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When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case

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Abstract

The recent judgment of the ICJ has indubitably shed light on a rather obscure area of international law, that is, the legal regulation of the personal immunities of foreign ministers. However, one should express serious misgivings about some of the Court's conclusions. In particular, the Court, besides omitting to pronounce upon the admissibility of universal criminal jurisdiction, failed both (i) to distinguish between so-called functional immunities (inuring to foreign ministers and, more generally, to all state agents with respect to acts performed in their official capacity), and personal immunities, and (ii) to refer to the customary rule lifting functional immunities in case of international crimes. It follows that, in the opinion of the Court, foreign ministers (and other state officials), after leaving office, may be prosecuted and punished for international crimes perpetrated while in office only if such crimes are regarded as acts committed in their 'private capacity', a conclusion that is hardly consistent with the current pattern of international criminality and surely does not meet the demands of international criminal justice.

1 Introduction

The recent judgment of the International Court of Justice in the *Case Concerning the Arrest Warrant of 11 April 2000* (the *Congo v. Belgium*), delivered on 14 February 2002, confirms the tendency of the Court to be seized and deal with topical issues confronting the international community. States, particularly developing countries,

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increasingly turn to the Court for the settlement of disputes that touch upon sensitive questions arising in their international dealings.

In this case the Congo claimed that Belgium, by issuing an arrest warrant against the then Congolese foreign minister for grave breaches of the Geneva Conventions of 1949 and for crimes against humanity allegedly perpetrated before he took office, breached international law. In particular, according to the Congo, Belgium violated the 'principle that a state may not exercise its authority on the territory of another state', the principle of sovereign equality of member states of the United Nations, as well as the diplomatic immunity of the Minister for Foreign Affairs of a sovereign state. Belgium contended, instead, that there had been no breach of international law, as the foreign minister concerned enjoyed immunity from prosecution while on official visits to Belgium; he was only liable for criminal prosecution during visits in a private capacity to Belgium.

Clearly, the question underlying this dispute belongs in the range of crucial issues facing the current international community: the tension between the need to safeguard major prerogatives of sovereign states and the demands of emerging universal values which may undermine those prerogatives. On the one hand, states cling to the notion that, when it comes to the exercise of criminal jurisdiction, it is up to the territorial or national state to prosecute and punish criminal offences. On the other hand, faced with the failure of territorial or national states to punish odious international crimes, there is a tendency to shift from territoriality or nationality: states other than the territorial or national state claim the right to exercise extraterritorial criminal jurisdiction over those crimes. Similarly, international criminal tribunals or courts are set up, precisely to substitute for states unable or unwilling to prosecute and try alleged authors of international crimes.

The Court has handed down a judgment that is remarkable for its brevity: it is both concise and stringent. The Court has pronounced only upon the scope of immunities accruing to foreign ministers and ruled that Belgium violated international law, as those immunities cover all acts performed abroad by incumbent foreign ministers, designed as they are to ensure the effective performance of their functions on behalf of their respective states. According to the Court, a foreign minister enjoys immunities from foreign criminal jurisdiction and inviolability, whether the minister is on foreign territory on an official mission or in a private capacity, whether the acts are performed prior to assuming office or while in office, and whether the acts are performed in an official or private capacity. The Court has, however, excluded that the granting of such immunities could imply impunity in respect of any crime that a foreign minister may have committed. In an important passage of the judgment, amounting to an *obiter dictum*, the Court has envisaged four exceptions in this regard,¹ none of which was present in the case at issue.

¹ See the Judgment, at para. 61; see *infra*.

2 The Court's Spelling Out of the Law on the Personal Immunities Accruing to Foreign Ministers

The judgment under discussion makes an important contribution to a clarification of the law of (what one ought to correctly term) *personal* immunities (including inviolability) of foreign ministers. This is an area where state practice and case law are lacking. To make its legal findings, the Court, therefore, did not have to establish the possible content of customary law. Rather, it logically inferred from the rationale behind the rules on personal immunities of senior state officials, such as heads of states or government or diplomatic agents, that such immunities must perforce prevent any prejudice to the 'effective performance' of their functions. They therefore bar any possible interference with the official activity of foreign ministers. It follows that an incumbent foreign minister is immune from jurisdiction, even when he is on a private visit or acts in a private capacity while holding office. Clearly, not only the arrest and prosecution of such a minister while on a private visit abroad, but also the mere issuance of an arrest warrant, may seriously hamper or jeopardize the conduct of international affairs of the state for which that person acts as a foreign minister.

By and large, this conclusion is convincing, despite the powerful objections raised by Judge Al-Khasawneh in his important Dissenting Opinion.² The Court must be commended for elucidating and spelling out an obscure issue of existing law. In so doing it has considerably expanded the protection afforded by international law to foreign ministers. It has thus given priority to the need for foreign relations to be conducted unimpaired.

In contrast, one ought to express misgivings on two issues. First, the Court's failure to rule, prior to tackling the question of immunity from jurisdiction, on whether states are authorized by international law to exercise extraterritorial criminal jurisdiction. Second, the Court's failure to distinguish between immunities inuring to state officials with respect to acts they perform in their official capacity (so-called functional or *ratione materiae* immunities) and immunities from which some categories of state officials benefit not only for their private life but also, more generally, for any act and transaction while in office (so-called personal immunities). This second flaw involves, as we shall see, legal consequences that prove extremely questionable.

3 The Court's Failure to Pronounce on Belgium's Assertion of Absolute Universal Jurisdiction

It would have been logical for the Court to first address the question of whether Belgium could legitimately invoke universal jurisdiction and then, in case of an affirmative answer to this question, decide upon the question of whether the Congolese foreign minister was entitled to immunity from prosecution and punishment. That the Court should have proceeded in this manner has been cogently argued by a number of Judges in their Separate Opinions (President Guillaume, Judges

² See Dissenting Opinion, paras 1–2.

Ranjeva, Higgins, Kooijmans, Buergenthal, Rezek)³ as well as by Judge ad hoc van den Wyngaert in her Dissenting Opinion. It is therefore not necessary to dwell on the matter. Suffice it to point out that the Court has thus missed a golden opportunity to cast light on a difficult and topical legal issue.

Fortunately, some Judges deemed it necessary to discuss the point in their Separate Opinions; they have thus made a significant contribution to elucidating existing law. For instance, some of these Separate Opinions clarify terminology. President Guillaume distinguishes between universal jurisdiction (*compétence universelle*) denoting jurisdiction over extraterritorial crimes by foreigners, based on the presence of the accused in the forum state, and universal jurisdiction by default (*compétence universelle par défaut*), that is, jurisdiction asserted by a state without any link with the crime or the defendant, not even his presence on the territory, when that jurisdiction is first exercised (by initiating investigations, issuing an arrest warrant, etc.).⁴ Judges Higgins, Kooijmans and Buergenthal distinguish instead between ‘universal jurisdiction properly so called’, that is jurisdiction over crimes committed abroad by foreigners against foreigners, without the accused being in the territory of the forum state, and ‘territorial jurisdiction over persons for extraterritorial events’, that is jurisdiction over persons present in the forum state who have allegedly committed crimes abroad.⁵ Perhaps, in order to emphasize the ‘meta-national’ dimension of the jurisdiction, one should speak of ‘absolute universal jurisdiction’ (that is, jurisdiction over offences committed abroad by foreigners, the exercise of which is not made subordinate to the presence of the suspect or accused on the territory), and ‘conditional universal jurisdiction’ (which is instead contingent upon the presence of the suspect in the forum state).

As to the question of whether either category of jurisdiction is authorized by international law, President Guillaume answers in the negative, holding the view that international law only authorizes, at customary level, universal jurisdiction by default for piracy, whereas treaties may, and indeed do, oblige contracting parties to exercise universal jurisdiction proper.⁶ Judge Rezek takes a similar view.⁷

In contrast, Judges Higgins, Kooijmans and Buergenthal maintain that international customary law, in addition to authorizing ‘universal jurisdiction properly so called’ over piracy, does not prohibit such jurisdiction for other offences, subject to a set of conditions they carefully set out.⁸ The enunciation of these conditions —

³ See President Guillaume’s Separate Opinion, paras 1–17; Judge Ranjeva’s Opinion, paras 1–12; Judges Higgins, Kooijmans, Buergenthal’s Joint Separate Opinion, paras 2–18; Judge Rezek’s Opinion, paras 3–11; Ad hoc Judge van den Wyngaert, paras 4 and 7.

