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Universal jurisdiction and the International Court of Justice: a comment on the *Congo* cases*

Summary

Universal jurisdiction relates to unprecedented developments which occurred in international law over the last decades, especially since the creation of the United Nations. Universal jurisdiction is linked with the emergence of international human rights law and criminal law and unfortunately conflicts with traditional international law principles such as equality among states and state sovereignty. International lawyers gave it renewed attention in the aftermath of the *Pinochet* case. However, the International Court of Justice was still to pronounce on its legality. The *DRC* case provided the first test but as some uncertainty remained, Africa in the *Congo* case returned to the World Court to help it dispose of the matter, making yet another contribution to the development of international law. The *Congo* case is still pending. This article discusses universal jurisdiction and sovereign immunity briefly. Against the backdrop of the *DRC* and the *Congo* cases, the author reflects on the prospects for universal jurisdiction. He contends that the ICJ will remain primarily a court for states and finally urges that the combat that culminated in the establishment of the International Criminal Court should continue to mark a new era for human and peoples' rights in international law in this new century.

Universele jurisdiksie en die Internasionale Geregshof: 'n Kommentaar oor die *Kongo*-uitsprake

Universele jurisdiksie het betrekking op sekere ontwikkelinge wat in die afgelope dekades, veral na die totstandkoming van die Verenigde Nasies, plaasgevind het en waarvoor geen presedente bestaan nie. Regslui in die volkereg het hernieude aandag daaraan gegee as gevolg van die *Pinochet*-saak. Die *DRK*-saak het die eerste toets voorsien maar aangesien 'n mate van onsekerheid steeds bestaan het, het Afrika in die *Kongo*-saak weereens die Wêreldhof genader om te help met die afhandeling van die aangeleentheid. In die proses is 'n verdere bydrae tot die ontwikkeling van die volkereg gelewer. Die *Kongo*-saak is egter steeds hangende. In hierdie artikel word universele jurisdiksie en soewereine immuniteit kortliks bespreek. Teen die agtergrond van die *DRK*- en die *Kongo*-saak besin die outeur oor die vooruitsigte vir universele jurisdiksie. Hy voer aan dat die IGH primêr 'n hof vir state sal bly en argumenteer ten slotte dat die stryd wat die instelling van die Internasionale Strafhof tot gevolg gehad het, moet voortgaan om 'n nuwe era vir menseregte en die internasionale regte van volkere in die volkereg in hierdie eeu in te lui.

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1. Introduction

Since the *Pinochet* case,[1] where it came into conflict with sovereign or state immunity, there have been numerous debates about universal jurisdiction, its grounds and its legality in international law.

This article deals with the justiciability and challenges to universal jurisdiction before the International Court of Justice (ICJ) in two recent cases, namely *Democratic Republic of Congo v Belgium*[2] and *Republic of Congo v France*.[3] It ends with a brief conclusion that reflects on the prospects for universal jurisdiction. It revolves around the thesis that despite progress that has been achieved in the promotion and protection of human rights with peoples and individuals being taken more and more seriously, international law remains predominantly the law of independent states, which remain its principal subjects.

2. Sovereign immunity and universal jurisdiction

The doctrines of sovereign immunity and jurisdiction can be seen as the cornerstones of international law.

2.1 Sovereign immunity

A great deal has been written about the doctrine of immunity.[4] Immunity entitles a person or an organ and the acts posed by them or their properties not to be subjected to the jurisdiction of any judicial authority of their own state, to the jurisdiction of a foreign state or to an international authority. It may be absolute, unqualified, or restrictive. In international law, sovereign immunity covers a state's organs or representatives (immunity *ratione personae*), their acts (immunity *ratione materiae*) or its properties and protects it against the jurisdiction of other states. In the *Schooner Exchange* case, Chief Justice Marshall justified the doctrine of state immunity on the basis of the sovereign equality, independence and dignity of states.[5] These sentiments are mirrored

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1 *R v Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte* (Amnesty International and others intervening) [1998] 4 All ER 897, [1999] 1 All Er 577 (HL), 1999 2 All Er 97 (HL).

2 *Case concerning the Arrest Warrant of 11 April 2000* (*Democratic Republic of Congo v Belgium*), *Request for the indication of Provisional Measures Order* 8 December 2000; *Case concerning the Arrest Warrant of 11 April 2002* (*Democratic Republic of Congo v Belgium*), 14 February 2002 International Court of Justice General List No 121 (at http: //www.icj-cij.org) (*DRC v Belgium*).

3 *Case Concerning Certain Criminal Proceedings in France* (*Republic of the Congo v France*) *Request for the Indication of Provisional Measures Order*, 17 June 2003 International Court of Justice General List No 129 (at http://www.icj-cij.org) (*Congo v France*).

4 Labuschagne 2001:180-191; Dugard 2000:180-181; De Wet & Strydom 2000: 20-68.

5 *Schooner Exchange v McFaddon* 1812 11 US 7 Cranch 116; Barrie 2001: 156.

in the maxim *par in parem non habet imperium*, which means that an equal has no authority over an equal. As Judge Marshall put it, one sovereign is in no way amenable to another and can consequently not place herself or her sovereign rights within the jurisdiction of another sovereign.[6] Because all sovereigns are equal none of them can be subjected to the jurisdiction of another without surrendering a fundamental right. In the *Liebowitz* case, Nicholas J held that "[t]he courts of a country will not by their process make a foreign state a party to legal proceedings against its will" and stated that this principle was "founded on grave and weighty considerations of public policy, international law and comity."[7]

South African Courts reaffirmed this principle, defending the sovereign immunity of states through their representatives and even state property such as ships.[8]

Originally the sovereign enjoyed immunity from the jurisdiction of the municipal courts of another state. This immunity was later extended by abstraction to the state and its organs.[9] When neither the sovereign nor her government engaged in trade or commercial activities to any appreciable degree, states were prepared to grant immunity to all the acts of foreign sovereigns and their governments, including their armed forces and state-owned vessels.[10] In this regard, sovereign immunity was traditionally an absolute one. With time, there has been a shift from an absolute or unqualified doctrine of state immunity to a more restrictive one.[11] Following this new approach, absolute sovereign immunity is granted to the person of the incumbent foreign sovereign and her representatives (diplomats, consuls, Minister of Foreign Affairs and other state representatives). As far as the acts of the state or its organs are concerned, a sovereign can claim absolute immunity only for *acta jure imperii* or acts posed by the state as a sovereign or by its organs in their capacity as legal representatives of a sovereign state. These acts cannot be scrutinised or fall under the jurisdiction of another state or its organs.[12] On the other hand, acts of a private law or commercial character or *acta jure gestionis* are no longer covered by immunity.[13]

Dugard explains this change as follows:

> a foreign government which enters into an ordinary commercial transaction with a trader … must honour its obligations like other traders and if it fails to do so, it [should] be subject to the same laws and [is] amenable to the same tribunals as they.[14]

6 Barrie 2001:156.
7 *Liebowitz v Schwartz* 1974 2 SA 661 (T); Dugard 2000:180.
8 Barrie 2001:156-157; Schlemmer 2002:248-255.
9 Dugard 2000:180-181.
10 Dugard 2000:181; Schlemmer 2002:248-255.
11 Barrie 2001:157; Swart 2002:306-307.
12 Barrie 2001:156-158, 160-161.
13 Barrie 2001:158-159, 161-162.
14 Dugard 2000:181.

