The ICJ Judgement on the Belgium v. Congo Case (14 February 2002): a Cautious Stand on Immunity from Prosecution for International Crimes

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Suggested Citation: Dr. Micaela Frulli, *The ICJ Judgement on the Belgium v. Congo Case (14 February 2002): a Cautious Stand on Immunity from Prosecution for International Crimes*, 3 German Law Journal (2002), *available at* http://www.germanlawjournal.com/index.php?pageID=11&artID=138

[1] On February 14, 2002, the International Court of Justice (ICJ) rendered a judgement in *Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of Congo v. Belgium).(1) The dispute had arisen after a Belgian investigating judge issued an international arrest warrant - based on charges of war crimes in an internal armed conflict and crimes against humanity - against the incumbent Minister for foreign affairs of the Democratic Republic of the Congo (DRC), Mr.Abdulaye Yerodia Ndombasi.(2) The arrest warrant was issued under the Belgian Law of 16 June 1993 (as amended by the Law of 10 February 1999) which establishes that Belgian courts shall have "pure" universal jurisdiction in respect of serious violations of international humanitarian law.(3) The Court found that Belgium violated its legal obligations towards the DRC in that it failed to respect the immunity from criminal jurisdiction and the inviolability which the then Minister for Foreign Affairs of the DRC enjoyed under international law. The Court also found that Belgium must cancel the arrest warrant and so inform the authorities to whom it was circulated.

[2] As several judges who appended their separate or dissenting opinions to the judgement rightly emphasized, the Court accepted the parties' invitation to narrow the dispute. Therefore, it only decided the question of immunity from jurisdiction and inviolability, but did not pronounce upon the validity, according to customary international law, of the Belgian Law establishing universal jurisdiction in relation to serious crimes of international humanitarian law. By doing so, "the Court has allowed itself to be manoeuvred into answering a hypothetical question,"(4) whereas from a logical point of view the question of jurisdiction should have preceded that of immunity.(5) As a result, the judgement is very succinct. Its brevity is also due to the fact that the Court tackled the issue of immunities in a very narrow perspective (restraining itself to immunity from criminal jurisdiction and inviolability of incumbent foreign ministers) and chose not to not build its conclusions against the background of the general prohibition to commit war crimes and crimes against humanity. In order to better focus on the ICJ conclusions, this brief comment follows the Court's approach and only addresses the issue of immunities.

[3] According to the ICJ, customary international law grants to incumbent foreign ministers - as long as they hold their office – absolute immunity from criminal jurisdiction and inviolability. The *rationale* behind such immunities is the need to ensure the performance of the very important functions that foreign ministers exercise on behalf of their States. (paras. 53-54). Moreover, since immunity and inviolability protect foreign ministers by any act of another state that could impair the performance of their functions, no distinction can be drawn between acts performed in an ‘official' or in a ‘private' capacity or among acts performed prior, during or subsequent to the period of office. For the same reason, a foreign minister is protected by immunities both in case of official and private visits.(6) The Court, however, did not adequately build its conclusions on the existence of rules of customary law granting such absolute immunities to foreign ministers. It rather adapted, by way of analogy, immunities that are generally accorded to heads of states to incumbent foreign ministers, but it did not substantiate its findings through State practice nor evidence of *opinio juris*, as it has accurately done in previous cases. (8)

[4] In particular, the Court – arguing the need to lay the foundation of its decision on customary law because of the lack of a general conventional text on foreign ministers immunities – did not sufficiently dwell on what can be inferred by international texts containing some rules on foreign ministers' immunities. Conversely, these documents could have been taken into account as elements attesting State practice in this field. (9) The 1969 Convention on Special missions (10) establishes that ministers for foreign affairs shall enjoy, *when they take part in a special mission of their State*, the same privileges and immunities accorded by international law to heads of States. But this reasoning of course applies only to special missions, that is to say official visits. Hence, according to this text, foreign ministers are surely immune from execution and inviolable in case of official visit, that is to say while exercising their public functions. But it is would be much more difficult to infer that they also enjoy full immunity from jurisdiction (with the consequence for instance that they cannot be tried *in absentia* even if the national system allows such proceedings) and immunity from execution and inviolability in case of private visits. (11) The 1991 International Law Commission (ILC) Draft Articles on Jurisdictional Immunities of States and their Properties also seems to cast some doubts as to the extent of immunities enjoyed by foreign ministers under customary law. A proposal to include a saving for the privileges and immunities *ratione personae* of heads of governments and foreign ministers (as it was done for heads of States) was refused by the ILC for the sake of not raising the issue of ‘the basis and of the extent of the jurisdictional immunity exercised by such persons'.(12) In addition, no precedent was quoted with regard to absolute immunities granted to foreign ministers. Instead, reference was constantly made – in the outline of the positions of the parties - to the *Pinochet* and *Qaddafi* cases, yet obviously involving immunities granted to heads of States (paras.56-

