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INTERNATIONAL COURT'S CONSIDERATION OF IMMUNITY OF
FOREIGN MINISTERS FROM CRIMINAL PROSECUTION IN
FOREIGN STATES**

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DEMOCRATIC REPUBLIC OF CONGO V. BELGIUM: THE INTERNATIONAL COURT'S CONSIDERATION OF IMMUNITY OF FOREIGN MINISTERS FROM CRIMINAL PROSECUTION IN FOREIGN STATES

I. INTRODUCTION

Senator Alain Destexhe, a member of the Belgian Parliament, stated “[g]enocide and crimes against humanity should not be accepted in the world today, just as terrorism isn’t accepted.”¹ He continued, “[u]niversal jurisdiction is a strong political commitment for peace, stability, rule of law, and democracy.”² He spoke of Belgium’s law of universal jurisdiction, allowing the Belgian courts to hear cases involving egregious infringements on human rights, regardless of where the acts were committed. Nearly 4,000 miles from Belgium,³ the then Minister for Foreign Affairs of the Democratic Republic of the Congo (“DRC”), gave a televised speech which spurred the massacre of hundreds of people.⁴ On April 11, 2000, over two years later, Belgium sent out an international warrant calling for Mr. Yerodia’s arrest under its own law of universal jurisdiction. The DRC fought the warrant by bringing suit against Belgium in the International Court of Justice (“ICJ”). The DRC alleged it had suffered a “moral injury” as a result of a foreign state’s violation of its Minister for Foreign Affairs’ sovereign immunity.⁵

II. BELGIUM’S LAW OF UNIVERSAL JURISDICTION

Under Article 7 of the Belgian Law, “[t]he Belgian Courts shall have jurisdiction in respect of the offenses provided for in the

¹ Daphne Eviatar, *Debating Belgium’s War-Crime Jurisdiction*, N.Y. TIMES, Jan. 25, 2003, at B7.

² *Id.*

³ See *Surface Distance Between Two Points of Latitude and Longitude*, at <http://www.wcrl.ars.usda.gov/cec/java/lat-long.htm> (last visited Apr. 23, 2003).

⁴ Human Rights Watch, *Rights Group Supports Belgium’s Universal Jurisdiction Law* (Nov. 16, 2000), at <http://www.hrw.org.press/2000/11/world-court.htm>. [hereinafter *Belgium’s Universal Jurisdictional Law*].

⁵ Case Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belg.), 2002 I.C.J. 121, para. 1 (Judg. Of Feb. 14).

present Law, wheresoever they may have been committed.”⁶ This law makes Belgium the only nation, which allows for the prosecution of anyone in the world for war crimes, without regard to where their crimes were committed.⁷ In 2001, four Rwandans became the first people to be convicted under the Belgian law, each serving between twelve and twenty years for the genocide of 800,000 Rwandans in 1994.⁸

Belgium’s law of universal jurisdiction for matters involving egregious crimes has met varying reactions. The United States sent warnings to Belgium that such a “universal competence” law would jeopardize Belgium’s position as an international hub.⁹ U.S. Secretary of State Colin Powell stated that “[w]e have cautioned our Belgian colleagues that they need to be very careful about this kind of effort, this kind of legislation, because it makes it hard for us to go to places, it puts you at such easy risk.”¹⁰ Human Rights Watch, on the other hand, is in favor of Belgium’s law.¹¹ According to Richard Dicker, the director of the International Justice Program at Human Rights Watch:

The Belgian law is part of a growing trend towards accountability for human rights crimes. Prosecutions based on universal jurisdiction are an essential part of the emerging system of international justice. They help to break down the wall of immunity with which tyrants and torturers protect themselves in their own countries.¹²

III. THE SPEECH AT ISSUE

In 1998, thousands of Rwandan troops, ethnic Tutsis, occupied parts of the DRC. In a televised speech, Foreign Affairs Minister, Abdulaye Yerodia Ndombasi (“Mr. Yerodia”), publicly referred to

⁶ *Id.* para. 15.

⁷ *Belgium’s Legal Trap for World Leaders*, CNN.COM (Jan. 23, 2002), at <http://www.cnn.com/2001/WORLD/europe/07/05/belgium.sharon/index.html>. There is currently an International Criminal Court, but it was not in effect at the time of *Arrest Warrant of 11 April 2000*.

⁸ *Id.*

⁹ Matthew Lee, *U.S. Warns Belgium Over “Universal Competence” Law*, AGENCE FRANCE-PRESSE, Mar. 18, 2003, 2003 WL 2756241.

