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Immunity v. Universal Jurisdiction: The Yerodia Ndombasi Decision of the International Court of Justice

*Alberto-Luis Zuppi**

On 14 February 2002 the International Court of Justice (I.C.J.) delivered its decision in the dispute between the Democratic Republic of the Congo and the Kingdom of Belgium regarding a Minister of Foreign Affairs' immunity from arrest.¹ The controversy was originated by issuing and internationally circulating a Belgian arrest writ against the Congolese Minister for Foreign Affairs, Mr. Yerodia Ndombasi. He was accused of broadcasting speeches inciting racial hatred against Tutsi residents in the Congo. Those speeches resulted in fierce manhunts which led to widespread slaughtering of Tutsis. Although such behavior appeared to be a purely internal affair, it was considered to be a crime under Belgian domestic law in force at that time.²

The Congolese claim before the international Tribunal essentially maintained that the Belgian warrant was issued in violation of a recognized international law ruling granting absolute immunity to a Minister for Foreign Affairs as accepted by The Hague Tribunal. Most interestingly, the I.C.J. decision touched tangentially upon the purest form of universal jurisdiction but resolved against its recognition as a

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1. Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 2000 I.C.J. 235 (Dec. 13, 2000), available at www.icj-cij.org. (last visited Mar. 23, 2003). See 4 I.L.M. 536 (2002).

2. The arrest warrant was issued by an investigating judge in Brussels who invoked a Belgian 1993 law, amended in 1999, relating to serious violations of international law. After the Yerodia Ndombasi decision of the I.C.J. and being this paper on print the Belgian Law was amended again in April 2003. This last amendment concerned several clauses of the former law and have been criticized by many human rights groups. It was seen as downsizing Belgian prior universal jurisdiction wide model to just those cases where the suspected party is Belgian, or when the crime was committed in Belgium, or if the suspected party is in Belgium, or if the victim has lived in Belgium for a minimum of three years. In those situations, if the Federal Prosecutor cases starts a proceeding against the related suspect, the case can be brought forward. See "Loi modifiant la loi du 16 juin 1993 relative à la répression des violations graves du droit international humanitaire et l'article 144ter du Code Judiciaire", *Montieur Belge*, 5 July 2003 available at <http://www.just.fgov.be/cgi/article_body.pl?numac=2003009412&caller=list&rticle_lang...> See English translation in 42 I.L.M. 749 (2003). On August 1, 2003 the Belgian Parliament repealed the law. Today Belgian courts will only have jurisdiction over international crimes if the accused or if the victim were Belgian or had their primary residence in Belgium for at least three years at the time the crimes were committed. See Human Rights Watch site available at <http://hrwatch.org> (last visited Aug. 15, 2003).

current international customary rule. Both conclusions have worried many human rights organizations³ and the concerns were further aggravated by the recent decision of the Brussels *Chambre d' Appel*. Specifically, the Brussels Court declared that Belgian jurisdiction may only be recognized regarding crimes perpetrated outside Belgium when the accused is in Belgian territory. On April 16, 2002 the Brussel's Chamber of Appeals annulled the prosecutions involved in the Yerodia case. The Chamber decision sustained that the related Belgian law was applicable only when the suspect physically were in Belgian territory. This decision was appealed by the civil parties into the *Cour de Cassation*,⁴ which on November 20, 2002 abrogated the former judgment, returning the case to the Brussel's Chamber of Appeals who will finally decide with a new judges composition.

This paper evaluates the I.C.J.'s conclusions, confronting them with current international law and analyzing the impact produced. In order to do this, I will first recall the underlying principles for the Belgian arrest warrant and assess the Congolese allegations on official immunity. Thereafter, I will examine the Court's opinion regarding immunity and its consideration of universal jurisdiction, comparing its conclusions with international case law and current literature. Although the decision was undoubtedly a setback for the more progressive position on this topic, and reversed some questions understood as already decided by the *Pinochet* case,⁵ the I.C.J. ruling needs to be understood within its true framework without magnifying its impact. While reading this paper, the reader should keep the following ideas in mind. In domestic law, we establish the rules of spatial application of criminal law by verifying its geographic implementation. A State usually exercises its criminal competence over crimes committed within its frontiers or, by applying the so called "personality principle," recognizes its jurisdiction because either the perpetrator or the victim is a citizen of that State (active or passive personality principle). A State may also apply its law in the case of a crime committed in another country, when the crime affects its vital interest (protective principle). Finally, every State has jurisdiction in the cases of some heinous crimes, wherever the crime was committed,

3. Compare the positions of Amnesty International, Human Rights Watch, and World Against Torture Organization in their respective websites, available at http://www.amnestyinternational.be/doc/article.php3?id_article=184, <http://www.hrw.org/press/2000/11/world-court.htm> and <http://www.omct.org/> (last visited Feb. 25, 2003).

4. See chronology of proceedings available at <http://www.diplomatiejudiciaire.com/Belgique/Yerodia.htm> (last visited Feb. 25, 2003).

5. Compare with Gilbert Sison, *A King No More: The Impact of the Pinochet Decision on the Doctrine of Head of State Immunity*, 78 Wash. U. L.Q. 1583 (2000).

or whatever the nationality of its perpetrator or its victim. This principle of universal jurisdiction does not require any bond or tie between its perpetrator and the forum State.⁶

Secondly, when in this paper reference is made to immunity, I am speaking of jurisdictional immunity, or the impossibility of submitting a foreign sovereign to the courts of another State without the former State's acquiescence. Traditionally, the principle of immunity was established in *The Schooner Exchange v. McFaddon* case.⁷ There, Justice Marshall declared the absolute immunity of a foreign sovereign, installing a precedent in case law legal tradition which remained operative until the second half of the past century. The sovereign was immune and untouchable: *par in parem non habet imperium*. More than a century later, by the so called "Tate Letter," the U.S. Government accepted the "restrictive immunity" theory differentiating between acts *iure imperii* and *iure gestionis*, and recognized immunity only for the former.⁸

I. THE BELGIAN ARREST WARRANT

On 11 April 2000 Judge Damien Vandermeersch issued international arrest warrant number 40/95/BR30.9937/99,⁹ accusing Yerodia Abdoulaye Ndombasi of crimes against the Belgian Law of 1993. The warrant was issued in a case which also investigated former Congolese President Laurent-Desiré Kabila, former Minister of Information Didier Mumengi and former Communication Counselor Dominique Sakombi. The case was initially filed by fourteen civilians, five of them Belgian citizens but all with residence in Belgium. Eight of them additionally initiated a civil claim for damages because of their Tutsi ethnic identity. The case motivated the Kings Procurator to request a judicial investigation in accordance with Belgian criminal procedure. Such antecedents oblige us to disregard the Congolese comments that the case was purely the initiative of a Belgian judge.

It can be ascertained that Laurent-Desiré Kabila led a coalition of Rwanda, Uganda and Burundi troops to overthrow president Mobutu in 1997. In the aftermath of these July 1998 events, Kabila ordered withdrawal of the coalition troops from the Congolese territory. His

6. Christopher C. Joyner, *Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability*, 59 *Law & Contemp. Probs.* 153, 153-72, 171 (Autumn 1996).

7. 11 U.S. (7 Cranch) 116 (1812).

8. *See generally*, Christoph H. Schreuer, *State Immunity: Some Recent Developments* (1988).

9. The arrest warrant is transcribed in 79 *Revue de Droit Penal et de Criminologie* 278 (1999).

order, however, was disregarded and a part of the Congolese army itself revolted in alliance with the coalition troops. In the conflict that followed, President Kabila and Yerodia Ndombasi made incendiary speeches against the Tutsis with the purpose of impelling the mob to impede the rebels occupying strategic places. The arrest warrant specifically recalls that between August 4th and 27th, 1998, Yerodia Abdoulaye Ndombasi, who was President Kabila's Private Secretary and Head of Cabinet, had broadcasted speeches inciting racial hatred, resulting in the Tutsi massacres.