The restrictive doctrine of state or sovereign immunity has been adopted by a number of states through their legislation[15] and has also been favoured by their courts.[16]

According to Barrie,

> the reason for the general adoption of the restrictive approach to state immunity can be ascribed to the vast expansion of the activities of the modern state in the economic sphere. The absolute doctrine of state immunity whereby states operating as traders occupied a privileged position compared to private traders, became unworkable.[17]

However, what is the distinction between acts *jure imperii* and acts *jure gestionis*?[18] The answer to this question is not a clear-cut one. Despite conceding that there are still areas of uncertainty and complexities, Dugard holds that the nature of the act should be considered and not its purpose.[19] According to him, "[t]he ultimate test, for the majority, is whether the act in question is of its own character a governmental act or an act that a private citizen or company can perform."[20] In the first case, it would be an act *jure imperii* and in the second, an act *jure gestionis*. Crawford disagrees, arguing that classifying acts as commercial or not without reference to their purpose is a delusion.[21] As for Barrie, "[t]he distinction between *actes iure imperii* and *actes iure gestionis* (commercial acts) is at this stage still imprecise."[22] In the author's view, the correct approach seems to be a contextual one that Botha once suggested by reference to a 1993 Canadian decision — *United States v The Public Alliance of Canada*[23] — where the 1985 *Canadian Immunity Act* was interpreted with regard to the purpose of the act, although its nature remained a primary consideration.[24]

According to Dugard:

> The immunity accorded to foreign sovereigns takes two forms: first sovereign immunity, which involves the immunity of a foreign head of

15 *European Convention* of 1972; *United States Foreign Immunities Act* of 1976; *United Kingdom State Immunity Act* of 1978; *South Africa Foreign States Immunities Act* 87of 1981; *Australia Foreign States Immunities Act* 196 of 1985; *Canada Immunity Act* of 1985.

16 *The Phillipine Admiral(Owners) v Wallem Shipping (Hong Kong) Ltd* 1976 1 All ER 78 (PC); *Trendtex Trading Corporation v Central Bank of Nigeria* 1977 1 All ER 881 (CA); *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique* 1980 (2) SA 111 (T); *Kaffraria Property v Government of the Republic of Zambia* 1980 (2) SA 709 (E); Barrie 2001:157-158; Dugard 2000:180-183.

17 Barrie 2001:159.

18 Barrie 2001:157-164.

19 Dugard 2000:185-186.

20 Dugard 2000:186; Barrie 2001:162.

21 Barrie 2001:162-163.

22 Barrie 2001:164.

23 1993 32 ILM 1.

24 Botha 1992/3:154; Barrie 2001:163.

> state, the government of a foreign state, or a department of such a government; secondly, diplomatic and consular immunity, which deals with the immunities and privileges granted to foreign diplomats and consuls.[25]

Arguably, diplomatic and consular immunity is part and parcel of sovereign immunity, to which it is closely related since diplomats and consuls represent a foreign state or government. Diplomats are head-of-state representatives. They are accredited with a foreign sovereign while consuls are appointed by a foreign government — through the Ministry of Foreign Affairs — to represent state commercial interests in another country.

Labuschagne cites with approval Mallory who distinguishes between sovereign immunity, head of state immunity, and diplomatic immunity.[26] The first concerns the state and is broader than the second, which is in turn superior to that of the diplomatic agent representing the state in another state.

State immunity or immunity of state officials is entrenched in a number of international conventions. The core document in this regard is the *Vienna Convention on Diplomatic Relations*.[27] This convention grants heads of state, ministers for foreign affairs, diplomats and other state officials who represent a state abroad diplomatic immunities which prevent foreign courts from arresting, prosecuting or judging them in the course of the exercise of their functions, except in a situation of waiver.[28] As far as the jurisdiction of the Court is concerned, the 1998 *Statute of the International Criminal Court*[29] provides for the “irrelevance of official capacity”.[30] The *Rome Statute* prevents the Court from proceeding 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.[31] This amounts to recognition of immunity despite Schabas’s contention that the *Rome Statute* provides no immunity as such.[32] Yet, the *Rome Statute* is one of the main international instruments that are generally invoked as legal basis for universal jurisdiction. Immunity is an exception to the exercise of jurisdiction.

25 Dugard 2000:180.
26 Labuschagne 2001:182.
27 *Vienna Convention on Diplomatic Relations* 1961 500 UNTS 95.
28 *Vienna Convention on Diplomatic Relations*: Articles 31 and 32.
29 UN Doc A/CONF.183.9 of 17 July 1998 37 ILM 1002. Hereinafter “the Rome Statute”.
30 *Rome Statute*: Article 27.
31 *Rome Statute*: Article 98 (1).
32 Swart 2002:313.

2.2 Universal jurisdiction

A state has jurisdiction over all persons within its territory and over all acts that take place within this territory.[33] Jurisdiction is an important aspect of sovereignty, which empowers a state to exercise the functions of a state — legislative, executive, administrative and judicial — within a particular territory to the exclusion of other states.[34] Sovereign equality of states and prohibition on foreign intervention in matters within the domestic jurisdiction of another state feature among the founding principles of international law both on the universal[35] and the African level.[36]

A state exercises and should exercise its jurisdiction for crimes whether commenced (subjective territoriality) or completed on its territory (objective territory), and whether its nationals are the perpetrators (active nationality) or the victims (passive nationality). A certain link of attachment — territory, nationality, and interest — is therefore necessary if a state has to exercise its criminal jurisdiction.[37] This domestic jurisdiction is restricted to acts committed in the territory or outside the territory under the jurisdiction of a state but whose perpetrators or victims are nationals of such a state. However, jurisdiction may also be universal.

The principle of universal jurisdiction applies to the implementation of international law pertaining to the most heinous crimes under customary international law codified through some international (UN) conventions adopted by almost all the states such as the *Convention on the Prevention and Punishment of the Crime of genocide*.[38] These crimes include war crimes, crimes against humanity, genocide, torture and other inhuman, cruel and degrading treatment. They are considered *crimen contra omnes* and their perpetrators are the enemies of all people. Accordingly, they are punishable by any state on behalf of the international community, "regardless of the status of the offence and the nationalities of the offender and the offended."[39]

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33 Dugard 2000:180.

34 Dugard 2000: 133.

35 *UN Charter* of 1945: Articles 2.1, 4, and 7; *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* GA Res 2625 XXV (1970); *Resolution on the Rights and Duties of States* GA Res 375 (1949); *Declaration on the Granting of Independence to Colonial Countries and Peoples* GA Res 1514 (XV) (1960); *Declaration on the Admissibility of Intervention in Domestic Affairs of States and the Protection of their Independence and Sovereignty* GA Res 2131 (1965); *Resolution on the Definition of Aggression* GA Res 3314 XXIX (1974); *Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations* GA Res 42/22 Annexe 18 Nov 1987 (1988) 27 ILM 21; *Frontier Dispute case (Burkina Faso v Mali)* 1986 ICJ Reports 554: 554; Dugard 2000:116-117.

36 *Charter of the Organisation of African Unity* (OAU) (1963) 2 ILM 766: Articles IIc, and III 1-3; OAU Res AHG 16 (1) (1964); *Constitutive Act of the African Union* (1999): Articles 3 and 4.