⁴ See paras 5, 9.

⁵ See paras 31–52.

⁶ See paras 5–9, 12–13.

⁷ See para. 6.

⁸ These conditions are as follows: (i) the state intending to prosecute a person must first ‘offer to the national state of the prospective accused person the opportunity itself to act upon the charges concerned’; (ii) the charges may only be laid by a prosecutor or investigating judge who is fully independent of the

whether or not one can fully subscribe to all of them⁹ — indubitably constitutes a commendable contribution to the careful delineation of general legal principles on the question of universal jurisdiction. It seems correct to hold the view that universal jurisdiction properly so called (or, according to the terminology I would prefer, absolute universal jurisdiction) is *permitted* by general international law, subject to the conditions set out by these three distinguished Judges — regardless of whether or not, as a matter of legal policy, the upholding of absolute universal jurisdiction is considered *inadvisable* in current international relations¹⁰ or even likely to lead to the eventual substitution of ‘the tyranny of judges for that of governments’.¹¹

An issue on which most judges seem to agree and is perhaps in need of some clarification is the view that under customary law *piracy* constitutes the only case where states are undoubtedly authorized to exercise ‘universal jurisdiction properly so called’ (or absolute universal jurisdiction). With respect, it may be contended that in fact the exercise of ‘universal jurisdiction’ by states over pirates belongs to the category of ‘territorial jurisdiction over persons for extraterritorial events’ (or conditional universal jurisdiction); in other words, it is predicated on the presence of the accused on the territory of the forum state. States *may try pirates only after apprehending them*, hence only when the pirates are on their territory or at any rate under their physical control: this is a typical application of the well-known maxim *ubi te invenero, ibi te judicabo*. One of the reasons most likely motivating this legal regulation is that, at a time when piracy was rife and all states of the world were therefore eager to capture persons engaging in this crime, potentially innumerable ‘positive conflicts of jurisdiction’ were settled in this way. Indeed, if all states had been

government; (iii) the prosecution must be initiated at the request of the persons concerned, for instance at the behest of the victims or their relatives; (iv) criminal jurisdiction is exercised over offences that are regarded by the international community as the most heinous crimes; (v) jurisdiction is not exercised as long as the prospective accused is a foreign minister (head of state, or diplomatic agent) in office; after he leaves office, it may be exercised over ‘private acts’ (see paras 59–60 and 79–85).

⁹ Some of the conditions may however give rise to objection. For instance, one fails to see why, in the first of the five conditions set out by the three judges, it is required that ‘the national state of the prospective accused’ be ‘offered’ the opportunity to act upon the charges. Why should one leave aside the territorial state (normally the *forum conveniens*) or the state of which the victim is a national? In addition, why should one envisage that the state exercising universal jurisdiction should ‘offer’ to another state the chance to prosecute the suspect? To make such an offer would involve shifting the whole matter from the judiciary to foreign ministries and might imply making a bilateral agreement. It would be easier to require that the court intending to exercise jurisdiction should first establish whether courts of the territorial or national state have (deliberately) failed to prosecute the suspect at issue; only then should a court proceed to assert universal jurisdiction.

It is submitted that also the fifth condition should be couched differently, to take account of the existence of the customary rule referred to in the text above, and which is intended to remove functional immunity in the case of international crimes.

¹⁰ I, for one, have expressed doubts about the expediency of upholding ‘absolute universality’ rather than ‘conditional universality’, at least with regard to persons having the status of senior state officials, in my paper ‘Y a-t-il un conflit insurmontable entre souveraineté des Etats et justice pénale internationale?’, in A. Cassese and M. Delmas-Marty (eds), *Crimes internationaux et juridictions internationales* (2002), at 22–28.

¹¹ See Kissinger, ‘The Pitfalls of Universal Jurisdiction’, 80 *Foreign Affairs* (2001), at 86 (and see 86–92).

entitled to claim jurisdiction over pirates wherever they were, very many positive conflicts would have ensued. Instead, granting jurisdiction to the state apprehending the pirates neatly resolved the matter. Furthermore, had the universal jurisdiction over pirates been absolute (or ‘universal properly so called’), any state of the world could have issued arrest warrants against pirates. State practice, however, does not show any such trend, and this, together with national legislation¹² and the restatement in the 1932 Harvard Law School Draft Convention and Comment¹³ bears out the ‘conditional’ nature of such category of universal jurisdiction. True, under customary law, restated in Article 105 of the 1982 Convention on the Law of the Sea, ‘on the high seas, or in any other place outside the jurisdiction of any State’, every state may seize a pirate ship (or aircraft) and arrest the pirates. It would seem, however, that this action does not constitute an exercise of jurisdiction in the sense used by the various Judges in their Opinions, that is, *judicial jurisdiction*. It only constitutes an exceptionally authorized use of enforcement powers over private ships not belonging to the capturing state (*executive jurisdiction*). Jurisdiction, in the sense of exercise of judicial power by courts, will follow. It is the state that has the alleged pirates in its hands that will exercise jurisdiction: as Article 105 provides, ‘The courts of the State which carried out the seizure may decide upon the penalties to be imposed.’¹⁴

Probably, the twofold significance of the word ‘jurisdiction’ accounts for the questionable language one can find in some of the Separate Opinions. It is well known that ‘jurisdiction’ means, depending on the context, *either* effective authority or control by a state, or state officials, over persons or territory (*executive jurisdiction*), *or* exercise of judicial authority by courts of law (*judicial jurisdiction*). The two notions ought to be distinguished. It would seem that when speaking of piracy and stating that jurisdiction over pirates is ‘universal’ or ‘universal properly so called’ the Judges in question referred wrongly to the second meaning.

¹² See, e.g., Section 290 of the US Criminal Code of 4 March 1909 (35 Stat. 1088) (‘Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life’ (in 26 *AJIL* (1932) *Suppl.*, at 899), Article 20(5) of the 1890 Penal Code of Colombia (‘National or foreigners who commit acts of piracy and are apprehended by the Colombian authorities’ ‘shall be punished according to this Code’ (*ibid.*, at 955), Article 2(2) of the 1916 Penal Code of Panama (*ibid.*, at 997–998), Article 4(9) of the Penal Code of Venezuela, of 1926 (*ibid.*, at 1013). However, most national laws do not specify whether the pirate must be in the custody of the prosecuting state, although the laws of Greece (*ibid.*, at 973–974) and Brazil (*ibid.*, at 908) seem to envisage a very broad jurisdiction, regardless of the presence of the pirate on the territory.

¹³ Under Article 14(1) of the Harvard Law School Draft Convention, ‘A state which has lawful custody of a person suspected of piracy may prosecute and punish that person.’ (26 *AJIL* (1932), *Suppl.*, at 745). In the Comment on Article 14 the views of such writers as Halleck, Pradier-Fodéré, Bluntschli, as well as the *Report of the Sub-Committee of the League of Nations Committee of Experts for the Progressive Codification of International Law* are quoted in support of the Article (*ibid.*, at 852–854).

¹⁴ In the Comment on the ‘Draft Convention, with Comment’ prepared in 1935 by the ‘Research in International Law of the Harvard Law School’, it is stated that in the case of the crime of piracy ‘the competence to prosecute and punish may be founded simply upon a lawful custody of the person charged with the offence’ (29 *AJIL* (1935), Supplement, at 564; see also 565).

4 Is Absolute Universal Jurisdiction Admissible?

Let us return to a major legal issue, namely the view set out by the three Judges referred to above, that absolute universal jurisdiction is legally admissible under international law. It seems appropriate to make a few points, which are all intended to bear out and fortify this view.

First, one should not be misled by the fact that in the case at issue and in other similarly striking cases, the person accused held a high position in government. Universal jurisdiction may also be, and indeed is, envisaged for cases involving *lower-rank* officers or state agents, or even *civilians*, culpable of alleged crimes such as torture, war crimes, crimes against humanity, and so on. With regard to such persons, one is at a loss to understand why, if the national or territorial state fails to take proceedings, another state should not be entitled to prosecute and try them in the interest of the whole international community. As far as these persons are concerned, the initiation of criminal proceedings in their absence, the gathering of evidence and the issuance of an arrest warrant would have the advantage of making their subsequent arrest and trial possible. Normally these persons are not well known, and their travels abroad do not make news, unlike those of foreign ministers or heads of state. Hence the only way of bringing them to trial is to issue arrest warrants so that they are at some stage apprehended and handed over to the competent state.

