ARREST WARRANT OF 11 APRIL 2000 (DEMOCRATIC REPUBLIC OF THE CONGO V BELGIUM)*

THE INTERNATIONAL COURT OF JUSTICE'S FAILURE TO TAKE A STAND ON UNIVERSAL JURISDICTION

CONTENTS

I INTRODUCTION AND FACTS OF THE CASE

On 14 February 2002 the International Court of Justice ('ICJ') gave its decision in the case brought by the Democratic Republic of the Congo ('DRC') against Belgium, challenging the latter's issuing of an international arrest warrant for a DRC citizen suspected of war crimes and crimes against humanity allegedly committed on the territory of the DRC.[1] By the time the Judgment was rendered, the case had aroused considerable interest and speculation among international lawyers,[2] as it would be the first to deal primarily with issues of state exercise of criminal jurisdiction under international law. This was a topic that had not been broached by an international tribunal of any description since the Permanent Court of International Justice's decision in the historic *Lotus Case*.[3] It also concerned jurisdiction over crimes which the events of the last decade of the 20th century have placed at the forefront of the contemporary development of international law. Additionally, the issue of immunity from jurisdiction figured prominently in the case, as the subject of the contested arrest warrant was none other than the incumbent Minister of Foreign Affairs of the DRC. This immediately brought to mind still-fresh memories of recent litigation, in which English courts adjudicated the susceptibility of the former Chilean President Augusto Pinochet Ugarte to extradition on charges of torture relating to the period of his military dictatorship.[4]

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* *Arrest Warrant of 11 April 2000 (DRC v Belgium) (Merits)*, 14 February 2002 <http://www.icj-cij.org> at 23 September 2002.

1 *Arrest Warrant of 11 April 2000 (DRC v Belgium) (Merits)*, 14 February 2002 <http://www.icj-cij.org> at 23 September 2002.

2 See, eg, Chanaka Wickremasinghe, 'Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v Belgium*)' (2001) 50 *International and Comparative Law Quarterly* 670.

3 *Lotus Case (France v Turkey) (Judgment)* [1927] PCIJ (ser A) No 10.

4 *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte* [2001] 1 AC 61; *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte [No 3]* [2001] 1 AC 147 ('*Pinochet [No 3]*').

The facts of the case were as follows. An international arrest warrant was issued by a Belgian *juge d'instruction* in the Brussels *Tribunal de première instance* on 11 April 2000 against Abdulaye Yerodia Ndombasi, who was accused of inciting racial hatred against the Tutsi ethnic group during the course of a non-international armed conflict in the DRC in 1998. It was alleged that several hundred Tutsis were massacred as a consequence of Yerodia's incitement. Although at the time of the issue of the arrest warrant Yerodia had been appointed Foreign Minister of the DRC, the facts alleged in the warrant referred to a period during which he was the *chef de cabinet* of the former DRC President Laurent Kabila. The particulars of the arrest warrant charged Yerodia with grave breaches of the *Geneva Conventions*[5] and their *Additional Protocols*,[6] and crimes against humanity, invoking the *Loi relative à la répression des violations graves du droit international humanitaire* (*Law concerning the Punishment of Serious Violations of International Humanitarian Law*) ('Belgian Law') to found jurisdiction.[7] Article 7 of the Belgian Law provides for the universal jurisdiction of Belgian courts over war crimes, crimes against humanity and genocide, irrespective of the territoriality of the alleged offences and the nationality of the alleged perpetrators and victims. Further, article 5(3) of the Belgian Law expressly rules out the possibility of any claim of immunity 'attaching to the official capacity of a person' precluding the jurisdiction of the courts thereunder.

II THE RELIEF REQUESTED AND THE ORDER ON PROVISIONAL MEASURES

In instituting its action in the ICJ, the DRC requested a declaration that Belgium, by issuing an international arrest warrant for Yerodia and circulating it to all states, had engaged in an excessive application of criminal jurisdiction unwarranted by international law, in that it constituted a violation of the territorial sovereignty of the DRC contrary to article 2(1) of the *Charter of the United Nations*, and a violation of the diplomatic immunity of an incumbent foreign minister contrary to article 41(2) of the *Vienna Convention on*

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[5] *Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked in Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); *Geneva Convention Relative to the Protection of Civilian Persons in Times of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) ('*Geneva Convention IV*') (collectively, '*Geneva Conventions*').

[6] *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) ('*Additional Protocol I*'); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978). It should be noted that charges relating to grave breaches of the *Geneva Conventions* and *Additional Protocol I* were clearly inappropriate in the circumstances, as charges of grave breaches of these instruments are not applicable in situations of non-international armed conflict.

[7] Enacted on 16 June 1993, as amended by the Law of 10 February 1999. For an English translation see Stefan Smis and Kim van der Borght, 38 ILM 921 (1999).

Diplomatic Relations.[8] The DRC further requested the Court to stipulate that the appropriate remedy for the alleged violations of international law was '*la mainlevée immédiate du mandat d'arrêt*' (the immediate discharge of the arrest warrant) on the grounds that the warrant, although unexecuted, prevented Yerodia from carrying out his duties as Foreign Minister because it effectively barred him from travelling to other states.[9]

Belgium noted, in argument before the Court on the hearing of the *Request for the Indication of a Provisional Measure*, that in the interim Yerodia had been removed from the foreign affairs portfolio after a cabinet reshuffle in the DRC. Belgium contended that the DRC's *Request* had thereby been rendered without object, and that its whole *Application Instituting Proceedings* was affected by this fundamental change of circumstances, such that the Court should remove the case from its list forthwith. The Court unanimously declined to remove the case from its list, but agreed by fifteen votes to two that the reassignment of Yerodia to the education portfolio — which would not require foreign travel to the extent of his previous position — meant that it had 'not been established that irreparable prejudice might be caused in the immediate future to the Congo's rights nor that the degree of urgency [was] such that those rights need[ed] to be protected by the indication of provisional measures'.[10]

III THE COURT'S JUDGMENT

In its judgment of 14 February 2002, the Court found: first, by 15 votes to one, that the DRC's *Application Instituting Proceedings* was not moot or inadmissible and that the Court accordingly had jurisdiction;[11] secondly, by 13 votes to three, that the issue and international circulation of the arrest warrant by Belgium constituted a violation of the inviolability and immunity from criminal jurisdiction of an incumbent foreign minister;[12] and thirdly, by 10 votes to six, that Belgium was under an obligation to cancel the arrest warrant and so inform

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8 Opened for signature 14 April 1961, 500 UNTS 95 (entered into force 24 April 1964); DRC, *Application Instituting Proceedings*, 17 October 2000 <http://www.icj-cij.org> at 23 September 2002.

