American University International Law Review

Volume 20 | Issue 1 Article 3

2004

Immunities of Foreign Ministers: Paragraph 61 of the *Yerodia* Judgement as it Pertains to the Security Council and the International Criminal Court

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IMMUNITIES OF FOREIGN MINISTERS:

PARAGRAPH 61 OF THE *YERODIA* JUDGMENT AS IT PERTAINS TO THE SECURITY COUNCIL AND THE INTERNATIONAL CRIMINAL COURT

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INTRODUCTION

On February 14, 2002, the International Court of Justice ("ICJ" or "the Court") handed down its judgment in the *Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium) ("*Yerodia*").[1] While the Court's decision that Belgium's issuance of an arrest warrant against the incumbent foreign minister of the Democratic Republic of the Congo ("DRC") violated

1. Arrest Warrant of 11 April 2000 (D.R.C. v. Belg.), 2002 I.C.J. 1 (Judgment Order of Feb. 14) [hereinafter Arrest Warrant Case].

immunity as protected under international law was fairly unremarkable, the absoluteness of the immunities accorded to incumbent foreign ministers in this case should not be passed over too quickly. The implications of the Court's *obiter dicta* also merits close scrutiny in two areas. First, the Court's extension of immunity, without qualification, to the "official acts" of former foreign ministers seems contrary to both international law and the Court's own rationale. Second, the Court's *dicta* with respect to immunities before international tribunals, including both those created under Chapter VII of the United Nations ("U.N.") Charter and the International Criminal Court ("ICC"), merits close analysis of the rationale behind the Court's conclusion. Such analysis aids the understanding of both the law on immunities and the Court's view of the function of the U.N. and the ICC. This paper begins with a brief review and critique of the narrow decision of the case and then addresses the extension of immunity to former foreign ministers in trials before international courts.

I. THE NARROW HOLDING: POTENTIALLY DUBIOUS ANALOGIES

On April 11, 2000, a Belgian judge issued an international arrest warrant against then Foreign Minister of the DRC, Abdulaye Yerodia Ndombasi ("Mr. Yerodia"), alleging that he committed crimes against humanity and grave breaches of the 1949 Geneva Conventions prior to his tenure as Foreign Minister.[2] The Belgian law that provided the basis for the charges not only asserted universal jurisdiction over such offenses, but also provided that "[i]mmunity attaching to the official capacity of a person shall not prevent the application of the present Law."[3] The DRC instituted a case against Belgium before the ICJ challenging the legality of Belgium's assertion of jurisdiction over the offenses and claiming that the arrest warrant violated the diplomatic immunity of the Minister for Foreign Affairs.[4] While Mr. Yerodia lost his position as

2. *Id.* paras. 13-15 (summarizing the procedural history behind Belgium's issuance of the arrest warrant against Yerodia).

3. Application Instituting Procedures (D.R.C. v. Belg.), 2000 I.C.J. 1 para. III.B.2 (Oct. 17).

4. *See id.* para. I(2) (stating DRC's allegation that Belgium violated the

Minister for Foreign Affairs in November 2000, the case proceeded on the merits to determine whether a warrant issued against an incumbent foreign minister violated Belgium's international obligations to the DRC.[5] After written and oral arguments, the DRC issued its final submissions; however, these submissions did not challenge Belgium's assertion of universal jurisdiction. Under the rule of *non ultra petita*, the Court decided to base its judgment solely on the issue of immunity and only discussed the assertion of universal jurisdiction as necessary to render the judgment.[6] The question the Court thus conceived itself as having to answer was whether the Belgian arrest warrant constituted "a violation in regard to the DRC of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers. . ."[7] The Court stated it would determine the scope of immunity accorded to foreign ministers under international law by examining customary international law.[8]

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diplomatic immunity of its Minister for Foreign Affairs); *see also* Steffen Wirth, *Immunities, Related Problems, and Article 98 of the Rome Statute*, 12 CRIM. L.F. 429, 441 (2001) (noting that the DRC phrased its pleadings to emphasize that the case involved diplomatic immunity and not state immunity).

5. *See* Order on the Request for Provisional Measures (D.R.C. v. Belg.), 2000 I.C.J. 182, paras. 51-60 (Dec. 8) (ruling it would not accede to Belgium's request to remove the case from the docket despite Yerodia's removal from office), *available at* http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm (last visited Oct. 18, 2004).

6. *See* Arrest Warrant Case, 2002 I.C.J. para. 43 (recalling the Court may only adjudicate on the questions presented in the parties' final submissions). *But see* Arrest Warrant Case (separate opinion of Judges Higgins, Kooijmans & Burgenthal), 2002 I.C.J. paras. 1-18 (arguing it desirable and "indeed necessary, that the Court should have stated its position on this issue of jurisdiction"); Verbatim Record of Oral Pleadings in the Arrest Warrant Case (D.R.C. v. Belg.), CR 2001/6 (Oct. 16, 2001) (uncorrected translation) (statement of Mr. D'Argent) (arguing the Court should pronounce on the question of universal jurisdiction), *available at* http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm (last visited Oct. 18, 2004). *But cf.* Ryszard Piotrowicz, *Immunities of Foreign Ministers and their Exposure to Universal Jurisdiction*, 76 AUSTL. L.J. 290, 291 (2002) (observing the Court's separate and dissenting opinions evidence division over the question of universal jurisdiction).

7. *See* Arrest Warrant Case, 2002 I.C.J. para. 11 (examining the Memorial of Democratic Republic of Congo to decide the immunity question).

8. *See id.* (acknowledging that incumbent foreign ministers possess immunity under international law, and challenging only the scope of immunity). The question before the Court was thus narrowed, effectively putting aside Judge Van

Ultimately, a dearth of both state practice and *opinio juris* greatly complicated a traditional analysis.[9]

Classically, international law did not provide special status to ministers for foreign affairs when traveling abroad.[10] Eventually, however, the conduct of international relations greatly changed, leaving the scope of immunities at the time of the decision quite unclear.[11] The Court performed a cursory analysis, first declaring that under customary international law the immunities of foreign ministers are functional in nature.[12] Then, in an equally short analysis, the Court analogized the functions of a foreign minister to

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den Wyngaert's argument that any such immunities were granted only as a matter of comity not law. *Id. But see* Arrest Warrant of April 11, 2000, Counter-Memorial of the Kingdom of Belgium (D.R.C. v. Belg.), 2001 I.C.J. 1, para. 2.47 (Sept. 28) (arguing new developments in international law recognize personal responsibility of diplomats and limit special immunities to circumstances involving official duties or functions), *available at* http://www.icj-cij.org/icjwww/idocket/iCOBE/icobepleadings/icobe_ipleading_countermemorial_belgium_20010928.pdf (last visited Oct. 18, 2004) [hereinafter Counter-Memorial of the Kingdom of Belgium].

9. *See* 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 L. 853, 855 (2002) (commending the Court for working to clarify the area of law regarding personal immunities of foreign ministers, an area "where state practice and case law are lacking").

10. *See* FRANCISZEK PRZETACZNIK, PROTECTION OF OFFICIALS OF FOREIGN STATES ACCORDING TO INTERNATIONAL LAW 15 (1983) (noting classical international law also did not protect the private travels of families of Ministers of Foreign Affairs).

11. *See* Sir Arthur Watts, *The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers*, *in* 3 RECUEIL DES COURS 20, 103-09 (1994) (discussing the evolution of special immunities for foreign diplomats); *see also* Arrest Warrant Case (dissenting opinion of Judge Al-Khasawneh), 2002 I.C.J. para. 1 (noting the immunities granted to diplomatic representatives is clear from the 1961 Vienna Convention, however the scope of immunities for foreign ministers is murky); Arrest Warrant Case (dissenting opinion of Judge ad hoc Van den Wyngaert), 2002 I.C.J. para. 17 (stating the International Law Commission has not codified customary international law regarding immunities for foreign ministers).

12. *See* Arrest Warrant Case, 2002 I.C.J. para. 53 (explaining under international law, the immunities granted to foreign ministers are not for their personal benefit, but rather "to ensure the effective performance of their functions on behalf of their respective states").

those of diplomats, Heads of State, and heads of government.[13] The Court noted that like the Head of State, whatever immunity the foreign minister enjoys is by nature of the office and not, as is the case with ambassadors, the result of possessing credentials from a foreign state.[14] The ICJ judgment also observed that due to changes in the way international relations are conducted, the foreign minister typically performs many functions traditionally ascribed to diplomats, including entering into binding agreements with other states and participating in international negotiations and other meetings.[15] Unlike diplomats, however, the foreign minister interacts not with one state, but with all states with which the home state conducts international relations.[16] Much of the activity once carried out by diplomats is now performed by the foreign minister, often on an ad hoc basis.[17] The Court contended these functions make it necessary that the foreign minister receive absolute immunity from the jurisdiction of foreign state courts, even when visiting such states on private visits. The Court concluded that an incumbent foreign minister has the right to absolute immunity from the criminal jurisdiction of other states for any acts, public or private, including acts which occurred before incumbency.[18] For this reason, the Court deemed that the warrant violated Belgium's international obligations to the DRC.

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13. *See* Arrest Warrant Case (dissenting opinion of Judge ad hoc Van den Wyngaert), 2002 I.C.J. paras. 11-14 (arguing it was insufficient for the Court to compare the rationales of special protections of diplomats, heads of states, and foreign ministers without studying the basis of the protection for each one individually).

14. *See* Arrest Warrant Case, 2002 I.C.J. para. 53 (describing the similarities between the functions of a foreign minister and a Head of State).

15. *See id.* (discussing the parallels between foreign ministers and diplomats).

