THE ICJ'S DECISION IN *CONGO* V. *BELGIUM* AND THE INTERNATIONAL CRIMINAL COURT

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I. INTRODUCTION

On 14 February 2002, the International Court of Justice (ICJ) rendered an important judgement in the case of *Congo* v. *Belgium*. The case offered the Court the opportunity to pronounce itself on two issues of the greatest importance and relevance for current international law: the exercise of universal jurisdiction and immunities under international law for international crimes. Both matters had already been the object of a few national decisions, the most prominent of them being the *Pinochet* Case, but the ICJ is of course the appropriate organ for an authoritative interpretation on the international law on these matters. Expectations were understandably high that the Court would provide, after *Pinochet*, the desired clarity as to the scope of universal jurisdiction and the scope of immunities for international crimes.

The ICJ has only partly succeeded in living up to these expectations. Its judgement leaves certain important issues unaddressed and also may be criticized as to the quality of its analysis on a number of points. The critical assessment of the judgement in the literature testifies to this.[1]

A question that has not yet been fully addressed in the literature concerns the possible consequences of the judgement for the functioning of the International Criminal Court (ICC). The ICC has been established on the basis and assumption that international crimes are prosecuted first and foremost

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1. M. Henzelin, La compétence pénale universelle. Une question non resolue par l'arrêt Yerodia, *Revue Générale de Droit International Public* (2002-4), pp. 819-854; Alexander Orakhelashvili, "Arrest Warrant of 11 April 2000", *American Journal of International Law*, vol.96 (2002), pp. 677-684; Nikolaus Schultz, "Ist *Lotus* verblüht? Anmerkung zum Urteil des IGH vom 14 February 2002 im Fall betreffend den Haftbefehl vom 11 April 2000", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, (2002), pp. 703-755; Marco Sassoli, L'arrêt Yerodia, "Quelques remarques sur une affaire au point de collision entre les deux couches de droit international", *Revue Générale de Droit International Public* (2002-4), pp. 791-817; Steffen Wirth, "Immunity for Core Crimes? The ICJ's Judgement in the *Congo* v. *Belgium* Case", *European Journal of International Law*, vol.13, no.4 (2002), pp. 877-893; Antonio Cassese, "When May Senior State Officials be Tried for International Crimes? Some Comments on the *Congo* v. *Belgium* Case", *European Journal of International Law*, vol.13, no.4 (2002), pp. 853-875.

at the national level. The purpose of this article is to explore the consequences of the ICJ's judgement for the division of cases between the ICC and national courts. The question arises whether the principle of complementarity, governing the relationship between national jurisdictions and the ICC, already needs revision, even before the ICC is truly operational.

When analysing *Congo-Belgium* in light of the ICC there is also another perspective worth examining. Both parties to the dispute before the ICJ are equally States parties to the Treaty of Rome, establishing the ICC. One may wonder whether on the basis of the ICC Statute, if already in force at the time of the dispute, there should not be a different means of resolution and a different outcome to the dispute. This question is particularly relevant if one assumes that Belgium was only doing what it was expected to do under the ICC Statute: prosecuting persons accused of international crimes at the national level.

Although it is the central objective of this paper to explore the consequences of the ICJ's judgement for the functioning of the ICC, two paragraphs need to be devoted first to analysis of the judgement in its own right.

II. THE DECISION OF THE ICJ

The prosecution of Mr. Abdulaye Yerodia Ndombasi, Minister of Foreign Affairs of the Democratic Republic of the Congo ("Congo") finds its basis in Belgian law, more precisely in the Act concerning the Punishment of Grave Breaches of International Humanitarian Law.[2] This Act criminalizes under Belgian law war crimes, crimes against humanity and genocide, and endows Belgian courts with universal jurisdiction over these crimes.[3] From the legislative history it follows that it was clearly the legislator's intention to expand the Belgian courts' competence to situations when the suspect would not be on Belgian territory.[4] Hereby Belgium has established the broadest claim of universal jurisdiction, requiring no link to Belgium at all. It has opened an avenue for victims of international crimes to undertake legal action against individuals from their countries of origin. In their endeavours these

2. Act of 16 June 1993 (Official Journal of 5 August 1993, pp. 17751-17755), as modified by the Act of 10 February 1999 (Official Journal of 23 March 1999, pp. 9286-9287, *ILM.* vol. 38(1999), p.918
3. See *Ibid*, Article 7, reading as follows: "The Belgian courts shall be competent to deal with breaches provided for in the present Act, irrespective of where such breaches have been committed (...)"
4. See Doc. Parl. Senat, session de 1990-1991, no. 1317-1, p. 16. See also Luc Reydams, Prosecuting Crimes Under International Law on the Basis of Universal Jurisdiction: The Experience of Belgium, in Horst Fischer, Claus Kress and Sascha Lüder (eds.), *International and National Prosecution of Crimes Under International Law*, (Berlin Verlag, Berlin 2001), p. 800.

victims are supported by Belgium's criminal justice system, which offers them, as *parties civiles*, a considerable role in the criminal procedure, especially in the sense of "triggering" criminal investigations.

