

Case Concerning the Arrest Warrant of 11 April 2000
(Democratic Republic of the Congo v. Belgium)

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An arrest warrant was issued on 11 April 2000 against Mr. Abdulaye Yerodia Ndombasi for offences constituting grave breaches of the Geneva Conventions of 1949, and the Additional Protocols, as well as with crimes against humanity. These charges related to the alleged making of speeches inciting racial hatred in August 1998 in the Democratic Republic of Congo (DRC), causing a massacre of several hundred Tutsis. The complaints that premised the Court's investigation were by victims of the alleged act and others who were Belgian nationals. The warrant was issued pursuant to the Belgian Law of 16 June 1993, 'concerning the Punishment of Grave Breaches of the *International Geneva Conventions* of 12 August 1949 and of Protocols I and II of 8 June 1977 Additional Thereto',² as amended by the Law of 19 February 1999 'concerning the Punishment of Serious Violations of International Humanitarian Law'.³ Such crimes were punishable in Belgium irrespective of where they were committed or the nationality of the perpetrator or the victims. Prosecutorial action could be taken against an accused person despite their absence from Belgian territory. In addition, the Belgian Law precluded claims of immunity based on acts of an official capacity.

While the warrant was issued, Mr. Yerodia was the Minister for Foreign Affairs of the DRC. The Congolese government claimed that the international circulation of the arrest warrant against Mr. Yerodia violated the rules of customary international law on absolute inviolability and immunity from criminal process for incumbent foreign ministers. They also challenged the Belgian law based on the principle of universal

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² *Loi relative à la repression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 9 juin 1977, additionnels à ces Conventions, 16 June 1993, Montier Belge, 5 August 1993.*

³ *Loi relative à la repression des violations graves de droit international humanitaire, 10 février 1999, Montieur Belge, 23 March 1999 (English translation at (1999) 38 ILM 918.*

jurisdiction, claimed to violate the territorial integrity of other states and the principle of sovereign equality. They requested that the Court: declare the circulation to be an unlawful act; order reparation to satisfy the moral injury to the Congo; revoke the arrest warrant; and renounce the request for cooperation in executing the warrant.

In November 2000, a cabinet reshuffle in the DRC resulted in the removal of Mr. Yerodia from his Foreign Affairs portfolio and a transfer to the position of Minister of Education. Prior to this, the DRC had applied for interim measures to discharge the arrest warrant, allegedly limiting Mr. Yerodia's ability to travel and exercise his functions as a foreign minister. The Court refused the application. Although the arrest warrant was still in place, the new post of Minister of Education did not involve as much international travel, therefore mitigating any future damages caused by the arrest warrant.

In April 2001, Mr. Yerodia ceased to hold any position with the new government in the DRC. Following the change in Mr. Yerodia's position, Belgium requested the Court to declare the case moot, since there was no longer a 'legal dispute' between the parties. In turn, the DRC withdrew its submissions concerning universal jurisdiction, claiming only the violation of absolute inviolability and immunity from criminal process of incumbent foreign ministers.

Preliminary Matters

One of the preliminary questions for the Court was whether the change in circumstances regarding Mr. Yerodia's new status rendered the case moot and thus denied the Court jurisdiction. The majority of the Court held that its jurisdiction commences on the date when the case is referred to it, which does not cease upon the emergence of subsequent events. At the time when proceedings began, there existed a legal dispute concerning the legality of the arrest warrant. Subsequent events may render an application without object so that a decision is not necessary but the change in this case did not end the dispute and deprive the DRC's application without object. The legality of the arrest warrant was still in dispute. Moreover, the DRC did not claim that they were acting in the context of protecting its own nationals and therefore Mr. Yerodia's current status had no bearing on whether the rights of the DRC had been violated.

Immunity of Foreign Ministers

As a result of the amendment of the pleadings, this immunity question was the only issue before the Court. The inquiry into this question began by reviewing the relevant treaties. No specific authorities were provided by the parties that spoke to the immunity accorded to foreign ministers. As a result, customary international law was referred to. The majority of the Court applied a functional analysis of what a foreign minister does in international relations, concluding that its functions require frequent international travel thus necessitating a freedom to do so. In addition, the position of a minister was likened to a head of state or a head of government since it acts as a representative of a state. Under this reasoning, the minister enjoys full immunity from criminal jurisdiction and inviolability during his or her time in office.

