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Diplomatic Immunity Ratione Personae Did the International Court of Justice Create a New Rule of Customary International Law in Congo v Belgium

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DIPLOMATIC IMMUNITY RATIONE PERSONAE: DID THE INTERNATIONAL COURT OF JUSTICE CREATE A NEW CUSTOMARY LAW RULE IN *CONGO V. BELGIUM*?

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I. INTRODUCTION

This article is the last in an unintentional trilogy[1] inspired by the International Court of Justice's (ICJ) 2002 decision in *Democratic Republic of the Congo v. Belgium*.[2] In that case, the ICJ considered for the first time the nature and scope of the immunities which protect officials from one state from criminal prosecution in the courts of another. The case arose because a Belgian judge issued an arrest warrant charging Congo's foreign minister *in absentia* with grave breaches of the 1949 Geneva Conventions and their 1977 Protocols that

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1. Mark A. Summers, *Immunity or Impunity?: The Potential Effect of Prosecutions of State Officials for Core International Crimes in States Like the U.S. That Are Not Parties to the Statute of the International Criminal Court*, 31 BROOK. J. INT'L L. 463 (2005-2006) [hereinafter Summers: *Immunity or Impunity*]; Mark A. Summers, *The International Court of Justice's Decision in* Congo v. Belgium: *How Has It Affected the Development of a Principle of Universal Jurisdiction that Would Obligate All States to Prosecute War Criminals?*, 21 B.U. INT'L L.J. 63 (2003) [hereinafter Summers: *Universal Jurisdiction*].

2. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3 (Feb. 14), *available at* http://www.icj-cij.org/docket/files/121/8126.pdf.

occurred in 1998 during a civil war in Congo.[3] The warrant was transmitted to the International Criminal Police Organization (Interpol), and as a result it was circulated internationally.[4]

In response, Congo asked the ICJ to quash the arrest warrant because it violated the foreign minister's diplomatic immunity.[5] The Court decided the case in Congo's favor because it reasoned that the mere issuance of the warrant violated customary international law diplomatic immunity, which renders foreign ministers absolutely inviolable from the processes of foreign courts while they are in office.[6]

This article will argue that the *Congo v. Belgium* Court expanded the doctrine of diplomatic immunity *ratione personae*[7] beyond its customary international law boundaries when it held that a state official, who was not actually in the prosecuting state, was immune from prosecution. In so doing, the Court explicitly linked a foreign minister's immunity to his job functions, finding that Belgium was precluded even from issuing a warrant for his arrest, if otherwise the effect would be to chill his ability to travel internationally.[8] These significant departures from the existing rule of customary law, this article will argue, could lead to the creation of a new rule which may have unforeseen negative consequences on the development of international criminal law.[9]

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3. *Id.* at 10-11.

4. *Id.*

5. *Id.* at 11.

6. *Id.* at 23.

7. It is important to note at the outset that this article does not consider the implications that *Congo v. Belgium* may have on the closely related doctrine of immunity *ratione materiae*. In Professor Dinstein's seminal article on diplomatic immunity, he distinguished the two doctrines: "[Immunity *ratione materiae*] consists of a permanent substantive immunity from the applicability of local law while [immunity *ratione personae*] merely comprises a transitory procedural exemption from judicial process." Yoram Dinstein, *Diplomatic Immunity from Jurisdiction Ratione Materiae*, 15 INT'L. & COMP. L.Q. 76, 80 (1966). Thus, immunity *ratione materiae* permanently bars prosecution for criminal acts that are committed by a state official in an "official capacity," while immunity *ratione personae* temporarily bars prosecution for any crime based on the protected person's status as a head of state or diplomat. Unlike immunity *ratione materiae,* its protection ends when the person no longer has that status, e.g., when she leaves office. *See* Summers: *Immunity or Impunity*, *supra* note 1, at 464.

8. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 29-30 (Feb. 14).

9. *See* Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757 (2001). As the inquiry is usually formulated, in order to be recognized as customary international law, a rule must be supported by "general and consistent practice by states" that is "followed out of a belief of legal obligation

Part II of this Article will trace the development of immunity *ratione personae* from its twin roots in sovereign and diplomatic immunity. Part III will demonstrate how the decision in *Congo v. Belgium* went beyond the customary international law rule. Part IV will examine whether these departures from the customary law rule resulted in the formation of a new, more expansive rule of immunity *ratione personae*, and Part V will postulate what some of the potential consequences of such a rule may be.