Secondly, it is commonly admitted that under *traditional* international law states are allowed to act upon the so-called protective principle, that is, for the safeguard of national interests, and can thus prosecute foreigners who commit crimes abroad (for instance, counterfeiting of national currency). In other words, states are authorized to take proceedings with regard to extraterritorial acts whose link with the forum state exclusively lies in the infringement by these acts of a *national interest* of that state. If this is so, it would seem warranted to hold that in the *present world community*, where *universal values* have emerged that are shared by all states and non-state entities, states should be similarly authorized to act upon such values. To put it differently, it would seem that any state is currently authorized to try foreigners who perpetrate abroad criminal offences which have no personal or territorial link with that state, but which attack and seriously infringe upon those universal values; in so doing, the state acts not to protect a national interest but with a view to safeguarding values of importance for the entire world community.

Thirdly, it is a fact that United States courts have for many years asserted universal jurisdiction by default, admittedly in *civil* proceedings, over serious violations of international law perpetrated by foreigners abroad.¹⁵ Although civil jurisdiction is less intrusive than criminal jurisdiction, when it is exercised over foreigners who possess official status (for instance, high-ranking state officials), it nevertheless amounts to interference with the internal organization of foreign states. Whether or not this trend of US courts is objectionable as a matter of policy, or on legal grounds, it is a fact that it has not been challenged, or in other words has been acquiesced in, by other states.

¹⁵ See, e.g., Damrosch, 'Enforcing International Law through Non-Forcible Measures', 269 *HR* (1997), at 161–167.

This implicit acceptance through non-contestation would seem to evidence the generally shared legal conviction that, in case of serious and blatant breaches of universal values, national courts are authorized to take action, subject to fulfilment of some fundamental requirements, such as ensurance of a fair trial.

Fourthly, for the purpose of confirming that customary international law or general principles of international law do indeed authorize — subject to the conditions set out by the Judges at issue, or to similar conditions¹⁶ — the exercise of absolute universal jurisdiction, one ought to also take into account some significant elements of state practice. I will briefly recall some of these elements.

Article 23(4) of the Spanish law of 1985 as amended in 1999¹⁷ provided for absolute universal jurisdiction even in advance of the Belgian law. Furthermore, the relevant Spanish case law is worthy of mention (in addition to a judgment of the Constitutional Court,¹⁸ the decisions of the *Audiencia Nacional* in *Pinochet*,¹⁹ *Scilingo*²⁰ and *Fidel Castro*²¹ should be recalled). In particular, *Fidel Castro* bears

¹⁶ See my remarks in *supra* note 9.

¹⁷ Under Article 23 para. 4 that Spanish jurisdiction also extends to 'facts committed by Spaniards or foreigners abroad and liable to be considered, under Spanish law, as one of the following crimes: (a) Genocide; (b) Terrorism ... (g) any other crime that, pursuant to international treaties or conventions, must be prosecuted in Spain'.

¹⁸ See the judgment of 10 February 1997 (no. 1997/56). The ship of the accused (flying Panama's flag) had been chased and seized on the high seas for drug trafficking; the accused had been prosecuted before Spanish courts for one of the crimes over which the Law of 1985 granted universal jurisdiction to those courts. In its lengthy decision, the Constitutional Court took the opportunity to state in an *obiter dictum* that Article 23 para. 4 of the 1985 Law, granting universal jurisdiction, was in keeping with the Constitution: the Spanish legislator had 'conferred a universal scope (*un alcance universal*) on the Spanish jurisdiction over those crimes, corresponding to their gravity and to the need for international protection' (Legal Ground 3 A). Spanish text on CD Rom on Spanish Legislation and case law, EL DERECHO, 2002, Constitutional decisions.

¹⁹ See, in particular, the Order (*auto*) of 5 November 1998 (no. 1998/22605). In this order the Spanish National High Court (*Audiencia nacional*) confirmed that national courts have jurisdiction over genocide and terrorism committed in Chile (see Legal Grounds nos 3 and 4; as for torture, where the Court held that Spanish jurisdiction was based on Article 23(4)(g), on the strength of the 1984 Torture Convention, see Legal Ground no. 7). It should be noted that the Court concluded that 'Spain has jurisdiction to judge the acts (*conocer de los hechos*), based on the principle of universal prosecution of certain crimes ... enshrined in our domestic law. It also has a legitimate interest (*interés legítimo*) in exercising that jurisdiction as more than fifty Spaniards were killed or made to disappear in Chile, victims of the repression reported in the orders' (Legal Ground no. 9). In other words, as is apparent both from the words reported and the entire text of the decision, Spanish jurisdiction was not grounded on passive nationality; the presence of Spaniards among the victims of the alleged crimes only amounted to a 'legitimate interest' of Spain in the exercise of universal jurisdiction. This order was confirmed by the decision of the *Audiencia Nacional* of 24 September 1999 (no. 1999/28720). There, the Court reiterated that the Spanish Court had jurisdiction over the crimes attributed to Pinochet, namely genocide, terrorism and torture (Legal Grounds 1 and 10–12), and also stated that Pinochet could not invoke the immunities pertaining to heads of states, for he no longer held this status (Legal Ground no. 3). For the (Spanish) text of the order and the subsequent decision, see the Spanish case law on CD Rom, EL DERECHO, 2002, Criminal jurisprudence, as well as on line: www.derechos.org/nizkor/espana.

²⁰ See the Order (*auto*) of 4 November 1998 (no. 1998/22604), very similar in its tenor to that of 5 November referred to in *supra* note 17.

²¹ See Order (*auto*) of 4 March 1999 (no. 1999/2723). The *Audiencia Nacional* held that the Spanish Court could not exercise its criminal jurisdiction, as provided for in Article 23 of the Law on the Judicial Power,

underlining. This case was material to the matter submitted to the Court, for it dealt with charges laid against an incumbent head of state. The Spanish court ruled that, as long as he was in office, Fidel Castro could not be prosecuted in Spain, not even for international crimes envisaged under the Spanish law of 1985. In addition, it is worth considering a recent German case, *Sokolović*, where the *Bundesgerichtshof* ruled that when the jurisdiction of German courts is provided for in an international treaty, those courts are entitled to try genocide and other international crimes even absent any link between the crime, or the offender, or the victim, and Germany.²² Also worthy of note is that in the course of the drafting process of the Statute of the International Criminal Court, Germany forcefully expressed the view that international customary law at present authorizes universal jurisdiction over major international crimes.²³ In line with this view, Article 1 of the bill on international

for the crimes attributed to Fidel Castro. He was an incumbent head of state, and therefore the provisions of Article 23 could not be applied to him because they were not applicable to heads of states, ambassadors etc. in office, who thus enjoyed immunity from prosecution on the strength of international rules to which Article 21(2) of the same Law referred (this provision envisages an exception to the exercise of Spanish jurisdiction in the case of 'immunity from jurisdiction or execution provided for in rules of public international law'). See Legal Grounds nos. 1–4. The Court also stated that its legal finding was not inconsistent with its ruling in *Pinochet*, because Pinochet was a former head of state, and hence no longer enjoyed immunity from jurisdiction (see Legal Ground no. 5). For the (Spanish) text of the order, see the CD Rom, EL DERECHO, 2002, Criminal case law.

²² The German Criminal Code contains a provision (Section 6 para. 1), whereby 'Regardless of the law of the place of commission, the German criminal law is also applicable to the following acts committed outside of Germany: para. 1. Genocide' (whereas Section 6 para. 9 refers to 'Acts committed abroad which are made punishable by the terms of an international treaty binding in the Federal Republic of Germany'). While in the past courts tended to interpret Sections 6 paras 1 and 9 to the effect that in any case a link was required with Germany for German courts to exercise jurisdiction (see thereon Ambos and Wirth, 'Genocide and War Crimes in the Former Yugoslavia before German Criminal Courts', in H. Fischer, C. Kress and S. Rolf Lüder (eds), *International and National Prosecution of Crimes under International Law* (2001), 778), in *Sokolović* the Federal Supreme Court held that a factual link was not required. The Court noted that in its decision of 29 November 1999 that the Court of Appeal (*Oberlandsgericht Düsseldorf*), following the traditional German case law, had held that a factual link was required by law (*legitimierender Anknüpfungspunkt*) for a German court to exercise jurisdiction over crimes committed abroad by foreigners (in the case at issue the offender was a Bosnian Serb accused of complicity in genocide perpetrated in Bosnia). The Court of Appeal had found this link in the fact that the accused had lived and worked in Germany from 1969 to 1989 and had thereafter regularly returned to Germany to collect his pension and also to seek work. After recalling these findings by the Court of Appeal, the Supreme Court added: 'The Court however inclines, in any case under Article 6 para. 9 of the German Criminal Code, not to hold as necessary these additional factual links that would warrant the exercise of jurisdiction . . . Indeed, when, by virtue of an obligation laid down in an international treaty, Germany prosecutes and punishes under German law an offence committed by a foreigner abroad, it is difficult to speak of an infringement of the principle of non-intervention' (Judgment of 21 February 2001, 3 StR 372/00, still unreported, at 19–21 of the typescript in German).