Some mention of the ILC Draft Articles on State Responsibility was made by Judges Higgins, Buergenthal and Kooijmans, in their Joint Separate Opinion, where they noted the absence of any savings clause preserving the privileges and immunities of a Minister for Foreign Affairs. Immunity is enjoyed only by heads of states under Article 3(2) of the ILC Draft Articles. A similar omission exists in the work of the *Institut de droit international* in 2001, granting immunity only for heads of state. However, the judges agreed with the majority due to a concern of avoiding the disruption of international relations by not recognizing the immunity of current foreign ministers.

The majority of the Court rejected any distinction between acts performed in an official capacity and those performed in a private capacity, or acts performed before or during the assumption of the position of foreign minister. The effect would be the same in that the minister would still be prevented from exercising the functions of his or her office, which would seriously undermine the operation of international diplomacy and state relations. Official acts are referred to in the literature as the line of distinction between being shielded from prosecution by immunity and being imputable.⁴ In addition, the official capacity distinction is expressed in the legal instruments establishing the

⁴ See Bianchi, 'Denying State Immunity to Violations of Human Rights', (1994) 46 *Austrian Journal of Public and International Law* 229.

various international criminal tribunals. Failing to uphold this distinction for the purpose of determining what acts are protected by immunity, did not reflect state practice, according to Judges Higgins, Kooijmans and Buergenthal, manifest in cases involving Eichmann,⁵ Pinochet,⁶ and the judgment of the Court of Appeal of Amsterdam in the *Bouterse* case.⁷ Moreover, it fails to recognize the exclusion of official acts as a basis for immunity under the Nuremberg Charter⁸ and the Statutes of the ICTY and the ICTR,⁹ as well as the future International Criminal Court.¹⁰ The question of whether there is an operative distinction between official acts, thus excusing jurisdiction, and acts of a private citizen did not receive much discussion in the majority's decision. The DRC argued that immunity for ministers encompassed all acts, including ones committed before one took office and despite any distinction between an official and private act.

Belgium argued that if a foreign minister were afforded immunity, it would operate as a bar against individual responsibility for war crimes or crimes against humanity. It was claimed that acts incurring international criminal liability could not fall under acts under an official capacity normally given immunity under international law. Support for this proposition was partly based on the decisions in the UK and French courts in *Pinochet (R. v. Bow Street)* and *Gaddafi*¹¹ respectively. Although the majority of the Court considered these decisions, it held that they did not fully demonstrate state practice under customary law attesting that there are exceptions to immunity from criminal jurisdiction for incumbent ministers for foreign affairs. In addition, the extension of extra-territorial and, in some cases, universal jurisdiction over international crimes exists in many treaties, and does not affect the customary international law immunity of ministers for foreign affairs.

⁵ *Attorney-General v. Adolf Eichmann*, Supreme Court of Israel, 29 May 1962, 36 ILR 5.

⁶ *R. v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte*, 25 Nov. 1998, All. ER (1994) 4 at 945.

⁷ *Gerechtshof Amsterdam*, 20 November 2000, para. 4.2.

⁸ Art. 7.

⁹ Statute of the International Criminal Tribunal for Yugoslavia, (1993) 14 *Hum Rts. LJ* 211, Art. 7 Statute of the International Criminal Tribunal for Rwanda, (1994) 33 ILM 1598, Art. 6

¹⁰ Statute of the International Criminal Court, Art. 27(1).

¹¹ *Arret no. 1414*, 13 Mar. 2001, Cass Crim. 1.

However, the Court noted that there is a temporal limit to a foreign minister's immunity. Jurisdictional immunity would bar prosecution during the time that the person held the foreign minister post but criminal responsibility would subsist, making an alleged offender liable in four particular circumstances; prosecution in one's own country; under a state's waiver of immunity; after the conclusion of one's tenure as Minister, which would entail prosecution for events either before or after holding the ministerial post as well as acts of a private nature while minister; or where prosecution is being conducted by international criminal courts. This would be consistent with the UK House of Lords in the second Pinochet decision, where under UK law, former heads of states are not protected by immunity in respect of the crime of torture.¹²