II. IMMUNITY AND INVIOLABILITY: THE PARAMETERS OF CUSTOMARY LAW IMMUNITY *RATIONE PERSONAE*

A. Diplomatic Immunity and Inviolability

Diplomatic immunity is a venerable international legal rule.[10] Grotius called it the obligation of "prime importance" of "volitional" international law.[11] The ICJ has characterized this rule as one of fundamental importance to the existence of the international legal system.[12] It is rarely violated, even in times of war or disruption in diplomatic relations, in which instances diplomats are normally given the option of leaving the host country.[13]

[*opinio juris*]." *Id.*

10. HUGO GROTIUS, ON THE LAW OF WAR AND PEACE 438-39 (Francis W. Kelsey, trans., 1925).

11. *Id.*; *see also* 1 OPPENHEIM'S INTERNATIONAL LAW § 464 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) [hereinafter OPPENHEIM] ("The right of legation is the right of a state to send and receive diplomatic envoys.").

12. United States and Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1979 I.C.J. 7, 19 (Dec. 15):

> [T]here is no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies, so that throughout history nations of all creeds and cultures have observed reciprocal obligations for that purpose; and . . . the obligations thus assumed, notably those for assuring the personal safety of diplomats and their freedom from prosecution, are essential, unqualified and inherent in their representative character and their diplomatic function.

13. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 39(2), 23 U.S.T. 3227, 500 U.N.T.S. 95 [hereinafter VCDR]; United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 40 (May 24) ("Even in the case of armed conflict or in the case of a breach in diplomatic relations those provisions [VCDR, arts. 26-27] require that both the inviolability of the members of a diplomatic mission and of the premises, property and archives of the mission must be respected by the receiving State."); B. SEN, A DIPLOMAT'S HANDBOOK OF INTERNATIONAL LAW AND PRACTICE 107 (3d ed. 1988) [hereinafter HANDBOOK].

Historically, diplomatic immunity "arose out of the concept that the diplomat represented the person of his sovereign and that any insult to him constituted an affront to the Prince who had sent him."[14] While diplomats are no longer seen as emanations of the king, they do represent sovereign states in foreign countries, so "the purpose of [their] privileges and immunities is not to benefit [them as] individuals but to ensure the efficient performance of the functions of diplomatic missions as representing states."[15] Given their vulnerability as emissaries of a state stationed abroad, diplomats must be accorded the broadest protections from any sort of interference by their host countries.[16] Thus, the Vienna Convention on Diplomatic Relations (VCDR)[17] makes diplomats, their missions, archives, correspondence, diplomatic bags, residences, families and staff inviolable.[18]

As for a diplomat's personal immunities (*ratione personae*), the VCDR provides in Article 29 that:

> The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due

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14. HANDBOOK, *supra* note 13, at 107.

15. VCDR, *supra* note 13, Prologue.

16. The immunities accorded to diplomats assigned to permanent missions in other countries and those accorded to diplomats on temporary missions are largely the same, but they are regulated in two different international conventions. The former are covered by the VCDR, the latter by the Convention on Special Missions. *See* United Nations Convention on Special Missions, Dec. 8, 1969, 1400 U.N.T.S. 231 [hereinafter Special Missions Convention].

17. The VCDR is declarative of customary international law. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES ch. 6, Introductory Note (1986) [hereinafter RESTATEMENT]:

> The Diplomatic Convention came into force in 1964 and as of 1987, 148 states were parties to it. The United States became a party in 1972 and Congress adopted the Diplomatic Relations Act of 1978, 22 U.S.C. § 254a-e, to implement the Convention. The Act repeals provisions of United States law inconsistent with the Convention and applies the terms of the Convention to foreign officials from all countries (including those that have not ratified the Vienna Convention).

See also OPPENHEIM, *supra* note 11, § 490 n.2, noting that:

> [t]he Convention does not say to what extent it is declaratory of or alters customary international law. National legislation in certain countries, for example the Diplomatic Privileges Act 1964 in the UK, applies many provisions of the Convention to diplomatic representatives of all states and not only to those states parties to the Vienna Convention. This suggests that the rules which are provided for in the Convention are considered to be consistent with customary international law.