It cannot come as a surprise that this exercise of broad universal jurisdiction has caused friction with other States, especially since immunities attributed to official capacity do not prevent the application of the Belgian "Graves Breaches Act".[5] The dispute with Congo thus appears a foreseeable consequence.

The immediate cause for commencing proceedings before the ICJ was the issuance of "an international arrest warrant in absentia" against Mr. Yerodia by a Belgian investigating judge on 11 April 2000, charging him with war crimes and crimes against humanity.[6] The Court's jurisdiction was ensured by both parties having filed declarations of acceptance of compulsory jurisdiction, in accordance with Article 36 (2) of the ICJ's Statute. The judgement of the ICJ, on both the jurisdictional challenges and on the merits of the case, was issued on 14 February 2002.[7] The brief judgement of the Court is accompanied by no less than nine separate or dissenting opinions, or declarations, demonstrating the diverging views of individual judges.

Focusing on the Court's decision on the merits of the case, it is remarkable that the Court does not pronounce itself on the question of legality of universal jurisdiction in absentia. The Court admits that, as a matter of logic, the question of the legality of the exercise of universal jurisdiction should be addressed first, before one should determine whether or not there be any question of immunities in regard to the exercise of that jurisdiction.[8] However, since Congo in its final submissions only invoked the immunity issue, the Court's majority did not address the legality of exercise of universal jurisdiction in the absence of the accused. The majority's approach has been criticized in separate and dissenting opinions of a number of judges.[9] There is nevertheless no agreement among these judges as to what

5. Article 5 (3) of the Act, note 2.
6. More specifically, in the arrest warrant Mr. Yerodia is accused of having made various speeches of inciting racial hatred during the month of August 1998.
7. ICJ, Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo* v. *Belgium*), Judgement of 14 February 2002, not yet reported; available at *http://www.icj-cij.org/icjwww/idocket/iCOBE/icobejudgment/icobe_ijudgment_20020214.PDF*.
8. *Ibid*, para. 46.
9. *Ibid*, See Dissenting Opinion of Judge Van den Wijngaert, para. 42; Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, paras. 3 – 18; Opinion Individuelle de M. Rezek, paras. 3-4; Separate Opinion of President Guillaume, para. 1; Declaration de M. Ranjeva, para. 2.One also finds support for the Court's approach, based on the *non ultra petita* rule and on the view that addressing the universal jurisdiction question was not necessary for the Court to reach its conclusion: see Opinion Individuelle de M. Bula-Bula, para. 37; Separate Opinion of Judge Koroma.

the position of the Court should be if it had addressed the scope of universal jurisdiction under international law.[10] Therefore, the matter is still unresolved and the separate opinions are not very indicative of a possible direction of the Court.

The Court could only leave the universal jurisdiction matter unaddressed if it would declare the international arrest warrant unlawful under international law because of the immunity attached to Mr. Yerodia, in his capacity as (acting) Minister of Foreign Affairs at the time the arrest warrant was issued. Indeed, with thirteen votes to three the Court found that the arrest warrant and its circulation failed to respect the immunity from criminal jurisdiction which Mr. Yerodia and Congo enjoyed under international law.[11] The majority's analysis of immunities under international law for Ministers of Foreign Affairs is very brief.[12] The majority makes a distinction between immunity from criminal jurisdiction and individual criminal responsibility under international law.[13] It rules that while jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law.[14] According to customary international law it is now generally accepted that official capacity does not relieve an individual of his criminal responsibility under international law, but may give rise to relevant and applicable immunities. The Judgement follows the *Pinochet* decision in that it attributes full immunity from criminal jurisdiction to acting Ministers of Foreign Affairs (immunities *ratione personae*).[15] Of particular interest is the Court's *obiter dictum*, indicating situations when immunities enjoyed under international law by an acting or former Minister for Foreign Affairs do not

10. *Ibid,* Judge Van den Wijngaert adopts the view that exercise of universal jurisdiction in absentia is permissible under international law (Dissenting Opinion of Judge Van den Wijngaert, para. 67). Judges Higgins, Kooijmans and Buergenthal seem to arrive at the same conclusion (see Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 58). Judges Rezek (Opinion Individuelle de M. Rezek, para. 4), Ranjeva (Opinion Individuelle de M. Rezek) and Guillaume (Separate Opinion of President Guillaume, paras. 10 and 16) believe the exercise of universal jurisdiction in absentia to be either extremely undesirable or unlawful under international law.
11. Judges Oda, Al-Khasawneh and Van den Wijngaert voted against. Judge Oda's vote, however, is the consequence of his position that the Court does not have jurisdiction over the dispute.
12. *Ibid,* Only four paragraphs are devoted to the Court's considerations.
13. *Ibid*, para. 60.
14. *Ibid.*
15. *Ibid*, para. 58: "[the Court] has been unable to deduced from [State] 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"

represent a bar to criminal prosecution.[16] The Court recognizes four exceptions to immunities. The first two are obvious: prosecution in the State benefiting from the immunity and prosecution in another State after waiver of the immunity. The third and fourth ones are more problematic, as will be demonstrated in subsequent paragraphs. As a third exception the Court acknowledges that after a person ceases to hold the office of Minister of Foreign Affairs, he may be tried in another State in respect of acts committed prior or subsequent to his period of office, as well as in respect of acts committed during that period of office in a private capacity (also referred to as immunities *ratione materiae*). The final exception mentioned by the Court is that an incumbent or former Minister of Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. As examples of such Courts, the ICJ mentions the ICTR, the ICTY and the ICC. The Court does not deal with the thorny issue as to whether Ministers of States that are not a party to these institutions (such as Switzerland for a long period of time with respect to the UN based ICTY and ICTR and the United States in case of the ICC) fall within the scope of this exception.[17]

III. INTERNATIONAL CRIMES AND THE QUESTION OF IMMUNITY

When critically analysing the Court's judgement it is best to start with the part of the case on which the Court in fact did pronounce itself: the question of immunities.

