PINOCHET REVISITED

It is a measure of how fast International Law is moving that the International Court of Justice found itself deciding a question on immunity for international crimes just three years after *Pinochet (No 3)*.[1] Yet its decision in *Congo v Belgium*[2] represents something of a return to conservatism in this field, and prompts a re-evaluation of *Pinochet*. *Congo v Belgium* may itself come to be seen as at least as significant for the ICJ's—divided—views on the issues which it did not decide, as for the *ratio* itself.

The facts were these. The Foreign Minister of the Congo, one Mr Yerodia, had allegedly made speeches which incited racial hatred in the Congo and which were claimed to have led to murders and lynchings. All of his activities took place in the Congo, and affected Congolese victims. Yet it was Belgian Investigating Magistrate Vandermeersch who took up the case and who issued an 'international arrest warrant *in absentia*' for the arrest of Mr Yerodia, which he then passed to Interpol.

The Magistrate claimed jurisdiction under a Belgian statute on grave breaches of international humanitarian law.[3] This Act specifically conferred competence on the Belgian courts irrespective of the location of the breach,[4] and irrespective of any immunity attributed to the official capacity of a person.[5]

The response of the Congo was to issue proceedings in the International Court of Justice. The application was formulated on two grounds. First, Congo claimed that the international circulation of the arrest warrant violated the rules of customary international law which provided immunity from the criminal process of foreign courts for serving foreign ministers. Secondly, Congo challenged Belgium's claim to universal jurisdiction as violating the sovereign equality of states.

Such are the vagaries of both political life and litigation that the case had taken on a rather different complexion by the time it reached judgment. Congo's initial application for provisional measures failed when, following a cabinet reshuffle, Mr Yerodia ceased to be Foreign Minister and became instead Minister of Education. The Court found that, in these circumstances, interim measures were not required.[6] By the time the case had been brought on for argument on the merits, Mr Yerodia had ceased to hold any governmental position. Nevertheless, the Court held that the controversy was not moot.[7] It should be decided on the basis of the facts as they were when the claim was instituted. In a final twist, before close of oral pleadings, Congo withdrew its claim of excess jurisdiction. The Court thus held itself, by each of these turns of events, limited to deciding solely the question of the immunity of a serving foreign minister. That issue was, by that stage, academic on the facts. It also avoided (to the frustration of some members of the Court)[8] the two most pressing and difficult issues which the

[1] *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)* [2001] 1 AC 147, herein '*Pinochet (No 3)*'.

[2] *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (International Court of Justice, General List No 121, 14 Feb 2002).

[3] Act concerning the Punishment of Grave Breaches of International Humanitarian Law of 16 June 1993, as amended on 10 Feb 1999. English translation reproduced in 38 ILM 918 (1999).

[4] Art 7.

[5] Art 6.

[6] Order of 8 Dec 2000.

[7] Op cit n 2, para 78(c).

[8] Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para 3 (hereafter, the 'Joint Separate Opinion').

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case could have presented. These were: the permissible extent of universal jurisdiction of national courts for international crimes; and the extent of the continuing immunity of a former foreign minister for acts committed whilst in office.

In rendering its decision, the Court approached the immunity of an incumbent foreign minister on first principles. That was perhaps unsurprising given the dearth of prior authority specifically directed to foreign ministers.[9] But the cassation-style brevity of the Court's reasoning at key points is nevertheless disappointing in light of the importance of the issues and the range of materials traversed in the pleadings.

The Court analysed immunities *ratione personae* on a functional basis, observing that 'the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States.'[10] Finding that these functions placed a foreign minister at the forefront of a state's relations with other states, the Court concluded that this required that 'he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability'.[11]

Thus far the Court carried all its members—save the Belgian ad hoc judge, the eminent professor of international criminal law Christine van der Wyngaert and Judge Al-Khasawneh—with it.[12] The terms of its judgment enunciate a classical approach to immunity *ratione personae*. It is one that is in line with the express rule for ambassadors enshrined in article 39(1) of the Vienna Convention on Diplomatic Relations. A similar proposition, applying whilst the representative of the foreign state holds office, was readily accepted by the House of Lords in *Pinochet (No 3)*.[13]

