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# IMMUNITY OR IMPUNITY? THE POTENTIAL EFFECT OF PROSECUTIONS OF STATE OFFICIALS FOR CORE INTERNATIONAL CRIMES IN STATES LIKE THE UNITED STATES THAT ARE NOT PARTIES TO THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT

*Mark A. Summers*\*

## I. INTRODUCTION

Hugo Grotius, often called the father of international law,<sup>1</sup> would be shocked to learn that in the 21st century the international community asserts the right to prosecute state officials for international crimes. Only since World War II has international law expanded to impose individual criminal responsibility on state officials.<sup>2</sup> A series of international criminal law conventions has been adopted which obligates states to extradite or prosecute international criminals found within their territories, regardless of where the crimes were committed.<sup>3</sup> International tribunals have been created to deal with the most heinous crimes and the most prominent wrongdoers, while national tribunals, which are left to prosecute the lesser malefactors, remain an integral part of this developing system of international criminal law enforcement.<sup>4</sup>

This substantial progress notwithstanding, few convictions of international criminals would have been possible if traditional concepts of state

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1. J.G. STARKE, INTRODUCTION TO INTERNATIONAL LAW 10 (9th ed. 1984).

2. *See, e.g., infra* Part II.D, Part V.

3. *See, e.g.,* Single Convention on Narcotic Drugs art. 36(2)(a)(iv), Mar. 30, 1961, 520 U.N.T.S. 151; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation art. 6(1), Sept. 23, 1971, 974 U.N.T.S. 177; International Convention Against the Taking of Hostages art. 6(1), Dec. 17, 1979, 1316 U.N.T.S. 205; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 6(1), Dec. 12, 1984, 1465 U.N.T.S. 112.

4. *See infra* notes 127–28 and accompanying text.

immunity had continued to be recognized by the courts,<sup>5</sup> because until the middle of the last century, the immunity of a state and its ruler from the jurisdiction of another state's courts was regarded as absolute, as per Louis XIV's famous quip, "*L'état c'est moi.*"<sup>6</sup> Fortunately, in the latter half of the 20th century, cracks began to appear in the doctrine of absolute immunity for states and state officials. Accordingly, a state's immunity was limited to its noncommercial, public, or in other words, official acts. As a result, the immunity of state officials developed into two branches: absolute immunity, known as *ratione personae* or inviolability, which applied to heads of state and some other state officials during their terms in office, and a more limited form of immunity, known as *ratione materiae* or subject matter or functional immunity, which shielded all state officials from the jurisdiction of another state's courts for acts committed in their "official capacities."<sup>7</sup> In 2002, the International Court of Justice (ICJ) had its first opportunity to address the issue of state official immunity in *Democratic Republic of Congo v. Belgium*.<sup>8</sup> Faced with the question whether Belgium's issuance of an arrest warrant for Congo's foreign minister violated international law, the Court held that the inviolability from the jurisdiction of another state's courts that attached to an incumbent foreign minister prohibited another state from engaging even in preliminary acts of investigation and prosecution for core international crimes during the foreign minister's term of office.<sup>9</sup> In so doing, the Court rejected the argument that a customary law of state official immunity had developed since World War II so as to include an exception applicable in national courts for the most serious, or core in-

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5. See *Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 279 (S.D.N.Y. 2001) ("Efforts to define the concept of international crime and the reach of human rights, and to hold violators accountable, would amount to no more than emblematic gestures unless those reforms were accompanied by a corresponding dismantling of the long-standing doctrinal bastions that have impeded the exercise of domestic and international jurisdiction over state officials for violation of the new standards.").

6. THE OXFORD DICTIONARY OF QUOTATIONS 475:16 (Elizabeth Knowles ed., 5th ed. 1999).

7. Yoram Dinstein, *Diplomatic Immunity from Jurisdiction Ratione Materiae*, 15 INT'L & COMP. L.Q. 76, 80 (1966) ("[D]iplomatic immunity *ratione materiae* and *ratione personae* became sharply distinguished from one another: the former consists of a permanent substantive immunity from the applicability of local law while the latter merely comprises a transitory procedural exemption from judicial process.").

8. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.) (Congo v. Belgium), 2002 I.C.J. 3 (Feb. 14), available at [http://www.icjci.org/icjwww/idocket/iCOBE/icobejudgment/icobe\\_ijudgment\\_20020214.PDF](http://www.icjci.org/icjwww/idocket/iCOBE/icobejudgment/icobe_ijudgment_20020214.PDF) (last visited Jan. 13, 2006).

9. See *id.* at 21.

ternational crimes,<sup>10</sup> treating state official immunity as an area of settled law,<sup>11</sup> instead of a developing rule with parameters that are still unclear.<sup>12</sup>

This Article will focus on the impact of the ICJ's decision on the immunity of state officials from prosecution for core international crimes in national courts and its interrelationship with the jurisdiction of the International Criminal Court (ICC). Its basic premise is that the decision in *Congo v. Belgium* can plausibly be read to mean that the immunities of state officials from prosecution for core crimes in national courts remains intact. As a result, there is a danger that national courts will apply *Congo v. Belgium* to immunize state officials charged with core crimes. And, since the jurisdiction of the ICC is complementary, or secondary, to that of the states,<sup>13</sup> it must defer to any state, even a non-party to the treaty, that in good faith investigates and/or prosecutes a crime within its jurisdiction.<sup>14</sup> In these circumstances the ICC can claim the right to prosecute, only when a state is "unwilling or unable genuinely to carry out the investigation or prosecution."<sup>15</sup> The ICC Statute, while it abrogates state official immunity for the core crimes within its jurisdiction, preserves those same immunities for non-party states.<sup>16</sup> In light of *Congo v. Belgium*, could it plausibly be argued that a state prosecution lacked genu-

10. This Article will use the term "core crimes" to refer to all the offenses within the jurisdiction of the ICC (war crimes, crimes against humanity, and genocide) as well as torture. See Antonio Cassese, *When May Senior State Officials be Tried for International Crimes? Some Comments on the Congo v. Belgium Case*, 13 EUR. J. INT'L L. 853, 868 (2002) (discussing the legal implications of the ICJ decision) [hereinafter Cassese, *Comments*]; Steffen Wirth, *Immunity for Core Crimes? The ICJ's Judgment in the Congo v. Belgium Case*, 13 EUR. J. INT'L L. 877, 882–85 (discussing state immunity and its exceptions).

11. See *Congo*, 2002 I.C.J. at 22.

12. Cf. Joseph W. Dellapanna, *Head-of-State Immunity—Foreign Sovereign Immunities Act—Suggestion by the Department of State*, 88 AM. J. INT'L L. 528, 531 (1994) ("We are left, then, with an at best amorphous legal doctrine [(head of state immunity)] whose very existence is not entirely settled in U.S. law and whose reach is almost completely uncertain."); Jerrold L. Mallory, Note, *Resolving The Confusion Over Head of State Immunity: The Defined Rights of Kings*, 86 COLUM. L. REV. 169, 177 (1986) ("While a survey of the international community's approach to head of state immunity reveals wide agreement that heads of state are entitled to some immunity, there is no consensus on the extent of that immunity.")

13. Rome Statute of the International Criminal Court Preamble art. 1, Jul. 17, 1998, 2187 U.N.T.S. 90, available at <http://www.un.org/law/icc/statute/rome.htm> [hereinafter ICC Statute].

14. *Id.* art. 17(1)(a).

15. *Id.*

16. Compare *id.* art. 27 (stating the irrelevance of official capacity with regard to criminal liability), with art. 98(1) (asserting the ICC's inability to require States to act inconsistently with their international obligations).

inness if it extended immunity to a state official who committed international crimes?

The Article will first briefly trace the development of state official immunity until the passage of the Foreign Sovereign Immunities Act (FSIA) by the United States Congress in 1976.<sup>17</sup> At this watershed, state immunity diverged from state official immunity.<sup>18</sup> Thereafter, until the decision in *Congo v. Belgium*, courts in the United States struggled with and divided over how to resolve questions of state official immunity, demonstrating the need for clear guidance on this issue. Instead of providing the needed clarity, *Congo v. Belgium* did the opposite since it is susceptible to equally possible interpretations: 1) that there is no exception to state official immunity for core crimes in national courts; or 2) that there is an exception to the immunity of state officials in national courts when they are charged with core crimes. A dissection of the sources on which the ICJ relied resolves this quandary by revealing that the latter interpretation is the more viable. Finally, the Article will examine the immunity provisions of the ICC Statute and demonstrate how officials from states, like the U.S., that are not parties to the ICC Statute could permanently escape the jurisdiction of the ICC.

## II. THE CUSTOMARY INTERNATIONAL LAW OF SOVEREIGN IMMUNITY

### A. *The State and the Sovereign are One*

Initially, there was no distinction between the immunities that a state and its ruler enjoyed from the jurisdiction of foreign courts.<sup>19</sup> In this form of “absolute” immunity, the term “absolute” had dual significance: 1) there was “absolute” identity between the state and its ruler;<sup>20</sup> and, 2) both were “absolutely,” i.e., without exception, immune from the juris-

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17. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 (1976) [hereinafter FSIA].

18. Since the passage of the FSIA, U.S. courts have struggled with the question whether it or a common law immunity controls in suits naming sitting heads of state. See *infra* Part II.C–D.

19. Shobha Varughese George, Note, *Head-of-State Immunity in the United States Courts: Still Confused After All These Years*, 64 FORDHAM L. REV. 1051, 1056 (1995) (“Historically, sovereign immunity for states and heads-of-state immunity were considered one and the same . . .”).