In comments to the decision, the question of immunities for international crimes has been approached as a conflict between two traditions/layers in international law.[18] International law protecting immunities, based on the principle of *par in parem non habet imperium*, was considered as belonging to the traditional part of international law, whereas international crimes and their prosecution, amounting to direct obligations for the individual, was seen as the law regulating the conduct of individuals within the international community.[19] It cannot be denied that in the case submitted to the ICJ, as in the *Pinochet* Case, there was an apparent conflict between international law on immunities and international law on international crimes. To put it simply, the former obliges a State not to arrest Heads of States, Ministers

16. *Ibid*, para. 61.
17. On the issue of the relationship between the ICC and States non-parties, especially the consequences for immunities, see Gennady M. Danilenko, "ICC Statute and Third States",. in Antonio Cassese and others (eds.), *The Rome Statute of the International Criminal Court - A Commentary* (Oxford University Press, 2002), pp. 1885 – 1888.
18. See Marco Sassoli, note 1, pp. 791-794.
19. *Ibid*, pp. 791-792.

for Foreign Affairs and diplomats, whereas the latter obliges a State to arrest and try individuals accused of international crimes. It has been argued that in this conflict of norms the Court has incorrectly given priority to the law on immunities.[20] This argument is based on the position that the duty to search for and arrest war criminals is absolute, without an exception as to the official capacity of the suspect, and is part of *jus cogens*.[21] Undeniably, the Geneva Conventions of 1949 contain the obligation "to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts".[22] Furthermore, it is stipulated in these Conventions that no contracting party shall be allowed to absolve itself of any liability incurred by itself or by another contracting party in respect of grave breaches.[23] It goes, however, too far to infer from these provisions that the duty to arrest and to try war criminals is a peremptory norm of international law. The legal effect of a *jus cogens* norm is that treaties concluded in violation with it can be considered void.[24] It can, however, not be inferred from this that any treaty prohibiting States parties to absolve themselves from certain duties in that treaty makes for *jus cogens* norms. Moreover, the duty to arrest and try war criminals is certainly of a different nature than the content of the grave breaches provisions themselves. I am also not persuaded that the duty in the Geneva Conventions to search for and arrest war criminals is absolute, in the sense that it clearly intends to derogate from existing norms of customary international law.

Rather than resolving the matter through according priority to one set of rules over the other, one should try to reconcile both, respecting the core of each set of rules. It is thus understandable and legitimate that the Court was looking for a way of reconciliation while respecting the core of both sets of rules. Therefore one encounters in the judgement the emphasis that immunity is by no means synonomous to impunity.

The distinction between *ratione materiae* immunities and immunities *ratione personae* is most problematic in the Court's judgement. Other commentators have explained the difference between the two in far more detail.[25] Suffice it to say that *ratione personae* – or personal-immunities are considered absolute, but only while in office (either as Head of State or as a diplomat).[26] Protection by this immunity does cover international crimes,

20. *Ibid*, p. 813.
21. *Ibid*, p. 812.
22. Articles 49/50/129 and 146 respectively of the four Geneva Conventions.
23. Articles 51/52/131 and 148 respectively of the four Geneva Conventions.
24. See Article 53 of the Vienna Convention on the Law of Treaties (1969).
25. See Cassese, note 1, and Wirth, note 1.
26. *Ibid*, p. 862.

as evidenced by national decisions, such as *Pinochet*.[27] On the other hand, immunities *ratione materiae* – or functional immunities- continue to apply after the individual has left office, as Head of State or Minister for Foreign Affairs, but only for acts accomplished in his official capacity and that therefore must be attributed to the State.[28]

The vital question since *Pinochet* has been what is the scope of "official acts". Does it include the commission of international crimes and if so, is there an exception on the basis of which immunities do not apply to them?