But it is difficult to suppress—and was so even for some members of the Court itself—a sense of missed opportunity occasioned by the Court's failure to give authoritative guidance on continuing immunity and on the scope of universal jurisdiction. In a new era of prosecutorial activism in international crimes, these issues require urgent clarification.[14] Attempts to bring Dr Kissinger, former US Secretary of State, to trial for his role in the Vietnam war are only the most recent example of many in the last 5 years.[15]

The several separate opinions rendered by members of the Court indicate that it remains divided and uncertain as to the future direction which the law should take. Worse, the Court did not confine its reasons for judgment (as it could well have done given the narrowness of the *dispositif*) to that which was necessary to establish the immunity of an incumbent foreign minister. As will be shown below, at certain points in its judgment, the Court appears to have gone out of its way to close the door to future lines of development on these issues.

[9] See: Watts 'The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers' (1994) 247 *Recueil des Cours* 106-8. The express rules of the New York Convention on Special Missions of 8 Dec 1969 were not applicable, as the Convention was not in force between the respective states.

[10] Op cit, n 2, para 53.

[11] Ibid, para 54.

[12] Judge Oda also dissented, but on grounds of jurisdiction and admissibility.

[13] Op cit, n 1, 201–2 per Lord Browne-Wilkinson.

[14] Kamminga, 'Lessons learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences' (2001) 23 *Human Rights Quarterly* 940 catalogues a number of recent prosecutions.

[15] 'Kissinger rejects demands for his arrest and trial' (*The Times*, 25 Apr 2002).

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I. THE SURVIVAL OF STATE IMMUNITY

Continuing immunity for state representatives after cesser of office is, in any event, a restricted and not absolute immunity. Both forms of immunity exist solely for the benefit of the state and not the individual. It is for the state to assert the immunity or to waive it. Justification for the immunity must be sought in reasons of state. But it is there that the parallels stop. Immunity for an existing state representative exists *ratione personae* in order to enable the person to carry out his state functions. Immunity for a former official is a continuing aspect of state immunity *ratione materiae*. It exists in order to protect the state from being impleaded in a foreign court in respect of 'a *governmental act*, as opposed to an act which any private citizen can perform'.[16]

The Court accepts this necessary qualification, but only in negative terms. It holds that a foreign minister will have no immunity where his state has waived that immunity, or, after cesser of office, for acts committed in a private capacity.[17]

This passage in the judgment (strictly unnecessary to the decision) will do little to assuage critics of the Court's approach. The Court appears to go out of its way to claim that immunity for incumbent foreign ministers will not lead to impunity. But its adoption of a 'private capacity' formulation of the test for former ministers represents the narrowest formulation which could have been adopted. It will undoubtedly inhibit future consideration of where and how the line in relation to former ministers is to be drawn.

The conundrum for any national court is simply this. In almost every case which matters, the gravamen of the complaint will be the defendant's alleged misuse of state power by governmental act. Indeed, and by the same token, a number of international crimes are defined by a requirement that the offence be committed by a 'public official'.[18] How is a court to solve this paradox?

The House of Lords in *Pinochet (No 3)* thought that it had found its philosopher's stone in implied state waiver by treaty. If, reasoned the majority, Chile was not to be taken to have waived immunity on ratification of the Torture Convention, 'the whole elaborate structure of universal jurisdiction over torture committed by officials is rendered abortive'.[19]

The great virtue of this approach, as a matter of international acceptation, was that it rested, and was seen to rest, on state consent. The problem with it is that such consent is essentially a fiction. As Lord Goff aptly pointed out in his dissent: 'how extraordinary it would be, and indeed, what a trap would be created for the unwary, if state immunity could be waived in a treaty sub silentio'.[20]

At all events, a route out of the impasse through this door has now been decisively

[16] The test propounded in the English Courts by Robert Goff J in *I Congreso del Partido* [1978] QB 500, at 528, approved by Lord Wilberforce [1983] 1 AC 244, at 269; applied in *Kuwait Airways Corporation v Iraqi Airways Co* [1995] WLR 1147. On the true nature of this form of immunity see the case note by Lady Fox on *Pinochet (No 3)* (1999) 48 *ICLQ* 687.

[17] Op cit, n 2, para 61.

[18] See, eg, Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment 1984, Art 1.