37 Dugard 2000:133-142.

38 GA Res 260 (III) 78 UNTS 277.

39 Randall 1988:785-788; Van der Vyver 1999:109-110; Swart 2002:317.

Universal jurisdiction trumps the principle of territoriality and the principle of nationality as well. Any nation, which has custody of the perpetrators, may punish them according to its laws applicable to such offences.[40] The *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,[41] for instance, defines "torture" and requires each State Party to take effective measures to prevent and punish any acts of torture in the territory under its jurisdiction or when the alleged offenders or victims are its nationals.[42] The Convention also entitles each State Party to prosecute those foreigners who committed acts of torture abroad if they are found on the territory under its jurisdiction or to extradite them.[43] This is in line with the international law principle of *aut dedere aut judicare*.

Universal jurisdiction fits well with international criminal tribunals such as the Nuremberg Tribunal,[44] the International Tribunal for Former Yugoslavia (ICTY),[45] and the International Tribunal for Rwanda (ICTR),[46] the *sui generis* UN-established Special Court for Sierra Leone (SCSL),[47] and the International Criminal Court (ICC). The Nuremberg Principles provided that "the fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible government official does not relieve him from responsibility under international law."[48] In the *Milosevic* case the Trial Chamber of the ICTY rejected Milosevic's claims of immunity due to his status as the former President of Yugoslavia.[49] Inspired by the *Pinochet* case, the ICTY relied on its Statute[50] and held that its rejection of Head of State immunity reflected an accepted principle of customary international law.[51] As far as the ICTR is concerned, its Statute provided that the official position of any accused person, whether as Head of State or Government or as a responsible government official, could not relieve such person of criminal responsibility nor mitigate punishment for crimes of genocide,[52] crimes against

40 Van der Vyver 1999:117; Swart 2002:317; *Demjanjuk v Petrovsky* 776 F 2 ed 571 (6th Cir 1985) 582.

41 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 24 ILM 535: Article 1.

42 *Convention Against Torture*: Articles 2, 4, and 5.1.

43 *Convention Against Torture*: Articles 5.2, 7.1 and 8.

44 Swart 2002:313.

45 Security Council (SC) Res 808 of 22 February 1993 authorising the establishment of the International Tribunal for Former Yugoslavia; SC Res 827 of 25 May 1993 establishing The International Tribunal for Former Yugoslavia. Hereinafter "the ICTY".

46 SC Res 955 of 8 November 1994 establishing the International Tribunal for Rwanda. Hereinafter "the ICTR".

47 SC Res 1315 of 14 August 2000 establishing the Special Court for Sierra Leone, hereinafter "the SCSL"; Mangu 2003: 240-241.

48 Swart 2002: 313.

49 Swart 2002: 317.

50 *Statute of the ICTY*: Article 7.

51 Swart 2002: 317.

52 *Statute of the ICTR*: Article 2.

humanity,[53] and violations of Article 3 common to the *Geneva Conventions* and of *Additional Protocol II*.[54]

The Statute of the SCSL allows for the prosecution of any person, despite his or her official position, whether as Head of State or Government or as a responsible government official, who might have threatened the establishment and implementation of the peace process in Sierra Leone.[55] Those who could be prosecuted included foreign leaders such as Liberia's President Charles Taylor who backed the rebels of the Revolutionary United Front. Therefore, the Liberian President could and still can be prosecuted before the SCSL without him invoking immunity as Head of State or former Head of State.[56] The *Rome Statute* provides that "immunities or special procedural rules which 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 person."[57]

The implementation of the principle of universal jurisdiction in any particular state will depend on the constitutional and criminal justice system of that state and particularly on its approach to international law, especially conventional international law, whether this approach is monist or dualist.[58] In monist countries, conventional international law is self-executing or automatically incorporated in domestic law and prevails over national legislation, enabling the courts of law to exercise universal jurisdiction without further ado. In dualist countries, however, universal jurisdiction will be subjected to the transformation of international conventions and their enactment into laws by national legislation.

When the principle of territoriality or nationality is encapsulated in the criminal procedure code, a special statutory exception to that rule is needed in the case of international crimes that qualify for universal jurisdiction.[59] This was done in Belgium in terms of the Law Concerning the Punishment of Grave Breaches of the International *Geneva Conventions of 12 August 1949* and of *Protocols I and II of 8 June 1977* or the *War Crimes Act*.[60] This law was amended on 10 February 1999. The original *War Crimes Act* was renamed *Loi relative à la repression des violations du droit international humanitaire*.[61] The 1999 amendments were largely confined to bringing two additional offences within the *ratione materiae* scope of the law, namely crimes against humanity and genocide. The French Code of Criminal Procedure (CCP) also conferred universal jurisdiction on the French courts with regard to some specified crimes. It provides that, pursuant to certain conventions to which France is

53 *Statute of the ICTR*: Article 3.
54 *Statute of the ICTR*: Article 4.
55 *Statute of the SCSL*: Articles 1.1 and 6.2.
56 Mangu 2003:242-245.
57 *Rome Statute*: Article 27(2).
58 Van der Vyver 1999:116.
59 Van der Vyver 1999:116.
60 Act 16 of 1993.
61 Law Concerning the Prosecution of Violations of International Humanitarian Law.

a party, namely the UN *Convention against Torture and Other Criminal, Inhuman or Degrading Treatment or Punishment* of 10 December 1984, "any person who has committed, outside the territory of the Republic, any of the offences enumerated in those articles, may be prosecuted and tried by the French courts if that person is present in France."[62] The *Convention on the Prevention and Punishment of the Crime of Genocide*[63] also punishes the authors of acts of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide "whether they are constitutionally responsible rulers, public officials or private individuals."

The exercise of universal jurisdiction by a state may lead to a dispute with another state when the alleged criminal is a national of the latter and especially when he or she enjoys immunity or is a government official. This occurred in the *DRC* and the *Congo* cases which were brought before the ICJ. The exercise of universal jurisdiction by the Belgian courts and the subsequent conviction of the "Four of Butare" — two nuns and two civilians prosecuted for their participation in genocide that was perpetrated in Rwanda in 1994 — did not affect the diplomatic relations between Belgium and Rwanda negatively. It rather contributed to sustaining them. The government of Rwanda welcomed the condemnation of those who allied with the previous government. The same would have applied had Belgium issued international warrants for arrest of Mobutu's former generals or Congolese rebels. The government of President Kabila would have lauded and congratulated its Belgian counterpart. There is little doubt that the government of Sassou Nguesso in the Republic of Congo would have observed the same attitude and applauded the French judicial authorities had they indicted former President Pascal Lissouba or his lieutenants. However, when the two European countries went so far as to investigate and issue judicial warrants against Yerodia — even though he was no longer DRC Minister for Foreign Affairs — and President Sassou Nguesso himself and some of his cronies, the Rubicon was crossed. DRC and the Republic of the Congo had no choice but to institute proceedings before the ICJ against Belgium and France respectively.

