

Jean-Claude Duvalier Can Be Prosecuted

THE OPEN SOCIETY JUSTICE INITIATIVE has produced a detailed legal analysis of the international legal arguments for bringing Jean-Claude Duvalier to trial in Haiti for crimes against humanity committed during his 15 years in power, from 1971 to 1986. Below is a summary of the arguments made in the brief, which has been submitted to Haiti's judicial authorities.

Background

On 16 January 2011, Jean-Claude Duvalier, the former dictator of Haiti, returned to the country after 25 years in exile. He is currently under investigation for offenses including corruption, attempted murder and sequestration, or illegal imprisonment. His defense lawyers have publicly argued that he qualifies for immunity from prosecution for the offences allegedly committed during his 15 years in power between 1971 and 1986. This argument, set out in full page advertisements in the Haitian press, claims among other things that the crimes should be covered by the Statute of Limitations adopted in 1988 and that he cannot therefore be tried for crimes against humanity in a Haitian court.

International Law Applies in Haiti

International law, which under the Haitian Constitution is the law of the land, requires that states investigate crimes which shock the conscience of humanity. Haiti is required to prosecute crimes against humanity by two treaties it has ratified, by its membership of the United Nations, and by the standards of its own constitution. The fact that Haiti has not signed other international treaties nor accepted the jurisdiction of the International Criminal Court is irrelevant.

There is No Statute of Limitation for Crimes against Humanity

The defense lawyers for Jean-Claude Duvalier have argued that it is not lawful to prosecute their client now because Article 466 of the Penal Code (introduced in 1986 and modified in 1998) introduced a statute of limitations which could prevent the prosecution of crimes after 10 years. However, statutes of limitations or amnesties for crimes against humanity are illegal under international law and have no legal force.

The Alleged Crimes were Crimes against Humanity at the Time

The fact that the crimes under consideration occurred in the 1970s and 1980s does not deprive Haitian courts of jurisdiction. Courts around the world have clarified that the crimes at issue were prohibited under customary international law as of the 1970s. Crimes against humanity were thus clearly criminalized in customary international law by the 1970s. It cannot be said that Duvalier did not know

that such conduct was illegal, and could come to trial. Haiti was also a member of the United Nations during the passage of five General Assembly Resolutions that dealt with the enforcement of crimes against humanity. As the head of the Haitian state, Duvalier should have been aware that a state policy that included incarcerating political prisoners, forced deportations, murder, the disappearance of dissidents, and the practice of forced labor or enslavement could well have attained the threshold of crimes against humanity.

Crimes under Existing Haitian Law Can Constitute Crimes against Humanity

There is nothing to stop the judicial authorities from charging Duvalier with domestic crimes, and characterizing the facts as part of a widespread or systematic attack upon the civilian population, thus classifying them as crimes against humanity, and putting them outside the statute of limitations introduced by the 1988 law.

Duvalier Is Liable for Offences Committed by the Haitian State

Duvalier is liable for the domestic offences outlined above under three alternate theories of liability. First, he is liable as an “indirect perpetrator” because these alleged crimes were committed as part of a state apparatus under his authority, if the court can establish a causal link between the leader’s orders and the alleged crimes. Secondly, liability may also arise under the principle of “accomplice liability” if a senior leader instigated, aided, or abetted the commission of crimes. Article 45 of the Haitian Penal Code establishes that a person can be tried and punished as an accomplice upon a showing of three conditions: first, an underlying act or predicate crime; second, an act of complicity before or during the crime; and third, mens rea, or knowing participation in the criminal activity. Thirdly, Duvalier is also liable for the alleged crimes through the customary international law doctrine of “command responsibility.” Under this theory, military commanders and non-military superiors are responsible for offences committed by soldiers or police under their effective control, where they knew or ought to have known that offences were being committed and failed to prevent them, or punish them after the event.

Conclusion: Jean-Claude Duvalier Can Be Prosecuted

Haiti possesses the requisite jurisdiction over crimes against humanity based on its constitutional law and due to its binding international obligations, both according to international criminal law and human rights law. As such, Haiti is compelled to exercise and implement its jurisdiction over crimes against humanity, and thus prosecute, judge and, in the event of a finding of guilt, to punish Duvalier.

In the alternative, Haiti is compelled to extradite Jean-Claude Duvalier to a country willing to pursue the accusations of crimes against humanity. Neither statute of limitations, amnesties nor the principles of legality that bar retroactive prosecution or punishment prohibit the judicial authorities, including the Investigating Magistrate or the State Prosecutor, from recognizing Haiti’s right to exercise jurisdiction.

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