[19] Op cit, n 1, at 205 per Lord Browne-Wilkinson

[20] Ibid, at 223 per Lord Goff of Chieveley. The rule that waiver of immunity by treaty must always be express is well established in international law. See: Jennings and Watts (eds), *Oppenheim's International Law*, vol 1, 351; and *Argentine Republic v Amerada Hess Shipping Corporation* (1989) 109 S Ct 683.

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rejected by the ICJ, which held, in another passage which goes far wider than was necessary for its decision:[21]

> although various international conventions on the prevention and punishment of certain serious crimes impose on States' obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign state, even where those courts exercise such a jurisdiction under these conventions.

If implied waiver will not do, the courts may have to look again at the notion of 'official' or 'governmental' acts. Judges Higgins, Kooijmans and Buergenthal, in an important passage in their Joint Separate Opinion, suggest that it may be that 'international crimes cannot be regarded as official acts because they are neither normal state functions nor functions that a state alone . . . can perform'.[22]

Yet, however convenient such a solution may be as an apparent development from established legal categories, it surely falls into the very trap which the courts have sought to avoid in defining acts *jure imperii*. What is required is an examination of whether the act is by its nature (and not purpose) a governmental act. It will most often be the case that the carrying out of an international crime by a high state official—particularly where it has the character of a 'widespread or systematic attack directed against any civilian population'[23]—will, of its nature, involve the exercise of the apparatus of the state. As Lord Millett observed in *Pinochet (No 3)* an exception to state immunity for international crimes, so far from falling within the existing restrictive theory of state immunity, would be an 'opposite development'.[24]

One is driven, then, to conclude that it would be preferable, if international law were to admit of an exception to state immunity for the prosecution of individuals for international crimes, that such an exception develop as an independent head. The development of the exception for torts committed on the territory of another state provides a parallel precedent.[25] As a matter of logic, unbundling individual criminal liability from other forms of impleading the state may have little to commend it,[26] but the law does not necessarily move by neat logic alone.

Whether such an exception is in truth developing as part of international law's 'living and expanding code'[27] is debateable. The recent response of other courts, national and international, has in fact been cautious.[28] Although the ICJ's judgment

[21] Op cit, n 2, para 59.
[22] Op cit, n 2, Joint Separate Opinion, para 85.
[23] Rome Statute of the International Criminal Court, Art 7.
[24] Op cit, n 1, at 268.
[25] In the UK found in section 5 State Immunity Act 1978. See Bianchi, 'Denying State Immunity to Violators of Human Rights' (1994) 46 *Austrian JPIL* 195.
[26] See the comments of Fox (1999) 48 *ICLQ* 687.
[27] To adopt the phrase of the Privy Council from *In re Piracy Jure Gentium* [1934] AC 586, 592.
[28] In *Qadaffi*, the French Cour de Cassation decided that, if there were an exception to immunity for a *serving* Head of State, it did not extend to the crime of terrorism (Cass Criminelle 13 March 2001 no 00–87.215, publié au bulletin criminel); in *Bouterse*, the Dutch Supreme Court decided that the jurisdiction of the Dutch courts in a criminal investigation for torture against a person not present in the Netherlands was limited to the grounds specified in the Torture Convention (18 Sept 2001); in *Al-Adsani v United Kingdom*, the European Court of Human Rights decided (by a 9:8 majority) that the UK was not in breach of its human rights obligations in according immunity to the Kingdom of Saudi Arabia in a civil claim of torture (2002) 34 EHRR 11. *Semble* its view may have been different in a criminal case against an individual.

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should properly be limited to the specific issue—as to serving foreign ministers—which it decided, the conservatism at the core of the decision is bound to have a chill effect on national judicial activism on related immunity issues, and thus inhibit the further development of state practice.

