
Immunity for Core Crimes? The ICJ's Judgment in the Congo v. Belgium Case

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Abstract

The ICJ, in its Judgment in The Congo v. Belgium (the so-called Yerodia case), stated in a problematic obiter dictum that, before national courts, former Ministers for Foreign Affairs enjoy immunity even if they committed a serious international crime, unless they acted in their private capacity. It seems that this statement (for which the Court gives no reasons) does not properly reflect the current state of customary international law. Rather, modern state practice and opinion juris deny immunities for core crimes to all former and incumbent state officials with the sole exception of the highest state representatives such as Heads of State or Ministers for Foreign Affairs; and even these persons are protected only while in office (as has been demonstrated in the Pinochet case). It is submitted that this rule not only reflects positive law but at the same time strikes the proper balance between, on the one hand, the need to protect a state's ability to discharge its most important tasks (such as the maintenance of peace), and, on the other hand, the need to punish serious violations of human rights (once retired, even Heads of State can be held responsible).

On 14 February 2002, the International Court of Justice (ICJ) in The Hague handed down for the first time a decision concerning the availability of state immunity against international crimes in a case between the Democratic Republic of the Congo and Belgium.¹ The argument between both states arose on 11 April 2000 when a Belgium judge issued an international arrest warrant against Mr Yerodia, the then Minister of Foreign Affairs of the Democratic Republic of the Congo. Belgium wanted to try Mr Yerodia for grave breaches of the Geneva Conventions and the additional protocols

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¹ International Court of Justice, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, 14 February 2002. The judgment and the individual votes are available at www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm.

thereto and for crimes against humanity. The acts charged were committed in 1998, before Mr Yerodia became Minister of Foreign Affairs, and included speeches allegedly inciting attacks on the Tutsi population in Kinshasa. In its application to the ICJ, the Congo claimed that Mr Yerodia, as the incumbent Minister of Foreign Affairs of a foreign state, enjoyed immunity before Belgian courts and that the warrant violated such immunity. The ICJ accepted that such immunity indeed existed and ordered Belgium to cancel the arrest warrant. Belgium complied with this order. Moreover, the ICJ, in an *obiter dictum*, held that not only would an incumbent Minister of Foreign Affairs be covered by state immunity but also a former such Minister with respect to his or her official acts.²

The present article will focus mainly on the latter issue. It will argue that the ICJ erred in its decision that there exists immunity for former Ministers of Foreign Affairs which attaches to the official nature of an act, if a core crime has been committed (the term ‘core crime’ is used to denote genocide, crimes against humanity and war crimes³). In doing so, the article will take into consideration that the ICJ’s decision was not rendered in a legal vacuum: on the one hand, there exists a comprehensive system of state immunity in international law which forms the legal background for any analysis in this field of law. On the other hand, beginning with the House of Lords’ *Pinochet* decisions of 1998 and 1999,⁴ a corpus of modern case law, state practice and *opinio juris* has emerged in the law of state immunity which specifically relates to serious human rights violations. Thus, this article will develop its thesis in four parts. Part 1 will summarize the relevant passages of the decision, indicating possible legal issues. Part 2 tries to place the issue of immunity for core crimes in the context of the law on state immunity and to determine its present state. Part 3 compares the

² Judgment, *supra* note 1, para. 61; according to the Court, a former Minister of Foreign Affairs can be held criminally responsible only for acts committed in a private capacity.

³ These are — with the exception of the crime of aggression — the crimes under the jurisdiction of the International Criminal Court and the Ad Hoc Tribunals for the former Yugoslavia and Rwanda. Whether aggression, for the purposes of state immunity, must be considered as a core crime cannot be decided in this article.

⁴ The decisions which dealt with immunities were the first and the third ones: *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet (No. 1)* [2000] 1 AC 61; [1998] 3 WLR 1456; [1998] 4 All ER 897; 37 ILM (1998) 1302, House of Lords (hereinafter referred to as *Pinochet (No. 1)*); and *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet (No. 3)* [2000] 1 AC 147; [1999] 2 WLR 827; [1999] 2 All ER 97, 38 ILM (1999) 430, House of Lords (hereinafter referred to as *Pinochet (No. 3)*). The second *Pinochet* decision annulled *Pinochet (No. 1)* for reasons of bias: *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet (No. 2)* [2000] 1 AC 119; [1999] 2 WLR 272; [1999] 1 All ER 577, House of Lords. For a summary and analysis of *Pinochet (No. 1)*, see Ambos, ‘Der Fall Pinochet und das anwendbare Recht’, 54 *Juristenzeitung* (1999) 16, at 20–23; on *Pinochet (No. 3)*, see Wirth, ‘Staatenimmunität für Internationale Verbrechen — das zweite Pinochet Urteil des House of Lords’, 22 *Juristische Ausbildung* (2000) 70, at 72–73; Ambos, ‘Pinochet — 2. Akt’, 54 *Juristenzeitung* (1999) 564; Bank, ‘Der Fall Pinochet: Aufbruch zu neuen Ufern bei der Verfolgung von Menschenrechtsverletzungen?’, 59 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1999) 677; Bianchi, ‘Immunity Versus Human Rights: The Pinochet Case’, 10 *EJIL* (1999) 237; and Bröhmer, ‘Immunity of a Former Head of State. General Pinochet and the House of Lords: Part Three’, 13 *Leiden Journal of International Law* (2000) 229.

judgment to the law as determined in Part 2. Finally, Part 4 summarizes the arguments of this article and draws some conclusions.

1 The Judgment's Examination of State Immunity

The merits of the case have a tripartite structure. A first section⁵ determines what, in the opinion of the Court, is the international law of immunity for Ministers of Foreign Affairs. In a second section,⁶ the judges apply this law to the facts of the case and conclude that Belgium's arrest warrant violated Congo's immunity. The third section⁷ then determines that the only possible remedy for this breach of international law is to cancel the warrant. There are legal issues with regard to all three parts of the merits.⁸ However, as indicated above, the present article will deal only with the first issue, the Court's determination of the law of state immunity, and, in particular, with the question of whether former Ministers of Foreign Affairs (or other former state officials) are entitled to immunity for their official conduct.