The warrant asserted that Yerodia Ndombasi was fully aware of the consequences of his speeches and rather than discourage the killings, he willfully sought to provoke them through dragnet operations, arbitrary arrests and trials. The warrant further asserted that he neglectfully omitted any action to prevent these results. Yerodia Ndombasi was charged with being the perpetrator or co-perpetrator of:

Crimes under international law constituting grave breaches, causing harm by act or omission to persons and property protected by the Conventions signed at Geneva on 12 August 1949 and by Additional Protocols I and II to those Conventions (Article 1, paragraph 3, of the Law of 16 June 1993, as amended by the 10 February 1999 Law concerning the punishment of serious violations of international humanitarian law);

Crimes against humanity (Article 1, paragraph 2, of 16 June 1993 Law, as amended by the Law of 10 February 1999 concerning the punishment of serious violations of international humanitarian law).¹⁰

II. THE BELGIAN LAW

The Belgian law justifying the arrest warrant was sanctioned on 16 June 1993. Originally titled as relating to the repression of grave breaches of the Geneva Conventions of 12 August 1949 and their Protocols I and II of 8 June 1977,¹¹ the law was issued in pursuit of the Conventions' common duty¹² obliging each State to:

Undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering

10. *Id.*

11. Aug. 12, 1949, 75 U.N.T.S. 31, 75 U.N.T.S. 85, 75 U.N.T.S. 135 and 75 U.N.T.S. 287. See 1125 U.N.T.S. 3 and 125 U.N.T.S. 609 for Protocols I and II, in force since 1977.

12. See identical text for all four Conventions in art. 49(I), art. 50(II), art. 129(III) and art. 146(IV) respectively.

to be committed, any of the grave breaches of the present Convention defined in the following Article.¹³

As a consequence of debate provoked by *Pinochet* in Britain and the introduction of some claims in Belgium against the former Chilean head of State, the Law was modified on 10 February 1999. Its title was also changed to the more general "Law related to the punishment of grave breaches of international humanitarian law."¹⁴ The new text included, in addition to the offences already set forth in the former text by the Geneva Conventions, those crimes which constitute genocide under the U.N. Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948,¹⁵ and the description of crimes against humanity given in the Rome Statute of the International Criminal Court.¹⁶

Additionally, Article 5 provides that "[i]mmunity attaching to the official status of a person, shall not prevent the application of the present Law."¹⁷

This paragraph propelled the warrant against Yerodia Ndombasi, who was an incumbent and prominent member of the Congolese government both at the time his racist speeches were broadcast and also at the time the warrant was issued. Yerodia Ndomasi held a ministerial position until a few months after the claim before the I.C.J. was submitted.

Finally, we need to recall that an 18 July 2001 Law¹⁸ modified article 12bis of the 17 April 1878 Law that related to the Code of Criminal Procedure, Preliminary Part. The 18 July 2001 law recognizes Belgian jurisdiction in all cases where an international treaty extends the States Party's jurisdiction. Judge Vandermeersch held that such a general reference was introduced to Belgian legislation in order to avoid having to adapt the law every time the country subscribes a Convention containing such obligations.¹⁹

13. *Id.*

14. Loi relative à la répression des violations graves du droit international humanitaire, available at <http://www.diplomatiejudiciaire.com/DJ/Loibelge2.htm> (last visited March 23, 1999).

15. Adopted by Resolution 260 A (III) United Nations General Assembly, on force since Jan. 12 1951, 78 U.N.T.S. 277.

16. See art. 7 in United Nations: Rome Statute of the International Criminal Court, 37 I.L.M. 999 (1998).

17. *Id.*, art. 5.

18. *Moniteur Belge*, 1Sept. 2001.

19. I wish to thank his facilitating some material for this paper such as *La compétence universelle en droit belge, in Poursuites Penales et Extraterritorialité*, Union Belgo-Luxembourgeoise de Droit Penal, la Charte, Brussels (B), 39-89, 45 (2002).

III. IMMUNITY FROM EXTRADITION

At the moment the warrant was issued on 11 April 2000 Mr. Yerodia had already assumed a position as Foreign Minister and was to remain in this position until November 2000. After a Ministerial reshuffle he was appointed Minister of Education serving in this office from November 2000 until April 2001. However, when the first hearings before the I.C.J. took place Yerodia Ndombasi no longer occupied any ministerial position. On 12 September 2001, the National Office of *INTERPOL* in Belgium, requested the *INTERPOL* Secretary General in Lyon, to issue a "red notice" for Yerodia Ndombasi. Such notices refer to persons to whom an arrest is required for extradition.

When the Congo deposited its application instituting proceedings against Belgium, it contended that the international arrest warrant violated the principle of sovereign immunity between States. That principle had been recognized by Court jurisprudence and laid down in Article 2 paragraph 1 of the U.N. Charter, as well as Article 41 paragraph 2 of the Vienna Convention on Diplomatic Relations.²⁰ However, when the Congo made its submission, its Memorial reduced all arguments to a violation of customary international law concerning the absolute inviolability and immunity from criminal proceedings for incumbent foreign ministers. This reduction was understandable because all those conventional provisions provide some guidance on specific aspects but do not contain any explicit provision regarding the immunities enjoyed by foreign ministers. At the most they refer to the situation of officers on "special missions" in the receiving State.

The Court was adamant on this point, concluding that a current Minister of Foreign Affairs while abroad enjoys full immunity and inviolability from criminal jurisdiction. But the Court's decision involved the situation of a standing minister. Belgium repeatedly insisted that the case on hand lost its juridical significance because Yerodia Ndombasi was no longer in office. Belgium presumed that such a circumstance worked as a clause *rebus sic stantibus* fundamentally changing the prior situation. This line of argument was rejected by the Court which concluded "that at the time that it was seized of the case it has jurisdiction to deal with it and, that it still has such jurisdiction."²¹

IV. EXCEPTIONS TO TOTAL IMMUNITY

The Court nonetheless affirmed that the immunity from jurisdiction enjoyed by current foreign ministers does not mean

20. Apr. 18, 1961, 500 U.N.T.S. 95, 120.

21. Par. 28.

impunity. The Court admitted that in certain circumstances the following exceptions could apply:

- (a) in the case when such person is tried in his/her own country;
- (b) when the represented State waives his/her immunity;
- (c) when a State invoking jurisdiction arrests a former minister for acts committed prior or subsequent to the ministerial position, or acts committed in a private capacity during that position; and
- (d) when subjected to criminal proceedings by a recognized international criminal tribunal.²²

The I.C.J. decision did not, however, find mandatory universal jurisdiction when the requested person is out of bounds for the State wishing to exercise jurisdiction. It recognized jurisdiction when there was a waiver, as well as in those cases where jurisdiction is effectively accepted. This could be the case of a State arresting the requested person in its territory or based on an arrest warrant by one of the recognized international criminal tribunals. In consequence, being (a) and (b) are very unlikely, and (c) requires a point of contact as we will see, the only plain recognition of a pure universal jurisdiction, in the way Belgium has admitted, remains only for the international criminal tribunals.

The language used for exception (c) prompts some questions. It accepts the waiver of immunity after a person ceases to hold his/her office. But afterward the text adverts: “. . . [p]rovided that it has jurisdiction under international law”²³ a State may prosecute the former officer “. . . 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.”²⁴ If a former minister were to be detained by a country prosecuting him or her, or obtained his or her extradition from another State, would such jurisdiction be understood to be in accordance with international law? Perhaps the question will be clearer with an example: If Pinochet were detained in London because the U.K. recognized the Spanish right to request his extradition, would the jurisdiction obtained by Spain be understood to be *in accordance with international law*? Moreover, would it be lawful for him to be prosecuted for acts committed prior or subsequent to his time in office or for acts perpetrated during such time but in *a private capacity*? As we can see there are two central issues to answering

22. Par. 6.

23. *Id.*

24. *Id.*

these questions. The significance of "private capacity" and the full meaning of "being in accordance with international law."