57). In short, customary international law on immunities granted to incumbent foreign ministers seems to be far less clear that the ICJ pretends it to be. (13)

[5] The ICJ also failed to ascertain whether the rules proscribing war crimes and crimes against humanity have acquired the *status* of customary norms, nor it did verify their peremptory character. Recent case-law – both at the national and international levels - has authoritatively affirmed that the prohibition to commit grave crimes, such as war crimes and crimes against humanity, can never be derogated from because it has a peremptory nature, that is to say it is part of the *jus cogens*. This is the position held by the ICTY judges (14) and by the Lords in the *Pinochet* case.(15) Some important legal scholars and experts in the field share the view that the prohibition to commit war crimes and crimes against humanity is not only prescribed by a customary rule but also by a peremptory norm.(16) This conclusion has significant repercussions on internal criminal systems, in that it implies, for instance, that no statute of limitation can apply and no amnesty law can be passed as far as the ‘core crimes' are concerned.(17) The ICJ chose not to pronounce on this matter and on its possible consequences in terms of hierarchy of norms.(18) Once again, the Court did not seize the opportunity to explain in detail why (alleged) customary rules granting immunities to incumbent foreign ministers should always be applied notwithstanding the existence of (alleged) peremptory rules proscribing war crimes and crimes against humanity and establishing, as a consequence, individual criminal liability.(19)

[6] In addition, the ICJ reaches some debatable conclusions on possible exceptions to immunity from criminal jurisdiction in case of charges of war crimes and crimes against humanity. The Court held that, from State practice, it is not possible to deduce that ‘there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity' (para.58). It must be underlined, instead, that functional immunities – that are substantial in nature – can never be invoked in case a State organ is charged with the commission of war crimes or crimes against humanity: the irrelevance of official capacity has always been a complement of the rule establishing individual criminal responsibility for such crimes. This means that state officials cannot, by any means, rely on their official position to shelter themselves from punishment. This holds true, from Nuremberg onward, for international tribunals(20) - as the Court itself recalled - but the same rule have applied in national systems as well, as the Eichmann trial in Israel clearly showed.(21) In other words, such an exception surely amounts to a customary rule. On the other hand (even if State practice is lacking as far as foreign ministers are concerned) one must look at the possibility to rely on personal immunities - *which are procedural in nature and cease with the end of office* - as a bar for prosecution even in case of charges of war crimes and crimes against humanity. This is, for instance, what the Lords affirmed, *obiter*, in the *Pinochet* case: if he was serving head of State it would have been impossible to extradite him because of personal immunities.

[7] According to this distinction, the present case only involves personal immunities.(22) However, the conceptual difference between functional and personal immunities is very important both in principle and at the practical level and should always be maintained.(23) The distinction, of course, becomes utterly significant after State officials leave office, because from that moment on only functional immunity can be invoked. Yet, we just said that there is a customary exception to functional immunities in case of charges of war crimes and crimes against humanity: as a result, after a state official leaves office there is no possible claim of immunity.(24) The ICJ agreed in principle with the need to discern the two types of immunities and, focusing its attention on personal immunities, it stressed that they are only a procedural bar to jurisdiction and do not grant impunity. Yet, after having affirmed that after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States, it said that "a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, *as well as in respect of acts committed during that period of office in a private capacity"* (para.61, emphasis added). This statement, if interpreted literally, seems rather to contradict the consolidated exception to functional immunities in cases of charges of war crimes and crimes against humanity. By saying that a former minister for foreign affairs may be tried abroad only in respect of acts committed during their period of office in a private capacity, the ICJ implicitly affirmed that he or she cannot be tried for acts performed in an ‘official' capacity. Practically, if a foreign minister commit a crime in his official capacity, and not as a private person, according to the Court's reasoning he could not be tried once his functions are terminated (that is to say he could rely on functional immunities).(25)

[8] With all due respect, it seems that the ICJ overlapped the two kinds of immunities. Unfortunately, the position it took could be interpreted in a way that does absolutely not correspond to customary international law and that could represent a huge step back in the struggle against impunity for the most serious international crimes.(26)

[9] In conclusion, it is regrettable that the Court did not seize this extremely favourable opportunity to elaborate further on such crucial questions arisen in the international criminal law field. One can fairly understand, from a political perspective, the conclusions reached by Court. The opposite decision could have entailed enormous dangers in terms of stability of international relations. Nevertheless, it would have been preferable that the Court had struck a

more progressive balance between the tendency to a restrictive application of immunities in case of charges of war crimes and crimes against humanity and the need to guarantee a smooth and unhindered functioning of diplomatic relations among States.