16. *See id.* (noting by virtue of the offices foreign ministers have the power to act on behalf of his or her state); *see also* Wirth, *supra* note 4, at 446-48 (examining similarities between the scope of immunities granted to diplomatic and consular employees).

17. *See* Watts, *supra* note 11, at 102 (discussing changes in foreign ministers' activities and duties).

18. *See* Arrest Warrant Case, 2002 I.C.J. para. 54 (concluding absolute immunity would protect the foreign minister's ability to fulfill his or her duties by preventing acts of authority by another state).

The soundness of the Court's conclusion depends on the accuracy of the comparisons between the functions of foreign ministers to those of diplomats and Heads of State.[19] The immunity of foreign ministers is comparable to the immunities of both diplomats and Heads of State; however, the type of immunity accorded to each position is, to some extent, unique. Historically, the various immunities derive from the principle that no one state has the power to pass judgment on the activities of another sovereign state.[20] For state immunity to be of real value it became necessary to accord "derivative state immunity" to the various individuals who carried out the actions of the state.[21] This led to two areas of well-developed law on immunities under international law: Head of State immunity and diplomatic or consular immunity. The different immunities derive from one of three rationales.[22] First, persons accorded immunity can personify the state, as this paper will discuss below with regards to Heads of State.[23] Second, the diplomat, consul, or other official traveling abroad, like the embassy abroad, may embody the fictional characterization as an "enclave of the sending state."[24] Third, state officials may receive a grant of immunity in order to enable them to properly carry out their functions unimpeded.[25]

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19. *See* PRZETACZNIK, *supra* note 10, at 15-16 (providing brief explanations of the special protections accorded to Heads of State, foreign ministers and diplomats).

20. *See* JURGEN BROHMER, STATE IMMUNITY AND THE VIOLATION OF HUMAN RIGHTS 26 (1997) (noting diplomatic immunity typically exempts diplomats from the jurisdiction of local courts and authorities); *see also* B.J. George, *Immunities and Exceptions*, *in* INTERNATIONAL CRIMINAL LAW 107 (M. Cherif Bassiouni ed., 2d ed. 1999) (stating the basic principle of international criminal law, under which states have full power to regulate the conduct of persons physically within their borders).

21. *See, e.g.*, Steffen Wirth, *Immunity for Core Crimes? The ICJ's Judgment in the Belgium v. Congo Case*, 13 EUR. J. INT'L L. 877, 882 (2002) (explaining derivative state immunity applies to individual state officials only with respect to official conduct, and not an all encompassing immunity for the person).

22. *See* George, *supra* note 20, at 107-08 (stating the Vienna Convention is the controlling source of law with regards to immunities).

23. *See id.* at 107 (explaining diplomats are thought to personify the sending state and thus are exempt just as the actual state would be).

24. *See id.*

25. *See* Wirth, *supra* note 4, at 431 (noting the grant of immunity for official

The ancient doctrine of Head of State immunity is rooted in the notion that Heads of State personify their state, most famously pronounced in Louis XIV's declaration, "*L'état, c'est moi.*"[26] Any act of the Head of State automatically became an act of the state, and to bring the Head of State before a foreign court was the equivalent of bringing the state itself before the court.[27] This rationale did not differentiate between private and public acts; Head of State immunity covered all of them. The result was twofold. First, incumbent or former Heads of State enjoyed absolute immunity for all acts committed during incumbency. Second, the incumbent Head of State enjoyed absolute immunity for any acts, whether committed before or during incumbency.[28] Recent challenges to this rationale question whether such immunity still applies when someone charges former Heads of State with serious international crimes such as genocide, crimes against humanity, war crimes, and torture.[29]

Whatever the original rationale for diplomatic immunity, most of the international community today considers that these immunities exist for functional reasons.[30] Unlike Head of State immunities which

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acts of a state official, in addition to enabling the official to perform its duties, also helps protect the dignity of the state).

26. *See* Arrest Warrant Case (separate opinion of Judges Higgins, Kooijmans, and Burgenthal), 2002 I.C.J. para. 80 (explaining that under traditional customary law Head of State immunity was predicated on status).

27. *See* BROHMER, *supra* note 20, at 29-32 (comparing Head of State immunity to state and diplomatic immunities, pointing out similarities between the latter two immunities and the former); *see also* Schooner Exch. v. M'Faddon, 11 U.S. 116, 137 (1812) (explaining when a Head of State enters a foreign state, he does so with the express license of its sovereign which, is universally understood to include an exemption from personal arrest).

28. *See* BROHMER, *supra* note 20, at 29-32 (discussing the implications of private versus public acts of a Head of State).

29. *See* Watts, *supra* note 11, at 84 (noting a Head of State will be liable if shown through sufficient evidence he committed or authorized serious international crimes); *see also* Jelena Pejic, *Accountability for International Crimes: From Conjecture to Reality*, 84 INT'L REV. RED CROSS 13, 24-26 (2002) (discussing various decisions of international courts in which Heads of State were not given immunity from prosecution for torture related charges); *see also* Cassese, *supra* note 9, at 866 n.35 (noting no states objected to the indictment of Slobodan Milosevic, who was at the time a sitting Head of State).

30. *See* George, *supra* note 20, at 107-09 (explaining diplomatic immunity is a combination of customary and conventional law, with the principal conventions being the Vienna Convention on Diplomatic Relations and the Vienna Convention

directly protect the dignity of the state, diplomatic immunity protects the person of the diplomat so that the state may thereby benefit.[31] Diplomatic immunity is limited to the functions of the diplomat, and shields the diplomat from trials before the accrediting state and also from the jurisdiction of states through which the diplomat transits when traveling between the home state and the accrediting state.[32] Thus, immunity does not extend to trials before third states or international tribunals. In addition, the immunity ceases upon termination of the diplomatic functions.[33] Thus, diplomatic immunity would not shield a diplomat from civil or criminal liability while vacationing in another state.[34] In order to protect the diplomat from having diplomatic functions lead to criminal liability, the law of diplomatic immunity provides immunity for acts within the scope of official diplomatic functions; however, such immunity does not cover the commission of international offenses.[35]

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on Consular Relations); *see also* BROHMER, *supra* note 20, at 26 (stating the two Vienna Conventions address diplomatic and constitutional immunities). *See* Stephen L. Wright, *Diplomatic Immunity: A Proposal for Amending the Vienna Convention to Deter Violent Criminal Acts*, 5 B. U. INT'L L.J. 177, 195-207 (1987) (discussing theoretical bases for diplomatic immunity, including extraterritoriality to functional necessity). Generally, the Vienna Convention on Diplomatic Relations based immunities on a functional rationale, which signaled the decline of the "extraterritoriality" theory. *Id.*

31. *See* BROHMER, *supra* note 20, at 26-27 (explaining that the state is an indirect beneficiary of the functions of an individual bearing diplomatic status); *see also* Watts, *supra* note 11, at 32 (noting the identity of the Head of State embodies the State and manifests the spirit and grandeur of a nation).

32. *See* Yoram Dinstein, *Defences*, *in* 1 SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW 371, 386 (Gabrielle McDonald & Olivia Swaak Goldman eds., 2000) (referring to the International Military Tribunal For the Far East which held diplomatic immunity "does not import immunity from legal liability, but only exemption from trial by the Courts of the state to which the Ambassador is accredited").

33. *See id.* at 386-88 (explaining diplomatic immunity is not personal to the diplomat but rather it belongs to the diplomat's state).

34. *See* Anthony D'Amato, *National Prosecution for International Crimes*, *in* 3 INTERNATIONAL CRIMINAL LAW 217, 219 (M. Cherif Bassiouni ed., 2d ed. 1999) (noting if a diplomat is merely a visitor to the forum state, there is little likelihood of success on a claim of immunity).

35. *See* Dinstein, *supra* note 32, at 386-87 (arguing that foreign minister immunity applies only in the courts of the accrediting state, and should not be perceived as providing general legal immunity).

While these different rationales have at times applied to Heads of State or diplomats, both Belgium, the DRC, and the Court agreed with current commentators that states provide foreign ministers with immunity to enable them to effectively perform their functions.[36] However, the Court's decision lacks any clarity as to why the functions of foreign ministers necessitate such absolute immunity, particularly with regards to private visits to foreign states. Head of State immunity before foreign courts is derived from the dignity of the state, not the function of the position.[37] The Court needs to determine a functional basis for the extension of such immunity to foreign ministers; it is unclear, however, that such a basis exists.[38]

The fact that foreign ministers interact with a large number of states suggests that their immunity might need to extend to more states than that of the ambassador who interacts only with the credentialing state. However, if foreign ministers could conduct their functions primarily from their home states, as Judge ad hoc Van den Wyngaert claims, the functional need for such immunity would be much less clear.[39] Even if foreign ministers can assert immunities against any number of states, it is not clear why this privilege should

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36. *See* Arrest Warrant Case, 2002 I.C.J. para. 53 (holding that under customary international law the immunities granted to ministers for foreign affairs ensure they can effectively perform the necessary functions to properly represent their respective states); *see also* Arrest Warrant Case (separate opinion of Judges Higgins, Kooijmans, and Burgenthal), 2002 I.C.J. para. 83 (agreeing with the Court's decision that ministers for foreign affairs should receive immunities on a functional basis). The DRC also agreed that whatever immunities do exist, they are "functional" in nature. *See* Verbatim Record of Oral Pleadings in the Arrest Warrant Case (D.R.C. v. Belg.), CR 2001/5 (Oct. 15, 2001) (statement of Mr. D'Argent) (uncorrected translation), *available at* http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm (last visited Oct. 2, 2004).