¹⁰ *Id.*

¹¹ *Belgium’s Universal Jurisdictional Law*, *supra* note 4.

¹² *Id.*

the Rwandan soldiers as “vermin” and encouraged that they be “methodically eradicated”.¹³ This was not the first time citizens of the DRC had been incited against the Tutsis. In 1994, similar statements were made by the DRC President, Laurent-Desire Kabila. In his radio messages he encouraged listeners to “squash the cockroaches,” speaking also of the Tutsis.¹⁴ These statements allegedly led to the massacre of over 500,000 Tutsis in neighboring Rwanda by Rwanda’s majority Hutus.¹⁵ Following the massacre, roughly one million Hutu refugees migrated to the DRC (then called Zaire), leading to friction between them and the DRC’s Tutsi population.¹⁶

In July 1998, President Kabila ordered predominantly Tutsi Rwandan troops to leave the DRC, causing the mutiny and rebellion of the Congolese Tutsis.¹⁷ Since that time, both the rebels and the Congolese government have waged war on each other, subjecting each other to torture, rape, and murder.¹⁸

IV. ABDULAYE YERODIA’S ARREST WARRANT

On April 11, 2000, a court from Belgium issued an international arrest warrant for Abdulaye Yerodia Ndombasi. The warrant accused Mr. Yerodia of war crimes and crimes against humanity—namely, making speeches that incited racial hatred in August 1998.¹⁹ The arrest warrant specifically alleged that Mr. Yerodia’s speeches incited the killing of hundreds of Tutsis in the beginning of a rebellion against President Kabila.²⁰ At the time of the speeches, the DRC was attempting to put down the rebellion, which was primarily led by Tutsis.²¹ The only connection between Belgium, Mr. Yerodia and the DRC was that the DRC was formerly a colony of

¹³ Michael C. Dorf, *Can One Nation Arrest the Foreign Minister of Another? The World Court Says No*, FINDLAW’S LEGAL COMMENTARY (Feb. 20, 2002), at <http://writ.findlaw.com/dorf/20020220.html>.

¹⁴ Lara Santaro, *Congo Leader Urges Nazi-Style Tactics Against Tutsis*, CHRISTIAN SCI. MONITOR, Sept. 2, 1998, <http://csmweb2.emcweb.com/durable/1998/09/02/p1s4.htm>.

¹⁵ *Id.*

¹⁶ BBC News, *The Congo Conflict: Q & A* (Aug. 10, 1998), at <http://news.bbc.co.uk/1/hi/world/africa/148462.stm>.

¹⁷ *Id.*

¹⁸ Human Rights Watch, *Democratic Republic of Congo: Human Rights Developments*, at <http://www.hrw.org/wr2k/Africa-02.htm> (last visited Apr. 23, 2003).

¹⁹ Case Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belg.), 2002 I.C.J. 121, para. 15 (Judg. Of Feb. 14).

²⁰ Dorf, *supra* note 13.

²¹ *Id.*

Belgium.²² Regardless of the lack of a more tangible link, Mr. Yerodia's crimes were determined by Belgian courts to be punishable under Belgian law as a human rights violation.²³ At both the time of the speeches and the international arrest warrant, Mr. Yerodia was serving as Minister for Foreign Affairs of the DRC.

In November 2000, Mr. Yerodia ceased to be Minister for Foreign Affairs, taking on the position of Minister of Education. With the formation of a new Congolese government in April 2001, Mr. Yerodia ceased to hold the position of Minister of Education. He currently holds no ministerial office with the DRC.

V. THE DEMOCRATIC REPUBLIC OF THE CONGO'S SUIT AGAINST BELGIUM

On October 17, 2000, the DRC instituted proceedings against Belgium in the International Court of Justice ("ICJ"), alleging "moral injury"²⁴ and requesting the annulment of the April 11, 2000 arrest warrant. The DRC did not cite to any additional damages or injuries.²⁵ The DRC claimed Belgium's refusal to recognize the immunity of a Minister for Foreign Affairs constituted a "violation of the diplomatic immunity of a Minister for Foreign Affairs of a sovereign state, as recognized by the jurisprudence of the Court and following from Article 41, paragraph 2, of the Vienna Convention of 18 April 1961 on Diplomatic Relations."²⁶ Further, the DRC claimed that Belgium's provisions in Article 7 violated the principle of sovereign equality among the states.²⁷ The DRC did not, however, claim that Belgium had overstepped its bounds of jurisdiction.

