BRIEFING PAPER

Universal Jurisdiction Law and Practice in France

February, 2019

OPEN SOCIETY
JUSTICE INITIATIVE

TRIAL international

Table of Contents

Introduction 3
Crimes invoking universal jurisdiction 4
1. Genocide 5
2. Crimes against humanity 5
3. War crimes 6
4. Enforced disappearance 7
5. Torture and other inhuman treatment 7
6. Other crimes 8
6.1. Crimes against cultural property during armed conflict 8
6.2. Laws on Rwanda and the former Yugoslavia 8
Modes of liability 8
1. Direct perpetrator(s) 8
2. Aiding and abetting 9
3. Command / superior responsibility 10
4. Preparation of a crime 10
5. Joint criminal enterprise 10
Temporal jurisdiction over crimes 11
1. Beginning of temporal jurisdiction 11
1.1. Crimes against humanity 11
1.2. War crimes 11
1.3. Genocide 11
1.4. Enforced disappearance 11
1.5. Torture and other inhuman treatment 11
1.6. Crimes against cultural property during armed conflict 12
1.7. Crimes committed in the former Yugoslavia and Rwanda 12
2. Statute of limitations 12
2.1. Crimes against humanity and genocide 12
2.2. War crimes 12
2.3. Enforced disappearance 12
2.4. Torture 13
2.5. Crimes against cultural property during armed conflict 13
2.6. Crimes committed in the former Yugoslavia and Rwanda 13
Universal jurisdiction requirements 13
1. Presence / residence of the accused 14
1.1. Torture, enforced disappearance, Rwanda/Former Yugoslavia crimes 14
1.2. Rome Statute crimes 15
2. Double criminality 15
3. Prosecutorial discretion 16

224 West 57th Street,
New York, New York, 10019
P. +1 212-548-0600
opensocietyfoundations.org

4. Political approval 16
5. Subsidiarity 17
Key steps in criminal proceedings 17
1. Investigation stage 17
1.1. Initiation of an investigation 17
1.2. Time limits for investigations 25
1.3. Completion of investigations 26
1.4. Arrest warrant 27
1.5. Victim rights and participation at investigation stage 27
2. Trial Stage 29
2.1. Competent authorities 30
2.2. Appeal 30
2.3. Victim rights and participation at the trial stage 30
Rules of evidence 31
1. At investigation stage 31
1.1. Necessary information for a complaint 32
1.2. Necessary evidence to open an investigation 33
1.3. Necessary evidence for an indictment 33
1.4. Admissibility of evidence 34
2. At trial stage 35
2.1. General rules of admissibility 35
2.2. Introduction of new evidence 36
3. Open source materials 36
Witness and victim protection 37
Reparation for victims in criminal proceedings 38
Immunities 39
Amnesties 41

224 West 57th Street,
New York, New York, 10019
P. +1 212-548-0600
opensocietyfoundations.org

Introduction

This briefing paper was written by the Open Society Justice Initiative in partnership with TRIAL International. It provides an overview of the French national legal framework on universal jurisdiction, including statutory and case law, and its application in practice.

The briefing paper intends to contribute to a better understanding of domestic justice systems among legal practitioners who operate in the field of universal jurisdiction, to support the development of litigation strategies. It forms part of a series of briefing papers on selected countries.

The content is based on desk research with the support of pro bono lawyers from the relevant jurisdiction. In addition, interviews with national practitioners were conducted on the practical application of the law. Respondents are not named in order to protect their identity and affiliation with certain institutions or organizations.

Universal jurisdiction in this briefing paper is understood to encompass investigations and prosecutions of crimes committed on foreign territory by persons who are not nationals of the jurisdiction in question. This briefing paper focuses on the international crimes of genocide, war crimes, crimes against humanity, torture and enforced disappearance.