In *Pinochet* the majority found in the concept of universal jurisdiction with respect to torture a ground not to extend immunities *ratione materiae* to that crime. One encounters in that case the opinion that torture cannot be considered part of the State functions and should for the purpose of *ratione materiae* immunity thus be assimilated with a "private act".[29] This makes, however, little sense. The bulk of international crimes are committed by State officials, because of and thanks to their official capacity, often using the "State apparatus" for the commission.[30] Moreover, it seems plainly absurd to argue that a crime like torture should be seen as being committed in a private capacity whereas the author's official capacity is part of the elements of the crime.[31]

The ICJ in *Congo-Belgium* appears to follow the assimilation of international crimes with "private acts". As was already mentioned, the Court ruled in its *obiter dictum* that immunities do not apply in relation to acts committed during the period of office in a private capacity.[32] In the context of this judgement, one would expect this to mean that international crimes should be seen as "private acts"; another interpretation would be in the

27. *R.* v. *Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte*, Decision of the House of Lords dated 24 March 1999 (2000) 1 AC 147 (1999) 2 All ER 97 (1999). See also the French *Cour de Cassation* in re *Khadaffi*, Case no. 00-87215; decision of 20 October 2000; published in *Bulletin criminel* 2001 no. 64, p. 218 and *revue trimestrielle de droit civil*, July-September 2001, no. 3, pp. 699-706.
28. *Ibid.* See also Cassese, note 1, p. 862.
29. Pinochet Ugarte, note 27. See Lord Browne-Wilkinson: "I believe there to be strong ground for saying that the implementation of torture as defined by the Torture Convention cannot be a state function"
30. See Cassese, note 1, p. 868; see also certain law Lords in Pinochet, note 27; Lord Hope of Craighead: "It may be said that it is not one of the functions of a head of state to commit acts which are criminal according to the laws and constitutions of his own state or which customary international law regards as criminal. But I consider that this approach to the question is unsound in principle. The principle of immunity *ratione materiae* protects all acts which the head of state has performed in the exercise of the functions of government"; Lord Hutton: "It is clear that the acts of torture which Senator Pinochet is alleged to have committed were not acts carried out in his private capacity for his personal gratification";
31. Cassese, note 1, p. 868 and Wirth, note 2, p. 891.
32. Judgement, note 7, para. 61.

context of this list of four exceptions to the scope of immunities in respect of international crimes which makes little sense. Nevertheless, if one construes the Court's proposition literally the *ratione materiae* immunity does cover international crimes, which are generally always committed in an official capacity.[33] Such literal reading would certainly amount to a step backwards since *Pinochet*. One can therefore not avoid that the Court's *obiter dictum* will be used to expand the scope of immunities in respect to international crimes rather than to narrow it down.

One can but support the criticism of Cassese and Wirth that it would have been better for the Court not to draw the distinction "official acts"-"private acts" in this sense.[34] Instead one may agree with Cassese that a rule of customary law has developed on account of which the *rationae materiae* immunity does not cover the commission of international crimes.[35] Thus, the Court should have ruled that a former Head of State or Minister for Foreign Affairs still enjoys the protection of immunities for official acts during his term of office, unless these acts constitute international crimes.

The confusion in respect of the "official acts"-"private acts" distinction is not confined to immunities in relation to the commission of international crimes. In the *Blaškiæ* Case the ICTY was called upon to determine whether or not a Minister of Defence of Croatia enjoyed immunity in respect of the obligation under the ICTY's Statute to testify before the Tribunal.[36] Although this is a different and underdeveloped aspect of immunities under international law, the ICTY Appeals Chamber's approach to this question is illustrative of the problems in determining the scope of immunity by means of the "official act"-"private act" distinction. The Appeals Chamber decided that the ICTY could only issue a *subpoena* or binding order to Ministers and other high ranking State officials when they were acting in a private capacity; acting in an official capacity they enjoy immunities under international law.[37] The Chamber then gave four examples of situations in which a State official would be seen as acting in a private capacity, thus having acquired evidence in a

33. Cassese, note 12, p. 868.
34. Cassese, note 1, pp. 866 - 870 and Wirth, note 1, pp. 889 891.
35. Cassese, note 1, pp. 870 – 874; note the cited jurisprudence in those pages; see also Antonio Cassese, *International Criminal Law* (Oxford, Oxford University Press 2003), pp. 265 – 267.
36. See both the Trial Chamber and Appeals Chamber on that matter: Decision on the Objection of the Republic of Croatia to the Issuance of Subpoenae Duces Tecum, *Prosecutor* v. *Blaškiæ*, Case No. IT-95-14-T, T. Ch. II, 18 July 1997 and Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, *Prosecutor* v. *Blaškiæ*, Case No. IT-95-14-AR108*bis*, A. Ch., 29 October 1997, in Klip/Sluiter ALC-I-245.
37. See Appeals Chamber Judgement, note 36, paras. 39 – 51.

private capacity.[38] One of these situations concerns the member of an international peacekeeping force, who, according to the Appeals Chamber, should always be regarded as acting in a private capacity.[39] One may understand the Chamber's desire to minimize the scope of immunities, thus to expand the "private acts" category, with a view to "facilitate" as much as possible the collection of evidence, but doing it in this way makes little sense. Members of international peacekeeping forces are made available through their State and also remain subject to the military discipline system of that State.[40] As a result, they should not be seen as persons acting in a private capacity.

IV. UNIVERSAL JURISDICTION IN ABSENTIA

Although the Court has not pronounced itself on the scope of universal jurisdiction under international law, the matter continues to be the object of (scholarly) debate.

