's request for the indication of provisional measures, the entire basis of which was the fact that it was effectively impossible for the Minister for Foreign Affairs to "leav[e] that State in order to go to any other State which his duties require him to visit and, hence, [to carry] out those duties", had been rendered without object and should therefore be refused; and whereas it further contended that "such a fundamental change of circumstances affect[ed] the Application . . . to such an extent as to vitiate all future proceedings based on that Application", and it requested the Court to order that the case be removed from its List;

53. Whereas, anticipating the argument by Belgium that the Application is without object, the Congo emphasized that in any event Belgium had violated the immunities of the Minister for Foreign Affairs at the time of the issue of the warrant and that, in view of "the technical nature and the growing complexity of international relations", "any minister sent by his or her State to represent it abroad . . . enjoy[ed], *sensu lato*, . . . [such] immunities";

54. Whereas it falls to the Court first of all to address the question of whether, as a result of the said ministerial reshuffle, the Application of

the Congo has been deprived of its object and must therefore be removed from the List; and whereas the Court will then, if necessary, examine the separate question of whether, as a result of this reshuffle, the request for the indication of provisional measures by the Congo has been rendered without object and must consequently be rejected;

55. Whereas the Court has the power to remove from its List *in limine* "a case upon which it appears certain [that it] will not be able to adjudicate on the merits" (*Legality of Use of Force (Yugoslavia* v. *Spain), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, para. 35); whereas

> "[t]he Court has already acknowledged, on several occasions in the past, that events subsequent to the filing of an application may 'render [the] application without object' (*Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 95, para. 66) and 'therefore the Court is not called upon to give a decision thereon' (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 272, para. 62) (cf. *Northern Cameroons, Judgment, I.C.J. Reports 1963*, p. 38)" (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objection, Judgment, I.C.J. Reports 1998*, p. 26, para. 46);

and whereas mootness of the Application is one of the grounds which may lead the Court to remove a case from its List without further consideration;

56. Whereas, in order to determine whether the Congo's Application has been rendered without object, the claim which it contains has to be ascertained; whereas, in the Application, "[t]he Court is requested to declare that . . . Belgium shall annul the international arrest warrant issued on 11 April 2000 . . . against the Minister for Foreign Affairs in office of the Democratic Republic of the Congo, Mr. Abdulaye Yerodia Ndombasi"; whereas, to date, the aforesaid warrant has not been withdrawn and still relates to the same individual, notwithstanding the new ministerial duties that he is performing; and whereas at the hearings the Congo maintained its claim on the merits, together with the various grounds relied on in support thereof;

57. Whereas, in view of the foregoing, the Court concludes that the Congo's Application has not at the present time been deprived of its object; and whereas it cannot therefore accede to Belgium's request for the case to be removed from the List at this stage of the proceedings;

58. Whereas this finding does not however resolve the separate question of whether or not the request for the indication of provisional measures would have been deprived of its object after 20 November 2000; and whereas Belgium claims that that request is now without object;

59. Whereas the request for the indication of a provisional measure submitted by the Congo following the filing of its Application "seeks an

order for the immediate discharge of the disputed arrest warrant"; whereas, as has just been pointed out (see paragraph 56 above), that arrest warrant continues to be in the name of Mr. Yerodia Ndombasi; whereas at the hearings the Congo maintained its original request, presenting it as follows:

> "Consequently, the Democratic Republic of the Congo requests the Court to order Belgium to comply with international law; to cease and desist from any conduct which might exacerbate the dispute with the Democratic Republic of the Congo; in particular, to discharge the international arrest warrant issued against Minister Yerodia";

whereas the Congo considers that Mr. Yerodia Ndombasi continues to enjoy immunities which render the arrest warrant unlawful; and whereas it furthermore maintained its argument, based on urgency and the risk of irreparable prejudice, put forward in support of its request;

60. Whereas the Court concludes from the foregoing that the request by the Congo for the indication of provisional measures has not been deprived of its object by reason of Mr. Yerodia Ndombasi's appointment as Minister of Education on 20 November 2000;

* *

61. Whereas each of the Parties has made a declaration recognizing the compulsory jurisdiction of the Court in accordance with Article 36, paragraph 2, of the Statute of the Court; whereas Belgium's declaration, deposited with the Secretary-General of the United Nations on 17 June 1958, is worded as follows:

