CASE WESTERN RESERVE UNIVERSITY
SCHOOL OF LAW

INTRODUCTION TO INTERNATIONAL CRIMINAL LAW

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Module #5:

Specialized Defenses

OCTOBER 10

International Criminal Law
Module #5
Defenses under International Criminal Law

On-Line Simulation

For this week's on-line simulation, assume the following facts, based on the real-life case of Drazen Erdomovic before the International Criminal Tribunal for the former Yugoslavia. Erdomovic is a 20 year old ethnic Serb, who had voluntarily enlisted in 1994 in the Bosnian Serb army as an auto mechanic. In May 1995, he was transferred to serve as an infantry soldier in the 10th Sabotage Detachment of the Bosnian Serb army. On 6 July 1995, the Bosnian Serb army commenced an attack on the UN "safe area" of Srebrenica. This attack continued through 11 July 1995, when the first units of the Bosnian Serb army entered Srebrenica. On 16 July 1995, busses containing Bosnian Muslim men arrived at the collective farm in Pilica, near Srebrenica. Each bus was full of about 70 Bosnian Muslim men, ranging from 17-60 years of age. After each bus arrived at the farm, the Bosnian Muslim men were removed in groups of about 10, escorted by members of the 10th Sabotage Detachment to a field adjacent to farm buildings and lined up in a row with their backs facing Erdemovic and members of his unit.

At first Erdemovic refused to carry out his commander's order to shoot and kill the Muslim men with his machine gun. But then the commander told him that the alternative was to line up next to the Muslims and be killed. Erdemovic then pulled the trigger, and killed approximately 70 men. When Erdemovic was prosecuted for these killings before the Yugoslavia Tribunal he raised the defense of having acted under duress. Based on the reading materials below:

Members of Group A are invited to upload a submission, playing the role of the Prosecutor, arguing why Erdomovic cannot rely on the defense of duress.

Members of Group B are invited to upload a submission, playing the role of the Defense, arguing why Erdomovic can rely on the defense of duress.

In order to complete the optional on-line simulations for this course, students must go to the Navigation Bar on the left panel. Under the Exercises section, you will find a button for "on-line simulations." The simulations for each session are available under this button. Written work can be submitted directly or through file upload. Students who post five or more on-line submissions of over 200 words in length during the course (simulations and discussions) will be awarded a Statement of Accomplishment with Distinction for the course.

Problem for On-Line Discussion

Based on the *New Tork Times* article about the court martial of Captain Lawrence Rockwood, and the background materials below, you are invited to upload a submission that argues why you think Captain Rockwood should or should not be able to prevail on the defense of refusing to obey an unlawful order.

In order to complete the optional on-line simulations for this course, students must go to the Navigation Bar on the left panel. Under the Exercises section, you will find a button for "on-line simulations." The simulations for each session are available under this button. Written work can be submitted directly or through file upload. Students who post five or more on-line submissions of over 200 words in length during the course (simulations and discussions) will be awarded a Statement of Accomplishment with Distinction for the course.

Francis X. Clines, "American Officer's Mission for Haitian Rights Backfires," New York Times, May 12, 1995.

An Army officer who took the words of the nation's Commander in Chief to heart and went off on his own in search of human-rights violations against Haitian penitentiary inmates faced a court-martial today with his career and his conscience on the line.

A panel of five fellow officers sat in judgment of the odd, passionate case of Capt. Lawrence P. Rockwood, a fourth-generation military man who talked his way alone into the National Penitentiary in Port-au-Prince last year during the multinational Haitian incursion in a zealous and unauthorized search for abused political prisoners.

His one-man mission, intercepted before he could complete it, has ruined his 15-year career and left him facing a possible dishonorable discharge and 10 years in prison. But as he took the stand this morning, the captain defended his belief in conscience, a belief that was bolstered, he emphasized, by his soldier-father, who took him as a boy to the Dachau concentration camp in Germany and taught him about the individual soldier's duty to human rights over rote obedience.

"He explained why these things exist in the world," Captain Rockwood told the tribunal here in a simple barracks courthouse. "What happened there was the result of cynicism and blind obedience," he said, speaking of Dachau. He justified his prison adventure by invoking international law and President Clinton's stated concern for "stopping brutal atrocities" as a main motive for the military intervention in Haiti that began Sept. 19.

Platoons of soldiers jogged past in orderly cadence this morning as the captain faced charges of leaving his assigned post and disobeying orders. In the view of the Army, Captain Rockwood was a military intelligence specialist on the loose in Haiti with a separate agenda and a loaded

rifle when he scaled the fence of his base on the night of Sept. 30 and found his way to the national prison, announcing that he was there to inspect it for prisoner abuses.

Captain Rockwood's defense is that he heeded too well the words of President Clinton. The 36-year-old officer said he acted on his own only after he was rebuffed in various attempts at going through the chain of command and found the military too preoccupied with protecting its own invasion force to attend properly to the human-rights abuses in Haiti. "The chain of command had cowardly failed to carry out the primary objective of the Commander in Chief," the captain firmly insisted, saying he had to act. "I felt it was my duty."

Rockwood testified that he had carefully gathered intelligence information from a number of sources and was convinced that political prisoners faced torture and murder in the Port-au-Prince prison, long a target of criticism by human-rights monitors. "I felt human life would be lost," he said, arguing that the Army was required to take action under international law like the Geneva conventions. Hours before his prison adventure, the captain had accused his own command of dereliction in a written complaint to the Inspector General of the Army. It was "a career-terminating move," Captain Rockwood said.

The captain edged toward sarcasm in denouncing military officials and he bristled when Captain Pede asked whether he claimed broad authority to selectively reject or reinterpret orders.

"I am personally responsible for carrying out international law," Capt. Rockwood replied. "That is the Nuremberg principle."

Under the Nuremberg Principles, established by the Allies after World War II, an international crime can be subject to punishment, heads of state can be held responsible, and obeying orders does not exempt subordinates when there is the possibility of a moral choice.

The prosecution objected repeatedly to the attempts by the captain's lawyer, former Attorney General Ramsey Clark, to focus on reports from international monitoring groups that the Port-au-Prince prison was notorious, with up to 85 percent of the inmates incarcerated for political opposition, not crimes.

Captain Rockwood, who was also supported by the Lawyers Committee for Human Rights, a private advocacy group, insisted that throngs of political prisoners in Port-au-Prince were at heightened risk as Haiti's despotic de facto regime was on the verge of collapse. To superiors' claims that no intelligence reports of prison abuse in Port-au-Prince were ever received, Captain Rockwood insisted that the Army never sought them out in the first place.

"I was aware that you are not allowed to walk on the grass to stop a rape," he said in an interview before he took the stand, referring to the Army's rules regarding actions that soldiers could take against Haitians. He said at the time he rated the court-martial risk as negligible in the face of the obligation he sensed by law and family tradition.

The ghosts of old and new armies seemed on trial, too. Prosecution witnesses hailed Operation Uphold Democracy, the military name for the Haitian incursion, as a great success under difficult

post-cold-war circumstances. But the defense invoked the history of World War II atrocities and the My Lai massacre in Vietnam as agonizing milestones pointing to the primacy of Captain Rockwood's conscience under the conditions he sensed in Haiti.

Once he was inside the prison, the Haitian authorities summoned help from the United States Embassy. A military attache, Maj. Roland S. Lane, told the court that he arrived to find a self-righteous and antagonistic captain holding a loaded weapon and "trying to take action into his own hands" during a "fragile" period of transition in Haiti.

"I thought, 'This could really turn out nasty,' " the major testified, adding that Captain Rockwood was "unstable" in fluctuating from calmness to shouting rages and demanding the right to check on prisoners' conditions. The captain was eventually talked into unloading the weapon and obeying an order to leave the prison. He was taken to an Army hospital for a psychiatric examination and was cleared as healthy.

"He's a soft person, a gentle person," Mr. Clark said in discussing the captain's excited state when confronting superiors. "He became upset because he knew if he was sent home his work would be severely damaged." His commander, Lieut. Col. Frank Bragg, testified that Captain Rockwood was shouting and had a contemptuous attitude after he returned from the prison. Colonel Bragg said he repeatedly ordered the officer to be silent and "shut up," but the captain shouted: "I'm an American officer. I'm not a Nazi officer and I want a full accounting of human-rights abuses." Captain Rockwood told the court what he meant was that, under international law, "there are limitations to military authority and I thought any educated officer realized that."