These four scenarios were criticized as having no practical effect in the Opinion of Judges Higgins, Kooijmans and Buergenthal. Their opinion notes that it is less than likely that a former minister will be tried in his or her own country or that the immunity will be waived by his or her own state. Judge van den Wyngaert in his Dissenting Opinion goes further noting that the Congo's failure to exercise its jurisdiction, even at the urging of Belgium who had sent information to the DRC, was a violation of the Geneva Conventions and other UN resolutions. As a result, the only possible and credible alternative was to use foreign courts after the person ceases to hold the office of foreign minister.¹³

The temporal factor on the immunity question suggests that immunity is more a matter of procedure than of substance. The majority ruled that all government officials cannot operate with impunity and are subject to criminal liability following the conclusion of their public service. The procedural immunity, distinct from substantive immunity, even in the case of serious international crimes, subsists for as long as the suspected official is in office. This is a reflection of the 'balancing of interests' according to Judges Higgins, Kooijmans and Buergenthal, between attributing responsibility for heinous crimes and the need for maintaining immunities for high-level officials in order that inter-state relations function properly. National court jurisprudence indicates that

¹² *R. v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*, 24 March 1999, (1999) 38 ILM 581.

¹³ See separate opinion of Judges Higgins, Kooijmans and Buergenthal at p. 19.

procedural immunity still exists.¹⁴ Achieving this balance might avoid malicious actions by enemy states against other leaders, which can impede the peaceful outcome of inter-state disputes. However, this type of balancing is skewed according to Judge Van den Wyngaert, who ruled that the international crimes, such as the ones raised in this dispute, are of a *jus cogens* nature, while immunities of foreign ministers do not have this status. This balancing may have tipped due to the gross violations of international criminal law such as when the ICTY indicted Slobodan Milošević while he still was a sitting head of state.

International Wrong

There was some discussion surrounding which act by the Belgian authorities constituted the illegal act. The DRC claimed that the mere issuance of the arrest warrant against Mr. Yerodia supported the finding of a breach of international law, as a consequential moral injury was incurred by the DRC. Belgium rejected this argument because the warrant did not impose any obligations on other states to execute it and therefore the illegal act would not take place until a third country arrested Mr. Yerodia. The Court disagreed, determining that the violation occurred, due to the nature and purpose of the circulation when the warrant was issued, because Belgium failed to respect the immunity from criminal jurisdiction and the inviolability of a foreign minister under international law at that time. The circulation of the warrant potentially caused Mr. Yerodia to refrain from undertaking his responsibilities as a foreign minister, including the need to travel internationally. Judges Higgins, Kooijmans and Buergenthal agreed, adding that the warrant was directly enforceable in Belgium, obliging the authorities to arrest Mr. Yerodia.

Judge Oda, in his dissent, held that the DRC's position that the Belgian law violated international law does not prove that a legal dispute existed in this case, as

¹⁴ See the French Cour de Cassation overruling of a lower court decision concerning Colonel Ghadaffi of Libya, an existing head of state, where his immunity for complicity in acts of terrorism of a French civilian plane over the desert was rejected.

required under Article 36(2) of the Statute of the International Court of Justice.¹⁵ The moral injury asserted by the DRC was insufficient to elevate the case to a legal dispute, transforming the dispute into a request for a legal opinion on the lawfulness of the Belgian legislation. The moral injury was based on an international unlawful act that had yet to happen since the impugned jurisdiction had not been exercised and no action was taken against Mr. Yerodia. The issuance and circulation of the warrant was not unlawful because no legal impact can be incurred until the request is validated by the third state.

The DRC was asking for damages for reparation for the injury caused. In order to effect restitution or reparation for the injury to the rights of the DRC, the Court ordered Belgium to withdraw and cancel the warrant, as well as inform the authorities who received the notice of arrest of its non-effect. Since the Court ruled that the circulation of the warrant violated international law, this was an adequate form of satisfaction making good the moral injury sustained by the DRC. The cancellation of the warrant would cure the violations of international law and repair the moral injury as well as restoring the situation to what existed prior to when the warrant was issued and circulated pursuant to the principles declared in the *Chozow Factory* case.¹⁶

Judge Van den Wygaert, in his Dissenting Opinion, raised the distinction between the issuing of the warrant, which was not in violation of international law, and its enforcement that might attract international liability. The former cannot be considered of any effect since there would be no violation of the alleged immunity. Enforcement of the warrant would likely infringe the minister's inviolability but the issuance of a summons only violates the immunity. This did not prevent the minister from exercising his functions since it was not automatically enforced in Interpol member states.

