ICJ, Democratic Republic of the Congo v. Belgium

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[Source: International Court of Justice, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgement 14 Febuary 2002; available on http://www.icj-cij.org; footnotes partially reproduced.]

INTERNATIONAL COURT OF JUSTICE YEAR 2002 14 February 2002 CASE CONCERNING THE ARREST WARRANT OF 11 APRIL 2000 (DEMOCRATIC REPUBLIC OF THE CONGO v. BELGIUM)

JUDGEMENT [...]

13. On 11 April 2000 an investigating judge of the Brussels *tribunal de première instance* issued "an international arrest warrant *in absentia*" against Mr. Abdulaye Yerodia Ndombasi, charging him, as perpetrator or co-perpetrator, with offences constituting grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto, and with crimes against humanity.

At the time when the arrest warrant was issued Mr. Yerodia was the Minister for Foreign Affairs of the Congo. [...]

15. In the arrest warrant, Mr. Yerodia is accused of having made various speeches inciting racial hatred during the month of August 1998. The crimes with which Mr. Yerodia was charged were punishable in Belgium under the Law of 16 June 1993 "concerning the Punishment of Grave Breaches of the International Geneva Conventions of 12 August 1949 and of Protocols I and II of 8 June 1977 Additional Thereto", as amended by the Law of 19 February 1999 "concerning the Punishment of Serious Violations of International Humanitarian Law" (hereinafter referred to as the "Belgian Law"). [See Belgium, Law on Universal

Jurisdiction]

Article 7 of the Belgian Law provides that “The Belgian courts shall have jurisdiction in respect of the offences provided for in the present Law, wheresoever they may have been committed”. In the present case, according to Belgium, the complaints that initiated the proceedings as a result of which the arrest warrant was issued emanated from 12 individuals all resident in Belgium, five of whom were of Belgian nationality. It is not contested by Belgium, however, that the alleged acts to which the arrest warrant relates were committed outside Belgian territory, that Mr. Yerodia was not a Belgian national at the time of those acts, and that Mr. Yerodia was not in Belgian territory at the time that the arrest warrant was issued and circulated. That no Belgian nationals were victims of the violence that was said to have resulted from Mr. Yerodia’s alleged offences was also uncontested. Article 5, paragraph 3, of the Belgian Law further provides that “[i]mmunity attaching to the official capacity of a person shall not prevent the application of the present Law”. [...]

17. On 17 October 2000, the Congo filed in the Registry an Application instituting the present proceedings [...], in which the Court was requested “to declare that the Kingdom of Belgium shall annul the international arrest warrant issued on 11 April 2000”. The Congo relied in its Application on two separate legal grounds. First, it claimed that “[t]he universal jurisdiction that the Belgian State attributes to itself under Article 7 of the Law in question” constituted 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, as laid down in Article 2, paragraph 1, of the Charter of the United Nations”. Secondly, it claimed that “[t]he non-recognition, on the basis of Article 5 … of the Belgian Law, of the immunity of a Minister for Foreign Affairs in office” constituted a “[v]iolation of the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State, [...] “. [...]

19. From mid-April 2001, with the formation of a new Government in the Congo, Mr. Yerodia ceased to hold the post of Minister of Education. He no longer holds any ministerial office today. [...]

45. [...] [T]he Congo originally challenged the legality of the arrest warrant of 11 April 2000 on two separate grounds: on the one hand, Belgium’s claim to exercise a universal jurisdiction and, on the other, the alleged violation of the immunities of the Minister for Foreign Affairs of the Congo then in office. However, in its submissions in its Memorial, and in its final submissions at the close of the oral proceedings, the Congo invokes only the latter ground.

46. [...] [I]n view of the final form of the Congo’s submissions, the Court will address first the question whether, assuming that it had jurisdiction under international law to issue and circulate the arrest warrant of 11 April 2000, Belgium in so doing violated the immunities of the then Minister for Foreign Affairs of the Congo. [...]

54. The Court accordingly concludes that the functions of a Minister for Foreign Affairs are such that,

throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.

55. In this respect, no distinction can be drawn between acts performed [...] in an “official” capacity, and those claimed to have been performed in a “private capacity”, or, for that matter, between acts performed before the person concerned assumed office [...] and acts committed during the period of office. [...]