At the very outset of the first section of the judgment, the Court states that 'in 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 of Foreign Affairs, enjoy immunities from jurisdiction in other states'.⁹ This introductory sentence clearly indicates where the focus of the Court's deliberations lies: it considers the problem of state immunity exclusively with regard to the few top representatives of a state. It will be suggested below that certain inconsistencies in the decision are due to this narrow perspective. A second particularity in the quote is that it equates the immunity of Ministers of Foreign Affairs with the immunity of Heads of State. This equation suggests that serving Ministers of Foreign Affairs enjoy the same type of state immunity as serving Heads of State, namely, absolute immunity *ratione personae* (or 'personal immunity'¹⁰). In the subsequent paragraphs, the decision reasons that the unfettered discharge of the functions of a Minister of Foreign Affairs — which the Court considers similar to those of a Head of State — requires the same immunity as is needed for a Head of State.¹¹ Thus, according to the Court, the rationale of the immunity available for Heads of State and Ministers of Foreign Affairs is their ability to discharge their *functions*.¹²

Having stated these principles, the judgment turns to the question of whether there

⁵ Judgment, *supra* note 1, paras 41 *et seq.*

⁶ *Ibid.*, at paras 62 *et seq.*

⁷ *Ibid.*, at para. 72 *et seq.*

⁸ Cf. e.g. on the question of whether the issuance of the arrest warrant was in violation of international law, the Dissenting Opinion of Judge Van den Wyngaert, paras 72 *et seq.*; on the question of whether the arrest warrant continued to be internationally wrongful after Mr Yerodia ceased to be Minister of Foreign Affairs, cf. the Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, paras 86 *et seq.*

⁹ Judgment, *supra* note 1, para. 51.

¹⁰ This term is used by Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v. Belgium* Case', 13 *EJIL* (2002) 853, at 855.

¹¹ Judgment, *supra* note 1, paras 53–55.

¹² On the method applied by the Court to arrive at this conclusion, cf. Cassese, *supra* note 10, at 855.

is an exception to such immunity with regard to war crimes or crimes against humanity.¹³ After a very short discussion, the judgment concludes that it is ‘unable to deduce from [state] practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity’.¹⁴ Obviously, the Court here refers to two cases which it had mentioned in the previous paragraph,¹⁵ namely, to the statement of Lord Browne-Wilkinson in *Pinochet*, saying that serving ambassadors and sitting Heads of State enjoy ‘complete immunity from all actions and prosecutions’,¹⁶ and to the French *Cour de Cassation* in *Qaddafi*,¹⁷ saying that for reasons of immunity incumbent Heads of State may not be prosecuted unless there is a special provision to the contrary in international law.¹⁸ Besides these two statements, the only other reason given by the Court for its decision is its dismissal of the statutes and the jurisprudence of the Nuremberg Tribunal¹⁹ and the Ad Hoc Tribunals for the former Yugoslavia²⁰ and for Rwanda²¹ as well as the Rome Statute of the International Criminal Court²² as bearing no relevance for national procedures.²³

These arguments mark the end of the Court’s deliberations on the legal framework of state immunity. With regard to the method applied by the Court, the two most striking features of these deliberations are that, as already mentioned, they deal only with *high-ranking officials*, and, moreover, they consider the situation of such

¹³ Judgment, *supra* note 1, paras 56 *et seq.*

¹⁴ *Ibid.*, at para. 58.

¹⁵ *Ibid.*, at para. 57.

¹⁶ *Pinochet* (No. 3), *supra* note 10, at 844 (*per* Lord Browne-Wilkinson).

¹⁷ *Cour de Cassation*, Arrêt No. 1414 of 13 March 2001, reprinted in: 105 *Revue Générale de Droit International Public* (2001) 474; on this decision, cf. Zappalà, ‘Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The *Ghaddafi* Case before the French *Cour de Cassation*’, 12 *EJIL* (2001) 595.

¹⁸ Both decisions are mentioned where the Court describes the case of the Congo (para. 57).

¹⁹ Cf. Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis (1945), including the Charter of the International Military Tribunal, 82 UNTS 280. The rule excluding immunities is Article 7 of the Charter of the International Military Tribunal.

²⁰ Cf. Article 7(2) of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (ICTY Statute); the Statute was adopted pursuant to Security Council Resolution 827 of 25 May 1993 (amended 13 May 1998 by Resolution 1166 and 30 November 2000 by Resolution 1329), first version reprinted in 32 *ILM* 1192; available at www.un.org/icty/basic.htm.

²¹ Cf. Article 6(2) of the Statute of the International Tribunal for Rwanda (ICTR Statute); the Statute was adopted pursuant to Security Council Resolution 955 of 8 November 1994, reprinted in 33 *ILM* 1598; available at www.icttr.org/legal.htm.

²² Cf. Article 27 of the Statute of the International Criminal Court, UN Doc. A/CONF.183/9, available at www.un.org/law/icc/statute/romefra.htm. The ICC Statute was adopted by the Rome Conference on 17 July 1998 and came into force on 1 July 2002, after its sixtieth ratification (Article 126 of the ICC Statute).

²³ Judgment, *supra* note 1, para. 58.

high-ranking officials only *while in office*.²⁴ Indeed, this is exactly the situation which the Court had to decide: Mr Yerodia, at the time of the issuance of the Belgian arrest warrant, was the serving Minister of Foreign Affairs of his country. Moreover, he committed his allegedly criminal acts before becoming Minister of Foreign Affairs. Thus, if there was any immunity which could be raised against the warrant, it would not be an immunity attaching to the official character of the acts but only to his official status at the time of the issuance of the warrant (these were, in fact, the reasons which led the Court to its finding against Belgium).