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(1) The full text of the judgement (including separate and dissenting opinions) is available on the International Court of justice website: www.icj-cji.org under the heading "decisions".
(2) Mr. Yerodia is accused of having pronounced speeches inciting racial hatred in 198, when he had not yet taken office as Minister for Foreign Affairs.
(3) Article 7 of the Belgian law establishes that Belgian Courts shall have jurisdiction over alleged violation of the most serious violations of international humanitarian law regardless of where they are committed (1), regardless of the nationality or legal status of either the victim or the accused (2) and regardless of the presence of the accused on Belgian territory (3).
(4) See Separate Opinion of Judges Higgins, Kooijmans and Buergenthal (para.17).
(5) The question of universality of jurisdiction over the most serious crimes under international law (the so-called core crimes) and the question of the application of immunities are - in the present case as well as in similar ones - inextricably linked and the Court seems to have lost a very important occasion to pronounce on such a combine of crucial issues. See the Separate Opinion of President Guillaume (para.1); Separate Opinion of Judges Higgins, Kooijmans and Buergenthal (para. 2); Dissenting Opinion of Judge Van den Wyngaert (para.4); Individual Opinion of Judge Rezek (para. 3)
(6) "The consequences of such impediment to the exercise of those official functions are equally serious, regardless of whether the Minister for Foreign Affairs was, at the time of arrest, present in the territory of the arresting State on an ‘official' or private' visit, regardless of whether the arrest relates to acts allegedly performed before the person became the Minister for Foreign Affairs or to acts performed while in office, and regardless of whether the arrest relates to alleged acts performed in an ‘official' capacity or a ‘private capacity." (para.55).
(7) One must not underestimate that the extent to which heads of State enjoy immunities is not totally undisputed.
(8) North Sea Continental Shelf (*Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands*), Judgement (1969), para. 77, *ICJ Reports 1969*, p.44; Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*),Judgement (1986), paras.183-186 (available on the ICJ website). See on this point the Dissenting Opinion of Judge Van den Wyngaert (paras. 12-13.)
(9) As the ICJ itself has authoritatively affirmed in the past: "It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and opinio juris of States, even though multilateral conventions may have an important role to playing recording and defining rules derived from custom, or indeed in developing them", Continental Shelf (*Libyan Arab Jamahiriya v. Malta*), para. 27, *ICJ Reports 1985*, pp.29-30.
(10) This is the only conventional text expressly conferring immunities to Foreign Ministers. The text is not applicable to the present case because it was not ratified by the parties.
(11) "Although it may well be that a head of State , when on a private visit to another State, still enjoys certain privileges and immunities, it is much less likely that the same holds true of heads of Government and foreign Ministers. Although they may be accorded special treatment by the Host State this is more likely to be a matter of courtesy and respect for the seniority of the visitors, than a reflection of any belief that such treatment is required by international law", Sir Arthur Watts, *The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers, Collected Courses of the Hague Academy of International Law*, 1994 (III), vol. 247, p.109.
(12) See the Dissenting Opinion of Judge Al-Khasawneh, passim. See also Sir Watts, supra, p.107.
(13) This opinion is expressed in may of the Separate and Dissenting opinions appended to the judgement, see Separate Opinion of Judges Higgins, Kooijmans and Buergenthal (pars.79-82); Dissenting Opinion of Judge Van den Wyngaert (paras.24-28); Dissenting Opinion of Judge Al-Khasawneh, passim..
(14) "Furthermore, most norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or *jus cogens*, i.e. of a non-derogable and overriding character", *Prosector v. Kupreksic* (ICTY), 20 January 2001, para.52. See also Prosecutor v. Furundzija, 10 December 1998, paras. 153 ff.; Prosecutor v. Delalic, 20 February 2001, para.172; *Prosecutor v. Krstic*, 2 August 2001, para. 541.
(15)According to Lord Browne-Wilkinson the prohibition of torture "has evolved into a peremptory norm of jus cogens, that is a norm that enjoys a higher rank in the international hierarchy than treaty law and even ‘ordinary customary' rules', *Regina v. Bartle and the Commissioner of Police for the Metropolis and Other, Ex Parte Pinochet* (On Appeal from a Divisional Court of the Queen's Bench Division); *Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet* (On Appeal from a Divisional Court of the Queen's Bench Division), 24 March 1999.
(16) C. Bassiouni, *Crimes against Humanity in International Criminal Law*, 1999, p.210 ff.; J.Dugard (appointed as expert by the Amsterdam Court of Appeal in the *Bouterse* case), *Opinion: in Re Bouterse*, para.4.5.6, available at www.icj.org/objectives/opinion.htm.

