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Crimes Against Humanity as a Nexus of Individual and State Responsibility: Why the ICJ Got *Belgium v. Congo* Wrong

by
Adam Day*

INTRODUCTION

The principle of sovereignty requires that states refrain from issuing binding orders towards other states.[1] Accordingly, customary international law dictates that each state possess immunity from the jurisdiction of other states.[2] The purpose of this immunity is to protect state actors while they perform their duties without foreign interference, as well as protect their state's dignity.[3] Because heads of state or foreign ministers carry out much of international relations, protection of state functions requires that sovereign immunity be extended to these officials.[4] This derivative immunity allows state officials to negotiate abroad without the fear that they will be subject to the criminal codes of foreign countries, while maintaining each state's integrity in the international arena.

However, the immunity granted to state officials is not absolute. As the House of Lords in the famous *Pinochet* case noted, human rights violations rising to the level of core crimes—genocide, crimes against humanity, and war crimes—may be exceptions to state officials' immunity.[5] Genocide, in particu-

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1. *See* Schooner Exchange v. M'Faddon, 11 U.S. 116, 137 (1812) ("This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects."); *see also* U.N. CHARTER art. 2, para. 1.

2. Steffen Wirth, *Immunities, Related Problems, and Article 98 of the Rome Statute*, 12 CRIM. L.F. 429, 430 (2001) [hereinafter Wirth, *Immunities, Related Problems*]; *see also* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 329 (5th ed. 1998).

3. Steffen Wirth, *Immunity for Core Crimes? The ICJ's Judgment in the* Congo v. Belgium *Case*, 13 EUR. J. INT'L L. 877, 882 (2002) [hereinafter Wirth, *Core Crimes*].

4. *See* Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 3230, 500 U.N.T.S. 95, 96 ("*Realizing* that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States.").

5. Regina v. Bow Street Magistrate, *Ex parte* Pinochet, [1999] 38 I.L.M. 581 (H.L.).

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lar, constitutes a clear exception to the principle of state immunity under Article IV of the Genocide Convention.[6] Likewise, the Torture Convention eliminates most immunities for torture allegations.[7] Consequently, these exceptions to state immunity can lead to the *personal* liability of state officials for their crimes, provided that such crimes are included among the group of core crimes.[8]

Nevertheless, core crime exceptions must still comply with the two general purposes of state immunity: (1) the performance of official functions, and (2) the protection of each state's dignity. Accordingly, customary international law recognizes two categories of state immunity in order to ensure the protection of these values. First, all state officials enjoy "functional immunity," or immunity *ratione materiae*, for acts carried out as part of their official duties for their state.[9] The rationale behind functional immunity is that by acting on behalf of a state, the official's acts are attributed directly to the state and, consequently, individual liability does not arise.[10] Second, some state officials (only those occupying the highest positions, such as heads of state and foreign ministers) enjoy "personal immunity," or immunity *ratione personae*, for all acts committed while holding an official state position.[11] Once that position is relinquished, as the House of Lords noted in *Pinochet,* personal liability arises, even for those acts committed while in office.[12] Both categories protect the functions of state officials in international relations; however the former is directed at the inviolability of the sovereign, whereas the latter merely protects an official from criminal prosecution during their tenure in office.

The International Court of Justice (ICJ) in the *Case Concerning the Arrest Warrant of 11 April 2000* (*Congo v. Belgium*) (*"Congo"*) raised the difficulty of maintaining the distinction between these two types of immunity.[13] The ICJ not only held that an incumbent minister of foreign affairs of a foreign state enjoyed immunity from prosecution for crimes against humanity before Belgian courts, but, in a controversial *obiter dictum,* it also held that *former* foreign ministers would also be immune from prosecution for their official acts.[14] Many scholars, including at least one of the dissenting judges in *Congo*, have noted that this holding contradicts the reasoning presented by the House of Lords in *Pinochet*,

6. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. 4, 102 Stat. 3045, 78 U.N.T.S. 278, 280 [hereinafter Genocide Convention].

7. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 39 U.N. GAOR, Supp. No. 187, at 197, U.N. Doc. A/39/51 (1984). *See also* Wirth, *Immunities, Related Problems, supra* note 2, at 433.

8. Salvatore Zappalá, *Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The* Ghaddafi *Case Before the French Cour de Cassation*, 12 EUR. J. INT'L L. 595, 601 (2001).

9. Antonio Cassese, *When May Senior State Officials Be Tried for International Crimes? Some Comments on the* Congo v. Belgium *Case*, 13 EUR. J. INT'L LAW 853, 862 (2002).

10. *Id.* at 863.

11. Zappalá, *supra* note 8, at 598.

12. *Pinochet*, 38 I.L.M. at 585 ("the notion of continued immunity for ex-heads of state is inconsistent with the provisions of the Torture Convention").

13. Case Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belg.), 2002 I.C.J. 121 (Feb. 14), *available at* http://www.icj-cij.org/icjwww/idecisions.htm.

14. *Id.* at para. 61.

in which the House of Lords excluded core crimes from the protection of functional immunity.[15] In contrast, under the ICJ's ruling, a crime against humanity committed as part of an official state duty would almost inevitably fall under the rubric of functional immunity and would therefore not give rise to individual criminal liability.[16]

Part I of this article will argue that the ICJ's holding in the *Congo* case is erroneous in light of the two categories of immunity mentioned above. In particular, it will examine the ICJ's reasoning for granting immunity to an incumbent foreign minister, and discuss the points at which the holding contradicts the scope of that immunity as established in customary international law. Furthermore, it will argue—as does Judge Van den Wyngaert's dissent in *Congo*—that no rule granting immunity to foreign ministers from core crimes exists in customary international law.

Part II will discuss the rule abrogating immunity for crimes against humanity in three different fora: (1) the domestic courts of several nations, (2) the *ad hoc* tribunals created in Rwanda and the former Yugoslavia, and (3) the International Criminal Court (ICC). Ultimately, it will argue that a clear rule has crystallized in customary international law: foreign ministers have no defense of immunity for crimes against humanity.

Part III will expand this rule to include state responsibility as well as individual liability for crimes against humanity. It will argue that the very definition of these crimes necessarily invokes state responsibility, whether through a state's active participation in or failure to prevent each crime. Individual responsibility is not dissolved by this definition; rather, a crime against humanity generates both individual and state responsibility. This section will conclude by addressing the possible problem of inappropriate forum as one cause of the unsound ruling in *Congo*. In particular, part III asks whether or not the ICJ, a court whose jurisdiction is limited to inter-state disputes, is the appropriate forum for resolving disputes that implicate both individual and state liability.

I.
IMMUNITIES OF FOREIGN MINISTERS ACCUSED OF CORE CRIMES

This part will maintain that the ICJ's holding, which grants immunity to former foreign ministers in *Congo*, is manifestly flawed. First, it will focus on the distinction between functional and personal immunity and the *Congo* court's conflation of the two. The ICJ's confusion resulted in a category of immunity for former foreign ministers, which contradicts the rationale of sovereign immunity established under customary international law, by all but granting former foreign ministers absolute impunity.

15. *See* Marina Spinedi, *State Responsibility v. Individual Responsibility for International Crimes*: Tertium Non Datur?, 13 EUR. J. INT'L LAW, 895, 896-97 (2002); *see also Congo v. Belgium*, at para. 36 (dissenting opinion of Judge Van den Wyngaert).

16. *See* Wirth, *Core Crimes*, *supra* note 3, at 881 ("The Court [ICJ] thereby seems to recognize an unrestricted immunity for all acts committed in the official capacity of a former Minister of Foreign Affairs.").