²³ In a document submitted in 1998 to the Preparatory Committee drafting the Statute, Germany stated the following: 'Under current international law, all States may exercise universal criminal jurisdiction concerning acts of genocide, crimes against humanity and war crimes, regardless of the nationality of the offender, the nationality of the victims, and the place where the crime was committed. This means that, in a given case of genocide, crime against humanity or war crimes, each and every state can exercise its own national criminal jurisdiction, regardless of whether the custodial State, territorial State or any other

criminal law proposed by the German government and now pending before the German *Bundesrat* (Senate), namely the *Entwurf eines Gesetzes zur Einführung des Völkerstrafgesetzbuches*, provides that German law applies to all criminal offences against international law envisaged in the law (namely genocide, crimes against humanity, war crimes), even when the criminal conduct occurs abroad and does not show any link with Germany.²⁴

All of these elements of state practice, in addition to showing that states tend increasingly to resort to absolute universal jurisdiction for the purpose of safeguarding universal values, also point to the gradually increasing diffusion and acceptance of the notion that this form of jurisdiction is regarded as admissible under international law.

5 The Court's Failure to Distinguish between Immunities *Ratione Materiae* (or Functional Immunities) and Immunities *Ratione Personae* (or Personal Immunities)

Let us move on to the second issue on which one can respectfully disagree with the Court, namely its failure to draw a distinction between two different categories of immunities from foreign jurisdiction: (i) those which a foreign minister, *like any state official*, enjoys for any official act (so-called functional, or *ratione materiae*, or organic immunities), and (ii) those which instead are intended to cover any act that *some classes* of state officials perform while in office (so-called personal or, with regard to diplomatic agents, diplomatic immunities).²⁵

The first category is grounded on the notion that a state official is not accountable to other states for acts that he accomplishes in his official capacity and that therefore must be attributed to the state. The second category is predicated on the notion that any activity of a head of state or government, or diplomatic agent²⁶ or foreign minister must be immune from foreign jurisdiction to avoid foreign states either infringing sovereign prerogatives of states or interfering with the official functions of a foreign state agent under the pretext of dealing with an exclusively private act (*ne impediatur*

State has consented to the exercise of such jurisdiction beforehand. This is confirmed by extensive practice.' (UN Doc.A/AC.249/1998/DP.2, 23 March 1998).

²⁴ 'Dieses Gesetz gilt für alle in ihm bezeichneten Straftaten gegen das Völkerrecht, für die in ihm bezeichneten Verbrechen auch dann, wenn die Tat im Ausland begangen wurde und keinen Bezug zum Inland aufweist.' (see Bundesrat, Drucksache 29/02, 18 January 2002, *Gesetzentwurf der Bundesregierung*, at 3; German text online at www.bmj.bund.de/images/10185.pdf). See the precisions made in the Commentary, at 29).

²⁵ Perhaps the Court hinted at this distinction in para. 60 of its judgment, when it stated that 'Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibilities'. However, what the Court states both before and after these propositions would seem to disregard the fundamental importance of the distinction referred to above.

²⁶ However, as is well known, international rules provide for exceptions to immunities of diplomatic agents for private acts (see Article 31 para. 1 of the Vienna Convention on Diplomatic Relations of 18 April 1961).

legatio). This distinction, oddly denied by Belgium in its Counter-Memorial,²⁷ is made in the legal literature,²⁸ and is based on state practice. With regard to the first class of immunities, suffice it to refer to the famous *McLeod* incident and the *Rainbow Warrior* case²⁹ as well as some recent judicial decisions (one can mention the judgment rendered by the Supreme Court of Israel in *Eichmann*³⁰ and that delivered by the ICTY Appeals Chamber in *Blaskić (subpoena)*³¹).

The distinction is relevant, for the *first class of immunity* (i) relates to substantive law, that is, it is a substantive defence (although the state agent is not exonerated from compliance with either international law or the substantive law of the foreign country, if he breaches national or international law, this violation is not legally imputable to him but to his state; in other words, *individual* criminal or civil liability does not even arise); (ii) covers official acts of any *de jure* or *de facto* state agent; (iii) does not cease at the end of the discharge of official functions by the state agent (the reason being that the act is legally attributed to the state, hence any legal liability for it may only be incurred by the state); (iv) is *erga omnes*, that is, may be invoked towards any other state.

In contrast, the *second class of immunities* (i) relates to procedural law, that is, it renders the state official immune from civil or criminal jurisdiction (it is a procedural

²⁷ See Counter-Memorial of the Kingdom of Belgium, of 28 September 2001, at 33, para 3.5.141.

²⁸ See, e.g., G. Morelli, *Nozioni di diritto internazionale* (1943, 7th ed., 1967), at 215–216; H. Kelsen, *Peace through Law* (1944), at 81–86; Niboyet, 'Immunité de juridiction et incompétence d'attribution', 39 *RC DIP* (1950), 139; H. Kelsen, *Principles of International Law* (1952), at 236–237 (according to Kelsen, 'the principle that no state has jurisdiction over another state excludes individual — civil or criminal — responsibility for acts of state'); G. Dahm, *Völkerrecht*, vol. I, (1958), at 225, 237, 303–305, 338–339 (also for Dahm the immunity of state organs for officials acts is a consequence of state immunity); G. Sperduti, *Lezioni di diritto internazionale* (1958), at 117–121; Giuliano, 'Les relations et immunités diplomatiques', in 100 *HR* (1960-II), at 166–180 (only with reference to the functions of diplomatic agents); van Panhuys, 'In the Borderland between the Act of State Doctrine and Questions of Jurisdictional Immunities', 13 *ICLQ* (1964), 1193, at 1205–1208; Seyersted, 'Jurisdiction over Organs and Officials of States, the Holy See and Intergovernmental Organizations', 14 *ICLQ* (1965), 31–82 and 493–527, at 33–43; Dinstein, 'Diplomatic Immunity from Jurisdiction *ratione materiae*' 15 *ICLQ* (1966), at 76–89; Bothe, 'Die strafrechtliche Immunität fremder Staatsorgane', in 31 *Zeit. Ausl. Öff. Recht Völk* (1971) 246; Akehurst, 'Jurisdiction in International Law' 46 *BYbIL* (1972–3), 240–244; A. Verdross and B. Simma, *Universelles Völkerrecht* (3rd ed., 1984), at 773–774 (para. 1177); R. Jennings and A. Watts (eds), *Oppenheim's International Law*, vol. I (9th ed., 1992), at 346; I. Brownlie, *Principles of Public International Law* (5th ed., 1998), at 361–362; P. De Sena, *Diritto internazionale e immunità funzionale degli organi statali* (1996), esp. at 109–250; P. Malanczuk, *Akehurst's Modern Introduction to International Law* (7th ed., 1997), at 122; A. Cassese, *International Law* (2001), at 93–96; Zappalà, 'Do Heads of States in Office Enjoy Immunity from Jurisdiction for International Crimes? The *Ghaddafi* Case before the French *Cour de Cassation*', 12 *EJIL* (2001), 595; Gaeta, 'Official Capacity and Immunities', in A. Cassese, P. Gaeta and J. Jones (eds), *The Rome Statute of the International Criminal Court — A Commentary*, vol. 1 (2002) 975–1002.

²⁹ For the *McLeod* case, see *British and Foreign Papers*, vol. 29, at 1139, as well as Jennings, 'The *Caroline* and *McLeod* Cases', 32 *AJIL* (1938), at 92–99; for the *Rainbow Warrior* case, see *UN Reports of International Arbitral Awards*, XIX, at 213. See also the *Governor Collot* case, in J. B. Moore, *A Digest of International Law*, vol. II (1906), at 23–24.