If a State, as such, cannot commit any crime as understood during the discussions of article 19 of the Draft Articles on State Responsibility of the International Law Commission, then a crime perpetrated by one of its officers must always be done in a private capacity.²⁵ On the other hand, the vague and open reference about obtaining jurisdiction *in accordance with international law*, leaves open a question upon the lawfulness of a specific capture. Consider for instance the doctrine of *male captus bene detentus* as it was developed in United States' case law through *Ker*²⁶ and *Frisbie*²⁷ until *Alvarez Machain*,²⁸ or by the Israeli's *Eichmann* case.²⁹ In those cases a legitimate right was invoked to justify an irregular capture of the accused. On the same line of reasoning we may understand *being in accordance with international law* a prosecution based on universal jurisdiction having the only point of contact with the perpetrated crime the accused's presence in the forum State. If we are in agreement with this last statement, then the I.C.J. decision can be seen to balance its wide recognition of official immunity of Government officers, while maintaining alive the main objective of prosecuting human rights violators wherever they are.

A. Immunity in International Law Instruments

In spite of the Court's argument regarding the absence of conventional texts explicitly granting immunity, and its recognition of an international customary norm, there are many provisions in international instruments refusing to recognize such immunity. The dismissal by the I.C.J. of these norms looks to be not only frustrating but unfounded as a brief summary will show.

Article 7 of the Nuremberg Charter for the International Military Tribunal declares:

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.³⁰

25. Compare with Marina Spinedi, *La Responsabilité de l'État pur 'crime': une responsabilité pénale?*, in *Droit International Pénal* 93-114 (H. Ascensio, E. Decaux, & A. Pellet eds., 2000).

26. *Ker v. Illinois*, 119 U.S. 436, 7 S. Ct. 225 (1886).

27. *Frisbie v. Collins*, 342 U.S. 519, 72 S. Ct. 509 (1952).

28. *United States v. Alvarez-Machain*, 504 U.S. 655, 112 S. Ct. 2188 (1992).

29. *Att'y Gen. of Israel v. Eichmann*, 36 Int'l L. Rep. 277 (1962).

30. Charter of the International Military Tribunal for the Far East *available at*

Furthermore, Article 6 of the Tokyo Charter of the International Military Tribunal for the Far East³¹ provides under the title "Responsibility of Accused" that neither the official position, at any time, of an accused, shall, of itself, be sufficient to free him from responsibility for any crime. However, it may be considered for mitigation of punishment.³²

It also emerges from the spirit of the Nuremberg Charter that anyone who violates a law of war may not demand immunity because he or she was acting pursuant to a governmental order or a State authority. If such were the case, the concerned State itself should be regarded as having infringed its own competence as established by international law.

The Military Tribunal decisions were ratified at the United Nations first General Assembly by Resolution 1/95,³³ and reaffirmed later by the so called "Principles of Nuremberg."³⁴ Principle III provided that even if a person, who committed a crime under international law, had acted as Head of State or as a responsible Government official, that fact does not relieve him from responsibility under international law. These Principles were further reaffirmed by a contemporaneous ruling on Article IV of the Convention on the Prevention and Punishment of the Crime of Genocide.³⁵

Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.³⁶

The same idea was supported by Article 3 of the Draft Code of Offenses against the Peace and Security of Mankind³⁷ and reappeared

<http://www.yale.edu/lawweb/avalon/imtfech.htm> (last visited Aug. 19, 2003).

31. Charter of the International Military Tribunal for the Far East, *available at* <http://www.yale.edu/lawweb/avalon/imtfech.htm> (last visited Feb. 27, 2003).

32. *Id.*

33. *U.N.G.A. Res. A/1/95* (1946) 11 Dec. 1946.

34. *U.N.G.A. Res. 177 (II)*. *Compare with* Report of the International Law Commission to the General Assembly, Part V, Doc. A/1316 (1950). After a request of the 1947 U.N. General Assembly, the International Law Commission elaborated those Principles between June and July 1950, as a kind of codification of the Military Tribunal conclusions and the main legal directives contained in the Nuremberg Charter.

35. 78 U.N.T.S. 277, 280. *See* <http://www.un.org/Depts/Treaty/ts2> (last visited Feb. 25, 2003).

36. *Id.*

37. Article 3: "The fact that a person acted as Head of State or as responsible government official does not relieve him of responsibility for committing any of the offences defined in this Code." Draft Code of Offences Against the Peace and Security of Mankind, 1954, *available at* <http://www.un.org/law/ilc/texts/offfra.htm>

as a recognized principle in Resolution 1989/65 of the Economic and Social Council of the United Nations (ECOSOC):³⁸

19. . . . Superiors, officers or other public officials may be held responsible for acts committed by officials under their authority if they had a reasonable opportunity to prevent such acts. In no circumstances, including a state of war, siege or other public emergency, shall blanket immunity from prosecution be granted to any person allegedly involved in extra-legal, arbitrary or summary executions.³⁹

Those principles were endorsed by the U.N. General Assembly Resolution 44/159 of 15 December 1989⁴⁰ and by the 1996 Draft Code of Crimes Against the Peace and Security of Mankind⁴¹ when the latter ruled on official position and responsibility in Article 7:

The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment.⁴²

The same principle appears in the Statutes of both *ad hoc* International Tribunals⁴³ and in the Rome Statute.⁴⁴ The latter

(last visited Feb. 25, 2003). The fact that a person acted as Head of State or as the responsible government official does not relieve him of responsibility for committing any of the offences defined in this Code. See 1954 Y.B. Int'l L. Comm'n, Vol. I, 137, U.N. Doc. A/CN.4/SER.A/1954d and Vol. II, 119, U.N. Doc. A/CN.4/85.

38. *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, E.S.C. res. 1989/65, annex, 1989 U.N. ESCOR Supp. (No. 1) at 52, U.N. Doc. E/1989/89 (1989), available at <http://www1.umn.edu/humanrts/instree/auoi.htm> (last visited Feb. 25, 2003).

39. *Id.*

40. *Summary of arbitrary executions*, U.N.G.A., 82nd plen. mtg., Doc. A/RES/44/159, available at <http://www.un.org/documents/ga/res/44/a44r159.htm> (last visited Feb. 25, 2003).

41. See <http://www.un.org/law/ilc/texts/dcodefra.htm> (last visited Feb. 25, 2003).

42. *Id.*

43. Article 7(2) from the Amended Statute of the International Tribunal for Yugoslavia and Article 6(2) from the Statute of the International Tribunal for Rwanda. Both identical texts declared: "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." See <http://www.un.org/icty/basic/statut/stat2000.htm> (last visited Feb. 25, 2003) and <http://www.ictr.org/wwwroot/ENGLISH/basicdocs/statute.html> (last visited Feb. 25, 2003).

44. See <http://www.un.org/icc> (last visited Feb. 25, 2003).

declares in Article 27 under the heading “Irrelevance of official capacity:”

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 elective 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.

2. 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 over such a person.⁴⁵

At this point it may be appropriate to underline that a clear consensus in the international community seems to have been reached on the principle of not allowing impunity for perpetrators of grave crimes against international law. In those cases immunity based on their status as a government official should be lifted. In the pertinent parts of paragraph 60 of the *Yerodia* decision the I.C.J. adverts that:

... *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. . . . Jurisdictional immunity may well bar prosecution for a certain period or for certain offenses; it cannot exonerate the person to whom it applies from all criminal responsibility.

