Immunity v. Accountability: the ICJ’s Judgment in the Yerodia case

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The Judgment of the ICJ in the Case concerning the Arrest Warrant of 11 April 2000 (DR Congo v. Belgium) is more notable for what it does not say than for what it says. The Judgment does not address the legality of the exercise of universal jurisdiction claimed by Belgian law over the crimes of which Mr Yerodia is accused. The Congo had originally claimed that such an extensive exercise of jurisdiction constituted a violation of international law. But in its final submission it restricted itself to the issue of immunity. The Court holds that this does not preclude it from dealing with certain aspects of universal jurisdiction in the reasoning if this is necessary or desirable (para. 43 of the Judgment). Also, the Court recognizes that, as a matter of logic, the question of immunity can only arise if there is jurisdiction (para. 46). Nevertheless, the Court bypasses jurisdiction and deals with immunity only.

One may regret that the Court missed this opportunity to make a pronouncement on the extent of jurisdiction to prosecute war crimes and crimes against humanity, an issue that has been the subject of some new practice and much discussion in recent years. The question of the extent of national jurisdiction over certain international crimes is in a state of flux and far from settled. But an authoritative statement by the Court on this point may well have done more damage than good. Statements in several individual and separate opinions to the Judgment indicate that a rejection of these new developments by a majority was a distinct possibility. A finding that universal jurisdiction over these crimes was not authorised by international law might have created impediments for the new developments in this area. Therefore, on balance, the Court’s silence on this point is to be welcomed.

The Court reaches the result that, in the absence of pertinent treaty provisions, a Minister of Foreign Affairs enjoys full immunity from criminal jurisdiction as a matter of customary international law. The Court does not cite any authority to support this finding. It merely states that immunity for high-ranking officers is “firmly established” (para. 51). The Court simply postulates this purported rule of international law without any reference to State practice and opinio juris. Accord-

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ing to the Court, the purpose of this immunity is to ensure the effective performance of the Minister’s functions (para. 53). Therefore, need for inductive proof of a rule of customary international law is replaced by a reference to its usefulness or necessity.

The Court then turns to the question of whether there is an exception to the rule of immunity for an incumbent Minister of Foreign Affairs where he is suspected of having committed war crimes or crimes against humanity. The Court states that, after carefully examining State practice, it has been unable to establish such an exception (para. 58). It is remarkable that the Court relies on State practice for purposes of establishing the exception but not to demonstrate the existence of the basic rule of immunity. Moreover, it is regrettable that the Court does not disclose in more detail the State practice that it has examined.

No actual arrest ever took place under the warrant of 11 April 2000. The warrant itself contained a reference to immunity from enforcement for State representatives on official visits. It appears that Mr. Yerodia actually visited Belgium in June 2000 but was not arrested. The arrest warrant was circulated internationally but actual arrest in a country other than Belgium would have required two additional steps: the issuance of a so-called Interpol Red Notice and a decision by the authorities of the State requested that the arrest was to be carried out. Therefore, actual arrest not only did not take place but was a somewhat remote possibility, at any rate while Mr. Yerodia still held the office of Minister of Foreign Affairs.

The Court does not accept the distinction between actual arrest and the circulation of a document that may lead to an arrest. It finds that the mere issue of the warrant violated the immunity which Mr. Yerodia enjoyed. Similarly, the Court finds that the international circulation of the arrest warrant impeded Mr. Yerodia’s travels and violated international law (paras. 70, 71).

The remoteness of the probability of actual arrest and the marginal nature of the impediment to the exercise of Mr. Yerodia’s official functions would indicate that the Court’s primary concern is with the indignity directed at the Foreign Minister and hence at the State he represented. The grievance for which the Court provides a remedy is not an actual violation of the Minister’s immunity but merely an act preparatory thereto. The fact that the arrest warrant could have resulted in an arrest is enough for the Court to reach the finding of a violation of the immunity.

By the time the Judgment was rendered Mr. Yerodia had ceased to hold any ministerial office. Yet, in paragraph (3) of the dispositif, the Court finds that “Belgium must, by means of its own choosing, cancel the arrest warrant […] and so inform the authorities to whom that warrant was circulated”. Since the Court previously invoked the Factory at Chorzów case (para. 76), it would seem that it