³⁰ Judgment of the Supreme Court of Israel of 29 May 1962, in 36 *ILR*, 277–342, at 308–309.

³¹ See *Blaskić (subpoena)*, ICTY Appeals Chamber's judgment of 29 October 1997, at paras 38 and 41. For other cases see in particular Bothe, *supra* note 26, at 248–253.

defence); (ii) covers official or private acts carried out by the state agent while in office, as well as private or official acts performed prior to taking office; in other words, assures total inviolability; (iii) is intended to protect only *some categories* of state officials, namely diplomatic agents, heads of state, heads of government, perhaps (in any case under the doctrine set out by the Court) foreign ministers and possibly even other senior members of cabinet; (iv) comes to an end after cessation of the official functions of the state agent; (v) may not be *erga omnes* (in the case of diplomatic agents it is only applicable with regard to acts performed as between the receiving and the sending state, plus third states whose territory the diplomat may pass through while proceeding to take up, or to return to, his post, or when returning to his own country: so called *jus transitus innoxii*).

6 The Distinction between the Two Classes of Immunities and the Coming into Operation of the Rule Removing Functional Immunities for International Crimes

The above distinction is important. It allows us to realize that the two classes of immunity *coexist* and somewhat *overlap* as long as the foreign minister (or any state official who may also invoke personal or diplomatic immunities) is in office. While he is discharging his official functions, he always enjoys functional immunity, subject to one *exception* that we shall soon see, namely in the case of perpetration of international crimes. Nevertheless, even when one is faced with that exception, the foreign minister is inviolable and immune from prosecution on the strength of the international rules on *personal* immunities. This proposition is supported by some case law (for instance, *Pinochet*³² and *Fidel Castro*,³³ which relate respectively to a former and an incumbent head of state), and is authoritatively borne out by the Court's judgment under discussion. In contrast, as soon as the foreign minister leaves office, he may no longer enjoy personal immunities and, in addition, he becomes liable to prosecution for any international crime he may have perpetrated while in office. This is rendered possible by a customary international rule on international crimes that has evolved in the international community. The rule provides that, in case of perpetration by a state official of such international crimes as genocide, crimes against humanity, war crimes, torture (and I would add serious crimes of international, state-sponsored terrorism), such acts, in addition to being imputed to the state of which the individual acts as an agent, also involve the criminal liability of the individual. In other words, for such crimes there may coexist state responsibility and individual criminal liability.

That such a rule has crystallized in the world community is evidenced by a whole

³² See references *infra* in note 39.

³³ See reference *supra* in note 21.

range of elements: not only the provisions of the various treaties or other international instruments on international tribunals, but also international and national case law (see below). The Court has instead taken a rather ambiguous stand on the existence and purport of this rule. Addressing the Belgian contention that immunities accorded to *incumbent* foreign ministers do not protect them when they are suspected of international crimes, and the contrary submission of the Congo, the Court first excluded the existence of a specific customary rule lifting immunity from criminal jurisdiction for incumbent foreign ministers accused of those crimes; it then considered the provisions of the various international tribunals, whereby the official position of defendants does not free them from criminal responsibility; it concluded that 'rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals' only apply to such tribunals. No 'such an exception exists in customary international law in regard to national courts'.³⁴

Although the Court's proposition is very sweeping, the context of the Court's ruling would seem to indicate that the Court did not intend to deny the possible existence of a customary rule lifting functional immunities for state officials in the case of international crimes. In fact, it did not take any stand on such a customary rule. What it intended to state was that in any case such a rule, assuming it existed, did not remove that immunity for *incumbent* senior state officials.

If this is so, it is respectfully submitted that the Court's proposition is questionable. It seems warranted to argue that the customary rule at issue (on whose existence and purport I shall come back to below) has a broad scope and importance and does not distinguish between *incumbent* and *former* state officials. The treaty provisions that are at the origin of this customary rule point in this direction. Article 7 of the Charter of the Nuremberg International Military Tribunal and all the subsequent treaties or at any rate written stipulations providing in this regard clearly intended to remove the substantial defence based on the official status of the accused with regard both to *incumbent* and *former* state agents. Actually, given the historical circumstances in which those provisions were adopted, it can be said that they were primarily intended to cover persons who were state officials when they committed the alleged crime, but *no longer* had such status when brought to trial.

Should one consequently conclude that under customary international law the lifting of functional immunities in case of international crimes, brought about by this rule, entails that an *incumbent* foreign minister may be brought to trial before a national court for such alleged crimes? The answer is no. However, this is so only because that minister is protected by the general rules on *personal* immunities, as long as he is in office of course. In this respect the Court may be right in pointing to a difference between the provisions of statutes of international tribunals and the

³⁴ Para. 58 of the judgment. It should be stressed that the clear wording of the Court's holding (in the second paragraph of para. 58 of the judgment) excludes that such holding is *only* intended to apply to foreign ministers. In other words, it seems clear that the Court has ruled out the existence of a customary rule concerning *any* state official, not solely foreign ministers.

customary rule (at least, the Court is right with regard to the practice of the ICTY³⁵ and the text of the ICC Statute³⁶). Under customary law the rule we are discussing must be applied *in conjunction with, and in the light of, customary rules on personal immunities*, whereas the statutes of international criminal tribunals and courts (other than the ICC, where the text is clear) may perhaps be construed as removing, at treaty level, *even personal immunities*.

The above propositions are borne out by some recent cases, such as the decision mentioned above of the Spanish *Audiencia nacional* in *Fidel Castro*,³⁷ by the French Court of Cassation on 13 March 2001 in *Ghadafi*, or the decision of the House of Lords in *Pinochet*. In *Fidel Castro*, the Spanish court clearly stated that as long as the Cuban head of state was in office, no prosecution could be initiated against him, on account of his entitlement to enjoy personal immunities. In *Ghadafi* the French Court held that '*la coutume internationale s'oppose à ce que les chefs d'Etats en exercice puissent, en l'absence de dispositions internationales contraires s'imposant aux parties concernées, faire l'objet de poursuites devant les juridictions pénales d'un Etat étranger*'.³⁸ This view is absolutely compatible with the rule whereby state officials accused of international crimes may not plead as a defence, before national or international courts, their having acted in an official capacity. Indeed, as stated above, under customary international law this rule only becomes operational *after the state official's cessation of functions*. The shield protecting state agents from criminal jurisdiction is only removed *after* that moment. The same holds true for *Pinochet*, where their Lordships held that he would have enjoyed immunities were he still in office as head of state, but that, having left office, he no longer enjoyed such (personal) immunities.³⁹

7 The Court's Ruling on the Immunity of *Former Foreign Ministers* from Criminal Jurisdiction

A *The Questionable Resort to the Distinction between Private and Official Acts*

The Court has admittedly recognized that personal or diplomatic immunities are only procedural in nature. Thus, it states in paragraph 60 of its judgment that 'the

³⁵ See the indictment made by the chief Prosecutor against Milosevic when he was an incumbent head of state. The indictment was confirmed by a Judge and did not give rise to any objection from other states.

³⁶ See Articles 27 and 98 of the ICC Statute.

³⁷ See *supra* note 21.

³⁸ See text in 105 RGDIP (2001), at 474.

³⁹ See, e.g., the speech of Lord Browne-Wilkinson, in *R. v. Bow Street Stipendiary Magistrate and others, ex parte Pinochet Ugarte*, House of Lords, Judgment of 24 March 1999, in [1999] 2 All ER, at 112–115, as well as those of Lord Hope of Craighead, at 145–152, Lord Saville of Newdigate, at 169–170, Lord Millet, at 171–191 and Lord Phillips of Worth Matravers, at 181–190.

immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy *impunity* in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility’.

This proposition is indisputably sound and must be subscribed to. However, in the following paragraph of its judgment, in an important *obiter dictum*, the Court infers from that proposition (paragraph 61 starts with ‘Accordingly’) that the immunities enjoyed under international law by an incumbent foreign minister *do not represent a bar to criminal prosecution in four different circumstances* that, as it would seem from the text of the judgment, are given as an exhaustive enumeration:⁴⁰ (i) when the national state institutes proceedings against its state official; (ii) when the national state (or the state for which the person acts as an agent) waives the immunities; (iii) when the person has ceased to discharge his official functions; at that stage ‘[p]rovided 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’; (iv) when an incumbent or former foreign minister may be subject to criminal proceedings before an international criminal court.