9 DRC, *Demande d'indication d'une mesure conservatoire* (*Request for the Indication of a Provisional Measure*), 17 October 2000 <http://www.icj-cij.org> at 23 September 2002.

10 *Arrest Warrant of 11 April 2000 (DRC v Belgium) (Provisional Measures)*, 8 December 2000 (Judgment of the Court) [72] (President Guillaume, Vice-President Shi, Judges Oda, Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Al-Khasawneh and Buergenthal, and Judge ad hoc Van den Wyngaert; Judge Rezek and Judge ad hoc Bula-Bula dissenting) <http://www.icj-cij.org> at 23 September 2002.

11 *Arrest Warrant of 11 April 2000 (DRC v Belgium) (Merits)*, above n 1, (Judgment of the Court) [78](1) (President Guillaume, Vice-President Shi, Judges Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh and Buergenthal, and Judges ad hoc Bula-Bula and Van den Wyngaert; Judge Oda dissenting).

12 Ibid [78](2) (President Guillaume, Vice-President Shi, Judges Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek and Buergenthal, and Judge ad hoc Bula-Bula; Judges Oda and Al-Khasawneh, and Judge ad hoc Van den Wyngaert dissenting).

the authorities to whom the warrant had been circulated.[13] No fewer than 11 of the 16 judges hearing the case entered declarations or separate or dissenting opinions, several of the most persuasive of which concentrated on the issue of universal jurisdiction, which was surprisingly not addressed in the Court's Judgment. The question of universal jurisdiction was generally believed to lie at the heart of the case. The failure of the majority to deal with this question can be explained by the fact that the DRC, despite originally claiming that Belgium had engaged in 'an exercise of an excessive universal jurisdiction'[14] (an assertion which one would have thought invited analysis of the concept and ambit of that jurisdiction), dropped this argument in its final submissions and relied exclusively on the alleged violation of diplomatic immunity. Belgium acquiesced in this strategy and did not ask the Court to decide the point either.[15] This was a bizarre attitude to take since the DRC, in abandoning its argument on universal jurisdiction, had expressly not conceded the point in Belgium's favour, but had merely opted for the exclusive pursuit of an alternative strategy. Furthermore, it is submitted that the law on universal jurisdiction was on Belgium's side and could have proved decisive to the disposition of the case. It is submitted that the DRC dropped its argument on universal jurisdiction precisely because it knew that the relevant principles of international law favoured Belgium. The result, at any rate, was that the Court concluded that it could not rule in the operative part of its Judgment on the substantive issue of the legality of Belgium's attempt to exercise universal jurisdiction.[16]

Even though the Court had studiously avoided making a finding to the effect that Belgium did have jurisdiction to issue and circulate the arrest warrant, the Court then adopted the strange procedure, on the assumption that such a jurisdiction did exist, of investigating whether Belgium had, in so doing, violated the immunities of the former Foreign Minister.[17] In a remarkably cursory manner, the Court began by affirming the general principles of immunity from criminal jurisdiction and the personal inviolability of an incumbent foreign minister. It noted that the immunities and privileges attaching to such persons were not defined by relevant treaties,[18] and were therefore to be determined by reference to customary international law.[19] On the basis of a single paragraph in which the generalities of foreign ministers' duties and functions were outlined,

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13 Ibid [78](3) (President Guillaume, Vice-President Shi, Judges Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren and Rezek and Judge ad hoc Bula-Bula; Judges Oda, Higgins, Kooijmans, Al-Khasawneh and Buergenthal and Judge ad hoc Van den Wyngaert dissenting).

14 DRC, *Memorial of the Democratic Republic of the Congo*, 15 May 2001, [75] <http://www.icj-cij.org> at 23 September 2002 ('*Memorial*').

15 Transcript of Proceedings, *Arrest Warrant of 11 April 2000 (DRC v Belgium) (Merits)* (ICJ, Oral Pleadings of Professor Eric David, Counsellor and Advocate for Belgium, 18 October 2001) 8–13 <http://www.icj-cij.org> at 23 September 2002.

16 *Arrest Warrant of 11 April 2000 (DRC v Belgium) (Merits)*, above n 1, (Judgment of the Court) [43].

17 Ibid [46]–[55].

18 The treaties relied on by the parties were the *Vienna Convention on Diplomatic Relations*, above n 8, and the *Convention on Special Missions*, opened for signature 16 December 1969, 1400 UNTS 231 (entered into force 21 June 1985).

19 *Arrest Warrant of 11 April 2000 (DRC v Belgium) (Merits)*, above n 1, (Judgment of the Court) [52].

and without any analysis or reference to state practice, the Court concluded 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'.[20] Moreover, it stated that:

> no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an 'official' capacity, and those claimed to have been performed in a 'private capacity', or, for that matter, between acts performed before the person concerned assumed office … and acts committed during the period of office.[21]

The basis for upholding the Foreign Minister's immunity was therefore primarily functional, in that the office required substantial foreign travel, which would be deterred by the existence of an international arrest warrant. From the few examples of state practice cited by the parties, the Court was unable to deduce that there was a customary international law exception to this immunity in cases of alleged war crimes or crimes against humanity.[22] It also rejected Belgium's reliance on the statutes of the international criminal tribunals (which without exception exclude the possibility of immunity)[23] as demonstrating that cases of such crimes constituted an exception to the immunity granted under international law.[24] At no stage were any substantive reasons given for these findings. The majority simply accepted the Congolese submissions and dismissed the Belgian ones, effectively holding that the immunity of foreign ministers is absolute (although the Judgment did not state this in as many words, and even suggested certain circumstances in which immunities did not represent a bar to prosecution).[25] The Court then held that the issue and circulation of the arrest warrant, given its 'nature and purpose', violated the immunity which Yerodia enjoyed and therefore constituted a violation of an international legal obligation of Belgium towards the DRC.[26]

As for reparations, the Court considered that its finding as to the unlawfulness of the issue and circulation of the warrant constituted 'a form of satisfaction

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20 Ibid [54].

