United Nations A/HRC/36/NGO/73

General Assembly

Distr.: General
6 September 2017

English only

Human Rights Council
Thirty-sixth session
11-29 September 2017
Agenda item 4
Human rights situations that require the Council's attention

Joint written statement* submitted by the International-Lawyers.Org, Arab Lawyers Union, Arab Organization for Human Rights, International Organization for the Elimination of All Forms of Racial Discrimination, IUS PRIMI VIRI International Association, Union of Arab Jurists, non-governmental organizations in special consultative status, International Educational Development, Inc., World Peace Council, non-governmental organizations on the roster

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[30 August 2017]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

Immunity For And Impunity Of High Ranking Government Leaders: A Threat To The Rule Of Law And Human Rights*

Focus

This statement focuses on the question of immunity for and impunity of government leaders who commit grave crimes under international law—torture, war crimes, genocide, the crime of aggression and crimes against humanity—and the ability to prosecute such leaders under theories of universal jurisdiction. Many former government leaders enjoy impunity for their crimes because they can rely on protective legal doctrines of immunity to shield their conduct from scrutiny. This impunity is a threat to the rule of law and the international system enshrined in the United Nations Charter.

Universal Jurisdiction

The theory of universal jurisdiction permits courts of any civilized society the ability to adjudicate crimes defined under international law. While universal jurisdiction has been successful in curtailing impunity of government leaders—the *Pinochet* case1 is one famous example—the concept has also been controversial. In particular, international and municipal law recognize various forms of immunity that may prevent a court from exercising jurisdiction even with respect to grave international crimes.

Immunity Under International Law

The International Court of Justice (ICJ) discussed the intersection of immunity, impunity and universal jurisdiction in the 2002 case, *Arrest Warrant Case (Congo v. Belgium)*.2 The ICJ held that incumbent government ministers enjoyed a broad immunity from legal action under international law. Nonetheless, the ICJ held there were several exceptions to this immunity, including in some instances where a minister ceased to hold office. Specifically, the ICJ noted that, "after a person ceases to hold the office … he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as … *acts committed during that period of office in a* ***private capacity***."3

Since the ICJ's decision, courts have grappled with what constitutes "personal" or "private" versus "official" conduct, with conflicting results.

The *Pinochet* Case

In 1999, after a number of appeals and hearings, the House of Lords of the United Kingdom concluded that the British government should honor an international warrant and request for extradition that was issued by a court in Spain against the former Chilean head of state, Augusto Pinochet.4 The House of Lords rejected any form of "official act" immunity for Pinochet partly on the basis that where a state has ratified international treaties prohibiting the conduct in question,

1 *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte*, 2 All E.R. 97 (H.L. 1999), available at https://publications.parliament.uk/pa/ld199899/ldjudgmt/jd990324/pino1.htm (last visited August 4, 2017) (parallel citation is [2000] 1 A.C. 147) ("*Pinochet*").

2 *Congo v. Belg.* 2002 I.C.J. 1, ¶¶ 1, 14–l6.

3 *Id.*, ¶ 61 (emphases added).

4 *See generally* NAOMI ROHT-ARRIAZA, PINOCHET EFFECT, THE: TRANSNATIONAL JUSTICE IN THE AGE OF HUMAN RIGHTS, (Univ. of Penn. Press ed., 2005); *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte*, 2 All E.R. 97 (H.L. 1999), *available at* https://publications.parliament.uk/pa/ld199899/ldjudgmt/jd990324/pino1.htm (last visited August 4, 2017) (parallel citation is [2000] 1 A.C. 147) ("*Pinochet*").

the conduct is not official, but is rather personal conduct. Specifically, Chile's participation in the Convention Against Torture treaty forbade Pinochet from arguing that his alleged torture, amounting to an international crime, could be explained as being conducted to further Chile's interests or was a legitimate official act.

Under *Pinochet,* where a government leader commits conduct amounting to an international crime that violates an international treaty to which that country is a party, such conduct would always amount to "personal" or "private" conduct and would be exempted from immunity, permitting prosecution and litigation under theories of universal jurisdiction or otherwise.

Saleh, et al. v. Bush, et al.