37. *See* Arrest Warrant Case (separate opinion of Judges Higgins, Kooijmans, and Burgenthal), 2002 I.C.J. para. 80 (noting that in this regard the Head of State is a personification of the sovereign state itself).

38. *See id.* at para. 81 (holding that there is no basis for the argument that Ministers of Foreign Affairs are entitled to the same immunities as Heads of State); *see also* Arrest Warrant Case (dissenting opinion of Judge ad hoc Van den Wyngaert), 2002 I.C.J. para. 16 (explaining that the analogy between foreign ministers and Heads of State is improper since only their functions can be compared).

39. *See* Arrest Warrant Case (dissenting opinion of Judge ad hoc Van den Wyngaert), 2002 I.C.J. para. 15 (differentiating between the roles of Heads of States, foreign ministers, and diplomatic agents).

exist when foreign ministers are on private visits.[40] Judges Higgins, Kooijmans, and Burgenthal voice the opinion that the arrest or detention of foreign ministers would prevent them from carrying out their official functions.[41] However, vacationing diplomats do not enjoy immunity, even though their arrest undoubtedly impairs their functions.[42] The most comprehensive study of foreign minister immunity reveals that the rationale for according immunity to foreign ministers on private visits is much weaker than for Heads of State and is derived primarily from comity, not law.[43] The necessity of immunity on private visits is a tough empirical question to which the Court's cursory handling–and the lack of available state practice–does not give due treatment. By simply blurring the distinctions between foreign ministers, Heads of State, and diplomats, the Court has created conceptual confusion.

II. PARAGRAPH 61: IMMUNITY FOR OFFICIAL ACTS

The ICJ decision does not stop with declaring the illegality of the arrest warrant in this particular case. Instead, through paragraph 61 of the Judgment, the Court prospectively delineates the scope of the immunities of foreign ministers before criminal tribunals.[44] The Court specifies four instances when immunity does not exist, with the clear implication that in any circumstances outside of this

40. *See* Arrest Warrant Case (dissenting opinion of Judge Al-Khasawneh), 2002 I.C.J. para. 4 (arguing a minister's discomfort with traveling for private reasons is a subjective element that must be discarded); *see also* Arrest Warrant Case (separate opinion of Judges Higgins, Kooijmans, and Burgenthal), 2002 I.C.J. para. 84 (noting that the application of such immunity is debatable).

41. *See* Arrest Warrant Case (separate opinion of Judges Higgins, Kooijmans, and Burgenthal), 2002 I.C.J. para. 84 (arguing a detention or arrest would constitute a measure that may prevent effective performance of the functions of diplomatic officials).

42. *See* Wirth, *supra* note 4, at 432 (explaining such personal immunity, referred to as immunity *ratione personae,* is afforded to very few state agents and only so long as they are on active duty).

43. *See* Watts, *supra* note 11, at 110 (noting private visits to foreign states by senior state representatives are likely to be instances when he or she is not entitled to the special protections of immunity).

44. *See* Arrest Warrant Case, 2002 I.C.J. para. 61 (noting instances in which the immunities provided by international law will not act as a bar to prosecution).

exhaustive list, the foreign minister retains absolute immunity. First, foreign ministers do not enjoy immunity in their own national courts.[45] Second, a state may voluntarily waive the immunity of its foreign minister before a foreign court.[46] Third, former foreign ministers do not enjoy immunity before foreign courts for acts committed before or after their incumbency or for any acts committed in a private capacity; however, foreign ministers do enjoy immunity for acts committed in an official capacity during their incumbency.[47] Finally, foreign ministers, whether former or sitting, do not enjoy immunity before international tribunals possessing jurisdiction created under Chapter VII of the U.N. Charter or by treaty, such as the ICC.[48]

The first two circumstances where foreign ministers may face trial are unproblematic. As the immunity of foreign ministers and other officials derives from state immunity, such immunity does not apply in the home state, and it is within the sovereign prerogative of the national state to waive the immunity in trials before foreign courts.[49] The most problematic aspect of the *Yerodia* judgment is the statement in Paragraph 61 that former foreign ministers do not enjoy immunity in trials before foreign courts for any acts committed before or after their incumbency, or for any acts committed in a

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45. *See id.*

46. *See id.*

47. *See id.; see also* Maria Spinedi, *State Responsibility v. Individual Responsibility for International Crimes: Tertium Non Datur?,* 13 EUR. J. INT'L L. 895, 896 (2002) (noting the Court's affirmation that a former minister of a state can be subjected to criminal jurisdiction for acts committed in a private capacity). *Contra* Cassese, *supra* note 9, at 867-68 (objecting to the Court's distinction between private and public acts because it is "hardly imaginable that a foreign minister may perpetrate or participate in the perpetration of an international crime 'in a private capacity' and as such, if the Court's decision is construed literally, foreign ministers could rarely be prosecuted for international crimes perpetrated while in office").

48. *See* Madeline Morris, *Terrorism and Unilateralism: Criminal Jurisdiction and International Relations,* 36 CORNELL INT'L L. J. 473, 488 (2004) (explaining if the U.N. Security Counsel refers a case to the ICC under Chapter VII of the U.N. Charter, the ICC will enjoy expanded jurisdiction).

49. *See* Arrest Warrant Case, 2002 I.C.J. para. 61 (noting in their home state, ministers of foreign affairs would be subject to that countries' courts and domestic laws).

private capacity during their incumbency.[50] As the Court intended Paragraph 61 to provide an exhaustive list of those circumstances where immunity does not apply, the clear consequence of this statement is that immunity protects all acts of a former foreign minister committed in an official capacity.[51] This includes serious international crimes, including crimes against humanity, war crimes, genocide, and torture, thereby placing the Court's judgment at variance with well-established principles of international law.

Before analysis of the Judgment itself, brief comment must be made with regard to the distinction between the *ratione decidendi* of a particular decision and those parts of a Court's pronouncement that are *obiter dicta*. While some have argued against a sharp delineation between the two,[52] Judge Shahabuddeen rightfully concluded that this oft-used distinction clearly exists in the decisions of the ICJ.[53] However, unlike some domestic traditions, which make sharp distinctions between *dicta* and the narrow holding of a case, Judge Shahabuddeen notes that what may appear to be *obiter* in an ICJ judgment "may well be made in response to a point raised in the internal deliberations of the Court and of relevance to the issues, particularly where the point so raised is carried forward in an appended opinion."[54] As such, while the distinction between *obiter dicta* and *ratione decidendi* is relevant to the ICJ, it is a less important distinction than in many domestic common law systems.[55] While the Court's statements in Paragraph 61 do not appear strictly

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50. *See supra* note 47 and accompanying text.

51. *See* Cassese, *supra* note 9, at 867-68 (discussing the four circumstances listed by the Court under which a foreign ministers may not claim immunity); *see also* Spinedi, *supra* note 47, at 896 (interpreting the Court's decision to mean that as long as a former minister of foreign affairs was acting in an official capacity, he cannot be subjected to the criminal jurisdiction of another state even after leaving office).

52. *See* MOHAMMED SHAHABUDDEEN, PRECEDENT IN THE WORLD COURT 153 (Cambridge University Press 1996) (noting that in the views of Hersch Lauterpacht and Judge Anzilotti of the Permanent Court of International Justice, there is little or no distinction between the principles of *ration decidenti* and *obiter dictum*).

53. *See id.* at 157 (disagreeing with the contention of Judge Anzilotti that "there is no need to distinguish between essential and non-essential grounds").

54. *Id.* at 159-60.

55. *See id.* at 160 (explaining that the distinction "carries less precedential significance than in a common law system").

necessary to reach the decision, these statements likely will shape the development of international law, and affect how other tribunals address the scope of immunities of foreign ministers and other state officials.

A. THE TREND AGAINST IMPUNITY FOR OFFICIAL OFFENSES

In the larger context, this case may appear to be striving for an appropriate balance between international justice and the sovereign rights of states, a balance currently in flux.[56] Belgium challenged the idea that immunities which do exist do not extend to international crimes; the *obiter dicta* of paragraph 61 seemingly and erroneously rejects this contention.[57] The idea of attempting to "save succeeding generations from the scourge of war," as well as other concerns of international and social justice, laid the groundwork for the entire post-World War II foundation of international law.[58] As part of this progressive mindset, the international community began an effort to clearly establish individual criminal responsibility over serious international crimes, and to eliminate any sort of immunity defenses to these crimes.[59]

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56. *See* Arrest Warrant Case (separate opinion of Judges Higgins, Kooijmans, and Burgenthal), 2002 I.C.J. paras. 73-75 (discussing the current shifts involved in international criminal law).

57. *See* Arrest Warrant Case, 2002 I.C.J. para. 56 (elaborating on Belgium's contention that immunity does not exist for leaders involved in major crimes against humanity).

58. *See* U.N. CHARTER pmbl. (affirming prevention of world war as the primary goal of major international organizations).