21 Ibid [55].

22 The national cases cited were the United Kingdom House of Lords decision in *Pinochet [No 3]* [2000] 1 AC 147 and *Re Qaddafi*, *Arrêt n 1414* (Unreported, *Cour de Cassation*, France, 13 March 2001) <http://courdecassation.fr> at 23 September 2002.

23 *Statute of the International Criminal Tribunal for the Former Yugoslavia*, annexed to *United Nations Security Council Resolution 827 on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Law in the Former Yugoslavia*, SC Res 827, UN SCOR, 48th sess, 3217th mtg, UN Doc S/Res/827 (1993) art 7(2); *Statute of the International Criminal Tribunal for Rwanda*, annexed to *United Nations Security Council Resolution 955 Establishing the International Tribunal for Rwanda*, SC Res 955, UN SCOR, 49th sess, 3453rd mtg, UN Doc S/Res/955 (1994) art 6(2); *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 37 ILM 999 (1998) (entered into force 1 July 2002) art 27 ('*Statute of the ICC*'). The ICJ took the view that (1) these provisions are limited to the specific tribunals to which they apply, and (2) they do not deal with the immunities of incumbent foreign ministers as such: *Arrest Warrant of 11 April 2000 (DRC v Belgium) (Merits)*, above n 1, (Judgment of the Court) [58].

24 *Arrest Warrant of 11 April 2000 (DRC v Belgium) (Merits)*, above n 1, (Judgment of the Court) [58].

25 Ibid [61]. See below n 97.

26 Ibid [70]–[71].

which will make good the moral injury complained of by the Congo'.[27] It went on to add, however, that this finding did not of itself 'wipe out all the consequences of the illegal act and re-establish the situation which would … have existed if that act had not been committed', as stipulated in the *Chorzów Factory Case*.[28] As the warrant was 'still extant, and remain[ed] unlawful' at the time of the Judgment (notwithstanding the fact that Yerodia had ceased to be Foreign Minister), the Court concluded that 'Belgium must, by means of its own choosing, cancel the warrant in question and so inform the authorities to whom it was circulated'.[29]

IV THE SEPARATE AND DISSENTING OPINIONS

Appended to the Judgment were five Separate Opinions, three Dissenting Opinions and one Declaration, representing between them the views of eleven judges — a startling array that demonstrates the multiplicity of views held by international lawyers on matters of jurisdiction and immunity. As it was widely anticipated that this would be a 'test case' on the issue of universal jurisdiction, which could have had a very important effect on the progressive development of an enforcement regime for international criminal law,[30] the failure of the majority to confront the issue directly is most unfortunate. The Separate and Dissenting Opinions note, virtually without exception and with varying degrees of surprise, the absence from the Judgment of any discussion of universal jurisdiction. However, not all of those Opinions themselves provide a legal analysis of jurisdiction in any great detail. For the purposes of this note, the Opinions can be divided into those that do not deal with the substance of universal jurisdiction, and those that do.

A *The Opinions Not Dealing with the Substance of Universal Jurisdiction*

Alone among the dissenting judges, Judge Oda took the view that the Court was without jurisdiction to hear the case, despite having agreed with the Order on the *Request for the Indication of a Provisional Measure*, in which the Court had refused to remove the case from its list[31] (a vote he now claimed to regret).[32] In his Dissenting Opinion, Judge Oda followed the same line of reasoning that he had expressed in his declaration appended to the earlier Order: that at the time of the *Application Instituting Proceedings*, there was no *legal* dispute between the DRC and Belgium within the meaning of article 36(2) of the *Statute of the ICJ*. Judge Oda based this argument on the DRC's failure to elaborate a legal dispute in its *Application Instituting Proceedings* and pleadings, which merely stated

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27 Ibid [75].

28 *Chorzów Factory Case (Germany v Poland) (Judgment)* [1928] PCIJ (ser A) No 17, 47.

29 *Arrest Warrant of 11 April 2000 (DRC v Belgium) (Merits)*, above n 1, (Judgment of the Court) [76].

30 See Wickremasinghe, above n 2, 670; *Arrest Warrant of 11 April 2000 (DRC v Belgium) (Merits)*, above n 1, (Dissenting Opinion of Judge ad hoc Van den Wyngaert) [5]–[6].

31 *Arrest Warrant of 11 April 2000 (DRC v Belgium) (Provisional Measures)*, above n 10, (Judgment of the Court) [78](1).

32 Judge Oda claimed to have voted for the Order '[w]ith much reluctance' and '*only* from a sense of judicial solidarity': *Arrest Warrant of 11 April 2000 (DRC v Belgium) (Provisional Measures)*, above n 10, (Declaration of Judge Oda) [6] (emphasis in original).

that the DRC believed Belgium to have violated international law. As the judge commented,

> [t]he Congo's mere belief that the Belgian law violated international law is not evidence, let alone proof, that a *dispute* existed between it and Belgium. It shows at most that the Congo held a different view, one opposed to the action taken by Belgium.[33]

As a policy argument in support of his approach, Judge Oda expressed the fear that the Court's decision would

> eventually lead to an excessive number of cases of this nature being referred to the Court even when no real injury has occurred, simply because one state believes that another state has acted contrary to international law … many States will then withdraw their recognition of the Court's compulsory jurisdiction in order to avoid falling victim to this distortion of the rules governing the submission of cases.[34]