56. The Court will now address Belgium’s argument that immunities accorded to incumbent Ministers for Foreign Affairs can in no case protect them where they are suspected of having committed war crimes or crimes against humanity. [...]

58. The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. It has been unable to deduce from this practice 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. The Court has also examined the rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals, and which are specifically applicable to the latter (see Charter of the International Military Tribunal of Nuremberg, Art. 7; Charter of the International Military Tribunal of Tokyo, Art. 6; Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 7, para. 2; Statute of the International Criminal Tribunal for Rwanda, Art. 6, para. 2; Statute of the International Criminal Court, Art. 27). It finds that these rules likewise do not enable it to conclude that any such an exception exists in customary international law in regard to national courts. Finally, none of the decisions of the Nuremberg and Tokyo international military tribunals, or of the International Criminal Tribunal for the former Yugoslavia, cited by Belgium deal with the question of the immunities of incumbent Ministers for Foreign Affairs before national courts where they are accused of having committed war crimes or crimes against humanity. The Court accordingly notes that those decisions are in no way at variance with the findings it has reached above. In view of the foregoing, the Court accordingly cannot accept Belgium’s argument in this regard.

59. It should further be noted that the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction. Thus, although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions.

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

61. Accordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances.

First, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law.

Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity.

Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.

Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. [...]

75. The Court has already concluded [...] that the issue and circulation of the arrest warrant of 11 April 2000 by the Belgian authorities failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by Mr. Yerodia under international law. Those acts engaged Belgium's international responsibility. The Court considers that the findings so reached by it constitute a form of satisfaction which will make good the moral injury complained of by the Congo.

76. However, as the Permanent Court of International Justice stated in its Judgment of 13 September 1928 in the case concerning the Factory at Chorzów: "[t]he essential principle [...] is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed" (P.C.I.J., Series A, o. 17, p. 47). In the present case, "the situation which would, in all probability, have existed if [the illegal act] had not been committed" cannot be re-established merely by a finding by the Court that the arrest warrant was unlawful under international law. The warrant is still extant, and remains unlawful, notwithstanding the fact that Mr. Yerodia

has ceased to be Minister for Foreign Affairs. The Court accordingly considers that Belgium must, by means of its own choosing, cancel the warrant in question and so inform the authorities to whom it was circulated. [...]

78. For these reasons,

THE COURT, [...]

(2) By thirteen votes to three,

Finds that the issue against Mr. Abdulaye Yerodia Ndombasi of the arrest warrant of 11 April 2000, and its international circulation, constituted violations of a legal obligation of the Kingdom of Belgium towards the Democratic Republic of the Congo, in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Buergenthal; Judge *ad hoc* Bula-Bula;

AGAINST: Judges Oda, Al-Khasawneh; Judge *ad hoc* Van den Wyngaert;

(3) By ten votes to six,

Finds that the Kingdom of Belgium must, by means of its own choosing, cancel the arrest warrant of 11 April 2000 and so inform the authorities to whom that warrant was circulated;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Rezek; Judge *ad hoc* Bula-Bula;

AGAINST: Judges Oda, Higgins, Kooijmans, Al-Khasawneh, Buergenthal; Judge *ad hoc* Van den Wyngaert. [...]

Separate opinion of Judge Rezek

[...]

[N.B.: unofficial translation.]

7. Of all the existing provisions of treaty law, article 146 of the Fourth 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War – an article that can also be found in the other three 1949 Conventions – is the one that offers the strongest support for the respondent State’s claim that criminal

jurisdiction may be exercised on the sole basis of the principle of universal jurisdiction. [...]

However, not only does the present case fall outside the strict field of application of the 1949 Conventions, but as Ms Chemillier-Gendreau pointed out in seeking to clarify the meaning of this provision, quoting the words of one of the most eminent specialists of international criminal law (and of criminal international law), Claude Lombois: “Wherever that condition is not put into words, it must be taken to be implied: how could a State search for a criminal in a territory other than its own? How could it hand a criminal over if he were not present in its territory? Both searching and handing over presuppose acts of restraint, linked to the prerogatives of sovereign authority, the spatial limits of which are constituted by the territory.”

