A Licence For Government Ministers To Kill, Torture, Rape and Abduct Their People -- The World Court's Millenium Gift to the Rulers of Humanity

by Dr. William F. Pepper

20 February 2002

Oxford University International Human Rights Seminar

On 14 February 2002 the International Court of Justice issued its Judgement in the case of the Democratic Republic of the Congo v Belgium. The ruling is one of the most significant ever issued by the Court in respect of the relationship and accountability of government officials to their citizens or subjects. Because I believe it to be essential that as many people as possible understand the ruling and its potentially retrograde effect in a growing human rights consciousness on our planet, I will try in this short piece to explain what the court ruling means as well as what it does not mean.

Facts

On 14 June 1993 Belgium enacted a strong human rights law which was amended on 19 February 1999 and which concerned "The Punishment of Crime and Breaches of the International Geneva Conventions" as well as "Serious Violations of International Humanitarian Law". Pursuant to this Law Belgian investigating judges have received complaints against a number of Government officials submitted by victims who often having no other contact with Belgium have come to that nation and lodged complaints in their efforts to obtain justice. Accordingly Belgian investigating judges have commenced initial investigations against a number of present and past government officials including Chile's Pinochet, Israel's Sharon, Iran's Rafzanjani, Iraq's Hussein and Cuba's Castro.

The dispute before the Court involving the D.R.C. (The Congo) and Belgium concerned an international arrest warrant in absentia issued by the Belgian investigating judge against the Minister for Foreign Affairs of the Congo (Mr Abdulaye Yerdia Ndombisi -"Yerdia") charging him with offences constituting gross breaches of the Geneva Conventions of 1949 and with crimes against humanity.

On 17 October 2000 the Congo instituted proceedings before the International Court of Justice requesting the Court to order Belgium to annul the arrest warrant primarily on the grounds that the Minister of Affairs of any state is entitled to Sovereign Immunity -- that is he cannot be prosecuted for acts which he performed whilst he was in office and certainly not by the courts of another state. (Though Yerdia was in office at the time the proceedings were commenced, he left office subsequently.) Belgium responded that no immunity should attach to incumbent ministers or other government officials when they are suspected of having committed war crimes or crimes against humanity.

The Belgian Government stressed the fact that the law in question had been passed precisely because of the responsibility imposed upon states, which had ratified the Geneva, Genocide, Torture and other related Conventions. It noted that the concept of Universal Jurisdiction was finding increasing favour and must be preserved in those cases where there is no prosecution in the home state of the offender.

The Judgement

With a plethora of separate opinions the Court ruled that:

1. it had jurisdiction to hear and decide the case and that this was in no way impaired or eliminated because the defendant ceased to be a government officer, since he had been in office when the proceedings began.

2. that the arrest warrant against the Minister must be withdrawn.

Though the Court did not effectively address the application of the concept of universal jurisdiction it did state that immunity does not lead to the impunity of former government ministers. The Court held the lifting of full immunity of such an officer could only be for acts committed prior to or subsequent to his or her period in office and also only for acts committed in a private capacity during that period. In an extraordinary omission the Court does not say whether war crimes or crimes against humanity can be private acts.

Having stated that the judgement did not mean that immunity and impunity were synonymous the Court went on to set out only four situations in which that would not be the case:

1. Where prosecution takes place in the official's / defendant's home state;

2. Where immunity is formally waived;

3. Where prosecution takes place for private acts after the official has left office and

4. Where prosecution takes place before duly constituted international courts.

In its dispositif of the warrant the Court did not even mention that the Belgian warrant was based upon charges of war crimes and crimes against humanity. Instead it focused on the very narrow technical question of rules of immunity for incumbent Foreign Ministers.

By adopting this approach the Court implicitly establishes the primacy of the rules governing immunity over the rapidly developing rules of accountability in international law. This is contrary to the consideration of other courts (the House of Lords in the Pinochet case and the European Court of Human Rights in the Al-Adsani case) which have given more thought to balancing the status of those Jus Cogens (most heinous) crimes and the immunity of official perpetrators.

Finally, the Court's argument that "official" and "private" acts must be distinguished is inherently specious. Some crimes under international law like genocide, aggression and

crimes against humanity can for all practical purposes only be committed using the means and mechanisms of the state. By drawing a distinction between official and private acts the Court has bestowed a cloak of immunity over all such official acts and thereby has not only absolved the official but also condoned his actions. For the Court to so rule in a time where there has emerged a considerable momentum in favour of international accountability, shows how out of step is the Court -- despite vigorous dissents -- with the overwhelming opinion of civil society.

The Future

Belgium should be applauded for being willing to act as an agent of the world community by allowing criminal complaints to be brought by foreign victims of serious human rights abuses committed abroad. Similar respect should be shown to those Federal District Courts in the United States of America which agree to hear civil cases brought by aliens against similar human rights abusers for acts committed abroad. (The U.S. Alien Tort Claims Act, however, does require personal service of the defendant in the jurisdiction of the trial Court.)

Since the majority of the International Court of Justice is clearly out of step with the modern movement for international accountability I suggest that for the time being, the Court be avoided whenever possible. Since its jurisdiction only extends to disputes between states this should not be very difficult. Criminal and / or civil actions may be brought against private individuals after they have left office. Such proceeding have, for example, been urged against former U.S. Secretary of State Henry Kissinger and, in fact, a case is going forward against him in Washington D.C., though it may not be the most receptive jurisdiction for such an action.

The concept of universal jurisdiction and the responsibility of the nations of the world to look after the victims of human rights abuse in any country is not new. It is as ancient a concept as civil society itself and such intervention was practised by Greeks, Romans and others before them. Though sad and regrettable the judgement of the International Court of Justice in the case of the Democratic Republic of the Congo v Belgium is an irrelevance in the face of the growing determination of the people of the world to hold human rights oppressors, regardless of their public or private station, accountable for their actions in order secure justice for their victims.

W.F. Pepper
February 20th 2002

William Pepper is an English barrister and American attorney at law specialising in international human rights. He has authored four books and a number of articles and convenes a seminar on international human rights at Oxford University.

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