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Second, this part will analyze Judge Van den Wyngaert's dissenting opinion in *Congo,* maintaining that the majority misstated the status of *both* functional and personal immunity in customary international law. Highlighting the absence of *opinio juris* concerning incumbent foreign ministers' immunity from core crimes, this part will postulate that foreign ministers should never receive immunity from the prosecution of core crimes under customary international law, even while those ministers are in office.

A. *The ICJ's Misjudgment of Functional Versus Personal Immunity in* Congo v. Belgium

On April 11, 2000, Judge Damien Vandermeersch of the Brussels court issued an international arrest warrant for Mr. Abdulaye Yerodia Ndombasi (Yerodia), who was at that time the Minister of Foreign Affairs for the Democratic Republic of Congo (DRC).[17] The warrant accused Yerodia of crimes against humanity in violation of the 1949 Geneva Conventions, for allegedly inciting the massacre of Tutsi residents in Kinshasa in 1998.[18] In its application to the ICJ, the DRC claimed that Yerodia, as the incumbent Minister of Foreign Affairs, enjoyed immunity before all foreign courts.[19] Furthermore, it alleged that Belgium's imposition of universal jurisdiction over acts committed in the sovereign territory of another state constituted a violation of sovereignty under customary international law.[20] However, by the time of the final submissions to the court, the DRC only invoked the defense of the absolute inviolability of foreign ministers.[21]

Interestingly, the Court noted that neither party cited to any specific authority concerning the immunity granted to foreign ministers. Both parties referred to the New York Convention on Special Missions of 8 December 1969, in which Article 21 provides:

> The Head of the Government, the Minister for Foreign Affairs and other persons of high rank, when they take part in a special mission of the sending State, shall enjoy in the receiving State or in a third State, in addition to what is granted by the present Convention, the facilities, privileges and immunities accorded by international law.[22]

However, as neither Belgium nor the DRC was a party to the above Convention, the ICJ relied on customary international law and a functional understanding of the duties of a foreign minister to support its holding.[23] Among the duties of a foreign minister, the Court emphasized the full powers granted to a foreign minister to act on behalf of the state, the necessity of travel abroad, and the binding

17. Pieter H.F. Bekker, *World Court Orders Belgium to Cancel an Arrest Warrant Issued Against the Congolese Foreign Minister,* AM. SOC'Y OF INT'L L., Feb. 2002, at 1, *available at* http://www.asil.org/insights/insigh82.htm.

18. *Congo v. Belgium*, at para. 15.

19. *Id.* at para. 12.

20. *Id.*

21. *Id.* at para. 45.

22. *Id.* at para. 52.

23. *Id.* at paras. 52-53.

nature of his or her decisions.[24] Ultimately, it found that a foreign minister "occupies a position such that, like the Head of State or the Head of Government, he or she is recognized under international law as representative of the State."[25] Correspondingly, the Court held that "*throughout the duration of his or her office,* he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability."[26]

This definition of the immunity afforded to an incumbent foreign minister adheres to the definition of personal immunity, or *ratione personae*, present in customary international law. As Cassese notes, personal immunity is founded on the notion that a head of state or foreign minister must be immune from foreign jurisdiction over *any* activity, in order to protect against "foreign states either infringing sovereign prerogatives of states or interfering with the official functions of foreign state agent[s] under the pretext of dealing with an exclusively private act."[27] As the ICJ reasoned, the role of high state officials in international relations requires this total inviolability while officials maintain their governmental position.[28]

However, a crucial aspect of personal immunity is that it does not render the official permanently immune from criminal proceedings; rather, it guarantees immunity only as long as the official retains his or her position in government.[29] Personal immunity, therefore, is a *procedural* law that (i) protects any act carried out by a state agent while in office or before taking office; (ii) is afforded only to those high officials who represent the state in international relations; and (iii) comes to an end at the termination of the official position.[30]

In contrast to personal immunity, functional immunity, or *ratione materiae,* is a matter of *substantive* law rendering state officials permanently unaccountable to other states for acts that fall within his or her official capacity.[31] Instead, under functional immunity, official acts are directly attributable to the state itself and thus cannot give rise to individual criminal responsibility.[32] As Cassese points out, the substantive nature of functional immunity means that a state official's violation of national or international law does not negate the violation. It means only that individual liability does not attach.[33] And because no individual liability ever arises for these official acts, at the termination of a state agent's position, that agent bears no personal criminal or civil liability.[34]

24. *Id.*
25. *Id.* at para. 53.
26. *Id.* at para. 54 (emphasis added).
27. Cassese, *supra* note 9, at 862.
28. *Congo v. Belgium*, at para. 54.
29. Cassese, *supra* note 9, at 862.
30. *Id.* at 863-64.
31. *Id.* at 862.
32. *See* Zappalá, *supra* note 8, at 598 ("[A] public official cannot be held accountable for acts performed in the exercise of an official capacity, as these are to be referred to the state itself.").
33. Cassese, *supra* note 9, at 863.
34. *Id.* For an example of the distinct definitions of functional and personal immunity applied to diplomatic agents, the Vienna Convention of 1961 states the following:

> [W]hen the functions of a person enjoying the privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when

The critical difference between functional and personal immunity in *Congo* rests upon the distinction between official versus private acts. Whereas personal immunity temporarily protects the agent for all acts, official or private, functional immunity is limited to those acts carried out on behalf of the state.[35] When understood as a matter of substantive law, by which individual acts are attributed to the state, functional immunity should be limited to those acts that are actually committed on behalf of the state. There is no basis in international customary law to impute the private actions of individuals to the state. Likewise, when personal immunity is understood as a provisional, procedural immunity intended to protect an official's position within the sovereign structure, it should dissolve at the moment the official leaves that position. As an agent's private actions are not attributed to the state, personal immunity attaches to the official position itself, not the individual.

Throughout most of its discussion, the *Congo* Court referred to the immunity enjoyed by incumbent foreign ministers solely in terms of personal immunity. For instance, it asserted that *all* of Yerodia's acts were immune,

> regardless of whether the Minister for Foreign Affairs was, at the time of arrest, present in the territory of the arresting State on an "official" visit or a "private" visit, regardless of whether the arrest relates to acts allegedly performed before the person became the Minister for Foreign Affairs or to acts performed while in office, and regardless of whether the arrest relates to alleged acts performed in an "official" capacity or a "private" capacity.[36]

By failing to distinguish between private and official acts, the court reinforced that its application of immunity was personal rather than functional. This finding should, under customary international law, lead to the conclusion that the immunity evaporated at the moment the minister left office.[37] In apparent support of this conclusion, the court held that jurisdictional immunity was "procedural in nature," and hence could not exonerate an official from all criminal responsibility.[38] This clear categorization of a foreign minister's immunity as procedural (and thus personal), can be paired with the holding that customary international law provides no exception to the rule that *incumbent* foreign ministers enjoy immunity for all acts done before or during their tenure. These two statements together would support a finding that *former* foreign ministers do not enjoy that same immunity.[39] Personal immunity, therefore, must dissolve at the moment the foreign minister leaves office.

> he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 39, 23 U.S.T. 3227, 3245, 500 U.N.T.S. 95, 118.

35. *See* Cassese, *supra* note 9, at 863.
36. *Congo v. Belgium*, at para. 55.
37. Cassese, *supra* note 9, at 864.
38. *Congo v. Belgium*, at para. 60.
39. *Id.* at para. 58. Note that the question posed to the court became whether a former minister of foreign affairs enjoyed immunity from alleged crimes against humanity in a foreign court. *See* Bekker, *supra* note 17, at 2.