A distinction in this debate is made between absolute universal jurisdiction and conditional universal jurisdiction.[41] Absolute universal jurisdiction is a broad notion of the universality principle in that it requires no link with the prosecuting State for exercise of jurisdiction, not even the accused's presence on its territory.[42] The underpinning of absolute universal jurisdiction is that international crimes offend the international community as a whole and each member of that community may prosecute on the international community's behalf, without requiring any link to that State.[43] Conditional universal jurisdiction, on the other hand, makes the presence of the accused on the territory of the prosecuting State a condition for the exercise of jurisdiction.[44] It is based on the view that in respect of international crimes other States with stronger titles of jurisdiction, such as territoriality and nationality, have "delegated" their jurisdictional titles to States where the accused is found, when these first-mentioned States do not exercise jurisdiction on the basis of these "stronger" titles.[45]

Both concepts of universal jurisdiction have clear advantages and disadvantages, without this necessarily saying much about their legality under

38. *Ibid,* paras. 49 – 51.
39. *Ibid*, para. 50.
40. Francoise J. Hampson, "The International Criminal Tribunal for the Former Yugoslavia and the Reluctant Witness", *International and Comparative Law Quarterly (ICLQ)*, vol. 47 (1998), p. 74.
41. For more detail, see Marc Henzelin, note 1, pp. 818 – 854 and Antonio Cassese, *International Criminal Law* (Oxford University Press 2003), pp. 284 – 295.
42. See Cassese, note 1, p. 286.
43. Henzelin, note 1, p. 823 and the authors cited there.
44. Cassese, note 1, p. 286.
45. Henzelin, note 1, pp. 836 – 839.

international law. Since the narrow concept of conditional universal jurisdiction has generally been accepted as being part of customary international law, obviously the focus is on the much broader idea of absolute universal jurisdiction. It has been both rejected and defended. Judge Guillaume, for example, rejects it because it would impair friendly relations between States and may produce "judicial chaos" because of abundant positive jurisdiction conflicts.[46] Cassese as well rejects the notion of absolute universal jurisdiction, at least with respect to political or military leaders.[47] He advances a number of arguments against it: for example, it may amount to undesirable "forum shopping" by victims; it may result in (undesirable) trials in absentia; it may easily lead to international disputes.[48]

Absolute universal jurisdiction has been defended by Henzelin. His most important argument in favour concerns the exercise of investigative powers.[49] This generally requires a jurisdictional basis. Under the conditional universal jurisdiction notion a State is prevented from exercising investigative powers, until the suspect enters the territory.[50] From the perspective of an effective criminal procedure it is clearly undesirable that investigative activity depends on whether or not the accused enters a State's territory.

The arguments above in favour and against absolute universal jurisdiction are inconclusive as to its legality under international law.

On the basis of a treaty such as the Convention against Torture (CAT) States have the obligation to establish conditional universal jurisdiction. However, from this it cannot be inferred that a permissive rule under customary international law to exercise absolute universal jurisdiction is lacking. State practice is practically absent, with the recent exception of Belgium. However, it remains uncertain whether States have refrained from exercising absolute universal juridisction out of the conviction that they were legally compelled to do so or out of convenience or for political motives. To illustrate this one may take account of the decision by the Dutch Supreme Court in the *Bouterse* Case.[51] In this case one of the questions that arose was whether universal jurisdiction over the crime of torture could be exercised in the absence of the accused. The Supreme Court determined that Netherlands, when implementing the CAT, was not prepared to go beyond the obligation to establish conditional universal jurisdiction, as provided for

46. Judgement, note 7, Separate Opinion of President Guillaume, paras. 10 and 16.
47. Cassese, note 1, p. 289.
48. *Ibid*, pp. 289-291.
49. Henzelin, note 1, p. 843.
50. *Ibid.*
51. Re Bouterse, *Hoge Raad der Nederlanden*, decision of 18 September 2001, no. 00749/01. The original Dutch version of the decision can be found at *http://www.rechtspraak.nl/uitspraak/show_detail.asp?ui_id=28356&webpage=/uitspraak/show_searchadv.asp.*

in Article 5 of the CAT.[52] However, the Court, which is in the Dutch legal system familiar with the interpretation of international law, did not rule out the possibility of absolute universal jurisdiction all together, as unlawful under international law.

The implementation of the ICC in the domestic legal order could shed some light on the scope of universal jurisdiction under international law. Various States are currently incorporating international crimes in their domestic legislation and establish jurisdiction over them. This ongoing legislative process represents a unique degree of State practice. When looking at various (draft) laws the emerging picture is that States establish universal jurisdiction, but only of the conditional kind.[53] Germany seems to constitute an exception in that it allows for absolute universal jurisdiction. However, the prosecuting authorities have considerable discretion not to prosecute when the accused is not present on German territory.[54] As far as Belgium is concerned, there appears no legal need to abandon its absolute universal jurisdiction for genocide, crimes against humanity and war crimes, since this has (still) survived the ICJ's ruling in *Congo-Belgium*. Yet, in light of diplomatic tensions with certain States it cannot be denied that Belgium feels more and more uneasy with its adopted absolute universality principle. The latest development there is a proposed amendment of the law, according to which Belgium should defer jurisdiction to the ICC or to States with jurisdiction on the basis of the territoriality or nationality principle, should the latter decide to diligently prosecute the case.[55] In this respect, it follows

