
State Responsibility v. Individual Responsibility for International Crimes: Tertium Non Datur?

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Abstract

The ICJ held in the recent Congo v. Belgium case that a former Minister for Foreign Affairs of a state may be subjected to the criminal jurisdiction of another state only in respect of acts carried out 'in a private capacity'. Therefore the question arises of whether international crimes committed by persons with the status of state officials are to be regarded as acts done 'in a private capacity'. This article argues that the answer to this question should be in the negative. Treating war crimes or crimes against humanity perpetrated by a state official as acts committed 'in a private capacity' would mean that such acts could not be attributed to the state at an international level. As a consequence, the state would not be responsible for those acts under international law.

1 The ICJ's Position on Subjecting Former Ministers for Foreign Affairs to Foreign Jurisdiction

In its judgment delivered on 14 February 2002 in the *Case Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belgium)*, commented on by Antonio Cassese and Steffen Wirth in this issue,¹ the International Court of Justice² held that an incumbent Minister for Foreign Affairs enjoys immunity from criminal jurisdiction while abroad, and inviolability for acts performed either in an 'official' or in a 'private' capacity, whether those acts were done before assuming office or during the term of office, even

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¹ Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v. Belgium Case*', 13 *EJIL* (2002) 853; and Wirth, 'Immunity for Core Crimes? The ICJ's Judgment in the *Congo v. Belgium Case*', 13 *EJIL* (2002) 877.

² The judgment and the separate opinions are available at www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm.

when the crime alleged is a war crime or a crime against humanity.³ The Court went on to add, in an *obiter dictum*, that immunity from foreign jurisdiction does not mean impunity. The Court noted 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. Provided that it has jurisdiction under international law, 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*.⁴

The Court thereby implicitly affirmed that, in relation to acts committed not 'in a private capacity' but 'in an official capacity', a former Minister for Foreign Affairs of a state cannot be subjected to the criminal jurisdiction of another state even after leaving office.⁵ It seems impossible to doubt that this is what the Court meant.⁶

The Court's view that a Minister for Foreign Affairs (and implicitly any other state official) who has committed an international crime may not, after leaving office, be subjected to the criminal jurisdiction of another state if the crime was committed while acting 'in an official capacity' has been rightly criticized by commentators, who stress that this aspect of the judgment seems to be at variance with developments in contemporary international law.⁷

2 Did the Court Include International Crimes among Acts Performed 'in a Private Capacity'?

Some commentators, as well as a dissenting judge⁸ in the case, have refused to believe that the Court, in an *obiter dictum* unsupported by reasons, meant to take a position leading to the conclusion that authors of international crimes could practically *never* be subjected to the criminal jurisdiction of foreign states. These commentators and the dissenting judge have taken the view that the Court's *obiter dictum* could be interpreted as implying that war crimes and crimes against humanity, even when committed by a state official, cannot ever be committed 'in an official capacity',

³ *Ibid.*, paras 54, 55 and 58.

⁴ *Ibid.*, para. 61 (emphasis added).

⁵ Unless the state of which he was Minister for Foreign Affairs has waived the immunity from criminal jurisdiction accruing to him (*ibid.*, para. 61).

⁶ This interpretation is supported not only by the clear language of the phrase quoted, but also by the fact that the Court stated in para. 55 of the judgment that a Minister for Foreign Affairs in office enjoys immunity from jurisdiction before the courts of a foreign state for acts committed in both an 'official' and a 'private' capacity. Further confirmation comes from a reading of the dissenting opinions of Judges Al-Khasawneh (para. 6) and Van den Wyngaert (para. 36) and from the Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal (para. 85).

⁷ See Cassese, *supra* note 1; Wirth, *supra*, note 1; and Frulli, 'The ICJ Judgment on the *Congo v. Belgium* Case (14 February 2002): A Cautious Stand on Immunity from Prosecution for International Crimes', 3 *German Law Journal* (2002), www.germanlawjournal.com.