The Court subsequently inferred, however, that the immunities granted to incumbent foreign ministers do not represent a bar to criminal prosecution in four different circumstances, the third of which significantly undermines the court's initial rationale:

> [T]he immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances. [The court mentions two other exceptions that will be covered later in this paper.]
>
> Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, *as well as in respect of acts committed during that period of office in a private capacity.*[40]

By limiting the liability of former foreign ministers for their crimes against humanity to only those acts committed outside of their tenure in office, or to acts committed "in a private capacity," the Court recognized an unlimited immunity for all acts committed by foreign ministers in their official capacity. This is a surprising statement considering that the Court's sole rationale for granting this type of immunity is the protection of high state officials' ability to perform their functions.[41] A former foreign minister clearly does not require this protection, however, because his or her official functions have already ceased.

The *Congo* Court thus conflated the two distinct categories of immunity regarding international crimes. The Court merged personal immunity, which covers all acts (official and private) while the minister is in office, with functional immunity, which negates individual liability and instead attributes all official acts to the state itself. The result: former foreign ministers retain no liability for international core crimes, provided they can show the acts were committed as part of their official duties while in office.

This conclusion has a potentially devastating effect on the advances made over the last fifty years in international humanitarian law. As Cassese points out, international core crimes—genocide, crimes against humanity, and war crimes—are almost never committed "in a private capacity."[42] Rather, the very nature of these crimes generally requires individual perpetrators to utilize military or governmental authority to achieve their objectives.[43] It is, in fact, the abuse of their official status that enables such officials to order, instigate, or tolerate crimes against humanity or grave breaches of the Geneva Convention.[44] The ICJ's limited exception to the otherwise absolute immunity is therefore a *de*

40. *Congo v. Belgium*, at para. 61 (emphasis added).
41. *Id.* at para. 55.
42. Cassese, *supra* note 9, at 868.
43. *Id.*
44. *Id.*

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facto empty set: international crimes committed by incumbent foreign ministers in their private capacity simply do not occur with any frequency.[45]

The empty exception laid out by the ICJ to the immunity granted to foreign ministers thus expands both functional and personal immunity far beyond what is allowed under customary international law. As Marina Spinedi argues, the ICJ ruling offers an "either/or" response to the problem of attribution: either (1) a former foreign minister's acts are considered official acts and are attributed directly to the state, or (2) they are considered private acts, and the state is not accountable for the ministers' crimes.[46] This result contradicts the Court's reasoning that foreign ministers' jurisdictional immunity is procedural in nature and does not mean impunity for the perpetrator of serious international crimes.[47] It also defies customary international law concerning the immunity granted to foreign ministers in general.

B. *The Absence of Customary International Law Concerning Immunity to Incumbent Foreign Ministers*

In his dissenting opinion, Judge Van den Wyngaert rejects the majority's opinion on the broadest grounds. He argues that neither personal *nor* functional immunity protects foreign ministers from core crimes under customary international law. This line of reasoning can be broken into two related premises: (1) there is no customary rule of international law granting immunity to foreign ministers, and (2) the laws granting immunity to heads of state cannot be attributed to foreign ministers.

(1) Customary International Law

In one of its leading precedents, *North Sea Continental Shelf*, the ICJ clearly laid out the criteria for establishing customary international law:

> Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.[48]

As both Judges Van den Wyngaert and Al-Khasawneh argue in their dissenting opinions in *Congo*, no such clearly established customary law exists for granting

45. Interestingly, Yerodia made his public remarks inciting racial violence in 1998 before he actually took the position of foreign minister in the DRC—under the ICJ's rationale, therefore, his acts would have been considered "private." *See* Congo v. Belgium, at para 67.

46. Spinedi, *supra* note 15, at 899.

47. *Congo v. Belgium*, at para. 60.

48. North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.) 1969 I.C.J. 3, 44 para. 77 (Feb. 20); *see also* Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 I.C.J. 14, 97-98, para. 184 (June 27).

immunity in foreign jurisdictions to foreign ministers.[49] In fact, Judge Al-Khasawneh points to a "total absence of precedents with regard to the immunities of Foreign Ministers from criminal process."[50] Only one such case was brought to the attention of the Court, and it involved a foreign minister on an official visit.[51] Nevertheless, even if such a case were considered factually analogous to the circumstances in *Congo*, a single case certainly does not rise to the level of state practice and *opinio juris* described in *Continental Shelf.*

Instead of a rule of customary international law, the Special Rapporteur on Jurisdictional Immunities of States and Their Property maintains that the immunities of foreign ministers are granted in accordance with interstate comity.[52] Judge Van den Wyngaert suggests a greater range of factors than merely comity, "including courtesy, political considerations, practical concerns, and a lack of extraterritorial criminal jurisdiction."[53] The immunity granted to foreign ministers appears to be granted more out of non-binding considerations of mutual respect, and not by positive instances in which states act under the auspices of an international obligation.

To claim that these comity considerations amount to customary international law would contravene the holding of the Permanent Court of International Justice in the famous *Lotus* case,[54] which rejected the notion that mere abstentions of governmental actions rise to the level of being obligatory customs of international law. In *Lotus*, the Court rejected the French government's submission that it was a violation of customary international law for Turkey to institute criminal proceedings based on offences by foreigners abroad; rather, the Court held:

> Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstance alleged by the Agent for the French Government, it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom.[55]

A conscious obligation, *opinio juris*, cannot be established merely through abstention. In addition, while international conventions have crystallized the immunities granted to foreign heads of state and diplomatic representatives, the immunities granted to foreign ministers have no such direct link to a conscious

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49. *Congo v. Belgium*, at para. 13 (dissenting opinion of Judge Van den Wyngaert); *id.* at para. 11 (dissenting opinion of Judge Al-Khasawneh).

50. *Id.* at para. 1 (dissenting opinion of Judge Al-Khasawneh).

51. *Id.* at para. 13 (dissenting opinion of Judge van den Wyngaert) (citing Chong Boon Kim v. Kim Yong Shik (Haw. Cir. Ct. Sept. 9, 1963), *summarized in* 58 AM. J. INT'L L. 186-87 (1964), as the only case that has been brought to the court's attention).

52. Report on the Draft Articles on the Jurisdictional Immunities of States and Their Property, U.N. Doc. A/46/10, *reprinted in* [1991] Y.B. INT'L L. COMM., Vol. II (2), at 17, *cited in Congo v. Belgium*, at para. 1 (dissenting opinion of Judge Al-Khasawneh).

53. *Id.* at para. 13 (dissenting opinion of Judge Van den Wyngaert).

54. S.S. Lotus Case (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

55. *Id.*

obligation.[56] What Judge Van den Wyngaert calls a "negative practice"[57] may exist, whereby states refrain from exercising jurisdiction over foreign ministers; however, customary international law provides no clear rule governing that abstention.[58]

(2) The Foreign Minister/Head of State Analogy

Faced with this "negative practice," the cause of which could be any number of non-obligatory considerations, the majority in *Congo* resorted to a flawed analogy between foreign ministers and heads of state. Citing the New York Convention on Special Missions of 8 December 1969, of which neither the DRC nor Belgium is a member, the Court noted,

> The Head of the Government, the Minister for Foreign Affairs and other persons of high rank, when they take part in a special mission of the sending State, shall enjoy in the receiving State or in a third State, in addition to what is granted by the present Convention, the facilities, privileges and immunities accorded by international law.[59]

The Court drew this analogy between the immunities given to heads of state and the immunities afforded foreign ministers through the imperfect notion of the functional similarities between the two roles: "a Minister of Foreign Affairs . . . occupies a position such that, like the Head of State . . . he or she is recognized under international law as representative of the State solely by virtue of his or her office."[60] In the New York Convention, however, the parallel between foreign ministers and heads of state is problematic: foreign ministers are granted immunity only in the limited circumstance of an official visit, whereas heads of state enjoy full immunity during their tenure.[61] If, as the ICJ claims, the two positions were alike, there would be no reason to distinguish between the types of immunity granted to each respective office.

