

Oxford Public International Law

Gaddafi case, General Prosecutor at the Court of Appeal of Paris, Appeal judgment, Appeal No 00-87215, Decision No 64, (2001) 125 ILR 490, (2001) RGDIP 474, ILDC 774 (FR 2001), 13th March 2001, France; Court of Cassation [Cass]; Criminal Division

Date: 13 March 2001

Content type: Domestic court decisions

Jurisdiction: Criminal Division

Citation(s): Appeal No 00-87215 (Application No)

Decision No 64 (Decision No)

(2001) 125 ILR 490 (Other Reference)

(2001) RGDIP 474 (Other Reference)

ILDC 774 (FR 2001) (OUP reference)

Product: Oxford Reports on International Law [ORIL]

Module: International Law in Domestic Courts [ILDC]

Parties: General Prosecutor at the Court of Appeal of Paris (France [fr])

Judges/Arbitrators: Cotte (President); Chanet (Reporter)

Procedural Stage: Appeal judgment

Previous Procedural Stage(s):

Court of Appeal of Paris, indictment division, unreported, 20 October 2000

Related Development(s):

Judgment of six Libyan nationals, Abdallah Senussi and ors, unreported, 10 March 1999

(‘10 March Judgment’)

Agreement between the Gaddafi International Foundation for Charity Associations, SOS attentats, the victim’s family, and the Bank for Official Deposits, 9 January 2004

Association SOS attentats et Béatrix de Boëry v France, Decision as to admissibility, App no 76642/01, 4 October 2006

(Application was filed with the European Court of Human Rights but the case was struck off the list by the court because an agreement was reached between the parties and Libya, and because of the

10 March Judgment

.)

Subject(s):

Diplomatic immunity – Heads of state and other senior officials – Privileges – Immunity from jurisdiction, state officials – Terrorism – Customary international law – General principles of international law – Reparation

Core Issue(s):

Whether an incumbent foreign head of state enjoyed immunity from jurisdiction in a criminal action brought before a French court for complicity in an act of terrorism.

Oxford Reports on International Law in Domestic Courts is edited by:

Professor André Nollkaemper, University of Amsterdam and August Reinisch, University of Vienna.

Facts

F1 This case originated from the 19 September 1989 bomb attack committed against a DC 10 aircraft operated by the French company UTA that killed 170 people, including several French nationals, above the Tenere desert. After a judicial investigation in France, six Libyan nationals were committed for trial. In Judgment, 10 March 2001, the Paris Assize Court sentenced them *in absentia* to life imprisonment and ordered them to pay compensation to members of the victims' families who had participated in the trial as civil parties.

F2 On 16 June 1999, a civil-party complaint was lodged against Colonel Muammar Gaddafi, the Libyan head of state, for complicity in the bomb attack. On 6 October 1999, the investigating judge ruled that there was a case to answer and decided to bring a case against Gaddafi for complicity in destruction of property by use of an explosive substance which caused loss of life in relation to a terrorist conspiracy.

F3 The prosecutor's office applied for review of the investigating judge's decision in Judgment, 20 October 2000 and upheld the decision to proceed with the case. The court of appeal recognized that a head of state enjoyed immunity from jurisdiction. However, it considered that the principle of immunity for heads of state had, since the end of World War II, undergone some modifications which would indicate that it was no longer absolute, and admitted exceptions when the act committed would not be considered part of the normal duties of heads of state. Considering the nature and gravity of the crime charged, the court of appeal ruled that Colonel Gaddafi, though an incumbent head of state, could not enjoy immunity from jurisdiction, and it remitted the case for trial.

F4 The general prosecutor at the Court of Appeal of Paris filed an appeal on a point of law with the court of cassation, arguing that the court of appeal had misinterpreted international law. The general prosecutor argued that immunity from jurisdiction was an absolute principle for incumbent heads of state and that no exception could be made to it—however grave the crime charged.

Held

H1 Sitting foreign heads of state enjoyed immunity from jurisdiction before French courts by application of customary international law. The crime charged in this case, regardless of its gravity, did not constitute an exception to the principle of immunity from jurisdiction internationally recognized for incumbent heads of state in foreign courts. (paragraph 9)

H2 The court of appeal had misinterpreted international law by recognizing an exception to this principle in light of the gravity of the crime alleged. As a consequence, its judgment was quashed. (paragraph 9)

H3 There was no ground to proceed further with the case. (paragraph 11)

Date of Report: 28 October 2008

Reporter(s): Thomas Margueritte

Analysis

A1 France, being a civil law country, mainly relies on written law; it is generally reluctant vis-à-vis customary law. As far as criminal law is concerned, France attaches great importance to the principle of *nullum crimen sine lege, nulla poena sine lege praevia*. As a result, French criminal courts are even more reluctant when it comes to the application of customary rules (Roulot, p 2631 and Massé, p 898, see Further Analysis).

