

JUR5570 - International Criminal Law

Spring 2009

All four questions below must be answered.

In the state of Petunia there had for decades been episodes of violence between the two main ethnic groups; the Majorians and the Minorians. In May 2005, the conflict escalated to a campaign where majorians systematically attacked, raped, killed and burned down the homes of minorians. Several of the crimes clearly amounted to crimes against humanity.

The Chief Prosecutor of the International Criminal Court (ICC) was deeply concerned about the situation in Petunia. He wanted to investigate and possibly prosecute some of the gravest crimes. The problem was, however, that Petunia – which was both the home state of the suspects and the state in which the crimes had been committed - had not ratified the Rome Statute. The ICC therefore lacked jurisdiction. Petunia had signalled no willingness to contribute to the establishment of ICC jurisdiction with regard to the situation.

Question 1: Explain the material criteria and the relevant procedures for a United Nations Security Council resolution conferring jurisdiction over a given situation to the ICC. Refer to relevant provisions both in the Rome Statute and the UN Charter.

In May 2006, the Security Council referred the situation in Petunia to the ICC Prosecutor. Passages from the referring resolution read:

“The Security Council,

... Determining that the situation in Petunia continues to constitute a threat to international peace and security,

Acting under Chapter VII of the Charter of the United Nations,

... Decides to refer the situation in Petunia since 1 May 2005 to the Prosecutor of the International Criminal Court;

Decides that the Government of Petunia and all other parties to the conflict in Petunia, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States to cooperate fully;

... Decides to remain seized of the matter.”

Upon some investigation, the Prosecutor concluded that the person most responsible for the atrocities in Petunia appeared to be the country's president, Shabana Al-Basra. The Prosecutor was, however, warned by Amnesty International that going after the president “could hurl the country back into civil war, and that it might spur retaliation by the president's loyalists and other forces against civilians, United Nations peacekeepers or international aid workers. Justice without peace would be a hollow victory”. Human Rights Watch argued, for its part, that the Prosecutor should investigate and prosecute the president if there was a reasonable basis for believing that she was guilty. The only way to achieve a long lasting peace was to bring the most responsible to justice, it was argued.

Question 2: Can the ICC Prosecutor take considerations such as those expressed by Amnesty International and Human Rights Watch into consideration when he decides whether to investigate and/or prosecute the president of Petunia? Suggest how arguments for and against such action might be weighed.

In May 2007, the ICC issued a warrant for the arrest of Petunia's president. The ICC Prosecutor contacted Petunian authorities and requested that they arrest the president and surrender her to the ICC. Petunian authorities replied that they would not comply with the request because: (a) Petunia was, as a non-state party, under no obligation to comply with requests from the ICC; (b) the Petunian Constitution did not allow such arrest and surrender; and (c) the president was, according to customary international law, immune to prosecution before the ICC.

Question 3: Is Petunia under an obligation to arrest its president and surrender her to the ICC?

Petunia failed to arrest the president. In May 2008, president Al-Basra made an official visit to the neighbouring state Begonia, which was a party to the Rome Statute. The ICC Prosecutor requested that Begonian authorities arrest the president and surrender her to the ICC. Begonian authorities replied, however, that under international law Petunia's president was immune to such arrest and surrender.

Question 4: Is Begonia under an obligation to arrest Petunia's president and surrender her to the ICC?