Customary international law recognizes no such equivalence between heads of state and foreign ministers. As Sir Arthur Watts notes, there is a clear rationale for distinguishing between the role of foreign minister and that of head of state:

> Heads of governments and foreign ministers, although senior and important figures, do not symbolize or personify their States in the way that Heads of States do. Accordingly, they do not enjoy in international law any entitlement to special treatment by virtue of qualities of sovereignty or majesty attaching to them personally.[62]

Foreign ministers do represent the state in important aspects of international relations, but they do not embody the state in the same manner as a head of state.

56. Diplomatic immunity, for example, is defined in the 1961 Vienna Convention. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 96.

57. *Congo v. Belgium*, at para. 13 (dissenting opinion of Judge Van den Wyngaert).

58. *See id.* at para. 52.

59. *Id.* at para. 52.

60. *Id.* at para. 53.

61. *See id.* at para. 52.

62. A. Watts, *The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers*, 247 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 9, 102-03 (1994).

Hence, the principle of sovereignty does not inhere to foreign ministers. Consequently, the immunities granted to such ministers reflect international standards of courtesy and respect, not adherence to any positive obligation.[63] As such, no reason exists for making "une analogie pure et simple" between heads of state and foreign ministers.[64] Furthermore, the New York Convention statement cited above simply postulates that foreign ministers should be given immunities already extant in international law—as this discussion has established, those immunities are not necessarily congruent with the immunities given to a head of state. For example, several scholars maintain that "members of a Government have not the exceptional position of Heads of States" and therefore do not merit the same treatment in the realm of foreign relations.[65] By failing to establish a clear analogy to heads of state, the majority in *Congo* was left without any custom of international law granting immunity to foreign ministers. As noted above, immunities for foreign ministers are often provided on the basis of comity, and do not rise to the level of customary international law under the *Continental Shelf* and *Nicaragua* criteria.[66] This absence of custom undermines the *Congo* Court's entire rationale, which presumed blanket immunity for foreign ministers, and then searched for exceptions to that general rule.[67] Rather than lay out exceptions to a rule, the Court should have taken a more rigorous approach by establishing custom first.

Accordingly, the following part will discuss customary international law concerning the immunity of foreign ministers accused of committing serious violations of international law. Relevant rules have arisen in several different fora, including domestic courts, ad hoc tribunals established by the United Nations, and the International Criminal Court. The following section will consider each of these in turn.

II.
CUSTOMARY INTERNATIONAL LAW CONCERNING IMMUNITY FOR CORE CRIMES

This part will focus on the establishment of customary international law concerning the immunities provided to foreign ministers accused of core crimes. It will discuss the findings of domestic courts, *ad hoc* tribunals, and the ICC. Examining these findings as a whole, this part will argue that a custom of inter-

63. *See id.* at 109.

64. J. Verhoeven, *L'immunité de juridiction et d'exécution des chefs d'Etat et anciens chefs d'Etat*, REPORT OF THE 13TH COMMISSION OF THE INSTITUT DE DROIT INTERNATIONAL, 46, para. 18, *cited in Congo v. Belgium*, at para. 14 (dissenting opinion by Judge Van den Wyngaert).

65. LAWRENCE OPPENHEIM & HERSCHT LAUTERPACHT, INTERNATIONAL LAW, A TREATISE, VOL. I, 358 (1955); Judge Van den Wyngaert also cites to the following jurists in support of this rule: ARRIGO CAVAGLIERI, CORSO DI DIRITTO INTERNAZIONALE 321-22 (2d ed. 1934); PHILLIPE CAHIER, LE DROIT DIPLOMATIQUE CONTEMPORAIN 359-60 (1962); BHAGEVATULA MURTY, THE INTERNATIONAL LAW OF DIPLOMACY: THE DIPLOMATIC INSTRUMENT AND WORLD PUBLIC ORDER 333-34 (1989); JEAN SALMON, MANUEL DE DROIT DIPLOMATIQUE 539 (1994).

66. *See supra* part I.B.1.

67. *See Congo v. Belgium*, at paras. 58, 61.

national law does in fact exist: one that does not grant immunity to a foreign minister accused of a core crime.

A. *Domestic Courts*

National case law worldwide provides a clear customary rule which removes functional immunity from all former state agents accused of committing international crimes while in office. Under this rule, state agents accused of war crimes, crimes against humanity, or genocide, may not defend these charges on the ground that they were performing their official duties at the time the crime occurred.[68]

The Israeli Supreme Court in *Eichmann* made one of the foundational holdings establishing this rule.[69] Adolf Eichmann had been a member of the Nazi police force during WWII, and was later charged with crimes against humanity after being abducted and brought to Israel. The court held that crimes against humanity were "banned by the law of nations and entail[ed] individual criminal responsibility."[70] In rejecting Eichmann's defense that his acts should be attributed solely to the state of Germany, the court stated,

> Of such odious acts it must be said that in point of international law they are completely outside the "sovereign" jurisdiction of the State that ordered or ratified their commission, and therefore those who participated in such acts must personally account for them and cannot shelter behind the official character of their task or mission.[71]

While this statement was one of the first to clearly establish individual criminal responsibility for core crimes, it relied upon previous scholarly writings, which adopted this rule as already part of customary international law. The court, in fact, quoted Lauterpacht as follows: "The fact that the offender acts on behalf of the State is irrelevant. He is bound personally by rules of international law whether he is acting in his personal capacity, in order to satisfy private greed or lust, or as an organ of the State."[72] Admittedly, this holding does not bear directly on the position of foreign ministers; however, as it breaks down immunity for any state-actor who commits a core crime, it must be assumed that foreign ministers are included as well.[73]

Similar to *Eichmann,* the following cases in other domestic courts affirm the customary rule denying immunity to officials accused of core crimes: *Barbie* in France,[74] *Kappler* in Italy,[75] *Rauter* in the Netherlands,[76] *Pinochet* in the

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68. Cassese, *supra* note 9, at 870.

69. Attorney-General for Israel v. Eichmann, 36 I.L.R. 277, 277-342, (Isr. S. Ct. 1962).

70. *Id.* at 287.

71. *Id.* at 310.

72. *Id.*

73. *See also In re* Rauter, Special Court of Cassation, The Hague, 1949 ANN. DIG. 526-48 (1949) (Dutch court finding the Supreme Chief of the German S.S. troops liable for crimes against humanity and war crimes).

74. Féderation National des Déportées et Internés Résistants et Patriots v. Barbie, 78 I.L.R. 125 (French Cour de Cassation 1985) (denying immunity to defendant).

75. *In re* Kappler, Military Tribunal of Rome, 1948 ANN. DIG. 471, 472 (1948) (denying immunity for war crimes and genocide).

United Kingdom,[77] *Fidel Castro* in Spain,[78] and *Filartiga* in the United States.[79] Furthermore, the U.N. Transitional Administration in East Timor unambiguously denies functional immunity to any person accused of committing core crimes.[80]

One of the most important and recent benchmarks in the establishment of this rule of customary international law arose in the famous *Ghaddafi* case before France's highest court of ordinary jurisdiction, the Cour de Cassation, in 2001. Mouammar Ghaddafi, considered the *de facto* head of state of Libya, was accused of bombing a commercial airline in 1989, killing 156 passengers.[81] The Court's decision, which ultimately granted Ghaddafi immunity, validated exceptions to the general rule of absolute immunity for high state officials from criminal prosecution. The Court held that these exceptions did not apply: "at this stage of development of international customary law, the crime charged [terrorism], no matter how serious, does not fall within the exceptions to the principle of immunity from jurisdiction of foreign Heads of State in office."[82] According to this statement, exceptions exist in customary international law, specifically for acts such as core crimes that cannot be considered part of the legitimate execution of official functions.[83] The fact that terrorism had not, at the time of *Ghaddafi*, reached the classification as a core crime confirms the Court's recognition that, if it had, Ghaddafi would not have been able to raise immunity as a defense.