8. Before attempting to steer the law of nations in a direction contrary to certain principles that still govern international relations today, every State needs to ask itself what the consequences would be if other States, and possibly a great number of other States, adopted the same practice. It is no coincidence that the Parties discussed before the Court the question of how certain European countries would react if a Congolese judge had charged members of their governments with crimes supposedly committed by them, or on their orders, in Africa. [...]

Separate opinion of Judge Bula-Bula

[...]

[N.B.: unofficial translation.]

65. The principle of a “universal jurisdiction” as so understood is asserted in Article 49 of the First Geneva Convention of 12 August 1949, among other places. But the conception which the respondent State has of this principle, and above all the way in which it seeks to apply it in the present case, deviate from the law as it stands.

66. According to the authorized interpretation of this treaty provision, the system is based on three fundamental obligations that are laid on each Contracting Party, namely “the obligation to enact special legislation on the subject, the obligation to search for any person accused of violation of the Convention, and the obligation to try such persons or, if the Contracting Party prefers, to hand them over for trial to another State concerned” [note 69: Jean Pictet (ed.), Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, ICRC, 1952, p. 362; emphasis added.]. [...]

70. Not only does the Commentary lay emphasis on the prosecution of suspects without regard for their nationality, it also stresses territorial jurisdiction. This is only to be expected under classical international law as it was codified in Geneva: as soon as one of the Contracting Parties “is aware that a person on its territory has committed such an offence, it is its duty to see that such a person is arrested and prosecuted without

delay.” It is not, therefore, merely on request by a State that the necessary police searches should be undertaken, but also spontaneously. Beyond the national territory to which, in principle, a State’s authority – be it legislative, executive or judicial – is limited, the Commentary, in my opinion, quite naturally refers to the mechanism of judicial cooperation constituted by extradition – a mechanism that requires “sufficient charges” to be brought against the accused. [...]

Dissenting opinion of Judge Van Den Wyngaert

[...]

34. I now turn to the Court’s proposition that immunities protecting an incumbent Foreign Minister under international law are not a bar to criminal prosecution in certain circumstances, which the Court enumerates. The Court mentions four cases where an incumbent or former Minister for Foreign Affairs can, despite his immunities under customary international law, be prosecuted: [...] (Judgment, para. 61).

In theory, the Court may be right: immunity and impunity are not synonymous and the two concepts should therefore not be conflated. In practice, however, immunity leads to *de facto* impunity. All four cases mentioned by the Court are highly hypothetical.

35. Prosecution in the first two cases presupposes a willingness of the State which appointed the person as a Foreign Minister to investigate and prosecute allegations against him domestically or to lift immunity in order to allow another State to do the same.

This, however, is the core of the problem of impunity: where national authorities are not willing or able to investigate or prosecute, the crime goes unpunished. And this is precisely what happened in the case of Mr. Yerodia. The Congo accused Belgium of exercising universal jurisdiction *in absentia* against an incumbent Foreign Minister, but it had itself omitted to exercise its jurisdiction *in presentia* in the case of Mr. Yerodia, thus infringing the Geneva Conventions and not complying with a host of United Nations resolutions to this effect. [...]

54. There is no rule of *conventional international law* to the effect that universal jurisdiction *in absentia* is prohibited. The most important legal basis, in the case of universal jurisdiction for war crimes is Article 146 of the IVth Geneva Convention of 1949, which lays down the principle *aut dedere aut judicare*. A textual interpretation of this Article does not logically presuppose the presence of the offender, as the Congo tries to show. The Congo’s reasoning in this respect is interesting from a doctrinal point of view, but does not logically follow from the text. For war crimes, the 1949 Geneva Conventions, which are almost universally ratified and could be considered to encompass more than mere treaty obligations due to this very wide acceptance, do not require the presence of the suspect. Reading into Article 146 of the IVth Geneva Convention a limitation on a State’s right to exercise universal jurisdiction would fly in the face of a t*eleological interpretation* of the Geneva Conventions. The purpose of these Conventions, obviously, is not to

restrict the jurisdiction of States for crimes under international law. [...]

59. International law clearly permits universal jurisdiction for war crimes and crimes against humanity. For both crimes, permission under international law exists. For crimes against humanity, there is no clear treaty provision on the subject but it is accepted that, at least in the case of genocide, States are entitled to assert extraterritorial jurisdiction. In the case of war crimes, however, there is specific conventional international law in support of the proposition that States are entitled to assert jurisdiction over acts committed abroad: the relevant provision is Article 146 of the IVth Geneva Convention, which lays down the principle *aut dedere aut judicare* for war crimes committed against civilians.

