

SEPARATE OPINION OF JUDGE KOROMA

Legal approach taken by Court justified in view of position of Parties, the origin and sources of the dispute and consistent with jurisprudence of the Court — Actual question before Court not a choice between universal jurisdiction or immunity — Though two concepts are linked, but not identical — Judgment not to be seen as rejection or endorsement of universal jurisdiction — Court not neutral on issues of grave breaches — But legal concepts should be consistent with legal tenets — Cancellation of warrant appropriate response for unlawful act.

1. The Court in paragraph 46 of the Judgment acknowledged that, as a matter of legal logic, the question of the alleged violation of the immunities of the Minister for Foreign Affairs of the Democratic Republic of the Congo should be addressed only once there has been a determination in respect of the legality of the purported exercise of universal jurisdiction by Belgium. However, in the context of the present case and given the main legal issues in contention, the Court chose another technique, another method, of exercising its discretion in arranging the order in which it will respond when more than one issue has been submitted for determination. This technique is not only consistent with the jurisprudence of the Court, but the Court is also entitled to such an approach, given the position taken by the Parties.

2. The Congo, in its final submissions, invoked only the grounds relating to the alleged violation of the immunity of its Foreign Minister, while it had earlier stated that any consideration by the Court of the issues of international law raised by universal jurisdiction would be undertaken not at its request but, rather, by virtue of the defence strategy adopted by Belgium. Belgium, for its part, had, at the outset, maintained that the exercise of universal jurisdiction is a valid counterweight to the observance of immunities, and that it is not that universal jurisdiction is an exception to immunity but rather that immunity is excluded when there is a grave breach of international criminal law. Belgium, nevertheless, asked the Court to limit its jurisdiction to those issues that are the subject of the Congo's final submissions, in particular not to pronounce on the scope and content of the law relating to universal jurisdiction.

3. Thus, since both Parties are in agreement that the subject-matter of the dispute is whether the arrest warrant issued against the Minister for Foreign Affairs of the Congo violates international law, and the Court is asked to pronounce on the question of universal jurisdiction only in so far as it relates to the question of the immunity of a Foreign Minister in office, both Parties had therefore relinquished the issue of universal juris-

diction; this entitled the Court to apply its well-established principle that it has a "duty . . . not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions" (*Asylum, Judgment, I.C.J. Reports 1950*, p. 402). In other words, according to the jurisprudence of the Court, it rules on the *petitum*, or the subject-matter of the dispute as defined by the claims of the Parties in their submissions; the Court is not bound by the grounds and arguments advanced by the Parties in support of their claims, nor is it obliged to address all such claims, as long as it provides a complete answer to the submissions. And that position is also in accordance with the submissions of the Parties.

4. This approach is all the more justified in the present case, which has generated much public interest and where two important legal principles would appear to be in competition, when in fact no such competition exists. The Court came to the conclusion, and rightly in my view, that the issue in contention is not one pitting the principle of universal jurisdiction against the immunity of a Foreign Minister. Rather, the dispute before it is whether the issue and international circulation of the arrest warrant by Belgium against the incumbent Minister for Foreign Affairs of the Congo violated the immunity of the Foreign Minister, and hence the obligation owed by Belgium to the Congo. The Court is asked to pronounce on the issue of universal jurisdiction only in so far as it relates to the question of the immunity of the Foreign Minister. This, in spite of appearances to the contrary, is the real issue which the Court is called upon to determine and not which of those legal principles is pre-eminent, or should be regarded as such.

5. Although immunity is predicated upon jurisdiction — whether national or international — it must be emphasized that the concepts are not the same. Jurisdiction relates to the power of a State to affect the rights of a person or persons by legislative, executive or judicial means, whereas immunity represents the independence and the exemption from the jurisdiction or competence of the courts and tribunals of a foreign State and is an essential characteristic of a State. Accordingly, jurisdiction and immunity must be in conformity with international law. It is not, however, that immunity represents freedom from legal liability as such, but rather that it represents exemption from legal process. The Court was therefore justified that in this case, in its legal enquiry, it took as its point of departure one of the issues directly relevant to the case for determination, namely whether international law permits an exemption from immunity of an incumbent Foreign Minister and whether the arrest warrant issued against the Foreign Minister violates international law, and came to the conclusion that international law does not permit such exemption from immunity.