Belgium responded to the DRC's suit with four objections. First, due to the fact that Mr. Yerodia was no longer the Minister for Foreign Affairs, there was no "legal dispute" between the parties, and therefore the ICJ lacked jurisdiction. Second, because Mr. Yerodia was no longer occupying the post of Minister for Foreign Affairs, nor any other governmental position with the DRC, the

²² *Id.*

²³ *Id.*

²⁴ Judge Oda, in dissent, noted that "moral injury" amounted to "at most, Mr. Yerodia might have thought it wise to forgo travel to foreign countries for fear of being arrested . . ." Case Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belg.), 2002 I.C.J. 121 (Judg. Of Feb. 14) (Oda, J., dissenting).

²⁵ *Id.*

²⁶ *Id.*, para. 1.

²⁷ *Id.*

case was without object, and therefore the ICJ should decline to proceed. Third, the case as it was at the time presented to the ICJ was materially different than it had been at the time of the DRC's application for proceedings, therefore the ICJ lacked jurisdiction. Finally, given Mr. Yerodia's change of position with the Congolese government, the case had become one of diplomatic protection. Because Mr. Yerodia failed to exhaust local remedies, the ICJ lacked jurisdiction and/or the application was inadmissible.²⁸ Both parties acknowledged that at the time of the filing of the complaint, a dispute did in fact exist.

The ICJ rejected each of Belgium's arguments in turn and found in favor of the DRC. The ICJ determined that there was a "legal dispute" at the time of the filing, and that the subsequent event of Mr. Yerodia losing his position did not deprive the ICJ of jurisdiction. The ICJ found that it continued to have jurisdiction on the matter, despite Mr. Yerodia's lack of a governmental position, because it did so *at the time the case was referred to it*.²⁹ By this determination, however, Mr. Yerodia would not necessarily be protected under the ICJ's ruling if Belgium were to issue another arrest warrant.³⁰

Belgium's second objection rested on the claim that the case was moot, due to the change in station of Mr. Yerodia. The DRC responded that for the case to lack object, the cause of the violation would have had to disappear and the redress sought obtained.³¹ Neither had occurred by the time of the proceedings. The ICJ acknowledged that it had found cases to be without object in the past due to subsequent occurrences, such was not the case here.³² This case was distinguishable because the DRC continued to maintain that the arrest warrant was unlawful, and therefore the dispute between the countries still existed. Agreeing with the DRC, the ICJ found that the case was not moot and rejected Belgium's second objection.³³

In its third objection, Belgium argued that Mr. Yerodia's change in position, rendered the case "materially different to that

²⁸ *Id.* para. 37.

²⁹ *Id.* para. 28.

³⁰ *Dorf*, *supra* note 13.

³¹ *Arrest Warrant of 11 April 2000*, 2002 I.C.J. 121, para. 31.

³² *Id.* para. 32.

³³ *Id.*

set out in the DRC's Application instituting proceedings"³⁴ and therefore the ICJ lacked jurisdiction and/or the application was inadmissible.³⁵ For the DRC to maintain its claims, Belgium asserted, it would have to initiate the proceedings again or to at least amend its complaint.³⁶ The DRC denied this objection, stating that it was not asserting a new claim, but merely refining its original claims. The ICJ found that there had been no transformation in the present dispute because the underlying facts of the Application remained the same. Furthermore, the ICJ found that the dispute had not been transformed in a way that either affected Belgium's ability to prepare a defense or the ICJ's administration of justice. Consequently, the ICJ rejected Belgium's third objection.³⁷

Belgium's final objection contended that the case became one of diplomatic protection when Mr. Yerodia ceased to be a member of the Congolese government, and that since Mr. Yerodia failed to exhaust local remedies under Belgian law, the ICJ lacked jurisdiction and/or the application was inadmissible.³⁸ The DRC responded that the claim was initiated on behalf of the DRC state because of the violation against its Minister for Foreign Affairs, and that protection of Mr. Yerodia's personal rights had never been invoked. Again, the ICJ found the case to be unaltered by Mr. Yerodia's change in position. The case concerned the lawfulness of an arrest warrant against a standing member of the DRC government, regardless of that individual's position at the time the case was brought. The ICJ found the essential question to the dispute to be whether the DRC's rights had been violated. Because the DRC was asserting the claim in its own name, the ICJ found the exhaustion of local remedies by Mr. Yerodia was not required. The ICJ proceeded on to consider the case on its merits.