Contradicting the defense, Colonel Bragg said Army regulations specifically barred counterintelligence specialists like Captain Rockwood and himself from investigating possible prison atrocities. Major Lane said officials from the State Department and the Justice Department, not from the Army, had prison responsibilities in the Haiti operation. Rather than worrying about human-rights abuses in prison, Colonel Bragg said, the defendant should have been worrying about protecting his fellow soldiers by tracing arms caches and "getting the bad guys off the streets."

[Rockwood was convicted and dishonorably discharged from the army. He went on to get his Ph.D. at the University of Florida, wrote a best-selling book about his case, titled “Walking Away from Nuremberg” (University of Massachusetts Press, 2007), and the production company owned by Steven Spielberg ("Saving Private Ryan") recently paid Rockwood $475,000 for the rights to his story.]

READINGS

I. The Defense of Superior Orders

The following excerpt draws upon “Superior Orders and Duress as Defenses in

International Law" available at:
http://www.unt.edu/honors/eaglefeather/2004_Issue/HensonC2.shtml

There are several important defenses that have raised in international criminal trials. The first, and probably the most well-known, of these defenses in international and military law is the defense of superior orders. This defense argues that an individual is not responsible for any act he or she commits if he or she was ordered to perform that act by a higher-ranking officer. According to one author:

> Military discipline is founded on complete obedience to superior orders, and it was considered impractical to expect a member of the armed services in conditions of war "to weigh scrupulously the legal merits of the orders received." (Mitchell, 2000, p. 5)

Essentially, since militaries are built on a hierarchical structure that is to be rigidly adhered to, lower-ranking members of the armed services do not have the necessary intent or motive required for most crimes.

Historic Development

While some defenses are relatively new, others have existed for several centuries. "Superior orders" is probably the oldest defense used in military trials. Dating back to the 15th century, Peter von Hagenbach was tried and convicted for mistreating, and permitting those under his command to mistreat, the people of Breisach (Levie, 1991, p.187). His defense was that he was adhering to the orders of his superior, the Duke of Burgundy. Henry Wirz, a captain for the Confederate Army in the American Civil War, made a similar defense against allegations of his mistreatment of prisoners of war (Levie, 186). Wirz stated:

> I think I may also claim as a self-evident proposition that if I, a subaltern officer, merely obeyed the legal orders of my superiors in the discharge of my official duties, I cannot be held responsible for the motives that dictated such orders. (Levie, 1991, p. 186)

Wirz's claim was not given much credence and he was sentenced to death.

Lassa Oppenheim, a well-known authority on international law in the first half of the 20th century, produced nine editions of his comprehensive works. His views, however, changed considerably over time. In his first edition, published in 1906, Oppenheim wrote that "If members of the armed forces commit violations by order of their Government, they are no war criminals and cannot be punished by the enemy…." (Levie, 1991, p. 186) However, by the sixth edition written in 1935, Oppenheim writes:

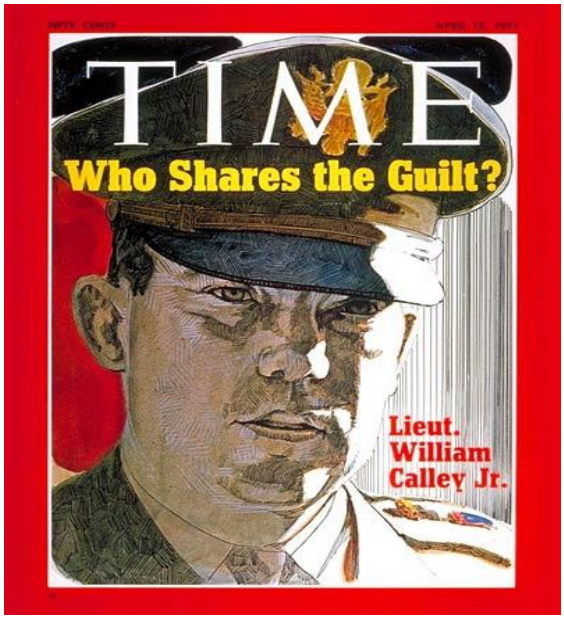
> The fact that a rule of warfare has been violated in pursuance of an order of the belligerent Government or of an individual belligerent commander does

> not deprive the act in question of its character as a war crime…[M]embers of the armed forces are bound to obey lawful orders only…. (Levie, 1991, p. 187)

It is certainly probable that Oppenheim and his editors revised his views after witnessing World War I and the trials following it.

The *Dover Castle* case following World War I provided one of the first cases involving the defense of superior orders in the period of modern warfare (Scaliotti. 2001, p. 133). The Dover Castle was a hospital ship carrying the sick and wounded from Malta to Gibraltar. In spite of the fact that this was known as a peaceful ship, it was torpedoed, resulting in the death of everyone on board. The National German court found the sailor who actually launched the torpedo not guilty because, according to German law, subordinates were required to follow all orders from their superiors (Scaliotti, 2001, p. 133). The *Llandovery Castle* case involved a similar situation where, subsequent to the boat sinking, most of the survivors in the water were shot by the accused. In this case as well, the accused were found not guilty because they acted pursuant to a superior's orders (Scaliotti, 2001, p. 133).

Another important and famous case for the development of the superior orders defense was the trial of Adolf Eichmann in 1961. This case codified the "manifest illegality" principle, which states that a subordinate should disobey all orders that are clearly illegal (Scaliotti, 2001, p. 131). Another particularly relevant case arising from crimes committed during World War II was the trial of Klaus Barbie. In this case, the French Court of Cassation stated that the defense of superior orders is not an excuse, and may not qualify as a mitigating factor for punishment (Scaliotti, 2001, p. 132).



The most famous Obedience to Orders Defense case in modern times was that Lt. William Calley and the My Lai massacre. Calley was charged on September 5, 1969, with premeditated murder for the deaths of 104 Vietnamese civilians near the village of My Lai during the Vietnam war. As many as 500 villagers, mostly women, children, infants and the elderly, had been systematically killed by American soldiers during a bloody rampage on March 16, 1968.

Calley's trial started on November 17, 1970. It was the military prosecution's contention that Calley, in defiance of the rules of engagement, ordered his men to deliberately murder unarmed Vietnamese civilians despite the fact that his men were not under enemy fire at all. Testimony revealed that Calley had ordered the men of 1st Platoon, Company C, 1st Battalion, 20th Infantry of the 23rd Infantry Division (Americal) to kill everyone in the village, including the elderly, infirm, and infants.

Calley's defense was that he was following the orders of his immediate superior, Captain Ernest Medina. Taking the witness stand, Calley, under the direct examination by his civilian defense lawyer George Latimer, claimed that on the previous day, his commanding officer, Captain Medina, made it clear that his unit was to move into the village and that everyone was to be shot for they all were Viet Cong. Twenty-one other members of Charlie Company also testified on Calley's defense corroborating the orders. In his personal statement, Calley stated that:

> "I was ordered to go in there and destroy the enemy. That was my job that day. That was the mission I was given. I did not sit down and think in terms of men, women and children. They were all classified as the same, and that's the classification that we dealt with over there, just as the enemy. I felt then and I

> still do that I acted as I was directed, and I carried out the order that I was given and I do not feel wrong in doing so."

After deliberating for 79 hours, the six-officer jury (five of whom had served in Vietnam) convicted Calley on March 29, 1971, of the premeditated murder of 22 Vietnamese civilians. On March 31, 1971, Calley was sentenced to life imprisonment and hard labor at Fort Leavenworth, the Department of Defense's only maximum security prison.

Calley's conviction was upheld by the Federal Court of Military Appeals in *United States v. Calley*, 22 U.S.C.M.A. 534. The Appeals Court began its opinion by agreeing that an order directing Calley and his troops to kill unresisting Vietnamese would be an illegal order. The Court went on to say:

> A determination that an order is illegal does not, of itself, assign criminal responsibility to the person following the order for acts done in compliance with it. Soldiers are taught to follow orders, and special attention is given to obedience of orders on the battlefield. Military effectiveness depends upon obedience to orders. On the other hand, the obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent, obliged to respond, not as a machine, but as a person. The law takes these factors into account in assessing criminal responsibility for acts done in compliance with illegal orders. Thus, the acts of a subordinate done in compliance with an unlawful order given him by his superior are excused and impose no criminal liability upon him unless the superior's order is one which a man of *ordinary sense and understanding* would, under the circumstances, know to be unlawful, or if the order in question is actually known to the accused to be unlawful.

Of the 26 officers and soldiers initially charged for their part in the My Lai Massacre or the subsequent cover-up, only Calley was convicted. His sentence was later commuted, and ultimately, Calley served only three and a half years of house arrest in his quarters at Fort Benning.

