CURRENT DEVELOPMENTS

PUBLIC INTERNATIONAL LAW

Edited by Colin Warbrick

I. IMMUNITY AND INTERNATIONAL CRIMES IN ENGLISH LAW

The texts of two brief judgments by district judges at Bow Street are reproduced below. In each case, an application was made for proceedings against a serving foreign official to answer allegations in England of conduct which constituted crimes against international law which were within the jurisdiction of the English court, even though committed abroad and by non-UK nationals. In each case, the judge decided that the official was protected by the law of State immunity *rationae personae* against the proceedings and the applications were dismissed.

MUGABE

An application was made at Bow Street on 7 January 2004 for the issue of an extradition warrant against Robert Mugabe, President of Zimbabwe, on charges of torture. The application was made by Peter Tatchell, a gay activist, who had previously pursued Mugabe, inter alia, because of the President's attitude to homosexuals. Tatchell had tried to arrest Mugabe when the latter was on a visit to London in 1999 on allegations of torture.[1] Tatchell argued that Mugabe was responsible for torture committed by officials in Zimbabwe and that there was no prospect of a trial in Zimbabwe. However, his conduct did constitute the crime of torture in English law under section 134 Criminal Justice Act 1988. Tatchell maintained that the UN Convention against Torture created an obligation on the UK to institute proceedings against Mugabe; in the present circumstances, that meant issuing an extradition warrant against him, which might be executed in any State in which Mugabe was and with which the UK had an extradition arrangement.[2] The applicant relied on *Pinochet (No 3)*,[3] to defeat any claim of immunity that might be made on Mugabe's behalf. There are, though, two differences between *Pinochet* and *Mugabe*: Pinochet was the ex-President of Chile by the time of the extradition proceedings in England, whereas Mugabe was the serving head of State of Zimbabwe;[4] and Chile was a party to the Torture Convention but Zimbabwe was not. This latter point does not affect the jurisdiction of the English court over extra-territorial torture, which does not limit the

[1] 'The arrest of President Mugabe' <http://www.petertatchell.nt/direct%20action/mugabe. htm>.

[2] 'Tatchell asks court to issue arrest warrant for Mugabe' *The Guardian*, 8 Jan 2004.

[3] *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte* [1997] 2 All ER 97.

[4] For serving heads of State, see also *Gadaffi*, France, Court of Cassation, 13 Mar 2001, 125 ILR 456.

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effect of section 134 to the territory or national of other parties. However, it does limit the application of the interpretation in *Pinochet* that a claim of State immunity, *rationae materiae*, was not available to parties to the UN Convention, *inter se*.[5] Tatchell maintained that the judgment of the ICJ in the *Arrest Warrant* case,[6] which appeared to confirm Mugabe's personal immunity, had no application in English law. As is apparent from the judgment, this was rejected.

The judgment was given by the Senior District Judge at Bow Street, Tim Workman, on 14 January 2004. He decided that President Mugabe was entitled to Head of State immunity in English law and, for that reason, was not liable to any form of arrest. He refused to issue the warrant.[7]

Judgment

Robert Mugabe

Mr Tatchell has most thoroughly and carefully prepared this application for a warrant for the arrest of Robert Mugabe on allegations of torture in Zimbabwe.

He has provided me with a wealth of information both factually and on issues of international law. I have read Mr Tatchell's submissions and the supporting documentation. I have also considered the case of *Pinochet* and the International Court of Justice ruling in *The Democratic Republic of Congo v Belgium* including the separate and dissenting opinions in that case.

The issue to which I have directed my mind is whether President Mugabe has immunity from prosecution as a Head of State, It is accepted that he is presently the Head of State of Zimbabwe.

Mr Tatchell has argued persuasively that the doctrine of State immunity is not one which sits comfortably with the State's obligation under international law to prosecute grave crimes of universal jurisdiction. Mr Tatchell has sought to persuade me that the principal [*sic*] of universal jurisdiction should be extended to override the immunity afforded to a Head of State.

Whilst international law evolves over a period of time international customary law which is embodied in our Common Law currently provides absolute immunity to any Head of State.

In addition to the Common Law our State Immunity Act of 1978 which extends the Diplomatic Privileges Act of 1964 provides for immunity from the criminal jurisdiction for any Head of State.

I am satisfied that Robert Mugabe is President and Head of State of Zimbabwe and is entitled whilst he is Head of State to that immunity. He is not liable to any form of arrest or detention and I am therefore unable to issue the warrant that has been applied for.

(signed) TIM WORKMAN
Senior District Judge
14 January 2004

[5] See also *Habre*, Senegal, Court of Cassation, 20 Mar 2001, 125 ILR 528.

