

February 12, 2003

BELGIAN COURT OF CASSATION

Ruling

No. P.02.1139.F/1

- I.**
- 1. H. S. A.,**
 - 2. A. A. e. N.**
 - 3. E. S. O. H.**
 - 4. Y. M.**
 - 5. E. D. F. A.**
 - 6. M. A. H.**
 - 7. S. S. M.**
 - 8. N. N. Y. S.**
 - 9. H. M. A.**
 - 10. T. C. A.-e.-G.**
 - 11. H. A. A.**
 - 12. Z. B.**
 - 13. F. M. I**
 - 14. R. M. C. A.**

15. E. S F. A. Q.

16. A.-M. A. A.

17. H. A.

18. E.-K. N. A.

19. A.-K N. A.-e.-R.

20. F. A. S.

21. E.-K. A. A.

22. A.-J. N. A.-R.

23. H. K.

civil parties,

having for counsel Maîtres Luc Walleyne, whose office is located in Schaerbeek, rue des Palais, 154, which serves as the registered address of choice, and Michaël Verhaeghe, attorneys admitted to the Brussels Bar, as well as Chibli Mallat, attorney in Beirut (Lebanon),

applicants on appeal,

against

1. S. A.

2. Y. A.

persons against whom the public action is engaged,

represented by Maître Philippe Gérard, attorney at the Court of Cassation and having for counsel Maître Adrien Masset, attorney admitted to the Verviers Bar, whose office is located in Herve, rue Bê Pâki, 16, which serves as the registered address of choice,

II. S. E.-M. S.

civil party,

applicant on appeal,
having for council Maîtres Alexandre Sachem and Michaël Verstraeten, attorneys
admitted to the Gand Bar,

against

1. S. A.

2. Y. A.

persons against whom the public action is engaged,
represented by Maître Philippe Gérard, attorney at the Court of Cassation and having
for council Maître Adrien Masset, attorney admitted to the Verviers Bar, whose office
is located in Herve, rue Bê Pâki, 16, which serves as the registered address of choice.

I. The contested decision

The appeals are directed against a ruling delivered June 26th, 2002, by the Court of Appeals in Brussels, Chamber of Indictments.

II. Proceedings before the Court

Judge Jean de Codt reported.

Public Prosecutor Jean du Jardin gave his conclusions.

Attorneys Luc Walley, Michaël Verhaeghe, Chibli Mallat and Raf Verstraeten, on behalf of Plaintiffs sub I, responded to the conclusions of the prosecuting magistrate and provided one document.

III. Grounds for appeal

Plaintiffs sub I claim three bases for appeal (cassation). Their submission is attached to the present ruling, certified by the Court.

Plaintiff sub II invokes one ground for appeal in her certified submission attached to the present ruling.

IV. Decision of the Court

A. Regarding appeals to the decision related to the criminal action against defendant A. Y. and others unknown:

On the first basis of appeal, and on the third part of the second basis of appeal asserted by applicants sub I, and the similar basis of appeal alleged by applicant sub II:

Whereas the statute of June 16 1993 relating to the repression of grave violations of international humanitarian law, amended by the statute of February 10 1999, describes crimes of international law and officially recognizes as such acts of genocide, as defined in the International Convention on the Prevention and Repression of the Crime of Genocide, adopted in Paris on December 9 1948 and ratified by the statute of June 26 1951, crimes against humanity as defined in the Rome Statute of the International Criminal Court, adopted in Rome on July 17 1998, ratified by law of May 25 2000, and war crimes as defined by the Four Geneva Conventions of 12 August 1949, ratified by the law of September 3 1952, as well as by the Additional Protocols I and II to those Conventions, adopted in Geneva on June 8 1977 and ratified by the law of April 16 1986;

Whereas Article 7, paragraph 1, of the aforementioned statute of June 16 1993 states that Belgian Courts enjoy jurisdiction to prosecute these crimes, regardless of where they were committed;

Whereas the contested ruling holds that the condition of admissibility of a criminal action as provided for in Article 12 of the law of April 17 1878 enforcing the Preliminary Title of the Code of Criminal Procedure applies to the prosecution in Belgium of crimes under international law committed outside its territory;

But, whereas, Article 12, paragraph 1 (previously cited), only requires the presence of the accused on Belgian territory for the prosecution of the crimes codified in Articles 6, 3°, 7, §§ 1^{er} and 2, 9, 10, 3° through 5°, 10 ter, 10 quater, 11 and 12bis of the law of April 17 1878;

Whereas acts of genocide, crimes against humanity and grave violations committed against persons or property protected under the August 12 1949 Geneva Conventions are neither offenses, envisaged by the Penal Code or by certain specific laws, enumerated in the aforementioned Chapter II of the Preliminary Title of the Code of Criminal Procedure, nor offenses for which this Chapter requires punishment as provided for by the laws of the state in which the act was committed, nor are they crimes and offenses for which the statute makes the admissibility of a criminal action dependent upon the existence of a complaint, a denunciation, or a condition precedent of nationality;