18. VCDR, *supra* note 13, arts. 22, 24, 27(2)-(3), 29-30, 37: *see also* HANDBOOK, *supra* note 13, at 128-30.

> respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.[19]

Personal inviolability thus shields diplomats from "measures that would amount to direct coercion."[20] Diplomats also enjoy personal immunity from criminal jurisdiction,[21] which temporarily prevents the receiving state from exercising its authority to adjudicate charges that a diplomat has violated the receiving state's criminal laws.[22] "This inviolability [in Article 29 of the VCDR] is distinct from the immunity from criminal jurisdiction."[23] However, the "right to exemption from the jurisdiction of the receiving state in respect of criminal matters" has been described as the "most important consequence of the personal inviolability of the envoy."[24]

The right to personal inviolability and immunity does not exist until a diplomatic envoy has been accepted by the receiving state and the diplomat has arrived on its territory,[25] and it is limited temporally to the period during which the diplomat is present on the territory of the receiving state.[26] Once she leaves her post, immunity from the criminal

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19. VCDR, *supra* note 13, art. 29. It is clear from the *travaux préparatoires* of the VCDR that the drafters intended that this provision of the Convention reflected customary international law. *Report of the International Law Commission Covering the Work of Its Tenth Session, 28 April-4 July 1958*, U.N. Doc. A/3859, *reprinted in* [1958] 2 Y.B. INT'L L. COMM'N 97 [hereinafter *Report of the International Law Commission*].

20. *Report of the International Law Commission*, *supra* note 20, at 97. Nonetheless, even the principle of inviolability does not prevent "a diplomatic agent caught in the act of an assault or other offence [from being] . . . briefly arrested by the police of the receiving State in order to prevent the commission of the particular crime." United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 40 (May 24).

21. VCDR, *supra* note 13, art. 31 ("A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State.").

22. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 356 (4th ed. 1990) ("Diplomatic agents enjoy an immunity for the jurisdiction of the local courts and not an exemption from the substantive law.").

23. *Id.* at 355.

24. *Compare* HANDBOOK, *supra* note 13, at 128, *with* United States v. Deaver, 1987 WL 13365 (D.D.C. 1987) (subpoena for diplomat to testify in criminal case quashed).

25. VCDR, *supra* note 13, arts. 4, 39; HANDBOOK, *supra* note 13, at 107 ("Inviolability attaches from the moment the diplomatic agent sets his foot in the country, if previous notice has been received by the government . . . ."); OPPENHEIM, *supra* note 11, § 479 ("Every state can refuse to receive as envoy a person objectionable to itself, and if it does so is neither compelled to specify what kind of objection it has, nor to justify its objection."); United States v. Enger, 472 F. Supp. 490 (D.N.J. 1978) (holding that diplomats must be accredited to the United States in order to claim immunity from arrest and prosecution).

26. VCDR, *supra* note 13, art. 39(2):

> When the functions of a person enjoying privileges and immunities have come to an

jurisdiction of the courts of her former host country ceases.[27] Additionally, there is a "widely asserted" exception to the principle of inviolability and immunity:

> If a diplomatic envoy commits an act of violence which disturbs the internal order of the receiving state in such a manner as makes it necessary to put him under restraint for the purpose of preventing similar acts, or if he conspires against the receiving state and the conspiracy can be made harmless only by putting him under restraint, he may be arrested for the time being, although he must in due time be safely sent home.[28]

While the rules of diplomatic immunity *ratione personae* are designed to prevent any interference in the activities of diplomats, it is also clear that they do not limit the receiving state from investigating a diplomat for, or charging her with, a violation of its criminal laws, so long as the state does not enforce those laws via the coercive processes of the state's criminal courts.[29] Indeed, there are numerous U.S. cases in which diplomats have been charged or indicted, after which the defendant claimed that diplomatic immunity barred further prosecution.[30] And even then the outcome is not ineluctable. The

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> end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of an armed conflict.

27. *Id.*

28. OPPENHEIM, *supra* note 11, § 493, and cases discussed therein; *see also* HANDBOOK, *supra* note 13, at 129-31. While the VCDR does not specifically refer to this exception, the *travaux préparatoires* state, "[t]his principle [inviolability] does not exclude in respect of the diplomatic agent either measures of self-defence or, in exceptional circumstances, measures to prevent him from committing crimes or offences." *Report of the International Law Commission*, *supra* note 19, at 97. The U.S. appears to have relied, at least in part, on this exception to diplomatic inviolability to justify its arrest of two Iranian diplomats in Iraq. *See* Sabrina Tavernise & James Glanze, *U.S. and Iraq Dispute Role of Iranians but Free Them*, N.Y. TIMES, Dec. 30, 2006, at A1.

29. *See, e.g.*, HANDBOOK, *supra* note 13, at 131-33. In common law courts, diplomatic immunity is a plea in abatement, which "does not go to the merits of an action, but demonstrates by presentation of facts extrinsic to the merits of an action irregularities or circumstances which preclude further prosecution of the action or require suspension of the proceedings (fn. omitted)." 71 C.J.S. *Pleading* § 180 (2007).