Judge Oda also took exception to the fact that the original underlying issues in the case — namely, the validity of the exercise of extraterritorial jurisdiction and the immunity of a foreign minister in relation to serious violations of international humanitarian law — had been 'transmuted', by the change in the arguments submitted by the DRC between its *Application Instituting Proceedings* and its *Memorial*, to questions of the 'issue and international circulation' of an arrest warrant against an incumbent foreign minister in light of his or her functional immunities.[35] The judge did, however, approve the Court's failure to take a definitive position on the underlying question of the extraterritorial application of criminal jurisdiction, since in his view 'the law is not sufficiently developed', and the Court had, in any event, not been requested to reach a decision on the matter.[36]

A similar note of approval was sounded by Judge Koroma in his Separate Opinion, which reads like an apologia for the Judgment. He took the view that, since both parties were apparently in agreement that the subject matter of the case was whether the arrest warrant violated Yerodia's immunity, the issue of universal jurisdiction was relevant only in so far as it related specifically to that alleged violation.[37] He accordingly rejected the suggestion that the Judgment could be interpreted as either an endorsement or an 'invalidation' of the principle of universal jurisdiction, because the Court was not required to make any such finding in order to sustain its conclusions on immunity. In his opinion, it was entirely proper that the Court should have refrained from making such a determination.[38]

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33 *Arrest Warrant of 11 April 2000 (DRC v Belgium) (Merits)*, above n 1, (Dissenting Opinion of Judge Oda) [4] (emphasis in original).

34 Ibid [7].

35 Ibid [9].

36 Ibid [12]. He also stated that the most important aspect of the issues — whether diplomatic immunity was available at all for serious violations of humanitarian law and whether a foreign minister was entitled to claim such immunity, if it were available — was 'too new to admit of any definitive answer': at [14].

37 *Arrest Warrant of 11 April 2000 (DRC v Belgium) (Merits)*, above n 1, (Separate Opinion of Judge Koroma) [3]–[4].

38 Ibid [9].

Judge Al-Khasawneh entered a Dissenting Opinion in which he disagreed with the majority's assertion of absolute immunity for foreign ministers. While he acknowledged the necessity of *some kind* of immunity for them, he was not able to find that such immunity could be assimilated either to that of diplomats[39] or heads of state.[40] In his analysis, immunities should, in principle, be construed narrowly as exceptions to 'the general rule that man is responsible legally and morally for his actions'.[41] He concluded that the mere issue of the arrest warrant did not disclose any breach of an obligation on Belgium's behalf, and went on to state compellingly that:

> The effective combating of grave crimes has arguably assumed a *jus cogens* character reflecting recognition by the international community of the vital community interests and values it seeks to protect and enhance. Therefore when this hierarchically higher norm comes into conflict with the rules on immunity, it should prevail.[42]

Of the other separate judicial statements, the Declaration of Judge Ranjeva and the Separate Opinion of Judge Rezek both expressed surprise and regret at the failure of the majority to tackle the question of universal jurisdiction. They also both expressed the view that the exercise of universal jurisdiction in absentia, and without any connection whatsoever between the state asserting jurisdiction and the case itself, was not permitted by international law as it currently stands.[43] Judge Ranjeva identified piracy on the high seas as the sole crime in customary international law attracting universal jurisdiction[44] — a unique position which he explained by reference to the fact that the high seas are, by definition, beyond the sovereign jurisdiction of any one state, so that the exercise of universal jurisdiction is the only way of remedying the consequent gap in international criminal law enforcement.[45] In his view, neither the *Geneva Conventions* (with their concept of the repression of grave breaches) nor the compulsory enforcement mechanism adopted in the various anti-terrorist conventions created a jurisdictional regime of trial in absentia of the kind asserted by Belgium.[46]

Judge Rezek agreed that the *Geneva Conventions* did not authorise such jurisdiction and correctly distinguished the case on those grounds from *Pinochet [No 3]*.[47] In that case, the subject of the proceedings was present in the United

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39 *Arrest Warrant of 11 April 2000 (DRC v Belgium) (Merits)*, above n 1, (Dissenting Opinion of Judge Al-Khasawneh) [1].

40 Ibid [2].

41 Ibid [3].

42 Ibid [7].

43 *Arrest Warrant of 11 April 2000 (DRC v Belgium) (Merits)*, above n 1, (Declaration of Judge Ranjeva) [5]; *Arrest Warrant of 11 April 2000 (DRC v Belgium) (Merits)*, above n 1, (Declaration of Judge Rezek) [6]. In his Separate Opinion, Judge ad hoc Bula-Bula expressed the same view but did not provide any legal analysis: *Arrest Warrant of 11 April 2000 (DRC v Belgium) (Merits)*, above n 1, (Separate Opinion of Judge ad hoc Bula-Bula) [64]–[65].

44 *Arrest Warrant of 11 April 2000 (DRC v Belgium) (Merits)*, above n 1, (Declaration of Judge Ranjeva) [6].

45 Ibid.

46 Ibid [7].

47 [2000] 1 AC 147.

Kingdom, a state of which he was not a national, which was trying to extradite him to Spain, a third state that wanted to try him on the basis of a totally different principle of criminal jurisdiction, and with which the UK had a treaty obligation to cooperate.[48] Like Judge Ranjeva, Judge Rezek's minimalist conception of universal jurisdiction was ultimately dependent on the prosecuting state actually having custody of the accused.

B *The Opinions Dealing with the Substance of Universal Jurisdiction*

The remaining three Opinions appended to the Judgment all concentrated largely on the question of universal jurisdiction. President Guillaume firmly opposed Belgium's assertion of such jurisdiction, while Judge ad hoc Van den Wyngaert equally firmly upheld it. The Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal was more equivocal in its conclusions. All three opinions were united in their dismay at the failure of the Court's Judgment to broach the question of the legality of Belgium's exercise of extraterritorial jurisdiction, and all three considered such analysis to be highly desirable at the very least.[49] Thereafter, however, their paths diverged.

