

***Democratic Republic of Congo v Belgium: Arrest Warrant of 11 April 2000; Crimes against Humanity: 'Immunity' versus 'Impunity'***

**Court:** International Court of Justice, The Hague

**Judges:** 14 Judges of the International Court of Justice, plus two ad hoc judges appointed by Belgium and Congo

**By Myint Zan**<sup>[\*]</sup>

On 14 February 2002, the International Court of Justice (ICJ) located in the Hague, Netherlands announced its ruling that Foreign Ministers cannot be indicted by the courts of another nation and any arrest warrant issued by the courts or executive officials of one country against a Foreign Minister of another country is, in effect, a violation of international law. And this would be so even if the Foreign Minister in question had been formally indicted on grounds of 'universal jurisdiction' for crimes against humanity.<sup>[1]</sup>

In April 2000, a Belgian investigating judge issued an international arrest warrant against Mr Abdoulaye Yeordai Ndombasi who was, at that time, Foreign Affairs Minister of the Democratic Republic of Congo (the Congo). The Congo brought a suit against Belgium in the International Court of Justice asking it to declare that Belgium, by issuing the international arrest warrant, violated the legal obligation Belgium owes to the Congo and that Belgium must therefore cancel the arrest warrant.<sup>[2]</sup> The ICJ, by a vote of thirteen votes to three, held that the issuing of the arrest warrant and its international circulation did violate the Congo's international legal rights. By ten votes to six, the ICJ also ruled that Belgium must 'by means of its own choosing' cancel the arrest warrant.<sup>[3]</sup>

By the time the case was argued before the ICJ, Mr Yerodai, the person in question was no longer the Foreign Minister of the Congo. On this ground Belgium tried to unsuccessfully argue before the ICJ that the case was 'moot'. During the actual proceedings, the Congo also amended its initial complaint to challenge the assumption of 'universal jurisdiction' by the Belgian judge. Instead, the Congo based its sole argument on the ground that since the arrest warrant was directed -at the time of issue- against an incumbent Foreign Minister who is immune from the judicial process of other courts, Belgium was in breach of international law.

The Court, by a solid majority, accepted the Congo's contention. It held that even in cases of persons accused of war crimes and crimes against humanity incumbent Minister of Foreign Affairs have, under the principles of customary international law, total immunity from another nation's judicial processes. The Court observed that immunity from jurisdiction (by the courts of other nations) does not mean that government officials, including Foreign Ministers enjoy *impunity* in respect of any crimes they have committed irrespective of their gravity. It observed that 'the immunities enjoyed under international law by an incumbent or former Minister of Foreign Affairs do not represent a bar to prosecution in certain

circumstances'.<sup>[4]</sup>

There were dissenting opinions to what might be considered this 'traditionalist' ruling of the ICJ. Judge Al-Khasawneh (from Jordan)<sup>[5]</sup> dissented stating that "the need for effective combating of grave crimes ... represents a higher norm than the rules of immunity' especially in cases of Foreign Ministers whose immunity under international law are not as clear or categorical as 'the immunities of diplomats and Heads of States'.

Judge ad hoc<sup>[6]</sup> Van den Wyngaert (appointed by Belgium) wrote a long, indeed one could say a bitter dissenting opinion. She stated that 'legal opinion does not support the Court's proposition that Ministers for Foreign Affairs are immune from jurisdiction of other States under customary international law' especially in the light of recent trends of restricting the 'immunity of State officials (including Heads of State) ... where there are allegations of war crimes and crimes against humanity'. She also stated that the ICJ by its ruling might have also afforded 'de facto impunity to an increasing number of government officials'.<sup>[7]</sup>

By changing some of the actual events in the Milosevic trial that is occurring now in another court room in The Hague<sup>[8]</sup>, a curiosity based on a 'hypothetical' could be extrapolated from this case of *Congo v Belgium*. Slobodan Milosevic was indicted for war crimes and crimes against humanity by the United Nations ad hoc International Criminal Tribunal for Former Yugoslavia (ICTFY). The indictments -and later arrest warrants- were issued while Milosevic was President of Yugoslavia. Unlike the facts in *Congo v Belgium*, the indictments were not issued by an investigating judge and prosecutor in a sovereign State claiming 'universal jurisdiction' but by a prosecutor of an international tribunal relying on the Statute of the ICTFY.

Suppose that Belgium (and not a UN tribunal) had issued an arrest warrant against Milosevic. Suppose also that Yugoslavia had (like Congo in the actual case here) brought a case against Belgium to declare that this arrest warrant was a violation of international law and that Milosevic has full immunity since he was a Head of State when the arrest warrant was issued by Belgium. Suppose further that Milosevic was overthrown but the Yugoslavian government not only refused to surrender him (to Belgium) but also asked the ICJ to 'order' Belgium to cancel the arrest warrant against Milosevic. And suppose that the ICTFY does not exist and that no other country has issued an 'arrest warrant' against Milosevic. In this 'counterfactual' hypothetical case how would the ICJ have ruled? Would it have made any difference whether Milosevic was President or Foreign Minister of Yugoslavia when the (hypothetical) arrest warrants were issued?