[6] *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* ICJ, General List No 121, 14 Feb 2002. See C McLachlan '*Pinochet* Revisited' (2002) 51 ICLQ 959.

[7] It might perhaps be wondered how the applicant had standing to make the application for the issue of an extradition warrant. Even if the warrant had been issued, the question of immunity would, no doubt, have been raised again in any State where the warrant was sought to be executed.

MOFAZ

On 11 February 2004 a second application was made for an arrest warrant against Shaul Mofaz, the Israeli Defence Minister, who was in England on official business. The application alleged conduct amounting to violations of Article 147 of the Geneva Convention on the Protection of Civilians 1949 (the Fourth Geneva Convention), an allegation of 'grave breaches'. 'Grave breaches' are made crimes of universal jurisdiction in England by Section 1, Geneva Conventions Act 1957. The previous application had been made in 1999 before Mofaz had assumed his present post but he left England before any proceedings were taken.[8] The present application was made on behalf of the families of persons alleged to have been killed in Israeli occupied territory by troops under Mofaz's command during the re-occupation of the West Bank in 2002. According to a newspaper report, Mofaz was one of a number of Israeli officials to whom the Israeli government had issued warnings about the possibility of criminal proceedings being brought against them while they were in other States, including the UK because of *Pinochet*.[9] Since then, the posting as ambassador of Israel to Denmark of Carmi Gillon, against whom there were allegations of torture, had been possible because of guarantees of his immunity from prosecution in Denmark[10] and the ICJ in the *Arrest Warrant* case had confirmed the wide personal immunity of senior government ministers.[11] The question here was whether or not a serving Minister of Defence was entitled to personal immunity on charges constituting grave breaches of the Geneva Conventions.

According to *The Guardian*, the Israeli government had sought a guarantee that Mofaz would be immune from proceedings in the UK but that, and very curiously, '[t]he Foreign Office said that it had not offered a guarantee but had consulted the Metropolitan Police who said that Mr Mofaz was entitled to diplomatic [*sic*] immunity.'[12]

Judgment

Application for Arrest Warrant Against General Shaul Mofaz

1. INTRODUCTION

This is an application for an arrest warrant against General Shaul Mofaz on behalf of the families and relatives affected by what is described as 'The Assassination Policy of Israel' or the 'Policy of Shooting with Impunity'. General Mofaz is the Israeli Defence Minister and is believed to be visiting this country.

2. ALLEGATIONS

It is alleged that General Mofaz, in his capacity of Defence Minister, has committed 'grave breaches' as defined by Article 147 of the Fourth Geneva Convention namely:

[8] 'British solicitor instructed to pursue complaints, particularly against Shaul Mofaz' <http://electronicintifada.net/v2/article839.shtml>.

[9] 'Israelis warned against arrest for war crimes' *Daily Telegraph*, 27 July 2001.

[10] 'Something rotten in Denmark' <http://www.israelinsider.com/channels/diplomacy/articles/dip_0066.htm>.

[11] Above n 6.

[12] 'Sharon's ally safe from arrest in Britain' *The Guardian*, 11 Feb 2004.

(i) wilful killing
(ii) wilfully causing great suffering or serious injury to body or health
(iii) extensive destruction and appropriation of property to justify [sic, not justified] by military necessity and carried out unlawfully or wantonly.

I have considered the extensive evidence of witnesses supplied to me, together with relevant reports, and I agree that these could certainly amount to 'grave breaches'.

3. JURISDICTION

I have also considered the question of jurisdiction. Section 1 of the Geneva Convention Act states:

> Any person, whatever his nationality who whether in or outside the United Kingdom, commits or aids, abets or procures the commission by any other person of a grave breach of any of the scheduled conventions on the first protocol shall be guilty of an offence.

Section 1A(4) of the Act adds:

> If the offence is not committed in the United Kingdom
>
> (a) proceedings may be taken, and
> (b) the offence may for incidental purposes be treated as having been committed in any place in the UK.

I am satisfied that I do have jurisdiction to deal with the allegations made.

4. ATTORNEY GENERAL'S CONSENT

Were I to allow these proceedings, it would then require the consent of the Attorney General to institute proceedings under the Act.

Section 25(2)(a) of the Prosecution of Offences Act 1985 states that any enactment to which this section applies: shall not prevent the arrest without warrant or the issue of execution of a warrant for the arrest of a person for any offence or the remand in custody or on bail of a person charged with any offence.

I am quite satisfied that I do not require the Attorney General's consent before the issue of any warrant although his consent would be needed if the proceedings were to progress further.