The authors would like to thank Valérie Paulet as well as all experts and practitioners who agreed to be interviewed for their invaluable contribution to this briefing paper

Crimes invoking universal jurisdiction

The French Criminal Code of Procedure (CCP) provides for universal jurisdiction over specified offenses emanating from international conventions ratified by France.[1] Yet, the CCP does not establish an obligation to prosecute these crimes.[2] The principle of universal jurisdiction allows for the investigation and prosecution of crimes regardless of where they were committed, and irrespective of the nationality of the victims and perpetrators.

The following crimes are penalized by French law under universal jurisdiction principles: torture and other cruel, inhuman or degrading treatment or punishment;[3] enforced disappearances;[4] crimes against cultural property during armed conflict;[5] terrorism and financing terrorism;[6] offenses committed with nuclear materials;[7] unlawful acts against the safety of maritime navigation;[8] seizure of aircraft and other crimes related to aviation;[9] European Union (EU) corruption crimes;[10] crimes within the jurisdiction of the International Criminal Court (ICC);[11] and specific road transport offenses.[12]

In addition to this list provided in the CCP, French authorities also have jurisdiction over (1) persons allegedly responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991;[13] and (2) persons allegedly responsible for acts of genocide or other serious violations of international humanitarian law committed in 1994 in the territory of Rwanda and, in the case of Rwandan citizens, in the territory of neighboring States.[14]

---

[1] Article 689 CCP.

[2] Article 689 and 689-1 CCP.

[3] Article 689-2 CCP.

[4] Article 689-13 CCP.

[5] Article 689-14 CCP.

[6] Articles 689-3, 689-9, and 689-10 CCP.

[7] Article 689-4 CCP.

[8] Article 689-5 CCP.

[9] Articles 689-6 and 689-7 CCP.

[10] Article 689-8 CCP.

[11] Article 689-11 CCP.

[12] Article 689-12 CCP.

[13] *Loi n° 95-1 du 2 janvier 1995 portant adaptation de la législation française aux dispositions de la résolution 827 du Conseil de sécurité des Nations Unies instituant un tribunal international en vue de juger les personnes présumées responsables de violations graves du droit international humanitaire commises sur le territoire de l'ex-Yougoslavie depuis 1991* (Law no. 95-1 of 2 January 1995 adapting the French legislation to the provisions of the United Nations Security Council Resolution 827 establishing an international tribunal to try persons alleged to be responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, unofficial translation). Hereinafter: Law n° 95-1 of 2 January 1995.

[14] *Loi n° 96-432 du 22 mai 1996 portant adaptation de la législation française aux dispositions de la résolution 955 du Conseil de sécurité des Nations unies instituant un tribunal international en vue de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du*

On-going investigations in France concern potential charges of genocide, crimes against humanity, war crimes, torture, and enforced disappearance for acts that occurred in Rwanda, Syria, Iraq, Libya, Chechnya, Chad, Ivory Coast, Central African Republic, the Democratic Republic of Congo, Afghanistan, and Liberia.[15]

For the purpose of this report, we will only address torture and other cruel, inhuman or degrading treatment or punishment; enforced disappearance; crimes within the subject matter jurisdiction of the ICC; crimes against cultural property during armed conflict (as they constitute war crimes); and the two laws on Rwanda and the former Yugoslavia.

On 9 August 2010, France incorporated the Rome Statute of the ICC (Rome Statute) into the CCP. Article 689-11 CCP allows for jurisdiction, under strict conditions (see below Universal Jurisdiction Requirements), for the following crimes defined under the Rome Statute.

1. Genocide

The French definition of genocide is similar to the definition contained in the Rome Statute, except that the French definition is broader as it includes groups identified by any arbitrary criteria.[16] This means that it would be possible to prosecute the destruction of additional groups, such as political or cultural groups.

Unlike the Rome Statute, the French Criminal Code (FCC) requires the existence of a concerted plan (*plan concerté*), with the intent to fully or partially destroy a group.