59. *See* Arrest Warrant Case (dissenting opinion of Judge ad hoc Van den Wyngaert), 2002 I.C.J. paras. 24-28 (providing support for the contention that international criminal law recognizes individual accountability for core crimes); *see also* Counter-Memorial of the Kingdom of Belgium, *supra* note 8, 2001 I.C.J. at pt. 3, chap. 5(B) (setting forth the principal events which establish the unavailability of immunities). *See generally* M. Cherif Bassiouni, *International Criminal Investigations and Prosecutions: From Versailles to Rwanda*, *in* 3 INTERNATIONAL CRIMINAL LAW 31, 33-37, 66 (M. Cherif Bassiouni ed., 2d ed. 1999) (highlighting the principle of individual responsibility without immunity and its established precedent in the Treaty of Versailles, which provided for the trial of Kaiser Wilhelm II after World War I). The Kaiser never faced trial, however, due to the refusal of the Netherlands to extradite him. *Id.*

Article 7 of the Nuremberg Charter states, "[t]he official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."[60] The Nuremberg Judgment, as well as the Charter and the judgments of the International Military Tribunal for the Far East (Tokyo) and Control Council Law No. 10 included similar provisions.[61] Former foreign ministers of Japan and Germany are among the numerous former state officials who have been tried and convicted for actions committed during their incumbency.[62] The International Law Commission subsequently restated this principle of individual criminal responsibility and the unavailability of immunity in the Nuremberg Principles[63] and the two Draft Codes of Crimes Against the Peace and Security of Mankind,[64] as did the Convention on the Prevention and the Punishment of the Crime of Genocide.[65] More

60. *See* 1 Nuremberg Trial Proceedings, Charter of the International Military Tribunal, Aug. 8, 1945, art. 7, *available at* http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm (last visited Oct. 18, 2004).

61. *See Excerpts from International Military Tribunal Judgment,* (1947), *in* 3 INTERNATIONAL CRIMINAL LAW 77 (M. Cherif Bassiouni ed., 2d ed. 1999) (describing various arenas which rejected immunity for Heads of State). *See generally* Control Council Law No.10, Dec. 20, 1945, art. 4, 3 Official Gazette Control Council for Germany 50-55 (1946) (rejecting immunity as a basis for avoiding prosecution for war crimes by the International Military Tribunal or other national tribunals), *available at* http://www1.umn.edu/humanrts/instree/Sccno10.htm (last visited Oct. 18, 2004).

62. *See* Bassiouni, *supra* note 59, at 50 (noting the conviction by the IMT-FE of Japan's wartime Foreign Minister Shigemitsu Mamoru); *see also* Watts, *supra* note 11, at 112 (discussing the conviction of Nazi foreign minister von Ribbentrop).

63. *See* U.N. GAOR, *Report of the International Law Commission*, *in* 3 INTERNATIONAL CRIMINAL LAW 84-86 (M. Cherif Bassiouni ed., 2d ed. 1999) (noting the International Law Commission recognized the idea of individual accountability for criminal behavior).

64. *See* International Law Commission, Draft Code of Crimes Against the Peace and Security of Mankind, art. 7 (1996) [hereinafter Draft Code of Crimes] (setting forth a foundation for an international code for crimes relating to international criminal behavior and individual responsibility), *available at* http://www.un.org/law/ilc/texts/dcodefra.htm (last visited Oct. 18, 2004).

65. *See* Convention on the Prevention and Punishment of the Crime of Genocide, *entered into force* Jan. 12, 1951, art. 4, 78 U.N.T.S. 277 (emphasizing

recently, the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") wrote statutes similar to Article 7 of the Nuremberg Charter. These are but a small sampling of the sources which support the conclusion that one's official capacity cannot be a defense against international criminal responsibility.[66]

Given the wealth of precedent, the ICTY trial chamber found Articles 7(2) of the ICTY and 6(2) of the ICTR to be "indisputably declaratory of customary international law."[67] As the International Law Association recently declared, the notion of immunity from criminal liability for crimes against international law perpetrated in an official capacity, whether by existing or former office holders, is fundamentally incompatible with the proposition that gross human rights offenses are subject to universal jurisdiction.[68]

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every person will be held criminally responsible for violations of international law regardless of their status or title).

66. *See Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935*, paras. 171-72, S/1994/1405 (Annex) (Dec. 9, 1994) (describing the trend within the international community to include clauses in criminal tribunals that do not grant automatic immunity to foreign leaders); *see also Situation of Human Rights in Rwanda*, U.N. GAOR, 49th Sess., 94th plen. mtg., U.N. Doc. A/RES/49/206 (1994) (highlighting the international human rights situation in Rwanda and the methods employed to determine accountability); U.N. GAOR, 50th Sess., 99th plen. mtg., U.N. Doc. A/RES/50/200 (1995) (praising various groups and agencies responsible for improving the human rights situation in Rwanda, as well as punishing all those responsible). *See generally* Prosecutor v. Tihomir Blaskic, Case No. IT-95-14, para. 41 (Trial Chamber II) (Oct. 19, 1997) (noting the Tribunal's authority to compel all documents necessary to ensure a fair and inclusive trial). *See generally Report of the Secretary-General Pursuant to Paragraph 2 of the SC Resolution 808*, S/25704 (May 3, 1993) (discussing the creation of the International Tribunal and its role in prosecuting all violators of human rights), *available at* http://www.un.org/icty/basic/statut/S25704.htm (last visited Oct. 18, 2004).

67. *See* Prosecutor v. Anto Furundzija, Case No. IT-95-17/1, para. 140 (Trial Chamber II) (Dec. 10, 1998) (considering absolute criminal responsibility so important that a conscious decision was made not to allow the ICTY Prosecutor to offer immunity in exchange for testimony against others); *see also* MICHAEL SCHARF & VIRGINIA MORRIS, INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 283-90, 415-16 (1998) (finding international tribunals supported the current trend in international criminal law, that status no longer determines immunity).

68. *See* INTERNATIONAL LAW ASSOCIATION, FINAL REPORT ON THE EXERCISE OF UNIVERSAL JURISDICTION IN RESPECT OF GROSS HUMAN RIGHTS OFFENSES 14 (2000) (discussing the discrepancy between current ideas regarding international

The irrelevance of official capacity is particularly important for establishing international justice, as senior state officials, including foreign ministers, often commit many of the most serious international offenses, including crimes against humanity, genocide, and war crimes. Other international crimes require state action, either by definition (e.g., torture), or because it is nearly impossible to extricate from the crime the official policies of a state (e.g., acts of aggression). Not only are senior government officials often the most culpable when serious waves of internationally-criminalized violence occur, but they use their official positions to manipulate the state into committing large-scale violence. Such patterns manifested themselves in Nazi Germany, Rwanda, and the former Yugoslavia to name a few countries.[69] In response, the ICTY summarized:

> [T]here is no privilege under international criminal law which would shield state representatives or agents from the reach of individual criminal responsibility. On the contrary, acting in an official capacity could constitute an aggravating circumstance when it comes to sentencing, because the official illegitimately used and abused a power which was conferred upon him or her for legitimate purposes.[70]

B. THE COURT'S STRUGGLE AGAINST IMPUNITY

Individual criminal responsibility has become so entrenched that both Belgium and the DRC asserted in their pleadings that immunity could not absolve responsibility.[71] In *Yerodia*, the Court struggled to reconcile the immunities of foreign officials with the trend against impunity. Paragraph 61 specifies instances when immunity does not attach and trials may occur, but permits an unsettling degree of

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criminal tribunal jurisdiction and the concept of immunity).

69. *See* Draft Code of Crimes, *supra* note 64, para. 1 (describing the role of official capacity in some of the more heinous of human rights atrocities and the difficulty in discerning between those responsible for carrying out such atrocities).

70. *See* Prosecutor v. Kunarac, Case Nos. IT-96-23-T, IT-96-23/1-T, para. 494 (Trial Chamber II) (June 12, 2002) (stating that official capacity should not only cease to act as a protectorate against criminal punishment, but should serve to make culpability greater).

71. *See* Cassese, *supra* note 9, at 870-74 (discussing the insistency of many nations that in order for justice to be accomplished, officials cannot receive immunity).

impunity for former foreign ministers, and presumably for certain other state actors.[72] The Court diminishes the law of criminal responsibility by accepting the DRC's view that absolute immunity is the default rule, limited by only a recognized exception.[73] This view requires proof of a rule of customary law providing an exception to immunity for war crimes or crimes against humanity; the court is unable to find such a rule.[74] It finds no supporting state practice in part because it declares the acts of international tribunals irrelevant to determining the customary law of immunities before national courts.[75] Interestingly, an apparent lack of state practice is sufficient to demonstrate that there is no exception to immunity, while the existence of absolutely no state practice or *opinio juris* did not prevent the Court from finding a customary law rule of absolute immunity. If the Court had begun with the proposition that there is a principle of criminal responsibility, a view supported by post-Nuremberg customary law, and then searched for an exception

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72. *See* Arrest Warrant Case (dissenting opinion of Judge Al-Khasawneh), 2002 I.C.J. para. 6 (offering a highly critical view of paragraph 61, seemingly implying the Court was attempting to prospectively delineate the scope of immunities of foreign ministers, but that the Court included this paragraph to "prove" that immunity did not necessarily mean impunity). Judge Al-Khasawneh notes, however, the removal of immunity in these four cases still does not go very far in removing the impunity which it has accorded to foreign ministers. *Id.*; *see also supra* notes 52-55 and accompanying text (supporting the contention that what may appear to be *dicta* in a majority opinion is often there to counter a specific minority point, and this may, in fact, be the correct way to read paragraph 61). *See generally* Arrest Warrant Case (dissenting opinion of Judge ad hoc Van den Wyngaert), 2002 I.C.J. paras. 34-38 (explaining immunity and impunity are not synonymous concepts and merit separate examination).

73. *See* Application Instituting Proceedings (D.R.C. v. Belg.) 2000 I.C.J. para. IV.B (Oct. 17) (setting forth the assumption that courts should ignore individual immunity unless a specific documented exception applies).

74. *See* Arrest Warrant Case (dissenting opinion of Judge ad hoc Van den Wyngaert), 2002 I.C.J. para. 25 (reiterating the need for a specific exception in order to grant immunity for crimes against humanity); *see also* Arrest Warrant Case, 2002 I.C.J. para. 58 (discussing the difficulties courts are likely to encounter when attempting to apply the exceptions to the rules granting immunity).