Having in mind this situation and the (limited) scope of the Court's deliberations, an attentive reader would probably assume that the Court would also limit its conclusions on the law of state immunity to the immunities enjoyed by an *incumbent* Minister of Foreign Affairs. However, this assumption is wrong. The judges, when summarizing their analysis,²⁵ state *inter alia*:

[A]fter a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a *former* Minister for Foreign Affairs of another State *in respect of acts committed prior or subsequent to his or her period of office*, as well as in respect of acts *committed during that period of office in a private capacity*.²⁶

Thus, the Court suddenly (and in an *obiter dictum*) extends its decision to *former* Ministers of Foreign Affairs, putting incumbent and former high-ranking officials on the same footing. The Court thereby seems to recognize an unrestricted immunity for all acts committed in the official capacity of a former Minister of Foreign Affairs. This is all the more surprising as the only rationale for immunity which is mentioned by the Court is to protect the ability of the highest state officials to discharge their functions, whereas, clearly, a former official no longer has any functions which would require protection. But these issues regarding merely the persuasiveness of the Court's arguments are not the only issues. In a more general perspective, the problem of the Court's formulation is that, as will be seen below, any decision on immunities for official acts cannot be understood as being restricted to 'official acts of former Minister of Foreign Affairs', as there is no such category in international law. Moreover, depending on the meaning of the terms 'private capacity' and 'official capacity' — which will also be considered in more detail below — this decision might be conceived as a step backwards to before the House of Lords' *Pinochet* judgment. In this landmark decision, Lord Hope, one of the six judges who denied immunity to Pinochet, stated with regard to international crimes:

A head of state is still protected while in office by the immunity *ratione personae*, but the immunity *ratione materiae* on which he would have to rely on leaving office must be denied to him.²⁷

²⁴ The reasons given in the passage on immunities of Ministers of Foreign Affairs relate to *incumbent* officials only, and, moreover, the quotes from Lord Browne-Wilkinson in *Pinochet* and the *Cour de Cassation* in *Qaddafi* also relate to *serving* Heads of State; cf. e.g. Judgment, *supra* note 1, paras 51 and 58.

²⁵ Judgment, *supra* note 1, para. 61.

²⁶ *Ibid.*, at para. 61 (emphasis added).

²⁷ *Pinochet* (No. 3), *supra* note 10, at 886–887 (*per* Lord Hope) (emphasis added).

This and other precedents, as well as the gap between the Court's reasons (which only refer to incumbent Ministers of Foreign Affairs) and the concluding paragraph (which suddenly includes also former officials), require an evaluation of the ICJ's decision in the light of the current law of state immunity for core crimes.

2 State Immunity

A *The General System of State Immunity*

State immunity is the right not to be submitted to the exercise of foreign jurisdiction. Its purpose,²⁸ in general, is to safeguard the ability of states to discharge their functions without foreign interference,²⁹ as well as to protect their dignity.³⁰ Moreover, the area of state immunity which borders on diplomatic immunity also serves to facilitate and maintain international relations.³¹ As is indicated by the term 'state immunity' itself, the primary tenant and beneficiary of this right is the state.³² This is reflected in the fact that immunity may be waived only by a state, never by an individual.³³ However, if state immunity was strictly restricted to states *as legal entities*, no effective protection would be achieved. Rather, it would be very easy to circumvent the law by simply suing or charging certain state officials instead of the state itself. Therefore, state immunity — in a derivative form — also covers those individuals who act on behalf of the state.³⁴ This derivative state immunity exists in two different forms.³⁵

In most cases, the individual (incumbent or former) state official is protected only with respect to official conduct³⁶ (i.e. *ratione materiae*³⁷). The person *as such* is not

²⁸ On the purposes of state immunity, cf. in more detail below; notes 70 *et seq* and the accompanying text.

²⁹ Ambos, 'Der Fall Pinochet', *supra* note 4, at 23.

³⁰ Ian Brownlie, *Principles of Public International Law* (5th ed., 1998) 329.

³¹ Judgment, *supra* note 1, paras 53–54.

³² For an in-depth discussion of the system of state immunity, cf. Wirth, 'Immunities, Related Problems, and Article 98 of the Rome Statute', 12 *Criminal Law Forum* (2001) 429, at 430–433, available at www.kluweronline.com/issuetoc.htm/1046-8374+12+4+2001

³³ Brownlie, *supra* note 30, at 343–344.

³⁴ Cf. e.g. Bothe, 'Die Strafrechtliche Immunität fremder Staatsorgane', 31 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1971) 246, at 251.

³⁵ For a more detailed explanation of these types of immunity, see Cassese, *supra* note 10, at 862–864; see also Zappalà, *supra* note 17, at 598; cf. also Wedgwood, 'International Criminal Law and Augusto Pinochet', 40 *Virginia Journal of International Law* (2000) 829, at 838.

³⁶ In the German *Scotland Yard* case of 1978, for example, the German Supreme Court (*Bundesgerichtshof*) decided that the conduct of the Director of Scotland Yard was attributable directly to the UK, and that it therefore could not be made an object of an exercise of German jurisdiction; 32 *Neue Juristische Wochenschrift* (1979) 1101, at 1102.

³⁷ *Pinochet* (No. 3), *supra* note 10, at 844 (*per* Lord Browne-Wilkinson); other terms used are functional or organic immunities, cf. Cassese, *supra* note 10, at 862.

protected by immunity *ratione materiae*. In terms of duration, this immunity only ends if the state itself ceases to exist.

In contrast, the second kind of derivative state immunity, immunity *ratione personae*, is, in principle, all-encompassing in that it attaches to the person *as such*: any exercise of (compulsory) foreign jurisdiction, regardless of the conduct in question, is incompatible with this immunity. It is available only for the highest state officials (including Heads of State³⁸) who are the most important guarantors of a state's internal stability and external reliability. The judgment states in this respect that 'no distinction can be drawn between acts performed by a Minister of Foreign Affairs in an "official capacity" and those claimed to have been performed in a "private capacity", or, for that matter, between acts performed before the person concerned assumed office as a Minister of Foreign Affairs and acts committed during the period of office'.³⁹ However, immunity *ratione personae* also has a 'weak spot', in that it is available only during the term of office. After the person has ceased to hold office, he or she is no longer protected by immunity *ratione personae*. Once retired, such a person, like any other state official,⁴⁰ enjoys only immunity *ratione materiae* with respect to his or her official conduct.⁴¹

Thus, the two⁴² kinds of state immunity which protect individuals are, first, immunity *ratione materiae* shielding every incumbent *or* former state official, but only with regard to his or her official conduct; and, secondly, absolute immunity *ratione personae* which shields the person as such, but only temporarily, during his or her term of office.⁴³ It now becomes apparent that, as has been indicated above, within this system of state immunity there cannot be a category termed 'immunities of former Ministers of Foreign Affairs'; rather, the immunity available to former Ministers of Foreign Affairs is the same as for every other former state official, namely, immunity *ratione materiae*.