In this paper I shall concentrate on the third hypothesis (some of the Judges to the case set forth cogent misgivings on the first two in their Joint Separate Opinion,⁴¹ while the fourth hypothesis obviously becomes relevant when treaty law or binding international instruments such as Security Council resolutions taken under Chapter VII are at stake). One can raise two important objections to the Court’s holding concerning this third hypothesis.

First, the Court wrongly resorted, in the context of alleged international crimes, to the distinction between acts performed ‘in a private capacity’ and ‘official acts’, a distinction that, within this context, proves ambiguous and indeed untenable. Second, the Court failed to apply, or at least to refer to, the customary rule lifting functional immunities for international crimes allegedly committed by state agents, a rule that becomes operational as soon as the rules on personal immunities are no longer applicable (or in other words, as soon as state agents enjoying personal immunities are no longer in office).

Let me expound the first objection. For this purpose, it may prove helpful to envisage four different hypothetical cases: (i) a foreign minister orders, aids and abets or

⁴⁰ Curiously, in a Press Statement of 14 February 2002, President Guillaume, in summarizing the Court’s judgment, stated that the Court ‘also pointed out that immunity from jurisdiction and individual criminal responsibility are two separate concepts’ and went on to say ‘By way of example, the Court emphasized that Ministers for Foreign Affairs’ did not enjoy immunity in the cases mentioned by the Court (emphasis added).

⁴¹ See Joint Separate Opinion, *supra* note 3, at para. 78.

willingly participates in, genocide or crimes against humanity before assuming his official functions of foreign minister (for example, when he was a senior member of the military); (ii) a foreign minister orders or aids and abets or willingly participates in the commission of genocide or crimes against humanity while acting as foreign minister; (iii) a person steals goods or bribes state officials before becoming foreign minister; (iv) a foreign minister, while in office, kills his servant in a fit of rage.

Under the Court's proposition, once the foreign minister has terminated his ministerial functions, he may be brought to trial before a foreign court having jurisdiction under international law for acts perpetrated *prior* to his taking office (cases sub (i) and (iii)); instead, if he engages in criminal offences *while in office*, he may be prosecuted and punished only if those acts are considered as being performed 'in a private capacity' (*à titre privé*). If this is so, it would follow that he could only be prosecuted for the murder of his servant (case sub (iv)). What about international crimes? Can international crimes such as genocide or crimes against humanity be regarded as being committed 'in a private capacity'?

It would seem warranted to infer from the holding of the Court that, as crimes are not normally committed 'in a private capacity', state agents do enjoy immunity for these crimes, even if they have terminated their official functions. That international crimes are not as a rule 'private acts' seems evident. These crimes are *seldom* perpetrated in such capacity. Admittedly, a civilian or a serviceman acting in a private capacity may indeed commit war crimes (think for instance of the rape or torture of an enemy civilian). It is however hardly imaginable that a foreign minister may perpetrate or participate in the perpetration of an international crime 'in a private capacity'. Indeed, individuals commit such crimes by making use (or abuse) of their official status. It is primarily through the position and rank they occupy that they are in a position to order, instigate, or aid and abet or culpably tolerate or condone such crimes as genocide or crimes against humanity or grave breaches of the Geneva Conventions. In the case of torture (not as a war crime or a crime against humanity), the 'instigation or consent or acquiescence of a public official or other person acting in an official capacity' is one of the objective requirements of the crime (see Article 1 of the 1984 Convention against Torture).

Hence, if one construes the legal propositions of the Court literally, it would follow that foreign ministers could never, or in any event rarely, be prosecuted for international crimes perpetrated *while in office*. However, a more radical question to be raised is as follows: *why* should one confine trials by foreign courts to acts performed 'in a private capacity'? *Which international rules* would exclude official acts?

In fact, the distinction between 'private' and 'official' acts made by the Court with regard to international crimes that may have been committed by a foreign minister while in office, has a twofold origin. First, it is the *transposition* to the area of immunities of foreign ministers of the well-established distinction, applicable to *diplomatic agents*, between their private and their official acts (the latter being, pursuant to Article 39(2) of the Vienna Convention on diplomatic immunities, the 'acts performed by such a person [i.e. a diplomatic agent] in the exercise of his

functions as a member of the mission').⁴² This distinction is designed to emphasize that, when his functions come to an end, the diplomatic agent stops enjoying *personal* immunities, whereas 'with respect to acts performed . . . in the exercise of his functions as a member of the [diplomatic] mission, immunity shall continue to exist'. The distinction, however, in addition to being of rather complex application,⁴³ only applies, even in relation to *diplomatic* agents, *as long as* the customary rule removing functional immunities of state agents in the case of international crimes does not come into operation. *A fortiori* the distinction evaporates as a result of that customary rule when what is at stake are the acts of *foreign* ministers that may amount to international crimes. Secondly, the distinction seems to derive from that between 'official' and 'unofficial public acts' made by some US courts in cases where actions for damage in tort had been brought against foreign states for acts of torture by state officials.⁴⁴ This distinction manifestly aimed at arguing that, as torture could not be regarded as an official public act, the foreign state at issue could not claim state immunity from US jurisdiction. In other words, the distinction was a practical expedient for circumventing the strictures of the US Act on state immunities (the Foreign Sovereign Immunities Act of 1976, as amended in 1988). Although in this respect it was meritorious, it is however unsound and even preposterous from the strictly legal viewpoint.⁴⁵

⁴² It seems less probable that the distinction under discussion is a transposition of, or grounded on, the old distinction between acts performed by states *jure gestionis* (that is, acts of a commercial nature), and acts done *jure imperii*. As is well known, this is a relatively outmoded distinction made in recent international law with regard to acts of states and aimed at establishing when a state enjoys immunity from the *civil* (not criminal) jurisdiction of foreign states. While this distinction makes sense with regard to privileges and immunities of foreign states, it does not hold water with regard to functional (or organic) immunity of *state officials*. Let me give an example: if a foreign minister signs abroad, on behalf of his state, a contract for the purchase of a building to house the state's embassy, and then fails to pay, he may not be sued, for he is covered by functional and personal immunities (on account of the former he may not be sued even after leaving office), whereas the state may be (under the restrictive doctrine of state immunity). If, in contrast, the foreign minister, after participating in a cabinet decision for the expulsion of nationals of a particular country, contrary to treaty provisions, is sued before the courts of that country for compensation, he again is sheltered by functional and personal immunity; in addition, the state enjoys immunity from jurisdiction for the act was clearly done *jure imperii*, with the consequence that the matter may only be settled at a diplomatic or political level. As is clear from these examples, the distinction at issue may be germane to acts of states, but is irrelevant to acts performed by state officials.

⁴³ As Brownlie, *supra* note 28, points out (at 361), 'The definition of official acts is by no means self-evident.'

⁴⁴ See for instance *Filartiga v. Peña Irala*, 630 F 2d 876 (2nd Cir. 1980), *Forti v. Suarez Mason*, 672 F Supp.1531 (ND Cal 1987), *Evans and others v. Avril*, 812 F Supp 207 (SD Florida, 1993). On these cases see Bianchi, 'Denying State Immunity to Violators of Human Rights' 46 *Austrian Journal of Public and International Law* (1994), 227–228. See also *Xuncax v. Gramajo*, 886 F.Supp.162 (DMA, 12 April 1995). Some Lords in *Pinochet* (iii) have taken up the distinction. See for instance the speeches of Lord Goff of Chieveley (at 125–126), of Lord Hutton (at 165), and of Lord Phillips of Worth Matravers (at 187). Lord Slynn and Lord Lloyd had propounded the same view in their speeches in the first judgment by the House of Lords in the same case (Judgment of 25 November 1998, in 37 ILM (1998), at 1309 and 1323 respectively).

