DISSENTING OPINION OF JUDGE AL-KHASAWNEH

Immunity of a Foreign Minister functional — Its extent is not clear — Different from diplomatic representatives — Also different from Heads of State — Ministers entitled to immunity from enforcement when on official missions — But not on private visits — Belgian warrant did not violate Mr. Yerodia's immunity — Express language on non-enforceability when on official mission — Circulation of warrant not accompanied by Red Notice — More fundamental question is whether there are exceptions in the case of grave crimes — Immunity and impunity — Distinction between procedural and substantive aspects of immunity artificial — Cases postulated by the Court do not address questions of impunity adequately — Effective combating of grave international crimes has assumed a jus cogens *character — Should prevail over rules on immunity — Development in the field of jurisdictional immunities relevant — Two faulty premises — Absolute immunity — No exception — Dissent.*

1. As a general proposition it may be said without too much fear of contradiction that the effective conduct of diplomacy — the importance of which for the maintenance of peaceful relations among States needs hardly to be demonstrated — requires that those engaged in such conduct be given appropriate immunities from — *inter alia* — criminal proceedings before the courts of other States. The nature and extent of such immunities has been clarified in the case of diplomatic representatives in the 1961 Vienna Convention, as well as in extensive jurisprudence since the adoption of that Convention. By contrast, and this is not without irony, the nature and extent of immunities enjoyed by Foreign Ministers is far from clear, so much so that the ILC Special Rapporteur on Jurisdictional Immunities of States and Their Property expressed the opinion that the immunities of Foreign Ministers are granted on the basis of comity rather than on the basis of established rules of international law. To be sure the Convention on Special Missions — the status of which as a reflection of customary law is however not without controversy — covers the immunities of Foreign Ministers who are on official mission, but reserves the extent of those immunities under the unhelpful formula:

> "The Head of the Government, the Minister for Foreign Affairs and other persons of high rank, when they take part in a special mission of the sending State, shall enjoy in the receiving State or in a third State, in addition to what is granted by the present Convention, the facilities, privileges and immunities accorded by international law." (Art. 21, para. 2.)

Nor is the situation made any clearer by the total absence of precedents with regard to the immunities of Foreign Ministers from criminal process. What is sure however is that the position of Foreign Ministers cannot be assimilated to diplomatic representatives for in the case of the latter the host State has a discretion regarding their accreditation and can also declare a representative *persona non grata*, which in itself constitutes some sanction for wrongful conduct and more importantly opens the way — assuming good faith of course — for subsequent prosecution in his/her home State. A Minister for Foreign Affairs accused of criminal conduct — and for that matter criminal conduct that infringes the interests of the community of States as a whole in terms of the gravity of the crimes he is alleged to have committed, and the importance of the interests that the community seeks to protect and who is furthermore not prosecuted in his home State — is hardly under the same conditions as a diplomatic representative granted immunity from criminal process.

2. If the immunities of a Minister for Foreign Affairs cannot be assimilated to a diplomatic representative, can those immunities be established by assimilating him to a Head of a State? Whilst a Foreign Minister is undoubtedly an important personage of the State and represents it in the conduct of its foreign relations, he does not, in any sense, personify the State. As Sir Arthur Watts correctly puts it:

> "heads of governments and foreign ministers, although senior and important figures, do not symbolize or personify their States in the way that Heads of States do. Accordingly, they do not enjoy in international law any entitlement to special treatment by virtue of qualities of sovereignty or majesty attaching to them personally." (A. Watts, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers", *Recueil des cours de l'Académie de droit international de La Haye*, 1994, Vol. 247, pp. 102-103).

3. Moreover, it should not be forgotten that immunity is by definition an exception from the general rule that man is responsible legally and morally for his actions. As an exception, it has to be narrowly defined.