⁸ See the Dissenting Opinion by Judge Van den Wyngaert, para. 36.

but must always and only be committed ‘in a private capacity’.⁹ Such an approach can also be found in the judgments of national courts, most recently in some of the speeches delivered in the *Pinochet* case in the House of Lords.¹⁰ This approach seems to have the approval of some of the judges of the Court who wrote separate opinions.¹¹ It is therefore useful to consider this question in more detail.

3 Reasons for Dismissing the View that International Crimes Must be Regarded as Acts Committed ‘in a Private Capacity’

In my view, treating a war crime or a crime against humanity as an act that is, by its nature, always committed in a private capacity is not only wrong per se but would constitute a remedy more harmful than the wrong it was intended to remedy. As rightly pointed out by Cassese,¹² although a state official may commit an international crime acting in a private capacity, in most cases he will have committed such a crime while acting in his capacity as a state official, even if by doing so he has acted in breach of domestic law. Maintaining that crimes such as, for example, torture, killing prisoners of war, or subjecting an ethnic group to conditions of life intended to bring about their physical destruction, always constitute acts committed ‘in a private capacity’ is an unconvincing argument. It is worth remembering that, for the purposes of determining the existence of an internationally wrongful act committed by a state, acts committed by a state official which exceed his authority or contravene instructions are considered to be acts committed in an official capacity as long as the act was done on behalf of the state.¹³

⁹ See Wirth, *supra* note 1; and the Dissenting Opinion of Judge Van den Wyngaert, para. 36.

¹⁰ See the speeches of Lords Nicholls and Steyn, in the judgment delivered by the House of Lords on 25 November 1998 in *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet (No. 1)*, 37 ILM (1998) 1333, at 1337–1338; and of Lord Hutton in the judgment delivered by the House of Lords on 24 March 1999 in *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet (No. 3)*, 38 ILM (1999) 638. The question discussed by the House of Lords was not, however, totally identical with the one considered here. As we know, the UK’s State Immunity Act 1978, taken together with the UK’s Diplomatic Privileges Act 1964 to which it refers, gives a foreign Head of State immunity from UK criminal jurisdiction for acts performed ‘in the exercise of his functions as a head of State’ (as Lord Hutton says). Consequently, the judges asked themselves not so much whether the acts of torture attributed to Pinochet were to be regarded as acts done in a ‘private’ or ‘official’ capacity, but whether acts considered criminal by international law could come within the functions of a Head of State.

¹¹ See the Joint Separate Opinion by Judges Higgins, Kooijmans and Buergenthal, para. 85.

¹² Cassese, *supra* note 1.

¹³ According to Article 7 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted on second reading by the International Law Commission in 2001: ‘The conduct of an organ of a State ... shall be considered an act of the State under international law if the organ ... acts in that capacity, even if it exceeds its authority or contravenes instructions.’ The comment on the Article specifies: ‘The State cannot take refuge behind the notion that, according to the provisions of its internal law or to instructions which may have been given to its organs or agents, their actions or omissions ought not to have occurred ... This is so even where the organ ... in question has overtly committed

Should one nevertheless consider international crimes to be acts committed by the state official in a private capacity, this solution would produce a more negative outcome than the harm it was intended to remedy. As rightly pointed out by Wirth,¹⁴ this would mean that the conduct could not be attributed to the state at the international level, thus making it impossible to assert the international responsibility of the state for those acts (in international law, one cannot attribute to the state the conduct of a person who, though a state official, acted in a private capacity).