3. *DRC* and *Congo* cases

Africa played an important role in the evolution of international law.[64] The *Yerodia* or *DRC* case served to "clarify a crucial point of State immunity in current international law".[65] The ICJ judgment in the *DRC* case is considered "the Court's first authoritative statement of the law of state immunity".[66] According to Du Plessis and Bosch, "[t]he decision of the International Court of Justice in the *Arrest Warrant* case can be seen as an authoritative statement

62 CCP: Articles 689-1 and 689-2.
63 GA Res 260 (III); 78 UNTS 277: Articles III and IV.
64 Bula-Bula 2004:172.
65 Bula-Bula 2004:88, 114; Xiadong 2002:242.
66 Xiadong 2002:242.

of sovereign immunity and its application to officials holding the portfolio of minister of foreign affairs".[67] In Bula-Bula's words, the ICJ judgment is an important contribution to the codification and "progressive" development of international law.[68] The *Yerodia* case was hailed as "a case of great substantive interest and importance",[69] "une véritable avant-première".[70] The judgment made history as one of the landmark decisions the ICJ made since its creation in the 1940s, "*un arrêt à rapprocher à d'autres grandes décisions de la Cour qui, par leur apport à la clarification du droit coutumier, ont durablement marqué l'évolution du droit international*".[71]

Comments on the judgment already abound among international lawyers.[72] While scholars such as the DRC international lawyer Bula-Bula applauded the ICJ for contributing to the progressive development of international law by "stopping the course of retrograde ideas" (those invoking exceptions to immunities and inviolability!),[73] some others rather found the ICJ judgment "an unfortunate ruling", an "unfortunate reversal of a trend towards greater accountability of individuals, whatever their status", a "step backward", "a setback", a "missed rendezvous" with history, a "surprising judgment", a "disappointing and superficial reading" of recent developments, a "lost opportunity" to contribute further to the development of international law, a "terrible blow" for public international law in general and international human rights and criminal law in particular, or a regrettable decision taking humanity back to the old age of international law.[74] With the *Congo* case still pending before the ICJ, Africa is expected to make a further contribution to the development of international law, particularly on the critical and related issues of universal jurisdiction and immunities of state officials from the jurisdiction of foreign domestic courts.

3.1 Similarities and differences

In both cases, the applicants — Democratic Republic of Congo and Republic of Congo — are two African Republics whose capital cities — Kinshasa and Brazzaville — are said to be the closest in the world. The two countries are located in central Africa and bear almost the same name. The respondents — Belgium and France — are European countries that colonised the DRC and Congo respectively.

67 Du Plessis and Bosch 2003:261.
68 Bula-Bula 2004:70, 72, 80, 81-82, 92, 104, 126, 133, 176-177; Bedjaoui 2004:XII.
69 Jennings 2002:99.
70 Bula-Bula 2004:172.
71 Quéneudec 2002.
72 Bianchi 2004:63-81; Cassese 2002:845-853; Verhoeven 2004; 2002:723; Sassoli 2002:791-818; Orakhelashvili 2002:677-684; Schreuer and Wittich 2002:117-120; Jennings 2002:99-103; Stern 2002:104-116.
73 Bula-Bula 2004:145, 176-177.
74 Du Plessis and Bosch 2003:246-262; Swart 2002:305-318; Hopkins 2002:256-263; Erasmus and Kemp 2002:634; Bianchi 2004:82-84.

Senior State officials of the applicants were charged for crimes against humanity by the judicial authorities of the respondents that had enacted laws conferring universal jurisdiction on their domestic courts and making no exception for diplomatic immunity of the alleged criminals. The applicants applied to the ICJ to obtain the annulment of the proceedings by the judicial authorities of the respondents for violation of international law principles, namely the principle of diplomatic immunity from the domestic jurisdiction of another state. Both the DRC and Congo first applied to the ICJ for the indication of provisional measures before any judgment on the merits of their respective cases.[75] Finally, the proceedings against Yerodia and the Congolese officials were based on complaints by some victims who managed to flee from the DRC or Congo to take refuge in Belgium and France respectively and enjoyed great support from human rights activists and organisations.

As far as the respondents are concerned, the difference between the two cases lies in the fact that unlike the Belgian law which provided for a much broader and unqualified universal jurisdiction, the universal jurisdiction of the French courts was qualified in the sense that the alleged criminals charged with torture or crimes against humanity could be prosecuted only if they were found on French territory. An attachment in the form of territory was required in France, not in Belgium. Secondly, unlike the Belgian investigation that concerned a former minister of foreign affairs, the French one went as far as involving the incumbent Congolese Head of State, his Minister of Interior, the Inspector-General of the Congolese Armed Forces, and the commander of the presidential guard who do not enjoy diplomatic immunities under customary international law.

3.2 *DRC* case: facts, requests, legal issues and judgments

On 11 April 2000, an investigating judge of the Brussels *Tribunal de première instance* issued an international arrest warrant *in absentia* against Mr. Yerodia Ndombasi, the then DRC Minister of Foreign Affairs. In the warrant, Yerodia was charged, as perpetrator or co-perpetrator, with offences constituting grave breaches of the *Geneva Conventions* of 1949 and of the *Additional Protocols* thereto, and with crimes against humanity for acts he allegedly committed in 1998 when he was not yet a minister. These acts included various hate speeches and remarks inciting the population to attack and kill Tutsi residents in Kinshasa. They resulted in several hundred deaths, the internment of Tutsis, summary executions, arbitrary arrests and unfair trials. A number of victims fled to Belgium.

Following upon their complaints, a criminal investigation was initiated in 1998, which led to the arrest warrant of 11 April 2000. This arrest warrant was transmitted to the International Police Organisation (Interpol) and circulated internationally through Interpol. However, it was not enforced when Yerodia visited Belgium on an official visit in June 2000. Belgium also did not request Yerodia's extradition as long as he was in office. In fact, the request for an Interpol Red Notice was only made in 2001, after Yerodia had ceased to be a minister.

75 *DRC v Belgium* 2000; *Congo v France* 2003.

The crimes with which Yerodia was charged in the warrant were punishable in Belgium under the *War Crimes Act* of 16 June 1993 as amended on 10 February 1999. Article 5 of the Belgian law dismissed the principle of immunity attached to the official capacity of the accused person while Article 7 provided for universal jurisdiction over serious international crimes such as crimes against humanity, war crimes or genocide.

The DRC contested the validity of the Belgian legislation, especially its exclusion of the immunity principle and the competence of Belgium to confer on its courts an unqualified universal jurisdiction. Article 5 was said to be "manifestly in breach of international law in so far as it claims to derogate from diplomatic immunity, as is the arrest warrant issued pursuant thereto against the Minister of Foreign Affairs of a sovereign state."[76]

Article 7 was also considered to be in breach of international law by providing for a universal jurisdiction "without even making such applicability and jurisdiction conditional on the presence of the accused on Belgian territory."[77] By its application filed in the Registry of the ICJ on 17 October 2000, the DRC initially instituted proceedings against Belgium for two reasons based on a violation of international law principles, namely the principles of respect for sovereign equality, independence of states and non-interference in the domestic affairs of another state entrenched in the UN Charter as well as the customary international law principle of diplomatic immunities codified by the *Vienna Convention* of 1961.

