

Ruling n°668 B+R

***Cour de cassation* (Court of cassation)**

Plenary assembly

Public hearing of May 12, 2023

Mr. Soulard, First President

Appeal n°Y 22-80.057

French Republic

In the name of the French people

**Ruling of the *Cour de cassation* (Court of cassation), in its plenary assembly,
on May 12, 2023**

The association “[1]”, a civil party, filed a third-party proceedings against the ruling of the *Cour de cassation* (Court of cassation), Criminal Chamber, dated November 24, 2021, which quashed and set aside, in all its provisions, the ruling of the Investigating Chamber of the *Cour d’appel* de (Court of appeal of) Paris dated February 18, 2021, which, in the investigation against Mr. [S] [R], on charges of torture, crimes against humanity and complicity in such crimes, ruled on his request for annulment of elements of the proceedings.

By order of September 9, 2022, the First President of the *Cour de cassation* (Court of cassation) ordered the examination of the third-party proceedings to be referred to the plenary assembly of the Court.

The [1] invoked a plea in third-party proceedings before the plenary assembly.

This plea was produced in a written submission filed with the Registrar of the *Cour de cassation* (Court of cassation) by SCP Piwnica et Molinié, counsel for the [1].

A brief in defense was filed with the Registrar’s office of the *Cour de cassation* (Court of cassation) by SPC Thouvenin, Coudray et Grévy, counsel for Mr. [S] [R].

Observations were filed with the Registrar's office of the *Cour de cassation* (Court of cassation) by SCP Piwnica et Molinié, counsel for the [2] ([2]), repeating, for the benefit of the latter, the plea proposed by the [1].

The written report of Ms. Leprieur, Judge, and the written opinion of Mr. Molins, Prosecutor-General, were made available to the parties.

On the report of Ms. Leprieur, Judge, assisted by Mr. Dimitri Dureux, Judge-auditor in the court’s department of documentation, studies and report, the observations of SCP Piwnica et Molinié, SCP Thouvenin, Coudray et Grévy, and the opinion of Mr. Molins, Prosecutor-General, to which, among the

parties invited to reply, SCP Thouvenin, Coudray et Grévy replied, after the debates at the public hearing of March 17, 2023, at which Mr. Soulard, First President, Messrs. Chauvin, Sommer, Ms. Teiller, Messrs. Bonnal, Vigneau, Presidents, Ms. Martinel, Elder-Judge of chamber acting as President, Ms. Leprieur, Reporting-Judge, Mr. Huglo, Ms. de la Lance, Ms. Darbois, Elder-Judges, Ms. Auroy, Ms. Leroy-Gissinger, Mr. Delbano, Judges acting as Elder-Judges of chambers, Ms. Cavois, Mr. Martin, Ms. Agostini, Ms. Grandjean, Mr. Bedouet, Judges, Mr. Molins, Prosecutor-General, and Ms. Mégnien, Court Registrar,

the *Cour de cassation* (Court of cassation), in its plenary assembly, composed of the First President, the Presidents, the Elder Judges of the chambers and the aforementioned Judges, after having deliberated in accordance with the law, has delivered the present ruling.

Facts and procedure

1. It follows from the ruling under appeal and the documents in the proceedings that :
2. On December 18, 2017, the *Office français de protection des réfugiés et des apatrides* (French Office for the Protection of Refugees and Stateless Persons) informed the specialized unit of the Paris Public Prosecutor's Office of its decision to exclude Mr. [S] [R], a Syrian national, from international protection on the grounds that there were plausible reasons to suspect that he had committed acts contrary to the purposes and principles of the United Nations under article 1, F, c) of the Geneva Convention of July 28, 1951, relating to the Status of Refugees.
3. He was accused of participating in the repression of demonstrations of the opposition to the Syrian regime, as well as the arrest of civilians during these events and during control operations on roadblocks, acts committed from 2011 to 2013, while he had been mobilized as a reservist of the Syrian army and assigned to the Directorate of General Intelligence.
4. A preliminary investigation was initiated.
5. On February 15, 2019, the prosecutor at the *Tribunal de Grande Instance de Paris* (Paris Tribunal of First Instance) opened an investigation against Mr. [R] on charges of torture, crimes against humanity and complicity in these crimes.
6. On the same day, Mr. [R] was charged with complicity in crimes against humanity, committed in Syria between March 2011 and the end of August 2013.
7. The [1] (“the Federation”) and the [2] ([2]) filed a civil suit.
8. On August 12, 2019, Mr. [R]'s lawyer filed a petition for the annulment of the official statement of arrest, police custody and subsequent acts, including the charge, on the grounds that the French prosecuting and trial authorities lacked jurisdiction. He also argued that there was no serious or corroborating evidence.