https://doi.org/10.1017/S2071832200014899 Published online by Cambridge University Press

(17) "It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void ab initio, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law (…)It would seem that other consequences include the fact that torture may not be covered by a statute of limitations", Prosecutor v. Furundzija (ICTY), 10 December 1998, ", paras. 155 and 157.
(18) "Questions concerning international accountability for war crimes and crimes against humanity and that were not addressed by the International Court of Justice include the following. Can international accountability for such crimes be considered to be a general principle of law in the sense of Article 38 of the Court's Statute? Should the Court, in reaching its conclusion that –there is no international crimes exception to immunities under international law, not have given more consideration to the factor that war crimes and crimes against humanity have, by many, been considered to be customary international law crimes ? Should it not have considered the proposition of writers who suggest that war crimes and crimes against humanity are *ius cogens* crimes, which, if it were correct, would only enhance the contrast between the status of the rules punishing these crimes and the rules protecting suspects on the ground of immunities for incumbent Foreign Ministers, which are probably not part of ius cogens?", Dissenting Opinion of Judge Van den Wyngaert (para. 28).
(19) As to State immunity from the jurisdiction of foreign States, A. Cassese holds that peremptory norms may impact on it, in that they may remove such immunity, A. Cassese, International Law, 2001, p.145.
(20) Article 7 of Statute of the Nuremberg International Military tribunal provided that: "The official position of the defendants, whether as Heads of States or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment". From the onwards, the irrelevance of official capacities has been regularly restated, both at the international and national level. It was enshrined in Article II (4) (a) of the 1945 Control Council Law No. 10, in Article IV of the 1948 Genocide Convention, in Principle III of the Nuremberg Principles adopted in 1950 by the United Nation General Assembly, in Article III of the 1973 Apartheid Convention and, more recently, Articles 7 (1) and 6 (2) of the Statutes of ICTY and ICTR and in article 27 (1) of the International Criminal Court Statute. For a comment see P.Gaeta, *«The Irrelevance of Official Capacities and Immunities »*, forthcoming in *Commentary to the ICC Statute*, edited by A.Cassese A., P.Gaeta and J. Jones.
(21) *Attorney General of the Government of Israel v. Adolf Eichmann* (case N° 40/61), District Court of Jerusalem, in *Int. Law Reports*, vol.36, pp.18-276; see also the judgement of the *Supreme Court of Israel* (case N° 336/61, 1961), *ibidem*, pp.277-342.
(22) This is confirmed also by the fact Mr Yerodia was not holding a ministerial post at the time of the alleged facts.
(23) In this respect the Dissenting opinion of Judge Van den Wyngaert is not to be shared. She points out that there is no point in making such a distinction when a State official is charged with war crimes and crimes against humanity (paras. 29-33), because there's no possible claim of immunities in respect of these crimes. It seems more appropriate instead to precisely know the difference in order to better establish the respective limits to their application.
(24) There is a different *rationale* underlying functional and personal immunities. While immunities *ratione materiae* protect the *par in parem non habet imperium* principle, that is to say State sovereignty; immunities *ratione personae* preserve the effective performance of functions exercised by different state organs (diplomatic agents for instance), or in other word the *ne impediatur legatio* principle: once the functions are terminated there's nothing left to protect.
(25) According to the Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, international crimes may never be considered as official acts because they are not normal state functions nor acts that can be performed by a State alone (para. 85), but their reasoning as well does not sound convincing.
(26) It is also surprising that the Court made practically no reference to the rule contained in the Rome Statute on the establishment of the International Criminal Court (ICC), which is about to entry into force. According to Article 27 (2) of the ICC Statute, personal immunities cannot be invoked - as it is obvious to some extent since it is an international tribunal - before the ICC. In principle however, they could bar the execution of an arrest warrant issued by the Court because States parties could be requested to co-operate with Court and, in doing so, they could violate their legal obligations as to personal immunities. The issue is dealt with by article 98 (1) which establishes that a waiver of immunity is a necessary condition to the execution of arrests or transfers only in those cases where the requested State is internationally obligated toward a State that is not party to the Statute. To put it differently, among State parties to the ICC there is an implicit waiver of personal immunities in case a state is requested to arrest or transfer a serving State official to the Court (even if he's a serving head of State). Of course this holds true only as cooperation between State parties and the ICC is concerned and does not have any bearing on the status of customary international law. Nonetheless it is a significant treaty exception to the rule according personal immunities and it attests the growing trend towards a more and more restrictive approach to the application of immunities in case of charges of war crimes and crimes against humanity.
(27) In this sense see the Separate Opinion of Judges Higgins, Kooijmans and Buergenthal (para.75 ff.)