The International Criminal Court's Test for the Obedience to Orders Defense

The International Criminal Court Statute has the following provision on the Obedience to Orders Defense:

Article 33: Superior orders and prescription of law

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

(a) The person was under a legal obligation to obey orders of the Government or the superior in question;

(b) The person did not know that the order was unlawful; and

(c) The order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

II. The Defense of Duress

Another defense commonly associated with superior orders is duress or necessity. Duress requires that a person be put into a situation where he/she, or someone they know, is being threatened with imminent and severe bodily harm if the person does not comply. Again, a person under duress lacks the necessary *mens rea* or intent to be found guilty of committing a crime because they were simply trying to avoid a greater harm by committing their crime.

Historical Development

Duress as a defense is accepted in nearly every jurisdiction around the world in some form or another. This defense has existed throughout time, yet has a relatively short history in international law. In the cases following World War II, duress was raised several times. First, in the *Einsatzgruppen* case, the Court found:

> There is no law which requires that an innocent man must forfeit his life or suffer serious bodily harm in order to avoid committing a crime which he condemns. The threat, however, must be imminent, real, and inevitable. No court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever. (U.S. Military Tribunal, 1950, p. 480).

Other cases, such as *Stalag III*, *Holzer*, and *Feurstein*, took a different approach, understanding that duress is not a defense when an innocent life is taken but not denying that duress is a defense in general terms. This approach has been adopted by many civil law systems, while many common law systems have not required that condition.

The *Jepsen* case, decided by a British court, ruled that duress could qualify as a defense if "the evil threatened the accused was on balance greater than the evil which he was called upon to perpetrate" (Scaliotti, 2001, p. 149). This decision was the first to incorporate a standard of proportionality between the threat levied and the act committed into the consideration of the defense. In the *Hostage* case before the Nuremberg Tribunal, duress was ruled as a defense, even to murder, when "the threat is imminent, real, and inevitable" (Scaliotti, 2001, p. 149).

Defense attorney Jovan Babic (left) and Erdemovic (CNN)

The Yugoslavia Tribunal's *Erdomovic Case*

The defense of duress has become one of the most controversial issues the ICTY has decided upon. Some members of the Tribunal have even expressed reservations and concern over the finding of the Court regarding this issue (G. Mettreux, personal interview, May 20, 2003). Without a doubt, the most applicable case regarding duress at the ICTY is *Erdemovic* (ICTY, 1995a). A great deal has been written discussing not only how the decision was made, but also what implications it will have on subsequent cases and proceedings. While there is technically a difference between necessity and duress, in that necessity can involve natural occurrences that force a person to commit a certain act while duress implies a situation created by another that forces a person to commit a certain act, the two shall be used equivocally, as is the case in the literature (ICTY, 1996c). Judge McDonald and Judge Vorhah filed a joint, concurrent opinion, Judge Li filing a separate, partially concurring and partially dissenting opinion, while both Judge Cassese and Judge Stephen filed separate dissenting opinions. While each of these opinions warrants discussion, only the joint opinion filed by Judge McDonald and Judge Vorhah (ICTY, 1996b), as well as the dissenting opinion filed by Judge Cassese (ICTY, 1996b) will be analyzed here for the sake of brevity. A short summary of the case will be presented first to allow a better understanding of the arguments and the rulings made by the judges.

Drazen Erdemovic was a young man who joined the Yugoslavian army to provide for his wife and infant son. He had tried to stay out of the conflict for as long as possible, but was in desperate need of money. Erdemovic allegedly joined a specific unit because it was more ethnically heterogeneous in the hope that this group would be less likely to commit war crimes. He signed on to become a mechanic. However, after a short time, the command and the composition of the group became predominantly Serbian. In July 1995, Erdemovic, along with the rest of his unit, was sent to a farm outside of Pilica, where he was ordered to execute Muslim men from 17 to 60 years in age who were unarmed and had recently surrendered to the Bosnian Serb army. When Erdemovic refused to participate, his commanding officer told him he would be shot along with the others if he did not comply. Reluctantly, Erdemovic took part in the killings, personally murdering between 10 and 100 people that day. Following his leaving the army, Erdemovic turned himself in to the ICTY, pled guilty, and

cooperated fully with the Tribunal.

The sentencing chamber found that duress, while potentially a legitimate defense, was not applicable in this situation, because there was no corroboration for Erdemovic's claim that he acted under duress (ICTY, 1996a, Paragraph 91). Interestingly, the Court needed no additional evidence to convict him of the crimes he told the Court he committed. The standards for duress, as established in the *Krupp* case, were that the act threatened must be immediate and serious, that there was no means of escape, and that the act committed was not disproportionate to the act threatened (ITCY, 1996a, Paragraph 17). Complicating the "disproportionate" standard was the understanding of the Trial Chamber that the life of the accused and the victim are not equivalent when dealing with a crime against humanity, where, tautologically speaking, humanity is the victim (ICTY, 1996a, Paragraph 19). The Chamber concluded that:

On the basis of the case-by-case approach and in light of all the elements before it, the Trial Chamber is of the view that proof of the specific circumstances which would fully exonerate the accused of his responsibility has not been provided. Thus, the defense of duress accompanying the superior order will…be taken into account at the same time as other factors in the consideration of mitigating circumstances. (ICTY, 1996a, Paragraph 20)

On Appeal, the Chamber split 3-2 against accepting duress as a defense, instead acknowledging it solely as a mitigating factor in punishment. The majority opinion, presented by Judge McDonald and Judge Vohrah, expressed the view that law "must serve broader normative purposes," and that the potential for abuses would undermine one of the prime objectives of international law, namely, the "protection of the weak and vulnerable" (ICTY, 1996b, Paragraph 75). McDonald and Vohrah go on to argue that their decision cannot be examined in a purely legal framework, but must be understood as having serious and actual policy implications (ICTY, 1996b, Paragraph 78). They rejected the utilitarian framework adopted by Cassese and the *Masetti* case, and instead argue that "international humanitarian law should guide the conduct of combatants and their commanders" (ICTY, 1996b, Paragraph 80). While they concede their standard would not be met by an ordinary citizen (ICTY, 1996b, Paragraph 83), McDonald and Vorhah go on to assert that a soldier should be prepared to die given his/her job and that he/she consequently has a stronger resolve than other people (ICTY, 1996b, Paragraph 84).

Cassese's dissenting opinion is truly different in many respects. Cassese accepts the notion of duress as a complete defense, offering four standards for its application. Three of these are the same as those described above (immediacy, no recourse, and proportionality), but the fourth criterion states that "the situation leading to duress must not have been voluntarily brought about by the person coerced" (ICTY, 1996c, Paragraph 16). Essentially, this standard was subsumed in earlier understandings of duress in international law – it is not a very compelling argument to say that a person was forced to do something after he/she willingly put himself in a position to be forced. After analyzing the cases set forth as examples by the prosecution for the

invalidity of duress as a defense, Judge Cassese moves on to analyze the *Llandovery Castle* case, the *Eichmann* case, and other previously discussed cases of precedent for duress (ICTY, 1996c, Paragraph 35).

Cassese spends a great deal of time analyzing the standard of proportionality, as well as its difficult applicability in cases of this nature. He seems to bear a similar reluctance demonstrated by Judge McDonald and Judge Vorhah to wholeheartedly endorse a purely utilitarian standard for duress, but because the present case involved a situation where the victims were going to die whether the accused participated in their execution, he seemed more willing to admit the need for it. Cassese even writes specifically about the difficulty a court would face in trying to weigh the life of the accused against that of the victim. He states:

> The third criterion – proportionality will, in practice, be the hardest to satisfy where the underlying offence involves the killing of innocents. Perhaps…it will never be satisfied where the accused is saving his own life *at the expense of* his victim, since there are enormous, perhaps insurmountable, philosophical, moral and legal difficulties in putting one life in the balance against that of others in this way: how can a judge satisfy himself that the death of one person is a lesser evil than the death of another? (emphasis in original) (ICTY, 1996b, Paragraph 42)

While concluding just as the majority of the Appeals Chamber had that there was no specific rule applied to duress as a defense to a crime involving the murder of innocent civilians, Cassese instead decided to apply the general rule that duress was a defense to this case in particular (ICTY, 1996b, Paragraph 41). Judge Cassese seemed quite willing to allow future courts to apply the rule of duress where necessary, in a case-by-case approach, much like the Trial Chamber had decided. As he wrote in Paragraph 42:

> Where it is *not* a case of a direct choice between the life of the person acting under duress and the life of the victim – in situations…where there is a high probability that the person under duress will not be able to save the lives of the victims whatever he does - then duress may succeed as a defense. Again, this will be a matter for the judge or court hearing the case to decide in light of the evidence available in this regard.…The important point, however…is that this question should be for the Trial Chamber to decide with all the facts before it. The defense should not be cut off absolutely and a priori from invoking the excuse of duress by a ruling of this International Tribunal….(ICTY, 1996b, Paragraph 42)

Cassese, like McDonald and Vorhah, seemed to be very concerned with possible abuses of this defense, but he deemed its use necessary to set the bar very high to prevent misapplication of the rule (ICTY, 1996b, Paragraph 43). A point that seemed especially relevant to Cassese was the fact that the crime was going to occur whether the accused committed the act or not; it is unclear whether this defense would have received support from him had this not been the case (ICTY, 1996b, Paragraph 43b).