The DRC accused Belgium of

> violation of the principle that a state may not exercise its authority on the territory of another State and of the principle of sovereign equality among all Members of the Organisation of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations.[78]

Belgium was also accused of "violation of the diplomatic immunity of the Minister of Foreign Affairs of a sovereign State, as recognized by the jurisprudence of the Court and following from Article 41, paragraph 2, of the *Vienna Convention* of 18 April 1961 on Diplomatic Relations."[79]

The DRC requested the ICJ to declare Belgium's warrant for the arrest of Yerodia unlawful and invalid and to order Belgium to annul it.[80] Given that the DRC had dropped its challenge to the legality of Belgium's claim to the exercise of universal jurisdiction on which the arrest warrant was based, the ICJ only assumed that Belgium had jurisdiction under international law to issue and circulate the warrant. The crisp question therefore remained whether the latter violated Yerodia's immunity.[81] In terms of Article 41 of the Statute

76 *DRC v Belgium* 2000: paragraph 4.
77 *DRC v Belgium* 2000: paragraph 4.
78 *DRC v Belgium* 2000: paragraph 1.
79 *DRC v Belgium* 2000: paragraph 1.
80 Erasmus and Kemp 2002: 69.
81 Hopkins 2002: 260.

of the ICJ, the DRC applied for provisional measures pending the outcome of the investigation including "an order for the immediate discharge of the arrest warrant."

During the proceedings, the DRC argued that "the disputed arrest warrant effectively bars the Minister of Foreign Affairs of the Democratic Republic of Congo from leaving that State in order to go to any other State which his duties require him to visit and, hence, from carrying out his duties."[82] By prohibiting the DRC Minister of Foreign Affairs from travelling abroad and therefore fulfilling his official duties, the Belgian arrest warrant caused irreparable prejudice to the DRC. The DRC relied on the jurisprudence of the ICJ, especially on the precedent constituted by the Order of 15 December 1979[83] in which the Court held that the violation of diplomatic immunity created a situation requiring the indication of a provisional measure.[84]

The DRC contended that "[t]he two essential conditions for the indication of a provisional measure according to the jurisprudence of the Court, namely urgency and existence of an irreparable prejudice" were clearly satisfied in this case.[85]

The applicant therefore specified in its request that it sought "an order for the immediate discharge of the disputed arrest warrant."[86] On the other hand, Belgium held that its law of 1993 and its 1999 amendment adapted the Belgian domestic law to its international obligations. It stated that Article 7 enshrined the universal jurisdiction of the Belgian courts and was entirely consistent with the second paragraph of the Article common to the four 1949 *Geneva Conventions*.[87]

Belgium claimed that there was no immunity under international law in respect of serious crimes, such as crimes against humanity. Nor was there any immunity for acts committed in individual capacity since as the Kingdom argued, the commission of a crime against humanity can never be part of one's official functions as a minister of a sovereign state.[88] Belgium also justified the denial of immunity as a bar to jurisdiction on the basis of the Statutes of the Nuremberg and Tokyo Tribunals, the *Convention on the Prevention and Punishment of the Crime of Genocide*, the Statutes of International Criminal Tribunals and other international instruments.[89]

In the judgment it handed down on 8 December 2000 the ICJ first recalled:

> the power of the Court to indicate provisional measures under Article 41 of the Statute of the ICJ has as its object to preserve rights of the

82 *DRC v Belgium* 2000: paragraph 9.
83 *US Diplomatic and Consular Staff in Tehran (US v Iran)* (Interim Measures) 1979 ICJ Reports 7: paragraphs 44-47.
84 *DRC v Belgium* 2000: paragraph 20.
85 *DRC v Belgium* 2000: paragraph 10.
86 *DRC v Belgium* 2000: paragraphs 11 and 59.
87 *DRC v Belgium* 2000: paragraph 24.
88 Hopkins 2002:259-260.
89 Hopkins 2002:259-260.

> parties pending the decision of the Court, and presupposes that irreparable prejudice should not be caused to rights which are the subject of the dispute in judicial proceedings … and such measures are justified solely if there is urgency.[90]

The ICJ held that it was not established that irreparable prejudice might be caused in the immediate future to the Congo's rights and the degree of urgency was not such that those rights needed to be protected by the indication of provisional measures.[91] Accordingly, by fifteen votes to two, the ICJ found that "the circumstances, as they now present themselves to the Court, are not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures."[92] The Court therefore rejected the DRC's request for the indication of provisional measures. It also unanimously rejected the request of the Kingdom of Belgium that the case be removed from the List.[93]

Since the Order on the indication of provisional measures in no way prejudices the question of the jurisdiction of the Court to deal with the merits of a case or any questions relating to the admissibility of the application or to the merits themselves,[94] the ICJ went on to deal with the merits and this time around the DRC got what it failed to obtain as provisional measures. In the judgment it delivered on 14 February 2000, the ICJ by thirteen votes to three held that Belgium failed to respect the immunity from criminal jurisdiction, which the incumbent Minister of Foreign Affairs enjoys under international law.[95] The Court ordered Belgium to annul its arrest warrant — judged inconsistent with international law for violation of diplomatic immunity due to ministers of foreign affairs, keeping a blind eye on the crimes against humanity allegedly committed by Mr. Yerodia.

3.3 *Congo* case: facts, requests, legal issues and judgment

In April and May 1999, some 350 hundred Congolese nationals fled the civil war raging in Brazzaville since 1998 between the forces of the democratically elected civilian President Pascal Lissouba and those of his predecessor General Denis Sassou Nguesso. They then crossed the Congo River to find refuge in Kinshasa in the neighbouring DRC. General Sassou Nguesso eventually managed to return to power with the support of his "Cobra" militia. Following an agreement between the new Sassou Nguesso government, the DRC government of Laurent-Désiré Kabila, and the UN High Commissioner for Refugees (HCR), those Congolese nationals who had fled to Kinshasa were to return to Brazzaville via the Ngobila Beach on the Congo River.

On their return in Brazzaville on 5 and 14 May 1999, the Congolese secret services arrested and tortured them. Many went missing.

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90 *DRC v Belgium* 2000: paragraph 69.
91 *DRC v Belgium* 2000: paragraph 72.
92 *DRC v Belgium* 2000: paragraph 78.
93 *DRC v Belgium* 2000: paragraph 78.
94 *DRC v Belgium* 2000: paragraph 77.
95 Swart 2002:318.

The International Federation of Human Rights (FIDH), the Congolese Observatory for Human Rights (OCDH), the Human Rights League (LDH), and two presumed survivors who had found refuge in France instituted proceedings before the *Tribunal de grande instance* of Paris on 5 December 2001 against President Denis Sassou Nguesso, General Pierre Oba, his Minister of Interior, Public Safety and Territorial Administration, General Norbert Dabira, the Inspector-General of the Congolese Armed Forces, and General Blaise Adoua, commander of the presidential guard who led the Cobra militia since June 1997. They were accused of torture and crimes against humanity.[96] In the meantime, one of the suspects, namely General Norbert Dabira, happened to be in France visiting his residence in Paris under the jurisdiction of the *Tribunal de grande instance* of the Meaux.

On 7 December 2001 the *Procureur de la République* of the *Tribunal de grande instance* of Paris transmitted the complaint to his colleague of the *Tribunal de grande instance* of the Meaux who was territorially competent in terms of Articles 689-1 and 689-2 of the French Code of Criminal Procedure. The *Procureur de la République* of the Meaux ordered a preliminary enquiry. On 23 January 2002 he issued a *réquisitoire* (application for a judicial investigation of the alleged offences by a judge) requesting investigation against a non-identified person held responsible for crimes against humanity and torture. The investigating judge of the Meaux initiated an investigation on 1 February 2002.

