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Focus

**Cour de Cassation,
Section française, 2^{ème}
chambre
Case JC032C1_1
12 February 2003**

« Attendu que la coutume internationale s'oppose à ce que les chefs d'Etat et de gouvernement en exercice puissent, en l'absence de dispositions internationales contraires s'imposant aux Etat concernés, faire l'objet de poursuites devant les juridictions pénales d'un Etat étranger »

One more decision in the Belgian saga on universal jurisdiction

The decision of the Cour de Cassation of Belgium, which overturns the Brussels' court's ruling that Belgian judicial authorities are not competent to try crimes bearing no connection to the country, cleared the way for the prosecution of Amos Yaron under the 1993 law on the prosecution of individuals alleged to have committed crimes against humanity, war crimes or genocide. However, it ruled that as Israeli Prime Minister Ariel Sharon (Israeli defence minister at the time of the alleged crimes) enjoyed immunity due to his function, he could not be indicted while still holding a senior official position. Both men are alleged to have committed war crimes in Sabra and Shatilla in 1982. The legislation was passed in 1993 by the Belgian Parliament and makes it possible for the courts to try anyone, of whatever nationality, for any war crime committed anywhere.

The Prosecutor before the Court in that case argued that the principle of universal jurisdiction should be applied in the light of current international law. After analysing the tenet "*aut dedere, aut judicare*", he notes that this internationally well-established obligation is only applicable if the alleged perpetrator is present on the territory of the State that has been requested to extradite. In his view, to reason otherwise would be tantamount to accept the application of principle of universal jurisdiction *in absentia*. His arguments are mainly based on a teleological interpretation (*effet utile*) of the 1993 Belgium law. In his opinion there is no point in a trial that bears no connection with Belgium: the defendant is not a Belgium national, the defendant did not commit a crime in Belgium and the defendant is not present on Belgium territory.

The Court, however, did not use the arguments of the Prosecutor in its reasoning. It concentrated instead on the interpretation of the relevant Belgian legislation, rather than on principles of international law.

Noteworthy is the lack of reference to the principle of universal jurisdiction. The Court simply asserts that the 1993 law gives judicial authorities the ability to investigate crimes that have been committed on another State's territory and whose perpetrator is not a Belgian national. Also no mention is made to the trial *in absentia*.

It further states that Ariel Sharon cannot be prosecuted due to his current position in Israel. Drawing on international law, the Court mentions that the combination of article 4 and 6 of the Convention on Genocide provides that perpetrators be tried either before courts that have jurisdiction on the basis of the territoriality principle or before an international criminal court.

It then asserts that neither article 27.2 of the ICC Statute nor the 1949 Geneva Conventions and their Additional Protocols encroach upon the customary rule of immunity provided to heads of State. Furthermore, the Court declares that although the 1993 piece of legislation does not include a reference to the principle of immunity from jurisdiction for international crimes, to interpret it as overriding the principle of immunity would lead the Belgian courts to acting in contravention of customary international law. Despite the lack of reference to the decision of the ICJ in the *Democratic Republic of Congo v. Belgium* case handed down in February last year, it is clear that the decision of the Cour de Cassation was made in accordance with the ICJ judgement. The ICJ ruled that Belgium could not bring war crimes charges against a foreign government minister who enjoyed diplomatic immunity, a decision that was seen as putting an end to hopes of prosecuting other members of current governments while they are in power.

The ruling is, in fact, only postponing the investigations into the role of Ariel Sharon at Sabra and Chatila. In addition, it should be mentioned that this decision allows, at the same time, the reopening of many more investigations regarding complaints lodged against head of States (e.g. Hissene Habre) or foreign ministers who are not holding such positions anymore.

Responsibility

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