Finally, it should be noted that diplomatic or consular immunity⁴⁴ must not be confused with state immunity,⁴⁵ but that on the other hand diplomats and consular agents are state officials and therefore are protected not only by diplomatic immunity but also by state immunity (*ratione materiae*). This protection is necessary with regard

³⁸ Monika Lüke, *Immunität staatlicher Funktionsträger* (2000) 91 *et seq*; Alfred Verdross and Bruno Simma, *Universelles Völkerrecht. Theorie und Praxis* (3rd ed., Berlin, 1984) 641–642, § 1027.

³⁹ Judgment, *supra* note 1, para. 55.

⁴⁰ Cf. Cassese, *supra* note 10, at 863.

⁴¹ Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim's International Law*, vol. I (9th ed., 1992) 1043–1044, § 456.

⁴² Commentators and state practice agree on this dichotomy; cf. the extensive references provided by Cassese, *supra* note 10, at 853, nn. 26–29; for a criticism, see Bröhmer, *supra* note 4, at 233 *et seq*.

⁴³ On the differences between immunity *ratione materiae* and immunity *ratione personae*, cf. Cassese, *supra* note 10, at 862–864.

⁴⁴ Vienna Convention on Diplomatic Relations of 1961, 500 UNTS 95; Vienna Convention on Consular Relations of 1963, 596 UNTS 262.

⁴⁵ On the issue of diplomatic and consular immunities with regard to core crimes, cf. Wirth, *supra* note 32, at 446–449; on the differences between state and diplomatic immunities, cf. Cassese, *supra* note 10, at 864.

to third states which are not bound by the regulations of diplomatic or consular immunity.

B Exceptions from State Immunity? Precedents and States' Opinions

This section of the article will examine if there are exceptions to the immunities set out above with regard to criminal procedures for the alleged commission of core crimes.⁴⁶ As the ICJ seems to accept that prosecutions before international judicial organs (such as the future International Criminal Court or the Ad Hoc Tribunals) cannot be barred by immunities,⁴⁷ the following survey shall be confined to sources which clearly relate to national prosecutions.

At the latest since *Pinochet*, exceptions to state immunity are contemplated with regard to international core crimes. As the *Pinochet* case has been analysed and interpreted elsewhere, it may suffice here to state that an analysis of the individual votes of the decision reveals that four of the seven Law Lords denied immunity for core crimes in general⁴⁸ — not just for torture under the Convention Against Torture. Therefore, the decision must be regarded as state practice⁴⁹ and *opinio juris* that immunity *ratione materiae* does not exist for international crimes like torture, genocide, crimes against humanity and war crimes. It must also be said, however, that the decision affirms that the immunity *ratione personae* of incumbent Heads of State is an effective shield (even) against prosecutions for the alleged commission of international core crimes.⁵⁰

Besides *Pinochet*, other state practice exists⁵¹ which supports the view that there are exceptions to state immunity. For example, states which requested the extradition of Pinochet (Spain,⁵² Belgium, Switzerland and France) or otherwise instituted proceedings (Germany⁵³) must have supposed that there was no immunity.

Moreover, in the *Bouterse* case in the Netherlands, the *Gerechtshof* Amsterdam held that 'the commission of very serious offences — as are concerned here [i.e. the crime against humanity of torture] — cannot be considered to be one of the official duties of

⁴⁶ For a more detailed analysis of this question, cf. Wirth, *supra* note 32, at 433–446.

⁴⁷ Judgment, *supra* note 1, para. 58; probably the Court correctly assumed that, to date, in all cases of international criminal tribunals, the respective states must be considered to have waived their right to immunity; cf. Wirth, *supra* note 32, at 442; cf. also Cassese, *supra* note 10, at 864–866.

⁴⁸ Wirth, *supra* note 32, at 434–437. For the reasons given in this article, the present author does not share the rather pessimistic analysis of Bianchi, *supra* note 4, at 249, who holds that most of the votes were confined to torture.

⁴⁹ Decisions of national courts must be regarded as state practice; Akehurst, 'Custom as a Source of International Law', 47 *British Yearbook of International Law* (1974–1975) 1, at 10.

⁵⁰ Cf. *Pinochet* (No. 3), *supra* note 10, at 898 (*per* Lord Hutton), at 902 (*per* Lord Saville), at 913 (*per* Lord Millet), and at 915–916 (*per* Lord Phillips); cf. also Bianchi, *supra* note 4, at 248–249 and 254, n. 73.

⁵¹ Cf. also Wirth, *supra* note 32, at 439–442.

⁵² Spanish courts denied immunity to Pinochet on several occasions; see Sole, 'The Pinochet Case in Spain', 6 *ILSA Journal of International and Comparative Law* (2000) 653, at 674–675.

⁵³ On the German proceedings, cf. Wirth, *supra* note 32, at 441.

a head of state'.⁵⁴ Thus, the court denied immunity to Bouterse for crimes allegedly committed by him while in office (however, it will be submitted below that arriving at this conclusion by negating the official character of the respective conduct is not the best theoretical approach). On appeal to the *Hoge Raad*, the *Gerechtshof's* finding on immunity remained unchallenged (even though the decision as a whole was set aside *inter alia* for reasons regarding the principle of legality).⁵⁵

A further example of state practice — even if not a typical one — is Regulation 2000/15 of the UN Transitional Administration in East Timor.⁵⁶ The Regulation establishes special panels at the Dili District Court which have jurisdiction over genocide, crimes against humanity and war crimes and a few other very serious crimes. Section 15(2) of the Regulation is an almost verbatim copy of Article 27(2) of the Rome Statute of the International Criminal Court. It reads:

Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the panels from exercising its jurisdiction over such a person.

Clearly, the UN (which issued the Regulation) is not a state. However, the UN Administration in East Timor is acting *on behalf of* the new state of East Timor. Moreover, it is doing so with the consent of the states represented in the Security Council.⁵⁷

Finally, to date, many states have developed an *opinio juris* according to which the doctrine of state immunity is not absolute with regard to core crimes. During the eighth and ninth sessions of the Preparatory Commission for the ICC (PrepCom),⁵⁸ three instruments were negotiated which relate to state immunity: the Agreement on Privileges and Immunities, the UN–ICC Relationship Agreement and the Principles for a Headquarters Agreement Between the Host State and the ICC.⁵⁹ In the discussions, it became clear that many states wanted to clarify that the Relationship Agreement was not an obstacle for the present developments regarding state immunity for core crimes. Therefore, it was decided to insert Article 32, which reads: 'The present Agreement is without prejudice to relevant rules of international law, including

⁵⁴ *Gerechtshof Amsterdam*, 20 November 2000, *Nederlandse Jurisprudentie* (2001) No. 51, 302, at 303 (translation by the International Commission of Jurists, available at www.icj.org/objectives/decision.htm).