⁴⁵ It should be noted that three Judges were aware of the possible consequences of the Court's proposition. In their Joint Separate Opinion, Judges Higgins, Kooijmans and Buergenthal mentioned the view that international crimes may not be regarded as 'official acts' 'because they are neither normal State

The distinction under discussion, if applied to international crimes committed by senior state officials, could lead to the consequence that such crimes should be considered as ‘private acts’ in order that their authors be amenable to judicial process. The artificiality of this legal construct is evident. This would mean, for example, that the crimes for which Joachim von Ribbentrop (Reich Minister for Foreign Affairs from 1938 to 1945) was sentenced to death, namely crimes against peace, war crimes and crimes against humanity, should be regarded as ‘private acts’;⁴⁶ or that the crime of having failed ‘to secure observance of and prevent breaches of the laws of war’, for which Mamoro Shigemitsu (Japanese Foreign Minister from 1943 to 1945) was sentenced to seven years’ imprisonment, should be considered ‘private acts’.⁴⁷

B The Court’s Failure to Refer to the Customary Rule Lifting Functional Immunities for State Officials Accused of International Crimes

Let me now move on to my second objection to the Court’s decision. On the question of the amenability to trial of *former* state agents accused of committing international crimes while in office, the Court, instead of relying upon the questionable distinction between private and official acts, should clearly have adverted to the customary rule that removes functional immunity.

National case law proves that a customary rule with such content does in fact exist. Many cases where military officials were brought to trial before foreign courts demonstrate that state agents accused of *war crimes*, *crimes against humanity* or *genocide* may not invoke before national courts, as a valid defence, their official capacity (leaving aside cases where tribunals adjudicated on the strength of international treaties or Control Council Law no. 10, one can recall, for instance, *Eichmann* in Israel,⁴⁸ *Barbie* in France,⁴⁹ *Kappler* and *Priebke* in Italy,⁵⁰ *Rauter*, *Albrecht* and *Bouterse* in the Netherlands,⁵¹ *Kesserling* before a British Military Court sitting in Venice and *von Lewinski* (called *von Manstein*) before a British Military Court in

functions nor functions that a State alone (in contrast to an individual) can perform’ (para. 85). It would however seem that they did not necessarily endorse such view.

⁴⁶ For the charges against him see *Trial of the Major War Criminals before the International Military Tribunal — Nuremberg 14 November 1945–1 October 1946*, Nuremberg 1947, I, at 69; for the Judgment see *ibid.*, at 285–288.

⁴⁷ For the judgment of the IMTFE concerning Shigemitsu, see B. V. A. Röling and C. F. Rüter (eds), *The Tokyo Judgment* vol. I (1977), at 457–458.

⁴⁸ See judgment of the Supreme Court of Israel of 29 May 1962, in 36 ILR, 277–342.

⁴⁹ See the various judgments in 78 ILR, 125 *et seq.* and 100 ILR 331 *et seq.*

⁵⁰ For *Kappler*, see the Judgment delivered on 25 October 1952 by the *Tribunale Supremo Militare*, in 36 *Rivista di diritto internazionale* (1953) 193–199; as for *Priebke* see the decision of the Rome Military Court of Appeal of 7 March 1998, in *L’Indice Penale* (1999), 959 *et seq.*

⁵¹ For *Rauter* see the decision of the Special Court of Cassation of 12 January 1949, in *Annual Digest 1949*, 526–548; for *Albrecht* see the judgment of the Special Court of Cassation of 11 April 1949 in *Nederlandse Jurisprudentie 1949*, 747–751 (in Dutch), summarized in *Annual Digest 1949*, 397–398; for *Bouterse*, see the decision of 20 November 2000 of the Amsterdam Court of Appeal online, at www.icj.org/objectives/decision.html.

Hamburg,⁵² *Pinochet* in the UK,⁵³ *Yamashita* in the US,⁵⁴ *Buhler* before the Supreme National Tribunal of Poland,⁵⁵ *Pinochet* and *Scilingo* in Spain,⁵⁶ *Miguel Cavallo* in Mexico⁵⁷). True, most of these cases deal with *military* officers. However, it would be untenable to infer from that that the customary rule only applies to such persons. It would indeed be odd that a customary rule should have evolved only with regard to members of the military and not for all state agents who commit international crimes. Besides, it is notable that the Supreme Court of Israel in *Eichmann*⁵⁸ and more recently various Trial Chambers of the ICTY have held that the provision of, respectively, Article 7 of the Charter of the IMT at Nuremberg and Article 7(2) of the Statute of the ICTY (both of which relate to *any person* accused of one of the crimes provided for in the respective Statutes) 'reflect[s] a rule of customary international law' (see *Karadžić and others*,⁵⁹ *Furundžija*,⁶⁰ and *Slobodan Milošević (decision on preliminary motions)*.⁶¹ Furthermore, Lords Browne-Wilkinson, Hope of Craighead, Millett, and Phillips of Worth Matravers in their speeches for the House of Lords' decision of 24 March 1999 in *Pinochet* took the view, with regard to any senior state agent, that functional immunity cannot excuse international crimes.⁶²

In addition, important national Military Manuals, for instance those issued in 1956 in the United States and in 1958 in the United Kingdom, expressly provide that the fact that a person who has committed an international crime was acting as a government official (and not only as a serviceman) does not constitute an available defence.⁶³

⁵² See *von Lewinski* in *Annual Digest 1949*, 523–524; for *Kesserling* see *Law Reports of Trials of War Criminals* (1947), vol. 8, at 9 ff.

⁵³ See references in note 39.

⁵⁴ See the judgment of the US Supreme Court in L. Friedman, *The Law of War, A Documentary History*, vol. II, (1972), at 1599 *et seq.*

⁵⁵ See *Annual Digest 1948*, at 682.

⁵⁶ See references in *supra* notes 20 and 21.

⁵⁷ See the decision of 12 January 2001 delivered by Judge Jesus Guadalupe Luna and authorizing the extradition of Ricardo Miguel Cavallo to Spain, text (in Spanish) on line in www.derechos.org/nizkor/arg/espana/mex.html.

⁵⁸ *Supra* note 30, at 311.

⁵⁹ ICTY, Trial Chamber I, Decision of 16 May 1995, at para. 24.

⁶⁰ ICTY, Trial Chamber II, Judgment of 10 December 1998, at para. 140.

⁶¹ ICTY, Trial Chamber III, Decision of 8 November 2001, at para. 28 and more generally paras 26–33.

⁶² See *supra* note 39, at 107–115 (Lord Browne-Wilkinson), 146–153 (Lord Hope of Craighead), 171–179 (Lord Millett) and 188–192 (Lord Phillips of Worth Matravers).

⁶³ See the US Department of the Army Field Manual, *The Law of Land Warfare* (July 1956). At para. 498 it states that: 'Any person, whether a member of the armed forces or a civilian, who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment. Such offenses in connection with war comprise: a. Crimes against peace; b. Crimes against humanity; c. War crimes. Although this manual recognizes the criminal responsibility of individuals for those offenses which may comprise any of the foregoing types of crimes, members of the armed forces will normally be concerned only with those offenses constituting "war crimes".' At para. 510 it is stated that: 'The fact of a person who committed an act which constitutes a war crime acted as the head of a state or as a responsible government official does not relieve him from responsibility for his act.'

One can also recall that on 11 December 1946 the UN General Assembly unanimously adopted Resolution 95, whereby it ‘affirmed’ ‘the principles recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal’. These principles include Principle III, as later formulated (in 1950) by the UN International Law Commission.⁶⁴ All of these Principles, Israel’s Supreme Court noted in *Eichmann*, ‘have become part of the law of nations and must be regarded as having been rooted in it also in the past’.⁶⁵

Furthermore, it seems significant that, at least with regard to one of the crimes at issue, genocide, the International Court of Justice implicitly admitted that under *customary* law any official status does not relieve responsibility. In its Advisory Opinion on *Reservations to the Convention on Genocide*, the Court held that ‘the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation’.⁶⁶ Among these principles one cannot but include the principle underlying Article IV, whereby ‘Persons committing genocide . . . shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.’ It is notable that the UN Secretary-General took the same view of the customary status of the Genocide Convention (or, more accurately, of the substantive principles it lays down), a view that was endorsed implicitly by the UN Security Council,⁶⁷ and explicitly by a Trial Chamber of the ICTR in *Akayesu* and of the ICTY in *Krstić*.⁶⁸

A further element supporting the existence of a customary rule having a general purport can be found in the pleadings of the two states before the Court: the Congo and Belgium. In its *Mémoire* of 15 May 2001, the Congo explicitly admitted the existence of a principle of international criminal law, whereby the official status of a state agent cannot exonerate him from individual responsibility for crimes committed while in office; the Congo also added that on this point there was no disagreement with Belgium.⁶⁹

Arguably, while each of these elements of practice, on its own, cannot be regarded

See also the British manual, *The Law of War on Land* (1958), at para. 632 (‘Heads of States and their ministers enjoy no immunity from prosecution and punishment for war crimes. Their liability is governed by the same principles as those governing the responsibility of State officials except that the defence of superior orders is never open to Heads of States and is rarely open to ministers’).