In *Pinochet*, the House of Lords articulated the rationale behind the core crimes exception to the immunity doctrine. Lord Browne-Wilkinson noted that, if immunity *ratione materiae* (functional immunity) were granted to former state officials for torture, "the whole elaborate structure of universal jurisdiction over torture committed by officials is rendered abortive and one of the main objectives of the Torture Convention—to provide a system under which there is no safe haven for torturers—will have been frustrated."[84] Although this portion of the holding was limited to the torture committed under the Pinochet regime, four of the seven Law Lords explicitly considered this exception to functional immunity within the broader context of core crimes, and not only in the limited context of torture.[85] Lord Hope maintained, "the obligations which were

76. Trial Of Hans Albin Rauter, 14 L. REPS. OF TRAILS OF WAR CRIM. 89 (1949) (rejecting immunity as a defense against war crimes and genocide).

77. Regina v. Bow Street Magistrate, *Ex parte* Pinochet, [1999] 38 I.L.M. 581, 585 (H.L.).

78. Cassese, *supra* note 9, at 60-61 n.21.

79. Filartiga v. Peña-Irala, 630 F.2d 876 (1980).

80. UNITED NATIONS TRANSITIONAL ADMINISTRATION IN EAST TIMOR; ON THE ESTABLISHMENT OF PANELS WITH EXCLUSIVE JURISDICTION OVER SERIOUS CRIMINAL OFFENSES REGULATION, U.N. Doc. UNTAET/REG/2000/15 (2000), *available at* http://www.un.org/peace/et imor/untaetR/Reg0015E.pdf.

81. Zappalá, *supra* note 8, at 595 (citing *Arrêt* of the Cour de Cassation, 13 March 2001, No. 1414, at 1).

82. *Id.* at 601 (citing *Arrêt* of the Cour de Cassation, at 3).

83. *See* Zappalá, *supra* note 8, at 601 (linking the court's holding specifically to exceptions to functional immunity).

84. *Pinochet*, 38 I.L.M. at 595 (Lord Browne-Wilkinson, J.).

85. *See* Wirth, *Immunities, Related Problems*, *supra* note 2, at 435.

recognised by *customary international law* in the case of such *serious international crimes* . . . are so strong as to override any objection by it on the ground of immunity ratione materiae."[86] The argument follows a simple logic: international law cannot bestow immunity from prosecution for acts that the same international law has universally criminalized.[87]

B. *International Courts and Tribunals*

International courts have also recognized the exception to immunity for core crimes. The first explicit formulation of this rule arose in the Nuremberg Principles in 1950.[88] Principle III reads, "The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law."[89] The attribution of individual acts to the state—which forms the entire framework for immunity *ratione materiae*—does not alleviate individual responsibility when core crimes are committed. The notion of individual versus state responsibility is at stake in this principle. To illustrate, Arthur Watts writes, "For international conduct which is so serious as to be tainted with criminality to be regarded as attributable only to the impersonal State and not to the individuals who ordered or perpetuated it is both unrealistic and offensive to common notions of justice."[90] Rather than consider which type of immunity arises in a given situation, Watts' approach assumes individual liability from the outset of an investigation and only then considers the possibility of attendant state liability.

The International Criminal Tribunal for the former Yugoslavia (ICTY) echoed this rule, while similarly focusing on the separate existence of individual and state responsibility. In *Prosecutor v. Blaskic*, the tribunal held, "[T]hose responsible for [war crimes, crimes against humanity, and genocide] cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity."[91] While this is an unequivocal abrogation of immunity for core crime allegations, it is important to note that the UN Security Council maintains the right to disregard immunities under international law in order to protect international peace and security. Therefore, the establishment of the international criminal tribunals in Rwanda and the former Yugoslavia, and the corresponding rules of those courts, do not necessarily constitute state practice or *opinio juris*.[92]

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86. Wirth, *Immunities, Related Problems*, *supra* note 2, at 435-36 (arguing that the phrase "serious international crimes" by Lord Hope is an indication that all core crimes be included in the exception to functional immunity).

87. *See* Andrea Bianchi, *Immunity Versus Human Rights: The* Pinochet *Case*, 10 EURO. J. INT'L LAW 237, 240 (1999).

88. U.N. GAOR, 5th Sess., Supp. No. 12, U.N. Doc. A/1316 (1950) [hereinafter Nuremberg Principles].

89. *Id.*

90. Watts, *supra* note 62, at 82.

91. Prosecutor v. Blaskic, Case No. IT-95-14, para. 41 (Int'l Crim. Trib. for former Yugoslavia, Oct. 29, 1997) (July 18, 1997) [hereinafter *Blaskic Judgment*].

92. Wirth, *Immunities, Related Problems*, *supra* note 2, at 442.

However, under Article 38(1)(d) of the ICJ Statute, the Court must take into account the "judicial decisions and the teachings of the most highly qualified publicists of the various nations" as a means for making its decisions.[93] The international criminal tribunals clearly fall into this category. Therefore, the *Blaskic* decision should be considered as evidence of the status of international law.

Likewise, the most progressive statement about international criminal law, the Rome Statute of the ICC, expressly abrogates all immunities for persons accused of all international crimes, including core crimes. Article 27(1) of the Statute states:

> 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 elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute.[94]

Article 27 perhaps goes beyond current customary international law—which as previously noted, excludes core crimes from the functional immunity of foreign ministers—and recognizes "no case" for immunity from core crimes. For example, *Pinochet* only established the lack of functional immunity for state officials; personal immunity—which is also waived under the Rome Statute—was not contested. Interestingly, the waiver of immunity in the Rome Statute only applies to state parties, leaving personal immunities of the officials of non-state parties in effect.[95] The ICC thus operates as a testing ground for customary international law: states that have signed and ratified the Rome Statute have apparently agreed with the rule that no immunity—functional or personal—can be raised to defend against accusations of core crimes of genocide, war crimes, and crimes against humanity. This treatment of immunity and core crimes accords with the trend of international humanitarian law by abrogating all immunities. This trend will be discussed in the next part.

C. *Conclusion: Individual Responsibility Arises out of Core Crimes*

Judge Van den Wyngaert argues that the rule excluding those accused of committing core crimes from the umbrella of immunity must necessarily apply to both functional and personal immunities granted to foreign ministers.[96] In support of this argument, he cites the International Law Commission's (ILC) 1996 Draft Code of Crimes against the Peace and Security of Mankind, which states:

> The absence of any procedural [i.e. personal] immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive [i.e. functional] immunity or defence. It would be

93. Statute of the International Court of Justice, June 26, 1945, art. 38(1)(d), 59 Stat. 1055, 1060 (entered into force October 24, 1945) [hereinafter ICJ Statute].

94. Rome Statute of the International Criminal Court, art. 27(1), U.N. Doc. A/ CONF.183/9 (1998), *reprinted in* 37 I.L.M. 999, 1017 (1998) [herinafter Rome Statute].

95. *See* Wirth, *Immunities, Related Problems*, *supra* note 2, at 453.

96. *Congo v. Belgium*, at para. 31 (dissenting opinion of Judge Van den Wyngaert).