⁵⁵ *Hoge Raad*, 18 September 2001, Case No. 00749/01 CW 2323, www.rechtspraak.nl/uitspraak/frameset.asp?ui_id=28356; and 23 October 2001, Case No. 02648/00 www.rechtspraak.nl/uitspraak/frameset.asp?ui_id=28488.

⁵⁶ Regulation No. 2000/15 of 6 June 2000 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UN Doc. UNTAET/REG/2000/15, www.un.org/peace/etimor/untaetR/Reg0015E.pdf.

⁵⁷ Resolution 1272, UN Doc. S/RES/1272 (1999).

⁵⁸ The eighth and ninth sessions of the Preparatory Commission for the ICC took place from 24 September to 5 October 2000 and from 8 April to 19 April 2002 at the UN headquarters in New York.

⁵⁹ Draft Agreement on the Privileges and Immunities of the Court, UN Doc. PCNICC/2001/1/Add.3; Draft Relationship Agreement Between the Court and the United Nations; UN Doc. PCNICC/2001/1/Add.1; Draft Basic Principles Governing an Agreement to be Negotiated Between the International Criminal Court and the Kingdom of the Netherlands Regarding the Headquarters of the Court, UN Doc. PCNICC/2002/WGHQA/L.1; all available at www.un.org/law/icc/prepcomm/ninth.htm.

international humanitarian law.’ A similar statement was inserted as Principle No. 40 into the Principles for the Headquarters Agreement. The rationale behind both provisions is that many states are of the opinion that certain exceptions to state immunity exist and that the said legal instruments should not be interpreted in such a way as to confirm the existence of immunities for core crimes. Moreover, according to some states, these clauses mark a caveat that even immunities under these agreements are not all-encompassing. An even clearer expression of this opinion was stated by Paula Escarameia, the representative of Portugal, on behalf of Austria, Belgium, Chile, Portugal, South Africa and Switzerland at the final plenary meeting of the eighth session of the Preparatory Commission with regard to the interpretation of Article 19 of the Privileges and Immunities Agreement.⁶⁰ The Article provides that the UN shall waive any immunities of their personnel, if this is necessary for prosecutions by the ICC. In this context, the six states noted that with regard to Article 19 immunities cannot be waived if they do not exist. Thus, these states are of the opinion that immunities of UN personnel are not all-encompassing.⁶¹ Their statement remained unchallenged.

Apart from examples of state practice and opinion, there are also interesting passages in the jurisprudence of the ICTY, which are a strong confirmation of the developments in state practice and must be considered in the light of Article 38(1)(d) of the Statute of the ICJ. In *Blaskic*, the Tribunal said that:

those responsible for [war crimes, crimes against humanity and genocide] cannot invoke immunity from *national or international* jurisdiction even if they perpetrated such crimes while acting in their official capacity.⁶²

With regard to torture, *Furundzija* held:

[I]t would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty-making power of

⁶⁰ UN Press Release L/2988 of 5 October 2001 ('At Eighth Session of Preparatory Commission for International Criminal Court, Four Working Groups Announce Completion of Assignments'), available at www.un.org/News/Press/docs/2001/L2988.doc.htm.

⁶¹ The different kinds of immunities of UN personnel and the question of whether they would protect a bearer of office against prosecutions for core crimes cannot be discussed here. However, the states were right to assert that Article 19, in any case, does not imply that there exist immunities for core crimes. The reason is that there are offences under the jurisdiction of the ICC which are not core crimes and for which immunities indeed will have to be waived in order to allow the court to prosecute UN officials. These are offences against the administration of justice (Article 70 of the Rome Statute). With regard to these offences, it makes perfect sense to include a provision like Article 19 in the Relationship Agreement, because UN officials are very likely to be witnesses before the ICC who must be 'deterred', for instance, from giving false testimony.

⁶² *Prosecutor v. Blaskic*, Case No. IT-9-14-A, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para. 41 (emphasis added).

sovereign States, and on the other hand bar *States* from prosecuting and punishing those torturers who have engaged in this odious practice abroad.⁶³

The words emphasized clearly indicate that the judges did not confine their statement to prosecutions before international courts.

Most of the state practice mentioned above and the opinions voiced by states and international courts would be reconcilable with the view of *Pinochet* that, whereas immunity *ratione personae* could — temporarily — bar core crimes prosecutions, this is not the case with mere immunity *ratione materiae* (one could even argue that some of the formulations deny immunity *ratione personae*, as well). On the other hand, none of the sources quoted would allow the conclusion that mere immunity *ratione materiae* could bar such prosecutions. This also holds true for the recent French *Qaddafi* decision which expressly accepted that there are possible exceptions to state immunity⁶⁴ and which, moreover, concerned a *sitting* Head of State (who according to *Pinochet* is entitled to immunity *ratione personae*).

Finally, it is worth noting that decisions in civil cases or in criminal cases regarding national crimes cannot be regarded as valid precedents for the issue of state immunity for the prosecutions of core crimes. Rather, an interpretation of state practice in cases which did not relate to the prosecution of core crimes shows that the law of state immunity (*ratione materiae*) applied in these cases does not comprise core crimes prosecutions.⁶⁵ This view has most recently been confirmed in the civil proceedings in the *Mugabe* case,⁶⁶ where the court implied that criminal proceedings against foreign Heads of State or other high officials follow different rules to civil ones. The relevant passage reads:

[D]evelopments in the criminal context, whether concerning former or sitting government leaders, have advanced more definitively than the parameters defining permissible jurisdiction over sitting heads-of-states extending to personal conduct in civil matters.⁶⁷

Similar implications may be drawn from the opinion of Lord Phillips in *Pinochet*.⁶⁸

⁶³ *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, 10 December 1998, para. 156 (emphasis added); cf. also para. 140. The decisions in *Blaskic* and *Furundzija* expressly pronounced on *national* prosecutions (as opposed to international ones). The decisions say that defendants cannot raise immunity against prosecutions for core crimes before national courts. In contrast, other decisions of the tribunals (e.g. *Prosecutor v. Kunarac*, Case No. IT-96-23-T and IT-96-23/1-T, Judgment, 22 February 2001, para. 494) do not expressly relate to national prosecutions but state that there is no immunity, without, however, clarifying whether their statements are intended to cover not only international but also national prosecutions.