Discussion

1.

a. Is it a grave breach of IHL to make statements constituting incitement to racial hatred? In August 1998 was there an international armed conflict in the Democratic Republic of the Congo? Can grave breaches of IHL also be committed in the context of a non-international armed conflict? Under IHL? Under Belgian law? (See Belgium, Law on Universal Jurisdiction; Case No. 228, Case Study, Armed Conflicts in the Great Lakes Region; GC I-IV, Art. 2 and Arts 50/51/130/147 respectively; GC IV, Art. 4)

b. Is it a crime against humanity to make statements constituting incitement to racial hatred?

2. Does the reasoning by which the Court granted full immunity to the foreign minister in office and a degree of immunity to the former foreign minister apply only to foreign ministers? To all government ministers? Also to heads of State? Also to heads of government? Also to diplomats? (All are referred to collectively below as “rulers”.)

3. *(Para. 60)* What is the difference between the concepts of “impunity” and “immunity”?

4. Does IHL allow States to provide for granting of impunity (unilaterally or by treaty) to persons being prosecuted for grave breaches? (GC I-IV, Arts 51/52/131/147 respectively)

5.

a. Does IHL allow States to grant immunity unilaterally to persons being prosecuted for grave breaches? (GC I-IV, Arts 49/50/129/146 respectively; P I, Art. 85)

b. (Paras 56-58) Is there a customary exception to the immunity *ratione personae* provided for under IHL in the event of prosecutions for international crimes? To the obligation to search for and prosecute perpetrators of grave breaches of IHL when those concerned are immune *ratione personae* under international law?

c. Does the obligation under IHL to prosecute grave breaches hold also with respect to persons having international immunity? (GC I-IV, Arts 49/50/129/146 respectively)

6. (*Para. 59*) Is there a contradiction between the obligation to prosecute and immunity *ratione personae*, both of which are provided for under international law? If yes, which of the two takes precedence? That which belongs to *jus cogens*? Does the principle according to which there is an obligation to prosecute belong to *jus cogens*? Does the immunity *ratione personae* provided for under international law belong to *jus cogens*? (GC I-IV, Art. 1, Arts 49/50/129/146 and Arts 51/52/131/148 respectively)

7.

a. Was the issue before the Court the immunity of the ruler in office or of the former ruler? Does the decision also relate to the immunity of the former ruler?

b. Why does the former ruler continue to benefit from immunity for acts committed in the discharge of his duties during his term in office?

c. Can it be supposed that rulers committing grave breaches of IHL do so in a private capacity?

8. Does the reasoning by which the Court granted full immunity to rulers in office and a degree of immunity to former rulers apply only to prosecutions based on universal jurisdiction by default or also when the suspected criminal is present in the territory of the prosecuting State? When the prosecuting State exercises its competence in relation to a crime committed on its territory?

9.

a. If we assume that the obligation to prosecute takes precedence over immunity, would this hold for rulers in office as well?

b. What would the consequences be if the obligation to prosecute were systematically given priority over international immunity?

10. (Para. 61) Is the Court's list of circumstances authorizing the prosecution of rulers sufficient effectively to fight the rulers' impunity? Does the obligation to prosecute laid down in IHL need to be interpreted as limited, as far as rulers are concerned, to the four cases listed by the Court? (GC I-IV, Arts 49/50/129/146 respectively)

11. How would you propose to reconcile the obligation to prosecute under IHL and international immunities?

12.

a. Does the obligation to prosecute the perpetrators of grave breaches of IHL provide for universal jurisdiction in the event such offences are committed? Does it oblige States to provide for universal jurisdiction? Even with respect to a perpetrator outside the territory of a prosecuting State? What would be the practical consequences of such an obligation? (GC I-IV, Arts 49/50/129/146 respectively)

b. Does IHL allow universal jurisdiction to be established by default?

13. Why did Belgium have to withdraw the arrest warrant at a time when Mr Yerodia was no longer a government minister? Was this a case of immunity of former rulers for official acts? Was it a consequence of the general obligation to stop a continuing violation? A re-establishment of the situation which existed before the wrongful act was committed? A kind of satisfaction? Could Belgium issue a new warrant?