30. *See, e.g.*, Medina v. United States, 259 F.3d 220 (4th Cir. 2001) (Venezuelan diplomat indicted for rape, sexual battery, burglary, petit larceny and simple assault); United States v. Rios, 842 F.2d 868 (6th Cir. 1988) (Columbian diplomat named but not prosecuted in an indictment charging, *inter alia*, that he used his position as a diplomat to further a narcotics conspiracy); Farnsworth v. Zerbst, 98 F.2d 541 (5th Cir. 1938) (diplomats named as co-conspirators in espionage indictment); United States v. Noriega, 746 F. Supp. 1506, 1510 (S.D. Fla. 1990) (after being indicted on RICO and drug trafficking charges, defendant moved to dismiss indictment based on head of state and diplomatic immunity); United States v. Egorov, 232 F. Supp. 732 (E.D.N.Y. 1964) (dismissing indictment "without prejudice" pursuant to

sending state may waive[31] or refuse to assert immunity,[32] in which case the prosecution may proceed. Or the court may find the assertion of diplomatic immunity invalid.[33] In the event there is no waiver, the diplomat is expelled from the host country as *persona non grata*, after which she could be prosecuted on those same charges in the sending state[34] or in the host state should she ever return.[35]

B. Head of State Immunity *Ratione Personae*

Whereas diplomatic immunity was originally based on the notion that a state's diplomats were emanations of its ruler, sovereign immunity was grounded on the theory that the ruler was the embodiment of the state itself.[36] In the seminal U.S. sovereign immunity case, Chief Justice Marshall wrote that "all sovereigns have consented to a relaxation in practice . . . of that absolute and complete jurisdiction within their respective territories which sovereignty confers."[37] Thus, as originally conceived, sovereign immunity was applied to one sovereign's acts or property within the territorial boundaries of another sovereign state.

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agreement with USSR that diplomats would voluntarily depart the U.S.).

31. HANDBOOK, *supra* note 13, at 128.

32. United States v. Aritizi, 229 F. Supp. 53 (S.D.N.Y. 1964) (sending state refused to represent that diplomat was in the U.S. to perform diplomatic functions or en route to another state to do so), *accord* United States v. Rosal, 191 F. Supp. 663 (S.D.N.Y. 1960). In *Medina*, 259 F.3d 220, after the sending state refused to waive the defendant's diplomatic immunity, he renounced his diplomatic status and stood trial.

33. United States v. Al-Hamdi, 356 F.3d 564 (4th Cir. 2004); *Noriega*, 746 F. Supp. at 1510; *Enger*, 472 F. Supp. at 490; *Aritizi*, 229 F. Supp. at 53; United States v. Coplon, 88 F. Supp. 915 (S.D.N.Y. 1950).

34. HANDBOOK, *supra* note 13, at 128.

35. *See, e.g.*, Tabatabai, 80 I.L.R. 388, 389 (F.R.G. Superior Provincial Ct. 1989) (Iranian special envoy who smuggled drugs into Germany prosecuted after special mission ended); *see also* Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 78 AM. J. INT'L L. 655, 658 (1984), stating the U.S. policy on criminal immunity:

> [O]n the termination of criminal immunity, the bar to prosecution in the United States would be removed and any serious crime would remain as a matter of record. If a person formerly entitled to privileges and immunities returned to this country and continued to be suspected of a crime, no bar would exist to arresting and prosecuting him or her in the normal manner for a serious crime allegedly committed during the period in which he or she enjoyed immunity.

36. Shobha Varughese George, Note, *Head-of-State Immunity in the U.S. Courts: Still Confused After All These Years*, 64 FORDHAM L. REV. 1051, 1056 (1995-1996) ("Historically, sovereign immunity for states and heads-of-state were considered one and the same . . . .").

37. Schooner Exch. v. McFaddon, 11 U.S. 116, 136 (1812).

By the mid-twentieth century, the sovereign state and its ruler were no longer viewed as a single entity.[38] As the immunities of states were elaborated in statutes and treaties,[39] two separate sets of head of state immunity rules emerged – head of state immunity *ratione materiae* and head of state immunity *ratione personae*.[40] The former were generally covered in the same texts that governed state immunity.[41] Interestingly, however, the development of the latter was much less systematic and was left largely to customary international law.[42]

Nonetheless, there was a need for such rules since heads of state[43] increasingly traveled outside their own countries.[44] At the same time, the development of international criminal law[45] and advances in the

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38. OPPENHEIM, *supra* note 11, § 447 n.2 ("The law relating to the position of Heads of State abroad has affinities with, but is now separate from, that relating to state immunity (which has a common origin in the identification of a sovereign with his state) and the treatment of diplomatic envoys (who also represent sovereign states).").