The International Law Commission stated in Article 5 of its Draft Articles on State Responsibility adopted on first reading¹⁵ that, in order for an internationally wrongful act of the state to arise, only conduct by a state official acting in his capacity as such is attributable to the state. In the Draft Articles adopted on second reading, this principle, though not explicitly stated in the text of the Articles, was clearly stated in the commentary to Article 4 (regarding attribution to the state of the conduct of persons having the status of state organs¹⁶) and in the commentary to Article 7 (regarding attribution to the state of the conduct of state officials acting in their capacity as such but outside their competence or in breach of instructions received). The commentary to the latter Article states:

The central issue to be addressed in order to determine the attribution to the State of unauthorized conduct of official bodies is whether the conduct was performed by the body in an official capacity or not. Cases where officials acted in their capacity as such, albeit unlawfully or contrary to instructions, must be distinguished from cases where the conduct is so removed from the scope of their official functions that it should be assimilated to that of private individuals, not attributable to the State.¹⁷

The commentary goes on to clarify that, as Article 7 provides that the conduct is attributable to the state ‘if the organ acts in that capacity’, ‘[t]his indicates that the conduct referred to comprises only the actions and the omissions of organs purportedly or apparently carrying out their official functions, and not the private acts or omissions of individuals who happened to be organs or agents of the State’.¹⁸

If the conduct is not attributable to the state, it cannot constitute an internationally wrongful act of the state. Consequently, the state would not be responsible for such conduct under international law. In other words, other states, including any state that may have been directly affected, have no right to demand cessation of the

unlawful acts under the cover of its official status or has manifestly exceeded its competence.’ See point 2 in the comment on Article 7, *Report of the ILC to the General Assembly on the Work of Its Fifty-Third Session*, Doc. A/56/10.

¹⁴ Wirth, *supra* note 1.

¹⁵ The Article was worded as follows: ‘[C]onduct of any State organ having that status under the internal law of that State shall be considered as an act of the State concerned under international law, provided that organ was acting in that capacity in the case in question.’ *Yearbook of the ILC*, vol. II (1973) 191.

¹⁶ See point 13 in the commentary to Article 4 (*ibid*, *supra* note 14).

¹⁷ See point 7 in the commentary to Article 7 (*ibid*).

¹⁸ See point 8 in the commentary to Article 7 (*ibid*).

conduct, *restitutio in pristinum*, compensation for damages for the victims or guarantees of non-repetition of the conduct.

If the view that international crimes are acts always carried out in a private capacity here is accepted, it would follow that the state could, for instance, be responsible under international law for an act of its organs that did not respect the immunity from jurisdiction and the inviolability of the Minister for Foreign Affairs of another state (even where the organs had acted in breach of domestic law), but not for genocide, torture or war crimes committed by its organs, since these latter acts would not be acts committed in an official capacity, but rather acts committed by state officials in a private capacity.

It might, however, be objected that there is always the possibility of asserting the state's responsibility for a wrongful omission, that is, for the conduct of other organs of the state who failed to prevent the officials from committing the genocide, torture etc., or to punish them. However, it is unsatisfactory that a state should be called to account only for failing to prevent the commission of the crimes or for failing to punish the wrongdoers, and not be called to account for the crimes themselves. In any case, why should the conduct of a Head of State or other state official planning and implementing genocide not be regarded as an act of the state at international level, while the conduct of other state officials in not preventing or punishing such acts is regarded as an act of the state? Taking this argument to its extreme, ought we not, then, to regard the latter conduct as also having been carried out 'in a private capacity'?

4 Conclusion

The Court's *obiter dictum* leaves us with the following alternatives. One either accepts the interpretation that the Court meant to include the conduct of state organs constituting war crimes or crimes against humanity among acts done 'in an official capacity'. If so, it must be concluded that, according to the Court, a state is under the obligation not to subject to its jurisdiction the organs of another state having committed such crimes even after the officials in question leave office (except in the very rare case where they have acted, not on behalf of the state, but as private individuals), though the possibility remains open to invoke state responsibility at the international level for the same conduct.

Alternatively, one accepts the interpretation that, for the Court, these crimes are always acts committed 'in a private capacity'. In this case, it must be concluded that, for the Court, it is possible to bring before the court of a state the officials of foreign states who have committed international crimes once they have left office — provided that the court in question has jurisdiction under international law — while ruling out the possibility of considering such conduct as a wrongful act of the state at the international level, and consequently of invoking state responsibility.

Whichever interpretation of the *obiter dictum* one wishes to take, the Court's contention seems open to criticism.