Cassese also acknowledged the relevance of the rank of the officer and the actions of the accused after the disputed act (ICTY, 1996b, Paragraphs 45, 46). Cassese summarizes his point quite clearly when he writes in his conclusion:

> Law is based on what society can reasonably expect of its members. It should not set *intractable* standards of behavior which require mankind to perform acts of martyrdom, and brand as criminal any behavior falling below those standards. (emphasis in original) (ICTY, 1996b, Paragraph 46)

The International Criminal Court's Test for the Duress Defense

The International Criminal Court Statute has the following provision on the Duress Defense:

Article 31
Grounds for excluding criminal responsibility

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

… (d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

(i) Made by other persons; or

(ii) Constituted by other circumstances beyond that person's control.

III. Other Defenses recognized in the Statute of the International Criminal Court

Article 31
Grounds for excluding criminal responsibility

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

(a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;

(b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;

(c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

(i) Made by other persons; or

(ii) Constituted by other circumstances beyond that person's control.

2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.

3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.

Report of Medical Commission on Defendant Rudolf Hess

Rudolf Hess was appointed Deputy Führer to Adolf Hitler in 1933, he served in this position until May 1941, when he flew solo to Scotland in an attempt to negotiate peace with the United Kingdom during World War II. He was taken prisoner and in 1945 was transferred to the Nuremberg Tribunal for trial with 22 other ranking Nazis. Almost immediately after his arrival

at Nuremberg, Hess began exhibiting bizarre behavior and amnesia, which may have been feigned in the hope of avoiding the death sentence. The Medical team that examined Hess issued the following report:

According to the information obtained on 16 November 1945, during the interrogation of Rosenberg who had seen Rudolf Hess immediately before the latter's flight to England, Hess gave no evidence of any abnormality either in appearance or conversation. He was, as usual, quiet and composed. Nor was it apparent that he might have been nervous. Prior to this, he was a calm person, habitually suffering pains in the region of the stomach.

As can be judged on the basis of the report of the English psychiatrist, Doctor Rees, who had Hess under observation from the first days of his flight to England, Hess, after the airplane crash, disclosed no evidence of a brain injury, but, upon arrest and incarceration, he began to give expression to ideas of persecution, he feared that he would be poisoned, or killed, and his death represented as a suicide, and that all this would be done by the English under the hypnotic influence of the Jews. Furthermore, these delusions of persecution were maintained up to the news of the catastrophe suffered by the German Army at Stalingrad when the manifestations were replaced by amnesia. According to Doctor Rees, the delusions of persecution and the amnesia were observed not to take place simultaneously. Furthermore, there were two attempts at suicide. A knife wound, inflicted during the second attempt, in the skin near the heart gave evidence of a clearly hysterico-demonstrative character. After this there was again observed a change from amnesia to delusions of persecution, and during this period he wrote that he was simulating his amnesia, and, finally, again entered into a state of amnesia which has been prolonged up to the present.

According to the examination of Rudolf Hess on 14 November 1945, the following was disclosed:

> Hess complains of frequent cramping pains in the region of the stomach which appear independent of the taking of food, and headaches in the frontal lobes during mental strain, and, finally, of loss of-memory.
>
> In general his condition is marked by a pallor of the skin and a noticeable reduction in food intake.
>
> Regarding the internal organs of Hess, the pulse is 92, and a weakening of the heart tone is noticeable. There has been no change in the condition of the other internal organs.
> Concerning the neurological aspect, there are no symptoms of organic impairment of the nervous system.
>
> Psychologically, Hess is in a state of clear consciousness; knows that he is in prison at Nuremberg under indictment as a war criminal; has read, and, according to his own words, is acquainted with the charges against him. He answers questions rapidly and to the point. His speech is coherent, his thoughts formed with precision and correctness and

they are accompanied by sufficient emotionally expressive movements. Also, there is no kind of evidence of paralogism. It should also be noted here, that the present psychological examination, which was conducted by Lieutenant Gilbert, Ph. D., bears out the testimony that the intelligence of Hess is normal and in some instances above the average. His movements are natural and not forced.

He has expressed no delirious fancies nor does he give any delirious explanation for the painful sensation in his stomach or the loss of memory, as was previously attested to by Doctor Rees, namely, when Hess ascribed them to poisoning. At the present time, to the question about the reason for his painful sensations and the loss of memory, Hess answers that this is for the doctors to know. According to his own assertions, he can remember almost nothing of his former life. The gaps in Hess' memory are ascertained only on the basis of the subjective changing of his testimony about his inability to remember this or that person or event given at different times. What he knows at the present time is, in his own words, what he allegedly learned only recently from the information of those around him and the films which have been shown him.

On 14 November Hess refused the injection of narcotics which were offered for the purpose of making an analysis of his psychological condition. On 15 November, in answer to Professor Delay's offer, he definitely and firmly refused narcosis and explained to him that, in general, he would take all measures to cure his amnesia only upon completion of the Trial.

All that has been exposed above, we are convinced, permits of the interpretation that the deviation from the norm in the behavior of Hess takes the following forms:

1. In the psychological personality of Hess there are no changes typical of the progressive schizophrenic disease, and therefore the delusions, from which he suffered periodically while in England, cannot be considered as manifestations of a schizophrenic paranoia, and must be recognized as the expression of a psychogenic paranoic reaction, that is, the psychologically comprehensible reaction of an unstable (psychologically) personality to the situation (the failure of his mission, arrest, and incarceration). Such an interpretation of the delirious statements of Hess in England is bespoken by their disappearance, appearance, and repeated disappearance depending on external circumstances which affected the mental state of Hess.

2. The loss of memory by Hess is not the result of some kind of mental disease but represents hysterical amnesia, the basis of which is a subconscious inclination toward self-defense as well as a deliberate and conscious tendency toward it. Such behavior often terminates when the hysterical person is faced with an unavoidable necessity of conducting himself correctly. Therefore, the amnesia of Hess may end upon his being brought to Trial.

3. Rudolf Hess, prior to his flight to England, did not suffer from any kind of insanity, nor is he now suffering from it. At the present time he exhibits hysterical behavior with signs of a conscious-intentional (simulated) character, which does not exonerate him from his responsibility under the Indictment.

/ s / KRASNUSHKIN
Doctor of Medicine /s/ E. SEPP
Honorary Scientist, Regular Member of the Academy of Medicine
/ s / KURSHAKOV
Doctor of Medicine, Chief Therapeutist of the Commissariat of Health of the U.S.S.R.

17 November 1945

IV. Head of State Immunity

Possible Indictment of Pinochet in the United States, ASIL Insight
By Frederic L. Kirgis
March 2000

The United States Department of Justice has reopened a grand jury investigation that could lead to the indictment in this country of General Augusto Pinochet, the former head of state of Chile, for the part he is alleged to have played in ordering or approving the murder of Orlando Letelier and a colleague in Washington, D.C. in 1976. Letelier was the former Chilean Ambassador to the United States and was a prominent opponent of Pinochet. He and his American colleague were killed when a bomb exploded in his car as he entered Sheridan Circle, on Massachusetts Avenue in Washington. The Republic of Chile was held liable for this act in a civil proceeding in the District of Columbia, and later paid the families of the victims a total of more than $2.5 million (though it never admitted liability).

If Pinochet had been a private party and had orchestrated the murder, international law would not preclude his indictment in this country even though his actions were taken entirely in Chile. Because this would be an intentional act and the effect was felt in U.S. territory where the murder took place, international law would permit the United States to proscribe the conduct that produced the killing, including conduct that orchestrated it from abroad.

Since Pinochet at the time of the murder was the head of state of Chile, the matter becomes more complicated. Normally a head of state is entitled to immunity from prosecution in domestic courts anywhere outside that state, even after he or she is no longer the head of state. The British

House of Lords, however, has held that Pinochet is not entitled to head-of-state immunity for complicity in a universally-condemned human rights violation (torture in Chile, in that case). The House of Lords limited this exception from immunity to acts committed after the date on which the widely-adopted convention (treaty) prohibiting torture entered into force for the U.K., but this limitation appears to have been required only as a matter of British law, not by international law.