20. For example, in the seminal United States Supreme Court case, *The Schooner Exchange v. McFaddon*, Chief Justice Marshall refers to the state (France) anthropomorphically as “NAPOLEON, the reigning emperor of the French,” or the “prince,” or by the personal pronoun, “he.” *The Schooner Exchange v. McFaddon*, 11 U.S. 116 *passim* (1812).

diction of another state's courts.<sup>21</sup> At this stage of the development of sovereign immunity, it was a rule based on reciprocity, convenience, and practicality predicated on the consent of all sovereigns not to exercise the absolute sovereignty they enjoyed over conduct within their territories.<sup>22</sup>

### *B. The Twentieth Century: Separation Anxiety*

Over the next century, the model of the United States—anti-monarchical and pro-democratic—led to a rapid decline in the number of monarchies, and, even in countries like Great Britain where monarchs remained, the powers and functions of government shifted away from the king or queen to an elected government.<sup>23</sup> Thus, by the middle of the twentieth century, state immunity had begun to separate from head of state immunity, and diplomatic immunity emerged as a distinctly separate branch of the law.<sup>24</sup>

As states, or state-created entities, entered increasingly into commercial transactions with one another, they needed to be able to enforce these commercial agreements in court.<sup>25</sup> The result was the doctrine of

21. *Id.* at 136–40. There were three instances of immunity from the “absolute and complete jurisdiction within their respective territories which sovereignty confers”: 1) “the exemption of the person of the sovereign from arrest or detention within a foreign territory;” 2) “the immunity which all civilized nations allow to foreign ministers;” and, 3) “a sovereign is understood to cede a portion of his territorial jurisdiction . . . where he allows the troops of a foreign prince to pass through his dominions.” *Id.*

22. Marshall wrote:

The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.

*Id.* at 136.

23. See 1 OPPENHEIM'S INTERNATIONAL LAW § 445 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) [hereinafter OPPENHEIM].

24. *Id.* § 447 n.2 (“The law relating to the position of Heads of State abroad has affinities with, but is now separate from, that relating to state immunity (which has a common origin in the identification of a sovereign with his state) and the treatment of diplomatic envoys (who also represent sovereign states).”).

25. See, e.g., *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711–14 (1976) (quoting Letter from Jack B. Tate, Acting Legal Adviser of the United States Department of State, to Philip B. Perlman, Acting Attorney General (May 19, 1952)). Tate summarized the then current state practice:

“restricted” sovereign immunity, exemplified by the 1952 Tate Letter, which exempted a state’s purely commercial activities from absolute immunity in the courts of another state.<sup>26</sup> The Tate Letter reflected the United States’ position that restricted immunity was emerging as a feature of customary international law.<sup>27</sup> Moreover, it suggested that at least four exceptions to absolute immunity already existed in U.S. practice—disputes in contract and tort, disputes relating to its merchant vessels, and disputes based on a government’s “commercial activities.”<sup>28</sup>

Following the Tate Letter, whether foreign states were accorded immunity in U.S. courts became a political matter because the State Department began to issue “suggestions of immunity” which were binding on the courts.<sup>29</sup> It was primarily to eliminate the problems that had arisen as a result of the suggestion of immunity procedure,<sup>30</sup> that Congress

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It is thus evident that with the possible exception of the United Kingdom little support has been found except on the part of the Soviet Union and its satellites for continued full acceptance of the absolute theory of sovereign immunity. There are evidences that British authorities are aware of its deficiencies and ready for a change. The reasons which obviously motivate state trading countries in adhering to the theory with perhaps increasing rigidity are most persuasive that the United States should change its policy. Furthermore, the granting of sovereign immunity to foreign governments in the courts of the United States is most inconsistent with the action of the Government of the United States in subjecting itself to suit in these same courts in both contract and tort and with its long established policy of not claiming immunity in foreign jurisdictions for its merchant vessels. Finally, the Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts. For these reasons it will hereafter be the Department’s policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.

*Id.*

26. *Id.*

27. *Id.*

28. Restricted state immunity was recognized by the Supreme Court in cases such as *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 487 (1983), which states, “[I]mmunity is confined to suits involving the foreign sovereign’s public acts, and does not extend to cases arising out of a foreign state’s strictly commercial acts.”

29. *Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 271 (S.D.N.Y. 2001).

30. Suggestions of immunity invaded the province of the court by determining questions of fact or mixed questions of fact and law, i.e., whether a state’s acts were public (*jure imperii*) and therefore immune, or whether its acts were private (*jure gestionis*) and therefore not. *See, e.g.*, George, *supra* note 19, at 1058 (“This method, however, was flawed because judicial reliance on State Department ‘suggestions’ led to inconsistent, and often politically-motivated results.”).

passed the Foreign Sovereign Immunities Act in 1976, transferring the determination of questions of sovereign immunity to the federal courts.<sup>31</sup> Some states, particularly those with a common law legal tradition, followed the United States' statutory approach to restricted state immunity,<sup>32</sup> while others reached the same position via court decisions.<sup>33</sup>

### C. Post-FSIA State Immunity

The FSIA codified restrictive sovereign immunity.<sup>34</sup> Structurally, it retained immunity for a "foreign state,"<sup>35</sup> which includes its "political subdivision[s]"<sup>36</sup> and "agenc[ies] or instrumentalit[ies]."<sup>37</sup> States are immune from the jurisdiction of the U.S. courts, except in those cases provided for in the statute.<sup>38</sup> The exceptions are: 1) waiver, 2) disputes over commercial activities, 3) disputes over rights to property "taken in violation of international law," 4) disputes over rights to immovable property or property acquired by succession or gift in the U.S., 5) torts committed

31. FSIA, 28 U.S.C. § 1602 (2000) ("Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in [the FSIA].").

32. *E.g.*, State Immunity Act, 1978, c. 33, § 15 (Eng.), *reprinted in* 17 I.L.M. 1123 [hereinafter State Immunity Act 1978]; State Immunity Act, R.S.C., c. S-18 (1985), *reprinted in* 21 I.L.M. 798 (1982); Foreign States Immunities Act, 1985, pt. 5, § 42 (Austl.), *reprinted in* 25 I.L.M. 715 (1986).

33. *E.g.*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 12, 1983 (F.R.G.), *translated in* 22 I.L.M. 1279; Cour de cassation [Cass. 1e civ.] [Court of Cassation], Mar. 14, 1984, J.C.P. 1984, II, 20205, note Gulphe (Fr.), *translated in* 23 I.L.M. 1062; Corte cost., 15 July 1992, n.31, Gazz. Uff. 1992 (It.), *translated in* 33 I.L.M. 593 (1994).

34. 28 U.S.C. § 1605(a)(1)–(7) (2000).

35. *Id.* § 1602 ("Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities.").

36. *Id.* § 1603(a).

37. Section 1603(b) defines an "agency or instrumentality of a foreign state" as:

any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of the United States . . . , nor created under the laws of any third country.

*Id.* § 1603 (b).

38. *Id.* § 1604.

in the U.S. by a foreign state, 6) enforcement of agreements to arbitrate, and 7) terrorist acts (including torture, extrajudicial killing, aircraft sabotage, and hostage taking) that result in the personal injury or death of a U.S. national committed by states that have been designated as state sponsors of terrorism.<sup>39</sup>

The FSIA represents a functional (*ratione materiae*) approach to state immunity that is no longer absolute but rather is linked to the legitimate, public functions of the state. But, because it authorizes jurisdiction over a foreign state only in a limited and carefully circumscribed number of circumstances,<sup>40</sup> it has stunted the growth of a more expansive approach to the liability of foreign states in U.S. courts.<sup>41</sup>

The FSIA does contain two exceptions, torts and terrorism, both of which can be based on conduct that is also a crime. This suggests that Congress regarded such acts as non-public, because otherwise it would have exempted them from the immunity that shields state acts.<sup>42</sup> Moreover, in two cases in which the FSIA's jurisdictional prerequisites were met,<sup>43</sup> U.S. courts held that states sponsoring core crimes are not immune

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39. 28 U.S.C. § 1605(a)(1)–(7).

40. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983) (stating that unless a FSIA exception is satisfied, U.S. courts lack “subject matter jurisdiction.”); *Argentine Rep. v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 441 (1989) (concluding that FSIA does not permit suits for torts committed outside the United States). The terrorism exception applies only to terrorist acts committed by citizens of states designated by the State Department as “state sponsors of terrorism” that occur outside the foreign (defendant) state and whose victims are nationals of the United States. 28 U.S.C. § 1605(a)(7)(A)–(B).

41. The FSIA exceptions require that the tort be committed in the United States under section 1605(a)(5), and that the terrorist act be committed outside the territory of a terrorist state and have as its victim a U.S. national under section 1605(a)(7)(B). In almost all of the post-World War II cases where states have been accused of international crimes, those crimes involve acts committed in those states against their nationals. By definition, then, they would fail the FSIA's jurisdictional tests. *See, e.g., Mathias Reimann, A Human Rights Exception to Sovereign Immunity: Some Thoughts on Prinz v. Federal Republic of Germany*, 16 MICH. J. INT'L L. 403 (1995).

42. *Cf. Letelier v. Rep. of Chile*, 488 F. Supp. 665, 671 (D.D.C. 1980) (“Nowhere is there an indication that the tortious acts to which the Act makes reference are to only be those formerly classified as ‘private,’ thereby engrafting onto the statute, as the Republic of Chile would have the Court do, the requirement that the character of a given tortious act be judicially analyzed to determine whether it was of the type heretofore denoted as *jure gestionis* or should be classified as *jure imperii*.”).