75. *See Excerpts from International Military Tribunal Judgment*, *supra* note 61, at 75-76 (interpreting the Nuremberg Charter as "the expression of international law existing at the time of its creation, and to that extent is itself a contribution to international law"). The Court's approach is particularly unfortunate since the ability of international tribunals, including the ICTY, ICTR, and ICC, to waive immunities derives from the waiver of immunity by states. *Id.*

according immunity for foreign ministers, it would have undoubtedly reversed its finding.

Given the weakness of this argument, the Court adopts another line of reasoning, stating, "Jurisdictional immunity may well bar prosecution for a certain period or for certain offenses; it cannot exonerate the person to whom it applies from all criminal responsibility."[76] The Court denies that it is according impunity based on official capacity by distinguishing procedural immunity from jurisdiction and "immunity" as a substantive defense.[77] The Court does not explain how or why it adopts this distinction,[78] and the dissenters criticize the majority for presenting a division which is in fact "artificial" and unsupported by a wealth of law.[79] The Commentary to the International Law Commission's Draft Code of Crimes indicates that beginning with Nuremberg, the absence of any procedural immunity "is an essential corollary of the absence of any substantive immunity or defence."[80] Analysis of the current state of international law might support distinguishing *immunity ratione personae* and *immunity ratione materiae*, as well as the Court's rejection of "substantive immunity" with respect to international

76. *See* Arrest Warrant Case, 2002 I.C.J. para. 60 (stating that jurisdictional immunity itself can never act as a complete protective shield from prosecution for international crimes).

77. *See id.* (emphasizing the Court will not allow one to shield himself or herself behind any types of immunity in hopes of escaping accountability for international crimes against humanity).

78. *See* Arrest Warrant Case (dissenting opinion of Judge ad hoc Van den Wyngaert), 2002 I.C.J. para. 33 (noting the lack of any mandate by the Court for the incorporation of non-impunity clauses).

79. *See* Arrest Warrant Case (dissenting opinion of Judge Al-Khasawneh), 2002 I.C.J. para. 5 (quoting commentary to article 7 of the 1996 Draft Code of Crimes); *see also* Arrest Warrant Case (dissenting opinion of Judge ad hoc Van den Wyngaert), 2002 I.C.J. paras. 29-33 (citing the 1948 Genocide Convention, 1996 Draft Code of Crimes against the Peace and Security of Mankind, Rome Statute, and Nuremberg Principles to show that there are no established, divergent views of immunity).

80. *See* Draft Code of Crimes, *supra* note 64 (explaining procedural immunity is the building block upon which other types of immunity rest); *see also* SCHARF & MORRIS, *supra* note 67, at 248 n.925 (examining the role of procedural immunity in the evolution of international criminal law).

crimes. It cannot, however, accept the Court's conclusion that immunity shields former foreign ministers for international crimes.[81]

C. IMMUNITY RATIONE PERSONAE AND IMMUNITY RATIONE MATERIAE

The above discussion indicated two types of immunity enjoyed by both Heads of State and diplomats. First, immunity *ratione personae* protects certain individuals irrespective of the nature of the acts committed; thus, maintaining the dignity of a state requires that Heads of State receive absolute immunity from foreign states.[82] Immunity shields diplomats from trial in the accrediting state during their time in office for all acts, but they receive no immunity in third states where they have no accreditation, unlike Heads of State who enjoy such immunity *erga omnes*.[83] As immunity *ratione personae* attaches to the office and not the acts, there is no distinction between private and public acts.[84] Immunity *ratione personae* is a procedural immunity, because the immunity attaches to the holder only for a period of time, ending at the conclusion of tenure.[85]

Second, there may be immunity *ratione materiae*, which attaches not to the person, but to the actions themselves in order to protect the

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81. *See* PRINCETON PROJECT ON UNIVERSAL JURISDICTION, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 48-49 (2001) (stating one may be able to find a divergence in modern international criminal law between various types of immunity, but none of those types allow for the freedom from accountability that foreign leaders wish and expect to enjoy), *available at* www.law.uc.edu/morgan/newsdir/unive_jur.pdf (last visited Oct. 18, 2004).

82. *See supra* notes 26-29 and accompanying text (discussing the importance of immunity for Heads of State).

83. *See* Wirth, *supra* note 4, at 432 (referring to Heads of States as one of the few state agents immune from any foreign jurisdiction regardless of whether the act is official or private, as long as they are on active duty).

84. *See* Verbatim Record, *supra* note 36 (statement of Mr. D'Argent) (asserting foreign ministers' immunity from criminal jurisdiction when in office covers all acts, regardless if they occurred before taking office or afterwards, and regardless of whether the acts committed while in office were official); *see also* Wirth, *supra* note 4, at 432 (noting this type of immunity covers all acts of the official when in office).

85. *See* Wirth, *supra* note 4, at 432 (noting this type of immunity occurred in the case against Augusto Pinochet).

dignity of the state.[86] Thus, certain official acts of either diplomats or Heads of State are covered by immunity from suit even after the official leaves office.[87] As Cassese correctly notes, immunity *ratione materiae* is not a procedural defense but a substantive defense because an act covered by such immunity "is not legally imputable to [the one who commits the act] but to his state; in other words, *individual* criminal or civil liberty does not even arise."[88] Diplomats and Heads of State are accorded both types of immunity, but the scope may vary for each official.

The Court itself does not use the term "substantive immunity." Instead, it refers to immunity as a procedural bar to jurisdiction, as opposed to a substantive defense denying individual criminal responsibility.[89] This approach is more technically precise than commentaries, which use the term "substantive immunity."[90] It also matches up nicely with the language of immunity *ratione materiae* and *ratione personae*. The language of paragraph 60 of the judgment suggests that the Court means immunity *ratione personae* when it refers to the "immunity" of former foreign ministers.[91] As the foreign minister acts as a diplomat vis-à-vis many, if not all, states, the Court's extension of immunity *ratione personae* to all states is not altogether problematic. However, the extension of immunity to official acts committed by former foreign ministers clearly means that foreign ministers enjoy both immunity *ratione personae* during their incumbency and immunity *ratione materiae* for all acts committed in an official capacity.[92] International law has, however,

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86. *See id.* at 431 (discussing the way in which an act, and not specifically the actor, receives immunity).

87. *See id.* at 432 (stating when an official leaves office, immunity *ratione personae* ceases and immunity *ratione materiae* remains).

88. *See* Cassese, *supra* note 9, at 863 (referring to procedural and substantive immunity as immunity *ratione personae* and immunity *ratione materiae* respectively).

89. *See* Arrest Warrant Case, 2002 I.C.J. para. 60.

90. *See, e.g.,* THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION, *supra* note 81 (interpreting "universal jurisdiction" to apply to persons who commit "serious crimes under international law").

91. *See* Arrest Warrant Case, 2002 I.C.J. para. 60 (stating jurisdictional immunity cannot exonerate a person from all criminal responsibility).

92. *See* Cassese, *supra* note 9, at 867-68 (describing the immunity shield for

clearly established that in no case does immunity *ratione materiae* extend to core crimes.[93]

The origins of immunity *ratione materiae* lie in the idea that official actions were attributable not to the individual, but to the state.[94] In the view of Hans Kelsen, official acts that lead to state responsibility cannot also lead to individual criminal responsibility, as the actors in question acted as the state and not in their individual capacities.[95] This theory applied to both the leaders and to minor cogs in the state machinery.[96] As Dinstein notes, "the upshot of [Kelsen's] thesis is that if a state–epitomized by Nazi Germany–adopts a coordinated policy of crimes on a vast scale, all offenders are shielded by the *aegis* of immunity."[97] Such a conclusion is not only morally repugnant, but by providing a permanent substantive defense based solely on official capacity, also runs counter to the entire body of international law developed after World War II.

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state officials); *see also* Spinedi, *supra* note 47, at 896 (detailing the nuances of state actor immunity).

93. *See* M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 84 (2001) (noting use of the defense of substantive immunity for certain international crimes was eliminated by the Nuremberg Charter).

94. *See* Cassese, *supra* note 9, at 862 (discussing the roots of immunity under international law).

95. *See* H. Kelsen, *Collective and Individual Responsibility for Acts of State in International Law*, 1948 JEWISH Y.B. INT'L L. 226, 230-31; *see also* Dinstein, *supra* note 32, at 384 (explaining Kelsen's theory includes both lower ranking officers acting under direct orders and high ranking officers who issue the orders, provided each is acting on behalf of their government); Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, *in* INTERNATIONAL CRIMES, PEACE, AND HUMAN RIGHTS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT 219-79, 220-22 (Dinah Shelton ed., 2000) (challenging the jurisdiction of the ICC over nationals of non-Party States on the grounds that such jurisdiction implicates state responsibility and thus the rights of the third state to choose its own dispute settlement mechanism). *But see* Michael P. Scharf, *Symposium: Universal Jurisdiction: Myths, Realities, and Prospects: Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States*, 35 NEW ENG. L. REV. 363, 377-78 (2001) (contending that it is not necessary to prove that the perpetrator acted on behalf of the state to gain a conviction, therefore the indirect infringement of the states interests does not occur).

96. *See* Wirth, *supra* note 21, at 877 (describing the blanket-like extensiveness of immunity for individuals acting on behalf of the state).

97. *See* Dinstein, *supra* note 32, at 384.