The principle of the Pinochet case in the House of Lords appears to be that a former head of state does not enjoy immunity for acts during his time in office when the acts violate very widely accepted human rights norms, at least insofar as those norms are reflected in a widely-adopted multilateral treaty (in that case the Convention Against Torture). There is also a multilateral convention requiring its contracting parties to treat the murder of an "internationally protected person" (including a diplomat) as a crime. Chile and the United States are parties to it, though the United States did not become a party until a month after the Letelier murder. More importantly, though, the convention defines "internationally protected persons" to include only those who hold their official positions at the time of the offense against them. Letelier was no longer in a diplomatic post when he was murdered.

Nevertheless, it is arguable that an officially-orchestrated murder rises to the same level of human rights violation as does officially-sponsored torture, even in the absence of an applicable treaty. The American Law Institute's *Restatement Third of Foreign Relations Law of the United States* places the two crimes on an equal footing as international human rights violations under customary international law, without regard to any treaty. Thus it could be argued that there is no immunity for a former head of state who, while in office, could be shown to have orchestrated the murder of a political foe such as Letelier.

Pinochet has returned to Chile. There is an extradition treaty between Chile and the United States, dating back to 1902. The treaty makes murder, including participation in murder, an extraditable offense if it is "committed within the jurisdiction of one of the contracting parties" and if the person charged with murder "shall seek an asylum or be found within the territories of the other." There is a proviso stating that extradition "shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his or her apprehension and commitment for trial if the crime or offense had been there committed."

Even though Pinochet was in Chile when Letelier was assassinated, the murder itself was committed in the United States. Moreover, it could be said that if Pinochet orchestrated the murder, his action would be "within the jurisdiction" of the United States because-as noted above-international law would give the United States jurisdiction to proscribe conduct leading to a murder in U.S. territory even if the person ultimately responsible for the murder is outside the territory.

Pinochet may currently be "found within the territories" of Chile, so the second condition quoted above from the extradition treaty would be met.

It is arguable that the proviso would be satisfied as well, even if Pinochet would not be committed for trial in Chile if Letelier had been murdered there. The proviso hinges on "such evidence of criminality" as would be sufficient for prosecution in Chile. Thus it appears to require only that there be sufficient evidence, under Chilean standards, that the accused committed the crime. Any immunity Pinochet might enjoy under Chilean law would be a matter of defense based not on a challenge to the evidence or to the criminality of murder under Chilean law, but based rather on his official position in Chile at the time of the crime.

Of course, even if Pinochet is extraditable, the United States might not insist on extradition-for example, if Chile were to agree to prosecute him at home, or if Pinochet's advanced age and deteriorating health dictate that public condemnation, rather than extradition and prosecution, should suffice.

World Court Orders Belgium to Cancel an Arrest Warrant Issued Against the Congolese Foreign Minister, ASIL Insight
by Pieter H.F. Bekker
February 2002

On February 14, 2002, the International Court of Justice (ICJ or Court), the principal judicial organ of the United Nations located in The Hague, The Netherlands, ruled that Belgium has violated international law by allowing a Belgian judge to issue and circulate an arrest warrant *in absentia* against the then Foreign Minister of the Democratic Republic of the Congo (DRC). The ICJ held, by 13 votes to three, that Belgium thereby failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Foreign Minister enjoyed under customary international law. By way of remedy, the Court found, by 10 votes to six, that Belgium must, by means of its own choosing, cancel the arrest warrant and so inform all the authorities to whom that warrant was circulated.

A dispute arose between the DRC and Belgium when, on April 11, 2000, Judge Damien Vandermeersch of the Brussels court of first instance issued an international arrest warrant for the detention of Mr. Abdulaye Yerodia Ndombasi (Yerodia), who at that time was the DRC Minister for Foreign Affairs. The warrant accused Yerodia of having committed grave breaches of the 1949 Geneva Conventions and crimes against humanity while serving in a non-ministerial post by making speeches in August 1998 that allegedly incited the massacre of Tutsi residents of Kinshasa.

The arrest warrant was issued under a Belgian law (Belgian Law) that establishes its universal applicability and the universal jurisdiction of the Belgian courts in relation to alleged grave violations of international humanitarian law regardless of where they were committed, the presence of the accused in Belgium, or the nationality or legal status of either the victim/complainant or the accused. The Belgian Law does not recognize any immunities that defendants might enjoy due to their "official capacity." In this case, it was uncontested that (i) the arrest warrant referred to acts committed outside of Belgium; (ii) Yerodia was the DRC Foreign Minister at the time the warrant was issued; (iii) the accused was neither Belgian nor had he been present in Belgium when the warrant was issued; and (iv) no Belgian national was a direct victim of the alleged crimes. After November 2001, Yerodia ceased being the DRC Foreign Minister. At the time of the judgment, he no longer held any ministerial office.

On October 17, 2000, the DRC instituted proceedings against Belgium before the ICJ based on their declarations accepting the Court's compulsory jurisdiction and requested the Court to declare that Belgium must annul the arrest warrant issued against Yerodia, because it violates the principle of sovereign equality among States. Public hearings were held on October 15-19, 2001.

The DRC initially also challenged the legality of the Belgian Law itself, raising broader questions about the permissible scope of jurisdiction by national criminal courts over international crimes committed outside the territory of the prosecuting court. However, the DRC later condensed and refined its claim, leaving the ICJ with the following question: Did the issue and circulation of an arrest warrant by a Belgian judge against a person who was at the time the Congolese Foreign Minister, but who no longer holds government office, violate his immunity from criminal process and make the arrest warrant unlawful under international law? Thus, the case before the Court was about whether ministerial immunity affected the lawfulness of the Belgian arrest warrant, and did not deal with the question whether the disputed warrant, issued in an exercise of purported universal jurisdiction, complied with the rules and principles of international law governing the jurisdiction of national courts. Given that the DRC had dropped its challenge to the legality of the arrest warrant based on Belgium's claim to exercise universal jurisdiction, the Court assumed solely for the purpose of this case that Belgium had jurisdiction under international law to issue and circulate the warrant.

After rejecting Belgium's objections relating to jurisdiction, mootness and admissibility by 15 votes to one, the Court found that the issue against Yerodia of the arrest warrant and its international circulation constituted violations of a legal obligation of Belgium against the DRC, in that they failed to respect the immunity from criminal jurisdiction and the inviolability that the incumbent Congolese Minister for Foreign Affairs enjoyed under international law.

The Court found that there are no treaties that specifically define the immunities enjoyed by ministers for foreign affairs. Whereas Belgium claimed that no immunity attaches under international law for serious crimes under international law or for acts done in a private capacity or other than in the performance of official functions, the DRC argued that a sitting foreign minister's immunity is subject to no exception. The ICJ agreed with the DRC that, under customary international law, sitting foreign ministers when abroad enjoy full immunity from criminal jurisdiction as well as inviolability protecting them from "any act of authority" by another State which would hinder them in the performance of their duties. The Court could not discern any exception to this rule in State practice. Thus, it does not matter whether a foreign minister was, at the time of arrest, present in the territory of the arresting State on an "official" or a "private" visit, or whether the arrest relates to acts allegedly committed before the foreign minister took office or while in office. It also is immaterial whether or not the arrest relates to alleged acts performed in an "official" capacity or a "private" capacity. Moreover, there is no exception to an incumbent foreign minister's absolute immunity from criminal process where that person is accused of having committed crimes under international law.

The Court, which includes two judges who had formerly served as foreign ministers, emphasized that this immunity from jurisdiction does not affect their individual criminal responsibility: immunity does not mean impunity. Thus, a foreign minister's State may itself prosecute him or her or may waive immunity to prosecution by another State. In addition, after a foreign minister ceases to hold public office, a court of one State may, provided it has jurisdiction under international law, try the former foreign minister of another State for any acts committed prior or subsequent to the minister's period of office, as well as for *private* acts committed during his or her tenure. Finally, incumbent or former foreign ministers may be tried by *international* criminal tribunals having jurisdiction over the alleged crimes.

In this case, the Court found that the issuance of the disputed arrest warrant constituted an unlawful coercive measure by Belgium violating the immunity of the then Congolese Foreign Minister, even though it was never executed against him. It infringed his immunity as the DRC Foreign Minister by hampering him in his foreign travels and exposing him to arrest while abroad.