43. In *Letelier v. Republic of Chile*, the court held that Chile was not immune from suit in tort for assassinations, allegedly the work of the Chilean national intelligence service, which took place in the United States, thus satisfying the “tort” exception to the FSIA. *Id.*; *see* 18 U.S.C. § 1605(a)(5). Rejecting Chile's contention that the killings fell within exceptions to the “tort” exception because they were “discretionary function[s]”

from suit.<sup>44</sup> By hypothesis, this reasoning would apply to state officials whose immunity *ratione materiae* is no more or less than the state's.<sup>45</sup>

#### D. State Official Immunity

The restrictive theory of sovereign immunity applied to state officials as well; that is, they were immune from the jurisdiction of foreign courts in so far as they acted in their "official" capacities on behalf of the state. In that case, the state official's act is attributable solely to the state that bears responsibility for it.<sup>46</sup> As a consequence, this form of immunity

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and therefore immune under the FSIA, the court stated: "Whatever policy options may exist for a foreign country, it has no 'discretion' to perpetrate conduct designed to result in the assassination of an individual or individuals, action that is clearly contrary to the precepts of humanity as recognized in both national and *international law*." *Letelier*, 488 F. Supp. at 673 (emphasis added). In *Alejandro v. Republic of Cuba*, the court found that the "extrajudicial killings" of American nationals over international waters by the Cuban Air Force not only satisfied the FSIA terrorism exception but also provided a basis for plaintiffs to seek punitive damages because "[t]he ban on extrajudicial killing . . . rises to the level of *jus cogens*, a norm of international law so fundamental that it is binding on all members of the international community." *Alejandro v. Republic of Cuba*, 996 F. Supp. 1239, 1252 (S.D. Fla. 1997) (citing, inter alia, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 702(c) (1986) [hereinafter RESTATEMENT (THIRD)], which states, "A state violates [customary] international law if, as a matter of state policy, it practices, encourages, or condones . . . the murder or causing the disappearance of individuals . . .").

44. *But see, e.g.,* *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 718 (9th Cir. 1992) (holding that FSIA does not permit a suit for a *jus cogens* violation of international law (torture) that occurred outside the United States); *Princz v. Fed. Republic of Germany*, 26 F.3d 1166, 1174 (D.C. Cir. 1994) (holding Germany immune under the FSIA for atrocities committed in Germany during the holocaust); *accord* *Sampson v. Fed. Republic of Germany*, 975 F. Supp. 1108, 1116 (N.D. Ill. 1997); *Persinger v. Islamic Rep. of Iran*, 729 F.2d 835, 837 (D.C. Cir. 1984) (holding Iran immune from claims based on hostage taking outside the United States); *Smith v. Libya*, 886 F. Supp. 306, 315 (E.D.N.Y. 1995) (holding Libya immune from claims stemming from the Lockerbie bombing), *aff'd* 101 F.3d 239 (2d Cir. 1996); *see also* *Al-Adsani v. Gov't of Kuwait*, 107 I.L.R. 536, 550 (1996) (holding Kuwait immune from allegations of torture committed outside the United Kingdom).

45. *Cf.* OPPENHEIM, *supra* note 23, at § 509 n.11 ("In respect of official acts it may not be so much a question of immunity from the jurisdiction of the local courts, but rather a matter of those courts being without competence *ratione materiae* over the acts, which pertain to the public activities of a foreign state.").

46. Cassese, *Comments, supra* note 10, at 862 ("The first category [immunity *ratione materiae*] 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.").

*ratione materiae* applies both during and after an official's term of office.<sup>47</sup>

It is debatable whether a separate doctrine of head of state immunity even existed prior to the passage of the FSIA.<sup>48</sup> In the rare pre-FSIA cases where a head of state was sued individually, courts seemed to apply the restrictive theory of state immunity.<sup>49</sup> A state's functional immunity (*ratione materiae*) did not, however, fully cover its head of state in situations in which she or he traveled abroad and while in a foreign country might be faced with arrest or service of civil process.<sup>50</sup> Not surprisingly then, the concept of inviolability from arrest or suit (immunity *ratione personae*) was imported from the law of diplomatic immunity and adapted to heads of state.<sup>51</sup>

Because the FSIA does not refer specifically to heads of state or state officials, U.S. courts have divided over the question of the scope of their immunities. Some, like the court in *Lafontant v. Aristide*,<sup>52</sup> have concluded that incumbent heads of state are inviolable from either criminal or civil process, because individuals are not "agencies or instrumentalities" as defined by the FSIA.<sup>53</sup> Thus, State Department "suggestions of

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47. *Id.* at 863.

48. *See, e.g., Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 276 (S.D.N.Y. 2001) ("At the time of the FSIA's adoption, no widely accepted international practice established a separately standing principle of head-of-state immunity. In fact, prior to 1976 the doctrine of sovereign immunity was generally understood to encompass solely state immunity. Consequently, any reference to a head-of-state immunity 'doctrine' as a concept distinct from foreign state immunity is a construct that does not arise in the case law and commentary as a specifically identified and widely recognized legal principle until after 1976.")

49. *See, e.g., Ex-King Farouk of Egypt v. Christian Dior, S.A.R.L.*, 24 I.L.R. 228, 228, Cour d'appel [CA] [regional court of appeal] Paris, Apr. 11, 1957 (finding sitting king immune from suit in France for cost of wife's wardrobe but could be sued after he was deposed); *see also* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 66 (1965) (under the restrictive theory, head of state immunity is the same as state immunity).

50. *See, e.g., Tachiona*, 169 F. Supp. 2d at 308–09 (dealing with an attempt to serve Zimbabwe's president with civil process while visiting New York to attend a U.N. conference).

51. *See* RESTATEMENT (THIRD), *supra* note 43, § 464, Reporters' Notes 14 ("*Heads of state or government*. Ordinarily, a proceeding against a head of state or government that is in essence a suit against the state is treated like a claim against the state for purposes of immunity. When a head of state or government comes on an official visit to another country, he is generally given the same personal inviolability and immunities as are accorded to members of special missions, essentially those of an accredited diplomat.")

52. *See Lafontant v. Aristide*, 844 F. Supp. 128, 139 (E.D.N.Y. 1994).

53. *See also Estate of Domingo v. Republic of Philippines*, 808 F.2d 1349, 1350 (9th Cir. 1987) (finding sitting head of state immune from claim based on murder of two op-

immunity” remain binding on the courts in those cases and cases of diplomatic and consular immunity, which likewise are not covered by the FSIA.<sup>54</sup> The opposite approach, adopted by the Ninth Circuit in *Chuidian v. Phillipine National Bank*,<sup>55</sup> is that a suit against a state official acting in his official capacity was tantamount to a suit against the state itself.<sup>56</sup> Accordingly, under this approach, the determination of state immunity questions belongs exclusively to the courts, applying the rules found in the FSIA.<sup>57</sup> A third strain in the U.S. case law is illustrated by *Tachiona v. Mugabe*, where the court allowed service of civil process on a sitting head of state in his “private” capacity as an officer of an organization accused of the murder, torture, terrorism, rape, and beatings of his political opponents.<sup>58</sup> In so holding, the court rejected both the absolute inviolability approach of *Aristide* and *Chuidian*’s holding that the FSIA had completely supplanted the pre-FSIA procedure of using suggestions of immunity in cases involving sitting heads of state:

While [there are] . . . valid grounds for the courts to honor the State Department’s suggestions of immunity . . . over a recognized sitting head of state that would subject the foreign official to be hauled into

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position union leaders); *Lafontant*, 844 F. Supp. at 129 (finding incumbent Haitian president immune from civil suit based on assassination of political opponent); *Saltany v. Reagan*, 702 F. Supp. 319 (D.D.C. 1988) (finding British prime minister immune from suit for damages arising from U.S. bombing of Libya).

54. *Lafontant*, 844 F. Supp. at 136–37.

55. *Chuidian v. Phillipine Nat’l Bank*, 912 F.2d 1095 (9th Cir. 1990). In *Chuidian*, the government filed a “statement of interest.” *Id.* at 1099. Unlike a “suggestion of immunity,” which was binding on the court, a “statement of interest” merely suggests “that courts decline to exercise jurisdiction in particular cases implicating sovereign immunity.” *Republic of Austria v. Altmann*, 541 U.S. 677, 701 (2004).

56. *Chuidian*, 912 F.2d at 1102. While the term “official capacity” is not used in § 1603(b) of the FSIA, it is that element, according to the *Chuidian* court, which makes a “suit against an individual . . . the practical equivalent of a suit against the sovereign directly.” *Id.* at 1101. Thus, “Daza must be granted immunity as an instrumentality of the Republic of the Philippines . . .” *Id.* at 1106. However, “[p]lainly Daza would not be entitled to sovereign immunity for acts not committed in his official capacity.” *Id.*

57. *Id.* at 1103. According to the *Chuidian* court,

The principal distinction between pre-1976 common law practice and post-1976 statutory practice is the role of the State Department. If individual immunity is to be determined in accordance with the [former], presumably we would once again be required to give conclusive weight to the State Department’s determination of whether an individual’s activities fall within the traditional exceptions to sovereign immunity.

*Id.* at 1102.