> paradoxical to prevent an individual from invoking his official position to avoid responsibility for a crime only to permit him to invoke this same consideration to avoid the consequences of this responsibility.[97]

Rather than focus on which type of immunity applies, the ILC states here that invoking *either* functional or personal immunity in the case of core crimes is paradoxical, because excluding one type of immunity from core crimes would be pointless if state officials could use the other to escape criminal liability. This understanding of core crimes adheres to the original formulation of the immunity rules by the Nuremberg Tribunal and the subsequent findings of national and international courts discussed above. Essentially, this recognizes what Micaela Frulli has termed "the irrelevance of official capacity," which "has always been a complement of the rule establishing individual criminal responsibility for [core] crimes."[98]

The final part will discuss the implications of this conclusion for core crime trials of foreign ministers and their respective states. Basing the discussion on the rule established in this part—that there is no immunity afforded to foreign ministers accused of core crimes—it will argue that the "either/or" holding in *Congo* should have been a "both/and" proposition: both individual *and* state responsibility are triggered by crimes against humanity.[99] The question thus becomes: What is the appropriate forum in which to prosecute a crime that implicates both a state and an individual?

III.
Crimes Against Humanity Generate Both State and Individual Responsibility

The preceding part established the customary rule of international law, which requires individual liability for foreign ministers accused of crimes against humanity. This part will more specifically examine the definition of crimes against humanity in current international legal jurisprudence. From that definition, it will argue that the commission of crimes against humanity necessarily generates state responsibility. This part concludes that the majority of the *Congo* Court failed to recognize that both individual and state responsibility inhere to each crime.

A. *State Responsibility in the Definition of Crimes Against Humanity*

The first legal formulation of the concept of crimes against humanity in the Nuremberg Tribunal explicitly limited the offenses to instances where "such acts are done or such persecutions are carried on in execution of or in connection

97. *Draft Code of Crimes Against the Peace and Security of Mankind, Report of the International Law Commission on the work of its forty-eighth session*, 6 May- 26 July 1996, GAOR, 51st Sess., Supp. No. 10, at 41, U.N. Doc. A/51/10 (1996), *cited in Congo v. Belgium*, at para. 32 (dissenting opinion of Judge Van den Wyngaert).

98. Micaela Frulli, *The ICJ Judgement on the* Congo v. Belgium *Case (14 February 2002): a Cautious Stand on Immunity from Prosecution for International Crimes*, 3 German L. J. 1, 6 (March 2002), *available at* http://www.germanlawjournal.com.

99. For a discussion of the "either/or" notion, see Spinedi, *supra* note 15, at 899.

with any crime against peace or any war crime."[100] This provision was originally designed as an accessory to genocide laws, a catch-all that was not bound to persecutions of particular groups.[101] While the United Nations War Crimes Commission of 1943 (UNWCC) broadly allowed for the possibility that crimes against humanity could occur in peacetime, the temporal jurisdiction restrictions of the Nuremberg Tribunal to crimes committed during WWII effectively rendered this provision moot.[102]

The requirements of Article 6(c) of the Nuremberg Charter formed a nexus between crimes against humanity and war crimes, effectively functioning as a "state action requirement."[103] Crimes against peace or war crimes were defined as those perpetrated by military officials, and were, therefore carried out on behalf of the state. Crimes against humanity were included in this definition and thus were also originally considered to be associated with the state.[104]

The ICTY attenuated this nexus between war crimes and crimes against humanity, by requiring only a showing that the crime against humanity be committed "in armed conflict, whether international or internal in character. . . ."[105] Nevertheless, the ICTY in its 1997 *Tadic* decision confirmed that the link to military and governmental entities was still foundational to the crime, by referring to "entities exercising *de facto* control over a particular territory but without international recognition of formal status of a *de jure* state, or by a terrorist group or organization."[106]

The civil war in Rwanda led to a fundamental weakening of the requirement of state action, primarily because uncontrolled civilians committed very large portions of the atrocities and did so in areas outside the civil war zones. In response, the International Criminal Tribunal in Rwanda (ICTR) Statute defines a crime against humanity simply as "a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds."[107]

Likewise, the Rome Statute adopted similar language, but eliminated the requirement that the attack be on any particular ground. To illustrate, the Rome

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100. Nuremberg Principles, *supra* note 88, Principle VI (c).

101. MACHTELD BOOT, GENOCIDE, CRIMES AGAINST HUMANITY, WAR CRIMES 462 (2002); *see also Second Report by J. Spiropoulos on the Draft Code of Offenses Against the Peace and Security of Mankind*, U.N. Doc. A/CN.4/44 (12 April 1951), *reprinted in* [1951] 2 Y.B. Int'l L. Comm'n 43, U.N. Doc. A/CN.4/SER.A/1951/Add.1.

102. Agreement for the Prosecution and Punishment of the Major War Criminal of the European Axis, and Charter of the International Military Tribunal, 82 U.N.T.S. 280, Part II, art. 6, entered into force Aug. 8, 1945 (limiting jurisdiction to "persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes").

103. Nuremberg Principles, *supra* note 87, Principle VI (c).

104. *Id.*

105. Statute of the International Tribunal for the former Yugoslavia, annexed to the Report of the Secretary-General pursuant to paragraph 2 of Security Council Res. 808 (1993), art. 5, U.N. Doc. S/25704, U.N. SCOR, 48th Year, Supp. for April- June 1993, at 117 (1995).

106. Prosecutor v. Tadic, Opinion and Judgment, Case No. IT-94-1-T para. 654 (May 7, 1991) *available at* http://www.un.org/icty/970507jt.htm [hereinafter *Tadic Judgment*].

107. Statute of the International Tribunal for Rwanda, annexed to S.C. Res. 955 (1994), art. 3, U.N. SCOR, 49th Year, Res. & Dec. of the Security Council 1994, U.N. Doc. S/INF/50 (1994).

Statute defines a crime against humanity as an act "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[108] The statute further defines such an attack as "a course of conduct involving multiple commission of acts . . . in furtherance of a State or organizational policy."[109] Many commentators have noted that the "course of conduct" provision in the Rome Statute might reintroduce the "systematic" element into the crime.[110] Specifically, a course of conduct could be interpreted to mean furthered by state institutions, or developed as part of an organizational policy.[111] Consequently, this interpretation would result in the requirement that the attack be both widespread *and* systematic, whereas the phrase was explicitly drafted with the word "or" in the Rome Statute.[112]

Ad hoc tribunals have similarly blurred the lines between the systematic criterion and the requirement of an institutional policy. For instance, in *Tadic*, *Akayesu*, and *Ruzindana*, the Trial Chambers of the ICTY and ICTR established the systematic requirement by showing a policy basis for the crime.[113] In fact, the *Kordic* Trial Chamber explicitly overlapped the systematic and policy elements, holding, "[T]he existence of a plan or a policy should better be regarded as indicative of the systematic character of offences charged as crimes against humanity."[114] In summary, the approaches of the *ad hoc* tribunals deduce the existence of a "plan" or "policy" from the widespread or systematic character of an attack, and vice versa.[115]

The unique formulation of crimes against humanity can be deduced by comparing it to the crime of genocide. Genocide is an intent-based crime, in which a single person who kills a member of a protected class with the intent to destroy that class partially or entirely can be found guilty.[116] That same person, however, could *not* be convicted of a crime against humanity under the current definition. To prove a crime against humanity, the court must determine if a person's acts fall within the policy of a state or other organizational body, a determination that can be made by applying the widespread and/or systematic test. As Machteld Boot notes, repeated commissions of acts alone do not satisfy this standard; in fact, there is no international standard concerning which acts rise to the level of crimes against humanity.[117]

108. Rome Statute, *supra* note 94, art. 7(1).

109. *Id.*

110. D. Robinson, *Defining Crimes Against Humanity at the Rome Conference*, 93 AM. J. INT'L L. 43, 43-57 (1999); *see also* BOOT, *supra* note 99, at 480-81.

111. *See generally* Robinson, *supra* note 108.

112. *See* Rome Statute, *supra* note 94, art. 7(1).

113. *Tadic Judgment*, *supra* note 106, at para. 648; Prosecutor v. Akayesu, Case No. ICTR 96-4-T, para. 580 (Sept. 2, 1998); Prosecutor v. Kayishema, Case No. ICTR-95-1-T, para. 123 (May 21, 1999).