A United States court of appeal reached a different result in examining the liability and immunity of U.S. leaders for the planning and execution of the Iraq War. In the *Saleh* case, the plaintiff Sundus Saleh challenged the legality of the Iraq war, alleging that the Bush Administration participated in an illegal war of aggression against Iraq—an offense in clear violation of the *jus cogens* norm prohibiting the crime of aggression.5 She argued that the defendants in the case—including former government leaders George W. Bush, Richard Cheney, Donald Rumsfeld, Colin Powell, Condoleezza Rice, and Paul Wolfowitz—were motivated by personal, ideological reasons in invading Iraq, and specifically, a "neoconservative" political philosophy that called for American military supremacy in the Middle East and the invasion and overthrow of Saddam Hussein and other Middle Eastern leaders. She also argued that since the United States was a signatory to the United Nations Charter, the Nuremberg Charter, the Tokyo Charter, and the Kellogg-Briand Pact, which all condemn and outlaw the crime of aggression, government leaders who commit the crime of aggression should be presumed to be acting in a personal capacity.

The United States Court of Appeal for the Ninth Circuit (the "***Ninth Circuit***") rejected these arguments, instead holding that a domestic immunity law called the Westfall Act was deemed to supersede and have greater weight than international treaties and customary international law. The court wrote that because the government defendants in the case were attempting to serve the United States through the war in Iraq—even if such objections or beliefs were "misguided or in contravention of international norms"6—they were acting within an official capacity and were protected from civil lawsuits by the Westfall Act.

The court wrote that "[a] federal official would act out of 'personal' motives and not be 'actuated … by a purpose to serve the master' if, for instance, he used the leverage of his office to benefit a spouse's business, paying no heed to the resulting damage to the public welfare."7 Consequently, under the Ninth Circuit's broad view of official-act immunity, American leaders who commit torture, genocide, or aggression on the basis of race or religious hatred, or on other irrational personal bases (so long as money is not involved), are immunized from civil lawsuits brought by foreign victims.8

Human Rights Implications of Continued Immunity for Government Leaders

Clarifying the scope of official-act immunity is urgent in light of municipal courts broadening protection over their own leaders who commit grave international crimes. On July 31, 2017, a British high court ruled that former Prime Minister Anthony Blair could not be held liable for the crime of aggression against Iraq in the United Kingdom.9 The high court

5 *See generally Saleh v. Bush*, 848 F.3d 880 (9th Cir. 2017).

6 *Id*. at 890.

7 *Id*.

8 The Ninth Circuit decision did not discuss domestic *criminal* responsibility in the United States. While certain war crimes are subject to criminal prosecution in the United States, there is no reported decision of a U.S. leader being criminally indicted by the U.S. Department of Justice for international crimes, and in the current political climate, the prospect of such prosecutions are virtually nonexistent. Thus, civil lawsuits, brought by individual victims, are likely the only means of domestic redress in the United States.

9 [2017] EWHC 1969 (Admin).

ruled that while the crime of aggression was a crime under international law, it was not incorporated in British law absent an act of Parliament.

Continued deference by municipal courts to the alleged international crimes of their domestic leadership is a serious threat to the rule of law. If courts look the other way and refuse to impose judicial review over leaders, the threat of legal sanction becomes meaningless, and leaders will feel free to commit egregious violations of human rights—jailing their opponents, threatening a free press, torturing those who stand in their way, and/or warring on weaker countries—without fear of penalty.

Recommendations:

- The Human Rights Council should urgently promote and advance the global rule of law, and should support the use of universal jurisdiction as a mechanism of judicial enforcement against state leaders who commit grave violations of human rights.
- The Human Rights Council should call on member states to ensure that domestic law provides for appropriate remedies and sanctions against government officials who violate *jus cogens* human rights norms, including the norms that protect against torture, crimes against humanity, and aggression, and should condemn the continued impunity of leaders who have violated nonderogable norms of international law.
- The Human Rights Council and all competent organs of the United Nations should urgently take all necessary and appropriate steps to end the state of impunity enjoyed by those government leaders who planned and executed the war of aggression against Iraq in order to provide justice to Iraq and its people and to promote and advance the rule of law.

*Just Atonement Inc (JAI) Geneva International Centre for Justice (GICJ) The Arab Lawyers Association- UK The Brussells Tribunal Euro-Mediterranean Human Rights Monitor Association of Humanitarian Lawyers (AHL), The Iraqi Commission for Human Rights (ICHR), Association of Human Rights Defenders in Iraq (AHRD), Alliance to Renew Co-operation among Humankind General Federation of Iraqi Women (GFIW), Organisation for Justice & Democracy in Iraq (OJDI), The Iraqi Centre for Human Rights, International Anti-Occupation Network (IAON), NGOs without consultative status, also share the views expressed in this statement.