Immunity is not equivalent to *impunity*. Immunity may shield a person for a restricted period or in relation with certain acts, but it does not mean a wide bill of impunity.

B. *Immunity in International Case Law*

During the hearings of the *Yerodia* case one Belgian counselor admitted as undeniable “that examples of criminal proceedings brought by a State against a sitting Minister are not legion.”⁴⁶ In fact,

45. *Id.*

46. Oral hearings available at <http://www.icjciij.org/icj/idoctet/iCOBE/iCOBEframe.htm>.

besides the failed prosecution of Kaiser Wilhelm II after World War I, historically the first precedents were those arising in the Nuremberg and Tokyo Military Trials, followed after nearly 50 years later by *Pinochet*. The *Pinochet* case has undeniably started a new era on this subject in international law.⁴⁷

In Nuremberg the Military Tribunal concluded that the authors of the alleged crimes could not shelter themselves behind their official position to avoid punishment in appropriate proceedings.⁴⁸ The Far East Tribunal decision was based on a similar Charter as Nuremberg, although its result was different. Specifically, it failed to indict the Japanese Emperor and used a more restrictive formulation of the concept of crimes against humanity (e.g. not including religious persecution). In order to find other cases related to criminal prosecution of persons enjoying an official position we need to come to *Pinochet* and the recent International *ad hoc* Tribunals case law.

Certainly, it must be recognized that exists an impressive list of cases pro and against official immunity, but they relate to torts handled in civil proceedings. Many of these cases are cited by both immunity supporters and their adversaries. Arguments used by the parties in those cases were introduced during the *Pinochet* and the *Yerodia* hearings.

A brief case law survey will show the confrontation. The justification of absolute state immunity is discussed by Chief Justice Marshall of the U.S. Supreme Court in the already cited decision of *The Schooner Exchange v. McFaddon*;⁴⁹ the similar 1848 Lord Chancellor ruling in *The Duke of Brunswick v. The King of Hannover*;⁵⁰ and in the 1876 New York Supreme Court decision in

(last visited February 25, 2003).

47. United Kingdom House of Lords: *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex parte Pinochet*, 37 I.L.M. 1302 (1998); United Kingdom High Court of Justice, Queen's Bench Division: *In re Augusto Pinochet Ugarle*, 38 I.L.M. 68 (1999); United Kingdom Home Secretary: Response of Her Majesty's Government Regarding the Spanish Extradition Request, 38 I.L.M. 489 (1999). See <http://www.parliament.thestatione...99899/ldjudgmt/jd981125/pino01.htm> (last visited Feb. 25, 2003) and tap.ccta.gov.uk/courtserv (last visited Feb. 25, 2003).

48. International Military Tribunal (Nuremberg), Judgment and Sentences, 41 Am. J. Int'l L. 172 (1947).

49. See *supra* note 7.

50. 81 Rev. Rep. 1 (1848).

Hatch v. Baez,⁵¹ upheld in 1982 in *Buttes Gas and Oil Co. v. Hammer*,⁵² in *Amerada Hess Shipping Corp. v. Argentine Republic*,⁵³ the U.S. Supreme Court in *Saudia Arabia v. Nelson*,⁵⁴ and in the Swiss Federal Tribunal decision in *Marcos and Marcos v. Federal Department of Police*.⁵⁵ This list demonstrates that judicial decisions maintaining an immunity shield in cases of individuals exercising a recognized official position are numerous. On the other hand, cases where immunity was rejected because the tortious act was understood as a private illegal act or a discretionary function not allowing immunity, also is impressive: Since *Filartiga v. Peña-Irala*⁵⁶ where jurisdiction was assumed under the 1789 Alien Tort Statute; and later continuing with the 1976 Foreign Sovereign Immunity Act (FSIA) in *Letelier v. Republic of Chile*,⁵⁷ *Tel-Oren v. Libyan Arab Republic*,⁵⁸ *Von Dardel v. USSR*,⁵⁹ *Forti v. Suarez-Mason*,⁶⁰ *Trajano v. Marcos*,⁶¹ *Siderman de Blake v. Republic of Argentina*,⁶² *Xuncax v. Gramajo*,⁶³ *Cabiri v. Assasie-Gimah*,⁶⁴ and finally before *Pinochet*, the decision of the International *ad hoc* Tribunal in *Prosecutor v. Anto Furundzija*.⁶⁵ A closer look shows that there is no conclusive answer concerning immunity for Heads of State and other officers for acts performed while enjoying official positions. However, a questioning about the proper meaning of this ambivalence is unavoidable.

During *Pinochet* this fluctuation brought Lord Saville to sustain that while immunity will continue being granted in civil litigation regardless the conduct of the tortious offender, in criminal proceedings

51. 7 Hun. 596 (N.Y. Sup. Ct. 1876).

52. 1982 App. Cas. 888.

53. *Amerada Hess Shipping Corp. v. Argentine Republic*, 638 F. Supp. 73, 77 (S.D.N.Y. 1986), *rev'd* 830 F.2d 421 (2d Cir. 1987), *rev'd* 488 U.S. 428, 109 S. Ct. 683 (1989).

54. 507 U.S. 349, 113 S. Ct. 1471 (1993).

55. *Marcos & Marcos v. Fed. Dep't of Police* [1989] 102 I.L.R. 198.

56. 630 F.2d 876 (2d Cir. 1980).

57. 488 F. Supp. 665 (D.D.C. 1980).

58. 726 F.2d 774 (D.C. Cir. 1984).

59. 623 F. Supp. 246 (D.D.C. 1985), *vacated*, 736 F. Supp. 1 (D.D.C. 1990).

60. 672 F. Supp. 1531 (N.D. Cal. 1987).

61. 978 F.2d 493 (9th Cir. 1992).

62. 965 F.2d 699 (9th Cir. 1992).

63. 886 F. Supp. 162 (Mass. 1995).

64. 921 F. Supp. 1189 (S.D.N.Y. 1996).

65. Case 1T-95-17/1-Trial Chamber of the ICTY, 153 (1998), *available at* <http://www.un.org/icty/furundzija/appeal/judgement/index.htm> (last visited Mar. 25, 2003).

Heads of State and other prominent officials may be held accountable without the prospect that the immunity shield will cover their behavior.⁶⁶

For example, in 1990 in *Manuel Noriega*,⁶⁷ the *de facto* Head of State of Panama was prosecuted for conspiring to introduce drugs into the U.S. Noriega's immunity claim failed under the fixed American standard of requiring consultation with the Executive Branch prior to the recognition of immunity. The American Government, by pursuing Noriega's capture and prosecution, clearly manifested its opinion that Noriega should be denied Head of State immunity.

However, it was in *Pinochet* when the first former Head of State was confronted in the domestic court of a foreign State with a criminal accusation for acts perpetrated during the time he was in office in his country. This situation produced an uncommon confrontation. On one side, the traditional common law doctrine supporting immunity in respect of crimes committed by a Head of State or somebody in exercise of official function; and on the other side, the position that sustains that individuals must be taken as accountable for perpetrating international law crimes regardless of their official situation when the crime was committed.⁶⁸

In *Pinochet* the judges accepted that the prohibition of torture had been elevated to the hierarchy of imperative law, *ius cogens*, and at this rank it was an absolute value from which nobody must deviate, imposing as consequence to all states which finds a torturer within their territories, either to prosecute him or to extradite him. But in no way could an order from a public authority be invoked as justification of torture, nor could a national measure condone it or leave its perpetrators with any sort of impunity. As it was stated by Lord Millet

. . . International law cannot be supposed to have a established a crime having the character of *ius cogens* and at the same time to have provided an immunity which is coextensive with the obligation it seeks to impose.⁶⁹

66. See *supra* note 42, par. 295-298.

67. *United States v. Noriega*, 746 F. Supp. 1506 (S.D. Fla. 1990), *aff'd*, 117 F.3d 1206 (11th Cir. 1997).

