France, Legislative Developments on Universal Jurisdiction

Introductory Text

In 2019 and 2020 French courts had to judge foreign individuals indicted for crimes against humanity, on the one hand, and for complicity in enforced disappearances, war crimes, torture and complicity in these crimes, on the other. A succession of rulings in these two cases called into question the conditions for the exercising of universal jurisdiction for international crimes in France, and the four "legislative locks" that impeded its use. The Court of Cassation's [Cour de cassation] rulings of May 12, 2023 marked a significant development in this area and led to a major legislative reform of the universal jurisdiction of French courts.

Acknowledgments

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Sources

A. FRENCH CODE OF CRIMINAL PROCEDURE, APPLICABLE UNTIL THE LEGAL REFORM OF NOVEMBER 20, 2023

[Source: French code of criminal procedure, available at : https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006071154/, unofficial translation]

[...]

Book IV. On some special procedures

[...]

Title IX. Offenses committed outside the territory of the Republic

Chapter 1. Jurisdiction of French courts

[...]

Article 689-11

Version in force from January 01, 2020 to November 22, 2023

Modified by Law n°2019-222 of March 23, 2019 - art. 63 (V)

With the exception of the cases provided for in Subtitle I of Title I of Book IV for the application of the Convention on the Statute of the International Criminal Court, opened for signature in Rome on 18 July 1998, any person suspected of having committed one of the following offenses abroad may be prosecuted and tried by the French courts, if he or she is ordinarily resident in the territory of the Republic:

1° The crime of genocide as defined in Chapter I of Subtitle I of Title I of Book II of the French Criminal Code;

2° The other crimes against humanity defined in Chapter II of the same subtitle I, if the acts are punishable under the legislation of the State where they were committed, or if this State or the State of which the suspected person is a national is a party to the aforementioned convention;

3° War crimes and offenses defined in articles 461-1 to 461-31 of the same code, if the acts are punishable under the law of the State where they were committed, or if that State or the State of which the suspected person is a national is a party to the aforementioned convention.

These crimes can only be prosecuted at the request of the anti-terrorist public prosecutor and if no international or national court requests the surrender or extradition of the person. To this end, the Public Prosecutor ensures that no proceedings have been initiated by the International Criminal Court and verifies that no other international jurisdiction competent to judge the person has requested his surrender and that no other State has requested his extradition.

[...]

B. FRENCH CODE OF CRIMINAL PROCEDURE, APPLICABLE SINCE THE LEGAL REFORM OF NOVEMBER 20, 2023

[...]

Book IV. On some special procedures

[...]

Title IX. Offenses committed outside the territory of the Republic

Chapter 1. Jurisdiction of French courts

[...]

Article 689-11

Version in force since November 22, 2023

Modified by Law n°2023-1059 of November 20, 2023 - art. 22

With the exception of the cases provided for in Subtitle I of Title I of Book IV for the application of the Convention on the Statute of the International Criminal Court, opened for signature in Rome on 18 July 1998, any person suspected of having committed one of the following offenses abroad may be prosecuted and tried by the French courts:

1° The crime of genocide as defined in Chapter I of Subtitle I of Title I of Book II of the French Criminal Code;

2° Other crimes against humanity defined in Chapter II of the same subtitle;

3° War crimes defined in articles 461-1 to 461-31 of the same code.

The person under suspicion must have a habitual residence on French territory, defined by a sufficient connection with France. This link is assessed in particular with regard to the actual or foreseeable duration of the person's presence on French territory, the conditions and reasons for this presence, the desire expressed by the person concerned to settle or remain there, or his or her family, social, material or professional ties.

These crimes can only be prosecuted at the request of the anti-terrorist public prosecutor and if no international or national court requests the surrender or extradition of the person concerned. To this end, the Public Prosecutor ensures that no proceedings have been initiated by the International Criminal Court and verifies that no other international jurisdiction competent to judge the person has requested his surrender and that no other State has requested his extradition.

[...]