VI. THE INTERNATIONAL COURT OF JUSTICE'S CONSIDERATION OF IMMUNITY

The primary question of the case was whether Belgium's act of circulating an arrest warrant for Mr. Yerodia violated the immunities of the then Minister for Foreign Affairs of the DRC.³⁹ The

³⁴ *Id.* para. 33.

³⁵ *Id.*

³⁶ *Id.* para 34.

³⁷ *Id.* para. 36.

³⁸ *Id.* para. 37.

³⁹ *Id.* para. 40.

DRC argued that a Minister for Foreign Affairs is entitled to “absolute or complete”⁴⁰ immunity during his or her time in office and therefore cannot be subject to criminal prosecution in a foreign court. Furthermore, the DRC stated the immunity covers *all* acts of the Minister for Foreign Affairs, even those personal in nature. The DRC conceded that a prosecution could be brought against a governmental office holder, but only before a court not bound by the immunity or at some time when the need for the immunity no longer exists.⁴¹

Belgium acknowledged that Ministers for Foreign Affairs *generally* enjoy immunity from foreign courts, but maintained that immunity only applies to acts carried out in pursuance of official functions.⁴² Belgium claimed that the warrant issued against Mr. Yerodia was issued personally, and the acts for which it was issued were not committed while in the course of his official functions.⁴³

The ICJ began by expressing that certain high holders of office in a State (including the Minister for Foreign Affairs) enjoy immunities from both civil and criminal prosecution in other states.⁴⁴ The primary purpose for this, the ICJ notes, was “to ensure the efficient performance of the functions of diplomatic missions as representing States.”⁴⁵ The ICJ then noted that being arrested is a certain way to make performance of diplomatic functions impossible, as communication between the State and the official would be severely limited and the travel, which is necessary to the position would be restricted.⁴⁶ The ICJ found no difference between acts committed in an “official capacity” and those committed in a “private capacity.”⁴⁷ Therefore, the ICJ agreed with the DRC that the immunity afforded to the Minister for Foreign Affairs covers all of his acts.⁴⁸

Belgium went on to argue that the immunities afforded to incumbent government officials were not available to those people, like Mr. Yerodia, who were accused of war crimes or crimes against humanity. Belgium looked to the comments in the French Court of Cassation, where that court held “the crime alleged [acts of terror-

⁴⁰ *Id.* para. 47.

⁴¹ *Id.* para. 48.

⁴² *Id.*

⁴³ *Id.* para. 49.

⁴⁴ *Id.* para. 51.

⁴⁵ *Id.* para. 52.

⁴⁶ *Id.* para. 53.

⁴⁷ *Id.* para. 55.

⁴⁸ *Id.* paras. 54-55.

ism], irrespective of its gravity, does not come within the exceptions to the principle of immunity from jurisdiction for incumbent foreign Heads of State.”⁴⁹ The DRC maintained that there was no basis for asserting *any* exceptions to absolute immunity for an incumbent Minister for Foreign Affairs.⁵⁰

The ICJ examined state practices, national legislation and the decisions of national higher courts to resolve this issue, but it was unable to deduce an exception to the immunity of incumbent government⁵¹ and thereby rejected Belgium’s argument. The ICJ did emphasize that *immunity* does not equal *impunity*, with regard to criminal acts of incumbent Ministers for Foreign Affairs.⁵² Expounding on this, the ICJ stated that while jurisdictional immunity may bar prosecution for a time, it does *not* exonerate the person from all criminal responsibility.⁵³ It also noted that the accused individuals received no immunity in their own State’s courts, nor if the State which they represent chooses to waive it, nor after the person ceases to hold the position of Minister for Foreign Affairs.⁵⁴ The ICJ added that an incumbent or former Minister for Foreign Affairs may be subject to criminal prosecution before certain international courts which have jurisdiction.⁵⁵

VII. THE INTERNATIONAL COURT OF JUSTICE’S CONSIDERATION OF THE APRIL 11, 2000 ARREST WARRANT

The ICJ lastly turned to the arrest warrant issued by Belgium for Mr. Yerodia. The warrant referred to crimes of war in the essence of Mr. Yerodia having made speeches that incited “racial hatred” and allegedly “resulted in several hundred deaths, the internment of Tutsis, summary executions, arbitrary arrests, and unfair trials.”⁵⁶ The warrant called for the detainment of Mr. Yerodia, but made an exception if Mr. Yerodia entered Belgium in an official capacity.⁵⁷ The ICJ found that the warrant’s issue and international

⁴⁹ *Id.* para. 56.