Yet this is not an issue which admits of easy answers. The proposition that the *jus cogens* or *erga omnes* nature of international crimes supplies the answer does not take the matter further. As the ICJ observed in another context: 'the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things.'[29]

Nor does the entry into effect of the Rome Statute for an International Criminal Court as of 1 July 2002 indicate an answer. This enormously significant development in the emergence of an international criminal justice system naturally carries with it an express provision that no claim of immunity will lie before the International Criminal Court.[30] That is of the essence of the position of a defendant before an *international* tribunal. Yet it does not supply an answer as to the position of a defendant before a foreign national court – the essential subject-matter of the law of state immunity.[31]

II. UNIVERSAL JURISDICTION *IN ABSENTIA*

All of this makes the second question left unanswered by the ICJ of urgent importance. If states are to continue to assert jurisdiction at least over former foreign state officials in cases of international crimes (however defined), may they do so in the absence of the defendant or any other connection with the forum state? Or, in the lexicon of *Congo v Belgium*, is there in international law a 'universal jurisdiction *in absentia*'? What is the proper role of the national court in the emerging international criminal justice system to police international crimes unconnected to its jurisdiction?

This is the issue which would have been referred to the ICJ in *Pinochet* had the Home Secretary not resolved the matter on other grounds.[32] Yet the *obiter dicta* of the judges in *Congo v Belgium* reveal the Court at its most divided. The President and Judges Ranjeva and Rezek express the view that international law prohibits the exercise of such jurisdiction. Judges Higgins, Buergenthal, Kooijmans, and Koroma take the opposite view.[33]

Much of the analysis centred on the series of international conventions on international crimes, which are commonly referred to as providing for 'universal jurisdiction'.[34] But, as Judge Higgins observed extra-judicially:[35]

[29] East Timor Case (*Portugal v Australia*) 1995 ICJ Rep 90, para 29. [30] Art 27.

[31] Art 98 of the Rome Statute specifically confirms that: 'The Court may not proceed with a request for surrender or assistance which would require the requested state to act inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a person or property of a third state, unless the Court can first obtain the co-operation of that third state for the waiver of the immunity.' See: Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court*, 1131.

[32] Exchange of diplomatic letters between the Republic of Chile and the Kingdom of Spain, 3 and 13 Sept 1999.

[33] The ad hoc judges van der Wyngaert and Bula Bula were also divided.

[34] An example of the model is the Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment 1984, Arts 5 and 7, and see: Clark, 'Offences of International Concern : Multilateral State Treaty Practice in the Forty Years Since Nuremberg' [1988] *Nordic J Int Law* 49.

[35] Higgins *Problems and Process: International Law and How We Use It* (Oxford University Press, 1994), 64–5

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> this is not treaty-based universal jurisdiction (and so the question of such a treaty basis 'passing into' general international law does not arise) . . . [The Conventions] provide for various bases of jurisdiction coupled with the *aut dedire aut punire* principle—that is, that a state party to the treaty undertakes to try an offender found on its territory, or to extradite him for trial.

As she observes in the Joint Separate Opinion:[36]

> By the loose use of language the latter has come to be referred to as 'universal jurisdiction', though this is really an obligatory territorial jurisdiction over persons, albeit in relation to acts committed elsewhere.

These conventions, then, do not provide for universal jurisdiction *in absentia*.[37] On the contrary, they represent a carefully negotiated array of permitted jurisdictional bases and an obligation imposed upon the state where the alleged offender is present to extradite or prosecute. In this way, no safe haven from jurisdiction is allowed for offenders.

Embedded, therefore, in the generalised notion of universal jurisdiction there are a number of gradations of meaning, which may make a substantial difference to the operation of any rule. First, one must ask universal jurisdiction in respect of what? This is not only the question of what crimes—a vital question for customary international law outside the operation of the Conventions.[38] It is also the question of what exercises of jurisdiction. There may be a real distinction, often obscured by national rules of criminal procedure, between the investigations phase on the one hand, and arrest, judgment and its execution on the other.[39] Finally, what an international treaty *requires* of states parties is of course a quite different thing to what customary international law *permits* states to do outside such a framework.

In failing to explore the implications of these distinctions, the Separate Opinion of President Guillaume, which holds sweepingly that 'the Belgian judge was wrong in holding himself competent to prosecute Mr Yerodia'[40] goes much too far. Indeed, his insistence that even today 'international law knows only one true case of universal jurisdiction: piracy'[41] locates his opinion in a nineteenth-century conception of international law.