58. *Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 309 (S.D.N.Y. 2001).

court and potentially be exposed to personal liability, the Court finds unconvincing the further contention that the doctrine requires courts to give conclusive effect to the State Department's advice with regard to the appropriateness of service of process upon a head-of-state as it arises in this case.<sup>59</sup>

By this view, immunity *ratione personae* does not mean absolute inviolability from all judicial processes of foreign courts.<sup>60</sup>

While all of the above are civil cases, application of the contrasting approaches represented by *Lafontant* and *Chuidian* might lead to different results in criminal cases.<sup>61</sup> According to the former, the incumbent official would be entitled to absolute immunity regardless of the nature of her crime.<sup>62</sup> On the other hand, the result under *Chuidian* would depend upon whether the official's crime was deemed "public" and therefore immune, or "private" and therefore not immune.<sup>63</sup> *Chuidian* is thus clearly at odds with the prevailing view of immunity *ratione personae* exemplified by *Congo v. Belgium*<sup>64</sup> and more closely resembles the analysis that would be appropriate in cases involving immunity *ratione materiae*, where only "official" conduct would be immune. In the few U.S. cases that do deal with the immunity of a state official charged with conduct that resembles a core violation of international law, the trend appears to be away from deeming any such conduct as "official."<sup>65</sup>

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59. *Id.* at 305; see also *Estate of Domingo*, 808 F.2d at 1350 (finding an order immunizing President of the Philippines from civil suit did not shield him from a deposition subpoena in the same action).

60. See Vienna Convention on Diplomatic Relations art. 31(1)(c), Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 [hereinafter VCDR] ("[A diplomatic agent] shall also enjoy immunity from [the receiving State's] civil and administrative jurisdiction, except in the case of: . . . (c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.").

61. A court following *Tachiona* presumably would reach the same result as in *Lafontant*, i.e., that the State Department's suggestion of immunity would be binding in cases where there was an attempt to exercise the territorial jurisdiction of the court in order to arrest or prosecute an incumbent head of state. Cf. *Tachiona*, 169 F. Supp. 2d at 270, with *Lafontant*, 844 F. Supp. at 132.

62. *Lafontant v. Aristide*, 844 F. Supp. 128, 139 (E.D.N.Y. 1994) ("We need not consider whether an act of President Aristide in ordering the killing [of a political opponent] would be official or private because he now enjoys head-of-state immunity.").

63. See *Chuidian*, 912 F.2d at 1104.

64. See *infra* Part III.

65. Cf. *Kadic v. Karadzic*, 70 F.3d 232, 239-40 (2d Cir. 1995) ("The Executive Branch has emphatically restated in this litigation its position that private persons may be found liable under the Alien Tort Act for acts of genocide, war crimes, and other violations of international humanitarian law."); *Xuncax v. Gramajo*, 886 F. Supp. 162, 175-76 (D. Mass. 1995) (finding no FSIA immunity for former defense minister accused of tor-

The doctrine of state immunity is in disarray in the United States. First, the FSIA has blocked a number of civil actions based on the commission of core crimes that could have contributed to the development of a rule that such acts are not the public acts of states.<sup>66</sup> Second, the courts are divided on the impact of the FSIA on suits against individuals. As the divergent approaches in *Lafontant v. Aristide*, *Chuidian v. Phillipine National Bank*, and *Tachiona v. Mugabe* illustrate, the courts have yet to conceive of or apply a consistent doctrine in deciding whether individuals are immune from suit or not. This may be due, in part, to the fact that U.S. courts almost never use the terms immunity *ratione personae* and immunity *ratione materiae*, and, as a result, they have not clearly identified the distinctions between the two doctrines.<sup>67</sup> Thus, a definitive opinion on state immunity from the ICJ could have benefited the development of the law in the U.S.

### III. ENTER CONGO V. BELGIUM

On April 11, 2000, a Belgian investigating magistrate issued an international arrest warrant for Adbulaye Yerodia Ndombasi (Yerodia), then the incumbent foreign minister of the Congo.<sup>68</sup> Yerodia was alleged to have made “speeches inciting racial hatred during the month of August

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ture, arbitrary detention, and disappearance, which are “acts . . . beyond the scope of the official’s authority”); *In re Extradition of Demjanjuk*, 612 F. Supp. 544, 571 (N.D. Ohio 1985) (finding “political offense” exception to extradition inapplicable in cases where defendant is charged with crimes that are “inconsistent with international standards of civilized conduct.”); *Filartiga v. Pena-Irala*, 577 F. Supp. 860, 864 (E.D.N.Y. 1984) (“To the extent that Pena might have expected that Paraguay would not hold him responsible for his official acts, that was not a ‘justified’ expectation . . .”).

66. *See supra* notes 40–44.

67. This may, in part, be due to the “act of state” doctrine in U.S. courts. Indeed, the similarities between a recent statement by the U.S. Supreme Court defining the act of state doctrine and the ICJ’s definition of immunity *ratione materiae* are striking. *Compare* *Rep. of Austria v. Altmann*, 541 U.S. 677, 701 (2004) (“Unlike a claim of sovereign immunity, which merely raises a jurisdictional defense, the act of state doctrine provides foreign states with a substantive defense on the merits.”), *with* *Congo v. Belgium*, 2002 I.C.J. 3, 22 (Feb. 14) (“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.”). While a definitive answer to this question is beyond the scope of this Article, a tentative conclusion may be that U.S. courts refer to the act of state doctrine in the same way that foreign courts use the term immunity *ratione materiae*.

68. *Congo*, 2002 I.C.J. at 8.

1998,”<sup>69</sup> which constituted grave breaches of the Geneva Conventions of 1949 and their two 1977 Additional Protocols.<sup>70</sup> These international crimes were punishable in Belgium pursuant to a 1999 law that gave its courts jurisdiction over such offenses “wheresoever they may have been committed,”<sup>71</sup> and also contained the provision that “[i]mmunity attaching to the official capacity of a person shall not prevent application of the present Law.”<sup>72</sup> Congo protested by filing an application and a request for provisional measures before the ICJ claiming, inter alia, that the Belgian law’s abrogation of the immunity of a sitting foreign minister was a “[v]iolation of the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State . . . .”<sup>73</sup>

The Court proceeded to the merits of the immunity question “assuming” that the Belgian judge had jurisdiction to issue the arrest warrant in the first place.<sup>74</sup> The Court reasoned that the immunities of incumbent diplomatic and consular agents, and “certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister of Foreign Affairs,” must be sufficient so that the official will not be hindered “in the performance of his or her duties.”<sup>75</sup> Sitting foreign ministers and heads of state must therefore be accorded both “full immunity”

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69. *Id.*

70. Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field ch. IX, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea ch. VIII, Aug. 12, 1949, 6 U.S.T. 3217, 74 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 74 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War pt. IV, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. Protocol additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter, collectively, the Geneva Conventions].

71. Act Concerning the Punishment of Grave Breaches of International Humanitarian Law (Belg.), Feb. 10, 1999, art. 5(3), *translated in* 38 I.L.M. 918, 924 (1999).

72. *Id.* art. 7.

73. *Congo*, 2002 I.C.J. at 9.

74. Initially, Congo had challenged Belgium’s assertion of universal jurisdiction as a “[v]iolation of the principle that a State may not exercise its authority on the territory of another State and of the principle of sovereign equality among all Members of the United Nations . . . .” *Id.* Congo abandoned these arguments in its Memorial and at oral argument. *Id.* at 10. Mark A. Summers, *The International Court of Justice’s Decision in Congo v. Belgium: How Has It Affected The Development of a Principle of Universal Jurisdiction That Would Obligate All States to Prosecute War Criminals?*, 21 B.U. INT’L L.J. 63, 67–68 (2003).

75. *See Congo*, 2002 I.C.J. at 18–20.

and “inviolability” from the criminal jurisdiction of another state because any assertion of another state’s criminal process could affect their ability to travel internationally, one of their essential job functions.<sup>76</sup>

Next, the Court had to dispose of Belgium’s argument that an exception to “full immunity” and “inviolability” *ratione personae* now exists for those incumbent state officials accused of war crimes or crimes against humanity.<sup>77</sup> The Court flatly rejected the contention that there was state practice<sup>78</sup> that supported the existence of such an exception. Nor did the statutes of the various international criminal tribunals established since World War II, all of which specifically abolished “official position” immunity, amount to “state practice” because “these rules . . . do not enable [the Court] to conclude that any such exception exists in customary international law in regard to *national courts*.”<sup>79</sup> Similarly, none of the cases of the international tribunals deals with “the question of the immunities of Ministers of Foreign Affairs before national courts where they are accused of having committed war crimes or crimes against humanity.”<sup>80</sup>

Thus, the Court was “unable to deduce . . . that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.”<sup>81</sup> The Court then ventured even further to outline the exceptions to “the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs.”<sup>82</sup>

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76. See *id.* at 20. See, e.g., VCDR, *supra* note 60, at art. 29 (“The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention.”); *id.* art. 31(1) (“A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State.”).

77. *Congo*, 2002 I.C.J. at 20.

78. Belgium had specifically cited the *Pinochet* case in the United Kingdom and the *Qaddafi* case in France as examples of such state practice. *Id.* The ICJ accepted Congo’s contention that neither of these cases stood for the abrogation of absolute immunity for “incumbent” heads of state and foreign ministers. *Id.* at 21.

79. *Id.* (emphasis added).

80. *Id.*

81. The Court did not mention or refer to the commentators who have urged that such an exception exists. See, e.g., Cassese, *Comments*, *supra* note 10, at 866–69. But see *Congo*, 2002 I.C.J. at 20 (joint separate opinion of Judges Higgins, Kooijmans and Buergenthal), available at [http://www.icj-cij.org/icjwww/idocket/iCOBE/icobejudgment/icobe\\_ijudgment\\_20020214\\_higgins-kooijmans-buergenthal.PDF](http://www.icj-cij.org/icjwww/idocket/iCOBE/icobejudgment/icobe_ijudgment_20020214_higgins-kooijmans-buergenthal.PDF).

