

JUDGEMENT OF 2 APRIL 2015

THE COURT OF APPEAL OF PARIS (COUR D'APPEL DE PARIS)  
UNIT 7  
INVESTIGATION CHAMBER TWO

ORDER DENYING MOTION TO GRANT INVESTIGATION MEASURES

JUDGEMENT  
(No. 2, 7 pages)

Pronounced in chambers on 2 April 2015

Proceedings brought against persons unknown on charges of arbitrary infringement of personal liberty by a public official causing a person to be detained for over 7 days, wilful failure to end unlawful deprivation of liberty by a public official, arrest, detention and false imprisonment of a person without an order from the established authorities and outside of the framework provided for by law.

**PLAINTIFFS**

**Hafsa ABDERRAHMANI, Chelali BENCHELLALI, Mourad BENCHELLALI, Khedidja SASSI, wife of Mr MAKHLOUF, Nizar SASSI, Sassi SASSI**

Who choose their lawyer's office as their address for service,

having as their lawyer:

Mr BOURDON, 156 Rue de Rivoli - 75001 PARIS

**Khaled BEN MUSTAPHA**

Who chooses his lawyer's office as his address for service,

having as his lawyer:

Mr MEILHAC, 14 rue de Milan - 75009 PARIS

**COMPOSITION OF THE COURT**

**During the proceedings, deliberation and announcement of the judgement:**

Mrs LUGA, Chief Judge

Mrs MERY-DUJARDIN, Judge

Mrs DUTARTRE, Judge

**All three appointed according to the provisions of article 191 of the French Code of Criminal Procedure (*Code de procédure pénale*).**

**REGISTRAR:** during proceedings and the announcement of the judgement: Ms LAMBERT

**PUBLIC PROSECUTOR:** during proceedings: Mrs GULPHE-BERBAIN, Public Prosecutor, and during the announcement of the judgement, Mrs FRYDMAN, Public Prosecutor

## **PROCEEDINGS**

At a hearing in camera on **5 March 2015**, the following persons were heard:

Mrs LUGA, Chief Judge, who presented her report;  
Mrs GULPHE-BERBAIN, Public Prosecutor, who presented her submissions;  
Mr BOURDON, plaintiffs' lawyer, who presented his summary submissions and was heard last;  
Mr MELHAC, lawyer of plaintiff Khaled BEN MUSTAPHA, was duly notified by the court of the date of the hearing but did not appear.

## **BACKGROUND OF PROCEEDINGS**

In an order dated 1 April 2014, the investigating judge of the PARIS district court (*Tribunal de Grande Instance de Paris*) rejected the motion filed by Mr BOURDON, the plaintiffs' lawyer.

On the same day, and in compliance with article 183, paragraphs 2, 3, and 4 of the French Code of Criminal Procedure, said order was sent to the plaintiffs and their lawyers by registered mail.

On 9 April 2014, Mr William BOURDON, lawyer for plaintiff Nisar SASSI, person who is under judicial investigation, filed an appeal against the said order with the Registry of the Paris District Court.

On 9 April 2014, Mr William BOURDON, lawyer of the plaintiff Mourad BENCHELLALI, and currently under judicial investigation, filed an appeal against the said order with the Registry of the Paris District Court.

In compliance with the provisions of article 186-1 of the French Code of Criminal Procedure, the chief judge of the Investigation Chamber ruled in an order dated 10 November 2014 that the appeal would be referred to the said chamber and ordered the case file to be sent to the Public Prosecutor.

The court informed the plaintiffs and their lawyers by registered mail that their case would be heard at a hearing on 6 January 2015.

The same day, the file containing the Public Prosecutor's written submissions dated 26 November 2014 was filed with the Registry for the Investigation Chamber and was made available to the parties' lawyers.

On 4 March 2015, Mr BOURDON, lawyer of the plaintiffs, filed his pleadings with the Registry for the Investigation Chamber, which were recorded by the Registrar, sent to the Public Prosecutor's office and added to the case file.

## **DECISION**

Taken after deliberation in accordance with article 200 of the French Code of Criminal Procedure.

## **ADMISSIBILITY**

The appeals were lodged in due form and within the timeframe specified in article 186 of the French Code of Criminal Procedure; they are therefore admissible.

To ensure the proper administration of justice, it is appropriate to join the appeals.