9. By a ruling dated February 18, 2021, the Investigating Chamber of the *Cour d'appel de* (Court of appeal of) Paris ruled that the French courts had jurisdiction, rejected the application for annulment, found that the proceedings were in order up to section number D.546 of the file and returned the file to the investigating judge for further investigation.
10. By a ruling of November 24, 2021 (Crim, November 24, 2021, appeal no. 21-81.344, published in the Bulletin), the Criminal Chamber of the *Cour de cassation* (Court of cassation) quashed and annulled, in all its provisions, the decision of the Investigating Chamber of February 18, 2021, declared that the French courts did not have jurisdiction to hear the case against the claimant, and, in order to rule again on the consequences of this lack of jurisdiction on the regularity of the proceedings, referred the case and the parties to the Investigating Chamber of the *Cour d'appel de* (Court of appeal of) Paris, composed differently.

Reviewing admissibility of the third-party proceedings

11. It follows from an examination of the proceedings before the *Cour de cassation* (Court of cassation) that Mr. [R] did not notify the Federation, a civil party, of the appeal he lodged against the ruling of the Investigating Chamber of the *Cour d'appel de* (Court of appeal of) Paris, dated February 18, 2021, as required by the provisions of article 578 of the Code of criminal procedure.
12. Nor was a copy of the brief produced in support of the appeal sent to the civil party, the interested party in the appeal, in disregard of the provisions of article 589 of the same code.
13. Consequently, the third-party proceedings, filed under the conditions provided for in Articles 579 and 589 of the Code of criminal procedure, is admissible.
14. In addition, the Federation has provided evidence that would lead the Plenary Assembly to re-examine Mr. [R]'s appeal.

Reviewing pleas

On the second part of the first plea

15. It is not such as to allow the appeal to be admitted within the meaning of article 567-1-1 of the Code of criminal procedure.

On the first and third parts of the first plea

Statement of plea

16. The plea criticizes the ruling of the Investigating Chamber of February 18, 2021, insofar as it decided that the French courts had jurisdiction to hear the charges of complicity in crimes against humanity against Mr. [R], that there was no reason to annul any act or document of the proceedings and noted the regularity of the remainder up to section number D.546 of the file, whereas :

“ 1°/ that the jurisdiction of French courts to hear cases constituting crimes against humanity committed abroad requires either that the State where the acts were committed or of which the defendant is a national be a party to the Rome Statute, or that the acts for which the defendant is being prosecuted be incriminated in the State in which they were perpetrated; that in the present case, in order to retain that the condition of double criminality was fulfilled, the ruling under appeal considered that while crimes against humanity were not expressly referred to as such in the Syrian penal code, the latter criminalized murder, acts of barbarism, rape, violence and torture, while the Syrian Constitution prohibited torture and incriminated violations of public freedoms, Syria being a party to numerous treaties, including the Geneva Conventions, adding that these crimes were constitutive elements of crimes against humanity; that by ruling thus while noting that the crimes against humanity were not expressly referred to as such in the Syrian penal code, and without noting that Syria would have been a party to the Rome Statute, the Investigating Chamber did not legally justify its decision with regard to articles 689 and 689-11 of the Code of criminal procedure;

3°/ that by merely retaining that, since it only has jurisdiction over acts committed on the territory of States parties to the Rome Statute, which was not the case of Syria, the International Criminal Court could not decline a jurisdiction that it did not have, when it was up incumbent on the Investigating Chamber to verify that the Public Prosecutor's Office had carried out the steps required of it by the provisions of article 689-11 of the Code of criminal procedure, the Investigating Chamber deprived itself of a legal basis for its decision with regard to article 689-11 of the Code of criminal procedure.”