The Court considered that its finding that Yerodia's immunity as Foreign Minister had been violated itself constitutes a form of remedy to the moral injury of which the DRC complained. But international law also requires the reestablishment of the situation which would have existed if the illegal act had not been committed. Thus, the ICJ found that Belgium must, by means of its own choosing, cancel the disputed arrest warrant and so inform the authorities to whom the warrant had been circulated. The Court did not rule that third States are precluded from executing the arrest warrant, given that such States fall outside the Court's jurisdiction over this case between the DRC and Belgium.

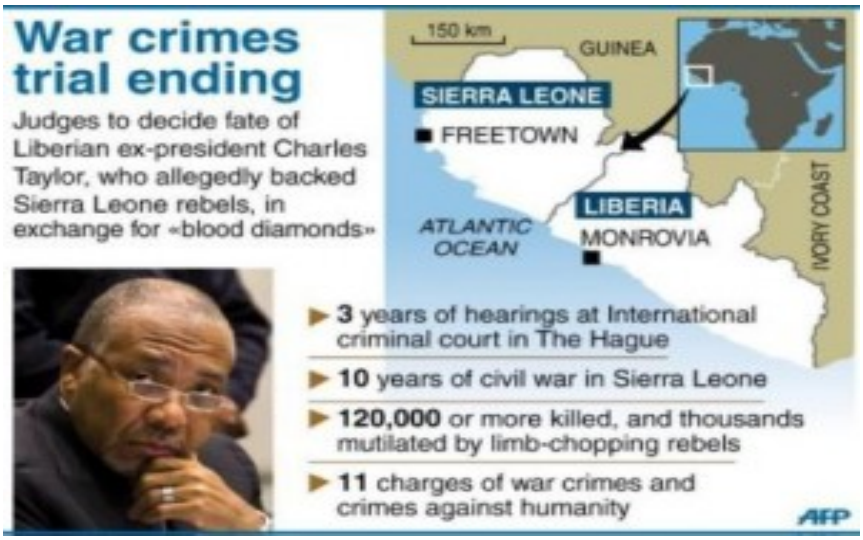
Although the decision is limited by its terms to sitting foreign ministers and, by virtue of Article 59 of the ICJ Statute, is binding only on the DRC and Belgium and only with regard to this particular case, its impact is potentially much broader. The judgment indicates that the ICJ would apply a similar analysis to other high-ranking officials who, like foreign ministers, represent the State in international affairs and must travel to carry out their duties. In light of this decision, Belgium is reviewing the human rights probe against incumbent Israeli Prime Minister Ariel

Sharon for alleged crimes committed by him in Palestinian refugee camps while he was Israeli Army chief. If the Court's analysis regarding Yerodia is found to apply to Sharon's circumstances, the Sharon warrant likewise violates international law and Belgium must cancel that warrant and reissue it after Sharon leaves office.

The decision also is significant for what it did not decide. For example, it leaves unaffected the Belgian Law on which the Brussels magistrate based his arrest warrant in this and other prominent cases where the accused is a non-Belgian dignitary (including human rights probes involving the presidents of the Congo, Cuba, Iran and Ivory Coast). Given that the ICJ necessarily assumed for purposes of this case that Belgium had jurisdiction under international law to issue its arrest warrant, the Court did not reach the issue of whether a nation (including Belgium) may adopt "long-arm" statutes allowing its domestic courts to hear cases involving alleged crimes under international law against any State, person or company where neither the alleged criminal acts took place in the territory in which these courts sit, nor the victims/complainants and defendants were present in that nation. Even though the potential long-arm reach of domestic courts with regard to alleged violations of international law was not addressed in this case, it is very much alive, especially in light of the Court's pronouncement that immunity does not mean impunity.

The decision is confusing in that it is unclear how broadly or easily States may designate (so as to create bases for claims of immunity) present and former officials as carrying-out "foreign minister"-type duties. The judgment suggests that former foreign ministers may never be tried abroad for "official" acts committed during their tenure, even though under international law certain crimes (e.g., genocide) cannot be defended as having been "official" acts.

The Court's conclusion that incumbent foreign ministers are protected from "any act of authority" by another State that would hinder them in the performance of their duties presumably refers not only to criminal warrants, but also to civil subpoenas and other forms of process that could hinder a minister's performance because of the threat of judicial compulsion or enforcement. Thus, although the decision only addresses an incumbent foreign minister's immunity from *criminal* process and does not *bind* third States, it may affect how countries like the United States apply laws allowing private plaintiffs to sue foreign States, persons and companies in national courts for alleged violations of the law of nations (e.g., under the U.S. Alien Tort Claims Act). Civil deposition subpoenas issued in such cases carry the possibility of compulsion by a national court, including in the form of contempt sanctions. Even though the U.S. Government regularly has intervened in U.S. cases to suggest immunity for foreign Heads of State and other high-ranking officials, which suggestion the courts have routinely adopted, a broad range of incumbent and former officials remain subject to suit under the Court's narrow reasoning.



Immunity from Prosecution for International Crimes: The Case of Charles Taylor at the Special Court for Sierra Leone, ASIL Insight, By C. Jalloh

October 2004

On May 31, 2004, the Appeals Chamber of the Special Court for Sierra Leone ("the Court"), a UN-backed hybrid criminal tribunal sitting in Freetown, Sierra Leone, ruled unanimously that Charles Taylor does not enjoy any immunity from prosecution by the Court though he was the serving Head of State of Liberia at the time criminal proceedings were initiated. This historic ruling by the Court is a significant contribution to the modern international law norm asserting that Heads of State and other high-ranking governmental officials are not absolved of criminal responsibility for serious international crimes.

Background to the Indictment of Charles Taylor

On March 7, 2003, David Crane, the Prosecutor of the Court, issued an indictment against President Charles Ghankay Taylor of Liberia. The indictment alleged that Mr. Taylor had committed serious international crimes in Sierra Leone including crimes against humanity, war crimes and other serious violations of international humanitarian law. The seventeen-count indictment accused President Taylor of responsibility for terrorizing the civilian population of Sierra Leone, unlawful killings, sexual and physical violence, use of child soldiers, abductions, forced labor, looting, burning, and attacks on peacekeepers and humanitarian assistance workers.

However, the indictment was sealed until a warrant for President Taylor's arrest was issued on June 4, 2003 following his arrival in Accra, Ghana, to attend peace talks that had been convened by other West African leaders. The talks were aimed at ending bitter fighting between Taylor's forces and various rebel factions that had led to the deaths of many civilians on the outskirts of Monrovia, Liberia's capital. Because of procedural mistakes by the Office of the Prosecutor,

including an apparent lack of prior consultation and coordination with Ghanaian and other West African authorities, Mr. Taylor returned to Monrovia unmolested.

Procedural and Factual History of the Case (paras. 1-5)

On July 23, 2003, counsel for President Taylor and Liberia filed a motion before the Trial Chambers of the Court seeking an order 1) to quash the Indictment; 2) to nullify the warrant of arrest; and 3) for provisional measures restraining service of the indictment and arrest warrant on Mr. Taylor. The ground for the motion was that Mr. Taylor should enjoy absolute immunity from criminal proceedings under customary international law as the sitting Head of State of Liberia at the time of his indictment.

As the Prosecution and Defence exchanged briefs before the Court, Mr. Taylor announced that he would resign from the Presidency of Liberia in August of 2003. In return for his resignation, he accepted an offer of sanctuary extended to him by President Olusegun Obasanjo of Nigeria who promised not to hand him over to the Court.

Approximately one month after Taylor's departure from Liberia, the Trial Chamber referred the motion challenging the Court's jurisdiction to the Appeals Chamber on the basis that it raised a fundamental issue of jurisdiction. The Appeals Chamber heard oral arguments on the motion in late fall of 2003.

Submissions of the Parties (paras. 6-16)

The parties' submissions to the Court fall into two categories. The first category corresponds to arguments by the Defence and counterarguments by the Prosecution that the Court, by issuing an indictment and a warrant of arrest for President Taylor, had violated various rules governing jurisdiction, immunity, and sovereign equality under *international* law. The second category hinges on the *national* law of Sierra Leone and on the legality, or illegality, of the actions taken by the Prosecutor and the Court in respect of the case against Taylor, with particular reference to the consistency of those actions with various provisions of the Sierra Leone Constitution of 1991. This Insight discusses only the international law aspects of the case.