President Guillaume proceeded by way of an historical analysis of the exercise of state jurisdiction, noting that '[o]rdinarily, States are without jurisdiction over crimes committed abroad as between foreigners'.[50] He acknowledged an exception in cases of piracy, but noted that international law had not extended to 'other comparable crimes which might also be committed outside the jurisdiction of coastal States, such as trafficking in slaves or in narcotic drugs or psychotropic substances'.[51] Although he recognised the creation of what he termed 'compulsory, albeit subsidiary, universal jurisdiction'[52] in the *Hague Convention for the Suppression of the Unlawful Seizure of Aircraft*[53] and its subsequent extension to many forms of terrorist-type conduct, he insisted that:

> none of these texts has contemplated establishing jurisdiction over offences committed abroad by foreigners against foreigners when the perpetrator is not present in the territory of the State in question. Universal jurisdiction *in absentia* is unknown to international conventional law.[54]

President Guillaume further concluded that state practice and *opinio juris* did not support the Belgian position that such jurisdiction existed at customary

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48 See generally David Turns, 'Pinochet's Fallout: Jurisdiction and Immunity for Criminal Violations of International Law' (2000) 20 *Legal Studies* 566.

49 *Arrest Warrant of 11 April 2000 (DRC v Belgium) (Merits)*, above n 1, (Separate Opinion of President Guillaume) [1]; *Arrest Warrant of 11 April 2000 (DRC v Belgium) (Merits)*, above n 1, (Dissenting Opinion of Judge ad hoc Van den Wyngaert) [4]–[6]; *Arrest Warrant of 11 April 2000 (DRC v Belgium) (Merits)*, above n 1, (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal) [2]–[5].

50 *Arrest Warrant of 11 April 2000 (DRC v Belgium) (Merits)*, above n 1, (Separate Opinion of President Guillaume) [4].

51 Ibid [5].

52 Ibid [7].

53 Opened for signature 16 December 1970, 860 UNTS 105 (entered into force 14 October 1971).

54 *Arrest Warrant of 11 April 2000 (DRC v Belgium) (Merits)*, above n 1, (Separate Opinion of President Guillaume) [9].

international law, dismissing as 'hardly persuasive' the oft-quoted statement from the *Lotus Case* to the effect that international law leaves states a wide margin of discretion in the extraterritorial application of their law.[55] Finally, he found that the *Geneva Conventions* did not contain any mandatory jurisdictional provisions analogous to those in the various anti-terrorist treaties, and that there was no convention in force dealing with jurisdiction over crimes against humanity. Thus he effectively considered the Belgian Law to be incompatible with international law.[56]

Judge ad hoc Van den Wyngaert — the only international criminal law expert on the bench — issued a powerfully argued Dissenting Opinion in which she strongly criticised the majority for equating the rationale for the immunities of foreign ministers with immunities of diplomats and heads of state. By analogy, the majority held that foreign ministers had a comparably full immunity, a conclusion rejected by Judge ad hoc Van den Wyngaert as having been reached without examination of whether the conditions for the formation of a rule of customary international law had been met. Specifically, the majority judges failed to adduce sufficient evidence of state practice or *opinio juris* which, the judge asserted, were not sufficiently settled to justify the majority's conclusion.[57] She went on to disagree strongly with the majority's finding that the immunity was effectively absolute — a finding which, she said, 'disregards the whole recent movement in modern international criminal law towards recognition of the principle of individual accountability for international core crimes'.[58] To support this view, she referred to the Nuremberg Principles,[59] the *Genocide Convention*,[60] various resolutions and reports of the UN and non-governmental organisations, and scholarly writings.[61] Further, Judge ad hoc Van den Wyngaert criticised the majority's approach to the problem as 'formalistic',[62] in addition to being based on an irrelevant 'doctrinal' distinction between procedural and substantive immunities, which, in her view, the Court had wrongly conflated.[63]

With regard to universal jurisdiction, the judge argued that the prescriptive assertion of such jurisdiction over war crimes and crimes against humanity was compatible with the '*Lotus* test', in that not only was it not prohibited, but clearly permitted, by international law.[64] She further stated that the principle did not necessarily require, in either treaty or customary law, the presence of the accused

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55 Ibid [14]; *Lotus Case (France v Turkey) (Judgment)* [1927] PCIJ (ser A) No 10, 19.

56 *Arrest Warrant of 11 April 2000 (DRC v Belgium) (Merits)*, above n 1, (Separate Opinion of President Guillaume) [17].

57 *Arrest Warrant of 11 April 2000 (DRC v Belgium) (Merits)*, above n 1, (Dissenting Opinion of Judge ad hoc Van den Wyngaert) [11]–[23].

58 Ibid [27].

59 International Law Commission, 'Principles of International Law Recognised in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal' [1950] 2 *Yearbook of the International Law Commission* [28], UN Doc A/CN.4/SER.A/1950/Add.1.

60 *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951).

61 *Arrest Warrant of 11 April 2000 (DRC v Belgium) (Merits)*, above n 1, (Dissenting Opinion of Judge ad hoc Van den Wyngaert) [27].

62 Ibid [28].

63 Ibid [33].

64 Ibid [54].

on the territory of the state asserting jurisdiction. Although Judge ad hoc Van den Wyngaert accepted the political inconvenience and practical difficulties in prosecuting cases on the basis of such a wide jurisdiction, she insisted that this did not give rise to *opinio juris* invalidating such prosecutions, as the considerations leading most states to avoid the exercise of criminal jurisdiction in the absence of a link with the state in question were 'more of a pragmatic than a juridical nature'.[65] She went on to assert that '[t]his does not, however, make such trials illegal under international law'.[66] On the contrary, in her opinion, states are entitled to assert universal jurisdiction in respect of war crimes, crimes against humanity and genocide.[67]