114. Prosecutor v. Kordic, Case No. IT-95-14/2-T, para 182 (Feb. 26, 2001); *see also Blaskic Judgment*, *supra* note 91, at para. 203 (holding that the systematic element could be established by "the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan").

115. *See* BOOT, *supra* note 101, at 482.

116. *See* Rome Statute, *supra* note 94, art. 6.

117. *See* BOOT, *supra* note 101, at 478.

While the nexus between the actions of an individual and the state that he or she represents has diminished over time, the above discussion confirms the requirement that some relationship between an actor and a state or political organization must be shown for actions to rise to the level of a crime against humanity. By treating the "systematic" and "policy" elements as interchangeable, the court actually operates to expand state liability which results from any widespread or systematic crimes within its borders. This conclusion accords with the common conception of a crime against humanity, where an abuse of official rank allows such widespread harm to be caused. As Cassesse argues, it is "hardly imaginable that [an official] may perpetrate or participate in the perpetration of an international crime 'in a private capacity.'"[118]

International conventions corroborate this notion of the dual liability of both the individual and the state in the case of core crimes. Under the International Military Tribunal Charter, the defenses of act of state, superior command, and command of law were abolished for war crimes and crimes against humanity.[119] Previously, these defenses formed the primary obstacle to holding individuals responsible for acts committed during war, and their abolition firmly established the existence of individual criminal liability for these acts.[120] Subsequent conventions formalized the individual's duty to refrain from such crimes by imposing obligations on states to prevent the acts from being committed at the hands of their own officials.[121] The Genocide Convention, for example, created both state responsibility for a state's failure to prevent the crime of genocide *and* individual criminal liability by declaring genocide an international crime.[122] This same rule applies to crimes against humanity. In sum, states have a responsibility to prevent atrocities and failure to do so can result in both individual and state responsibility.[123]

These conventions validate the findings of the *ad hoc* tribunals and the ICC. Widespread or systematic atrocities within a state's borders implicate the state, either by its failure to prevent, or its active support of the crimes. The interchangeability of "systematic" and "policy" in the definition of a crime against humanity allows the liability of the state to be more easily demonstrated. The state is thus held responsible for widespread and/or systematic atrocities within its borders, without eliminating the individual culpability of the actors.

This state culpability for crimes against humanity illustrates how the *Congo* majority's "either/or" proposition is erroneous. Instead of attributing responsibility to either the foreign minister or the state, the Court should have reached a "both/and" conclusion. Core crimes committed by state officials do not attach

118. Cassese, *supra* note 9, at 868.

119. Steven R. Ratner, *New Democracies, Old Atrocities: an Inquiry in International Law*, 87 GEO. L.J. 707, 712 (1999).

120. *Id.* at 712-13.

121. *Id.*

122. Convention on the Prevention and the Punishment of the Crime of Genocide, Dec. 9, 1948, arts. I, VI, 78 U.N.T.S. 277, 280-82.

123. *See* STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 141-43 (1997).

to either the state or the individual; in fact, the notions of "private" and "official" capacity are not present in such a manner that allows that attribution process to occur. Furthermore, the Court's flawed reasoning leads to *de facto* impunity for former foreign ministers because crimes against humanity will almost invariably occur as part of a foreign minister's official duties. The ICJ's exception, which allows immunity for those duties, goes far beyond the immunities allowed under customary international law.[124] According to Cassesse, there "coexist[s] state responsibility and individual criminal liability" for crimes against humanity.[125]

B. *Is It a Forum Problem?*

This article has criticized the *Congo* Court's rationale for granting immunity to a foreign minister accused of crimes against humanity. As demonstrated above, the Court's holding clearly contravened the custom of international law denying immunity for core crimes accusations. This section will conclude, however, by asking whether using the ICJ, a forum of limited jurisdiction, to decide *Congo*, actually caused this erroneous holding. In addressing this question, this section will compare the ICJ to U.S. domestic courts, which have tried many cases concerning foreign sovereign immunity. In particular, the Foreign Sovereign Immunities Act's (FSIA)[126] restricted grant of immunity will be compared to the rule of customary international law, discussed above, which abrogates immunity for those accused of core crimes. This comparison will determine that the ICJ was a proper tribunal in which to try cases such as *Congo*.

(1) *The United States' Grant of Immunity to Foreign Sovereigns*

The FSIA was enacted in 1976 and currently provides the "sole basis for obtaining jurisdiction over a foreign state in the courts of [the United States]."[127] While courts may find that jurisdiction exists under one of the several exceptions listed in the FSIA,[128] a foreign sovereign is otherwise granted immunity from federal jurisdiction.[129] The purpose of the FSIA is to codify the "restrictive theory" of sovereign immunity, which grants the foreign state immunity for public acts, but not for private ones.[130] This restrictive grant of immunity accords with the evolution of customary international law post *Schooner*

124. *See Congo v. Belgium*, at para. 34 (dissenting opinion of Judge Van den Wyngaert).

125. Cassese, *supra* note 9, at 864.

126. Pub. L. No. 94-583, 90 Stat. 2892 (codified as amended at 28 U.S.C. §§ 1330, 1391(f), 1441(d), 1602-1611 (2000)).

127. Arg. Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 443 (1989).

128. 28 U.S.C. § 1605(a) (1976) (listing exceptions to immunity, which include, *inter alia*, commercial activity, implied waiver, and the taking of property).

129. Princz v. F.R.G., 26 F.3d 1166, 1171 (1994).

130. Keith Sealing, *"State Sponsors of Terrorism" is a Question, Not an Answer: the Terrorism Amendment to the FSIA Makes Less Sense Now Than It Did Before 9/11*, 38 TEX. INT'L L.J. 119, 122 (2003).

Exchange, which by 1976, did not recognize absolute immunity where the state acted in a private capacity.[131]

An important aspect of the FSIA is its relationship with international custom and *jus cogens* norms. To the extent the international community recognizes certain serious crimes as non-derogable, the U.S. Constitution incorporates those violations into its federal law.[132] Therefore, a violation of *jus cogens* norms not only breaks international customary law, but also United States law.[133] Despite the fact that both the FSIA and customary international law maintain the same status as U.S. federal law, it is generally agreed that the FSIA "trumps" custom when actually adjudicating claims in U.S. courts.[134] This power is given to the FSIA under Article 1 of the U.S. Constitution, which grants Congress the power to limit the jurisdiction of state and federal courts.[135] Therefore, even violations of *jus cogens* norms can only be adjudicated in U.S. courts to the extent permitted under the FSIA.

The FSIA does not have a core crimes exception. Therefore, plaintiffs trying to bring claims for serious human rights violations—such as injuries sustained during the Holocaust—have consistently failed to find any other exception with which to pierce the general grant of immunity to foreign sovereigns.[136] These plaintiffs have argued that the first exception (implied waiver) should apply when a state is accused of *jus cogens* violations. However, federal courts require a higher standard of proof in these situations by showing that the foreign state *intended* to waive its immunity in the United States.[137] The implied waiver exception is thus insufficient to capture all core crime allegations brought to U.S. courts.

The most promising exception for the purposes of adjudicating serious human rights abuses was added to the FSIA in 1996, which states:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency. . . .[138]

131. *See generally* Jeffrey Rabkin, *Universal Justice: the Role of Federal Courts in International Civil Litigation*, 95 COLUM. L. REV. 2120, 2132 (1995) (*Schooner Exchange* "explained that the American sovereign immunity doctrine followed what was then the common practice of nations.").

132. Mathias Reimann, *A Human Rights Exception to Sovereign Immunity: Some Thoughts on* Princz v. Federal Republic of Germany, 16 MICH. J. INT'L L. 403, 407 (1995); U.S. CONST. art. III.