52. *Ibid*, para. 8.4.
53. Only the United Kingdom does not establish universal jurisdiction, but only jurisdiction on the basis of the territoriality and active nationality principles (see International Criminal Court Bill, 14 December 2000, Articles 51 and 58). Conditional universal jurisdiction has been established by South Africa (International Criminal Court Bill, B42-2001, Article 4.2 ICC Bill), Democratic Republic of the Congo (Projet de Loi portant mise en oeuvre du statut de la cour pénale internationale, Octobre 2002, Article 18), Uruguay (Pryecto de Ley implementación del estatuto de Roma de la Corte Penal Internacional, Article 3.2), Ecuador (Pryecto de ley sobre delitos contra la humanidad, Articles 1 and 2), Argentina (Pryecto de ley sobre crímenes de competencia de la corte penal internacional, Article 1), Canada (Crimes Against Humanity and War Crimes Act, 2000 c. 24, Article 8 (b)), and the Netherlands (Regels met betrekking tot ernstige schendingen van het internationaal humanitair recht (Wet internationale misdrijven), No. 28337, Article 2).
54. See Article 3 (5) of Act to Introduce the Code of Crimes against International Law of 26 June 2002.
55. See *Advies van de Raad van State over de voorgestelde wijziging van de wet van 16 juni 1993 betreffende de bestraffing van ernstige schendingen van het internationaal humanitair recht*, 4 April 2003.
In the *Sharon* case the *Chambre des mises en accusation* of the Brussels Court of Appeal had already adopted the conditional universal jurisdiction approach (decision of 6 March 2002). However, this decision has been generaly criticized as going against the express wishes of the Belgian legislator to establish absolute universal jurisdiction.

the Italian law which also provides for a conditional form of universal jurisdiction, conditioned on the absence of prosecution by other States or the ICC.[56]

What conclusion should one draw from the developments above? One can discern a fairly uniform and consistent State practice in favour of conditional universal jurisdiction. While the question of the *opinio juris* is far from being settled, the emerging State practice is certainly significant for the formulation of a future rule of customary international law.

V. THE PRINCIPLE OF COMPLEMENTARITY: IN NEED OF REVISION?

The dispute between *Congo-Belgium* was decided prior to the entry into force of the ICC. One notices that the ICJ pays no attention to the possible consequences of its judgement for the functioning of the ICC and its proposed relationship with States parties. Yet, there is reason to believe that the ICJ's judgement affects the proposed principle of complementarity.

According to the principle of complementarity, the prosecution of crimes within the ICC's jurisdiction should preferably take place at the national level.[57] There is no direct obligation to that end in the Statute. Rather, the drafters have choosen to give practical effect to this idea by curtailing the powers of the Court. In this respect it is worth quoting Article 17 (1) of the ICC Statute:

> Having regard to paragraph 10 of the Preamble and Article 1, the Court shall determine that a case is inadmissible where:
>
> (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
>
> (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
>
> (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under Article 20, paragraph 3; (d) The case is not

56. See Article 15 of Proposta di legge, no. 2724.

57. See on the principle of complementarity John T. Holmes, The Principle of Complementarity, in Roy S. Lee (ed.), *The International Criminal Court - The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer Law International, The Hague, 1999), pp. 41–78 and John T. Holmes, "Complementarity: National Courts versus the ICC", in Cassese, note 17, pp. 667 – 686.

of sufficient gravity to justify further action by the Court. It becomes apparent from this provision that "unwilling" and "unable" are key elements in respect of the principle of complementarity. A decision of non-prosecution and ongoing prosecutions must be respected, unless there is a situation of unwillingness or inability to genuinely prosecute. Sections 2 and 3 of Article 17 seek to further define these terms. A State should be considered "unwilling" when, *inter alia*, the proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court, when there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice, or when the proceedings were not or are not being conducted independently or impartially. A State should be regarded as "unable" when due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings. In light of the language of Sections 2 and 3 the question arises to what extent the drafters of the Statute expected States to be in the same position to prosecute as the ICC. It can be said that to a considerable degree general principles of international criminal law are expected to be incorporated in the domestic legal order. Thus, a State that does not prosecute because of absence of the notion of command responsibility in its domestic legal order or a State that accepts in its domestic law the defence of superior orders in respect of war crimes can with reason be regarded as "unwilling" or "unable" by the ICC.[58] Prosecution in such situations by the ICC therefore appears clearly admissible in the sense of Article 17. But what about the official capacity of the accused? According to Article 27 (2) of the ICC Statute immunities or special procedural rules 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

58. See Paola Gaeta, Official Capacity and Immunities, in Cassese note 17, p. 998: "Clearly, if the criminal legislation of the relevant State is at odds with the provisions of the Statute on the definition of crimes and their constituent elements or on general principles of criminal law, these circumstances may amount to the conditions required for the Court's stepping in, since the Court might find that the relevant State is 'unable' to genuinely carry out national proceedings."