6. In making its determination, as it pointed out in the Judgment, the Court took into due consideration the pertinent conventions, judicial decisions of both national and international tribunals, resolutions of international organizations and academic institutes before reaching the conclusion that the issue and circulation of the warrant is contrary to international customary law and violated the immunity of the Minister for Foreign Affairs. The paramount legal justification for this, in my opinion, is that immunity of the Foreign Minister is not only of functional necessity but increasingly these days the Foreign Minister represents the State, even though his or her position is not assimilable to that of Head of State. While it would have been interesting if the Court had done so, the Court did not consider it necessary to undertake a disquisition of the law in order to reach its decision. In acknowledging that the Court refrained from carrying out such an undertaking, in reaching its conclusion, perhaps not wanting to tie its hands when not compelled to do so, the Judgment cannot be said to be juridically constraining or not to have responded to the submissions. The Court's Judgment by its nature may not be as expressive or exhaustive of all the underlying legal principles pertaining to a case, so long as it provides a reasoned and complete answer to the submissions.

7. In the present case, the approach taken by the Court can also be viewed as justified and apposite on practical and other grounds. The Minister for Foreign Affairs of the Congo was sued in Belgium, on the basis of Belgian law. According to that law, immunity does not represent a bar to prosecution, even for a Minister for Foreign Affairs in office, when certain grave breaches of international humanitarian law are alleged to have been committed. The immunity claimed by the Foreign Minister is from Belgian national jurisdiction based on Belgian law. The Judgment implies that while Belgium can initiate criminal proceedings in its jurisdiction against anyone, an incumbent Minister for Foreign Affairs of a foreign State is immune from Belgian jurisdiction. International law imposes a limit on Belgium's jurisdiction where the Foreign Minister in office of a foreign State is concerned.

8. On the other hand, in my view, the issue and circulation of the arrest warrant show how seriously Belgium views its international obligation to combat international crimes. Belgium is entitled to invoke its criminal jurisdiction against anyone, save a Foreign Minister in office. It is unfortunate that the wrong case would appear to have been chosen in attempting to carry out what Belgium considers its international obligation.

9. Against this background, the Judgment cannot be seen either as a rejection of the principle of universal jurisdiction, the scope of which has continued to evolve, or as an invalidation of that principle. In my considered opinion, today, together with piracy, universal jurisdiction is available for certain crimes, such as war crimes and crimes against

humanity, including the slave trade and genocide. The Court did not rule on universal jurisdiction, because it was not indispensable to do so to reach its conclusion, nor was such submission before it. This, to some extent, provides the explanation for the position taken by the Court.

10. With regard to the Court's findings on remedies, the Court's ruling that Belgium must, by means of its own choosing, cancel the arrest warrant and so inform the authorities to whom that warrant was circulated is a legal and an appropriate response in the context of the present case. For, in the first place, it was the issue and circulation of the arrest warrant that triggered and constituted the violation not only of the Foreign Minister's immunity but also of the obligation owed by the Kingdom to the Republic. The instruction to Belgium to cancel the warrant should cure both violations, while at the same time repairing the moral injury suffered by the Congo and restoring the situation to the *status quo ante* before the warrant was issued and circulated (*Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 47*).

11. In the light of the foregoing, any attempt to qualify the Judgment as formalistic, or to assert that the Court avoided the real issue of the commission of heinous crimes is without foundation. The Court cannot take, and in the present case has not taken, a neutral position on the issue of heinous crimes. Rather, the Court's ruling should be seen as responding to the question asked of it. The ruling ensures that legal concepts are consistent with international law and legal tenets, and accord with legal truth.

(Signed) Abdul G. KOROMA.