⁶⁴ Principle II provides as follows: ‘The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law’. See *YbILC* (1950, II), at 192.

⁶⁵ *Supra* note 30, at 311.

⁶⁶ ICJ Reports (1951), at 24.

⁶⁷ See Report of the Secretary-General Pursuant to Para. 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, at para. 45.

⁶⁸ ICTR, Trial Chamber I, judgment of 2 September 1998, at para. 495; ICTY, Trial Chamber I, judgment of 2 August 2001, at para. 541.

⁶⁹ *Mémoire*, at 39, para. 60 (‘. . . la R.D.C. ne conteste pas qu’est un principe de droit international pénal, notamment forgé par les jurisprudences de Nuremberg et de Tokyo, la règle suivant laquelle la qualité officielle de l’accusé au moment des faits ne peut pas constituer une cause d’exonération de sa responsabilité pénale ou un motif de réduction de sa peine lorsqu’il est jugé, que ce soit par une juridiction interne ou une juridiction internationale. Sur ce point, aucune divergence existe avec l’Etat belge.’)

as indicative of the crystallization of a customary rule, taken together they may be deemed to evidence the formation of such a rule (a rule, it should be added, on whose existence legal commentators seem to agree, although admittedly without producing compelling evidence concerning state or judicial practice,⁷⁰ and which the *Institut de droit international* has recently restated, at least with regard to heads of state or government).⁷¹

Let me emphasize that the logic behind this rule, which was forcefully set out as early as 1945 by Justice Robert H. Jackson in his Report to the US President on the works for the prosecution of major German war criminals,⁷² is in line with contemporary trends in international law. At present, more so than in the past, it is state officials, and in particular senior officials, that commit international crimes. Most of the time they do not perpetrate crimes directly. They order, plan, instigate, organize, aid and abet or culpably tolerate or acquiesce, or willingly or negligently fail to prevent or punish international crimes. This is why 'superior responsibility' has acquired, since *Yamashita* (1946), such importance. To allow these state agents to go scot-free only because they acted in an official capacity, except in the few cases where an international criminal tribunal has been established or an international treaty is applicable, would mean to bow to and indeed strengthen traditional concerns of the international community (chiefly, respect for state sovereignty), which in the current international community should instead be reconciled with new values, such as

⁷⁰ See, e.g., Glaser, 'L'Acte d'Etat et le problème de la responsabilité individuelle', *Revue de droit pénal et de criminologie* (1950), 1 *et seq.*; S. Glaser, *Introduction à l'Etude du Droit International Pénal* (1954), at 71–76; G. Hoffmann, *Strafrechtliche Verantwortung im Völkerrecht — Zum gegenwärtigen Stand des Völkerrechtlichen Strafrechts* (1962), at 135–139 (only with regard to war crimes); Bothe, *supra* note 28, at 254–257; Akehurst, *supra*, note 28, at 241; Dinstein, 'International Criminal Law', in 5 *Israel Yearbook on Human Rights* (1975), at 82–83; De Sena, *supra* note 28, at 139–187; Malanczuk, *supra* note 28, at 122; Bianchi, 'Immunity versus Human Rights: The Pinochet Case', 10 *EJIL* (1999), at 259–260, 269–270.

⁷¹ See the Resolution on 'Immunities from Jurisdiction and Execution of Heads of State and of Governments in International Law' adopted at the Session of Vancouver (August 2001). At Article 13(2) it is stated that, although a former head of state (or government) enjoys immunity in respect of acts performed in the exercise of official functions and related to the exercise thereof, he or she nevertheless may be prosecuted and tried 'when the acts alleged constitute a crime under international law'.

⁷² In his Report to the US President of 6 June 1945, Justice R. H. Jackson (who had been appointed by President Roosevelt as 'Chief Counsel for the United States in prosecuting the principal Axis War Criminals') illustrated as follows the first draft of Article 7 of the London Agreement (whereby "The official position of defendants, whether as Heads of State or responsible officials in Government departments, shall not be considered as freeing them from responsibility or mitigating punishment"), contained in a US memorandum presented at San Francisco on 30 April 1945: 'Nor should such a defence be recognized as the obsolete doctrine that a head of state is immune from legal liability. There is more than a suspicion that this idea is a relic of the doctrine of the divine right of kings. It is, in any event, inconsistent with the position we take toward our own officials, who are frequently brought to court at the suit of citizens who allege their rights to have been invaded. We do not accept the paradox that legal responsibility should be the least where power is the greatest. We stand on the principle of responsible government declared some three centuries ago to King James by Lord Justice Coke, who proclaimed that even a King is still "under God and the law"' (in *Report of Robert H. Jackson United States Representative to the International Conference on Military Trials, London 1945*, US Department of State, 1949, at 47).

respect for human dignity and human rights. These last values require that all those who gravely attack human dignity and fundamental rights be prosecuted and punished.

To ignore or play down the customary rule in question may lead to ensuring impunity for the perpetrators as well as denying compensation to the victims, given that in such cases, although the state on whose behalf the authors of crimes acted formally incurs responsibility, in practice it is not held accountable by anybody. Furthermore, as no one denies that soldiers and other military personnel may be brought to trial for war crimes (but also for crimes against humanity or genocide), one would come to the preposterous conclusion that lower-ranking state agents could be punished for such crimes, while those in power (heads of states or governments, senior members of cabinet, senior military commanders), who are endowed with greater power and normally bear greater responsibility for international crimes, would be absolved of any liability for participation in such crimes, *only on account of their seniority*.

8 The Court's Balancing of the Requirements of State Sovereignty with the Demands of International Justice

Finally, the Court's judgment lends itself to some general considerations. The Court of course had to strike a balance between two conflicting requirements, which were lucidly expounded by Judges Higgins, Kooijmans and Buergenthal.⁷³ They are the requirements of smooth and unimpaired conduct of foreign relations, a traditional concern of sovereign states, on the one side, and the need to safeguard new community values, in particular the need to prosecute and punish the perpetrators of grave crimes seriously infringing fundamental rights of human beings, on the other side. In the event, the Court put greater weight on one scale of the balance and markedly favoured the former requirements. Absent any state practice or *opinio juris seu necessitatis*, it logically deduced from the whole system of the law of international immunities that foreign ministers enjoy a broad range of immunities while in office. However, by ambiguously excluding that state agents could be brought to trial after leaving office for acts other than 'private' ones performed while in office, the Court has arguably left in the event the demands of international justice unheeded. One might be tempted to recall what another international court had the opportunity to state in general terms, admittedly in a different context: 'It would be a travesty of law and a betrayal of the universal need for justice, should the concept of state sovereignty be allowed to be raised successfully against human rights.'⁷⁴

The holding of the Court is indeed striking, the more so because, it is submitted, the legal regulation that can be deduced from current international law manages to protect both sets of requirements in a balanced way. As stated above, as long as a foreign minister is in office, he enjoys full immunity from foreign jurisdiction and

⁷³ See Joint Separate Opinion, *supra* note 3 at paras 73–75.

⁷⁴ ICTY, Appeals Chamber, *Tadić (Interlocutory Appeal)*, judgment of 2 October 1995, at 32, para. 58.

inviolability, for whatever act he may perform. However, once he leaves office, he may continue to be shielded from foreign criminal or civil jurisdiction for the acts he performed in his official capacity (under the rules on functional immunities), but not (i) for his private acts and transactions; in addition, (ii) he may no longer take shelter behind personal (or functional) immunities, with respect to international crimes such as genocide, crimes against humanity, war crimes, torture, and serious international acts of terrorism. If he is accused of such crimes, whether they were committed *prior* to his taking office or *after* he left office or *while* he was in office, he may legitimately be subject to foreign criminal jurisdiction.

Finally, one ought not to pass over in silence one major negative knock-on effect of the Court's judgment. In future cases brought before the International Criminal Court involving states not parties to the Statute, the asserted lack of a customary rule lifting the functional immunity of state officials could be relied upon by such third states. Clearly, the relevant provisions of the Court's Statute removing any immunity only apply to contracting states. Thus, for instance, if the accused is the national of a third state who, acting as a state official, has allegedly perpetrated international crimes on the territory of a state party to the Statute, the third state might argue that under customary international law that state official enjoys functional immunity, hence also immunity from the Court's jurisdiction.