68. See Andrea Bianchi, *Immunity Versus Human Rights: The Pinochet Case*, 10 Eur. J. Int'l L. 2, 237 (1999).

69. See 38 I.L.M. 581, 651 (1999).

Also, in *Furundzija* the International Criminal Tribunal for the Former Yugoslavia stated a similar reasoning:

140 . . . As the International Military Tribunal at Nuremberg put it in general terms: 'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provision of international law be enforced' . . . Individuals are personally responsible, whatever their official position, even if they are heads of State or government ministers: Article 7(2) of the Statute and article 6(2) of the Statute of the International Criminal Tribunal for Rwanda . . . are indisputably declaratory of customary international law.⁷⁰

Another example of an indictment of a Head of State in power is involved Slobodan Milosevic who was still in office as President of the Federal Republic of Yugoslavia when he was indicted on 24 May 1999 by the Prosecutor of the Criminal Tribunal for the former Yugoslavia.

It seems that international law cannot recognize immunity for those acts that on the other side it condemns. It will therefore be difficult to understand that international law recognizes the prohibition of certain hideous crimes as paramount, rising to the level of *ius cogens* but on the other side accepts a shield of sovereign immunity in cases where the perpetrator holds an official position. Consequently, in cases where we speak of practices amounting to one of those categories of crimes against international law, such violations should not be covered by State immunity.⁷¹

V. UNIVERSAL JURISDICTION

The *Yerodia* decision touched on this topic by refusing to recognize the purest form of universal jurisdiction as a norm of

70. Prosecutor v. Furundzija, Case IT-95-17/1-T, Trial Chamber II, Judgement, Dec. 10, 1998, 140, 38 I.L.M. 346-47 (1999), also available at <http://www.un.org/icty/furundzija/trialc2/judgement/index.htm> (last visited Mar. 25, 2003).

71. Compare with Jordan J. Paust, *Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under the F.S.I.A. and the Act of State Doctrine*, 23 Va. J. Int'l L. 191 (1983).

customary international law. The main decision and some of the judges' separate opinions attempted, by looking at international conventions, treaties and contemporary case law, to determine how far universal jurisdiction was recognized in modern international law. In spite of the conciseness of the decision's paragraph outlining this problem, it appears to have been the real core of the case because of its significance for the future development of international criminal law. Consequently, it is necessary to review the main points referred to by both the decision and the judges' separate opinions and to compare them to other conventions and case law relating to the subject.

A. Treaties and Conventions

Some of the separate opinions recalled that the 1958 U.N. Geneva Convention on the High Seas⁷² included the only cases of universal jurisdiction recognized by international customary law. Accordingly, Article 13 declares that every State shall adopt effective measures to prevent and punish the transport of slaves in ships under its flag,⁷³ and Article 19 stipulates that:

. . . on the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed⁷⁴

This principle using identical language appears in Articles 99 and 105 of the Montego Bay Convention of 1982.⁷⁵

In their common separate opinion, Judges Higgins, Buergenthal and Kooijmans understood that the loose use of language confounded the obligatory territorial jurisdiction, which happens when a State detains an alleged perpetrator of crimes against international law

72. 450 U.N.T.S. 82.

73. *Id.*

74. *Id.*

75. United Nations Convention on the Law of the Sea, 10 Dec. 1982, U.N. Doc. A/CONF. 62/122. See also 21 I.L.M. 1261 (1982), and http://www.un.org/Depts/los/convention_agreements/texts/unclos/part7.htm (last visited Mar. 25, 2003).

found in its territory, with the treaty-based extraterritorial jurisdiction as outlined in the above mentioned Conventions. But as we will see, the meaning of the universal jurisdiction concept goes beyond both these alternatives.

Supervinient Conventions assimilate the duty to extradite or to prosecute, internationally known by the Latin expression "*aut dedere aut prosequi*" or "*aut dedere aut iudicare*."⁷⁶ Thereby, the U.N. Single Convention on Narcotic Drugs signed in New York in 1961,⁷⁷ in Article 36(a)(iv) refers to:

Serious offences heretofore referred to committed either by nationals or by foreigners shall be prosecuted by the Party in whose territory the offence was committed, or by the Party in whose territory the offender is found if extradition is not acceptable in conformity with the law of the Party to which application is made, and if such offender has not already been prosecuted and judgement given.⁷⁸

Judge Guillaume regarded the Convention for the Suppression of Unlawful Seizure of Aircraft or Hague Convention of 16 December 1970⁷⁹ as the first significant change in the 1970s. Article 4 paragraph 2 recognizes:

Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article.⁸⁰

This text works as a pivotal turning point since after it, the duty to prosecute should not be understood as conditioned to the existence of jurisdiction. On the contrary, jurisdiction may be established in order to prosecute after the offender is found within the territory.

The premise "prosecute or extradite" has been followed by a considerable amount of international agreements. Here we should mention the "Montreal Convention" or Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation,⁸¹ the Convention on Psychotropic Substances signed in Vienna 21

76. Cherif M. Bassiouni & Edward M. Wise, *Aut Dedere, Aut Judicare—The Duty to Extradite or Prosecute in International Law* 22-25 (1995).

77. 520 U.N.T.S. 204.

78. *Id.*

79. 860 U.N.T.S. 105.

80. *Id.*

81. 974 U.N.T.S. 177.

February 1971,⁸² the New York Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents signed 14 December 1973,⁸³ the New York Convention against the Taking of Hostages signed 17 December 1979,⁸⁴ the Vienna Convention on the Physical Protection of Nuclear Material from 3 March 1980,⁸⁵ the U.N. Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment from 10 December 1984,⁸⁶ the Montreal Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation from 24 February 1988,⁸⁷ the Rome Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation from 10 March 1988,⁸⁸ the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf,⁸⁹ the U.N. Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances from 19 December 1988,⁹⁰ the International Convention for the Suppression of Terrorist

82. 1019 U.N.T.S. 175.

Serious offences heretofore referred to committed either by nationals or by foreigners shall be prosecuted by the Party in whose territory the offence was committed, or by the Party in whose territory the offender is found if extradition is not acceptable in conformity with the law of the Party to which application is made, and if such offender has not already been prosecuted and judgement given.

Art. 22 § 2 (a)(iv).

83. 1035 U.N.T.S. 167; 13 I.L.M. 41 (1974).

84. 1316 U.N.T.S. 205; 18 I.L.M. 1456 (1979).

85. 1456 U.N.T.S. 101; T.I.A.S. 11080; 18 I.L.M. 1422 (1979).

86. G.A. Res 39/46, 39 U.N. GAOR 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/5, 23 I.L.M. 1027 (1984).

87. 704 U.N.T.S. 219.

88. 974 U.N.T.S. 177; 27 I.L.M. 668 (1988).

89. 1678 U.N.T.S. 201.

Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 in cases where the alleged offender is present in its territory and it does not extradite him to any of the States Parties which have established their jurisdiction in accordance with paragraphs 1 and 2 of this article.

Art. 3 par. 4.

90. 1696 U.N.T.S. 449. Entered into force 11 Nov. 1990.