39. Summers: *Immunity or Impunity*, *supra* note 1, at 468-69.

40. U.N. Int'l Law Comm', *Draft Articles on Jurisdictional Immunities of States and Their Property*, art. 3, ¶ 2, U.N. Doc. A/46/10 (1991), *available at* http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/4_1_1991.pdf (sets forth specific rules governing head of state immunity *ratione materiae*, making it clear that these two closely related areas of the law are now doctrinally separate: "The present articles are likewise without prejudice to privileges and immunities accorded under international law to Heads of State *ratione personae*.").

41. *See, e.g., id.*

42. *Id.* Historically, diplomatic immunities under customary international law were the first to be considered ripe for codification, as indeed they have been in the VCDR and in the various bilateral consular agreements. Another classic example of immunities enjoyed under customary international law is furnished by the immunities of sovereigns or other heads of state. A provision indicating that the present draft articles [pertaining to state immunity] are without prejudice to these immunities appears as paragraph 2 of article 3. *Id.*

43. Foreign Ministers, who were the sovereign's direct representative, were also covered by head of state immunity *ratione personae*. *See* SATOW'S GUIDE TO DIPLOMATIC PRACTICE 9 (Lord Gore-Booth ed., 5th ed. 1979) [hereinafter SATOW]; *see also* OPPENHEIM, *supra* note 11, § 459, for a description of the position of foreign minister as a representative of the state.

44. *See, e.g.*, Tachiona v. Mugabe, 169 F. Supp. 2d 259, 291 (S.D.N.Y. 2001). While U.S. presidential travel is now a commonplace occurrence, it is interesting to note that in 1918, President Wilson became the first U.S. President to travel to Europe while in office in order to head the U.S. delegation at the Paris Peace Conference following the First World War. MARGARET MACMILLAN, PARIS 1919 3 (Random House 2001). Coincidentally, it was at that Conference that for the first time there was a serious proposal to prosecute a head of state for war crimes. *See* S.S. Gregory, *Criminal Responsibility of Sovereigns for Willful Violations of the Laws of War*, 6 VA. L. REV. 400, 414 (1920).

45. *See, e.g.*, Summers: *Universal Jurisdiction*, *supra* note 1, at 67-69; M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and*

theories of extraterritorial jurisdiction[46] made it increasingly likely that one state might try to prosecute criminally the leader of another. Thus, there are arguments for head of state immunity *ratione personae*: 1) the exercise of a state's criminal jurisdiction is an affront to "the person and dignity of the leader of a sovereign nation" which has a "greater potential for fraying sensibilities" than does the exercise of civil jurisdiction in commercial cases;[47] 2) because there are no "coherent and widely accepted rules" regarding prosecution of heads of state, such cases present "a far greater likelihood . . . for stirring embarrassment and offense to national pride and provoking acts of retaliation;"[48] and 3) "branding a foreign ruler with the ignominy of answering personal accusations of heinous crimes" has "the potential to harm diplomatic relations between the affected sovereign states."[49]

Given these substantial justifications for head of state immunity *ratione personae*, it is ironic then that the law is less well developed than are the sister rules regarding the immunities of diplomats and states.[50] Moreover, the rules of head of state immunity that are widely recognized have been borrowed from diplomatic immunity *ratione personae*.[51] Thus, the head of state is immune from arrest or detention within a foreign territory.[52] While she is abroad, she is immune from

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Contemporary Practice, 42 VA. J. INT'L L. 81 (2001-2002).

46. Summers: *Universal Jurisdiction*, *supra* note 1, at 71-72.

47. *Tachiona*, 169 F. Supp. 2d at 291; *see also* OPPENHEIM, *supra* note 11, § 447 n.2.

48. *Tachiona*, 169 F. Supp. 2d at 291.

49. Nevertheless, the *Congo v. Belgium* Court seems to have rejected the notion that such dignitary injuries alone justify a rule that immunizes the acts of a foreign minister from prosecution in the courts of another state because it refused to order that Belgium pay reparations for the "opprobrium [it] 'cast upon one of the most prominent members of [The Congo's] Government.'" Arrest Warrant of 11 April 200 (Dem. Rep. Congo v. Belg.) 2002 I.C.J. 3, 26 (Feb. 14). Instead, it held that immunities are solely to ensure that foreign ministers are able to effectively perform their functions on behalf of the states they represent. *Id.* at 31-32.

50. SATOW, *supra* note 43, at 9:

> [I]t is a curious consequence of the developments of the last few decades, which have brought greater certainty to the law concerning diplomats, consuls and other state officials and to the law which regulates the immunities of the state itself, that the position of the head of state has become less clear.