⁶⁴ '[L]e crime dénoncé [i.e. terrorism] ne relève pas des exceptions au principe de l'immunité de juridiction des chefs d'Etat étrangers en exercice.' *Qaddafi*, *supra* note 17.

⁶⁵ Cf. Wirth, *supra* note 32, at 442–446.

⁶⁶ *Tachiona v. Mugabe*, 169 F Supp 2d 259 (SDNY 2001). The plaintiff's claims against Mugabe for damages for an alleged campaign of violence against the political opposition in Zimbabwe were dismissed in part because Mugabe was the sitting Head of State of Zimbabwe.

⁶⁷ *Ibid.*, at 281.

⁶⁸ *Pinochet* (No. 3), *supra* note 10, at 918 and 922–923; Lord Phillips refers to criminal law precedents only; cf. on this question Wirth, *supra* note 4, at 74.

C *The Current Law of State Immunity for Core Crimes*

In conclusion, it may be stated that it has been recognized in all relevant precedents that immunity *ratione materiae* is no protection against core crimes prosecutions and, consequently, that 'normal' state officials and all *former* state officials, including the highest representatives, may be prosecuted abroad for these crimes.⁶⁹ Whereas some precedents could be interpreted as going even further, i.e. allowing prosecutions even against persons protected by immunity *ratione personae*, it remains doubtful whether these precedents are in accordance with the hierarchy of values recognized by modern international law.⁷⁰ The highest of these values is the maintenance of peace; and immunity *ratione personae*, protecting the most important representatives and decision-makers of a state, helps to safeguard the ability of a state to contribute to the maintenance of international and internal peace.⁷¹ In fact, in a situation where the highest functionaries of a state were arrested or otherwise seriously constrained in the exercise of their functions by a foreign state, the risk of war would be obvious.⁷² Therefore, it is submitted that immunity *ratione personae* should prevail even over the very important value which is addressed by the criminal prosecution of core crimes, namely, human rights.⁷³ On the other hand, however, immunity *ratione materiae* is no effective means for safeguarding *the person* of a state official, because his or her private acts are not covered. Neither is such safeguard warranted, as 'normal' officials can usually be replaced without endangering the ability of a state to discharge its functions and maintain peace. As to retired officials, high-ranking as they may have been, they need not even be replaced to guarantee a state's ability to discharge its functions.⁷⁴ Thus, it may be concluded that immunity *ratione materiae* protects mainly the state's dignity in that it prevents a foreign state from judging another state's conduct. This latter value, state dignity, obviously cannot trump human rights. Therefore, immunity *ratione materiae* should be no obstacle to the prosecution of the most serious violations of human rights which are described in the concept of core crimes. Thus, it is submitted that the *Pinochet* rule on state immunity is not only a manifestation of state practice and *opinio juris* but is also in accordance with the hierarchy of values of the international community.

It must be added that the situation is different if an international court like the ICC or the Ad Hoc Tribunals conducts the prosecutions (these courts are entitled to

⁶⁹ Zappalà, *supra* note 17, at 601, states: 'It is generally agreed that an exception to functional immunity [i.e. immunity *ratione materiae*] exists in cases where the individual is responsible for crimes under customary international law.'

⁷⁰ For a more thorough analysis of this matter, cf. Wirth, *supra* note 32, at 444–445.

⁷¹ The judgment, *supra* note 1, paras 53–54, also emphasizes that immunity for Ministers of Foreign Affairs is required for the unfettered discharge of their functions.

⁷² Cf. Wedgwood, *supra* note 35, at 841.

⁷³ Cf. Zappalà, *supra* note 17, at 611, who advocates a similar, though slightly narrower, scope, of immunity *ratione personae*.

⁷⁴ Wedgwood, *supra* note 35, at 841.

prosecute even persons protected by immunity *ratione personae*⁷⁵). In such a case, the public disturbances caused by the prosecution would most probably be mitigated⁷⁶ because much less doubt would exist as to the legality and fairness of such proceedings. Moreover, international courts and tribunals are backed by a great number of states which represent a more effective deterrent against a violent reaction than the power of a single nation. Finally, in any case, the states parties to the Rome Statute, with regard to the application of this Statute, waived any immunities by accepting its Article 27.⁷⁷

3 Does the ICJ's Opinion Correctly Reflect the Current Law of State Immunity?

The ICJ's decision with regard to the immunity of Ministers of Foreign Affairs raises at least two legal issues. First, due to the lack of relevant state practice, to date it was not clear whether Ministers of Foreign Affairs enjoy the same immunities as Heads of State.⁷⁸ The result of the equation made by the Court is that an incumbent Minister of Foreign Affairs enjoys immunity *ratione personae* from foreign jurisdiction under all circumstances regardless of whether he or she is at home or abroad or whether the act in question has been committed in an official or in a private capacity. As noted above, the Court arrived at this conclusion by emphasizing the similarity of the functions of both state representatives.⁷⁹ Indeed, if the above reasoning is applied, it seems very plausible that the position of a Minister of Foreign Affairs is important enough to accord him or her the same immunities as a Head of State: a Minister of Foreign Affairs maintains the foreign relations of a state and thus plays a crucial role in the management of inter-state conflicts; in this respect, he or she is even more important than an ambassador, who — at least in the receiving state — enjoys immunity *ratione personae*. Thus, it is submitted that the judgment was correct in treating Ministers of Foreign Affairs on the same footing as Heads of State.⁸⁰

⁷⁵ However, Article 27 of the Rome Statute — which is a treaty-based waiver of all immunities including immunity *ratione personae* — is not applicable to Heads of State and other high-ranking state officials of non-party states which enjoy immunity *ratione personae*; cf. Wirth, *supra* note 32, at 453.

⁷⁶ Imagine, for example, the situation if Milosevic had not been prosecuted by the ICTY but by a Croatian prosecutor.