Judge ad hoc Van den Wyngaert next turned to consider the majority's finding that Belgium's action in issuing the arrest warrant had constituted a violation of international law. Like Judge Al-Khasawneh, she strenuously disagreed with the Court's finding of illegality on this point, although she did accept that to issue the warrant might have been contrary to international courtesy or comity. She also stated that the warrant's issue and execution were two separate matters which the Court had incorrectly conflated for the purpose of finding a violation by Belgium.[68] Judge ad hoc Van den Wyngaert pointed out that the warrant had not been enforced, in that 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.'[69] In addition, she argued that the Court had confused immunity with inviolability, in that the *dispositif* found Belgium's *issuing* of the warrant to have violated Yerodia's 'immunity from criminal jurisdiction and … inviolability'.[70] The judge, however, suggested that it would only be the *execution* of a warrant that might infringe the subject's inviolability. Furthermore, she pointed out that, in any event, the warrant could not actually be enforced without the cooperation of other states' authorities, and that Belgium had not even requested the provisional arrest of the Congolese Foreign Minister for the purposes of extradition. This differed from the situation in *Pinochet [No 3]*, where Spain had made such a request of the UK. The judge accordingly suggested that any fear the Foreign Minister might have had of being arrested whilst outside the DRC 'was based on psychological, not on legal grounds'.[71]

Finally, in relation to the remedy ordered by the Court, she held that even if, for argument's sake, the warrant had constituted a violation of an international obligation in 2000, such violation did not have a continuing character and was no longer illegal at the time of judgment in 2002 as Yerodia had, in the interim, ceased to be Foreign Minister. The judge held that 'the declaratory part of the Judgment should have sufficed as reparation for the moral injury suffered by

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65 Ibid [56].
66 Ibid.
67 Ibid [67].
68 Ibid [71]–[72].
69 Ibid [71].
70 *Arrest Warrant of 11 April 2000 (DRC v Belgium) (Merits)*, above n 1, (Judgment of the Court) [78](2).
71 *Arrest Warrant of 11 April 2000 (DRC v Belgium) (Merits)*, above n 1, (Dissenting Opinion of Judge ad hoc Van den Wyngaert) [79].

Congo' — all the more so as the DRC had not come to the Court with clean hands, having failed to comply with its obligation under article 146 of *Geneva Convention IV* to investigate Yerodia's alleged crimes itself.[72]

The last opinion to be considered is the Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal. Although it purports to agree with the essence of most of the Court's Judgment, much of the time it reads as if it were a dissenting opinion, not least because of its convergence with the views expressed by Judge ad hoc Van den Wyngaert on the issues of universal jurisdiction and remedies. Judges Higgins, Kooijmans and Buergenthal agreed with several of their colleagues that the Court was in no way obliged to accommodate the consensus of the parties that it should only be asked to consider immunity.[73] While the *non ultra petita* rule restrained the court from making a substantive decision on universal jurisdiction in the *dispositif*, jurisdiction was so essential an element in the case that the majority should, in the judges' view, at least have addressed it. By failing to do so, they argued, the Court had 'allowed itself to be manoeuvred into answering a hypothetical question … nothing is more academic, or abstract, or speculative, than pronouncing on an immunity from a jurisdiction that may, or may not, exist.'[74]

The judges began their analysis of the jurisdictional issue by considering state practice and asserting that, with the exception of the Belgian Law, 'national legislation … does not suggest a universal jurisdiction' over international crimes.[75] In their view, state practice on the matter was 'more qualified'.[76] A survey of national decisions and national legislation from Australia, Austria, France, Germany, the Netherlands and the UK disclosed a generally cautious approach to universal jurisdiction. Likewise, the various treaties on international crimes which incorporate jurisdictional provisions were considered by the judges to be less than fully conclusive on the matter. While stating that 'virtually all national legislation envisages links of some sort to the forum State; and no case law exists in which pure universal jurisdiction has formed the basis of jurisdiction', they continued: 'This does not necessarily indicate, however, that such an exercise would be unlawful.'[77] Further, they noted that there was no evidence of *opinio juris* to the effect that universal jurisdiction was unlawful. Indeed, in the case of certain international crimes, the judges thought that it was clearly *not* regarded as unlawful. They concluded that state practice 'is neutral as to exercise of universal jurisdiction',[78] and, quoting Oppenheim, that 'there are clear indications pointing to the gradual evolution of a significant principle of international law' in favour of universal jurisdiction in respect of serious international crimes,[79] and that a state could choose to assert such jurisdiction in

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72 Ibid [84].

73 *Arrest Warrant of 11 April 2000 (DRC v Belgium) (Merits)*, above n 1, (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal) [2].

74 Ibid [17]–[18].

75 Ibid [20].

76 Ibid.

77 Ibid [45].

78 Ibid.

79 Ibid [52]. See Robert Jennings and Sir Anthony Watts, *Oppenheim's International Law* (9th ed, 1992) vol 1, 998.

absentia. In this regard they were close to the opinion expressed by Judge ad hoc Van den Wyngaert. In respect of the crimes with which Yerodia was charged, the three judges suggested that they could rightly be classified as crimes against humanity, and therefore fell 'within that small category [of crimes] in respect of which an exercise of universal jurisdiction is not precluded under international law'.[80]

Turning to the question of immunity in light of the foregoing discussion of jurisdiction, the three judges noted the balancing of interests evident in current trends in international criminal law. They observed that universal jurisdiction represented the interest of the international community in preventing impunity for the perpetrators of serious crimes, whilst immunity represented an equal interest in not unduly interfering with the effective conduct of international relations.[81] They declined to accept the Congolese argument that foreign ministers were entitled to the same immunities as heads of state. Nevertheless, they agreed with the majority that the basis of foreign ministers' immunities was functional. As the warrant was directly enforceable in Belgium, and would have required the authorities there to arrest Yerodia had he visited the country on private business, the judges held that the warrant's 'very issuance' was a violation of Yerodia's inviolability as long as he held the post of Foreign Minister.[82] This was a peculiarly illogical point for the three judges to make, given its hypothetical nature and their earlier condemnation of such speculation.[83] They also acknowledged the view, expressed with increasing force in recent years, that immunity only subsists in respect of official acts and that serious international crimes cannot be regarded as such acts,[84] but strangely failed to express any opinion on this trend or its relevance to the case. Finally, their views again converged with those of Judge ad hoc Van den Wyngaert, in holding that any illegal consequences attached to the arrest warrant came to an end as soon as Yerodia ceased to be Foreign Minister.[85] Indeed, given that he no longer held that office, the three judges found it impossible to see how the majority's adherence to the *Chorzów Factory Case* doctrine was possible in practical terms.[86]

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80 *Arrest Warrant of 11 April 2000 (DRC v Belgium) (Merits)*, above n 1, (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal) [65].