Fifty years of international criminal law have progressively dismantled this notion, holding that individual criminal responsibility exists for serious international crimes completely independent of the responsibility of a state.[98] Bassiouni observes "'Nuremberg' focused on individual criminal responsibility for conduct that was the product of state policy and for which collective responsibility and state responsibility could have been possessed."[99] The ICTY has said that the individual and state could be simultaneously liable for war crimes, crimes against humanity, and torture.[100] In fact, the whole concept of international humanitarian law is aimed at both states and individuals, primarily state officials.[101] Sir Arthur Watts explains the rationale for allowing individual responsibility concurrent with state responsibility:

> States are artificial legal persons: they can only act through the institutions and agencies of the State, which means, ultimately, through its officials and other individuals acting on behalf of the State. 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 perpetrated it is both unrealistic and offensive to common notions of justice.[102]

Dinstein summarizes his position, stating, "Indubitably, as a general rule today, the attribution of an act to the state–while engendering state responsibility–does not negate the criminal liability of individuals under contemporary international law."[103]

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98. *See* Watts, *supra* note 11, at 82 (noting as "an accepted part of international law" the idea that individuals who commit international crimes are internationally accountable).

99. *See* Bassiouni, *supra* note 59, at 195, 210 (stating the purpose of international criminal law is to pursue accountability but not necessarily responsibility and criminal punishment).

100. *See* Prosecutor v. Anto Furundzija, Case No. IT-95-17/1, paras. 140-42 (Trial Chamber II) (Dec. 10, 1998) (explaining if state officials carry out torture on a wide scale, it would result in a serious breach of the international obligation to safeguard human life).

101. *See id.* para. 140 (discussing the application of customary law to the acts of individuals).

102. *See* Watts, *supra* note 11, at 82.

103. *See* Dinstein, *supra* note 32, at 386 (asserting that criminals who act in violation of international law cannot claim immunity if the state on whose behalf

The practice of allowing concurrent individual and state responsibility is alive and well in the former Yugoslavia, where the ICTY is prosecuting both military and civil officials for many of the same acts. This has led Bosnia to bring a case for genocide against Yugoslavia before the ICJ.[104] The Court's judgment effectively creates a substantive defense, according absolute impunity in violation of international law beginning with Nuremberg, as well as with the Court's own stated goal of not equating immunity with impunity.

The joint separate opinion attempts to remedy the Court's decision in another way, by suggesting that serious international crimes cannot constitute official acts.[105] This legal fiction generates at least three difficulties. First, such acts quite often are official acts in the sense that state actors carry them out in the name of the state. To pretend otherwise is a conceptual nightmare. Spinedi notes:

> for the purposes of determining the existence of an internationally wrongful act committed by a state, acts committed by a state official which exceed his authority or contravene instructions are considered to be acts committed in an official capacity as long as the act was done on behalf of the state.[106]

Second, this legal fiction would effectively eliminate state responsibility, as acts done in one's private capacity are no longer attributable to the state.[107] This view would, in turn, affect potential remedies, particularly since former state officials often remain in the home state, and because the only way to break the immunity shield is

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they act moves outside of its international legal "competence"); *see also* Draft Code of Crimes, *supra* note 64, art. 4 (providing individual criminal responsibility does not prejudice any question of state responsibility under international law).

104. *See* Scharf, *supra* note 95, at 378.

105. *See* Arrest Warrant Case (separate opinion of Judges Higgins, Kooijmans, and Burgenthal), 2002 I.C.J. para. 85 (noting state-related motives are not the proper test for determining whether something constitutes a public state act); *see also* Arrest Warrant Case (dissenting opinion of Judge ad hoc Van den Wyngaert), 2002 I.C.J. para. 36 (arguing the Court's opinion leaves this issue open, perhaps in an attempt to salvage something from this decision).

106. *See* Spinedi, *supra* note 47, at 897 (citing article 7 of the Draft Articles on State Responsibility adopted by the ILC).

107. *See id.* (stating that crimes against humanity are not committed in the private capacity per se).

through inter-state mechanisms.[108] Spinedi claims that the "remedy" of this fictional approach is "not only wrong per se but would constitute a remedy more harmful than the wrong it was intended to remedy."[109] Third, this is not the most plausible way to read the majority opinion. The inclusion of this idea in the separate opinion indicates the majority was aware of it, and the lack of discussion within the majority opinion indicates a deliberate refusal to entertain this idea in the main opinion.[110] However, despite its significant drawbacks, this fiction may ultimately be the best way to read the ICJ judgment so as to avoid destroying principles of individual criminal responsibility.[111]

III. PARAGRAPH 61: IMMUNITY BEFORE INTERNATIONAL TRIBUNALS

The *obiter dicta* of Paragraph 61 also states that immunity may be unavailable before "certain international criminal courts."[112] Here, the Court includes two types of tribunals: those created by the Security Council under Chapter VII of the U.N. Charter and those created by several states via a treaty, such as the ICC.[113] The Court's *dicta* is correct, but requires clarification to avoid two potential misunderstandings resulting from the Court's failure to differentiate between the types of tribunals which may refuse immunity. First, this may give rise to the incorrect opinion that the rationales for disallowing pleas of immunity are the same for each tribunal. While the Court's decision might be read this way, there is a better reading

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108. *See* Arrest Warrant Case (dissenting opinion of Judge ad hoc Van den Wyngaert), 2002 I.C.J. para. 35 (discussing how trials by the host state are unlikely to occur, and in fact did not occur in this case).

109. *See* Spinedi, *supra* note 47, at 897 (examining alternatives to the notion that serious international crimes cannot constitute "official" acts).

110. *See supra* notes 52-55 and accompanying text (discussing the distinction between *ratione deciendi* and *obiter dicta*).

111. *See* Scharf, *supra* note 95, at 378-79 (holding state officials are generally not protected from criminal prosecution when they commit crimes such as genocide, even in a state capacity, as these crimes are not properly considered legitimate or official functions of a state).

112. *See* Arrest Warrant Case, 2002 I.C.J. para. 61 (emphasis added).

113. *See id.*

which corresponds more closely to international law. Second, following from the different rationales for the lack of immunity before different international tribunals, the scope of immunity may also differ between types of tribunals.

There are at least three types of justifications explaining why immunities may not attach before international criminal courts: an "internationalness" argument,[114] a world order/constitutional argument,[115] and a treaty argument.[116] While the world order/constitutional argument has some adherents, the treaty rationale provides the ultimate justification for the unavailability of immunities, and thus determines the scope of available immunities. This section will discuss these two rationales with respect to the U.N. tribunals and the ICC. First, however, it is necessary to quickly dispatch with the internationalness argument.

Ryszard Piotrowicz argues that the Court's rationale finds its basis in the "internationalness" of such tribunals.[117] Leila Sadat also argues:

> Because the rules governing international immunities are primarily derived from international law, the international community may determine when those immunities are no longer applicable, and apply that determination in an international forum such as the ICC. National courts, however, are more circumspect in their treatment of international immunities.[118]

Putting aside the possibility that Sadat's statement is mere hyperbole, the international community can only make such

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114. *See infra* notes 117-125 and accompanying text (expanding upon the "internationalness" argument).

115. *See infra* notes 127-141 and accompanying text (discussing the constitutional argument).

116. *See infra* notes 141-167 and accompanying text (advocating the treaty rationale).

117. *See* Piotrowicz, *supra* note 6, at 293 (explaining while this might be the Court's thinking, the Judgment is stated as a conclusion, thus allowing the attribution of several possible rationales and the other readings comport better with international law).

118. LEILA NADYA SADAT, THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM 201 n.113 (Cherif Bassiouni ed., Transnational Publishers 2002).

determinations through the processes of international law. As a fundamental norm of international law, the opinion of even a great number of states cannot bind another state without its active or passive consent. No multitude of states can simply create a rule of law removing immunities that bind an objecting third state. One argument offered is that at least those tribunals supported by a sufficient multiplicity of international actors provide the fairness and legality which, when missing, gives rise to the need for immunities.[119] Several problems with this view are immediately obvious. Not only does this violate the principle of *pacta tertiis*, but it also ignores the fact that fairness had nothing to do with the creation of immunities. Moreover, there is no empirical basis for concluding that widely-supported international tribunals are any fairer than others. The unavailability of immunities must be rooted in another theory, which may depend on the tribunal in question.

A. IMMUNITY BEFORE CHAPTER VII TRIBUNALS

The U.N. Security Council created the ICTY and ICTR under Chapter VII of the U.N. Charter, which endows the Council with the authority to take measures to "maintain or restore international peace and security."[120] Article 7(2) of the ICTY Statute reads, "[t]he official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment."[121] Article 6(2) of the ICTR Statute is identical.[122] In drafting the ICTY Statute, the Secretary-General not only felt that customary international law precluded any defense of immunity

119. *See* Wirth, *supra* note 21, at 888-89 (concluding that in these circumstances "public disturbances caused by the prosecution would most probably be mitigated because much less doubt would exist as to the legality and fairness of such proceedings").

120. U.N. CHARTER, art. 39.

121. Statute of the International Tribunal for Yugoslavia, *adopted* May 25, 1993, S.C. Res. 827, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/827.

122. *See* Statute of the International Tribunal for Rwanda, *adopted* Nov. 8, 1994, art. 6(2), S.C. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955 (providing the "official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment").

based on official capacity, but also observed that similar concerns were voiced by "[v]irtually all of the written comments received by the Secretary-General."[123] Bassiouni says that the ICTR and the ICTY both eliminate substantive immunity as a defense, but they do not address the question of procedural immunities, which is a question of jurisdiction.[124] The indictment and prosecution of Milosevic, to which no state objected, seems to indicate that the current interpretation of the ICTY Statute removes any procedural immunity as well.[125] Even if this were not the case, the ICJ judgment makes clear that Security Council tribunals could theoretically deny any immunity of official capacity.