The reasoning of the remedy granted by the majority was questioned by Judges Higgins, Kooijmans and Buergenthal. Restitution was considered impossible in the circumstances of the case because Mr. Yerodia was no longer the minister for foreign affairs. Under the premise that the immunity was lost once Mr. Yerodia no longer served the DRC as the foreign affairs minister, the illegal consequences of the warrant no longer existed.

¹⁵ (1945) 59 Stat. 1055, T.S. No. 993.

Universal Jurisdiction

The majority for the Court ruled that the case dealt specifically with the question of immunity for foreign ministers, thus narrowing the focus of the judgment. The DRC had withdrawn its challenge to the Belgian law based on universal jurisdiction and therefore the Court, under the *non ultra petita* rule, had a duty to abstain from deciding issues not included in the parties' submissions.¹⁷ However, the operation of this principle was held, in the Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, not to prevent the Court from considering issues absent in the parties' submissions but deemed relevant for the Court's conclusions. In any event, the principle of *jura novi curia* can supercede the *non ultra petita* rule, recognizing a tribunal's, and in this case, the International Court of Justice's, inherent ability to rule on questions of international law independent on what is adduced by the parties.

The question of universal jurisdiction was an issue needing clarity in international law.¹⁸ The composite of treaty practice and customary international law established a patchwork application that lacked uniformity. Although the Court's comments on universal jurisdiction can arguably be considered *obiter dicta*, several judges noted that the questions of jurisdiction were inseparable from ruling on immunity because the former needs to be established in advance of any declaration that immunity from jurisdiction exists. In any event, the dispute offered the first opportunity for the Court to address the question of universal jurisdiction and its status in international law.

President Guillaume, in a Separate Opinion concurring with the majority, noted that the 'territorial character of criminal law is fundamental' in all systems of law.¹⁹ This then

¹⁶ *Factory at Chozrow*, Merits, Judgment No. 13, 1928 PCIJ, Series A. No. 17, at 47.

¹⁷ See *Asylum (Interpretation) Case*, ICJ Reports (1950) 402.

¹⁸ Judge Oda, in his dissenting opinion, held that the Court should not take any stance on this issue due to its uncertainty in international law as well as because it did not form part of the request before the Court.

¹⁹ As mentioned in the *Lotus* case, Judgment No. 9, 1927 PCIJ, Series A, No. 10, at 20. Judge Guillaume noted that the *Lotus* case was decided on the basis of the application of territorial jurisdiction since one of the ships involved in the crash was Turkish.

evolved to include nationality as a basis of jurisdiction. The President noted that, historically, universal jurisdiction was accepted in only one case, that being piracy, perhaps because the crimes are committed on the high seas and outside national jurisdiction. Where the principle *aut dedere aut prosequi* (duty to prosecute or extradite) was codified in many treaties, jurisdiction was no longer relied on, either territoriality or nationality. In practice this did not allow states to exercise jurisdiction when the alleged perpetrator was not present in the territory of the state exercising the jurisdiction. Reference can be made to various national courts, such as in France, that have refused to exercise universal jurisdiction without the presence of the accused in the state exercising jurisdiction. This may be the only link between the state and the accused person but it still differs from what is known as universal jurisdiction. Judges Higgins, Kooijmans and Buergenthal acknowledged that the exercise of jurisdiction based on finding a perpetrator of an international criminal act on your territory, should not be confused with universal jurisdiction since the former is a treaty-based obligation to exercise jurisdiction over persons who commit acts elsewhere and are within your territory.²⁰ This distinction limits the definition of universal jurisdiction to its purest form – exercising jurisdiction over international crimes without any other basis for jurisdiction in international law.

Reference was also made to the opinion of Lord Slynn of Hadley in the first *Pinochet* case that universality of jurisdiction is subject to customary international law rules.²¹ Other cases from French, Austrian, Dutch courts were also cited – all of which fell short of the state practice of universal jurisdiction since there either was a nationality or passive personality basis to exercising jurisdiction or the basis was treaty-based. In any event, judicial decisions were held by Judges Higgins, Kooijmans and Buergenthal to be insufficient proof of a rule of universal jurisdiction, since it cannot evidence international practice amounting to custom. The same would apply to treaties that contain provisions on universal jurisdiction, as they do not demonstrate state practice. However, the corollary was raised in that there was no state practice contrary to the exercise of universal jurisdiction.