A2 In this case, the court of cassation, the final instance for civil and criminal matters, did apply customary law. The apparent audacity of the court of cassation should not, however, be overestimated. This case referred to a procedural matter, not to substantive law. It is not clear whether the court's willingness to apply customary law would extend to substantive rules—see Michel Massé, 'La coutume internationale dans la jurisprudence de la chambre criminelle—(Affaire *Kadhafi et Aussarès*)', (2003–4) *Revue de science criminelle et de droit pénal comparé* 894 p 402; and also *The Movement Against Racism and for Peoples' Friendship v Aussarès*, Appeal no 02-80719, Decision no 122; ILDC 775 (FR 2003), 17 June 2003.

A3 Treaties and conventions come under Article 55 of the Constitution, 4 October 1958 (France), which provides that, when regularly ratified and published, treaties and conventions prevail over statutory law. The Constitution remained silent as to the reception of international customary law, but the Preamble of the Constitution, 1946 (France) ('1946 Constitution') which is referenced in the Constitution and has been declared by the French Constitutional Court as having constitutional value, provides in Article 14 of the 1946 Constitution that France, faithful to its traditions, abides by rules of international law. Article 14 could be a constitutional ground for the application of international customary law by a French court (Roulot, p 2632, see Further Analysis).

A4 In this case, the main bone of contention between the court of appeal and the court of cassation did not lie in the recognition of the principle of immunity from jurisdiction of a head of state, but in its exceptions.

A5 For the Paris Court of Appeal, immunity from jurisdiction was no longer absolute and conduct that could not be attached to the normal duties of a head of state prevented the head of state from enjoying the protection given to him by international law. According to the court of appeal, new international obligations have been created for states, among which is the obligation to judge international criminals regardless of their position. The court of appeal concluded that there were accordingly exceptions to the principle of immunity from jurisdiction.

A6 The court of cassation took a different approach, ruling that, at the time of the decision, the alleged crime had not been an exception to the principle of immunity from jurisdiction of foreign incumbent heads of state. The court of cassation did not say, however, that immunity from jurisdiction of foreign heads of state was absolute, but that an exception had to be established under international law. It added that immunity applied only to incumbent heads of state.

A7 The decision of the French Supreme Court later found support in the *Yerodia case, Congo, Democratic Republic of the v Belgium*, (2002) ICJ 121, 11 April 2000 ('*Yerodia case*'), in which the International Court of Justice held that immunity from jurisdiction for state officials was absolute and protected them against 'any act of authority of another State which would hinder him or her in the performance of his or her duties' (*Yerodia case* (54)). It added that 'no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an "official" capacity', and those claimed to have been performed in a "private capacity..." (*Yerodia case* (55)). This holding thus supported the conclusion that the exception applied by the Paris Court of Appeal had no basis in international law.

A8 The decision of the court of cassation appeared audacious for applying international customary law in a civil law country usually reluctant to do so. Despite criticisms from victims' associations and NGOs (see eg FIDH, 13 March 2001, this decision also appeared right in that it applied the correct legal regime of the international customary principle at issue.

A9 On 11 September 2001, an application was filed with the European Court of Human Rights, on the ground that that this judgment had violated their right of access to a court. A chamber relinquished jurisdiction to the Grand Chamber. On 9 January 2004, before the Grand Chamber had considered the case, an agreement was signed between the Gaddafi International Foundation for Charity Associations, the families of the victims, and the Bank for Official Deposits, which provided for compensation. In view of the agreement and the fact that six Libyan officials had been convicted, the court struck the case from the list on the basis of Article 37(1)(c) of the Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 222; 312 ETS 5, entered into force 3 September 1953. (See Agreement between the Gaddafi International Foundation for Charity Associations, SOS attentats, the victim's family, and the Bank for Official Deposits, 9 January 2004.)

Date of Analysis: 29 October 2008

Analysis by: Yann Kerbrat, Thomas Margueritte

Further analysis:

Michel Massé, 'La coutume internationale dans la jurisprudence de la chambre criminelle—(Affaire *Kadhafi et Aussarès*)', (2003–4) *Revue de science criminelle et de droit pénal comparé* 894

Carlo Santulli, 'Coutume internationale et juge national: qui peut quoi? A propos de l'immunité du chef de l'Etat étranger dans l'affaire Khadafi', (2002–3) *Journal du droit international* 805

Florence Poirat, 'Immunité de juridiction pénale du chef de l'Etat étranger en exercice et règle coutumière devant le juge judiciaire', (2001-2) *Revue générale de droit international public* 473
Jean-François Roulot, 'La coutume du droit international pénal et l'affaire "Kadhafi"', (2001) 32 *Recueil Dalloz* 2631