82. The “exceptions” are: 1) “such persons enjoy no criminal immunity under international law in their own countries;” 2) they cease to enjoy immunity from the jurisdiction of another state “if the State they represent or have represented decides to waive that immunity;” 3) a former Minister for Foreign Affairs may be prosecuted by another state

Although this portion of its opinion is clearly obiter dictum, binding only the parties to the case and therefore has no formal precedential value, there is no doubt that *Congo v. Belgium* will substantially affect the development of the law of state official immunity in both international and national courts.<sup>83</sup>

#### IV. IS THERE AN EXCEPTION TO STATE OFFICIAL IMMUNITY FOR CORE INTERNATIONAL CRIMES?

The *Congo v. Belgium* decision might be read narrowly as applying only to the immunities *ratione personae* of *incumbent* foreign ministers. However, its sweeping conclusion—that there is no customary international law exception “to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers of Foreign affairs, where they are suspected of having committed war crimes or crimes against humanity”<sup>84</sup>—may not be so neatly cabined in future cases.<sup>85</sup> Indeed, a broader reading of *Congo v. Belgium* is also plausible: There is no customary law exception to the immunity, *ratione personae* or *ratione materiae*, of state officials from the “criminal jurisdiction” of foreign courts, even for core international crimes.<sup>86</sup> And, while a careful examination of the sources relied upon by the Court does not support such an

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“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;” and, 4) “an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international courts, where they have jurisdiction.” *Congo*, 2002 I.C.J. para. 61.

83. As Henkin writes, “A decision of the International Court of Justice is not binding on states other than the parties to the case, but judicial decisions are ‘subsidiary means for the determination of rules of law’ (article 38 of the Statute of the Court), and decisions of the court are highly authoritative.” LOUIS HENKIN ET AL., *RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE* 49 (2d ed. 1991) (discussing the *Nicaragua* case).

84. *Congo*, 2002 I.C.J. at 21.

85. See *infra* Part VI.

86. Even one of the most distinguished scholars of international law has read this portion of the Court’s opinion differently at different times. Compare Cassese, *Comments*, *supra* note 10, at 865 (“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.”), with Antonio Cassese, *The Belgian Court of Cassation v. The International Court of Justice: The Sharon and Others Case*, 1 J. INT’L CRIM. JUST. 437, 444 (2003) (“As I pointed out at the outset of this paper, the ICJ held, although not in explicit terms, that the functional immunity accruing to a minister of foreign affairs . . . does not cease when the person is accused of an international crime.”) [hereinafter Cassese, *The Sharon and Others Case*].

expansive reading of the case, regrettably, the opinion itself leaves us to guess the Court's actual position.

#### A. State Practice

The Court said it had analyzed the state legislation that does exist and found it wanting in its support for the existence of an exception to state official immunity for core international crimes.<sup>87</sup> The Court also apparently accepted Congo's interpretation that *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*<sup>88</sup> and the *Qaddafi*<sup>89</sup> case "confirm the absolute nature of the immunity from criminal process of Heads of State and Ministers for Foreign Affairs."<sup>90</sup> A closer analysis of the cases is necessary in order to appreciate the import of this conclusion.

First, since Pinochet was a former head of state, the extent of incumbent head of state immunity for torture was not squarely before the two different panels of the House of Lords that considered the case.<sup>91</sup> Nonetheless, altogether seven of the Law Lords posited that an exception to

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87. In this regard, it is telling that the Court did not refer to the 1999 Belgian law, Act Concerning the Punishment of Grave Breaches of International Humanitarian Law (Belg.), Feb. 10, 1999, *translated in* 38 I.L.M. 918, 924 (1999), on which *Congo v. Belgium* itself was based and which specifically abolished head of state immunity for core crimes. *See also* Convention on the Prevention and Punishment of the Crime of Genocide art. IV, Dec. 9, 1948, 78 U.N.T.S. 277, 280 ("Persons committing genocide . . . shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, 1465 U.N.T.S. 113 ("['T]orture' means any act by which severe pain or suffering . . . is intentionally inflicted on a person . . . by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity . . ."). There are currently 137 state parties to the Genocide Convention and 140 state parties to the Torture Convention. Multilateral Treaties Deposited With the Secretary-General, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty1.asp> (last visited Jan. 15, 2006). For a discussion of the significance of state ratifications of international conventions as state practice, see *infra* text accompanying notes 126–39.

88. *Regina v. Bartle & the Comm'r of Police for the Metropolis & Others Ex Parte Pinochet (Pinochet II)*, [2000] 1 A.C. 119 (H.L. 1999) *reprinted in* 38 I.L.M. 581 (1999).

89. Cour de Cassation (Fr.), Mar. 13, 2001, Judgment No. 1414, *reprinted in* 105 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 473 (2001); *see also* Salvatore Zappalà, *Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case Before the French Cour de Cassation*, 12 EUR. J. INT'L L. 595, 596 (2001) (discussing the Qaddafi case).

90. *Congo*, 2002 I.C.J. at 21.

91. The question was also considered in *Regina v. Bow St. Stipendiary Magistrate & Others Ex parte Pinochet Ugarte (Pinochet I)*, [2000] 1 A.C. 61 (H.L. 1998). In *Congo v. Belgium*, the ICJ referred only to *Pinochet II*.

immunity exists when a head of state is charged with a serious international crime.<sup>92</sup> Although on this view, head of state immunity is no longer absolute, four of the *Pinochet* judges limited the exception to immunity *ratione materiae*, opining that immunity *ratione personae* would shield a sitting head of state, even one charged with torture.<sup>93</sup>

In *Qaddafi*, the Libyan leader was sued in France based on his government's involvement in terrorist acts that caused the crash of a French airliner and the death of French nationals.<sup>94</sup> Although highly critical of the French Cour de Cassation's decision,<sup>95</sup> one commentator's interpretation of it is far more nuanced than the ICJ's:

The decision . . . implicitly admits the possibility of exceptions to immunity from jurisdiction of Heads of State in office. The Court concluded: 'at this stage of development of international customary law, the *crime charged* [i.e., terrorism], no matter how serious *does not fall within the exceptions* to the principle of immunity from jurisdiction of foreign Heads of State in office.' An *a contrario* interpretation of this passage leads to the conclusion that there are crimes that constitute exceptions of the jurisdictional immunity of Heads of State. This passage, however, does not shed any light on the type of immunity involved.<sup>96</sup>

Thus, the *Pinochet* and *Qaddafi* cases actually evince the views of those courts that an exception to state official immunity exists for at least

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92. *Pinochet II*, 38 I.L.M. at 594 (Lord Browne-Williamson); *id.* at 626 (Lord Hope of Craighead); *id.* at 637 (Lord Hutton); *id.* at 661 (Lord Phillips of Worth Matravers); *Pinochet I*, [2000] 1 A.C. at 108–09 (Lord Nicholls of Birkenhead); *id.* at 115 (Lord Steyn); *id.* at 118 (Lord Hoffman); *but see id.* at 79–82 (Lord Slynn of Hadley); *id.* at 96–97 (Lord Lloyd of Berwick).

93. *Pinochet II*, 38 I.L.M. at 641–42 (Lord Saville of Newdigate); *id.* at 643–45 (Lord Millett); *id.* at 661 (Lord Phillips of Worth-Matravers); *Pinochet I*, [2000] 1 A.C. at 107–09 (Lord Nicholls of Birkenhead).

94. Cour de Cassation (Fr.), Mar. 13, 2001, Judgment No. 1414, *reprinted in* 105 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 473 (2001); *see also* Zappalà, *supra* note 89, at 596.

95. The French high court's opinion has been described as a "three-page terse and poorly reasoned decision." Zappalà, *supra* note 89, at 596. Zappalà criticizes this holding, *inter alia*, for failing to consider whether Qaddafi was in fact a head of state; failing to distinguish between immunity *ratione personae* and *ratione materiae*; failing to "clarify whether it considered that exceptions to functional immunity for international crimes are provided for only by conventional texts or also by customary rules"; and failing to explain why terrorism is not an international crime. *Id.*

96. *Id.* at 600–01. The French version of the excerpt quoted above reads: "[E]n l'état du droit international, le crime dénoncé, quelle qu'en soit la gravité, ne relève pas des exceptions au principe de l'immunité de juridiction de chefs d'Etats étrangers en exercice." *Id.* at 601 n.30.

some core international crimes,<sup>97</sup> although the cases do not make the parameters of the exception clear. The ICJ must have either ignored or rejected this interpretation when, referring specifically to these cases, it stated that it had not been able to “deduce . . . any form of exception to the rule according immunity . . . to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.”<sup>98</sup>

### *B. The Post-World War II International Tribunals*

The Court next analyzed post-war international practice. Since World War II, the statutes of every tribunal created to prosecute core crimes have abolished official position immunity. In *Congo v. Belgium*, the ICJ limited the significance of these developments to international courts, stating that “the rules concerning the immunity or criminal responsibility of persons having an *official capacity* . . . do not enable it to conclude that any such exception exists in customary international law in regard to *national courts*.”<sup>99</sup> A plausible interpretation of the quoted language might be that the Court meant only that it found that no such exception exists in national courts only with regard to immunity *ratione personae*. This position is at least defensible because immunity *ratione personae* (inviolability) does shield incumbent officials and diplomats from prosecution, even for crimes.<sup>100</sup> However this reading is rendered less tenable because of the Court’s use of the phrase “persons having an official capacity,” which would have been superfluous if the Court were referring only to immunity *ratione personae*, which covers all acts, official and unofficial. And, significantly, “official capacity” is the term used in the statutes of the international tribunals to refer to immunity *ratione materiae*. Is the ICJ then saying that no customary law exception for international crimes exists with regard to immunity *ratione materiae* in national

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97. Torture cases were also initiated against Pinochet in France and Germany, presumably because he was not believed to be immune as a former head of state. See Summers, *supra* note 74, at 90–91 n.142.