C. ABDULHAMID CHABAN, DECISION OF THE PLENARY ASSEMBLY OF THE COUR DE CASSATION OF MAY 12, 2023

[Source: Cour de Cassation, Plenary Assembly, May 12, 2023, 22-80.057 & 22-82.468, available at https://www.legifrance.gouv.fr/juri/id/JURITEXT000047545821 and https://www.legifrance.gouv.fr/juri/id/JURITEXT000047545823, unofficial translation]

Facts and procedure:

[...]

Examination of the admissibility of the opposition:

[...]

Examination of the plea:

[...]

On the first part of the plea:

[...]

The Court's answer:

[...]

17. The plea raises the question of the interpretation of the double criminality condition set forth in article 689-11 of the Code of Criminal Procedure.

18. Under the terms of this text, in its version resulting from law no. 2010-930 of August 9, 2010, in force from August 11, 2010 to March 25, 2019, any person who habitually resides in France and who is guilty abroad of one of the crimes falling within the jurisdiction of the International Criminal Court under the Convention on the Statute of the International Criminal Court, signed in Rome on July 18, 1998, may be prosecuted and tried by the French courts, if the acts are punishable under the law of the State where they were committed, or if that State or the State of which the person 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 be

punishable under the law of the State where they were committed.

20. However, these offenses have a contextual constitutive element. Crimes against humanity, other than genocide, as defined in articles 212-1 to 212-3 of the Criminal Code, must have been committed in execution of a concerted plan against a civilian population group as part of a widespread or systematic attack. War crimes and misdemeanors, as defined in articles 461-1 to 461-31 of the same code, must have been committed during and in connection with an armed conflict, in violation of the laws and customs of war or international conventions applicable to armed conflicts.

21. Article 689-11, cited above, may therefore be interpreted in two different ways.

22. According to the first interpretation, it must be considered that the existence of a contextual element is an integral part of the acts being 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 which does not take account of this contextual element, and confines itself to punishing the underlying acts taken individually, does not punish the acts prosecuted as a whole, but only part of them. Yet it is this whole that justifies the extraterritorial jurisdiction of French courts, which does not exist for the underlying acts alone. The condition of double criminality is therefore only met 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 this conflict. This interpretation was retained by the judgment of the Criminal Chamber which was opposed.

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 classification under which they might be prosecuted. It is inferred that it is sufficient that the underlying acts be punishable under the legislation of the State where they were committed.

24. Since the mere wording of the text does not make it possible to give it a certain meaning, the legislator's intention must be ascertained. This is decisive when it comes to implementing the universal jurisdiction of French courts, which is a matter of State sovereignty in criminal matters.

25. It is clear from the parliamentary debates preceding 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 set out in the said article, does not require identity of qualification and incrimination.

[...]

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 extradition matters, requires that the “fact” be “punishable under French

law” by a penalty.

30. In this respect, the Criminal Chamber of the Cour de Cassation has ruled that it is up to the French courts to determine whether the facts referred to in the extradition request are punishable under French law by a criminal or correctional penalty, regardless of the classification given by the requesting State [...] The condition of double incrimination 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 [...], or aggravated arbitrary sequestration [...].

31. There appears to be no justification for interpreting 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 criminal cooperation mechanism of extradition, and is applicable in cases where the foreign State is failing in its obligation to prosecute international crimes.

33. It should therefore be noted that the condition of double criminality, required for the prosecution of crimes against humanity and war crimes, does not imply that the criminal characterization of the acts is identical in the two legislations, but only requires that they be criminalized by both.

34. The condition of incrimination by foreign law may be met through an ordinary offence constituting the basis of the crime being prosecuted, such as murder, rape or torture.

35. Such an interpretation does not deprive the condition of double incrimination of all scope.

36. For example, with regard to crimes against humanity, the offence set out 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 misdemeanors, such as ordering that there be no survivors or threatening an adversary with the same, as 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 reject the plea of nullity based on the lack of jurisdiction of the French courts to hear the crimes against humanity alleged against Mr. [Chaban] on the basis of article 689-11 of the Code of Criminal Procedure, the judgment 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

freedom or the protection of personal life or any other rights or public freedoms guaranteed by the Constitution is considered a crime which is punishable by law.

39. The judges note that, while crimes against humanity are not expressly referred to as such in the Syrian Criminal Code, it does criminalize murder, acts of barbarism, rape, violence and torture.