Court's Response

On the first part of the plea,

17. The plea raises the question of the interpretation of the condition of double criminality, set out in article 689-11 of the Code of criminal procedure.
18. Under the terms of this text, in its version resulting from law n°2010-930 of August 9, 2010, in force from August 11, 2010 to March 25, 2019, can be prosecuted and judged by the French courts any person who usually resides on the territory of the French Republic and who was guilty abroad of one of the crimes falling under the jurisdiction of the International Criminal Court in application of the convention relating to the statute of the International Criminal Court signed in Rome on July 18, 1998, if the acts are punishable by the legislation of the State where they were committed or if this State or the State of which he/she is a national is a party to the aforementioned convention.
19. This article requires that acts prosecuted in France as crimes against humanity or war crimes and offenses be punished by the legislation of the State where they were committed.
20. However, these offences have a contextual constitutive element. Crimes against humanity, other than genocide, defined by articles 212-1 to 212-3 of the Criminal code, are necessarily committed in execution of a concerted plan against a group of civilian population in the context of a generalized or systematic attack. War crimes and offenses, defined in articles 461-1 to 461-31 of the same code, must have been committed during an armed conflict and in relation to this conflict, in violation of the laws and customs of war or international conventions applicable to armed conflicts.

21. Article 689-11, mentioned above, can therefore be given two different interpretations.
22. According to the first interpretation, it must be considered that the existence of a contextual element is an integral part of the acts prosecuted, since, in the absence of this element, they cannot be qualified as "crimes against humanity" or "war crimes and offenses". It can be deduced from this that legislation that does not take into account this contextual element and limits itself to repressing the underlying facts, taken individually, does not criminalize the acts prosecuted considered as a whole, but only a part of them. It is this whole that justifies the extraterritorial jurisdiction of the French courts, which does not exist for the underlying acts alone. Thus, the condition of double criminality is only fulfilled if, in the State where the acts were committed, the legislation takes into account the fact that they were committed in execution of a concerted plan or during an armed conflict and in relation to the conflict. This interpretation was retained by the ruling of the Criminal Chamber that was the subject of the third-party proceedings.
23. The second interpretation is based on the fact that article 689-11 of the Code of criminal procedure merely requires that the acts be punished in the State where they were committed, without taking into account the qualification under which they could be prosecuted. It is inferred that it is sufficient that the underlying acts be punishable by the legislation of the State where they were committed.
24. Since the simple wording of the text does not make it possible to give it a certain meaning, it is appropriate to seek the legislator's intention. This is decisive in the implementation of the universal jurisdiction of French courts, which is a matter of State sovereignty in criminal matters.
25. However, it results from the parliamentary debates that preceded the adoption of the law of August 9, 2010, which created article 689-11 of the Code of criminal procedure, that the condition of double criminality, as stated in the aforementioned article, does not require an identity of qualification and incrimination.
26. Thus, the rapporteur of the Law Commission of the National Assembly indicated, in this regard, during the 1st session of July 13, 2010: "This condition is only the translation of the principle of legality of penalties. It aims to give legal legitimacy to the intervention of the French courts. It does not imply, however, that the acts must be incriminated in the same way in both States. The acts must indeed be punished in the other country even if they are qualified differently or if different penalties are applied. [...] No country in the world allows murder or acts of barbarism to go unpunished in its criminal legislation. It cannot therefore be argued that maintaining the condition of double criminality would leave the perpetrators of genocide, for example, unpunished.
27. The Secretary of State to the Minister of Justice and Freedoms added: "This criterion of double criminality [...] does not prevent the prosecution of serious offences. Moreover, contrary to what is explained in the summary of these amendments, neither the qualifications nor the penalties incurred are identical. No serious act, whether genocide, murder or rape, will escape the jurisdiction of the French courts because of this requirement of dual criminality."

