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CK

13 JANUARY 2021

REJECTION

M. SOULARD, President,

R É P U B L I Q U E F R A N Ç A I S E

A U N O M D U P E U P L E F R A N Ç A I S

JUDGMENT OF THE COURT OF CASSATION, CRIMINAL CHAMBER,
OF 13 JANUARY 2021

[...]

Facts and procedure

1. It follows from the judgment under appeal and from the procedural documents as follows.
2. On 14 November 2002, [...] and their parents have lodged a complaint with civil party constitution with the dean of the investigating judges of the Lyon high court for acts infringing on individual liberty consisting of detention for more than seven days, voluntary abstention from ending an illegal deprivation of liberty and sequestration of person.
3. The two concerned, of French nationality, were arrested in the context of operations launched by the United States against the Taliban regime and Al Qaida network, and detained at the Guantanamo Bay camp, an American military base located in Cuba.
4. By order of 14 February 2003, the investigating magistrate refused to inform [investigation]. The investigating chamber of the Lyon Court of Appeal confirmed this order by judgment of 20 May 2003.
5. By judgment of 4 January 2005 (appeal n03-84.652), the criminal chamber of the Court of Cassation quashed this decision and referred the case back to the investigating chamber of the Paris Court of Appeal.

6. By judgment dated 1 June 2005, this court overturned the order refusing to inform [investigate].

7. The investigating magistrates seized carried out numerous investigations into the conditions under which the civil parties were detained.

8. On 6 October 2009, the public prosecutor issued a supplementary indictment of the counts of torture and other barbaric acts [cruel treatment] concomitant with the crimes of arrest, kidnapping, detention, sequestration without legal basis, committed by a group, with premeditation and with use or threat of a weapon.

9. None of the various international letters rogatory addressed to the United States has been executed, the American authorities refusing to lift the defense secret.

10 Likewise, the French Minister of Defense informed the investigating magistrates that the Consultative Commission of the National Defense Secrecy had rendered an unfavorable opinion which he intended to follow.

11. On 18 September 2017, the investigating judges issued an order of dismissal from which the civil parties appealed.

Examination of the pleas

On the first plea.

Statement of the plea.

12. The plea criticizes the judgment under appeal in that it declared inadmissible the brief filed in the interest of the applicants, whereas "*the courts must, in applying the rules of procedure, avoid an excess of formalism which would undermine the fairness of the procedure and in particular the right to a judge; that by holding that in the absence of being signed, the brief that the civil parties' lawyer had filed in person on 6 November 2019 at the Registry of the Investigating Chamber was inadmissible, therefore, did not seize the Chamber of the plea that it could contain, the Investigating Chamber has shown excessive formalism and thus ignored Articles 6, § 1, of the European Convention on Human Rights, preliminarily, and 198, 591 and 593 of the Code of Criminal Procedure.*"

Response of the Court.

13. To rule inadmissible the brief filed by Maître [...] on 6 November 2019 at the Registry of the investigating chamber, the judgment under appeal states that an unsigned brief does not seize the court of the arguments it might contain or of the attachments.

14. In so ruling, the investigating chamber justified its decision and did not violate the conventional principles invoked.

15. Indeed, the briefs presented to the investigating chamber under article 198 of the Code of Criminal Procedure, when they do not include the signature of the interested party or his lawyer, do not seize the judges with the pleas which may be formulated therein.

16. The applicant cannot object to this requirement intended to guarantee the authenticity of the document. It does not matter, in this regard, the identity of the person who submitted the said brief.

17. The plea must, therefore, be rejected.

On the second plea

Statement of plea

18. The plea criticizes the judgment under appeal in that it pronounced a dismissal then:

"1 / that the acts of torture and barbarism committed by the State agents do not participate in the exercise of state sovereignty; that by maintaining that the persons likely to have participated as perpetrator or accomplice in offenses involving acts of torture denounced by the civil parties enjoyed jurisdictional immunity since these offenses had been committed by agents of the State of the United States of America within the framework of policy of the fight against terrorism following the attacks of 11 September 2001, the determination and implementation of which by the United States military are acts which fall under the sovereignty of this State, the investigating chamber disregarded the principles of international law relating to immunity from jurisdiction of foreign states, Articles 3 and 6 of the European Convention on Human Rights, 222-1 and 432-4 of the Penal Code, and 591 and 593 of the Code of Criminal Procedure;

2 / that being a *jus cogens* norm of international law, which takes precedence over other rules of international law, the prohibition of torture constitutes a legitimate restriction on immunity from jurisdiction; that by holding that the persons likely to have participated as perpetrator or accomplice in the offenses accompanied by acts of torture denounced by the civil parties benefited from jurisdictional immunity, the investigating chamber disregarded the principles of international law relating to immunity from jurisdiction of foreign states, articles 5 of the Universal Declaration of Human Rights of 1948, 7 of the 1966 International Covenant on Civil and Political Rights, 3 of the 1975 United Nations Declaration on the Protection of All against Torture and Other Cruel Treatment or Punishment, inhuman or degrading, 2 and 4 of the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 3 and 6 of the European Convention on Human Rights, 222-1 and 432-4 of the Penal Code, and 591 and 593 of the Code of Criminal Procedure;