4. A Minister for Foreign Affairs is entitled to immunity from enforcement when on official mission for the unhindered conduct of diplomacy would suffer if the case was otherwise, but the opening of criminal investigations against him can hardly be said by any objective criteria to constitute interference with the conduct of diplomacy. A faint-hearted or ultra-sensitive Minister may restrict his private travels or feel discomfort but this is a subjective element that must be discarded. The warrant

issued against Mr. Yerodia goes further than a mere opening of investigation and may arguably be seen as an enforcement measure but it contained express language to the effect that it was not to be enforced if Mr. Yerodia was on Belgian territory on an official mission. In fact press reports — not cited in the Memorials or the oral pleadings — suggest that he had paid a visit to Belgium after the issuance of the warrant and no steps were taken to enforce it. Significantly also the circulation of the international arrest warrant was not accompanied by a Red Notice requiring third States to take steps to enforce it (which only took place after Mr. Yerodia had left office) and had those States acted they would be doing so at their own risk. A breach of an obligation presupposes the existence of an obligation and in the absence of any evidence to suggest a Foreign Minister is entitled to absolute immunity, I cannot see why the Kingdom of Belgium, when we have regard to the terms of the warrant and the lack of an Interpol Red Notice was in breach of its obligations owed to the Democratic Republic of Congo.

5. A more fundamental question is whether high State officials are entitled to benefit from immunity even when they are accused of having committed exceptionally grave crimes recognized as such by the international community. In other words, should immunity become *de facto* impunity for criminal conduct as long as it was in pursuance of State policy? The Judgment sought to circumvent this morally embarrassing issue by recourse to an existing but artificially drawn distinction between immunity as a substantive defence on the one hand and immunity as a procedural defence on the other. The artificiality of this distinction can be gleaned from the ILC commentary to Article 7 of the Draft Code of Crimes against the Peace and Security of Mankind, which states: "The absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings" — and it should not be forgotten that the draft was intended to apply to national or international courts — "is an essential corollary of the absence of any substantive immunity or defence. It would be paradoxical to prevent an individual from invoking his official position to avoid responsibility for a crime only to permit him to invoke this same consideration to avoid the consequences of this responsibility."

6. Having drawn this distinction, the Judgment then went on to postulate four cases where, in an attempt at proving that immunity and impunity are not synonymous, a Minister, and by analogy a high-ranking official, would be held personally accountable:

(a) for prosecution in his/her home State;
(b) for prosecution in other States if his/her immunity had been waived;

(c) after he/she leaves office except for official acts committed while in office;
(d) for prosecution before an international court.

This paragraph (Judgment, para. 61) is more notable for the things it does not say than for the things it does: as far as prosecution at home and waiver are concerned, clearly the problem arises when they do not take place. With regard to former high-ranking officials the question of impunity remains with regard to official acts, the fact that most grave crimes are definitionally State acts makes this more than a theoretical lacuna. Lastly with regard to existing international courts their jurisdiction *ratione materiae* is limited to the two cases of the former Yugoslavia and Rwanda and the future international court's jurisdiction is limited *ratione temporis* by non-retroactivity as well as by the fact that primary responsibility for prosecution remains with States. The Judgment cannot dispose of the problem of impunity by referral to a prospective international criminal court or existing ones.

7. The effective combating of grave crimes has arguably assumed a *jus cogens* character reflecting recognition by the international community of the vital community interests and values it seeks to protect and enhance. Therefore when this hierarchically higher norm comes into conflict with the rules on immunity, it should prevail. Even if we are to speak in terms of reconciliation of the two sets of rules, this would suggest to me a much more restrictive interpretation of the immunities of high-ranking officials than the Judgment portrays. Incidentally, such a restrictive approach would be much more in consonance with the now firmly established move towards a restrictive concept of State immunity, a move that has removed the bar regarding the submission of States to jurisdiction of other States often expressed in the maxim *par in parem non habet imperium*. It is difficult to see why States would accept that their conduct with regard to important areas of their development be open to foreign judicial proceedings but not the criminal conduct of their officials.

8. In conclusion, this Judgment is predicated on two faulty premises:

(a) that a Foreign Minister enjoys absolute immunity from both jurisdiction and enforcement of foreign States as opposed to only functional immunity from enforcement when on official mission, a proposition which is neither supported by precedent, *opinio juris*, legal logic or the writings of publicists;

(b) that as international law stands today, there are no exceptions to the immunity of high-ranking State officials even when they are accused of grave crimes. While, admittedly, the readiness of States and municipal courts to admit of exceptions is still at a very nebulous stage of development, the situation is much more fluid than the

Judgment suggests. I believe that the move towards greater personal accountability represents a higher norm than the rules on immunity and should prevail over the latter. In consequence, I am unable to join the majority view.

(Signed) Awn AL-KHASAWNEH.