51. *See* RESTATEMENT, *supra* note 17, § 464 cmt. 14 ("When a head of state or government comes on an official visit to another country, he is generally given the same personal inviolability and immunities as are accorded to members of special missions, essentially those of an accredited diplomat."); *Tachiona*, 169 F. Supp. 2d at 291-92 ("[The] scope of protection [equals] . . . a level of immunity from territorial jurisdiction at minimum commensurate with that accorded by treaties and widely accepted customary international law to diplomatic and consular officials." (citing SATOW, *supra* note 43, at 9-10)).

52. *Schooner Exch.*, 11 U.S. at 137; SATOW, *supra* note 43, at 9.

both the criminal and civil jurisdictions of another state.[53] Her foreign residence, moveable property, family members and possibly her entire entourage are inviolable.[54] Significantly, all of these well-accepted features apply when heads of state are traveling abroad and serve to prevent foreign interference with that function while on the territory of another state. Thus, prior to *Congo v. Belgium*, a head of state's immunity *ratione personae* from the criminal jurisdiction of another state, to the extent that there was consensus about it,[55] was the same as diplomatic immunity *ratione personae* and was triggered by her territorial presence in the other state.

III. BEYOND THE CUSTOMARY LAW RULE OF DIPLOMATIC IMMUNITY *RATIONE PERSONAE*

Belgium used its universal jurisdiction law[56] to issue an arrest warrant charging Congo's Foreign Minister with grave breaches of the Geneva Conventions that had taken place outside Belgium.[57] Congo argued that the arrest warrant should be annulled:

> The non-recognition on the basis of Article 5 . . . of the Belgian Law, of the immunity of a Minister for Foreign Affairs in office [constituted a] [v]iolation of the diplomatic immunity of the Minister for Foreign Affairs . . . 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.[58]

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53. SATOW, *supra* note 43, at 10.

54. *Id.*

55. *See, e.g.*, *In re* Doe, 817 F.2d 1108, 1110 (4th Cir. 1987) (noting the disagreement over whether head of state immunity could be waived and stating that "[t]he exact contours of head-of-state immunity, however, are still unsettled."); Jerrold L. Mallory, *Resolving the Confusion Over Head of State Immunity: The Defined Rights of Kings*, 86 COLUM. L. REV. 169, 177 (1986) ("While a survey of the international community's approach to head of state immunity reveals wide agreement that heads of state are entitled to some immunity, there is no agreement on the extent of that immunity.").

56. Act Concerning the Punishment of Grave Breaches of International Humanitarian Law (Belg.), *translated in* 38 I.L.M. 918, 924 (1999) [hereinafter Belgium Act].

57. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 9-10 (Feb. 14).

58. *Id.* at 10. Article 5 § 3 of the Belgian Act provided that "[i]mmunity attaching to the official capacity of a person, does not prevent the application of the present Act." Belgium Act, *supra* note 56, at 924. Because the question of immunities arises only when a court has jurisdiction and because Congo withdrew its submission with regard to the legality of Belgium's assertion of universal jurisdiction, the ICJ proceeded on the assumption that Belgium had

The parties agreed that the Court could decide the case as a matter of conventional law and cited the Special Missions Convention, as well as the VCDR, as sources for the rules they claimed could provide a basis for the Court's decision.[59]

The Court, however, rejected the parties' contentions that the case could be decided on conventional rules because neither the VCDR nor the Special Missions Convention contain "any provision specifically defining the immunities enjoyed by Ministers for Foreign Affairs."[60] While this statement is accurate with regard to the VCDR, it is not with regard to the Special Missions Convention, which specifically extends the "facilities, privileges and immunities accorded by international law" to the "Head of Government, the Minister for Foreign Affairs and other persons of high rank," when they "take part in a special mission of the sending State . . . in the receiving State or in a third State."[61] The Special Missions Convention goes on to provide that "[t]he persons of the representatives of the sending State . . . shall be inviolable"[62] and that they "shall enjoy immunity from the criminal jurisdiction of the receiving State."[63]

Thus, despite what appears to be very explicit rules in the Special Missions Convention regarding the inviolability and immunity of a foreign minister, what can explain the Court's statement that there were no such rules? One possibility is that, since neither Congo nor Belgium was a party to the Special Missions Convention,[64] the Court could not base the decision on the Convention.[65] In that event, why did the Court not say that the Special Missions Convention is declarative of customary international law[66] and therefore could be the source for a

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jurisdiction. *See* Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 19 (Feb. 14).

59. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 21 (Feb. 14).

60. *Id.*

61. Special Missions Convention, *supra* note 17, art. 21(2).

62. *Id.* art. 29.