An alternative justification to the "internationalness" rationale for the lack of immunities before Chapter VII tribunals considers the U.N. Charter as the constitution of the international community. Under this view, the Security Council could, through operation of constitutional processes, bind the entire international community. The Security Council has wide discretion in responding to threats to international peace and security. Article 24(2) of the Charter binds the Security Council to the "Purposes and Principles" of the Charter, which include international law under Article 1.[126] However, as the Council is not subordinate to any other organ and has its own *Kompetenz-Kompetenz*, it "has been given a virtual monopoly in the settlement of questions to do with the maintenance of peace."[127]

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123. *Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808*, U.N. SCOR, 48th Sess., U.N. Doc. S/25704 (1993).

124. *See* Bassiouni, *supra* note 59, at 85 (mentioning "heads of state and diplomats can still claim procedural immunity in opposition to the exercise of national criminal jurisdiction"). *See generally* THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION, *supra* note 81, at 50-51 (noting Bassiouni was a participant in creating the Princeton Principles).

125. *See* THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION, *supra* note 81, at 51 (stating "[a] head of state. . .may, therefore, be immune from prosecution while in office, but once they step down any claim of immunity becomes ineffective, and they are then subject to the possibility of prosecution"); *see also* Cassese, *supra* note 9, at 866 n.35 (stating the indictment against Milosevic was "did not give rise to any objection from other states").

126. *See* MOHAMMED BEDJAOUI, THE NEW WORLD ORDER AND THE SECURITY COUNCIL: TESTING THE LEGALITY OF ITS ACTS 14 (M. Nijhoff 1994) (explaining "the text adopted for Article 24 is less confining for the Security Council").

127. *See id.* at 128 (stating even if there are somewhat stringent limits to the

Thus, the Security Council could declare a threat to international peace, create a tribunal, and waive the immunity of any who appeared before it. Such a measure would bind the entire international community.

While this view is certainly plausible, it remains extremely controversial. The question of the presence of non-member states, while usually only of theoretical interest, plays an important role in identifying the correct explanation of how these tribunals are competent to remove immunity.[128] Kelsen argues that the adoption of the U.N. Charter was "revolutionary" and indirectly obliged non-members.[129] However, Bruno Simma's authoritative commentary on the United Nations Charter declares that "[t]he overwhelming majority of commentators maintain a contrasting opinion that Article 2(6), being a norm of mere treaty law, can have no binding effect *vis-à-vis* non-member states."[130] It may soon be conceivable to view the U.N. Charter as the constitution of the international community of member states, but that day is not yet here. Simma instead offers the "conventional" picture of the U.N. Charter as a treaty, with Article 2(6) as "a kind of a classic 'alliance clause.'"[131] The same justification exists for the Security Council's decision under the U.N. Charter as for the international constitution argument. Under Article 25 of the Charter, members must accept and carry out decisions of the Security Council even if this alters the default rules of international law on immunities.[132] However, the Security Council

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Security Council's actions, paragraph 61 of *Yerodia* implies the power to waive immunities before a Chapter VII tribunal is within the Council's powers).

128. *See* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 132-35 (Bruno Simma ed., Oxford University Press 1995) (exploring the few articles that explicitly deal with how the United Nations relates to non-members).

129. *See id.* at 137 (indicating Kelsen believed the tension between article 2(6) and the traditional *'pacta tertiis'* rule gave the provision its revolutionary quality); *see also* Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 COLUM. J. TRANSNAT'L L. 529, 532 (1998) (explaining that the U.N. Charter is not just special as a "constituent treaty," but "'the constitution of the international community in its entirety").

130. THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 128, at 137.

131. *Id.* at 138.

132. *See* U.N. CHARTER art. 25 (providing all members "agree to accept and carry out the decisions of the Security Council in accordance with the present

lacks the power to waive immunities of state officials outside the ambit of the United Nations.[133] While the Charter does not legally bind non-members, political pressure can push non-members to adopt the obligations of the Charter.[134]

For the ICTY, the question of whether Serbia and Montenegro were members of the United Nations during the period of the alleged acts committed becomes quite important. In Resolution 471, the General Assembly, upon recommendation of the Security Council, declared that Serbia and Montenegro could not succeed to the seat of Yugoslavia at the United Nations, but instead had to apply for membership.[135] If Serbia were not a member of the U.N. at the time in question, the ICTY's jurisdiction is essentially treaty-based jurisdiction over a non-party's nationals.[136] It would also mean that the indictment of Slobodan Milosevic either violated or waived his immunities as Head of State of a non-party state.

In this case, there are several possible interpretations of the power of the Security Council. First, the Security Council's waiver of Milosevic's immunity might constitute an illegal act. Second, the Milosevic case might finally prove that the United Nations Charter is the constitution of the entire international community. The best understanding, however, is that Serbia and Montenegro, through a written unilateral declaration, agreed to assume all the rights and all the international obligations of Yugoslavia, including the United

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Charter"); *see also* Verbatim Record, *supra* note 36 (statement of Mr. D'Argent) (acknowledging immunities may be discarded by a decision of the Security Council, and noting state parties agreed in advance to obey the Council's decisions and to cooperate with international tribunals established by the Council).

133. *See* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 128, at 137-38 (explaining the Charter cannot control the actions of a non-party state).

134. *See id.* at 138-39 (suggesting non-member states which try to stay neutral with regard to activities by states that jeopardize international peace, will face political repercussions).

135. *See* G.A. Res. 47, U.N. GAOR, 17th Sess., 7th plen. mtg., U.N. Doc. A/Res/47/1 (1992).

136. *See* Michael P. Scharf, *The United States and the International Criminal Court: The ICC's Jurisdiction over the Nationals of Non-Party States: A critique of the U.S. Position*, 64 LAW & CONTEMP. PROB. 67, 109-10 (2001) (stating the ICTY provides modern precedent for international tribunal based on treaties).

Nations Charter.[137] As such, the treaty rationale is sufficient to explain the ability of the Security Council to waive immunities ordinarily enjoyed by Serbia and Montenegro. An ultimate conclusion on this issue, however, may depend on the ICJ decision in the case between Bosnia and Yugoslavia.

Left unclear is whether the Security Council can remove immunities in trials at the national level. The ICJ judgment mentions only the lack of immunities before international courts.[138] It is quite plausible that, in the absence of state practice, the ICJ did not consider the relationship between the powers of the Security Council and immunities before national courts. With respect to the ICTR, Article 8 of the Statute provides that national courts have concurrent jurisdiction.[139] The resolutions creating the tribunals under Chapter VII also obligated states to cooperate with the tribunal and to take any measures necessary under domestic law to implement the resolution.[140] This, however, is far from an affirmative grant of jurisdiction, let alone tantamount to a waiver of immunities. A Security Council Resolution after the creation of the ICTR:

> [u]rges States to arrest and detain, in accordance with their national law and relevant standards of international law, pending prosecution by the International Tribunal for Rwanda or by the appropriate national authorities, persons found within their territory against whom there is sufficient evidence to believe that they were responsible for acts within the jurisdiction of the International Tribunal for Rwanda.[141]

However, the Security Council did not adopt this Resolution under Chapter VII, and in the wake of *Yerodia* its reference to international law might lead to an interpretation of the sustainability of immunity

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137. *See* Letter from the Charge d'Affaires of the Permanent Mission of the Federal Republic of Yugoslavia Addressed to the Secretary-General, CERD/SP/54 (Feb. 2, 1994).

138. *See* Arrest Warrant Case, 2002 I.C.J. para. 61.

139. *See* Statute of the International Tribunal for Rwanda, *adopted* Nov. 8, 1994, art. 8, S.C. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955 (providing the ICTR shall have primacy over the national courts of all states).

140. *See* S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 2, U.N. Doc. S/RES/955 (1994) (describing the creation of the ICTR).

141. S.C. Res. 978, U.N. SCOR, 50th Sess., 3504th mtg. at 1, U.N. Doc. S/RES/978 (1995).

of foreign ministers before national courts. Perhaps the accumulated jurisprudence and commentary pertaining to the ad hoc tribunals might be construed to waive immunities before national courts. While national tribunals implicate different state concerns than international tribunals, neither the international constitution nor the treaty justification would explain limiting the Security Council's powers to international courts. Such a waiver is seemingly within the Security Council's powers as well. This may remain one of the more important questions left open after *Yerodia*.

B. IMMUNITY BEFORE THE ICC

Article 27 of the Rome Statute reads:

> 1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State, 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, nor shall it, in and of itself, constitute a ground for reduction of sentence.
>
> 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.[142]

Article 27(2) eliminates both immunity *ratione materiae* and immunity *ratione personae* before the ICC.[143] Here, too, the rationale behind the *Yerodia* judgment affects the interpretation of the ICC statute and vice versa. Third states could, and likely would, invoke the *Yerodia* case to claim functional immunity for certain acts of their nationals.[144]

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142. Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/Conf.183/9 [hereinafter Rome Statute], *.available at* http://www.un.org/law/icc/statute/final.htm (last visited Oct. 18, 2004) .

143. *See* Otto Triffterer, *Article 27, in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 501, 512-13 (Otto Triffterer ed., Nomos 1999) (noting that procedural rules and immunities do not prevent jurisdiction for the Court).

144. *See* Cassese, *supra* note 9, at 875 (arguing a state official enjoying functional immunity would also be immune from the jurisdiction of the Court).