As part of this investigation, General Dabira was located in France, summoned and interrogated. His testimony was first taken on 23 May 2002 by judicial police officers who had taken him into custody, and then on 8 July 2002 by the investigating judge as a témoin assisté (legally represented witness). In French criminal procedure, a *témoin assisté* is more than a mere witness. To some extent he or she is a suspect and enjoys certain procedural rights (assistance of counsel, access to the case file) not conferred on ordinary witnesses.[97] Shortly after, the *Procureur de la République* in Brazzaville opened an investigation on the same facts. On 10 September 2002 the Congolese government announced that it would not authorise General Norbert Dabira to appear before the French judge of the *Tribunal de grande instance* of the Meaux for investigation on the same affair already pending before the *Procureur de la République* in Brazzaville where the criminal acts had been allegedly committed. The Congolese government held that the Brazzaville *Procureur de la République* was the only competent authority *ratione loci*. It announced that it would institute proceedings against France before the ICJ. On 11 September 2002 General Dabira was nevertheless summoned to be *mis en examen* (formally placed under judicial examination), but had by then returned to the Congo. He informed the French authorities that, on instructions from his superiors, he considered that he should not comply with the summons.[98] On 16 September 2002 the instructing judge of the *Tribunal de grande instance* of the Meaux issued a *mandat d'amener* (warrant of immediate appearance) against General Dabira.[99]

96 *Congo v France* 2003: paragraph 10.
97 *Congo v France* 2003: paragraph 14.
98 *Congo v France* 2003: paragraph 15.
99 *Congo v France* 2003: paragraph 15.

The investigating judge also issued a *commission rogatoire* (warrant) to judicial police officers instructing them to take testimony from President Sassou Nguesso during his state visit to France from 18 to 25 September 2002. Although for diplomatic reasons no *commission rogatoire* was actually issued and the Congo admitted that President Sassou Nguesso was never "*mis en examen*, nor called as a *témoin assisté*", France acknowledged before the ICJ that the investigating judge sought to obtain evidence from him under Article 656 of the Code of Criminal Procedure, applicable where evidence is sought through the diplomatic channel from a "representative of a foreign power".[100]

On 25 November 2002 President Denis Sassou Nguesso conferred full powers on Jacques Obia, the Congolese Ambassador to Belgium, Luxemburg and The Netherlands, in order to bring the dispute against France before the ICJ. The application was filed on 9 December 2002. In the same application, Congo appointed Professor Jean-Yves de Cara as its judge *ad hoc* and also applied for the indication of provisional measures in terms of Article 41, paragraph 1 of the Statute of the ICJ.[101]

The request for indication of provisional measures was based on the grounds that the investigation by the French judicial authorities affected the honour and consideration due to the Congolese Head of State, his Minister of Interior, the Inspector-General of the Congolese Armed Forces and thereby the international credibility of the Congolese Republic. The application was filed in the Registry of the ICJ on 9 December 2002. It was based on almost the same grounds and raised the same legal issues as the DRC application.

The Republic of Congo instituted proceedings against its former colonial power France first for

> violation of the principle that a state may not, in breach of the principle of sovereign equality among all members of the United nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations, exercise its authority on the territory of another state, by unilaterally attributing to itself universal jurisdiction in criminal matters and by arrogating to itself the power to prosecute and try the Minister of the Interior of a foreign State for crimes allegedly committed in connection with the exercise of his powers for the maintenance of public order in this country.[102]

Congo also held France responsible for "violation of the criminal immunity of a foreign Head of State, an international customary rule recognized by the jurisprudence of the Court."[103]

Like the DRC against Belgium earlier, the Republic of Congo requested the Court

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100 *Congo v France* 2003: paragraph 16.
101 *Congo v France* 2003: paragraph 18.
102 *Congo v France* 2003: paragraph 1.
103 *Congo v France* 2003: paragraphs 1 and 23.

> to declare that the French Republic shall cause to be annulled the measures of investigation and prosecution by the *Procureur de la République* of the Paris *Tribunal de grande instance*, the *Procureur de la République* of the Meaux *Tribunal de grande instance*, and the investigating judges of those courts.[104]

As in the *DRC* case earlier, the Congo application also contained a "Request for the indication of a provisional measure" whereby the Congo sought "an order for the immediate suspension of the proceedings being conducted by the investigating judge of the Meaux *Tribunal de grande instance*."[105] In almost the same terms as the DRC, the Republic of Congo submitted that "the two essential preconditions for the indication of a provisional measure, according to the Court's jurisprudence, namely urgency and irreparable prejudice," were manifestly satisfied in the case.[106] According to the applicant, there was not only urgency but also irreparable prejudice.

The Congo argued:

> the proceedings in question are perturbing the international relations of the Republic of Congo as a result of the publicity accorded, in flagrant breach of French law governing the secrecy of criminal investigations, to the actions of the investigating judge, which impugn on the honour and reputation of the Head of State, of the Minister of Interior and of the Inspector-General of the Armed Forces and, in consequence, the international standing of the Congo. Furthermore, those proceedings are damaging to the traditional links of Franco-Congolese friendship. If these injurious proceedings were to continue, that damage would become irreparable.[107]

The Congo further alleged that this prejudice, in the circumstances of the case, could be regarded such as to 'irreparably' affect the rights asserted in the application.[108] The ICJ reiterated that the indication of a provisional measure was only directed at the preservation of the rights, especially the right to require a state to abstain from exercising universal jurisdiction in a manner contrary to international law.[109] The ICJ then moved on to deal with the two conditions required to granting provisional measures, namely urgency and the risk of irreparable prejudice.

The ICJ pointed out that the aim of granting provisional measures was to prevent the aggravation or extension of the dispute whenever the Court considers that circumstances so require.[110]

In its order of 17 June 2003 the Court found by fourteen votes to one that the two requirements of urgency and irreparable prejudice to the rights of

104 *Congo v France* 2003: paragraphs 2 and 23.
105 *Congo v France* 2003: paragraphs 2, 4, 18, and 24.
106 *Congo v France* 2003: paragraph 19.
107 *Congo v France* 2003: paragraphs 26 and 27.
108 *Congo v France* 2003: paragraph 29.
109 *Congo v France* 2003: paragraph 24.
110 *Congo v France* 2003: paragraph 39.

the parties were not met and the circumstances as they presented were not such as to require the exercise of its power under Article 41 of its Statute to indicate provisional measures.[111] The ICJ found that no evidence had been placed before it of any serious prejudice or threat of irreparable prejudice to the honour of the highest authorities of the Congo, to internal peace in the country and its international standing and to the Franco-Congolese friendship.[112]

According to the ICJ there was no risk of irreparable prejudice to the right of the Congo to respect by France of the immunities of President Sassou Nguesso as Head of State. Nor did any such risk exist with regard to General Oba, the Congolese Minister of Interior for whom Congo also claimed immunity in its Application to the ICJ.[113] The latter then dismissed the application for indication of provisional measures made by the Congo and indicated that it would nevertheless proceed with the matter as to its merits and any questions relating to the admissibility of the application or to the merits themselves.[114]

4. Implications of the ICJ judgment in the *DRC* case for the upcoming final decision in the *Congo* case

Fox contended that civilisation had finally shifted from a "State-centred order of things" and brought humanity to the recognition that human beings are more important than the state.[115] On the other hand, Schabas held that a head of state immunity "was laid to rest" at Nuremberg.[116] Unfortunately, by upholding the sovereign immunity at the expense of human and peoples' rights, particularly in the *DRC* case, the ICJ taught us that it was too early to celebrate. This should not be surprising with international law being primarily the law of independent states, especially the most powerful of them.