Without prejudice to the exercise of any criminal jurisdiction established in accordance with its domestic law, a Party in whose territory an alleged offender is found shall:

- (a) If it does not extradite him in respect of an offence established in accordance with article 3, paragraph 1, on the grounds set forth in article 4, paragraph 2, subparagraph (a), submit the case to its competent authorities for the purpose of prosecution, unless

Bombings from 15 December 1997,⁹¹ and finally, the New York Convention for the Suppression of the Financing of Terrorism from 9 December 1999.⁹²

In addition to these international multilateral instruments, the principle was also accepted by some regional agreements. For example, the “Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance,” signed at the third special session of the General Assembly of the O.A.S., in Washington, 2 February 1971.⁹³ Article 5 of this Convention declares:

When extradition requested for one of the crimes specified in Article 2 is not in order because the person sought is a national of the requested state, or because of some other legal or constitutional impediment, that state is obliged to submit the case to its competent authorities for prosecution, as if the act had been committed in its territory

The same principle appears in Article 6 paragraph 1 of the “European Convention on the Suppression of Terrorism,” signed at Strasbourg, 27 January 1977,⁹⁴ and was reaffirmed by different Declarations and Resolutions from organs of the United Nations. For

- otherwise agreed with the requesting Party;
- (b) If it does not extradite him in respect of such an offence and has established its jurisdiction in relation to that offence in accordance with article 4, paragraph 2, subparagraph (b), submit the case to its competent authorities for the purpose of prosecution, unless otherwise requested by the requesting Party for the purposes of preserving its legitimate jurisdiction.

Article 6, par. 9.

91. UN Doc. A/RES/52/164 available at http://ue.eu.int/ejn/data/vol_c/9_autres_textes/terrorismen.html (last visited Aug. 20, 2003).

92. UN Doc. A/RES/54/109 available at <http://www.un.org/law/cod/finterr.htm>.

93. 1438 U.N.T.S. 24 381. Also available at <http://www.oas.org/juridico/english/Treaties/a-49.html> (last visited Mar. 22, 2003).

94. See <http://conventions.coe.int/Treaty/EN/Treaties/html/090.htm> (last visited Mar. 22, 2003). The text declares:

Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over an offence mentioned in Article 1 in the case where the suspected offender is present in its territory and it does not extradite him after receiving a request for extradition from a Contracting State whose jurisdiction is based on a rule of jurisdiction existing equally in the law of the requested State.

Id.

instance in G. A. Resolution 3074 (XXVIII) from 3 December 1973⁹⁵ the principle was already present within the fifth paragraph:

5. Persons against whom there is evidence that they have committed war crimes and crimes against humanity shall be subject to trial and, if found guilty, to punishment, as a general rule in the countries in which they committed those crimes. In that connection, States shall co-operate on questions of extraditing such persons.

Article 14 of Resolution 47/133⁹⁶ of the U.N.G.A. from 18 December 1992 declares:

Any person alleged to have perpetrated an act of enforced disappearance in a particular State shall, when the facts disclosed by an official investigation so warrant, be brought before the competent civil authorities of that State for the purpose of prosecution and trial unless he has been extradited to another State wishing to exercise jurisdiction in accordance with the relevant international agreements in force. All States should take any lawful and appropriate action available to them to bring to justice all persons presumed responsible for an act of enforced disappearance, who are found to be within their jurisdiction or under their control.

These international instruments give very explicit guidance to States when any person presumed to have perpetrated any conduct prohibited by the relevant instruments is found within the State. In such a case, the State in whose territory such a person was arrested, has the duty to prosecute or to extradite him or her to another requiring State. Despite this premise, as we have already seen, the I.C.J. decision affirmed that the existence of the above does not necessarily indicate the existence of a recognized pure universal jurisdiction without any link with the forum State. Besides those cases accepted

95. See Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, adopted by General Assembly resolution 3074 (XXVIII) of 3 Dec. 1973, 28 UN GAOR sup. (30A) at 78, U.N. Doc. A/9030 Add. 1 (1973) available at http://www.unhchr.ch/html/menu3/b/p_extrad.htm (last visited Mar. 25, 2003).

96. Declaration on the Protection of all Persons from Enforced Disappearance, U.N. Doc. A/Res/47/133 (Dec. 18, 1992), available at <http://www.un.org/Depts/dhl/resguide/resins.htm> (last visited Mar. 25, 2003).

by the decision, after recalling that immunity is not equivalent to impunity, it must be concluded that for the I.C.J. a wide and generous universal jurisdiction, such as the prior Belgian law, does not seem to be part of international mandatory law today. This latter premise cannot be challenged by revisiting either former or recent jurisprudence relating to universal jurisdiction.

B. Case law

In its written submission Belgium relied on dicta from the 1927 *Lotus* case for support of its interpretation of universal jurisdiction.⁹⁷ In that case the Permanent Court of Justice declared:

. . . Now the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.

It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and which it cannot rely on some permissive rule of international law. . . . Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion

In addition, in *Pinochet*,⁹⁸ mentioned in the *Yerodia* decision, the related opinions were more orientated toward determining immunity limitations rather than the recognition of universal jurisdiction. The case was seized upon a prior conventional recognition of the corresponding international law principle as required by British law, rather than the acceptance of universal jurisdiction itself. This

97. Case of the S.S. *Lotus* (France v. Turkey), 1927 P.C.I.J. (Ser. A), at 18-19.

98. *Regina v. Bartle and the Comm'r of Police and Others-Ex parte Pinochet*, 37 I.L.M. 1302 (1998), 38 I.L.M. 68 (1999) and 38 I.L.M. 489 (1999).

requirement hinged on the temporal limitation of the British ratification to the U.N. Torture Convention. However, this case implied the explicit acceptance that an individual in an official position can be held responsible for international crimes. Likewise it distinguished between acts of a State organ which could be understood to simply be illegal, from those considered to be crimes against international law. The latter habitates universal jurisdiction and impedes invoking immunity *ratione materiae* before international tribunals and in certain cases, also before domestic courts.⁹⁹

The 1991 *Polyukhovich* case¹⁰⁰ also analyzed and accepted the universal jurisdiction concept when it ordered prosecution of a war criminal. However, the tribunal by a majority decision, turned the charges down invoking the *ex post facto* prohibition. In *Nulyarimma*,¹⁰¹ also cited by the *Polyukhovich* judges in their joint separate opinion, the Australian Supreme Court decided a claim against the Prime Minister and other high ranking officers who were accused of issuing a law understood as against Aboriginal's land and traditions. The occasion was used to introduce a claim of genocide perpetrated 200 years ago. The Court recognized genocide as opening universal jurisdiction but noted domestic legislation should be drafted first. The opening hearings, surrounded by much drama, were a significant move toward the approval of the 1999 Australian Genocide Act.¹⁰²

The *Cvjetkovic* case¹⁰³ was also mentioned in the *Polyukhovich* joint separate opinion. *Cvjetkovic* was the first case related to the Balkans conflict to rely on universal jurisdiction. The Prosecutor affirmed Austrian jurisdiction when a crime perpetrated in a foreign country fulfills the double criminality principle. The defendant was acquitted because of errors in the proceedings.

99. Bianchi, *supra* note 69.

100. *Polyukhovich v. The Commonwealth of Australia and Another* (1991) 172 C.L.R. 501.

101. *Nulyarimma v. Thompson* (1999) FCA 1192. See <http://www.law.mq.edu.au/Units/law309/nulyarimma.htm> (last visited Mar. 22, 2003).

102. See <http://www.law.mq.edu.au/Units/law309/antigenocide.htm#bill> (last visited Mar. 22, 2003).

103. *Austria g. Cvjetkovic, Oberster Gerichtshof Vienna*. See <http://www.redress.org/publications/unjeur.html> (last visited Aug. 15, 2003).

In *Bouterse*,¹⁰⁴ a powerful army official was tried crimes committed in Surinam in 1982. The army official was accused of murdering fifteen persons but the crime had no visible ties to Holland. Nevertheless, the Dutch Supreme Court recognized that torture is an international crime open to universal jurisdiction. The only prerequisite demanded by the Court was the accused's presence in Dutch territory. However, in the Report for the Council of Europe after its ratification of the Rome Statute Holland recognized that a new law text had been prepared and introduced in Parliament and was awaiting approval.¹⁰⁵

C. Other Judicial Decisions

There are some interesting cases which date back to World War II, where juridical support habilitating the jurisdiction of the military tribunal or commission in question was universal jurisdiction and was not mentioned in the *Yerodia* decision or in the separate opinions. It can be doubted, however, that their inclusion would have changed in any way the I.C.J. opinion.