98. *Congo*, 2002 I.C.J. at 21.

99. *Id.* (emphasis added). From a purely logical perspective, this statement is curious indeed. Absolute sovereign (including head of state) immunity was a rule of customary international law that prohibited the courts of one state from sitting in judgment on the acts of another; that is, by definition it was applicable only in national courts. How then could any exception to that customary rule not apply in national courts?

100. See *supra* Part II.D.

courts?<sup>101</sup> That would create a substantial jurisdictional loophole in national courts prosecuting international crimes.

### 1. Nuremberg

The exception to absolute state official immunity for core international crimes first appeared in the Nuremberg Charter, which was a response to the largely failed attempt to judicially punish those responsible for World War I. During the peace negotiations following the First World War, a divided Commission on Responsibility of the Authors of the War and Enforcement of Penalties recommended to the Preliminary Peace Conference that criminal charges be brought against the German emperor.<sup>102</sup> The novelty of this proposal was reflected by the objection interposed by the U.S. representatives on the Commission that:

[they were] unable to agree with this conclusion, in so far as it subjects to criminal, and therefore, to legal prosecution, persons accused of offenses 'against the laws of humanity,' and in so far as it subjects Chiefs of States to a degree of responsibility hitherto unknown to *municipal or international law*, for which no precedents are to be found in the modern practice of nations (emphasis in the original).<sup>103</sup>

Thereafter, in what was evidently compromise language, the Treaty of Versailles charged Kaiser William II with "a supreme offence against international morality and the sanctity of treaties."<sup>104</sup> Commentators, writing shortly before the Nuremberg Charter was adopted in 1945, disagreed whether the Versailles Treaty charged the Kaiser with a "crime"<sup>105</sup> or whether it merely alleged "breaches not of international law

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101. That is precisely how the Special Court for Sierra Leone read the ICJ's opinion in *Congo v. Belgium* in the Charles Taylor case. See Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, paras. 50–52 (May 31, 2004), available at <http://www.sc-sl.org/SCSL-03-01-I-059.pdf>.

102. Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference (Mar. 29, 1919), reprinted in 14 AM. J. INT'L L. 95, 95–104 (1920). The Commission wrote, "All persons belonging to enemy countries, however high their position may have been, without distinction of rank, including Chiefs of States, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution . . . ." *Id.* at 117.

103. S.S. Gregory, *Criminal Responsibility of Sovereigns for Willful Violations of the Laws of War*, 6 VA. L. REV. 400, 414 (1920).

104. Treaty of Peace with Germany (Treaty of Versailles), art. 227, June 28, 1919, 2 Bevans 43, 136.

105. Hans Kelsen, *Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals*, 31 CAL. L. REV. 530, 545 (1943).

but of international morality . . . .”<sup>106</sup> In any event, the dispute went unresolved because the Netherlands, where the Kaiser had sought refuge after the war, refused to surrender him for trial.<sup>107</sup>

There were, nonetheless, some war crimes prosecutions following World War I. The disappointing results were six convictions and six acquittals with the longest sentences of four years imprisonment imposed on two German sailors who intentionally fired upon the survivors of a British hospital ship.<sup>108</sup> However, even this prosecution was frustrated by the assertion of the “superior orders” defense, according to which a soldier is not guilty of a war crime committed on the orders of a superior officer, unless such commands are “manifestly and undisputably [sic] illegal.”<sup>109</sup>

A superior order can also be what Hans Kelsen referred to as an “act of State”<sup>110</sup> if it was “issued by the government (Head of State, cabinet, member of cabinet, parliament), or issued at the command or with the authorization of the government.”<sup>111</sup> Thus understood, the two defenses—superior orders and act of State—could operate in tandem to shield those both up and down the chain of command from individual criminal responsibility.<sup>112</sup> Equally important is the fact that these defenses were customary international law rules applicable in national courts:

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106. George Manner, *The Legal Nature and Punishment of Criminal Acts of Violence Contrary to the Laws of War*, 37 AM. J. INT’L L. 407, 416 (1943).

107. PAUST ET AL., INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS 749 (2d ed. 2000).

108. U.S. DEPARTMENT OF THE ARMY, PAMPHLET NO. 27-161-2, 2 INTERNATIONAL LAW 221–22 (1962). Three German officers, one of whom did not stand trial, agreed to destroy all 234 survivors of the British hospital ship, Llandovery Castle, because they witnessed the sinking. They were acquitted of sinking the ship based on the “superior orders” defense but convicted of killing the survivors because this was the “rare and exceptional case” where “it was perfectly clear to the accused that killing defenceless people in the lifeboats could be nothing else but a breach of the law.” Kelsen, *supra* note 105, at 558–59 n.30.

109. Kelsen, *supra* note 105, at 558.

110. As Kelsen uses the term “act of State,” it means simply an official act of the sort over which foreign courts would not have jurisdiction by virtue of immunity *ratione materiae*. *Id.* at 541–42.

111. This is true even if the ordered act violated international law. *Id.* at 556.

112. Kelsen also recognized that these defenses would frustrate most war crimes prosecutions since a state “is nearly always in a position to justify its acts from the point of view of national law by the necessities of war” and in “autocratic states like Nazi Germany” the “legal power conferred by national law . . . upon the head of the State as commander-in-chief of the armed forces with respect to the conduct of war is almost unlimited.” *Id.* at 557.

The collective responsibility of a State for its own acts excludes, according to general international law, the individual responsibility of the person who, as a member of the government, at the command or with the authorization of the government, has performed the act. This is a consequence of the immunity of the State from the jurisdiction of another State.<sup>113</sup>

To avoid the problems that had arisen in the post-World War I prosecutions,<sup>114</sup> the drafters of the Nuremberg Charter<sup>115</sup> made explicit the exception to immunity based on “official position” and the elimination of the superior orders defense.<sup>116</sup> And, despite substantial evidence to the contrary, at least one commentator of the time concluded that “the law stated in Articles 7 [official position] and 8 [superior orders] of the Charter . . . was amply supported by general principles of law which constitute a source of international law.”<sup>117</sup>

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113. *Id.* at 540–41.

114. According to Kelsen’s rigidly positivist view, individuals could not be prosecuted for war crimes “[having] the character of acts of State” unless their state of nationality consented in the peace treaty. Nevertheless, he believed that Article 228 of the Treaty of Versailles could be “interpreted as the necessary consent,” though he recommended “insert[ing] into a future international treaty conferring upon a national or international court jurisdiction over war criminals, an express provision including war crimes which have the character of acts of State.” *Id.* at 561.

115. Kelsen also doubted that “the rules of general internation[al] law . . . are favorable” to the establishment of tribunals to try war criminals by occupying powers on the territory of their defeated enemy. Despite that potential objection, that was the procedure adopted by the Allies in the London Agreement which created the Nuremberg tribunals. *Id.* at 561–62 n.35.

116. Charter of the International Military Tribunal art. 7, Aug. 8, 1948, 59 Stat. 1544, 1548 (“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.”); *id.* art. 8 (“The fact that the Defendant acted pursuant to Order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment . . .”). In addition to the United States, the Soviet Union, France, and Great Britain, by whose agreement the Charter was adopted, it was subsequently ratified by nineteen other states. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 562 (4th ed. 1990).

117. Quincy Wright, *The Law of the Nuremberg Trial*, 41 AM. J. INT’L L. 38, 71 (1947). *But see* Kelsen, *supra* note 105, at 543–44. Kelsen, a contemporary of Wright’s, criticizes as “very questionable” the use of “general principles of law . . . as sources of international law.” Another of Wright’s contemporaries flatly contradicts him: “However, if foreign law may be applied in this situation without violating the rule against *ex post facto* criminal punishment, its application is, of course, limited by the defenses act of state [immunity *ratione materiae*] and superior orders since they are part of the law of war.” Manner, *supra* note 106, at 419.

The Charter was an “exercise of the sovereign legislative power of the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world.”<sup>118</sup> In an article written shortly after the Nuremberg trials ended, Quincy Wright argued that the parties to the Charter were justified in exercising jurisdiction over the Nuremberg defendants as an extraterritorial application of their criminal jurisdictions or as a derivative of their temporary sovereignty over Germany.<sup>119</sup> Either way, the trials were examples of “national” courts sitting in judgment of charges of core international crimes,<sup>120</sup> as to which the official position immunity defense was unavailable because it had been abrogated by the Charter.

In 1946, the UN General Assembly unanimously affirmed the principles of the Nuremberg Charter and Judgment.<sup>121</sup> In 1950, the General Assembly recalled this affirmation<sup>122</sup> and received the International Law Commission formulation of these Principles, which included the abolition of state official immunity for core international crimes.<sup>123</sup> This action swiftly led to the universal recognition that the Nuremberg principles were customary international law.<sup>124</sup> Thus, whatever uncertainty

118. Int'l Military Tribunal, XXII *Trial of the Major War Criminals Before the Int'l Military Tribunal* 461 (1947) (opinion and judgment as to jurisdiction on Sept. 30, 1946).

119. Wright, *supra* note 117, at 49–51. In *Pinochet II*, Lord Millet described in some detail how the tribunals administered “Nuremberg law”:

The great majority of war criminals were tried in the territories where the crimes were committed. As in the case of the major war criminals tried at Nuremberg, they were generally (though not always) tried by national courts or by courts established by the occupying powers. The jurisdiction of these courts has never been questioned and could be said to be territorial. But everywhere the plea of state immunity was rejected in respect of atrocities committed in the furtherance of state policy in the course of the Second World War; and nowhere was this justified on the narrow (though available) ground that there is no immunity in respect of crimes committed in the territory of the forum state.