The status of *ius cogens* norms may be a cogent reason to restrict the immunity of state officials, but erasing it as Swart suggested,[117] seems as utopian as the idea that we might be moving towards a society without States that Marx anticipated.

Expectations might have been too high. Contrary to those like Labuschagne who heralded the downfall of sovereign immunity *vis-à-vis* universal jurisdiction for massive human rights violations,[118] the doctrine of head of state immunity is not in the process of being phased out of international law. The ICJ might have missed a golden opportunity to clarify and lay down principles, but the judgment in the *DRC* case, which may inspire the one in the still pending *Congo* case makes it clear that the time has not yet come for universal jurisdiction to prevail over sovereign immunity in international law.

111 *Congo v France* 2003: paragraphs 29, 30, 35, 36, 38, 39, and 41.
112 *Congo v France* 2003: paragraph 29.
113 *Congo v France* 2003: paragraph 35.
114 *Congo v France* 2003: paragraph 40.
115 Swart 2002:305.
116 Swart 2002:313.
117 Swart 2002:318.
118 Labuschagne 2001:190.

A conservative ICJ is very likely to order France to annul its proceedings against the Congolese authorities and once more champion and enforce state immunity at the expense of human and peoples' rights.

5. Conclusion

Israel was the first country to strongly level criticism at Belgium after a Belgian judge acting under the law of universal jurisdiction indicted Prime Minister Ariel Sharon for crimes against humanity during the 1982 massacres of Palestinians in the refugee camps in Sabra and Chatilla in Lebanon when Sharon was the Minister of Defence of the Israeli state.

Pressure became unbearable when the US, a key Israeli ally, joined in the fray after a Belgian judge indicted General Tommy Franks for crimes against humanity during the joint American and British war of aggression on Iraq. The judge curiously "beatified" George Bush and Tony Blair who decided to wage war against this country in violation of all international law norms and the civilisation values for which the US and UK have always pretended to stand for. Arguably, Belgium is too small a country to resist pressure from the most powerful members of the international community, especially from the US, the only remaining world superpower.

The ICJ's judgment in the *DRC* case had such a disastrous impact that Belgium had to amend and finally repeal its progressive and audacious law of universal jurisdiction, causing celebration among Sharon, Franks, Bush, Blair and the like and disappointing the Palestinians, Iraqi and victims of human rights violations worldwide. In light of the *DRC* decision and under joint American and Israeli pressure, the Belgian government conceded through its Ministry of Justice that they believed a continuation of the human rights probe against Sharon was impossible.[119]

On 26 June 2002 a Belgian Appeals Court decided that Belgium's law on universal jurisdiction was valid but not applicable because Sharon had no link to Belgium.[120] Yet, in the *DRC* case, the Congolese Minister of Foreign Affairs was not in Belgium when a warrant of arrest was issued against him. His only link to Belgium seems to be that Yerodia was a minister of a former Belgian colony.

The Belgian law was amended in April and June before being repealed in July 2003. Belgian Prime Minister Guy Verhofstadt announced in a press conference that a law of limited scope to be enacted by Parliament in August 2003 would replace it. According to the new law, the exercise of jurisdiction by Belgian courts would be subjected to two conditions, namely respect of sovereign immunity of other states and immunities of their officials and attachment of the victim to Belgium. Verhofstadt elaborated on the second condition, emphasising that the victim should be a Belgian national or a resident who had spent at least three years on the Belgian territory. Pressure on the Belgian government

119 Swart 2002:316.
120 Swart 2002:316.

was so high that Belgium reverted back to a universal jurisdiction even more “restricted” than the one that is provided for those responsible for acts of torture under the French Criminal Procedure Code. Finally, as the Belgian Act of 1993 was laid to rest, the results obtained were very disappointing and even opposed to its purpose.

While Yerodia, Sharon, Franks, and the like managed to escape jurisdiction in the name of sovereign immunity, the only “victims” were the two unfortunate Four of Butare who found refuge (or rather prison) in Belgium and ended up being convicted by a Belgian court for their participation in genocide committed in Rwanda in 1994. The French law, which is modest compared to the now defunct Belgian law of universal jurisdiction, is likely to survive.

The French Republic is one of the major European powers and one of the five permanent members of the Security Council. International pressure from other world leading forces and even from the US will hardly force France to change its already restrictive legislation on “universal” legislation. The most determining pressure can only emanate from the ICJ, which will be tempted to recycle its judgment in the DRC case, helping the violators of human rights to once more escape the jurisdiction of domestic courts of foreign states in the name of sovereign immunity.

The ICJ in the DRC case delivered a terrible and unforgivable blow to the theoreticians of “State Collapse”,[121] “State Failure”[122] and “Statelessness”[123] in Africa. The DRC, which is considered a paradigmatic case of state collapse, state failure, or statelessness,[124] won the case against its former coloniser. On the other hand, the ICJ judgment should be interpreted as a strong invitation to *Reposat In Pace* (RIP) addressed to Marx and radical Marxists who indulged in predictions such as “State Withering” and “Great Event” following the establishment of an egalitarian “Communist society”. These projections have so far proved to be chimerical or utopian. The whistle was blown too early and as the ICJ warned authoritatively, the celebrations were only premature.

Does sovereign immunity now weigh heavier than universal jurisdiction where a crime against humanity has been committed, as Swart suggested?[125] Is the doctrine of Head of State, State and diplomatic immunities in a rapid process of being phased out in international law, as Labuschagne contended?[126] Is State or national sovereignty now discarded in favour of the human rights notions of individual freedom and human dignity, as some scholars argued?[127] Can international law help “restraining the barbarians”, as many human rights

121 Zartman 1995; Zartman 1999; Mazrui 1995:24-25.
122 Wunsch & Olowu 1990; Joseph 1993; Herbst 1996:120-144; Young and Turner 1985; Botha 1999:133-147; Villalon and Huxtable 1997.
123 Widner 1995:129-154.
124 Joseph 1999:68; Young 1983, Young and Turner 1985.
125 Swart 2002:318.
126 Labuschagne 2001:190.
127 Perron 1997; Van der Vyver 1999:8-11.

lawyers and activists expect?[128] The ICJ's jurisprudence tends to favour a negative answer.

A great deal has been done in the sense of promoting human and peoples' rights and universal jurisdiction over offences such as genocide, crimes against humanity, and war crimes, especially with the establishment of the ICC, which is effective since 1 July 2002. Unfortunately, this Court has been firmly rejected by the world self-proclaimed human rights and democracy gendarme, which is the United States. In an attempt at sidelining the ICC, the Americans have been resorting to all means — promise of assistance to "friends" who agree to co-operate on the one hand and threat of sanctions, reduction or withdrawal of aid to those who oppose on the other hand — to force some countries to enter into agreements with them.

The "friendly States" interdict themselves from prosecuting American citizens or handing them over to the ICC as required by the *Rome Statute* even though the Statute may already be binding and must be performed by them in good faith according to Article 26 of the 1969 *Vienna Convention on the Law of Treaties*.[129] Such provisions make these "impunity agreements" very questionable in international law.