However, it equally seems to the present writer to go too far in the opposite direction to conclude, as do Judges Higgins, Kooijmans, and Buergenthal, that there is no rule of international law prohibiting such jurisdiction where the third state concerned consents.[42] Modern international criminal cooperation is founded on a network of interlocking obligations. It is of vital importance for third states to know what they ought to do, as a matter of international law, in response to a request for arrest and extradition. It is the third state which must mediate what may be conflicting demands of the requesting state and of the national state of the accused official. Nor is it

[36] Op cit, n 2, Joint Separate Opinion, para 41.

[37] The preservation in many of the Conventions of other criminal jurisdiction exercised in accordance with national law (eg Art 5(3) of the Torture Convention 1984) takes the matter no further, since the question still remains as to which national claims to jurisdiction are permitted by international law.

[38] Op cit, n 2, Joint Separate Opinion, para 62, emphasising the need for the acts to be 'committed in a systematic manner or on a large scale' to qualify as international crimes.

[39] See the discussion by van der Wyngaert in her Dissenting Opinion, para 75.

[40] Separate Opinion of President Guillaume, para 17.

[41] Ibid, para 12.

[42] Joint Separate Opinion, para 54.

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adequate, as the Joint Separate Opinion suggests, to rely upon immunities as one of the safeguards against abuses of jurisdiction. As the Joint Separate Opinion itself propounds, a proper application of the rules of jurisdiction themselves must precede the rules of immunity.

The *via media* would have been to provide that what the international conventions require, customary international law permits. That is the exercise of enforcement jurisdiction for international crimes based on the presence of the offender irrespective of the location of the crime. This would have involved the recognition in customary international law of the 'no safe haven' principle. Such a principle is integral to the notion of universal jurisdiction already recognised by customary international law in cases of piracy.[43] Its extension to such other crimes to qualify as international crimes under customary international law would have represented a natural progression from existing approaches.

But, it is submitted that it is equally important to insist, as the Dutch Supreme Court held in *Bouterse*,[44] that there must be a jurisdictional link between the prosecuting state and the offender or offence. It is not for a national court to act as a global policeman in the absence of any jurisdictional connection.[45] Whether or not the charge that the judicial anarchy which would otherwise result would amount to a 'monstrous cacophony'[46] is really justified, a coherent system for the regulation of international crimes by national courts requires some rules of allocation of jurisdiction. The pattern already developed by international convention suggests the right direction. It is a pity that the opportunity was lost for the ICJ to develop a consensus on this issue. If, as Judges Higgins, Buergenthal and Kooijmans indicated:[47]

> International law seeks the accommodation of this value [the preservation of unwarranted outside interference in the domestic affairs of states] with the fight against impunity, and not the triumph of one norm over another,

a firmer starting-point would have been to uphold clear jurisdictional guidelines for national court intervention.

III. BACK TO THE FUTURE

In retrospect, it is unfortunate that the first real opportunity given to the International Court to find a new balance between state sovereignty and the fight against impunity should have arisen quite so soon in the development of state practice, and on the facts of *Congo v Belgium*. As the resent spate of national prosecutorial activism came to be tested in superior national courts, it might have been possible for some more nuanced responses to be developed. A set of facts based on a serving senior minister, particularly where (as in *Pinochet*) the prosecution was driven from the former colonial power, was not best calculated to provoke an imaginative response in an international court.

[43] *Oppenheim*, op cit n 20, at 469.

[44] Op cit, n 28.

[45] Cf *Airbus Industrie GIE v Patel* [1999] 1 AC 119 (HL) on the need for an adequate link with the forum for the court to grant an anti-suit injunction.

[46] The phrase adopted by Congo in its pleadings, referred to by van der Wyngaert in her Dissenting Opinion, para 87.

[47] Joint Separate Opinion, para 79.

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But nevertheless the Court's conservative approach on what it did adjudicate, and its evident disarray on the larger issues beyond, will do little to assist the progressive development of customary international law. There have been recent occasions in international law—just as in politics—where the erection of an apparently impregnable wall around the *status quo* has proved the final act in provoking a revolution in approach.[48] One must hope that *Congo v Belgium* will prove to be one such case.

CAMPBELL MCLACHLAN*

[48] See, eg the approach of the English Courts to the recognition of Public International Law, cf *J H Rayner (Mining) Ltd v Department of Trade and Industry* [1990] 2 AC 418, with *Pinochet (No 3)* (op cit, n 1).

* Solicitor, London.

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