## **MERITS**

**On 14 November 2002**, the parents of Nizar Sassi and Mourad Benchellali filed a criminal complaint and claim for civil damages in connection with the arrest, abduction, detention, and false

imprisonment without a corresponding order from the authorities and outside of the framework provided for by law, arbitrary detention and failure to end the arbitrary detention allegedly imposed on the persons in question on account of the conditions of their arrest, during operations in Afghanistan following the attacks of 11 September 2001 on US territory, and their subsequent transfer to and ultimate detention at the American military base in Guantanamo Bay.

**In an order dated 14 February 2003**, the investigating judge at the Lyon District Court (*Tribunal de grande instance de Lyon*) issued a decision not to pursue the matter, on the ground that the charges brought forth cannot legally be pursued in a court of law for reasons relating to the very nature of public prosecution. (D 16).

**In a judgement dated 20 May 2003**, the Investigation Chamber of the Lyon District Court upheld the ruling on the following grounds:

- Legally, the charges brought [on these grounds] cannot give rise to prosecution or be considered as a criminal offense, as they fall within the scope of “United Nations Security Council resolutions 1368 and 1373 adopted unanimously on 12 September 2001 and 28 September 2001, respectively; and article 51 of the Charter of the United Nations”, which “prevail over article 432 of the French Criminal Code, which does not apply to this case”;
- No international convention assigns jurisdiction to the French courts to hear the matters in question, which “cannot be governed by French law alone, as the alleged grievances are moreover not covered by any international covenant or agreement or governed by French law;
- It is outside the jurisdiction of the French courts to hear proceedings related to the “military order” signed by the President of the United States on 13 November 2001.

**In an order dated 4 January 2005**, the French Court of Cassation (*Cour de Cassation*) ruled that it would be appropriate to analyse whether the arrest and conditions of the detention of Nizar Sassi and Mourad Benchellali, in particular in the light of the Third Geneva Convention of 12 August 1949 and the International Covenant on Civil and Political Rights of 19 December 1966, were covered by the provisions of article 224-1 of the French Criminal Code, and if so, given the French nationality of the persons concerned, whether they were subject to the jurisdiction of French law and the French courts, pursuant to article 113-7 of the French Criminal Code and article 689 of the French Code of Criminal Procedure.

**In a judgement dated 1 June 2005**, following this decision by the Court of Cassation, the Investigation Chamber at the Paris District Court designated an investigating judge to lead these proceedings.

**On 16 March 2009**, Khaled Ben Mustapha filed a criminal complaint and claim for civil damages for abduction, false imprisonment, acts of torture and barbarity, and arbitrary infringement of personal liberty—acts which were also allegedly committed during his arrest in Afghanistan and subsequent transfer to and detention at the military base at Guantanamo Bay.

This complaint was joined to the initial proceedings by an order dated 16 December 2011.

**On 6 October 2009**, the principal Public Prosecutor for Paris requested the investigating judge to extend the investigation with respect to acts allegedly committed against Nizar SASSI and Mourad BENCHELLALI, including torture and acts of barbarity concomitant with their arrest, abduction, detention, false imprisonment without an order from the established authorities and outside of the framework provided for by law, whereby the acts were committed by a group of persons with premeditation and with the use of or under the threat of a weapon.

**On 2 January 2012**, the investigating judge sent a letter rogatory to the United States with the following requests:

“... it is our honour to formally request the competent authorities of the Federal Republic of the United States of America to authorise our presence on their territory. Furthermore, we request

authorisation for the presence and collaboration of officials from the French police unit OCRVP (*Office Central pour la Répression des Violences faites aux Personnes*), attached to the French national judicial police (*Direction Centrale de la Police Judiciaire*), itself attached to the Ministry of the Interior. These officials carry a second original copy of the letter rogatory. We kindly request that the competent US authorities conduct, in our presence, any investigations necessary to uncover the truth, including hearings, police searches, requisitions, and seizures, so that we may consult and make a copy of any documents held by the American authorities concerning Mourad BENCHELLALI, Nizar SASSI and Khaled BEN MUSTAPHA. This includes, in particular, documents concerning their arrest, transfer and detention at a military camp in Kandahar and their subsequent transfer and detention at the American base at Guantanamo Bay.

- to provide us with any documents concerning the grounds and methods relating to the armed operations carried out in Afghanistan and Pakistan and the treatment of persons arrested during such operations;
- to provide us with any documents concerning any judicial proceedings directly or indirectly concerning Mourad BENCHELLALI, Nizar SASSI, and Khaled BEN MUSTAPHA;
- to identify and question any persons who had contact with Mourad BENCHELLALI, Nizar SASSI and Khaled BEN MUSTAPHA during their detention in Afghanistan and later at the American base at Guantanamo Bay;
- to allow us to make any material ascertainments at the American base in Guantanamo Bay, in particular at the places where Mourad BENCHELLALI, Nizar SASSI and Khaled BEN MUSTAPHA were detained...”