28. In the same vein, in its observations on the appeals against the law adapting criminal law to the establishment of the International Criminal Court, presented to the *Conseil Constitutionnel* (Constitutional Council), the Government stated: "... this condition of dual criminality will never in fact constitute an obstacle to the prosecution and trial of the most serious crimes. It is not necessary, for the application of the article, that the denominations of the crimes be identical (in particular that genocide be criminalized as such): it is sufficient that the acts be criminally sanctioned; and all the States of the world criminalize assassination and murder.
29. Moreover, the terms of article 689-11 of the Code of criminal procedure are identical to those of article 696-3 of the same code, which in matters of extradition requires that the "fact" be "punishable under French law" by a penalty.
30. However, in this matter, the Criminal Chamber has stated that it is up to the French courts to determine whether the acts referred to in the extradition request are punishable under French law or by a criminal or corrective sentence, regardless of the qualification given by the requesting State (Crim., March 21, 2017, appeal n°16-87.122, Bull. crim 2017, n°75). The condition of double criminality of acts qualified as crimes against humanity by the requesting foreign State may be met in national legislation through common law offenses, in particular the crime of murder (Crim., July 12, 2016, appeal n°16-82.664), or aggravated arbitrary sequestration (Crim., May 24, 2018, appeal n°17-86.340, Bull. crim. 2018, n°102).
31. It does not seem justified to interpret differently the terms of article 689-11 of the Code of criminal procedure, relating to a case of universal jurisdiction, and those of article 696-3 of the same code, relating to extradition.
32. Indeed, the mechanism of universal jurisdiction constitutes an alternative to the mechanism of criminal cooperation that is extradition and is applied in the case where the foreign State is failing in its obligation to prosecute international crimes.
33. It should therefore be noted that the condition of dual criminality, required for the prosecution of crimes against humanity and war crimes and offenses, does not imply that the criminal characterization of the acts is identical in both legislations, but merely requires that they be criminalized by both.
34. The condition of criminalization by foreign law can be fulfilled through a common law offence constituting the basis of the crime prosecuted, such as murder, rape or torture.
35. Such an interpretation does not deprive the condition of double criminality of all significance.
36. For example, with regard to crimes against humanity, the offence provided for in article 212-1 of the Criminal code, consisting of the persecution of any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious or gender grounds or on the basis of other criteria universally recognized as inadmissible under international law, does not necessarily have an equivalent in certain foreign laws.

37. Similarly, certain war crimes and offences, such as ordering that there be no survivors or threatening the adversary with this, provided for in article 461-8 of the same code, are not systematically criminalized, even in substance.
38. In the present case, in order to dismiss the plea of nullity based on the incompetence of the French courts to hear the crimes against humanity alleged against Mr. [R] on the basis of article 689-11 of the Code of criminal procedure, the ruling under appeal, with regard to the condition of double criminality, after noting that Syria is not a party to the Convention on the Statute of the International Criminal Court, states that the Syrian Constitution of 2012 prohibits torture, and that, under this text, any violation of personal liberty or protection of personal life or any other rights or public freedoms guaranteed by the Constitution is considered a crime that is punishable by the law.
39. The judges note that, while crimes against humanity are not expressly referred to as such in the Syrian penal code, it does criminalize murder, acts of barbarism, rape, violence and torture.
40. The Investigating Chamber deduced that Syrian law, even if it does not criminalize in an autonomous matter crimes against humanity, it punishes the acts that gave rise to the prosecution in the case before it.
41. In so ruling, the Investigating Chamber correctly applied the texts referred to in the plea.
42. The plea must therefore be rejected.
43. The third-party proceedings is therefore well-founded, so that the ruling of the Criminal Chamber should be declared null and void.