*Pinochet II*, at 647.

120. Genocide was not defined as a separate crime in the Nuremberg Charter.

121. Affirmation of the Principles of International Law recognized by the Charter of the Nuremberg Tribunal, G.A. Res. 95(I), U.N. GAOR, 1st Sess., pt. 2, U.N. Doc. A/64/Add.1 (1946).

122. G.A. Res. 488 (V), U.N. GAOR, 320th mtg., U.N. Doc. A/1775 (1950).

123. *The Principles of International Law Recognized in the Charter and the Judgment of the Nürnberg Tribunal: Report of the International Law Commission to the General Assembly*, 5 U.N. GAOR, Sup. No. 12, U.N. Doc. A/1316 (1950), reprinted in [1950] 2 Y.B. Int'l L. Comm'n 364, 374, U.N. Doc. A/CN.4/SER.A/1950/Add.1. The *Congo v. Belgium* opinion did not mention this resolution or consider its effect.

124. See BROWNLIE, *supra* note 116, at 562.

may have existed prior to World War II regarding the customary law status of an exception to state official immunity for war crimes and crimes against humanity, it had been completely erased shortly after the war. And, since the law of Nuremberg was an exercise of national legislative authority administered in national courts by national authorities,<sup>125</sup> it is difficult to see how it could be construed as other than “state practice” evidencing the abrogation of head of state immunity in “national” courts.

## 2. Post-Nuremberg

Since then, all of the other tribunals created by the international community to prosecute core crimes have explicitly abolished head of state immunity. The language in each of these statutes is almost identical with that in the Nuremberg Charter.<sup>126</sup> This consistent and frequent reaffirmation by the international community of a principle of law only reinforces its customary stature. But, does it represent “state practice” that the rule is applicable in national courts?

Although these statutes are not directly applicable in national tribunals, they do represent the consensus of the international community that war

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125. In all, 1,416 defendants were convicted by the tribunal established by the United States to try war criminals within its “zone.” Similar tribunals were established by France, Great Britain and the Soviet Union who controlled the other zones into which Germany was divided in the immediate post-war period. These zonal tribunals were the equivalent of state courts. FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUREMBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10 (1949), *reprinted in* PAUST ET AL., *supra* note 107, at 633–35.

126. *Compare* Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7(2), Annex to the Report of the Secretary-General Pursuant to Paragraph 2 of U.N. Security Council Resolution 808 (1993) at 39, U.N. Doc. S/25704 (1993) (“The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.”), *with* Statute of the International Tribunal for Rwanda, art. 6(2), S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., Annex, at 6, U.N. Doc. S/RES/955 (1994) (“The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.”), *and* ICC Statute, *supra* note 13, art. 27 (“This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as Head of State or Government . . . shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.”), *and* Statute of the Special Court for Sierra Leone, art. 6(2), Annex to the Agreement on the Establishment of a Special Court for Sierra Leone, Jan. 16, 2002, U.N.-Sierra Leone, 2178 U.N.T.S. 145, 147 (“The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.”).

criminals, regardless of their official position, should not escape justice no matter where they are prosecuted.<sup>127</sup> Like the international tribunal at Nuremberg, these courts were set up to prosecute the most prominent wrongdoers, leaving the others for prosecution in the national courts.<sup>128</sup> It would be ironic indeed if the statutes of the international tribunals evidence only that state official immunity has been abolished in international courts, since if that were so, a head of state would not be immune in the international court, whereas those carrying out his orders, if tried in a national court, would be. This is precisely the outcome in reverse that the changes in the law of immunities initiated by Nuremberg were intended to preclude.

This outcome is also not supported by the ICJ's analysis of the post-war tribunals as "state practice,"<sup>129</sup> because the Court did not consider the significance of the voting in the Security Council for the resolutions that created the International Criminal Tribunal for the former Yugoslavia (ICTY),<sup>130</sup> the International Criminal Tribunal for Rwanda (ICTR),<sup>131</sup> and the Special Court for Sierra Leone.<sup>132</sup> Nor did it refer to the number of state ratifications of the ICC treaty.<sup>133</sup> While scholars argue over the

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127. Cf. Dapo Akande, *International Law Immunities and the International Criminal Court*, 98 AM. J. INT'L L. 407, 420 (2004) ("[B]y providing that the ICC Statute applies to state officials, Article 27(1) establishes that those officials are subject to prosecution by the ICC even when they acted in their official capacity.").

128. See, e.g., Press Release, ICTY, Address of the Prosecutor at the Inauguration of the War Crimes Chamber of the Court of B-H, Sarajevo (Mar. 9, 2005), available at [http://www.bosnia.org.uk/news/news\\_body.cfm?newsid=2046](http://www.bosnia.org.uk/news/news_body.cfm?newsid=2046) (last visited Jan. 10, 2006) (recognizing the concurrent jurisdiction of the ICTY and the national courts).

129. Interestingly, the Court limited its examination to "state practice" and did not mention "*opinio juris*," the other element necessary for the formulation of a rule of customary international law. See Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 757 (2001). As the inquiry is usually formulated, in order to be recognized as customary international law, a rule must be supported by "general and consistent practice by states" that is "followed out of a belief of legal obligation [*opinio juris*]." *Id.*

130. U.N. Security Council Resolution 827 was adopted by a vote of 15-0. S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

131. U.N. Security Council Resolution 955 was adopted by a vote of 13-1, with China abstaining and Rwanda opposing. U.N. SCOR, 49th Sess., 3453d mtg. at 3, U.N. Doc. S/PV.3453 (1994).

132. U.N. Security Council Resolution 1315, 14 Aug. 2000, was passed 15-0. Meetings Conducted/Actions Taken by the Security Council in 2000, <http://www.un.org/Depts/dhl/resguide/scact2000.htm> (last visited Jan. 15, 2006).

133. The ICC treaty, which went into force July 1, 2002, currently has 100 parties and 139 signatories. None of the parties or signatories has submitted reservations or interpretive declarations regarding Article 27 of the treaty which abolishes official position im-

weight to be attached to such votes<sup>134</sup> or ratifications<sup>135</sup> or even whether voting and ratification amount to “state practice” [action] or “*opinio juris*” [statements of legal obligation],<sup>136</sup> in this case all of the assenting states were self-consciously voting for or ratifying a body of legal rules that they understood were customary international law.<sup>137</sup> Thus their votes or ratifications are by definition expressions of their beliefs in the validity of the legal principles contained in the statutes of the tribunals. Finally, when the Appeals Chamber of the ICTY considered the question whether “official position” immunity insulates state officials from com-

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munity. Status of Multilateral Treaties Deposited with the Secretary-General, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp>.

134. Compare Daniel H. Joyner, *The Kosovo Intervention: Legal Analysis and a More Persuasive Paradigm*, 13 EUR. J. INT'L L. 597, 615 (2002) (“[D]ecisions of the Security Council and the actions taken in pursuance thereof, in and of themselves, do not create customary international law.”), with John Alan Cohan, *The Bush Doctrine and the Emerging Norm of Anticipatory Self-Defense in Customary International Law*, 15 PACE INT'L L. REV. 283, 295 (2003) (“[T]he voting patterns of the United States in the U.N. Security Council and policy statements made on behalf of the United States in the Security Council are formal state expressions of *opinio juris* on the practice [anticipatory self-defense] at issue.”).

135. In the *North Sea Continental Shelf* cases, the ICJ famously opined:

With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected.

*North Sea Continental Shelf* (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3 (Feb. 20), para. 73.

136. Cf. Roberts, *supra* note 129, at 758, where the author argues that:

[M]odern custom is derived by a *deductive* process that begins with general statements of rules rather than particular instances of practice. This approach emphasizes *opinio juris* rather than state practice because it relies primarily on statements rather than actions. Modern custom can develop quickly because it is deduced from multilateral treaties and declarations by international fora such as the General Assembly, which can declare existing customs, crystallize emerging customs, and generate new customs.

137. When they voted unanimously for U.N. Security Council Resolution 827, the members of the Council clearly understood that they “would not be creating or purporting to ‘legislate’ that law. Rather, the International Tribunal would have the task of applying existing international humanitarian law.” Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), para. 8, U.N. Doc. S/25704 (May 3, 1993). See Zappalà, *supra* note 89, at 603. The same would hold true for the other tribunals since their statutes, as noted above, contained nearly identical language regarding the abrogation of “official position” immunity.

plying with the orders of international tribunals to produce evidence, it concluded that the exception to state official immunity for core crimes is customary law applicable in national as well as international courts.<sup>138</sup>

The general rule under discussion [“official position” immunity] is well established in international law and is based on the sovereign equality of States (*par in parem non habet imperium*). The few exceptions relate to one particular consequence of the rule. These exceptions arise from the norms of international criminal law prohibiting war crimes, crimes against humanity and genocide. Under these norms, those responsible for such crimes cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity.<sup>139</sup>

The need for the ICJ to clarify whether there is a customary international law exception to “official position” immunity in national courts should be apparent. As the above analysis demonstrates, the same authorities on which it relied in *Congo v. Belgium* support the existence of such a rule. Moreover, it is especially important for the Court to affirm in clear terms that the exception applies in national courts because the failure to do so could not only deleteriously affect the prosecution of core crimes in national courts, but also the ICC’s ability to do so as well.