Defence Submissions on the Preliminary Motion

The key submission of the Defence was that Mr. Taylor was entitled to absolute personal immunity from criminal prosecution as Liberia's incumbent Head of State at the time of his indictment. The Defence claimed that the immunity which attaches to Taylor shields him from prosecution whether he is on official business in a foreign State (Ghana) or in office in Liberia. Further, the Defence argued that immunity is not nullified by any exceptions arising under other international law rules, such as resolutions enacted by the Security Council pursuant to its Chapter VII powers permitting international criminal tribunals to indict incumbent Heads of State for egregious international crimes. In any event, because the Court was a Sierra Leonean tribunal that lacked Chapter VII powers, in contrast to the International Criminal Tribunals for Yugoslavia and Rwanda ("ICTY" and "ICTR" respectively), it had no authority to assert

jurisdiction over President Taylor since its judicial orders had the same (limited) force as those of a national court.

In addition, according to the Defence, by purporting to indict the President of Liberia, and by issuing and communicating a warrant for his arrest to Ghanaian authorities at a time when he was performing peace-making functions as Head of State, the Court had violated the sovereignty of Liberia and Ghana as well as the international law rule exempting incumbent Heads of State from criminal prosecution in foreign jurisdictions. Furthermore, it was argued, the Court's approval of both the indictment and the arrest warrant failed to account for the ruling of the International Court of Justice ("ICJ") in *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo* v. *Belgium)* ("*Yerodia*").

Prosecution's Response

The Prosecution's response focused primarily on procedural matters, and in respect of the bulk of substantive issues, wholly on international law. In sum, the Prosecution pleaded that under the Court's Rules, the motion by the Defence should be dismissed because 1) it improperly raised an issue of *immunity* rather than one of *jurisdiction*; 2) it was "premature" because Mr. Taylor had not made the mandatory initial appearance before the Court; and 3) Mr. Taylor lacked standing to bring the motion since he was not before the Court.

In response to the substantive issues raised by the Defence, the Prosecution submitted, *inter alia*, that 1) *Yerodia* concerned "the immunities of an incumbent Head of State from the jurisdiction of the Courts of another state" (which is not the case here); 2) customary international law permits international criminal tribunals, of which the Court is an example, to indict serving Heads of State; 3) the lack of Chapter VII powers does not encumber the Court's jurisdiction over Heads of States because the International Criminal Court, which does not possess Chapter VII powers, similarly denies immunity to Heads of States in respect of international crimes; 4) Taylor's indictment is for crimes committed within Sierra Leone rather than elsewhere; and finally, 5) the mere transmission of the relevant documents to Ghanaian authorities could not violate that country's sovereignty.

The Legal Basis of the Special Court for Sierra Leone (paras. 34-36)

After disposing of the procedural issues, the Appeals Chamber turned to the merits. It explained that the Court is a unique treaty-based criminal tribunal authorized by UN Security Council Resolution 1315 (2000). The various reports, correspondence, briefings and other documents between the Secretary-General and the President of the Security Council, taken together, "demonstrate the high level of involvement of the Security Council in the establishment of the Court including, but not limited to, approving the Statute of the Special Court and initiating and facilitating arrangements" for its funding.

Is the Special Court an International Criminal Tribunal? (paras. 37-42)

In addressing the above question, the Appeals Chamber noted that the Court's novelty lay in the fact that it was established jointly by agreement between the UN and the government of Sierra

Leone. This is in contrast to the ICTY and ICTR, which were established as subsidiary organs of the UN by the Security Council acting pursuant to its Chapter VII powers. According to the Appeals Chamber, the immediate source of authority for the Security Council to participate in creating the Court emanates from Resolution 1315, but more fundamentally, is "derived from the Charter of the United Nations both in regard to the general purposes of the United Nations as expressed in Article 1 of the Charter and the specific powers of the Security Council in Articles 39 and 41." The Security Council's powers under Article 39 were sufficiently broad for it to establish the Court in agreement with Sierra Leone, since it had reiterated in Resolution 1315 that the situation in Sierra Leone "continued to constitute an ongoing threat to international peace and security in the region."

Second, the Appeals Chamber asserted that while much has been read into the lack of a Chapter VII mandate for the Court, such an omission by the Security Council is not determinative of the legal status of the Court. For on a disjunctive reading of the first sentence of Article 41 of the UN Charter, it is manifest that the Security Council is empowered to 1) decide what measures not involving the use of armed force should be taken to implement its decisions and 2) whether or not to call upon UN Members to apply such measures in order to maintain or restore international peace and security. Thus, the Court concluded,

> Where the Security Council decides to establish a court as a measure to maintain or restore international peace and security it may or may not, at the same time, contemporaneously, call upon the members of the United Nations to lend their cooperation to such court as a matter of obligation. Its decision to do so in furtherance of Article 41 or Article 48, should subsequent events make that course prudent may be made subsequently to the establishment of the court.

In addition, in executing its duties under Article 39, the Security Council acts on behalf of all UN Members as per Article 24(1) of the UN Charter, and to that extent, the agreement that it entered into with Sierra Leone to create the Court is an Agreement that is "an expression of the will of the international community" as a whole. The Court is therefore "truly international."

In the result, the Appeals Chamber held that the Court is an international criminal tribunal with an international mandate exercising jurisdiction over international crimes. In so holding, the Appeals Chamber observed that the "constitutive instruments of the court contain indicia too numerous to enumerate to justify that conclusion. To enumerate those indicia will involve virtually quoting the entire provisions of those instruments. It suffices that having adverted to those provisions, the conclusion we have arrived at is inescapable."

The Special Court and Jurisdictional Immunity (paras. 43-59)

The Appeals Chamber explained that pursuant to Article 6(2) of the Court's Statute, the position of any accused as Head of State does not relieve that person of criminal responsibility nor does it mitigate punishment. It noted the similarity of that provision to ICTY Article 7(2), ICTR Article 6(2) and ICC Article 27(2), all of which are traceable to Article 7 of the Charter of the International Military Tribunal for Nuremberg which had become a part of customary

international law. Moreover, Article 6(2) of the Court's Statute is consonant with other (including peremptory) norms of international law.

Related to this point, the Court reasoned that the nature of the offences and the character of the tribunal asserting jurisdiction assist in determining the circumstances in which exceptions to immunity would be extended or denied. Thus, in the *Yerodia* case, the ICJ could not discern a rule denying incumbent foreign ministers immunity from criminal jurisdiction before national courts. On the other hand, the ICJ concluded that under customary international law, incumbent or former foreign ministers may be subject to proceedings before certain international criminal courts, assuming those courts have jurisdiction.

Noting the apparent differences in the treatment of immunities in national and international courts, the Appeals Chamber postulated that this may be because of "the principle that one sovereign state does not adjudicate on the conduct of another state; the principle of state immunity derives from the equality of sovereign states and therefore has no relevance to international criminal tribunals which are not organs of a state but derive their mandate from the international community."

The Appeals Chamber concluded that "the principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court." Thus, according to the Appeals Chamber, the official position of Taylor as serving Head of State of Liberia at the time of his indictment is not a bar to his prosecution. Taylor was and still is subject to criminal proceedings before the Court. In view of this conclusion, the Court declined to discuss the cases in which immunity was claimed before national courts.

As to whether the issuance and transmission of the arrest warrant for President Taylor infringed the sovereignty of Ghana, the Court ruled that to the extent such a claim could be said to exist, vindication of it rests with Ghana rather than with Mr. Taylor. That said, the Court nevertheless observed that with two exceptions, warrants of arrest are not self- executing; consequently, their implementation would require the cooperation of the receiving state. Therefore, "merely requesting assistance, far from being an infringement of sovereignty of the receiving state is in fact a recognition of sovereignty."

Finally, the Court noted that Taylor had ceased to be Head of State at the time of its decision. Thus, whatever personal immunity he would have been entitled to is already spent. Accordingly, even if his motion had succeeded, the Prosecutor could have validly re-issued a new warrant. The motion was therefore dismissed.

Conclusion

Prosecutor v Charles Ghankay Taylor is an addition to the small but growing body of jurisprudence from national and international tribunals delineating the contours of the immunity accruing to Heads of State and other senior governmental officials. While the trend in the jurisprudence suggests that the scope of immunity is highly contested and will therefore continue

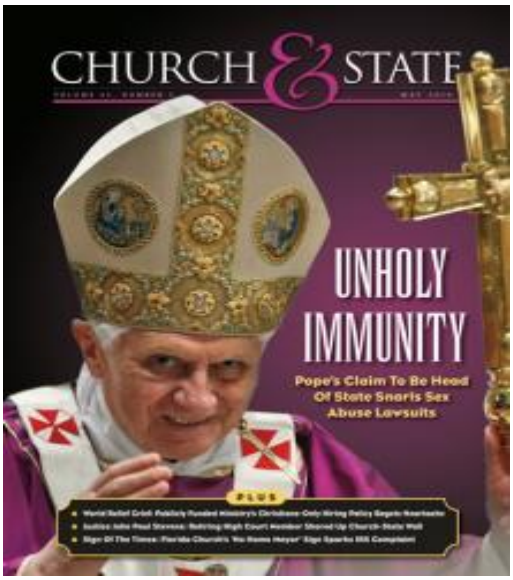
to evolve,] this decision is significant because it is the first application of the ICJ's decision in *Yerodia* to a former Head of State.