On the third part of the plea

44. According to article 689-11, second paragraph, of the Code of criminal procedure, in the version resulting from the law of August 9, 2010, in force from August 11, 2010 to March 25, 2019, the prosecution of the crime of genocide, other crimes against humanity and war crimes and offenses can only be carried out at the request of the Public Prosecutor's Office if no international or national court requests the surrender or extradition of the person. To this end, the Public Prosecutor's Office shall ascertain from the International Criminal Court that it has expressly declined jurisdiction and shall verify that no other international court competent to try the person has requested his surrender and that no State has requested his extradition.
45. In order to dismiss the plea of nullity based on the lack of jurisdiction of the French courts to hear the crimes of which Mr. [R] is accused on the basis of article 689-11 mentioned above, the ruling under appeal, with regard to the condition that the International Criminal Court decline jurisdiction, states that this court cannot decline jurisdiction that it does not have.
46. In so determining, the Investigating Chamber justified its decision.

47. Indeed, it follows from article 12 of the Rome Statute that the International Criminal Court may exercise its jurisdiction if the State on whose territory the conduct in question took place, or the State of which the person accused of the crime is a national, is a party to the Statute.

48. As Syria is not a State Party, it cannot be required that the prosecution ascertain from the International Criminal Court that it expressly declines jurisdiction, which it clearly does not have.

49. The plea is therefore unfounded.

On the second plea

50. The plea criticizes the decision of the Investigating Chamber of February 18, 2021, insofar as it decided that there was no need to annul an act or document of the proceedings and noted the regularity of the proceedings for the remainder up to section number D.546 of the file, whereas "under penalty of nullity, the investigating judge may only examine persons against whom there is serious or corroborating evidence making it likely that they may have participated, as perpetrator or accomplice, in the commission of the offences referred to him; that by finding against the exhibitor the existence of serious and corroborating evidence "that he may have participated as an accomplice in the crime in question" without characterizing any positive act against him that would constitute serious or corroborating evidence of having committed crimes against humanity as an accomplice, the Investigating Chamber did not provide its decision with any legal basis under article 80-1 of the Code of criminal procedure."

Court's Response

51. In rejecting the request that the charges be declared null and void, on the grounds that there was no positive act attributable to Mr. [R], the ruling noted that the intelligence services of the Syrian security apparatus were particularly active from the beginning of the demonstrations and that the activities of the General Intelligence Directorate were focused on combatting the demonstrations and arresting alleged opponents of the regime.

52. The judges added that Mr. [R] was successively assigned to two of the sections of the General Intelligence Directorate, which were identified as being the ones from which many of the photographs of the bodies of tortured persons contained in the so-called "Cesar" report originated.

53. The judges noted that, according to a Syrian report, carrying out one's military service in a security service was generally considered to be one of the best assignments and that Mr. [R], who had stood out on several selections, had necessarily given proof of loyalty to the regime. They conclude that this evidence contradicts his allegations that he was assigned to these sections for no particular reason and that his role was limited to performing static guards at roadblocks in high-security neighborhoods.

54. They also state that the personnel of the sections in question worked in coordination to carry out patrols and that the reservists, selected for their loyalty, were systematically armed.

55. They note that two witnesses believed they recognized [R] in a photograph, one believing he had seen him as a guard in a detention center, the other as an officer or supervisor. Another witness said he heard him say that his job was to arrest demonstrators and hit them with a baton.

56. In light of these statements, based on its sovereign assessment of the facts, from which it deduced that there was serious or corroborating evidence making it likely that Mr. [R] was an accomplice to the crime in question, the Investigating Chamber justified its decision.

57. The plea must therefore be dismissed.

58. Furthermore, the ruling is in order.

On these grounds, the Court:

Declares that the [1] association's third-party proceedings is admissible;

The Court, on the merits, accepts the third-party proceedings;

Declares null and void the decision rendered by the Criminal Chamber of the *Cour de cassation* (Court of cassation) on November 24, 2021, which quashed and annulled, in all its provisions, the decision of the Investigating Chamber of the Paris Court of Appeal of February 18, 2021;

Dismisses the appeal;

Thus decided by the *Cour de cassation* (Court of cassation), in plenary assembly and pronounced by the First President in its public hearing on May 12, 2023.

The First President

The Reporting Judge

The Court Registrar