UCL
Université catholique de Louvain

INTERNATIONAL HUMAN RIGHTS
LouvainX online course [Louv2.01x] - prof. Olivier De Schutter

READING MATERIAL

Related to: section 1, sub-section 3, unit 2: *Jus cogens* status of human rights norms (ex. 4)

Example 4. War crimes and crimes against humanity as part of *jus cogens*

International Court of Justice, case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo* v. *Belgium)*, I.C.J. Reports 2002, 3 (judgment of 14 February 2002):

[The DRC filed an application against Belgium following the issuance of an international arrest on 11 April 2000 by a Belgian investigating judge against the then Minister for Foreign Affairs in office of the Democratic Republic of the Congo, Mr Abdulaye Yerodia Ndombasi. The application contended that Belgium had violated the 'principle that a State may not exercise its authority on the territory of another State', the 'principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations', as well as 'the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State, as recognized by the jurisprudence of the Court and following from Article 41, paragraph 2, of the Vienna Convention of 18 April 1961 on Diplomatic Relations'. The arrest warrant delivered by the Belgian investigating judge charged him, as perpetrator or co-perpetrator, with offences constituting grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto, and with crimes against humanity. These crimes were punishable in Belgium under the Law of 16 June 1993 concerning the Punishment of Grave Breaches of the International Geneva Conventions of 12 August 1949 and of Protocols I and II of 8 June 1977 Additional Thereto, as amended by the Law of 10 February 1999 concerning the Punishment of Serious Violations of International Humanitarian Law, which provides for a universal jurisdiction of Belgian courts to prosecute certain international crimes.

The International Court of Justice concluded by thirteen votes to three that 'the issue against Mr Abdulaye Yerodia Ndombasi of the arrest warrant of 11 April 2000, and its international circulation, constituted violations of a legal obligation of the Kingdom of Belgium towards the Democratic Republic of the Congo, in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law'. Without reaching the issue of whether Belgium was authorized to apply an extraterritorial legislation, the Court took the view, first, that 'the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State would hinder him her in the performance of his or her duties' (para. 54). It then found, having 'carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation', that it was 'unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having

committed war crimes or crimes against humanity' (para. 58).]

Dissenting opinion of Judge Van den Wyngaert, judge ad *hoc* (para. 28):

The Court ... adopts a formalistic reasoning, examining whether there is, under customary international law, an international crimes exception to the – wrongly postulated – rule of immunity for incumbent Ministers under customary international law (judgment, para. 58). By adopting this approach, the Court implicitly establishes a hierarchy between the rules on immunity (protecting incumbent former Ministers) and the rules on international accountability (calling for the investigation of charges against incumbent Foreign Ministers charged with war crimes and crimes against humanity).

By elevating the former rules to the level of customary international law in the first part of its reasoning, and finding that the latter have failed to reach the same status in the second part of its reasoning, the Court does not need to give further consideration to the status of the principle of international accountability under international law. As a result, the Court does not further examine the status of the principle of international accountability. Other courts, for example the House of Lords in the *Pinochet* case [see above] and the European Court of Human Rights in the *Al-Adsani* case [see above], have given more thought and consideration to the balancing of the relative normative status of international *jus cogens* crimes and immunities.

Questions concerning international accountability for war crimes and crimes against humanity and that were not addressed by the International Court of Justice include the following. Can international accountability for such crimes be considered to be a general principle of law in the sense of Article 38 of the Court's Statute? Should the Court, in reaching its conclusion that there is no international crimes exception to immunities under international law, not have given more consideration to the factor that war crimes and crimes against humanity have, by many, been considered to be customary international law crimes (see: American Law Institute, *Restatement of the Law Third. The Foreign Relations Law of the United States* (St Paul, Minn.: American Law Institute Publishers, 1987), vol. 1, para. 404, Comment; M. C. Bassiouni, *Crimes against Humanity in International Criminal Law* (The Hague, Kluwer Law International, 1999); T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon Press, 1989); T. Meron, 'International Criminalization of Internal Atrocities', *American Journal of International Law* 89 (1995), 558; A. H. J. Swart, *De berechting van internationale misdrijven* (Deventer: Gouda Quint, 1996), p. 7; ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, *Tadic*, paras. 96–127 and 134 (common Art. 3))? Should it not have considered the proposition of writers who suggest that war crimes and crimes against humanity are *jus cogens* crimes (M. C. Bassiouni, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*', *Law and Contemporary Problems*, 59 4 (1996), 63–74; M. C. Bassiouni, *Crimes against Humanity in International Criminal Law* (The Hague: Kluwer Law International, 1999), pp. 210–17; C. J. R. Dugard, *Opinion In: Re Bouterse*, para. 4.5.5, to be consulted at: www.icj.org/objectives/opinion.htm; K. C. Randall, 'Universal Jurisdiction under International Law', *Texas Law Review*, 66 (1988), 829–32; ICTY, judgment, 10 December 1998, *Furundzija*, para. 153 (torture)), which, if it were correct, would only enhance the contrast between the status of the rules punishing these crimes and the rules protecting suspects on the ground of immunities for incumbent Foreign Ministers, which are probably not part of *jus cogens*?