> "I declare on behalf of the Belgian Government that I recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice, in conformity with Article 36, paragraph 2, of the Statute of the Court, in legal disputes arising after 13 July 1948 concerning situations or facts subsequent to that date, except those in regard to which the parties have agreed or may agree to have recourse to another method of pacific settlement.
>
> This declaration is made subject to ratification. It shall take effect on the day of deposit of the instrument of ratification for a period of five years. Upon the expiry of that period, it shall continue to have effect until notice of its termination is given";

and whereas the declaration of the Congo (then Zaire), deposited with the Secretary-General on 8 February 1989, reads as follows:

> "in accordance with Article 36, paragraph 2, of the Statute of the International Court of Justice:
>
> The Executive Council of the Republic of Zaire recognizes as compulsory *ipso facto* and without special agreement, in relation to

any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

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

It is understood further that this declaration will remain in force until notice of its revocation is given";

62. Whereas, relying on the Order made by the Court on 2 June 1999 in the case concerning *Legality of Use of Force (Yugoslavia* v. *Belgium) (I.C.J. Reports 1999*, para. 44), Belgium contended in the course of the present proceedings that, since the Congo had not expressly invoked both of the above-mentioned declarations until a late stage, in the second round of oral argument, the Court could not take them into consideration for the purposes of deciding whether or not it could indicate provisional measures in the present case (see paragraph 42 above);

63. Whereas, notwithstanding a certain lack of precision in the terms whereby, in its Application, the Congo set out the bases on which it sought to found the jurisdiction of the Court, the Application does nonetheless refer to the acceptance of the Court's jurisdiction by Belgium; whereas, in accordance with Article 38, paragraph 2, of the Rules of Court, "[t]he application shall specify *as far as possible* the legal grounds upon which the jurisdiction of the Court is said to be based" (emphasis added), and whereas it is in any event for the Court to ascertain in each case whether it has jurisdiction; whereas, as recalled above (see paragraph 61), the declarations whereby Belgium and the Congo recognized the compulsory jurisdiction of the Court were duly deposited with the Secretary-General of the United Nations, who, in accordance with Article 36, paragraph 4, of the Statute, transmitted copies thereof to the Court and to all the States parties to the Statute; whereas these declarations were reproduced in the *Yearbook* of the Court; whereas the declarations in question are therefore within the knowledge both of the Court and of the Parties to the present case, who cannot but be aware that "the Court's jurisdiction . . . is based on the consent of States, expressed in a variety of ways including declarations made under Article 36, paragraph 2, of the Statute" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 32, para. 44); whereas, having regard to the terms in which the Application was formulated and to the submissions presented by the Congo, Belgium could readily expect that the declarations made by the two Parties would be taken into consideration as a basis for the jurisdiction of the Court in the present case; whereas

Belgium was therefore in a position to prepare and put forward any such argument as it thought fit in this regard; and whereas the fact that the Congo invoked those declarations in the second round of oral argument on the request for the indication of provisional measures was not likely to "seriously jeopardize the principle of procedural fairness and the sound administration of justice" (*Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, para. 44);

64. Whereas, in view of the foregoing, the Court considers that there is nothing to prevent it, for purposes of deciding whether or not it can indicate provisional measures in the present case, from taking account of the declarations whereby the Parties have accepted its compulsory jurisdiction;

65. Whereas, however, in the final version of its argument in the present proceedings, Belgium further observed that by the terms of its declaration it had excluded the compulsory jurisdiction of the Court concerning situations or facts "in regard to which the parties have agreed or may agree to have recourse to another method of pacific settlement"; and whereas it stated that negotiations at the highest level regarding the arrest warrant issued on 11 April 2000 were in fact in progress when the Congo seised the Court (see paragraph 46 above);

66. Whereas Belgium has not, however, provided the Court with any further details of those negotiations, in particular with regard to the way in which they have been carried out, or to their duration, scope or state of progress at the time of filing of the Congo's Application; whereas the Court is not in a position to determine whether, in the present case, the Parties had agreed temporarily to exclude any recourse to the Court on account of, and for the duration of, the ongoing negotiations; whereas Belgium, moreover, has not explained to the Court the precise consequences which it considered the holding of those negotiations, or the holding of negotiations generally, would have in regard to the Court's jurisdiction, and in particular its jurisdiction to indicate provisional measures;

67. Whereas, when the Court has before it a request for the indication of provisional measures, it has no need, before deciding whether or not to indicate such measures, to satisfy itself beyond doubt that it has jurisdiction on the merits of the case, but whereas it cannot nevertheless indicate those measures unless the provisions invoked appear prima facie to constitute a basis on which its jurisdiction could be founded;