81 Ibid [73]–[75].

82 Ibid [84]. This ignores the fact that Belgium had made it clear that it accepted the immunity of foreign ministers to the extent that Yerodia could not have been arrested pursuant to the warrant had he visited Belgium on official business; indeed, he did make such a visit after the warrant had been issued and was not arrested: see Transcript of Proceedings, *Arrest Warrant of 11 April 2000 (DRC v Belgium) (Merits)* (ICJ, Oral Pleadings of Professor Eric David, Counsel and Advocate for Belgium, 21 November 2000) [21] <http://www.icj-cij.org> at 23 September 2002.

83 See above n 74 and accompanying text.

84 *Arrest Warrant of 11 April 2000 (DRC v Belgium) (Merits)*, above n 1, (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal) [85].

85 Ibid [87]–[89].

86 Ibid.

V ANALYSIS

The decision of the majority at the merits stage of the *Arrest Warrant Case* amounts to an affirmation of the absolute immunity of foreign ministers *ratione personae* while in office, irrespective of the nature of the offences which they are alleged to have committed. Despite Judge Koroma's unwillingness to see it as such, it also amounts to a prima facie negation of the principle of universal jurisdiction vis-à-vis immunity. This is because the implication of the Judgment, it is submitted, is that an attempt to exercise universal jurisdiction over a crime clearly recognised as attracting such jurisdiction cannot succeed when the suspect claims immunity — even if he or she no longer holds the office to which immunity attaches. In these cases, the presumption is still in favour of immunity, which, it might be said in the circumstances, amounts to *impunity*. It is all the more astonishing that the Court reached its conclusion without any serious analysis of the concept and ambit of universal jurisdiction. The perfunctory reasoning of the Judgment is also particularly regrettable in view of the great topical importance of questions of jurisdiction and immunity. It was in any event highly illogical for the Court to proceed in such fashion because, as was noted in several of the Separate and Dissenting Opinions, an immunity cannot logically exist unless there is a jurisdiction in opposition to which it is invoked.[87] The invocation of an immunity from jurisdiction is the second stage of a process that can only begin with an exercise of such jurisdiction. This criticism also affects another aspect of the case: that it was brought without the jurisdiction having actually been exercised as such, in that the arrest warrant remained unexecuted.

International law traditionally recognises three aspects or manifestations of state jurisdiction: first, the power of a state to legislate in respect of persons, property or events; secondly, the power of a state physically to enforce such legislation, by apprehending a suspect, sequestrating property, and so on; and thirdly, the power of a state's courts to entertain cases brought under such legislation.[88] International law does not concern itself with the first and third aspects of jurisdiction, only with the second. In the instant case, the Belgian Law constituted the first aspect and the issue of the arrest warrant constituted the *initiation* of the second aspect; the third aspect, obviously, never took place. In as much as the issue of the arrest warrant was the initiation of an attempt at enforcing jurisdiction beyond Belgian frontiers, it can validly be asserted that such enforcement outside Belgium needed to be in conformity with international law. However was the warrant actually *enforced*, given that it was never executed? It is submitted that the answer must logically be in the negative. The Congolese complaint to the ICJ was unprecedented in its challenge to a putative international wrong; in this respect Judge Oda's criticism of the case in his Dissenting Opinion is far from unreasonable. It would have made much more sense for the DRC to initiate proceedings against whichever state eventually arrested Yerodia, as only then would an exercise of enforcement jurisdiction have occurred. Instead, the implication of bringing a case against Belgium was a challenge to the legality of the Belgian Law — an aspect of jurisdiction with

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87 Even the majority accepted the logic of this point: *Arrest Warrant of 11 April 2000 (DRC v Belgium) (Merits)*, above n 1, (Judgment of the Court) [46].

88 On jurisdiction generally, see Jennings and Watts, above n 79, 456–8.

which international law is not normally concerned. Even setting aside these formalistic considerations, the Court would have done a great service to the clarification of a controversial and important area of international law had it properly considered the legality of the Belgian Law in terms of the validity and extent of the principle of universal jurisdiction.

Indeed, a major reason for concern in this case is the Court's very unfortunate refusal to make a finding on the contemporary scope and ambit of universal jurisdiction. With the recent establishment of the International Criminal Court,[89] which will exercise jurisdiction complementary to that of states, it is essential that States Parties to the *Statute of the ICC* enact legislation incorporating adequate jurisdictional provisions in respect of the so-called 'core crimes' currently contained in the Statute: genocide, crimes against humanity and war crimes.[90] Each of these categories of crime has been recognised as attracting universal jurisdiction in customary international law.[91] Therefore President Guillaume's contention that such jurisdiction is limited exclusively to cases of piracy[92] must be rejected as doctrinally incorrect. Universal jurisdiction grants a state the right to prosecute in respect of a particular crime in the absence of any link whatsoever between that crime and the state asserting jurisdiction.[93] Although the traditional links referred to are those of territoriality and nationality, custody could also in reality be seen as an effective link between the state and the crime. There is nothing in international law to suggest that custody is a prerequisite for the exercise of universal jurisdiction; yet that is precisely the interpretation suggested, with the thinnest of analyses, by the Court. At the very most, as Judge ad hoc Van den Wyngaert suggested,[94] it is arguably contrary to international *comity* to issue an arrest warrant in respect of an incumbent minister. States certainly do not appreciate having their foreign ministers cited as defendants in other states' municipal courts, and it is self-evident that the fabric of international relations would be intolerably disrupted were such a practice to become widespread. At present, however, it is not widespread. As noted by Judges Higgins, Kooijmans and Buergenthal, the practice is limited to Belgium,[95] and, it is submitted, for precisely those reasons of international

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89 The *Statute of the ICC*, above n 23, entered into force 1 July 2002 with 76 ratifications: <http://www.un.org/law/icc> at 23 September 2002.

90 See generally Claus Kreß and Flavia Lattanzi (eds), *The Rome Statute and Domestic Legal Orders: General Aspects and Constitutional Issues* (2000) vol 1.