⁷⁷ Wirth, *supra* note 32, at 452.

⁷⁸ Cf. Karl Doehring, *Völkerrecht* (1999) 284; Monika Lücke, *Die Immunität staatlicher Funktionsträger* (2000) 106 *et seq*; some authors even strictly deny that — unless during official missions abroad — Ministers of Foreign Affairs enjoy the same immunities as Heads of State, Georg Dahm, Jost Delbrück and Rüdiger Wolfrum, *Völkerrecht*, Band I/1 (2nd ed., 1989) 257; Folz and Soppe, 'Zur Frage der Völkerrechtsmäßigkeit von Haftbefehlen gegen Regierungsmitglieder anderer Staaten', 16 *Neue Zeitschrift für Strafrecht* (1996) 576, at 577.

⁷⁹ Judgment, *supra* note 1, para. 53.

⁸⁰ Cf. also Cassese, *supra* note 10, at 855.

However, with regard to the second issue, the present writer cannot agree with the Court: if the current law of state immunity was correctly stated in the paragraphs above, then it would follow that the Court was wrong in also holding that a *former* Minister of Foreign Affairs is immune against core crimes prosecutions. This is because such a decision implies that immunity *ratione materiae* — the only immunity available to former state officials — covers core crimes. However, to grant immunity *ratione materiae* in cases of core crimes would mean granting it to *every* state official, as even the lowest-ranking state officials are protected by immunity *ratione materiae*⁸¹ (as has been indicated above, there is no separate category of ‘immunity of former Ministers of Foreign Affairs’ in international law). Consequently, the vast majority of the perpetrators who are usually responsible for the commission of ‘crimes of state’⁸² such as genocide, crimes against humanity and war crimes would be immune.⁸³ It seems that this is what the Court overlooked when focusing exclusively on ‘holders of high-ranking office’ instead of taking an approach which considers the whole system of state immunity.⁸⁴

There is only one way to harmonize the views of the ICJ with the prevailing state practice, namely, to understand the term ‘official act’ in such a way that it, *per definitionem*, excludes the commission of core crimes. This approach was taken by some of the dissenting judges⁸⁵ in the case under discussion, in the *Bouterse* decision⁸⁶ and also by some of the judges in the *Pinochet* case.⁸⁷ However, it is not the most satisfactory method of dealing with the problem.⁸⁸ First, it is clear that, in general, the term ‘official act’ cannot be interpreted to comprise only legal conduct.⁸⁹ Otherwise, immunity for official acts would only exist if, in the opinion of the prosecuting state, the act in question was legal. In such cases, however, the prosecution would be pointless anyway. Moreover, one could make the following *argumentum ad absurdum* with regard to the Convention Against Torture:⁹⁰ Article 1(1) of the Convention

⁸¹ *Pinochet (No. 3)*, *supra* note 10, at 845 (*per* Lord Browne-Wilkinson): ‘the ambassador, like any other official of the state, enjoys immunity in relation to his official acts’ (emphasis added); Zappalà, *supra* note 17, at 598.

⁸² Cf. the title of the book of Pieter N. Drost, *The Crime of State. Penal Protection for Fundamental Freedoms of Persons and Peoples* (1959).

⁸³ Judge Al-Khasawneh in his Dissenting Opinion, para. 6, correctly points out that the gravest crimes are committed by states.

⁸⁴ A similar criticism has been voiced by Judge Van den Wyngaert in her Dissenting Opinion, paras 5–6.

⁸⁵ The Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal holds that ‘State-related motives are not the proper test for determining what constitutes public State acts’ (para. 85) but fails to provide an alternative definition.

⁸⁶ *Supra* note 54.

⁸⁷ Cf. e.g. *Pinochet (No. 3)*, *supra* note 10, at 899 (*per* Lord Hutton); for a criticism of these views, cf. Bröhmer, *supra* note 4, at 232–233.

⁸⁸ Cf. also the convincing criticism of Cassese, *supra* note 10, at 867–870.

⁸⁹ For example, if State A is of the opinion that the leaders of State B committed a breach of a treaty in force between both states State A cannot prosecute the leaders of State B for this alleged violation of the law; cf. also Wedgwood, *supra* note 35, at 839.

⁹⁰ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1985, 1465 UNTS 85; UN Doc. A/RES39/46; 23 ILM 1027 (1984) (draft) and 24 ILM 535 (1985) (changes to the draft on adoption).

provides that ‘the term “torture” means any act by which severe pain or suffering is intentionally inflicted when such pain or suffering is inflicted by a *public official or other person acting in an official capacity*’.⁹¹ Therefore, to define ‘official act’ as not comprising international crimes would mean that any act of torture was committed in a private capacity and, thus, would, *per definitionem*, not be subject to the provisions of the Convention Against Torture.⁹²

Besides, to define core crimes as ‘private’ acts would also imply that these acts cannot be attributed to the state for the purposes of state responsibility (unless the state would also be responsible for merely tolerating certain acts). This, in turn, would mean that the European Court of Human Rights could not order a state to pay damages to the victims of core crimes.⁹³

Thus, the proper definition of ‘official act’ should be something similar to ‘act committed for official purposes’.⁹⁴ According to such a definition, an act committed in order to restore public security would be an official act, whereas an act with the (immediate) purpose of acquiring personal wealth would be a private act, regardless of whether either act was legal or not.⁹⁵ If this definition of official act were accepted, the rule of state immunity *ratione materiae* should — in parallel to the exception for commercial activities⁹⁶ — simply be interpreted as not comprising such official acts which amount to core crimes.

4 Summary and Conclusion

The present article argued that the ICJ’s *obiter dictum*, that Ministers of Foreign Affairs are immune for official acts even when they are no longer in office, is both not well reasoned and difficult to reconcile with the existing law of state immunity. The

⁹¹ Emphasis added.

⁹² Cf. Cassese, *supra* note 10, at 868; Bank, *supra* note 4, at 693, holds that the terms of the Convention Against Torture and the notion of ‘official act’ for the purposes of state immunity could be interpreted differently, but seems to consider this not a very convincing solution. Indeed, it would be hard to argue that it helps to form a consistent system of international law to label the same act official and non-official. It is submitted that, in the case of state immunity, at least from a systematic point of view, there is no need for such disparity.