Though Taylor is not in the custody of the Court, the decision reaffirms the idea that the long arm of international criminal law would extend to reach the most powerful state official, so long as that person commits crimes that shock the conscience of the international community.

Regarding the Court's status as an international criminal tribunal, the Court focused on the UN's involvement with the creation of the tribunal, and in particular, the Security Council's authority to enter into an agreement with Sierra Leone to establish the Court. According to the Appeal's Chamber, that authority could emanate from 1) the general purposes of the UN as expressed in Article 1 of the Charter as well as 2) the specific powers under Article 39 and 41 to undertake appropriate measures to maintain or restore international peace and security. The Court examined the latter aspect of the Security Council's authority focusing on Resolution 1315. That resolution authorized the UN Secretary-General to negotiate the creation of the Court, while reaffirming that the situation in Sierra Leone continued to constitute a threat to international peace and security.

The Court did not elaborate on how the general powers of the Security Council applied to its establishment. Unlike the resolutions but a question remains whether mere reiteration in the preamble to Resolution 1315 that the situation in Sierra Leone continued to constitute a threat to the peace carries the same weight as the unequivocal language contained in the resolutions establishing the ICTY and ICTR. If the Security Council does not clearly state the nature and the scope of the authority under which it is acting. This is particularly so given the active role that the Security Council has assumed since the end of the Cold War to formulate and enforce decisions with serious ramifications for States and individuals as well as for the coherent development of international criminal law. Clearly, fundamental interests of States are at stake in situations wherein the Security Council purports to abrogate, through the creation of a tribunal, the immunity of a serving Head of State. creating the ICTY and the ICTR which specifically invoked Article Chapter VII of the UN Charter, the Security Council did not expressly state that it was acting under Chapter VII when it authorized the Secretary-General to conclude a treaty to create the Special Court for Sierra Leone. The Appeals Chamber noted that the lack of a Chapter VII mandate "does not by itself define the legal status of the Special Court," states may question, or perhaps even challenge, its authority to create criminal tribunals that were not contemplated by the framers of the UN Charter.

There is the additional question of the nature and status of the Court. The Court concluded that it is an international court and that there are numerous indicia to support that conclusion. However, an examination of the Court's constitutive instruments reveals that the Court also has the trappings of a national court. As the Court is distinct in its national and international character, the Secretary-General of the UN described it as a unique Court "of mixed jurisdiction and composition." By focusing purely on the factors that make the Court international, the Appeals Chamber may have missed an important opportunity to contribute to the jurisprudence defining the unique place of hybrid criminal tribunals in the machinery of international criminal justice.



Reuters, Feb. 13, 2013 - Pope Benedict's decision to live in the Vatican after he resigns will provide him with security and privacy. It will also offer legal protection from any attempt to prosecute him in connection with sexual abuse cases around the world, Church sources and legal experts say.

"His continued presence in the Vatican is necessary, otherwise he might be defenseless. He wouldn't have his immunity, his prerogatives, his security, if he is anywhere else," said one Vatican official, speaking on condition of anonymity.

"It is absolutely necessary" that he stays in the Vatican, said the source, adding that Benedict should have a "dignified existence" in his remaining years.

Vatican sources said officials had three main considerations in deciding that Benedict should live in a convent in the Vatican after he resigns on February 28.

Vatican police, who already know the pope and his habits, will be able to guarantee his privacy and security and not have to entrust it to a foreign police force, which would be necessary if he moved to another country.

"I see a big problem if he would go anywhere else. I'm thinking in terms of his personal security, his safety. We don't have a secret service that can devote huge resources (like they do) to ex-presidents," the official said.

Another consideration was that if the pope did move permanently to another country, living in seclusion in a monastery in his native Germany, for example, the location might become a place of pilgrimage.

POTENTIAL EXPOSURE

This could be complicated for the Church, particularly in the unlikely event that the next pope makes decisions that may displease conservatives, who could then go to Benedict's place of residence to pay tribute to him.

"That would be very problematic," another Vatican official said.

The final key consideration is the pope's potential exposure to legal claims over the Catholic Church's sexual abuse scandals.

In 2010, for example, Benedict was named as a defendant in a law suit alleging that he failed to take action as a cardinal in 1995 when he was allegedly told about a priest who had abused boys at a U.S. school for the deaf decades earlier. The lawyers withdrew the case last year and the Vatican said it was a major victory that proved the pope could not be held liable for the actions of abusive priests.

Benedict is currently not named specifically in any other case. The Vatican does not expect any more but is not ruling out the possibility.

"(If he lived anywhere else) then we might have those crazies who are filing lawsuits, or some magistrate might arrest him like other (former) heads of state have been for alleged acts while he was head of state," one source said.

Another official said: "While this was not the main consideration, it certainly is a corollary, a natural result."

After he resigns, Benedict will no longer be the sovereign monarch of the State of Vatican City, which is surrounded by Rome, but will retain Vatican citizenship and residency.

LATERAN PACTS

That would continue to provide him immunity under the provisions of the Lateran Pacts while he is in the Vatican and even if he makes jaunts into Italy as a Vatican citizen.

The 1929 Lateran Pacts between Italy and the Holy See, which established Vatican City as a sovereign state, said Vatican City would be "invariably and in every event considered as neutral and inviolable territory".

There have been repeated calls for Benedict's arrest over sexual abuse in the Catholic Church.

When Benedict went to Britain in 2010, British author and atheist campaigner Richard Dawkins asked authorities to arrest the pope to face questions over the Church's child abuse scandal.

Dawkins and the late British-American journalist Christopher Hitchens commissioned lawyers to explore ways of taking legal action against the pope. Their efforts came to nothing because the pope was a head of state and so enjoyed diplomatic immunity.

In 2011, victims of sexual abuse by the clergy asked the International Criminal Court to investigate the pope and three Vatican officials over sexual abuse.

The New York-based rights group Center for Constitutional Rights (CCR) and another group, Survivors Network of those Abused by Priests (SNAP), filed a complaint with the ICC alleging that Vatican officials committed crimes against humanity because they tolerated and enabled sex crimes.

The ICC has not taken up the case but has never said why. It generally does not comment on why it does not take up cases.

NOT LIKE A CEO

The Vatican has consistently said that a pope cannot be held accountable for cases of abuse committed by others because priests are employees of individual dioceses around the world and not direct employees of the Vatican. It says the head of the church cannot be compared to the CEO of a company.

Victims groups have said Benedict, particularly in his previous job at the head of the Vatican's doctrinal department, turned a blind eye to the overall policies of local Churches, which moved abusers from parish to parish instead of defrocking them and handing them over to authorities.

The Vatican has denied this. The pope has apologized for abuse in the Church, has met with abuse victims on many of his trips, and ordered a major investigation into abuse in Ireland.

But groups representing some of the victims say the Pope will leave office with a stain on his legacy because he was in positions of power in the Vatican for more than three decades, first as a cardinal and then as pope, and should have done more.

The scandals began years before the then-Cardinal Joseph Ratzinger was elected pope in 2005 but the issue has overshadowed his papacy from the beginning, as more and more cases came to light in dioceses across the world.

As recently as last month, the former archbishop of Los Angeles, Cardinal Roger Mahony, was stripped by his successor of all public and administrative duties after a thousands of pages of files detailing abuse in the 1980s were made public.

Mahony, who was archbishop of Los Angeles from 1985 until 2011, has apologized for "mistakes" he made as archbishop, saying he had not been equipped to deal with the problem of sexual misconduct involving children. The pope was not named in that case.

In 2007, the Los Angeles archdiocese, which serves 4 million Catholics, reached a $660 million civil settlement with more than 500 victims of child molestation, the biggest agreement of its kind in the United States.

Vatican spokesman Father Federico Lombardi said the pope "gave the fight against sexual abuse a new impulse, ensuring that new rules were put in place to prevent future abuse and to listen to victims. That was a great merit of his papacy and for that we will be grateful".

(Reporting by Philip Pullella; Additional reporting by Robin Pomeroy; Edited by Simon Robinson and Giles Elgood)