Against this background, the road to the "Promised Land" that would be a paradise for human and peoples' rights is still long and even too long. States' rights and sovereign immunity still outweigh peoples' rights and universal jurisdiction and this is unlikely to change soon. However critical one may be from a human rights perspective, one should agree that the ICJ judgment in the *DRC* case was consistent with international law. As emphasised earlier, the ICJ is primarily a court of and for independent states. Given its mandate, it is not well suited to champion human rights and universal jurisdiction for their violators, especially those who are entitled to diplomatic immunity as state officials. Human rights activists should better turn to international criminal courts. Hopefully, there will not be *requiem* for universal jurisdiction, which will survive at least in terms of customary international law and enable the prosecution and judgment of those responsible for massive human rights violations such as genocide, crimes against humanity, and war crimes. For all those who have suffered so much from local and global authoritarianism and whose struggle against impunity for grave human rights violations culminated in the establishment of the ICC, la *lutta continua*. They should keep on fighting to extend the frontiers of democracy and freedom both domestically and internationally. This will be a particularly costly and "bloody" struggle, as they will have to fight against Leviathans using the shield of state or sovereign immunity.

128 Labuschagne 2001:189.
129 *Vienna Convention on the Law of Treaties* 1969 1155 UNTS 331 8 ILM 679.

Bibliography

Barrie GN

2001. Sovereign immunity of states: Acts *iure imperii* and acts *iure gestionis* — what is the distinction? *SAYIL* 26:156-164.

Bedjaoui M

2004. Preface. In Bula-Bula 2004.

Bianchi A

2004. L'immunité des Etats et les violations graves des droits de l'homme: la fonction de l'interprète dans la détermination du droit international. *Revue Générale de Droit International Public*: 63-84.

Botha C

1999. From mercenaries to 'private military companies': The collapse of the African State and the outsourcing of state security. *SAYIL* 24: 133-147.

Botha N

1992/3. The commercial nature of state bond issues within the US Foreign States Immunities Act. *SAYIL* 18:154-158.

Bula-Bula S

2004. *Les immunités pénales et l'inviolabilité du Ministre des Affaires Etrangères en droit international* (Affaire du mandat du 11 avril 2000. RD Congo c. Royaume de Belgique, CIJ, Arrêt du 14 février 2002). Kinshasa: Presses de l'Université de Kinshasa.

Cassese A

2002. When may senior state officials be tried for international crimes? Some comments on the *Congo v. Belgium*. *European Journal of International Law*: 845-853.

De Wet E and Strydom H

2000. Implementing international humanitarian law: developments in South Africa and other jurisdictions with special reference to international war crimes tribunals. *SAYIL* 25: 20-68.

Dugard J

2000. *International law: A South African perspective*. Johannesburg: Juta & Co, Ltd.

Du Plessis M and Bosch S

2003. Immunities and universal jurisdiction — The World Court steps in (or on?). *SAYIL* 28:246-262.

Erasmus G and Kemp G

2002. The application of international criminal law before domestic courts in the light of recent developments in international and constitutional law. *SAYIL* 27:64-81.

Herbst J

1996. Responding to state failure in Africa. *International Security*:120-44.

Hopkins K

2002. The International Court of Justice and the question of state immunity: why the Yerodia case is an unfortunate ruling for the development of public international law. *SAYIL* 27: 256-263.

Jennings R

2002. Jurisdiction and immunity in the ICJ decision in the Yerodia Case. *News/Actualité Table Ronde du Forum de Droit International*: 99-103.

Joseph R

1999. The reconfiguration of power. In Joseph R (ed) *State, conflict and democracy in Africa*. Boulder: Lynne Rienner Publishers.

1993. *Failed states in Africa*. Unpublished paper presented at a joint seminar on political development hosted by Harvard and MIT.

Labuschagne JMT

2001. Immunity of the head of state for human rights violations in International Criminal Law. *SAYIL* 26: 180-191.

MANGU MBATA BA
2003. Immunities of heads of state and government: A comment on the indictment of Liberia's president Charles Taylor by the Special Court for Sierra Leone and the reaction of the Ghanaian government. *SAYIL* 28:238-245.

MAZRUI A
1995. Towards a benign recolonisation of the disintegrating states of Africa. *CODESRIA Bulletin*: 24-25.

MSHAULANA PM, DUGARD J AND BOTHA N
1996. *Documents on International Law*. Kenwyn: Juta & Co, Ltd

ORAKHELASHVILI A
2002. Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*). *American Journal of International Law* 96:677-684.

PERRON W
1997. Sind die nationalem Grenzen des Strafrechts überwindbar? *ZStW* (24/2) 283*ff*.

QUENEUDEC JP
2002. Un arrêt de principe: l'arrêt de la CIJ du 14 février 2002. Actualité et droit international. Http://www.ridi.org/adi/articles/2002/200205que.htm (accessed on 20 July 2004).

RANDALL KC
1988. Universal jurisdiction under international law. *Texas Law Review*: 785-788.

SASSOLI M
2002. L'Arrêt Yerodia: quelques remarques sur une affaire au point de collusion entre les deux couches du droit international. *Revue Générale du Droit International Public*: 791-818.

SCHLEMMER EC
2002. The immunity of state-owned ships. *SAYIL* 27:248-255.

SCHREUER C AND WITTICH S
2002. Immunity v. accountability: The ICJ's judgment in the Yerodia case. *News/Actualité Table Ronde du Forum du Droit International* 4:117-120.

STERN B
2002. Les dits et les non-dits de la Cour internationale de justice dans l'affaire RDC contre la Belgique. *News/Actualité Table Ronde du Forum du Droit International* 4:104-116.

SWART M
2002. Democratic Republic of the Congo versus Belgium: A step backward? *SAPR/PL* 17:306-307.

VAN DER VYVER JD
1999. Truth commissions, state sovereignty and an emerging international criminal justice system for the next millennium. *JJS*:8-11.

1999. Universal jurisdiction in international criminal law. *SAYIL* 24:109-119.

VERHOEVEN J
2004. Mandat d'arrêt international et statut de ministre. Actualité et droit international http://www.ridi.org/adi/articles/2002/200205que.htm (accessed on 20 July 2004).

VILLALON L AND HUXTABLE (eds)
1997. *Critical juncture: The African state between disintegration and reconfiguration*. Boulder: Lynne Rienner Publishers.

WIDNER JA
1995. States and statelessness in late twentieth-century. *Daedalus*: 129-154.

WUNSCH JS AND OLOWU D
1990. *The failure of the centralized state: institutions and self-government in Africa*. Boulder: Westview Press.

XIADONG Y
2002. Immunity from international crimes: A reaffirmation of traditional doctrine. *The Cambridge Law Journal* 61:242-246.

YOUNG C
1983. *Zaire, is there a state?* Unpublished paper read at the Annual Conference of the Canadian Association of African Studies.

YOUNG C AND TURNER T
1985. *The rise and decline of the Zairean state*. Madison: University of Wisconsin Press.

ZARTMAN IW
1999. *Collapsed states*. Boulder: Lynne Rienner Publishers.

ZARTMAN IW (ed)
1995. *Collapsed states: The disintegration and restoration of legitimate authority*. Boulder: Lynne Rienner Publishers.