91 *A-G (Israel) v Eichmann* (1962) 36 ILR 277, 298–304; *Demjanjuk v Petrovsky*, 776 F 2d 571, 582–3 (6th Cir, 1985); Kenneth Randall, 'Universal Jurisdiction under International Law' (1988) 66 *Texas Law Review* 785, 800–2, 815–39; International Law Commission, 'Articles of the Draft Code of Crimes against the Peace and Security of Mankind' [1996] 2 *Yearbook of the International Law Commission*, art 8 and Commentary thereto, pt 2, [27]–[30], UN Doc A/CN.4/SER.A/1996/Add.1; *Sub-Commission on Human Rights Resolution 2000/24*, UN Doc E/CN.4/SUB.2/RES/2000/24 (2000); 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) 4–9 <http://www.ila-hq.org> at 23 September 2002; M Cherif Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice' (2001) 42 *Virginia Journal of International Law* 81, 115–25.

92 See above n 53 and accompanying text.

93 Ian Brownlie, *Principles of Public International Law* (5th ed, 1998) 307.

94 See above n 68 and accompanying text.

95 See above n 76 and accompanying text.

comity, the practice is likely to remain so limited. On the other hand, the proper exercise of the principle of complementarity in accordance with the *Statute of the ICC* implies that all States Parties must have legislation affording the full range of jurisdictional grounds necessary to enable them to prosecute offenders accused of committing one of the 'core crimes'. After this case, will all attempts at enforcing such jurisdiction be ruled invalid in the absence of custody? In truth, jurisdiction is not actually exercised until the accused is placed under arrest and taken before a court. If all unexecuted arrest warrants based on universal jurisdiction are to be condemned because of the absence of the accused, how else is an effective system of *state* international penal law enforcement ever supposed to operate?

If the ICJ's refusal to endorse universal jurisdiction without custody is compared to the anvil on which the effective enforcement of international law is placed, then the Court's alarming willingness to endorse an absolute immunity for government ministers accused of serious international crimes might be likened to the hammer that crushes attempts at enforcement. It is axiomatic that the perpetrators of such serious crimes are frequently (though not invariably) government officials. If we are to disregard the distinctions between acts performed in official and private capacities, and acts performed before or during the minister's period of tenure, as the Court suggests,[96] then it is to be feared that states will become even more cautious than hitherto in the enforcement of international criminal law, as it will always be presumed in such cases that immunity subsists. In this light, the four situations suggested by the Court, under the lame slogan that 'immunity does not mean impunity', as being circumstances in which immunity will not be a bar to prosecution, are unrealistic to the point of absurdity as their circumstances are unlikely to arise in practice.[97]

The ICJ's decision flies in the face of the current trends in this field of international law. The dilemma which lies at the heart of those trends was best summed up by the House of Lords in *Pinochet [No 3]*: how can international law provide for individual criminal liability for serious crimes on the one hand, while maintaining concurrent immunity for certain classes of persons who allegedly commit those very crimes on the other?[98] Clearly, there are competing policy

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96 See above n 21 and accompanying text.

97 *Arrest Warrant of 11 April 2000 (DRC v Belgium) (Merits)*, above n 1, (Judgment of the Court) [60]–[61]. The four situations mentioned are: (1) cases of trials under the domestic law of the accused's own country, in which international immunities are not applicable; (2) cases of waiver of immunity; (3) cases where the allegations relate to acts committed before or after the accused held office, or during the period of office if committed in a private capacity; and (4) cases falling under the jurisdiction of international tribunals such as the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. It is submitted that situations (1) and (2) are unlikely to occur unless there has been a change of regime in the accused's state and the new regime is willing and able to prosecute (assuming there are no problems with domestic immunity or amnesty laws) — unless the state is unable or unwilling *and* is a party to the *Statute of the ICC*, in which case it will be the ICC's jurisdiction that triumphs over immunity, not *state* jurisdiction; situation (3) would seem to be negated by the ICJ's own ruling in the *Arrest Warrant Case*, since that was precisely Yerodia's position; and situation (4) refers to international tribunals and is again not concerned with cases of immunity and *state* jurisdiction.

98 *Pinochet [No 3]* [2000] 1 AC 147, 277–8 (Lord Millett), 289 (Lord Phillips). Even if it is insisted upon that the crimes in question are prohibited by rules having the character of *jus cogens*, Yerodia's alleged crimes would still be covered by Lord Millett's *dictum*.

imperatives that need to be balanced in resolving this dilemma. It is submitted that in the *Arrest Warrant Case*, the ICJ struck the wrong balance and thereby subverted ongoing attempts at securing an effective international criminal law enforcement order. Implicit in the Judgment is that Belgium could simply issue another arrest warrant since Yerodia no longer holds any ministerial post — in which case the enforced cancellation of the original warrant will have served no purpose whatsoever.

However, a renewed arrest warrant in the present case will certainly not be forthcoming now that the Court of Appeal in Brussels has held that Belgian law can be applied against persons accused of committing crimes outside Belgium '*que si l'inculpé est trouvé en Belgique*' (only if the accused is found in Belgium)[99] — a decision that might be described as the first casualty of the Judgment in the *Arrest Warrant Case*. The case has in fact already done further damage: as a direct result of the ICJ's Judgment, Belgium is rapidly distancing itself from its former enthusiasm for universal jurisdiction, even to the extent of contemplating a revision of the *Loi relative à la répression des violations graves du droit international humanitaire*. Nevertheless, it is hoped that the Judgment in this wrongly brought and erroneously decided case will be disregarded as an authoritative source of international law in future cases involving extraterritorial criminal jurisdiction and immunities.

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99 *Kabila, Laurent-Désiré et consorts* (Unreported, *Arrêt de la Cour d'appel de Bruxelles, Chambre des mises en accusation*, 16 April 2002) 5. A similar decision has also been handed down in the controversial case against the Prime Minister of Israel, Ariel Sharon: *Sharon, Ariel et Yaron, Amos* (Unreported, *Arrêt de la Cour d'appel de Bruxelles, Chambre des mises en accusation*, 26 June 2002) 7–15.

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