⁹³ Clearly, a possibility to avoid this result would be, again, to interpret the term ‘official conduct’ differently for the purposes of state responsibility; however, the criticism formulated in the previous note would apply to this solution as well.

⁹⁴ According to Lord Hope in *Pinochet (No. 3)*, *supra* note 10, at 881, one should ask ‘whether the act was done for the state’s interest’; cf. also *ibid.*, at 889 (*per* Lord Hutton); Wedgwood, *supra* note 35, at 839, suggests that there are three classes of conduct: official acts, private acts and ‘yet other acts that are excluded from official duties despite their “impersonal” motivation’; however, in the present case, the formulation of the ICJ which refers in para. 61 to ‘private acts’ only as possible subject-matters for criminal proceedings is at odds with Professor Wedgwood’s suggestion. In any case, it may be concluded that the issue is not yet settled and needs some further consideration to provide an adequate solution for all possible cases.

⁹⁵ Cf. Bothe, *supra* note 34, at 262.

⁹⁶ On this exception, cf. Wirth, *supra* note 32, at 433. Another exception is accepted, for instance, for undercover or clandestine acts (like espionage or sabotage) committed on the territory of the state which wishes to exercise jurisdiction; Folz and Soppe, *supra* note 78, at 578; and Bothe, *supra* note 34, at 252.

decision seems to disregard to a considerable extent existing state practice and *opinio juris* with regard to state immunity *ratione materiae* in the context of criminal prosecutions of core crimes. In fact, the Court hardly adduces any evidence for the existence of the rule which it asserts,⁹⁷ and, what is more, there is a gap in its reasoning: whereas all arguments made by the Court in discussing the merits of the case relate only to *incumbent* Ministers of Foreign Affairs, the conclusion drawn in paragraph 61 of the decision then includes *former* Ministers of Foreign Affairs.

A survey of the available sources showed that there is a strong tendency in international law to deny immunity to state officials who have committed core crimes. It has been argued that the best concretization of the existing state practice would be a rule shaped along the lines of the *Pinochet* decision. According to this rule, immunity *ratione personae* would grant effective protection (even) against prosecutions for core crimes. However, as immunity *ratione personae* is available only to incumbent holders of office, it ceases to protect them as soon as their term of office ends. Thereafter, these persons are protected only by immunity *ratione materiae*, which should be interpreted as providing no protection against core crimes prosecutions.

It is submitted that such a rule would strike the right balance between the protection of a state's ability to function and the protection of human rights.⁹⁸ It would ensure that the highest state representatives could discharge their functions unfettered, but, at the same time, would provide that, once they are out of office, they must face responsibility even for their official conduct. No Head of State and no Minister of Foreign Affairs could be sure anymore that he or she would not be called to account sooner or later and, thus, would have to take international criminal law into consideration when formulating his or her policies.

As to lower-ranking state officials, there would be no protection whatsoever — even while they are in office — against prosecutions for core crimes, because lower-ranking state officials are not protected by immunity *ratione personae* but only by immunity *ratione materiae*. This also would be in accordance with the principle that a state's ability to function should not be impaired because, unlike a Head of State, a lower-ranking state official can be replaced if he or she is, for instance, arrested while abroad for the alleged commission of crimes against humanity.

Finally, it must be noted that restricted state immunity with regard to core crimes is

⁹⁷ Cf. Dissenting Opinion of Judge Van den Wyngaert, para. 27.

⁹⁸ Bianchi, *supra* note 4, at 261, submits that no immunity at all should be granted with regard to prosecutions for the alleged commission of core crimes. He contends that granting immunity to incumbent Heads of State but denying it to former Heads of State would create a situation in which holders of power 'will be protected by law as long as they retain power, whereas they will be left to their fate once that power comes to an end'. However, former Heads of State who are prosecuted for the alleged commission of core crimes are not 'left to their fate' but are brought to justice. Moreover, whereas it may be true that those in power gain — temporary — advantage from state immunity, this is merely an unavoidable side-effect. The *legal* beneficiary of immunities is only and exclusively the state and the international community, never an individual. Thus, the scope of state immunity cannot be interpreted with regard to a perceived injustice in relation to individuals but only with regard to the international values protected by it.

not only, as has been submitted in this article, a part of current international law, it is also an imperative necessity for the protection of human rights. Judges Higgins, Kooijmans and Buergenthal are right in expressing serious doubts that, as the Court suggested in paragraph 61, a Minister of Foreign Affairs will be tried in his or her own country.⁹⁹ Indeed, as Professor Wedgwood noted, states which commit international crimes through their officials are most probably not the proper forum to call these officials to account.¹⁰⁰ A good example is the case of Hissène Habré, the former Head of State of Chad, who cannot be called to account in his own country.¹⁰¹ With regard to international prosecutions which the judgment¹⁰² conceived as a viable substitute for foreign national prosecutions, Judge Van den Wyngaert correctly points out that the future 'International Criminal Court, like the ad hoc international tribunals, will not be able to deal with *all* crimes that come under its jurisdiction'.¹⁰³ Rather, the Statute of the International Criminal Court itself envisions that the huge majority of the cases will be prosecuted before national courts¹⁰⁴ as the International Criminal Court will itself be able to conduct no more than four or five trials at the same time in its first years.

Therefore, it is necessary for the effective protection of human rights that core crimes can be prosecuted in national courts of third countries, and this is exactly what the members of the international community have finally decided to do.¹⁰⁵

⁹⁹ Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 78.

¹⁰⁰ Cf. Wedgwood, *supra* note 35, at 832.

¹⁰¹ Cf. Human Rights Watch, 'Disappointment on Belgian War-Crimes Law Ruling', www.hrw.org/press/2002/02/icj0215.htm.

¹⁰² Judgment, *supra* note 1, para. 61.

¹⁰³ Dissenting Opinion of Judge Van den Wyngaert, para. 37 (emphasis in original).

¹⁰⁴ Cf. Article 17 of the Rome Statute (regulating the so-called complementarity).

¹⁰⁵ It is to this end that Germany and other states updated their legislation implementing the core crimes of the Rome Statute (an English translation of the draft German International Crimes Code can be found at www.iuscrim.mpg.de/de/forsch/online_pub.html, bottom of page; the International Crimes Code came into force on 30 June 2002, one day before the Rome Statute).