3 / that the granting of immunity from jurisdiction to officials of a foreign State in which a party vile charge of acts of torture excessively infringing the right to a court; that by retaining, to order a dismissal, that the persons likely to have participated as perpetrator or complicit in offenses accompanied by acts of torture denounced by the civil parties benefit from the immunity opposing their prosecution before the French criminal courts and their indictment, the investigating chamber infringed the very substance of the right of the civil parties to access a court and thus disregarded Articles 3 and 6, § 1, of the European Convention on Human Rights, 591 and 593 of the Code of Criminal Procedure;

4 / that the immunity from jurisdiction of foreign states and their representatives can constitute an obstacle to the pursuit of an investigation only in the event that the investigating jurisdiction is ensured that the facts denounced can only be attributed to persons entitled to immunity; that by limiting itself, in order to retain the existence of an obstacle to the pursuit of investigation, to asserting that the acts denounced by the civil parties had been committed by the military personnel of the United States within the framework of the policy of combating terrorism decided by President Georges W. Bush, from which she wrongly deduced that they constituted acts falling within the exercise of the sovereignty of the State concerned, instead of questioning whether the various acts denounced, which, for some, qualified as of acts of torture and barbarism or rape which it refrained from analyzing, had been committed by order of the highest authorities of the

State in the exercise of its sovereignty or if, on the contrary, they were the work of soldiers who had acted outside any decision of the said authorities, and therefore could not benefit from immunity when even they had acted in the exercise of their functions, the Investigating Chamber disregarded Articles 3 and 6 of the European Convention on Human Rights, and 85, 86, 591 and 593 of the Code of Criminal Procedure.

Response of the Court

19. To confirm the dismissal order, the judgment under appeal notes that the persons designated by the lawyers of the civil parties during the investigation are indeed likely to have participated, as perpetrator or accomplice, in the facts which are the subject of the proceedings but that they benefit from an immunity from jurisdiction which prevents the investigation from being usefully pursued, and such immunity *ratione materiae* concerning acts which, by their nature or their purpose, fall within the exercise of the sovereignty of the State concerned.

20 The judges hold that the arrest of the people transferred to Guantanamo, among which were [...] as well as the treatment which was reserved for them, were decided and organized by the political authorities of the United States of America, and at the highest level of the State by President George W. Bush and implemented by the United States army in the context of counterterrorism operations launched following the 11 September 2001 attacks, that these acts fall within the exercise of the sovereignty of the State concerned and do not constitute acts of simple management.

21. The investigative chamber concludes that the persons likely to have participated as perpetrators or accomplices in the facts denounced by [...] and [...], and in particular the American officials targeted by the observations of the civil parties during the proceedings, namely, M. G. W. Bush, President of the United States from 2001 to 2009, Mr. Donald Rumsfeld, Secretary of Defense of the United States of January 2001 to 8 November 2006, Mr. [...], legal advisor to the White House from 2001 to 2005, Mr. [...], legal advisor to the attorney general, Mr. [...], Assistant Attorney General, Mr. [...], General Counsel, Department of Defense under Donald Rumsfeld, and General [...], commander of the Guantanamo camp at the time of the events, enjoyed immunity from jurisdiction which precludes their prosecution before the French criminal courts, their indictment or the issuance of an arrest warrant against them.

22. Finally, the judges add that it is not useful for the manifestation of the truth to proceed to the hearing of the American officials previously mentioned when they cannot be prosecuted, indicted or be the subject of arrest warrants and that, for the same reasons, new witness hearings are not necessary, likewise the reiteration of requests made through international criminal assistance which have already encountered the lack of response or the refusal to execute by the judicial authorities of the United States, or any other act of information.

23. In light of these statements, the investigating chamber justified its decision for the following reasons.

24. The incriminated facts, alleged against a former President of the United States and various members of the government, officials or members of the U.S. army, cannot be assimilated to simple acts of management but constitute acts falling within the exercise of the sovereignty of the State.

25. International custom is against allowing State officials, in the absence of contrary international provisions binding on the parties concerned, to be prosecuted for acts falling within this category before the criminal courts of a foreign State.

26. It is up to the international community to set the possible limits of this principle, when it may be confronted with other values recognized by this community, and in particular that of the prohibition of torture.

27. Under the state of international law, the crimes denounced, however serious, do not fall under the exceptions to the principle of immunity from jurisdiction.

28. Furthermore, the right of access to a court, as guaranteed by Article 6 of the European Convention on Human Rights, is not absolute and does not preclude a limitation of this right deriving from the immunity of Foreign States and their representatives, as long as this limitation is enshrined in international law and does not go beyond the generally recognized rules on State immunity. In the instant case, the grant of immunity, in accordance with international law, does not constitute a disproportionate restriction on the right of an individual to have access to a court.

29 Finally, it is in vain that the judgment is criticized for having refused to order the new investigative measures requested, since the advisability of ordering additional

information [investigation] is a matter of pure fact which escapes the control of the Court of Cassation.

30. Thus, the plea must be rejected.

31. Moreover the judgment is regular in form.

FOR THESE REASONS, the Court:

DISMISSES the appeal;

Thus done and judged by the Court of Cassation, criminal chamber, and pronounced by the president on January thirteenth, two thousand and twenty-one.

Président : M. Soulard

Rapporteur : M. Guéry

Avocat général : M. Petiprez

Avocat(s) : SCP Piwnica et Molinié