5. STATE IMMUNITY

The question arises as to whether General Mofaz has any [S]tate immunity in his capacity as the current Israeli Defence Minister. It has been argued by the Applicant that if the General enjoys any kind of immunity, and that is not accepted by the Applicant, then the proper time to raise it would be at the first hearing after the warrant has been issued. I am afraid that I disagree with that proposition and take the view that [S]tate immunity is one of the issues that I must consider.

There appears to be no statutory basis for a claim of immunity in this case. The House of Lords in *Pinochet (No 3)* 2000 1 AC 119 accepted the principle that United Kingdom law would give effect to immunity under customary international law in the absence of a statutory requirement not to do so. State immunity has only to date been recognized to shield the conduct of certain individuals. The International Court of Justice in the Arrest Warrant case (*Congo v Belgium*) held that such immunity extended to the serving Head of State, Head of Government and the Foreign Minister. However, what is clear from paragraph 51 of the judgment is that the [C]ourt did not need to consider immunity in relation to any other minister. Paragraph 51 reads:

> The [C]ourt would observe at the outset that in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal. For the purposes of the present case, it is only the immunity from criminal jurisdiction and the inviolability of an incumbent Minister for Foreign Affairs that fall for the Court to consider.

Two points arise from that. The use of the words 'such as' the Head of State, Head of Government and Minister for Foreign Affairs indicate to me that other categories could be included. In other words, those categories are not exclusive. Additionally, the last line made it absolutely clear that it was only the Minister of Foreign Affairs that fell to the Court to consider—no other office holder.

The basis for saying that a Foreign Minister should have [S]tate immunity was to enable him effectively to fulfil his function which would include travel or diplomatic missions on behalf of the State. Would such immunity extend to any other Minister of State, including a Defence Minister?

The function of various Ministers will vary enormously depending upon their sphere of responsibility. I would think it very unlikely that ministerial appointments such as Home Secretary, Employment Minister, Environment Minister, Culture Media and Sports Minister would automatically acquire a label of [S]tate immunity. However, I do believe that the Defence Minister may be a different matter.

Although travel will not be on the same level as that of a Foreign Minister, it is a fact that many [S]tates maintain troops overseas and there are many United Nations missions to visit in which military issues do play a prominent role between certain States, It strikes me that the roles of defence and foreign policy are very much intertwined, in particular in the Middle East.

I recognize that I am working in somewhat unchartered waters but having given the matter very considerable consideration overnight and today I conclude that a Defence Minister would automatically acquire [S]tate immunity in the same way as that pertaining to a Foreign Minister. Given that finding, I decline to issue the warrant requested.

(signed) CL PRATT
District Judge—Bow Street
12 February 2004

The judgment is unconvincing in its reference to *Pinochet*. It would have been interesting to know whether or not the argument which proved decisive in *Pinochet* with respect to torture—that immunity was not compatible with the undertakings of parties, given the definition of torture in the UN Convention—might have been extended to conduct falling within 'grave breaches' of the Geneva Conventions. However that might have come out, it appears that the *Arrest Warrant* judgment would have precluded the denial of personal immunity to Mofaz. Although the judge does not say so expressly, it must be inferred that he took the ICJ to be laying down a rule of customary international law, a rule which thus was a rule of the common law and one to which he was bound to give effect. The only question was the interpretation of the ICJ judgment. Judge Pratt held that immunity applicable to a minister of foreign affairs was also applicable to a minister of defence—he took the same functional approach as the ICJ, holding that 'the roles of defence and foreign policy are very much intertwined'. Whether it was desirable that he go on to say which ministers he though the

immunity would not benefit is doubtful: there remains much room for argument about the limits of the *Arrest Warrant* case.

Judge Pratt's judgment makes no reference to any argument that the immunity might be limited by the nature of the charges (grave breaches), doubtless accepting that that question had been disposed of by the ICJ.

The two judgments give little comfort to those who would maintain that international law immunities should be reconsidered in the face of allegations of international criminal conduct.[13] Whether or not the matter might be different in civil proceedings presently waits the attention of the Court of Appeal in *Jones*, a case seeking redress against Saudi Arabia and a named official for allegations of torture by officials there brought by UK national plaintiffs.

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[13] See, for instance, S Wirth 'Immunity for Core Crimes? The ICJ's judgment in the *Congo v Belgium* case' (2002) 13 EJIL 877; A Orakhelashvili 'State Immunity and International Public Order' (2002) 45 German Yearbook of International Law 227.

* University of Durham. I am grateful to the Foreign and Commonwealth Office for the copies of the judgments.