²⁰ At 10.

²¹ House of Lords, 25 November 1998, *R. V. Bartle; ex parte Pinochet*.

Judge Van den Wyngaert ruled that universal jurisdiction is not restricted to cases where the accused offender is in the state exercising the jurisdiction. To support this, Judge Van den Wyngaert asserted that there are no customary international law rules denying universal jurisdiction in absentia. Some states such as Spain and New Zealand have legislative authority to assert universal jurisdiction without the presence of the accused on its territory. In the *Bouterse* case, the Court ruled that although the national court required territorial presence under Dutch law, this did not preclude that universal jurisdiction is contrary to international law. This logic is somewhat flawed since it presupposes that that universal jurisdiction is customary law and therefore can only be refuted by another peremptory norm or rule of equal status. There is some reference to international jurists who support that universal jurisdiction is applicable in cases of *jus cogens* international crimes.²² Since Mr. Yerodia was charged with incitement to racial hatred, this would qualify as a crime against humanity and therefore universal jurisdiction could be applied.

Future Questions

Although the Court ruled that the issuing of the arrest warrant violated international law, another question might be whether a state's initiation of proceedings within its own country, perhaps through a criminal investigation, would constitute a violation. Belgium claimed that the investigation or prosecution of a case against a person outside its territory did not violate any rule of international law and was acceptable both in state practice and international practice. In the case being brought against Ariel Sharon in the Belgian courts, the applicants are arguing that the ICJ ruling does not preclude Belgian authorities to investigate international crimes occurring outside its territory. Judge Al-Khasawneh, in his Separate Opinion, agreed with the Belgian submission in this regard. Moreover, the commencement of an investigation would not impede the operation of

²² Bassiouni, 'Universal Jurisdiction for international Crimes: Historical Perspectives and Contemporary Practice', 42 *Virginia J. of Int Law* (2001) 1. The ICTY has ruled that the *jus cogens* nature of the crime of torture does bestow universal jurisdiction on states to investigate, prosecute and punish or extradite an offender. See *Prosecutor v. Anton Furundzija*, ILM (1999) 346.

foreign relations unless the investigating authorities requested international assistance from other states, which could potentially impede the activities of a foreign minister. There would not be any unfairness towards an accused by simply initiating the criminal investigative process, therefore assuaging the concern about trying an accused not present on the state's territory.

Conclusions

Overall, this case must be seen as one looking definitively at the question of sovereign immunity and how it applies to officials holding the portfolio of minister of foreign affairs. Since a functional analysis was employed, the impact of any state activity must be reviewed to determine whether inter-state relations and diplomacy are impaired. This might invite questions on whether a government official performs international functions representing the state. There is potential that legal certainty may be undermined and a slippery slope be formed in the face of atrocious international crimes and the need for individual accountability. Although, this case was seen in its wider context of international criminal law and human rights by many of the Judges of the Court, the implications of granting immunity based on one's position negate the emergence of new rules of international law departing from such immunity for international crimes of a heinous nature.

The Opinion of Judges Higgins, Kooijmans and Buergenthal suggests that universal jurisdiction is nearing the status of customary law in light of the international consensus that perpetrators of international crimes should not have impunity. However, its application may still be fragmented in light of the various instances that it may be exercised. It is only for states to respond to the inconsistencies in treaties and national legislation in order to meet the requirements of customary international law. Positive steps by national legal systems such as mandating universal jurisdiction in their legislation might be a necessary step to establish *opinio juris*.

Current developments may not assist in resolving the questions. Judge Guillaume noted that the principle of complementarity, enshrined in the Statute of the International

Criminal Court, might come into conflict with universal jurisdiction since states may opt to prosecute an international crime committed in another country rather than under the auspices of the ICC prosecutor. An ICC proceeding would be based on the territoriality principle and the active personality principle, since the crime must occur in a state party or the person prosecuted must be a national of a party state. Whether deference to national courts that fail to apply universal jurisdiction may follow, it may defeat one of the fundamental purposes of the Court, which is to end the impunity of all perpetrators of international crimes. Conversely, the divergence between upholding procedural immunity amongst national courts and its exclusion under the ICC will also challenge the notion of complementarity. These are questions that could not be resolved by the Court, although a more definitive statement of the law is needed.