Instruments cited in the full text of this decision:

Constitutions

Constitution, 4 October 1958 (France)

To access full citation information for this document, see the Oxford Law Citator record

Decision - full text

Paragraph numbers have been added to this decision by OUP

Republique Francaise au nom du Peuple Francais

1 CASSATION sans renvoi sur le pourvoi formé par le procureur général près la cour d'appel de Paris, contre l'arrêt de la chambre d'accusation de ladite cour d'appel, en date du 20 octobre 2000, qui a confirmé l'ordonnance du juge d'instruction disant y avoir lieu à informer sur la plainte de l'association X... et de Y..., épouse Z..., contre A..., du chef de complicité de destruction d'un bien par l'effet d'une substance explosive ayant entraîné la mort d'autrui, en relation avec une entreprise terroriste.

2 LA COUR,

3 Vu l'ordonnance du président de la chambre criminelle en date du 22 novembre 2000 prescrivant l'examen immédiat du pourvoi ;

4 Vu les mémoires produits en demande et en défense ;

5 Sur le moyen unique de cassation, pris de la violation du droit pénal coutumier international relatif à l'immunité de juridiction reconnue aux chefs d'Etat étrangers :

6 Vu les principes généraux du droit international ;

7 Attendu que la coutume internationale s'oppose à ce que les chefs d'Etat en exercice puissent, en l'absence de dispositions internationales contraires s'imposant aux parties concernées, faire l'objet de poursuites devant les juridictions pénales d'un Etat étranger ;

8 Attendu que l'association X... et Z... ont porté plainte avec constitution de partie civile du chef de complicité de destruction d'un bien par l'effet d'une substance explosive ayant entraîné la mort d'autrui, en relation avec une entreprise terroriste, contre A..., chef d'Etat en exercice de la Jamahiriya Arabe Libyenne, à qui elles reprochent son implication dans l'attentat commis le 19 septembre 1989 contre un avion DC 10 de la compagnie UTA, lequel, en explosant au-dessus du Niger, a causé la mort de 170 personnes, plusieurs d'entre elles étant de nationalité française ;

9 Attendu que, pour confirmer l'ordonnance du juge d'instruction disant y avoir lieu à informer, nonobstant des réquisitions contraires du ministère public, les juges du second degré retiennent que, si l'immunité des chefs d'Etat étrangers a toujours été admise par la société internationale, y compris la France, aucune immunité ne saurait couvrir les faits de complicité de destruction d'un bien par l'effet d'une substance explosive ayant entraîné la mort d'autrui, en relation avec une entreprise terroriste ;

9 Whereas, to uphold the Investigating Judge's order stating an investigation be carried out, notwithstanding the contrary submissions of the public prosecutor, the judges at second instance held that, while the immunity of foreign heads of State was still accepted by international society, including France, no immunity could cover the facts of complicity in the destruction of property using an explosive substance leading to the death of others, in relation with a terrorist enterprise;

10 Mais attendu qu'en prononçant ainsi, alors qu'en l'état du droit international, le crime dénoncé, quelle qu'en soit la gravité, ne relève pas des exceptions au principe de l'immunité de juridiction des chefs d'Etat étrangers en exercice, la chambre d'accusation a méconnu le principe susvisé ;

10 But whereas in delivering this verdict, as in international law, the reported crime, regardless of its gravity, does not provide exceptions to the principle of the immunity from jurisdiction of foreign heads of State in office, the indictment division failed to consider the abovementioned principle;

11 D'où il suit que la cassation est encourue ; qu'elle aura lieu sans renvoi, la Cour de Cassation étant en mesure d'appliquer la règle de droit et de mettre fin au litige ainsi que le permet l'article L. 131-5 du Code de l'organisation judiciaire ;

11 It was on this basis that the quashing will occur, without remitting the case to an appeal court, the Court of Cassation being able to apply the rule of law and put an end to the dispute as is permitted by Article L. 131-5 of the Judicial Organisation Code;

12 Par ces motifs :

12 For these reasons:

13 CASSE ET ANNULE, en toutes ses dispositions, l'arrêt de la chambre d'accusation de la cour d'appel de Paris, en date du 20 octobre 2000 :

13 QUASHES AND ANNULS all the provisions of the Decision of the Indictment Division of the Paris Court of Appeal of 20 October 2000:

14 DIT n'y avoir lieu à informer ;

14 DECLARES that there is no need for investigation;

15 DIT n'y avoir lieu à renvoi.

15 DECLARES there is no need for appeal.

Copyright © 2018. All rights reserved.

Powered by PubFactory