Application for Arrest Warrant Against General Shaul Mofaz, First instance, unreported (Bow Street Magistrates' Court)

12 February 2004

Source: International Law in Domestic Courts

1. Introduction

1 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

- 2 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:
- (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.
- 3 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

4 I have also considered the question of jurisdiction. <u>Section 1 of the Geneva Convention Act</u> 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.

5 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.
- 6 I am satisfied that I do have jurisdiction to deal with the allegations made.

4. Attorney General's Consent

- 7 Were I to allow these proceedings, it would then require the consent of the Attorney General to institute proceedings under the <u>Act</u>.
- 8 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.
- 9 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

10 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.

11 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.

- 12 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?
- 13 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.

14 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.

15 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