As with the Chapter VII tribunals, some people have portrayed the ICC statute as "effectively existing *erga omnes*."[145] Such a view might derive to some extent from Leila Nadya Sadat, who views the establishment of the ICC as a "constitutional moment."[146] Unlike the U.N. tribunals, however, many states are not party to the ICC, including several quite vocal objectors.[147] It is especially clear that the treaty rationale is the only ground for the ICC's elimination of immunity, as states, which each individually possess the right to waive their own immunities, agreed by treaty to waive such immunities before the ICC.[148] The immunities of officials of non-party states under customary law will continue to exist before the ICC.[149] The rule of *pacta tertiis* prevents party-states from abrogating the immunities accorded to non-party states.[150] Applying *Yerodia* as indicative of customary international law, therefore, protects former foreign ministers, and several other government officials of non-party states, for acts committed in their official capacity.[151] *Yerodia* thus may shape the ICC's jurisprudence by rejecting Belgium's

145. Sascha Rolf Lüder, *The Legal Nature of the International Criminal Court and the Emergence of Supranational Elements in International Criminal Justice*, 84 INT'L REV. RED CROSS 79, 82 (2002).

146. SADAT, *supra* note 118, at 74.

147. *See e.g.*, Human Rights Watch, *The United States and the International Criminal Court* (stating that the United States was among only seven nations to vote against the Rome Statute in 1998), *available at* http://www.hrw.org/campaigns/icc/us.htm (last visited Oct. 18, 2004).

148. *See* Morris, *supra* note 48, at 485 (explaining Article 27 is only a waiver of immunity for state-parties).

149. *See id.* (affirming that heads of state or foreign ministers will retain their immunities, even if the state party decides to waive its own immunity). Thus, the ICC cannot lawfully exercise jurisdiction over a head of state or a foreign minister. *Id.*

150. *See* Wirth, *supra* note 4, at 453 (citing articles 34 and 35 of the Vienna Convention on the Laws of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 as the basis for this rule); *see also* Kimberly Prost & Angelika Schlunck, *Article 98*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 1131 (Otto Triffterer ed., Nomos 1999); Triffterer, *supra* note 143, at 514.

151. *See* Wirth, *supra* note 4, at 453 (stating diplomats of non-party states are still protected by immunity *ratione personae* against prosecutions before the ICC).

argument that Article 27's bar on immunity is indicative of customary law, not just convention among states parties.[152]

The treaty rationale also colors the interpretation of Article 98 of the ICC Statute, which tempers the waiver of immunities contained in Article 27.[153] Under Article 98(1) of the Statute:

> The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.[154]

As Article 27 waives the immunity of states parties' officials as protected under *Yerodia*, Article 98 makes it explicit that such immunities continue to exist for non-party states unless waived.[155]

The question remains as to what the ICC may do in the case of a foreign minister of a non-party state asserting immunity before the ICC. Article 98 obliges the ICC to seek a waiver from states when immunity is a problem, but it is unclear what will happen should the state refuse to grant the waiver.[156] Triffterer suggests that one option might be for the Court to seize the matter, declaring the state "unable" to prosecute.[157] Alternatively, Wirth argues that prosecution

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152. *See* Counter-Memorial of the Kingdom of Belgium, *supra* note 8, 2001 I.C.J. para. 3.5.36 (indicating that once customary international law excludes immunity, a state is acting compatibly with its international obligations if it does not take into account the immunity accorded to a person accused of a crime).

153. *See* Bassiouni, *supra* note 93, at 86 (discussing Article 98 as it affects Article 27); *see also* Counter-Memorial of the Kingdom of Belgium, *supra* note 8, 2001 I.C.J. paras. 3.5.33-3.5.35 (stating Article 98 does not limit the applicability of Article 27 in cases only involving nationals of Party-States).

154. *See* Bassiouni, *supra* note 93, at 86 (quoting Article 98 of the ICC Statute).

155. *See* Bruce Broomhall, *The International Criminal Court: A Checklist for National Implementation*, *in* ICC RATIFICATION AND NATIONAL IMPLEMENTING LEGISLATION 113, 136 (Nouvelles Etudes Pénales v. 13 quater, 1999) (arguing that Article 27 show's the Statutes intention to hold persons acting in official capacity criminally liable despite national immunities).

156. *See* Prost & Schlunck, *supra* note 150, at 1132-33 (explaining that if the court is unaware that a waiver was needed the state can inform the Court and then the Court will have discretion whether or not to obtain the waiver).

157. *See* Triffterer, *supra* note 143, at 512 (discussing how immunities or other

may be foregone altogether, as Article 98 of the Rome Statute bars the Court from demanding the surrender of a diplomat.[158]

Aside from the near universality of membership, another significant factor differentiates the ICC from the ad hoc tribunals. Unlike the U.N., where states cede power to the Security Council and agree to be bound by its decision, there is no such body of the ICC that can waive immunities.[159] Rather, the states consenting to the ICC agreed to waive immunities specifically.[160] This becomes important when determining the issue of immunities before the national courts of states party to the ICC. The ICJ decision does not provide for the elimination of such immunities before the national courts with regard to officials of states party.[161] The question here is whether the waiver of immunity before the ICC can also imply a waiver before national courts.

In its pleadings, the DRC recognized that a state could waive immunity either on a case-by-case basis, or in advance by treaty (as under the ICC Statute).[162] However, national courts implicate different interests than international courts.[163] Thus, the DRC contended that in joining the ICC, states consented only to waive immunity before the international tribunal and not before national courts.[164] There is little in the text of the ICC Statute that one could

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special procedural rules shall not bar the Court from exercising jurisdiction).

158. *See* Wirth, *supra* note 4, at 453-54 (noting under Article 98, the ICC may not issue any requests once it has been established that "a norm exists under international law making it illegal for a state to comply with [such] a request").

159. *See* Michael J. Matheson, *United Nations Governance of Postconflict Societies*, 95 AM. J. INT'L L. 76, 84 (2001) (explaining that U.N. Charter Article 25 obliges U.N. members to accept and carry out the Council's decisions).

160. *See* Morris, *supra* note 48, at 485 (mentioning that state parties waive the immunity of their officials under Article 27 of the Rome Statute).

161. *See id.* at 484 (explaining that the *Yerodia* decision preserved immunities for officials in national courts).

162. *See* Verbatim Record, *supra* note 36 (statement of Mr. D'Argent) (agreeing there is no violation of immunity if the State waives immunity).

163. *Cf.* Morris, *supra* note 48 (arguing that while individual states may possess universal jurisdiction, the legality of delegating such jurisdiction to international courts requires independent justification because of the different interests involved).

164. *See* Verbatim Record, *supra* note 6 (statement of Mr. D'Argent) (summarizing Belgium's counter-argument that its national courts have universal

construe to constitute a waiver of immunities among domestic courts, but at least one scholar contends that the ICC statute waives immunities both before the ICC and in trials before national courts.[165] Moreover, Article 9 of the DRC's Draft Legislation on the Implementation of the International Criminal Court Statute, which provides for domestic trials states, "[t]he immunities or rules of special procedures associated with persons of official capacity, by virtue of internal or international law, do not prevent the judge from exercising his/her competence with regards to the person in question."[166] Along with national trials in which the Security Council waives immunity, the effect of the ICC Statute on immunities before national courts is likely the next big question left unanswered by the decision of the Court. Given the complementary structure of the ICC, such issues are likely to emerge in the not-too-distant future, and it will be interesting to see how the ICC responds to these issues.[167]

CONCLUSION

While the issue upon which the Court ruled on in the *Yerodia* case was quite narrow, this analysis shows the range of issues implicated by its brief and seemingly innocuous *obiter dicta*. The scope of immunity accorded by the Court to acts committed by foreign ministers in their official capacities is quite controversial. The impact of the Court's decision in this case will extend beyond the immediate dispute over Mr. Yerodia, despite Article 59 of the ICJ Statute.[168]

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jurisdiction when states waive immunities).

165. *See* Wirth, *supra* note 4, at 452 (arguing under Article 27 state parties to the Statute must not respect any immunities for nationals of other state parties when complying with a request from the ICC for the arrest or surrender of said national). States also oblige themselves not to establish any new immunities. *Id.*

166. DRC Draft Statute on ICC (English translation obtained from Lawyers Committee for Human Rights) (Oct. 2002), *available at* http://www.humanrightsfirst.org/international_justice/icc/implementation/DRC/DRC%201st%20govt%20DRAFT%20LEGISLATION-ENGL.pdf (last visited Oct. 18, 2004).

167. *See* Rome Statute, *supra* note 142, art. 119 (providing disputes about the interpretation of the statute should be settled by negotiations or referral to the Assembly of States Parties). In order for this to occur the Assembly of States Parties must have the ability to refer such a dispute to the ICJ. *Id.*

168. *See* SHAHABUDDEEN, *supra* note 52, at 68 (explaining the precedential effect of such decisions).

Notwithstanding its limited jurisdiction, the prestige of the ICJ, both as the supreme judicial body of the United Nations, and as a collection of learned experts in international law, means that the Court's judgments are not only an "indirect source" for its own decisions; they also shape the development of international law.[169] While the opinion of the Court will undoubtedly influence current views of this matter, it will likely not be the last word on the issue. In the field of international criminal law, the decisions of the ICJ compete with those of two more specialized ad hoc tribunals and will soon also compete with the decisions of the ICC, all of which will have to incorporate *Yerodia* into their jurisprudence. Not only are these other tribunals not bound by the decisions of the ICJ, but they have also demonstrated different preferences in reconciling the competing demands of international justice and state sovereignty.[170] The issue in this case should not be viewed as a narrow procedural issue, but as the International Court of Justice offering its view of the principles underlying the international community and continuing an old debate. Given the recent explosion in the development of international criminal law, the ICJ's decided emphasis on protecting the sovereign function of states is quite understandable. It would be unfortunate, however, if such a stance were to undo established principles of individual criminal responsibility.

169. *See id.* at 67-96 (discussing the influence of the Court's decisions).

170. *See* Cassese, *supra* note 9, at 874 (discussing the challenge of the Court in balancing state and international community interests).