> over such a person. The special reference to the Court, may make it difficult to argue that this is part of the general principles of international criminal law that every State is expected to incorporate in its domestic law. In this respect there is a clear difference between national and international prosecution for international crimes.[59] The question arises whether this should have consequences for the principle of complementarity, as put into effect through Article 17. As established in *Congo-Belgium*, a State is under international law prohibited from arresting and prosecuting foreign acting Heads of States, Heads of Governments and Ministers for Foreign Affairs. In practice, a State may decide not to arrest a foreign acting Head of State either after an investigation has been launched or without any investigation. The first situation calls for the determination of admissibility of the case, if the ICC is interested in investigation and prosecution of the Head of State. In the second situation, the admissibility question does not rise to the same extent, since no investigation has been launched yet. According to Article 17 (1), the Court must only declare a case inadmissible after an investigation has been launched or after a person has been tried.

If an investigation has been started and the State subsequently decides not to prosecute, because of the immunity status of the Head of State, Article 17 (1) (b) comes into play. According to this provision, the Court must declare the case inadmissible, unless the decision not to prosecute is the result of the State in question being "unwilling" or "unable". Is that the case? The State's decision is the result of an obligation under international law incumbent upon it and does not fit in the clarifications of the "unwilling" and "unable" notions given in Sections 2 and 3 of Article 17. Indeed, the State appears neither unwilling nor unable in the sense of Article 17.[60] Plainly, inadmissibility is inappropriate in this situation, because it seems that the Court is particularly designed to deal with these situations; a way around the problem is expanding the scope of inability to situations where international law is a bar to prosecution at the national level. Article 17 (3), even if not intended for this situation, may be of assistance, especially the words "(...) or otherwise unable to carry out its proceedings". However, this should not distract us from one of the major misgivings of the principle

59. For a commentary to Article 27 (2), see Otto Triffterer, 'Article 27', in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court Observers' notes, article by article*, Nomos, Baden-Baden 1999, pp. 512 – 513.

60. See again, John T. Holmes, note 57, for a discussion of the terms "unwilling" and "unable"

of complementarity. It is based on the existence of concurrent jurisdiction in all cases, with priority for national courts. The Statutes of the ICTY and ICTR also assume a situation of concurrent jurisdiction, as evidenced by Article 8 (1) of the ICTR Statute and Article 9 (1) of the ICTY Statute.[61] It should, however, be acknowledged that in practice there is no concurrent jurisdiction in all situations. Following *Congo-Belgium*, not all national courts can exercise jurisdiction over acting Heads of State, whereas the ICTY, ICTR and ICC always can. Since the underlying rationale of the principle of complementarity is flawed, one is tempted to reconsider the relationship between the ICC and national courts. It can be safely contended that the ICC and the State of nationality have exclusive jurisdiction over acting Heads of State, Heads of Government and Ministers for Foreign Affairs; in other situations there is concurrent jurisdiction, and any possible positive jurisdiction conflict should be settled in accordance with Article 17.VI. *Congo* v. *Belgium*: A Dispute Between Two States parties To The ICC Belgium ratified the ICC Statute on 28 June 2000, the Democratic Republic of the Congo did the same on 11 April 2002. The ICJ decided the dispute between the two States on 14 February 2002, prior to the ICC's entry into force and also prior to Congo's ratification of the ICC Statute. Be this as it may, the dispute is in a way related to the ICC. It can be argued that Belgium was living up to the expectations underlying the complementarity principle, namely that international crimes should preferably be tried at the national level. This argument raises the question as to whether the application of the ICC Statute to the dispute may have reached different results.As to the method of dispute settlement, it should be noted that the ICC Statute contains a specific provision to this end, Article 119. If Belgium would maintain that its exercise of universal jurisdiction is the result of the application of the ICC Statute, resort to Article 119 seems imperative. In fact, Article 119 (2) reads as follows: Any other dispute between two or more States parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or make recommendations on further means of settlement of the dispute, including referral to the ICJ in conformity with the Statute of that Court.The establishment and functioning of the Assembly of States parties is the object of Article 112. Taking the dispute first through the Assembly offers advantages. It may result in resolution of the dispute in an advanced

61. Article 8 (1) of the ICTR Statute reads as follows:
The International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.
Article 9 (1) of the ICTY contains practically identical language.

stage. Furthermore and more importantly, it gives the Assembly the opportunity to pronounce itself on the effects of the principle of complementarity. It seems indeed useful that the Assembly gives its views as to the expectations in relation to States parties in light of the principle of complementarity. At the same time, the Assembly must be careful and not substitute its own (political) preference to the interpretation of Article 17 by the Court. An even more intriguing question is whether an ICC Statute in force could have contributed to the resolution of the substantive aspects of the dispute. By ratifying the Statute States accept the prosecution by the Court of their nationals that would normally enjoy immunity in other jurisdictions.[62] One may wonder whether this should not be taken even a step further. Can it be argued that by ratifying the ICC Statute States have set up a new legal order, in which they not only accept prosecution of their Heads of States and Ministers by the Court, but also by other States parties? In other words, can ratification of the Statute, in particular acceptance of the content of Article 27, be considered as some sort of waiver of immunity, not only in relation to the ICC but also in respect of the national courts of other States parties?