40. The Investigating Chamber therefore concludes that Syrian law, even if it does not autonomously incriminate crimes against humanity, punishes the acts at the origin of 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.

[...]

D. MAJDI NEMA, DECISION OF THE PLENARY ASSEMBLY OF THE COUR DE CASSATION OF MAY 12, 2023

Facts and Procedure:

[...]

Examination of the plea:

[...]

On the third part of the plea:

[...]

The Court’s answer:

32. According to article 689-11 of the Code of Criminal Procedure, amended by Act no. 2019-222 of March 23, 2019, effective as of March 25, 2019, any person suspected of having committed abroad the crimes against humanity, other than genocide, may be prosecuted and tried by the French courts, if he or she habitually resides in the territory of the Republic, provided for in articles 212-1 to 212-3 of the French Criminal Code, as well as the war crimes and misdemeanors defined in articles 461-1 to 461-31 of the same Code, if the acts are punishable under the legislation of the State where they were committed or if this State or the

State of which the suspected person is a national is a party to the Convention on the Statute of the International Criminal Court.

33. The question raised by the plea concerns the interpretation of the concept of habitual residence, a question on which the Criminal Chamber has never ruled, even though the concept appears, without being defined, in various texts of the Criminal Code.

34. In the parliamentary debates, reference was made, in the absence of case law from the Criminal Chamber, to the case law of the First Civil Chamber of the Cour de Cassation on habitual residence, an autonomous concept under European Union law.

35. It follows from the case law of the Court of Justice of the European Union that habitual residence is a functional and protean concept, varying according to the context and purpose of the rule, and is assessed by an analysis based on a bundle of indicators, i.e. the factual circumstances specific to the case (CJEU, December 22, 2010, Case C-497/10, Barbara Mercredi v. Richard Chaffe, § 46 and 47).

36. This approach can usefully inspire the assessment of the concept of habitual residence in criminal matters.

37. The condition set out in article 689-11 of the Code of Criminal Procedure must therefore be interpreted in the light of the objective pursued by the legislator.

38. The parliamentary debates reveal that the legislator, on the one hand, was anxious to prevent the perpetrator of crimes against humanity or war crimes from finding asylum on French territory, and on the other hand, aimed to guarantee the existence of a sufficient link with France, such as to legitimize prosecution, in order to avoid any instrumentalization of the French courts under conditions prejudicial to the conduct of international relations.

39. As the rapporteur for the National Assembly's law commission stated: “[...] this condition is intended to guarantee the existence of a genuine link between France and the person being prosecuted. A mere passage through our territory, for a few hours, would not [...] constitute a sufficient link, especially as the condition of habitual residence is not as demanding as that of permanent residence or principal residence”.

40. In view of these factors, the condition of habitual residence, within the meaning of article 689-11 of the French Code of Criminal Procedure, which presupposes a sufficient connection with France, must be assessed by taking into account a range of indicators, such as the actual or foreseeable duration, conditions and reasons for the presence of the person concerned on French territory, his or her desire to settle or remain there, or his or her family, social, material or professional ties.

41. In the present case, in rejecting the plea of nullity based on the lack of jurisdiction of the French courts to

hear the war crimes of which Mr. [Nema] on the basis of article 689-11 of the Code of Criminal Procedure, the judgment under appeal states, with regard to the condition of habitual residence, that the notion is not to be confused with that of principal residence, nor with that of permanent residence, but that the said text requires more than mere transit or passage for a few hours on French territory, since habitual residence must respond to an idea of stability, without any criterion of duration being set.

42. The judges note that the fact that Mr. [Nema] lives mainly in Turkey - assuming this information is correct, since this is in fact his parents' home - does not automatically mean that he has no other habitual residence.

43. They note that Mr. [Nema] moved to [Locality 5] on November 7, 2019 and that, during the search of his home, an Erasmus student card in his name to study at the *Institut de recherches et d'études sur le monde arabe et musulman*, section de [Locality 5], a metro ticket [Locality 5], a university library card [Localité 5] in his name, a French telephone card as well as a card for transport [Locality 5] were discovered. They added that since he has been living in France, Mr [Nema] has visited [Locality 7] and [Locality 6], and that between these two trips, he has returned to [Locality 5]. During the two days of surveillance carried out, the investigators noted that the person concerned remained in his apartment most of the time, leaving only to go to the mosque or eat, thus behaving like an actual resident and not a tourist. They also noted that Mr. [Nema] made numerous telephone calls to correspondents living in the area.