In spite of several reminders, including through the liaison judge in Washington, the letter rogatory has yet to be executed.

**On 26 February 2014**, given the apparent refusal of the United States to execute the letter rogatory issued by the liaison judge, Mourad BENCHELLALI’s lawyer requested the investigating judge to question, in his presence, General Geoffrey Daniel Miller, former commander of the base at Guantanamo.

He moreover requested to be present during this questioning.

His request was denied in an order dated 1 April 2014, which is the subject of the appeal in this proceeding:

*“The Court of Cassation has issued a line of decisions upholding the principle whereby the international custom of not prosecuting states before domestic courts also covers the bodies and entities that act as an emanation of the state, as well as their agents with respect to acts related to the sovereignty of the state in question.*

*However, Commander MD MILLER is an agent of the United States, acting within the framework of action linked to the security of the United States. Commander MILLER therefore can only be heard as a witness.*

*On 2 January 2012, Ms Sophie CLEMENT, the investigating judge in charge of the case, sent the American authorities a letter rogatory. This letter rogatory requested permission for the investigating French judge to work with the American judicial authorities to, among other things, identify and question any persons who had had contact with the plaintiffs during their detention at the American base at Guantanamo, which was the case of MD MILLER as the commander of the base.*

*As matters stand, it appears from both the Justice Ministry and the French liaison judge to the United States that the letter rogatory will not be executed and that no response will be received. It also appears that a request to question an American official residing in US territory can only be granted by means of a request for international judicial assistance and, therefore, such a request was bound to fail and could only needlessly delay the closing of a case opened in 2005.”*

In a letter to the court dated 15 April 2014, the plaintiffs’ lawyer summed up his arguments as follows:

- “The charges brought before the Court are extremely serious;

PAGE 4

(signature)

- The French proceedings are the only proceedings in Europe concerning these charges;
- The letter rogatory sent to the United States will not be executed;
- The legal grounds for the request to question Commander MILLER in the framework of the letter rogatory fundamentally differ from the grounds for a request made by an investigating judge to help uncover the truth;
- The legal opinion written by renowned legal experts such as Professor GALLACHER constitutes a new element, which should have been taken into account by the investigating judge, as the Commander “can and must be considered responsible for the camp at Guantanamo... and for the conditions in which the camp was managed”.

**In an order dated 10 November 2014**, the Chief Judge of the Investigation Chamber considered it appropriate to consult the bench, on the following grounds:

*“Considering the arguments presented by the plaintiffs’ lawyers in support of their appeals, and the specific nature and context of the charges, the appeal in question warrants consideration by the Investigation Chamber.”*

**On 10 April 2014**, the investigating judge cited the provisions of article 175 of the French Code of Criminal Procedure and forwarded the case file to the Public Prosecutor’s office for further preparation.

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The Public Prosecutor requests that the order in question be upheld.

In his pleadings duly filed with the registry of the Chamber at 4:18 p.m. on 4 March 2015, the plaintiffs’ lawyer requests the Court to set aside the order and order further investigations for the purpose, in particular, of having the investigating judge question General MULLER in the presence of the plaintiffs’ lawyers.

Essentially, it is argued that:

- General MULLER’s responsibility for running the detention camp at Guantanamo and for the torture inflicted upon detainees has been established by studies, other evidence and witness accounts collected by American human rights associations and organisations, the CCR and the ECCHR (study by lawyer Katherine GALLAGHER and legal advisor Andreas SCHUELLER, as well as the findings of the declassified Report of the United States Senate Committee on Armed Services published on 20 November 2008) ;
- General MULLER cannot invoke immunity. He is “a public military official. As such, under well-established principles of both French and international law, he is unconditionally subject to the rules of ordinary law without reserve or restriction”;
- The questioning is necessary considering the United States’ refusal to execute the letter rogatory issued by the French judicial authorities, without “caring to respond”. This silence towards France “could be interpreted as a form of disregard by the United States for their international obligations of judicial assistance and cooperation with France” (page 11 of the pleadings);
- The foremost international institutions have widely commented on and condemned the alleged violations in question.

The plaintiffs’ lawyer intends to send the investigating judge a list of questions to ask General MULLER. He argues that, should the general fail to respond to the judge’s subpoena, then the judge should, “in the light of the most recent evidence produced and the evidence to which access is likely to be granted...” (the lawyer is referring to documents declassified by the American government that acknowledge that there were no charges against any of the plaintiffs), impose all necessary judicial consequences.