In *Lothar Eisentrager*¹⁰⁶ the American Military Commission denied the defendant's lack of jurisdiction argument, based on his status as a German citizen with residence in the Chinese territory. The defendant argued the case was controlled by Chinese law. The American Military Commission, in a remarkable decision, sustained:

A war crime . . . is not a crime against the law or criminal code of any individual nation, but a crime against the *ius gentium*. The laws and usages of war are of universal application, and do not depend for their existence upon national laws and frontiers. Arguments to the effect that only a sovereign of the *locus criminis* has jurisdiction and that only the *lex loci* can be applied, are therefore without any foundation.¹⁰⁷

104. *Re Bouterse*, 18 September 2001. See <http://www.rechtspraak.nl/flashed.asp> (last visited Aug. 15, 2003). Original version is cited as AB1471 (Rechtspraak.nl).

105. Cf. Consult/ICC (2001) 21, 19 July 2001.

106. See *In re Eisentrager*, 14 L. Rep. of Trials of War Criminals 8 (1949).

107. *Id.*

Likewise, in *Wilhelm List*¹⁰⁸ the Military Tribunal in Nuremberg sustained:

An international crime is such an act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances.¹⁰⁹

Both citations were mentioned in *Polyukhovich*,¹¹⁰ discussed earlier in this paper. In addition, in *Alstoetter*¹¹¹ the American Military Tribunal in Nuremberg, in response to the question of universality concerning punishment of war crimes, declared:

This universality and superiority of international law does not necessarily imply universality of its enforcement. As to the punishment of persons guilty of violating the laws and customs of war (war crimes in the narrow sense), it has always been recognized that tribunals may be established and punishment imposed by the State into whose hands the perpetrators fall. Those rules of international law were recognized as paramount, and jurisdiction to enforce them by the injured belligerent government, whether within the territorial boundaries of the State or in occupied territory, has been unquestioned.¹¹²

In *Alfons Klein*, also known as the *Hadamar Trial*,¹¹³ the defendants stood accused of having participated in murders committed in an extermination center. Here for the first time, a point of contact was clearly required as a prerequisite for access to universal jurisdiction. The Military Commission addressed whether it could

108. Trial of Wilhelm List and Others, 8 L. Rep. of Trial of War Criminals 34, 54 (1948). Also available at <http://www.ess.uwe.ac.uk/WCC/List1.htm> (last visited Mar. 22, 2003).

109. *Id.*

110. *Polyukhovich*, *supra* note 100.

111. 14 Ann. Dig. 278, 282-83 (U.S. Military Trib. 1947) (citing *Ex parte Quirin*, 317 U.S. 1, 63 S. Ct. 1 (1942) and *In re Yamashita*, 327 U.S. 1, 66 S. Ct. 640 (1946).

112. *Id.*

113. Trial of Alfons Klein and six others, 1 L. Rep. of Trials of War Criminals 46 (1945). Also available at <http://www.ess.uwe.ac.uk/WCC/hadam.htm> (last visited Mar. 22, 2003).

assume jurisdiction despite the fact that all crimes were committed by foreigners outside American frontiers and that the victims were also foreigners. The Commission decided the question in the affirmative, basing its jurisdiction on three main principles:

- (a) the general doctrine recently expounded and called 'universality of jurisdiction over war crimes,' which has the support of the United Nations War Crimes Commission and according to which every independent State has, under International Law, jurisdiction to punish not only pirates but also war criminals in its custody, regardless of the nationality of the victim or of the place where the offence was committed, particularly where, for some reason, the criminal would otherwise go unpunished.
- (b) the narrower theory that the United States did have a direct interest in punishing the perpetrators of the offence inasmuch as the victims were nationals of allies engaged in a common struggle against a common enemy;
- (c) the assumption of supreme authority in Germany by the four great Powers through the Declaration of Berlin, dated 5th June, 1945, the United States being the local sovereign in the United States zone of occupation and deriving jurisdiction both from the principle of territoriality and from the principle of personality, the accused being German nationals.¹¹⁴

After World War II, the case of *Adolf Eichmann*¹¹⁵ was also concerned with the issue of jurisdiction. It may be questionable whether it was a pure exercise of personal jurisdiction because Israel subsidiarily recognized it had an emergent right to prosecute. The Tribunal was confronted with accusations against Eichmann as perpetrator of crimes against humanity for acts committed even before the existence of Israel. The Tribunal decided that:

12. The abhorrent crimes defined in this Law are crimes not under Israeli law alone. These crimes which offended the whole of mankind and shocked the conscience of nations are

114. *Id.*

115. *Att'y Gen. of Israel v. Eichmann*, 36 I.L.R. 18, 39 (Dist. Ct. Jerusalem 1961).

grave offences against the law of nations itself (“delicta juris gentium”). Therefore, far from international law negating or limiting the jurisdiction of countries with respect to such crimes, in the absence of an International Court, the international law is in need of the judicial and legislative authorities of every country, to give effect to its penal injunctions and to bring criminals to trial. The jurisdiction to try crimes under international law is universal.¹¹⁶

These conclusions were reaffirmed when the Tribunal considered its jurisdiction in relation to the crime of genocide according to Article VI of the Genocide Convention.¹¹⁷ The Court stated:

25 . . . It is clear that the reference in Article 6 to territorial jurisdiction, apart from the jurisdiction of the non-existent international tribunal, is not exhaustive, and every sovereign state may exercise its existing powers within the limits of customary international law, and there is nothing in the adherence of a state to the Convention to waive powers which are not mentioned in Article 6.¹¹⁸

Israel’s right to prosecute Eichmann, according to this position, derived from a twofold source: first, from the universal right to prosecute crimes of this type which belongs to mankind as such; and second, the specific right of the State of Israel to prosecute anyone who jeopardizes its existence, Israel having been a victim itself. In relation to Nazi war criminals, Israel’s right to prosecute was established in the Foundational Act of the State of Israel. According to cases decided before *Eichmann*, Israel attributed to itself complete competence to decide cases related to crimes perpetrated by any member of the German National Socialist Party.

116. Covey Oliver, *Jurisdiction of Israel to Try Eichmann-International Law in Relationship to the Israeli Nazi Collaborators (Punishment) Law*, 56 Am.J.Int’l.L. (1962) 805-845.

117. Article VI declares

Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

UNTS No 1021, Vol. 78 (1951), p. 277, available at <http://www.hrweb.org/legal/genocide.html> (last visited Mar. 22, 2003).

118. *Id.*

Another important case took place in Canada where Jewish deportations from Hungary during War World II were investigated. The Canadian Supreme Court admitted that a State can exercise jurisdiction over a individual founded within its borders without consideration of the place where the crime was committed.¹¹⁹ However the accused was acquitted on other grounds.

In Europe a similar development took place. On 25 November 1994 the Danish Supreme Court condemned Refic Saric, for violations of international humanitarian law when he engaged in violent acts against Croatian prisoners detained in the Bosnian detention center of Dretelj.¹²⁰ Saric was a Bosnian Muslim who helped his Croatian captors persecute his fellows prisoners. Danish doctors declared Saric as mentally ill in spite of reports about his perfect health when he punished his fellow prisoners. He was sentenced to eight years in prison to be carried out in a specialized institution, after which he would be deported. The Danish jurisdiction was based in the Geneva Conventions together with Article 8.5 of the Danish Penal Code. In September 1995 the Danish Supreme Court ratified the verdict.