#### V. STATE OFFICIAL IMMUNITY AND THE ICC STATUTE

The ICC statute has three separate provisions pertaining to state official immunity. Article 27(1) contains language nearly identical to that in statutes of the other post-war tribunals.<sup>140</sup> It abolishes immunity *ratione materiae* in cases before the court. Article 27(2) is new and it eliminates immunity *ratione personae*: “Immunities or special procedural rules

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138. In *Congo v. Belgium*, the ICJ found no support for this proposition in the cases of the ICTY cited by Belgium, among which this case was not included. See *Congo*, 2002 I.C.J. at 21; Counter Memorial of the Kingdom of Belgium, Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.) (Sept. 28, 2001), available at [http://www.icj-cij.org/icjwww/idocket/iCOBE/icobepleadings/icobe\\_ipleading\\_countermemorial\\_belgium\\_20010928.pdf](http://www.icj-cij.org/icjwww/idocket/iCOBE/icobepleadings/icobe_ipleading_countermemorial_belgium_20010928.pdf) (last visited Feb. 13, 2006).

139. Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, para. 41 (Oct. 29, 1997), available at <http://www.un.org/icty/blaskic/appeal/decision-e/71029JT3.html>.

140. ICC Statute, *supra* note 13, art. 27(1) (“This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.”).

which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”<sup>141</sup> Some commentators have asserted that Article 27(2) applies to immunity *ratione materiae* as well as immunity *ratione personae*.<sup>142</sup> However, this reading of the statute seems unlikely, since it would render Article 27(1) surplusage. Moreover, Article 27(1) makes a specific reference to exemption from “criminal responsibility,” the theoretical basis of immunity *ratione materiae*, whereas Article 27(2) refers to exercise of the Court’s “jurisdiction,” the concept behind immunity *ratione personae*.<sup>143</sup> If this narrower reading of Article 27(2) is accepted, then the Court would have jurisdiction over the defendant by virtue of the waiver of her immunity *ratione personae* and she would be precluded from raising immunity *ratione materiae* as a defense to any of the substantive charges levied by the Court by virtue of Article 27(1).<sup>144</sup>

In addition, Article 27, when read in conjunction with Article 98(1),<sup>145</sup> is asserted by some to constitute a state party’s waiver of all the immunities of their officials even before the national courts of other state parties.<sup>146</sup> The counter interpretation is that the state parties to the ICC Statute have waived state official immunity only with regard to the cases before the ICC.<sup>147</sup> The adherents of both positions seem to agree that

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141. *Id.* art. 27(2).

142. *E.g.*, David S. Koller, *Immunities of Foreign Ministers: Paragraph 61 of the Yerodia Judgment as it Pertains to the Security Council and the International Criminal Court*, 20 AM. U. INT’L L. REV. 7, 37 (2004) (“Article 27(2) eliminates both immunity *ratione materiae* and immunity *ratione personae* before the ICC.”).

143. *See supra* text accompanying note 67.

144. *But see* Akande, *supra* note 127, at 420 (“Article 27(2) conclusively establishes that state officials are subject to prosecution by the ICC and that provision constitutes a waiver by states parties of any immunity that their officials would otherwise possess vis-à-vis the ICC.”).

145. ICC Statute, *supra* note 13, art. 98(1) (“The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.”).

146. *See* Akande, *supra* note 127, at 422; Koller, *supra* note 142, at 38–40; Jann K. Kleffner, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, 1 J. INT’L CRIM. JUST. 86, 106 (2003); Micaela Fruilli, *The Question of Charles Taylor’s Immunity—Still in Search of a Balanced Application of Personal Immunities?*, 2 J. INT’L CRIM. JUST. 1118, 1129 (2004).

147. *See* Cassese, *The Sharon and Others Case*, *supra* note 86, at 442 (“Under another, more convincing interpretation, immunities are lifted only in proceedings before the ICC.”).

state officials of non-parties retain all their immunities before the national courts of other states, even those that are parties to the ICC statute.<sup>148</sup> As will be demonstrated below, in tandem with the decision in *Congo v. Belgium*, this could result in total impunity from prosecution for core crimes for non-party state officials.

Two examples will illustrate this point:

*Case 1.* Following the U.S. withdrawal from Afghanistan and a change in its government, Afghanistan<sup>149</sup> could refer to the Court an allegation that a former U.S. Secretary of Defense had authorized the use of torture in the interrogation of prisoners captured in Afghanistan during the Afghan conflict, and therefore had committed “grave breaches” of the Geneva Prisoners of War Convention.<sup>150</sup>

If the U.S. requests that the ICC defer to its investigation,<sup>151</sup> under the “complementarity” provisions in Article 17 of the ICC Statute, the Court must defer even to a non-party state, like the U.S., unless “the State is unwilling or unable genuinely to carry out the investigation or prosecution.”<sup>152</sup> A zealous U.S. Attorney, who is a veteran of the ICTY, indicts, and the former Secretary moves to dismiss the indictment because he was acting in his official capacity when he authorized the interrogations in Afghanistan. The U.S. judge, unable to resolve the immunity question under U.S. law because there are no cases directly on point, turns to the customary international law of immunity, which is applicable in U.S. courts.<sup>153</sup> She reads *Congo v. Belgium* to mean that there is no customary law exception to immunity for core crimes in national courts and grants the motion to dismiss the indictment.

*Case 2.* The newly recognized state of Palestine accedes to the ICC Statute. Thereafter, it charges that a former Israeli prime minister committed a war crime when he authorized the Israeli air force bombing of civilian targets in Gaza. Palestine requests that the United Kingdom, another state party to the ICC Treaty, arrest and extradite the former prime minister, who is in London to give a speech.

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148. See *supra* notes 146–47.

149. Afghanistan is a party to the ICC Statute and could therefore make such a referral under Article 14.

150. Geneva Conventions, *supra* note 70.

151. See ICC Statute, *supra* note 13, art. 17(1).

152. *Id.*

153. See *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.”).

The former prime minister challenges the extradition request in the British courts on the ground that he was acting in his official capacity when he authorized the bombing of Gaza targets. The British judge reads *Congo v. Belgium* to mean that there is no customary law exception to immunity for core crimes in national courts and refuses the extradition request. In either of these cases could the judges' immunity decisions provide bases for the ICC to assert its jurisdiction because the states are "unwilling" to prosecute?<sup>154</sup>

The answer to this question is arguably, "No." The ICC Statute defines "unwillingness in a particular case" as "proceedings . . . undertaken . . . for the purpose of shielding the person concerned from criminal responsibility," or "proceedings . . . not conducted independently or impartially" or "in a manner . . . inconsistent with an intent to bring the person concerned to justice."<sup>155</sup> These standards are simply inapposite in a case where a judge, based on a plausible interpretation of a less than pellucid decision of the ICJ, determines that a former state official has immunity.<sup>156</sup> This is especially true since in these cases the courts' decisions are based on immunity *ratione materiae* which, unlike immunity *ratione personae*, does not simply temporarily defeat an assertion of jurisdiction but rather provides a complete, permanent defense because the alleged criminal act is chargeable only to the state and not to the individual acting on its behalf.<sup>157</sup>

## VI. CONCLUSIONS

It might be argued that the results predicted above are not ineluctable. Fortunately, hypothesis is not limited by probability. Even so, it is significant that at least one post-*Congo v. Belgium* court has read the case precisely this way. In *Prosecutor v. Charles Ghankay Taylor*,<sup>158</sup> the Special Court for Sierra Leone said, "the International Court of Justice [in *Congo v. Belgium*] upheld immunities in national courts even in respect

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154. Professor Cassese has suggested that this should be the outcome. See Cassese, *The Sharon and Others Case*, *supra* note 86, at 442–43.

155. ICC Statute, *supra* note 13, art. 17(2)(a),(c).

156. The other ground for invoking the ICC's jurisdiction—when a state is unable to prosecute because of a "total or substantial collapse or unavailability of its national judicial system"—is obviously inapplicable on these facts. See *id.* art. 17(3).

157. See, e.g., *Lafontant v. Aristide*, 844 F. Supp. 128, 132 (E.D.N.Y. 1994).

158. *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, para. 50 (May 31, 2004), available at <http://www.sc-sl.org/SCSL-03-01-I-059.pdf>.

of war crimes and crimes against humanity relying on customary international law.<sup>159</sup>

Given this, it cannot be said that the potential for misinterpretation of *Congo v. Belgium* in national tribunals is illusory. This is particularly unfortunate since if one accepts the proposition that the states most likely not to ratify the ICC treaty are those most likely to engage in conduct it prohibits, then it follows that non-party state officials will also be those who most frequently commit core crimes. In such cases, the courts in their nationality states, where they are most apt to be found, may be motivated to shield them from prosecution by an international court, which they abjure, by applying a rule of immunity based on a colorable reading of *Congo v. Belgium*.

Moreover, the effects will not be limited to non-parties to the ICC Statute. For even in cases involving state parties, the ICC will be precluded from requesting the surrender of the officials of non-party states because, if *Congo v. Belgium* means that non-party state officials have immunity for core crimes, such a request would require the state party “to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State . . . .”<sup>160</sup> In either situation it is unlikely that the ICC will ever be able to assume jurisdiction by invoking the exception to the rule of complementarity for a prosecution that lacks “genuineness.”

Equally unfortunate is the opportunity missed to bring some clarity to an underdeveloped area of international law. Instead, in *Congo v. Belgium*'s wake the status of state official immunity is even more in doubt. After more than a half century of erosion in the rule of absolute immunity from prosecution for core international crimes, it appears that state officials in national courts can still plead, “*L'état c'est moi.*”

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159. *Id.* para. 50. In this case, the defendant, the exiled former president of Liberia, moved to quash an indictment issued by the U.N.-supported Special Tribunal for Sierra Leone charging him with core international crimes. *Id.* para. 8.

160. ICC Statute, *supra* note 13, art. 98(1).