63. *Id.* art. 31.

64. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 21 (Feb. 14).

65. *See* Statute of the International Court of Justice art. 38(1)(a), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933 (stating "[t]he Court, whose function is to decide in accordance with international law, such disputes as shall be submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules recognized by the contesting states.").

66. The customary status of articles 29 and 31 in the Special Missions Convention

customary rule binding on the parties?[67] A plausible explanation is that the conventional rules, even if declarative of customary law, were inadequate because there was no "provision specifically defining the immunities enjoyed by [a] Minister[] for Foreign Affairs" who was not present on the territory of the prosecuting state.

IV. A NEW CUSTOMARY DIPLOMATIC IMMUNITY *RATIONE PERSONAE*

To fill this lacuna, the ICJ articulated the following rule:

> [T]he functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she *when abroad* enjoys full immunity from criminal jurisdiction and inviolability. That immunity and inviolability protect the individual concerned against *any act of authority* of another State which would hinder him or her in the performance of his or her duties.[68]

It is noteworthy that the first sentence appears to state the rule of diplomatic immunity *ratione personae*, including its explicit territorial limitation. The second sentence goes beyond that formulation, however, by stating that a state is precluded from taking "any act" that would interfere with the performance of a foreign minister's duties.[69] From this premise, and without citation to any authority, the ICJ opined that "even the mere risk" of arrest "could deter" foreign ministers from traveling and thereby interfere with the performance of their duties.[70] Consequently, the "mere issue [of the arrest warrant] . . . infringed the

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cannot be doubted since they are identical to the provisions in the VCDR. *Compare* VCDR, *supra* note 13, arts. 29, 31, *with* Special Missions Convention, *supra* note 16, arts. 29, 31.

67. Statute of the International Court of Justice, *supra* note 65, art. 38(1)(b).

68. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.) 2002 I.C.J. 3, 22 (Feb. 14) (emphasis added).

69. In *Regina v. Bartle ex rel, Ex parte Pinochet*, 38 I.L.M. 581 (1999) (H.L. 1999), the House of Lords had to interpret a statute that explicitly made the diplomatic immunities contained in the VCDR applicable to "a sovereign or other head of state." State Immunity Act, 1978, c. 33, § 20 (U.K.), *reprinted in* 17 I.L.M. 1123 (1978). While the Lords agreed that, consistent with customary international law, a head of state was protected by immunity *ratione personae* so long as she was in office, they disagreed on whether that immunity applied absent a territorial presence in the United Kingdom. *Compare Pinochet*, 38 I.L.M. at 593 ("[T]he original section 20(1)(a) read 'a sovereign or other head of state *who is in the United Kingdom at the invitation or with the consent of the Government of the United Kingdom*.' On that basis the section would have been intelligible."(emphasis in original)) (Speech of Lord Browne-Wilkinson), *with Pinochet*, 38 I.L.M at 598 ("In the case of a head of state, there can be no question of tying Article 39(1) or (2) [of the VCDR] to the territory of the receiving state, as was suggested on behalf of appellants.") (Speech of Lord Goff of Chievely).

70. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 22 (Feb. 14).

immunity from criminal jurisdiction and the inviolability then enjoyed by [the foreign minister] . . . under international law."[71]

As the Court reformulated the rule and applied it to bar even the issuance of an arrest warrant for a foreign minister who was not within the territory of the prosecuting state, the ICJ unmoored diplomatic immunity *ratione personae*[72] from its *raison d'être* – protection of the person of a diplomatic representative "when abroad" from interference by another state.[73] Additionally, by extending the rule to "any act of authority," it also effectively blocked states from initiating an investigation or prosecution of a foreign head-of-state, when such a limitation was never a feature of diplomatic immunity *ratione personae*.[74]

Moreover, this new rule of diplomatic immunity[75] blurs the distinction between immunity *ratione personae* and immunity *ratione materiae*.[76] The former, which attaches to the person of the diplomat entitled to immunity, protects her only so long as she is representing her

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71. *Id.* at 29.

72. *Id.* at 20-21:

> [I]n international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal. For the purposes of the present case, it is only the immunity from criminal jurisdiction and the inviolability of an incumbent Minister for Foreign Affairs that fall for the Court to consider.

73. *Id.* at 22.

74. As the authorities cited above clearly demonstrate, diplomatic immunity and inviolability do not prevent states from taking some prosecutorial actions, such as investigation, indictment and even arrest, when the diplomat is suspected of having committed a crime or threatens the essential interests of the receiving state.