A German tribunal judged Novislav Djajic on 23 May 1997.¹²¹ The tribunal declared Djajic not guilty of the charge of participating in the crime of genocide but guilty of being co-author of fourteen murders. He was sentenced to five years in prison. This conviction was the first in Germany related to crimes committed during the Balkan conflict. German jurisdiction was based on a specific statutory provision on the crime of genocide in the German Penal Code § 220^a StGB, and on the fact that the General Prosecutor of the *ad hoc* International Tribunal did not request deferral as had happen in earlier cases.

Furthermore, in April 1997 a Swiss Military Tribunal, invoking the principle of universal jurisdiction, acquitted a Yugoslavian citizen accused of having participated in crimes committed in the Omarska and Keraten Bosnian concentration camps.¹²² And, in France on 6 January 1998, the French *Cour de Cassation*, under universal

119. Regina v. Finta, [1994] 1 S.C.R. 701.

120. Rafaëlle Maison, *Les premiers cas d'application des dispositions pénales des Convention de Genève par les juridictions internes*, 6 Eur. J. Int'l L. 260 (1995). Compare with Public Prosecutor against N.N., High Court (Ostre Landsrets) 3d Division, 25 Nov. 1994.

121. *Staatsanwalt g. Novislav Djajic*, Bayerisches Oberstes LG, 23.5.1997, 1998 *Neue Juristische Wochenschrift* 392, commented in Christoph Safferling, 92 Am. J. Int'l L. 528 (1998).

122. In re G, Tribunal Militaire, Div. 1, Lausanne, Switzerland, 18 Apr. 1997, commented in 92 Am. J. Int'l. L. 78 (1998).

jurisdiction, decided *Munyeshayaka*,¹²³ where a Rwandan priest, domiciled in France, was prosecuted for crimes of genocide and crimes against humanity.

On 30 April 1999, the German *Bundesgerichtshof* ratified a decision of a Dusseldorf Tribunal which sentenced Nikola Jorgic¹²⁴ to life imprisonment for the crime of genocide, thereby confirming German Tribunals had jurisdiction according to the Genocide Convention. It declared as sufficient point of contact the fact that the convict had resided several years in Germany where he was also arrested.

Finally, and ratifying the existence of a point of contact, the International *ad hoc* Tribunal in *Furundzija*,¹²⁵ referred to criminal responsibility on an individual level and established that:

. . . it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite [an] individual accused of torture, who [is] present in a territory under its jurisdiction.¹²⁶

From the above mentioned jurisprudence emerges a clear trend toward the recognition of universal jurisdiction, although it would be fair to accept that generally a point of contact was always required. A wide and pure universal jurisdiction, as maintained by Belgium in *Yerodia*, does not have any precedent.

D. Doctrine

Despite the failure to recognize the existence of universal jurisdiction as a specific international compulsory principle, the main decision and the separate opinions declared that clear evidence exists

123. *Webceslas Munyeshyaka* case, Cour de Cassation, Paris, 6 Jan. 1998, 102 *Revue Générale de Droit International Public* (1998). See also Brigitte Stern, 93 *Am. J. Int'l L.* 525 (1999).

124. See <http://www.preventgenocide.org/de/bestrafung/nikolajorgic.htm> (last visited Mar. 22, 2003).

125. *Prosecutor v. Anton Furundzija*, I.C.T.Y., 10 Dec. 1998, ¶ 156; 38 *I.L.M.* 349 (1999).

126. *Id.*

of a trend in that sense. Thus, in addition to the Belgian law, the Max Planck Institute of Freiburg Project, which was recently approved by the German Parliament, must be cited. This so called "code of international criminal law" *Völkerstrafgesetzbuch*, abbreviated VstGB, establishes in its first Article:

This Act shall apply to all criminal offences against international law designated under this Act, to serious criminal offences designated therein even when the offence was committed abroad and bears no relation to Germany.¹²⁷

Judge *ad hoc* Van den Wyngaert also referred to the monumental work of Amnesty International in September 2001. Specifically Amnesty International compiled, in a compact disk, legislation from more than 120 countries related to the way domestic legislation introduces the concept of universal jurisdiction.¹²⁸ The Final Report of the I.L.A. London 2000¹²⁹ meeting, and the work of the N.G.O. REDRESS are also mentioned.¹³⁰

Another recent document must be cited because of its significance coming from a gathering of representatives of proponents of the purest form of universal jurisdiction, and because of the quality of their scholarship. It brought together members of the United Nations, university professors and practitioners under the auspices of the *Law and Public Affairs* Program of the University of Princeton, the *Woodrow Wilson School of Public and International Affairs*, the International Commission of Jurists, the Urban Morgan Institute of Human Rights and the Dutch Institute of Human Rights. They met in January 2001 and after several working sessions produced what is called "The Princeton Principles on Universal Jurisdiction."¹³¹ The authors of these Principles recognized that they contain *lege lata* and

127. See <http://www.bmj.bund.de/images/11222.pdf> (last visited Mar. 22, 2003) and the publication of the Max-Planck Institute, available at http://www.iuscrim.mpg.de/forsch/online_pub.html (last visited Mar. 22, 2003).

128. Amnesty International, *Universal Jurisdiction. The Duty of States to Enact and Implement Legislation*, AI Index IOR 53/2001.

129. Compare with <http://www.ila-hq.org/pdf/Human%20Rights%20Law/HumanRig.pdf> (last visited Mar. 22, 2003).

130. See *supra* note 103.

131. Compare http://www.princeton.edu/~lapa/unive_jur.pdf (last visited Mar. 22, 2003) and Doug Kassel, *The World Reaches Out of Justice*, The Chi. Trib., Dec. 8, 2001. See also <http://www.commondreams.org/views01/0812-04.htm> (last visited Mar. 22, 2003).

de lege ferenda elements. Their objective is to be a guide which could help law makers prepare legislation that implements those principles in domestic law. When drafting the Principles, the question emerged whether the moment and circumstances were appropriate in order to bring greater clarity to the universal jurisdiction question, or whether they should wait until a more convenient moment so as not to prematurely determine the rules.

VI. CONCLUSIONS

The *Yerodia* decision produced a strong current of sympathy and support for the Belgian position from many human right organizations and scholars. However, it is now clear that the decision declares an international position which is understood as operative today and it seems less than probable that the Belgian example will propagate in other countries.

While expressing my sympathy to the valiant movement initiated in Belgium, I also share the opinion that the acceptance of a broad *in absentia* universal jurisdiction seems more likely to be an objective in international law yet to be reached.

Nonetheless, attention must be called to the loose use of the term "universal jurisdiction." It shows a certain confusion even among legal scholars. In Argentina, for example, this confusion was further spread by the Argentine Government through resolutions taken by the Executive branch. The objective of those resolutions was to impede extradition procedures against former members of the Armed Forces relating to crimes committed during the 1976-1983 dictatorship. Thus, the Argentine authorities publicly declared that the country belongs to those which give priority to territorial jurisdiction, and they refuse the so called "extraterritorial" theory. This is a serious mistake. Argentina had subscribed, among others, to the 1949 Geneva Conventions and its Protocols and to the 1984 U.N. Torture Convention which expressly recognized the principle of extraterritorial jurisdiction as already explained in this paper.

If we speak on universal jurisdiction we must realize that it has nothing to do with the British *Pinochet* case or with any other extradition requests based on human rights violations committed by former military rulers and invoking the victim's citizenship. Universal

jurisdiction does not mean either the legal principle to prosecute or to extradite as was understood by many scholars. It was prevented in the already cited common separate opinion of Judges Buergenthal, Higgins and Kooijmans.¹³² Pure universal jurisdiction, in essence, is similar to the *Yerodia* decision's so called "*in absentia*" jurisdiction, and will take into consideration only the nature of the crime in order to be qualified as such. We reference neither the citizenship of the perpetrator or victim nor the circumstance of being physically in the forum State territory. This principle, and not its variations, is the one the I.C.J. decision did not recognize as compulsory international law.

132. Compare par. 41 separate opinion.