Whereas, admittedly, pursuant to Article 12bis of the April 17 1878 law, amended by the law of July 18 2001 -- a clause which must be read in combination with the preceding clause -- Belgian courts may also claim jurisdiction to try crimes committed outside the territory of the Kingdom, which are the subject of international conventions to which Belgium is a party, if the convention imposes the duty on Belgium, in whatever way, to prosecute these crimes;

Whereas, it follows from the text of Article 12bis itself, previously cited, that jurisdiction conferred on Belgian tribunals concerns the crimes codified in every treaty ratified by Belgium that contains an obligatory rule that extends jurisdiction by derogating from the principle of territoriality in criminal law;

Whereas, neither Articles V and VI of the Convention on the Prevention and Repression of Genocide, nor the Rome Statute, nor Articles 49, 50, 129 and 146 of the four Geneva Conventions of 12 August 1949 include such a rule;

That crimes under international law, targeted by the June 16 1993 statute amended February 10 1999, are irrelevant to Chapter II of the Preliminary Title of the Code of Penal Procedure and so do not constitute crimes for which prosecution requires the presence of the accused in Belgium if the acts in question were committed outside Belgian territory;

That, having held the opposite, the contested ruling is not legally supported;

Accordingly, the first basis for the appeal and the third part of the second basis for appeal alleged by the applicants sub I and the similar grounds asserted by the applicant sub II are well-founded;

B. Regarding appeals to the decision related to the criminal action against the defendant A. S.:

On all the bases of appeal invoked by each applicant:

Whereas, for reasons discussed below, the Chamber of Indictment did not legally justify its decision;

Whereas, however, the Court can replace a criticized rationale, and upon which the contested ruling was based, by another legal basis that justifies the holding;

Whereas, the findings of the ruling show that the plaintiffs initiated the action on the counts of genocide, crimes against humanity and war crimes in particular against the defendant, while at the time this criminal action was initiated the defendant was the prime minister of a foreign state, a role he still held when the contested ruling was delivered;

Whereas international custom bars acting heads of state and government -- absent contrary international provisions binding the relevant states -- from becoming the object of proceedings before criminal tribunals in foreign states;

Whereas, admittedly, Article IV of the Convention on the Prevention and Repression of the Crime of Genocide stipulates that persons who have committed acts criminalized in the Convention shall be punished irrespective of their official capacity;

That, however, Article VI of the same Convention only provides for prosecution of these persons before appropriate tribunals in the state on whose territory the act was committed or before the International Criminal Court;

That, taken together, these two clauses assert that jurisdictional immunity is excluded in the case of proceedings before tribunals enumerated in Article VI, previously cited, but that immunity is not excluded if the accused is brought before the courts of a third state claiming jurisdiction not provided for by conventional international law;

Whereas, elsewhere, Article 27.2 of the Rome Statute of the International Criminal Court stipulates that immunities which might attach to the official capacity of a person, pursuant to either domestic or international law, do not raise a jurisdictional barrier to the aforementioned court for such a person;

That this clause does not threaten the principle of customary international criminal law relating to jurisdictional immunity when the protected person is prosecuted, as in this case, before national courts of a state which asserts universal jurisdiction in absentia;

Whereas, finally, the Geneva Conventions of August 12 1949 and Additional Protocols I and II to these Conventions contain no provisions that would pose an obstacle to the jurisdictional immunity the defendant can invoke before the Belgian courts;

Whereas, without doubt, in pursuance of Article 5, § 3 of the statute of June 16 1993, relating to the suppression of grave violations of international humanitarian law, immunity attaching to a person's official status does not prevent application of the aforementioned statute;

Whereas, however, if this provision of Belgian domestic law were interpreted as setting aside the immunity principle of customary international criminal law, this provision would contravene the aforementioned principle; that the aforementioned rule cannot therefore be considered to have such a meaning, but instead must be understood as only excluding the official capacity of a person as a basis for penal non-accountability for the crimes enumerated in this statute;

Whereas the ruling holds that these proceedings are not admissible;

That, based on the grounds given by the Court -- which replace the ones the applicants contest -- the criminal action for the counts of genocide, crimes against humanity and war crimes is indeed inadmissible with regards to the defendant;

That even well founded, the bases for appeal could not justify cassation and are thus not admissible as without benefit.

FOR THESE REASONS,

THE COURT

Overturns the appealed ruling insofar as it held inadmissible the criminal action against A. Y. and others unknown;

Rejects the other motions,

Orders that mention of the present ruling be made alongside the partially overturned ruling;

Fines the defendant A. Y. half of the Court's fees for the appeal;

Fines each of the plaintiffs 1/48 of the fees mentioned above;

Remands the case, as limited, to the Court of Appeals in Brussels, Chamber of Indictment, comprised of different judges from those who previously heard the case.

[...] [paragraph on the exact sums to be paid by relevant parties]

This appeal was decided by the Second Chamber of the Court of Cassation in Brussels, by Justices Marc Lahousse, President, Francis Fischer, Jean de Codt, Frédéric Close and Paul Mathieu, judges, and pronounced in a public hearing on February 12 2003 by the President Marc Lahousse, in the presence of Jean du Jardin, General Prosecutor and Fabienne Gobert, registrar of the Court.