⁵⁰ *Id.* para. 47.

⁵¹ *Id.* para. 58.

⁵² *Id.* para. 60.

⁵³ Press Release, U.N., ICJ Rejects Belgian Arrest Warrant for Foreign Minister of Democratic Republic of Congo (Feb. 14, 2002), *available at* <http://www.un.org/News/Press/docs/2002/afr379.doc.htm>.

⁵⁴ *Id.*

⁵⁵ *Arrest Warrant of 11 April 2000*, 2002 I.C.J. 121, para. 61.

⁵⁶ *Id.* para. 67.

⁵⁷ *Id.* para. 68.

circulation infringed Mr. Yerodia's immunity as Minister for Foreign Affairs of the DRC.⁵⁸ Further, the circulation of the warrant constituted a violation of an obligation of Belgium towards the DRC.⁵⁹

Given these conclusions, the ICJ formally determined that the warrant was in fact unlawful. The ICJ further required Belgium to cancel the warrant in a manner of Belgium's choosing and to inform the authorities to whom the warrant was sent of its cancellation.⁶⁰ As the ICJ was not required to address the law upon which the arrest warrant was based, and the law is "not sufficiently developed,"⁶¹ the ICJ did not strike down Belgium's law of universal jurisdiction over human rights violations.⁶²

VIII. SUITS OF NOTE UNDER BELGIUM'S UNIVERSAL JURISDICTION SINCE *DEMOCRATIC REPUBLIC OF CONGO V. BELGIUM*

Since the decision of the ICJ in *Democratic Republic of Congo v. Belgium*, the Belgium court has continued to hear cases involving alleged war crimes of international leaders. On February 13, 2003, Belgium's highest court ruled that Israeli Prime Minister Ariel Sharon can be prosecuted for war crimes after he leaves office.⁶³ The suit is being brought by twenty-three Palestinian survivors of a refugee camp massacre in Lebanon in 1982.⁶⁴ The massacre resulted in the deaths of up to 2,000 Palestinian refugees at the hands of an Israeli-allied Christian militia.⁶⁵

More recently, families of Iraqi civilians killed during the bombing of a civilian shelter in Baghdad⁶⁶ during Operation Desert Storm filed a suit in Belgium against former United States Presi-

⁵⁸ *Id.* para. 71.

⁵⁹ *Id.* para. 70.

⁶⁰ *Id.* para. 76.

⁶¹ *Id.* (Oda, J., dissenting).

⁶² Pieter H. F. Bekker, *The Democratic Republic of the Congo Requests the World Court to Order Belgium to Annul an Arrest Warrant Issued Against the Congo's Foreign Minister*, ASIL INSIGHTS, Oct. 2000, <http://www.asil.org/insights/insigh55.htm>.

⁶³ Fabrice Randoux, *Sharon War Crimes Suit*, NEWS INTERACTIVE, at http://www.news.com.au/common/story_page/0,4057,5977811%255E2,00.html (last visited Apr. 21, 2003).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Lee, *supra* note 9.

dent George Bush, Sr., Colin Powell, Dick Cheney, and General Norman Schwarzkopf on March 18, 2003.⁶⁷ The U.S. Ambassador to Belgium demanded that the suit be thrown out.⁶⁸ Aside from Prime Minister Sharon and former President Bush, other leaders facing legal sanction under the Belgian law include Palestinian leader Yasser Arafat,⁶⁹ Cuban President Fidel Castro,⁷⁰ and Iraqi President Saddam Hussein.⁷¹

IX. THE IMPACT OF *DEMOCRATIC REPUBLIC OF CONGO*
v. BELGIUM

The ICJ clearly stated that certain foreign officials—in particular the Minister for Foreign Affairs—are immune to prosecution in foreign states during their time in office. Beyond this, and despite varying viewpoints, Belgium's law of universal jurisdiction remained fully intact, the only limitation resting on the individual no longer being in office. Without a more stringent decision, the impact of *Democratic Republic of Congo v. Belgium* is lessened, and Belgium still remains a popular venue for the resolution of international disputes.

Amanda Nelson

⁶⁷ *Iraqi Gulf War Victims File Suit in Belgium Against Bush Snr, Cheney, Others*, RTBF RADIO 1, Mar. 18, 2003, 2003 WL 16569245.

⁶⁸ *US Envoy Blasts Belgium Over Suit Against Bush Senior*, AGENCE FRANCE-PRESSE, Mar. 19, 2003, 2003 WL 2757088.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Randoux, *supra* note 63.