Due to a technicality, the tenability or otherwise of the claim of universal jurisdiction by domestic courts was not directly ruled upon by the ICJ in the case of *Congo v Belgium*. In a separate opinion and as an observation, the President of the ICJ, Judge Guillaume expressed his view that 'under the law as classically formulated ... only the crimes of piracy' and a few others in which 'the offender is present on [the] territory [of the state claiming universal jurisdiction] does international law accept universal jurisdiction'.<sup>[9]</sup> However in the joint separate opinions of Judge Rosalyn Higgins<sup>[10]</sup>, Judge Koijmans and Buergenthal argued that though they agreed with the majority ruling, 'the growing international consensus on the need to punish crimes regarded as most heinous by the international community, indicate that the warrant for the arrest of Mr. Yerodia did not as such violate international law'.

Hence though the issue does not have a direct bearing on the case the judges of the ICJ appear to be 'split' on the issue of universal jurisdiction as exercised by local or domestic courts. One should add though that a domestic court's exercise of universal jurisdiction was not without precedent. In 1961, Israel claimed universal jurisdiction when it kidnapped the former Nazi Adolf Eichmann from Argentina, tried

him in an Israeli court and executed him.<sup>[11]</sup>

One may be taking 'poetic licence' a bit too much if one were to claim that the ICJ has given a 'Valentine Day's gift' (the decision was announced on 14 February 2002) of 'impunity' to top government officials across the board, world-wide including those from the most odious regimes. Nonetheless from the plain words of the majority ruling in the case of *Congo v Belgium* it is clear that the cloak of immunity would continue to protect top government officials even in cases of allegations amounting to crimes against humanity.

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[1] *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* (hereafter cited as the *Congo v Belgium* case). The Press Release and Summary of the judgment in the *Congo v Belgium* case can be found in <http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm> (accessed 20 February 2003). The entire judgement including the majority, dissenting and separate opinions in various pdf format files can be accessed in <http://www.icj-cij.org/icjwww/idocket/1COBE/1COBEframe.htm>. For the purpose of this note the citations from the case is taken from the Press Release 'summary judgment'.

[2] Summary of paras 13-21 of the judgment as excerpted from [http://www.icj-cij.org/icjwww/ipresscom/ipress2002/ipresscom2002-04bis\\_cobe\\_20020214.htm](http://www.icj-cij.org/icjwww/ipresscom/ipress2002/ipresscom2002-04bis_cobe_20020214.htm)

[3] [http://www.icj-cij.org/icjwww/ipresscom/ipress2002/ipresscom2002-04\\_cobe\\_20020214.htm](http://www.icj-cij.org/icjwww/ipresscom/ipress2002/ipresscom2002-04_cobe_20020214.htm)

[4] Ibid

[5] The ICJ ordinarily has 15 judges, elected for 9 year terms by the United Nations General Assembly and intended to represent the 'major' legal systems of the world. Once a judge is on the ICJ he or she does not 'represent' his or her country though for the purposes of identification reference to an ICJ judge's nationality or the country from which he or she was nominated as a judge of the ICJ is occasionally mentioned. Still, if there are no judges on the ICJ bench of the contesting parties, each country can, in the particular case they are contending, appoint an 'ad hoc judge'.

[6] Under Article 31 (2) and (3) of the *Statute of the International Court of Justice*, if there are no judges on the ICJ bench of the contesting parties, each country can, in the particular case which is being litigated before the ICJ, appoint an 'ad hoc judge'. Hence in the case of *Democratic Republic of Congo v Belgium* both Belgium and the Congo have ad hoc judges on the ICJ Bench.

[7] The quotations of statements of all the judges of the ICJ are excerpted from the summary of the judgment from [http://www.icj-cij.org/icjwww/ipresscom/ipress2002/ipresscom2002-04\\_cobe\\_20020214.htm](http://www.icj-cij.org/icjwww/ipresscom/ipress2002/ipresscom2002-04_cobe_20020214.htm)

[8] For the latest developments on the trial of Slobodan Milosevic in the International Criminal Tribunal for former Yugoslavia (ICTY) in the Hague see <http://www.un.org/icty/latest/index.htm> (accessed 20 February 2003)

[9] See [http://www.icj-cij.org/icjwww/ipresscom/SPEECHES/iSpeechPresident\\_Guillaume](http://www.icj-cij.org/icjwww/ipresscom/SPEECHES/iSpeechPresident_Guillaume) (accessed 20 February 2003)

[10] Judge Rosalyn Higgins from the United Kingdom made history when she became the first female judge to be appointed to the ICJ in 1995. The International Court of Justice (ICJ) has been in existence since 1946. Its predecessor the Permanent International Court of Justice (PCIJ) was first established in 1920 and was abolished in 1946. So far, Judge Higgins is the only female judge in the PCIJ and ICJ. In 7 February 2003 seven female judges were elected to serve in the newly established International Criminal Court (ICC) which also have its headquarters in The Hague. There are 18 Judges in the ICC seven of whom are now female.

[11] For the decision of the Israeli Court in the Eichmann case, see *Eichmann v Attorney-General of Israel*

(1961) *International Law Reports* 5. For the decision of the Israeli Supreme Court in the Eichmann case, see (1962) *International Law Reports* 277.

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