68. Whereas the Court concludes that the declarations made by the Parties pursuant to Article 36, paragraph 2, of its Statute constitute prima facie a basis on which its jurisdiction could be founded in the present case; and whereas such jurisdiction cannot be excluded, at the present stage of the proceedings, solely by reason of the negotiations referred to by Belgium;

* *

69. Whereas the power of the Court to indicate provisional measures under Article 41 of the Statute of the Court has as its object to preserve the respective rights of the parties pending the decision of the Court, and presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings; whereas it follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by the Court to belong either to the Applicant or to the Respondent; and whereas such measures are justified solely if there is urgency;

70. Whereas in its Application the Congo requested the Court to annul the international arrest warrant issued against Mr. Yerodia Ndombasi by a Belgian investigating judge on 11 April 2000; whereas it contended that this warrant was in breach of international law in regard to the jurisdiction of national criminal courts and to the immunity of Heads of State and members of governments; whereas in requesting, as a provisional measure, the discharge of the arrest warrant, the Congo seeks to preserve its rights under both of those categories;

71. Whereas the circumstances relied on by the Congo, which in its view require the indication of such discharge, are set out as follows in the request submitted on 17 October 2000:

> "[t]he disputed arrest warrant effectively bars the Minister for Foreign Affairs of the Democratic Republic of the Congo from leaving that State in order to go to any other State which his duties require him to visit and, hence, from carrying out those duties";

72. Whereas, following the Cabinet reshuffle of 20 November 2000, Mr. Yerodia Ndombasi ceased to exercise the functions of Minister for Foreign Affairs and was charged with those of Minister of Education, involving less frequent foreign travel; and whereas it has accordingly not been established that irreparable prejudice might be caused in the immediate future to the Congo's rights nor that the degree of urgency is such that those rights need to be protected by the indication of provisional measures;

73. Whereas, in view of the conclusion thus reached by the Court, it is unnecessary for it to examine each of the further arguments submitted by Belgium seeking rejection of the request for provisional measures, and in particular the argument that the measure relating to the discharge of the arrest warrant, sought by the Congo on a provisional basis, is identical to that sought by it on the merits;

74. Whereas in its second round of oral argument the Congo asked the Court to call upon the two Parties "to adopt a course of conduct which will prevent the continuation, aggravation and extension of the dispute, in particular by eliminating the main cause of this dispute"; whereas it also asked the Court to "[have] regard to the readiness of both Parties to seek a friendly settlement by diplomatic means, and . . . [persuade] the

Belgian judge, Mr. Vandermeersch, to withdraw his international arrest warrant";

75. Whereas in the course of its oral argument Belgium stated that it would have no objection to the Court's requesting the Parties to examine jointly, in good faith, the difficulties raised by the arrest warrant, with a view to finding a solution that was consistent with their obligations under international law (see paragraphs 39 and 49 above);

76. Whereas, while the Parties appear to be willing to consider seeking a friendly settlement of their dispute, their positions as set out before the Court regarding their respective rights are still a long way apart; whereas, while any bilateral negotiations with a view to achieving a direct and friendly settlement will continue to be welcomed, the outcome of such negotiations cannot be foreseen; whereas it is desirable that the issues before the Court should be determined as soon as possible; whereas it is therefore appropriate to ensure that a decision on the Congo's Application be reached with all expedition;

* *

77. Whereas the decision given in the present proceedings in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application, or relating to the merits themselves; and whereas it leaves unaffected the right of the Governments of the Congo and Belgium to submit arguments in respect of those questions;

* * *

78. For these reasons,

THE COURT,

(1) Unanimously,

Rejects the request of the Kingdom of Belgium that the case be removed from the List;

(2) By fifteen votes to two,

Finds that the circumstances, as they now present themselves to the Court, are not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures.

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Oda, Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Al-Khasawneh, Buergenthal; *Judge* ad hoc Van den Wyngaert;

AGAINST: *Judge* Rezek; *Judge* ad hoc Bula-Bula.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this eighth day of December, two thou-

sand, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Democratic Republic of the Congo and the Government of the Kingdom of Belgium, respectively.

(Signed) Gilbert GUILLAUME,
President.

(Signed) Philippe COUVREUR,
Registrar.

Judges ODA and RANJEVA append declarations to the Order of the Court; Judges KOROMA and PARRA-ARANGUREN append separate opinions to the Order of the Court; Judge REZEK and Judge *ad hoc* BULA-BULA append dissenting opinions to the Order of the Court; Judge *ad hoc* VAN DEN WYNGAERT appends a declaration to the Order of the Court.

(Initialled) G.G.
(Initialled) Ph.C.