133. *See* Reimann, *supra* note 132, at 407.

134. *Id.*

135. *Id.* at 407-08.

136. *See Arg. Republic*, 488 U.S. at 443; *see also Princz*, 26 F.3d at 1176 (finding that no exceptions to the FSIA applied in the case of a Holocaust survivor).

137. *See, e.g.* Sampson v. F.R.G., 975 F. Supp 1108, 1116 (1997) (noting that "[a]n implied waiver requires that the foreign sovereign express a willingness to appear in Unites States courts").

138. 28 U.S.C. § 1605(a)(7).

Courts, however, can only utilize this exception if the foreign state is designated as a sponsor of state terrorism, if local remedies have been adequately exhausted, and if one of the parties is a U.S. national.[139] This so called "terrorism exception" in the FSIA was meant to allow victims of terrorism to seek redress, and also to deter terrorists worldwide.[140] However, given that the exception itself does not include many serious human rights abuses—genocide and crimes against humanity, for example—and that only seven states have been designated as sponsors of terrorism,[141] this exception has very limited potential uses for most victims.

As the War on Terror continues, courts have expanded the rationales used to grant U.S. courts jurisdiction over foreign defendants in general. In *United States v. Yousef*, for example, a foreign defendant accused of plotting to bomb a U.S. commercial airliner was tried in a U.S. court.[142] The court reasoned that his plot was a politically motivated act because it was intended to change U.S. policy, and an act with the intent of interfering with U.S. "governmental functions" gives rise to jurisdiction under the protective principle of international law.[143] It is this author's opinion that this holding greatly broadens the scope of the doctrine of the protective principle and grants a much greater range of potential cases in U.S. courts. Regardless of the positive or negative implications of expanding jurisdiction to cover such an attenuated relationship with U.S. governmental functions, this trend in the law could further expand potential cases under the FSIA.

Overall, however, the FSIA is more generous in granting immunity to foreign sovereigns and their actors than that granted under customary international law. As discussed previously in this paper, customary international law abrogates immunity in the case of core crimes, whereas the FSIA only has limited exceptions to the blanket immunity granted to foreign sovereigns and their representatives.

(2) The ICJ as a Forum that Cannot Offer the Same Breadth of Immunity to Foreign Sovereigns as U.S. Domestic Courts

While domestic systems may create a more expansive foreign sovereign immunity, the ICJ does not have this freedom. The ICJ Statute does not contain a provision granting a sovereign immunity similar to that of the United States and, as discussed above, there is strong precedent removing immunity in instances of core crimes. The ICJ's jurisdictional limitations—discussed in this

139. *See, e.g.*, United States v. Yousef, 327 F.3d 56 (2d Cir. 2003).

140. Recent Case, *International Law – Foreign Sovereign Immunities Act – D.C. Circuit Holds that an International Agreement Bars Former Hostages' Suit Against Iran, Despite Legislation Aimed at Aiding the Suit* – Roeder v. Islamic Republic of Iran, *333 F.3d 228 (D.C. Cir. 2003)*, 117 HARV. L. REV. 743, 747-48 (2003).

141. Press Release, U.S. Dept. of State, Overview of State-Sponsored Terrorism (Apr. 30 2001), *available at* http://www.state.gov/s/ct/rls/pgtrpt/2000/2441.htm (naming Iran, Iraq, Syria, Libya, Cuba, North Korea, and Sudan as designated sponsors of terrorism).

142. *Id.*

143. *Id.* at 110-11 ("The protective (or 'security') principle permits a State to assume jurisdiction over non-nationals for acts done abroad that affect the security of the State.").

section—provide a possible explanation for the Court's outcome in *Congo.* An explanation, however, does not signify that the Court correctly decided the case in terms of international law; in fact, this section will conclude that the Court's limited jurisdiction did not provide an adequate excuse for its holding in *Congo.*

According to Article 34 of the ICJ Statute, "[o]nly states may be parties in cases before the Court."[144] However, Article 36(b) grants the Court jurisdiction to resolve "any question of international law."[145] However, as exemplified by the above discussion regarding the immunity granted to foreign ministers, the question of international law posed to the ICJ in *Congo* had implications beyond mere state interest. The issue of individual criminal liability—which was not satisfactorily discussed by the *Congo* majority—should be at the forefront of any question of diplomatic immunity concerning core crimes. Therefore, given the ICJ's mandate to consider only states as parties, with the concurrent impossibility of holding a state criminally responsible under international law, was the ICJ the appropriate forum for deciding this particular question of international law? Despite the Court's attempts to convert the question presented into a purely state-oriented discussion, this part will conclude that the ICJ was nevertheless a valid forum to adjudicate the claim.

The ICJ's most conspicuous attempt to turn the question into a debate concerning only sovereignty was the Court's analogy between heads of state and foreign ministers. As noted above, the Court stated, "[A] Minister of Foreign Affairs . . . occupies a position such that, like the Head of State . . . he or she is recognized under international law as representative of the State solely by virtue of his or her office."[146] While ministers of foreign affairs do represent their respective states in international relations, the discussion in part II showed that such ministers do not embody the state in the same manner and magnitude as heads of state.[147] The principle of sovereignty, which inheres logically and legally to the position of head of state, is only recognized in terms of comity regarding foreign ministers.[148]

The previous discussion regarding the difference between foreign ministers and heads of state focused upon the absence of a rule of customary international law granting immunity to foreign ministers. In the context of the current discussion, however, the ICJ's decision can be understood as an endeavor to turn the question presented into a purely sovereign issue: if foreign ministers are exactly the same as heads of state, then sovereign immunity attaches to them with equal force.[149] As the preceding argument demonstrated, however, that analogy fails, rendering the question as not being exclusively concerned with sovereign immunity. Rather, it is the absence of sovereign immunity, and the potential individ-

144. ICJ Statute, *supra* note 93, art. 34.
145. *Id.* art. 36.
146. *Congo v. Belgium*, at para. 53.
147. *See* Watts, *supra* note 62, at 102-103.
148. *See generally* Verhoeven, *supra* note 64.
149. Note that the New York Convention on Special Missions only draws the analogy when a foreign minister is participation in a special mission of the sending state. *Congo v. Belgium*, at para. 52.

ual liability of foreign ministers, that form the foundation for any question regarding core crimes.

The ICJ's misplaced emphasis on state, rather than individual liability, may have engendered the central fault in the *Congo* holding because the majority failed to accurately apply its own statute. Under Article 36(2), the Court must apply the following to evaluate questions presented:

> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; and (d) [. . .] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[150]

The Court first conceded that no treaty bound either party, thereby deeming the first source of law to be considered under the Statute inapplicable; the Court then considered international custom.[151] As this article has shown, however, it was the Court's failure to accurately evaluate customary international law concerning immunities granted to foreign ministers accused of core crimes that precipitated its faulty holding. Not only did the Court inaccurately represent the status of customary international law regarding the immunities afforded to foreign ministers, but it also allowed for former foreign ministers to maintain *de facto* impunity for acts done while in office. The fact that the ICJ is bound to regard only states as parties does not establish justification for it to disregard the clear guidelines for evaluating customary international law.

In conclusion, the ICJ's holding in *Congo* should be seen as an erroneous exception to the established rule of customary international law. International customary law recognizes no obligation for states to extend immunity to foreign ministers in the same fashion as given to heads of state. Furthermore, as the above discussion showed, there is a definite abrogation of immunity when core crimes are involved. As the *Congo* Court should have recognized, a crime against humanity is a crime that constitutes a nexus of individual and state responsibility and against which no claim of immunity can be raised.

150. Rome Statute, *supra* note 94, art. 36(2).
151. *Congo v. Belgium*, at paras. 52-53.