44. The judges deduce that these various elements show a definite stability of residence for a period of more than three months, and that the criterion of habitual residence is thus met.

45. In the light of these statements, which fall within the scope of its sovereign discretion, the Investigating Chamber, which characterized Mr. [Nema]'s habitual residence on French territory having regard to its duration, the university education he had attended and his social and material ties, justified its decision.

46. The plea must therefore be rejected.

[...]

DISCUSSION

I. Applicable law until the reform of November 20, 2023

1. According to International Humanitarian Law, on what grounds does France have jurisdiction over the *Chaban* and *Nema* cases? (Geneva Conventions of 1949, Articles 49/50/129/146; Additional Protocol I of 1977, Article 85) Must every country adopt similar legislation? (CIHL, Rules 157 and 158)

2. *(Document A)*
    1. What are the four conditions required for French courts to exercise universal jurisdiction under

Article 689-11? What are the similarities and differences between the conditions applicable to each of the crimes mentioned?

2. Compare the last paragraph of article 689-11 with Article 17 of the Rome Statute. How does French law interpret the principle of complementarity of jurisdictions established by this Article? Give your opinion on this interpretation: do you find it to be technically sound; expansive or restrictive; consistent with International Criminal Court case law?
3. In your opinion, do the four conditions for the exercising universal jurisdiction set out in Article 689-11 excessively restrict the possibilities for prosecuting perpetrators of international crimes in France? Do you see any advantages or disadvantages to adopting such a regime?

II. The *Cour de Cassation*'s findings on universal jurisdiction

3. *(Document C)*
    1. Which of the four conditions for the exercising universal jurisdiction set out in Article 689-11 do the judges interpret in this extract?
    2. *(Paras 21-23)* What interpretation did the Criminal Chamber give in the contested decision? What alternative interpretation does the Court propose? What are the main differences between the two? In your opinion, are there any advantages or disadvantages to either or both, in terms of fighting against impunity; respecting international law; protecting the rights of the victims or the Defense?
    3. *(Paras 24-32)* What information does the Cour de cassation use to decide which interpretation of the provision should prevail? Why?
    4. *(Paras 33-37)* Which of the two interpretations laid out by the Court did the judges adopt? Why?
    5. *(Paras 38-42)* How do the judges apply their conclusions in this case? How does this differ from the verdict of the Criminal Chamber in the contested decision? What is your opinion on the impact of such a change in jurisprudence?

4. *(Document D)*
    1. Which of the four conditions for exercising universal jurisdiction set out in Article 689-11 do the judges interpret in this extract?
    2. *(Paras 33-39)* What information does the Cour de cassation use to guide its interpretation of this condition? Why? Based on these references, what do you think is the usefulness of such a provision in terms of universal jurisdiction?
    3. *(Paras 40-46)* According to the Court, what factors should be taken into account in determining “habitual residence”? How does this interpretation apply to the present case? Does the Court establish a criterion of duration?
    4. Some countries, such as Germany, authorize the prosecution of foreign perpetrators of international crimes in certain cases, even when these perpetrators are not present on their territory *(see Strafprozeßordnung, art. 153(f))*. In other countries, a less stringent condition, such as mere presence on national territory, is required. In your opinion, what are the advantages and disadvantages of these systems? How does the French interpretation of habitual residence compare?

III. Applicable law since the reform of November 20, 2023

5. *(Document B)* In this new version of Article 689-11, what are the conditions required for French courts to exercise universal jurisdiction over international crimes? Compare with the previous version of the

Article and the case law provided. How has the universal jurisdiction regime evolved? In your opinion, what are the advantages and/or risks of this evolution?

6. Does IHL provide for universal jurisdiction? (Geneva Conventions of 1949, Articles 49/50/129/146; Additional Protocol I of 1977, Article 85) Over which crimes? What are the differences between grave breaches and war crimes? How does the French legislation compare to the criminal prosecution envisioned by the Geneva Conventions?