17 documents are appended to the pleadings.

**WHEREFOR, THE COURT:**

The motion duly filed by the plaintiffs' lawyer pertains to a request to question, in his presence and in the investigating judge's chambers, General Geoffrey Daniel MILLER, Commander of the base at Guantanamo, where the plaintiffs SASSI, BENCHELLALI and BEN MUSTAPHA were detained.

In denying this motion, the investigating judge argued that:

- A letter rogatory issued on 2 January 2012, which has not been executed, is not expected to be executed, based on information received from official channels;
- A request to question an American official residing in the United States can only be granted through a request for international assistance, and such a request is bound to fail;
- Commander MILLER is a United States official "acting within the framework of action relating to the security of the United States" and "Commander MILLER therefore can only be heard as a witness".

This last argument was based on a judgement issued by the Court of Cassation's Criminal Chamber on 23 November 2004;

- **1) Questioning was to take place within the framework of the letter rogatory, which cannot be executed:**

It does indeed appear that the United States do not intend to satisfy the request issued three years ago. This is clear from communications between the judge and the liaison judge in the U.S., as well as with the French Justice Ministry's international judicial assistance service. This situation must be acknowledged, as this implied refusal appears to conflict with the principle of international co-operation that exists and applies between the two countries.

- **2) The request for questioning can only be granted by means of international judicial assistance, and is therefore bound to fail:**

There is no reason, and in any case no legal reason, why the investigating judge could not subpoena General MULLER, whose contact information is contained in the case file. The outcome of such a measure must not be speculated, as the violations in question, which have been commented on and condemned at the international level, are serious enough for the French courts to admit a criminal complaint and claim for civil damages duly brought before them.

- **3) The requested questioning concerns a United States officer, acting within the framework of U.S. security interests, who can only be heard as a witness:**

First off, the case law cited by the investigating judge must be placed in its context. Since the decision of 23 November 2004, the judgement of 4 January 2005 issued in the case at hand, as described in the statement of facts, paved the way for judicial proceedings of this kind to be initiated in France and introduced the principle of legitimacy of investigations by the French judicial authorities, in accordance with the provisions of article 224-1 of the French Criminal Code in the case at hand, with respect to the Third Geneva Convention and the International Covenant on Civil and Political Rights of 19 December 1966.

It should be noted that whilst the judgement of 23 November 2004 effectively established that states' immunity from legal process before the criminal courts of a foreign country "extends to the bodies and entities that act as an emanation of the state as well as to their officials", the decision also specifies that this applies "with respect to acts... related to the sovereignty of the state in question".

Accordingly, a distinction must be drawn based on the nature of an act or activity, and not the capacity of the person committing the act, between acts of state (*actes d'autorité*) and acts by right of management (*actes de gestion*). This would thus require determining whether an act's nature or its purpose is to be considered. In any case, this must be determined in the light of international public policy, as there is no UN resolution prohibiting the effective examination of the conditions under which people are arrested and detained that conflicts with international legislation on the protection of human rights, such as the International Covenant on Civil and Political Rights and the Geneva Conventions.

Therefore, considering that, in principle, there is nothing standing in the way, it is appropriate to determine that the person whose questioning is requested must be placed in a position such that he can provide any explanations concerning the nature of the acts in question and his role in those acts, in the light of the information contained in the complaint, it being noted that the person in question retired on 31 July 2006 and his address is known;

In view of the foregoing, the Court considers that the order of the lower court must be set aside, and the motion to allow questioning of Mr Geoffrey D. MULLER, in the capacity to be determined by the investigating judge, and in the presence of the plaintiffs' lawyer if appropriate, must be granted.

**FOR THESE REASONS**

**THE COURT,**

Considering articles 81, 82-1, 167,183, 185, 186, 186-1, and 194 *et seq.* of the French Code of Criminal Procedure,

**ADMISSIBILITY**

**DECLARES THE APPEALS ADMISSIBLE**

**ORDERS THEM TO BE JOINED**

**MERITS**

**DECLARES THEM MERITORIOUS**

**SETS ASIDE THE ORDER OF THE LOWER COURT**

**HOLDS that the request for questioning must be granted**

**RETURNS the case file to the investigating judge**

**ORDERS the judgement to be executed at the request of the Public Prosecutor**

**THE REGISTRAR**

**THE CHIEF JUDGE**

**(Signature)**

**(Signature)**

**(Stamp of the Paris Court of Appeal,  
second signature by the Registrar)**