In *Pinochet* the question arose whether States parties to the Convention against Torture (CAT, 1984) have excluded immunities in respect of State officials suspected of having committed torture. In other words, did the Convention amount to an implicit expression of waiver of immunity? Lord Goff of Chievely found that no mention is made of State immunity in the CAT and that waiver of immunity must always be express under international law.[63] His views were supported by Lord Phillips of Worth Matravers, but only insofar as personal immunities are concerned.[64] Lord Hope of Craighead, on the other hand, came to the conclusion that the effect of the

62. Not only have States parties accepted that immunities do not apply before the Court, they have also accepted that Heads of States, Ministers etc. do no longer enjoy immunity from domestic legal process, which may need to be used, for example, to execute an arrest warrant. Thus, during the ratification process the Dutch government, for example, acknowledged the priority of the ICC Statute over constitutional provisions attributing immunity to Ministers and members of parliament. See Explanatory Memorandum, TK, vergaderjaar 2000-2001, 27 484 (R 1699), note 3, p. 9.

63. *Pinochet Ugarte* note 27, Opinion of Lord Goff of Chieveley. This Law Lord furthermore emphasised in this respect that "(...) there is no trace in the travaux preparatoires of any intention in the [CAT] to exclude state immunity."

64. *Ibid*, Opinion of Lord Phillips of Worth Matravers: "Where states, by convention, agree that their national courts shall have jurisdiction on a universal basis in respect of an international crime, such agreement cannot implicitly remove immunities *ratione personae* that exist under international law. Such immunities can only be removed by express agreement or waiver."

CAT was to remove immunity by necessary implication.[65] Lord Hutton supported this conclusion.[66] So did Lord Millett.[67]

It should be noted, however, that none of the Law Lords extended the "implicit waiver" of immunity to acting Heads of States. The latter still enjoy their personal immunities.[68]

It would really amount to stretching the techniques of interpretation to read in Article 27 a waiver of immunity in respect of foreign national courts, covering both former and acting Heads of States. A vital difference with the CAT, and other conventions, is that Article 27 is not embedded in a system of exclusive national prosecution. The inclusion of Article 27 in a legal framework which would clearly oblige States to establish (universal) jurisdiction over the crimes within the ICC's jurisdiction, to either prosecute or extradite/surrender individuals suspected of these crimes and to provide legal assistance to other fora that prosecute these crimes, be the other States parties or the ICC, may have warranted a different conclusion. In such a context a farreaching waiver of immunity, not only vis-à-vis the Court but also in relation to other States parties, could be inferred from the aforementioned Article 27.

Stretching the interpretation of Article 27 to constitute a waiver of immunity between States parties *inter se* is furthermore likely to produce the undesirable effect of reducing the number of States parties. States may, sometimes reluctantly, be prepared to give up the immunity of their Heads of States in case of prosecution by an ICC. However, no State can be expected to accept the same degree of waiver in respect of national courts of all the States parties to the ICC.

VI. FINAL REMARKS

The ICJ's judgement in *Congo-Belgium* is certainly open to criticism, both for what has been decided in that judgement, but also for not having ruled on important questions of international law. The ruling on immunities under international law for international crimes, especially the scope and content of immunities *ratione materiae*, is without doubt subject to

65. *Ibid,* Opinion of Lord Hope of Craighead. Note that he did not see this as a form of waiver, but rather as a situation in which States have accepted stronger and overriding obligations.
66. *Ibid,* Opinion of Lord Hutton. He even went a step further in that he believed that the "express and unequivocal terms of the Torture Convention fulfil (...)" the waiver requirements.
67. *Ibid,* Opinion of Lord Millett: "The definition of torture (...) is in my opinion entirely inconsistent with the existence of a plea of immunity ratione materiae."
68. The Law Lords did not give a clear explanation for this difference. Why may a waiver for former Heads of State be inferred from the CAT, but not for acting Heads of State.

revision.[69] The scope of universal jurisdiction under international law remains undecided, but one may expect that the current national legislative activity following ratification of the ICC Statute will result in a considerable degree of clarity, atleast as far as State practice is concerned.

The question has been addressed in this paper to what extent the ICJ's ruling has affected the proposed division of tasks between ICC States parties and the Court itself. There is nothing against, rather there is even much in favour, of making the Court exclusively competent to prosecute and try acting foreign Heads of States, Heads of Governments and Ministers for Foreign Affairs. In fact, it is no exaggeration that widespread following of the "Belgium experience" could harm friendly relations between States and even endanger international peace and security.

The problem with respect to the above division of tasks is that the ICC's principle of complementarity appears not to be designed for it. According to the practical application of the principle, by means of Article 17 admissibility mechanism, there appears to be no difference as to the competence of States and the competence of the ICC. In other words, if a State does not prosecute an individual for war crimes it is because this State is either unwilling or unable to do so. This assumption of the complementarity principle is false and in this sense the principle is already in need of revision. In certain cases and circumstances, like acting foreign Heads of States, it should be acknowlegded that the ICC is exclusively competent.

69. Maybe an opportunity is even presented to the ICJ sooner than expected by means of the pending dispute between Congo and France (*Case concerning Certain Criminal Proceedings in France*). See *http://www.icj-cij.org/icjwww/idocket/icof/icoframe.htm*