75. The Court clearly based its decision on diplomatic immunity *ratione personae*, *see* Dinstein, *supra* note 7, rather than the closely related doctrine of head of state immunity *ratione personae*, even though the contours of the latter are less well-settled, *see In re* Doe, 817 F.2d at 1110, and there is some state practice which suggests that head of state immunity *ratione personae* may be asserted by a defendant in a criminal case who is not present on the territory of the prosecuting state. *See Re Honecker*, 80 I.L.R. 365, 366 (F.R.G. Fed. Sup. Ct. (Second Criminal Chamber (1984))). The Supreme Court of the Federal Republic of Germany held "inadmissible" an "inquiry or investigation by the police or the public prosecutor" of the head of state of the German Democratic Republic because the "jurisdiction of the Federal courts does not extend to persons who are exempted from that jurisdiction by virtue of the general rules of international law." *See also Noriega*, 746 F. Supp. at 1519-25 (upholding dismissal of indictment because it violated both his head of state and diplomatic immunities). However, the *Congo v. Belgium* Court neither acknowledged the existence of a separate form of head of state immunity *ratione personae*, nor referred to either of these cases.

76. *See* Dinstein, *supra* note 7.

state abroad.[77] The latter protects any state official from being prosecuted for any act, wherever and whenever committed, so long as that act was "official," i.e., one taken on behalf of the state.[78] The new rule increases uncertainty as to who is entitled to claim this new immunity and under what circumstances because immunity *ratione personae* is no longer linked to the official's position, i.e., *personae*, but rather to the functions she performs, i.e., *materiae.*

While conventional and customary law carefully circumscribe those officials who are entitled to claim diplomatic immunity by their official titles, the new rule conceivably could apply to any state official so long as that official must travel abroad as a part of her job and a foreign state's act of prosecution could interfere with her ability to travel.[79] Thus, the ICJ's stated reason for the immunity – "to ensure effective performance of [an official's] functions on behalf of their respective States" – could justify extending protection to officials well below the level of head of state or foreign minister.[80]

V. CONCLUSION

If this new, more expansive view of diplomatic immunity *ratione personae* is adopted and applied by other state or international courts, it could have deleterious effects on the nascent system of international criminal law enforcement. By barring even the most preliminary acts of state law enforcement, such as issuing an arrest warrant, the ICJ effectively stifles a state's motivation to investigate international crimes which implicate another state's officials, since it may be precluded for years from pursuing the wrongdoers.[81] Additionally, if courts choose to

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77. *Id.*

78. *Id.*

79. There need only be a possible, rather than an actual, interference with an official function, since the circulation of the arrest warrant infringed the Congo foreign minister's immunities "whether or not it significantly interfered with [his] . . . diplomatic activity." Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 30 (Feb. 14).

80. Certainly many other officials, like the U.S. Secretary of Defense, could claim that travel is an essential part of their jobs. *See, e.g.*, Craig S. Smith, *A Different Home for NATO?*, INT'L HERALD TRIB., June 13, 2003, at 1.

81. Many leaders who have been accused of international crimes have served decades in office. *But see* Cirian Giles, *Iberoamerican Summit: Annan Urges Cuts in Farm Subsidies*, MIAMI HERALD, Oct. 15, 2005, at A10 (suggesting that the 79-year old Cuban dictator Fidel Castro avoided a summit meeting in Spain because of the threat of indictment for genocide and other international crimes).

expand this new diplomatic immunity *ratione personae* to state officials below the rank of head-of-state or foreign minister in order to protect their rights to travel or some other government function, this could effectively cut off the right of foreign states to investigate even minor officials for violations of international criminal law so long as they remain in office. Finally, as the *Congo v. Belgium* court itself noted, such immunity could be asserted as a bar to extradition or prosecution under "various international conventions on the prevention and punishment of certain serious crimes,"[82] thus trumping one of the primary mechanisms for prosecuting international wrongdoers.[83]

There may be legitimate reasons for adopting a broader rule of immunity *ratione personae*. For example, an extension of the rule may be warranted to preclude any use of a state's criminal judicial process to harass unpopular foreign leaders for political purposes.[84] Or there may be something intrinsically different about the position of a head-of-state that dictates that she be treated differently than her diplomats.[85] However, without a stated rationale, the ICJ's holding in *Congo v. Belgium* is inherently ambiguous and its ultimate reach uncertain.

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82. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 25 (Feb. 14).

83. Summers: *Universal Jurisdiction*, *supra* note 1 at 73-75.

84. *See* David B. Rivkin, Jr. & Lee A. Casey, Editorial, *Crimes Outside the World's Jurisdiction*, N.Y. TIMES, July 22, 2003, at A19.

85. *See Pinochet*, 38 I.L.M. 581.