2. Crimes against humanity

Under French law, crimes against humanity are generally defined according to the Rome Statute, with some differences, as provided below:

- The FCC requires that a crime against humanity be part of a concerted plan.[17]

---

droit international humanitaire commis en 1994 sur le territoire du Rwanda et, s'agissant des citoyens rwandais, sur le territoire d'Etats voisins (Law no. 96-432 of 22 May 1996 adapting the French legislation to the provisions of the United Nations Security Council Resolution 955 establishing an international tribunal to try persons alleged to be responsible for genocide or other grave breaches of international humanitarian law committed in 1994 on the territory of Rwanda and, in the case of Rwandan citizens, on the territory of neighboring States, unofficial translation). Hereinafter: Law n° 96-432 of 22 May 1996.

[15] Interview with a member from the police unit specialized in war crimes and crimes against humanity (*l'office central de lutte contre les crimes contre l'humanité*, hereinafter OCLCH*)* on 28 October 2018*.*

[16] Article 211-1 FCC: "*ou d'un groupe déterminé à partir de tout autre critère arbitraire"*.

[17] Article 212-1, paragraph 1 FCC provides: "Deportation, enslavement or the massive and systematic practice of summary executions, abduction of persons followed by their disappearance, of torture or inhuman acts, inspired by political, philosophical, racial or religious motives, and organized

- The FCC includes the enumerated Rome Statute crimes against humanity, except sexual slavery.[18] However, Article 212-1 paragraph 7 of the FCC includes "any other sexual violence of comparable gravity".
- Unlike the Rome Statute, the French definition of persecution does not require a "connection" between persecution and another crime against humanity or "any crime within the jurisdiction of the Court".[19]
- Finally, Article 212-2 of the FCC adds a category of crimes against humanity committed in connection to an armed conflict. This offense allows the same statute of limitations for crimes against humanity to apply to war crimes (see below Statute of Limitations).

3. War crimes

A chapter of the FCC is dedicated to war crimes.[20] Yet, the correlation between the Rome Statute and the FCC is difficult to establish not only because of the different terminology used, but also because the definition of war crimes is spread out across various provisions.

The war crimes in the FCC are divided as follows:

- Assaults on life and physical or psychological integrity;[21]
- Assaults on individual liberty;[22]
- Infringements of the rights of minors in armed conflict;[23]
- Prohibited means and methods of warfare;[24]
- Assaults on goods in armed conflict;[25]
- Groups formed or agreements established to prepare war crimes;[26]
- Violations of the freedom and rights of persons in international armed conflicts;[27]
- Means and methods of warfare prohibited in international armed conflicts (such as using chemical weapons, attacking civilian objective, starving the civilian population, launching disproportionate attacks against civilians or against the environment; misusing of emblems);[28]

in pursuit of a concerted plan against a section of a civil population are punished by criminal imprisonment for life." (Translation by Legifrance).

[18] Article 212-1, para. 7 FCC.

[19] Compare Article 212-1 FCC and Article 7(1)(h) Rome Statute,

[20] *Livres IV bis : Des crimes et des délits de guerre* (Chapter IV bis: War Crimes), Articles 461-1 to 462-11 FCC.

[21] Article 461-2 to 462-5 FCC.

[22] Article 461-6 FCC.

[23] Article 461-7 FCC.

[24] Article 461-8 to 461-14 FCC.

[25] Article 461-15 to 461-17 FCC.

[26] Article 461-18 FCC.

[27] Article 461-19 to 461-22 FCC.

[28] Article 461-23 to 461-29 FCC.

- War crimes committed in non-international armed conflicts (such as forced displacement of civilian population or violation of fair trial guarantees);[29] and
- Specific provisions regarding the sentence or the mode of liability (such as aggravating circumstances or defenses).[30]

The FCC is broader than the Rome Statute regarding the crime of conscripting or enlisting children. French law prohibits conscripting or enlisting children "under the age of 18 years," whereas the Rome Statute only prohibits conscripting or enlisting children "under the age of 15 years."[31]

4. Enforced disappearance

The crime of enforced disappearance[32] was introduced into the FCC on 5 August 2013 in the form of two new articles: 1) Article 221-12 FCC, as an independent offense, and 2) Article 212-1, paragraph 9 FCC, as a crime against humanity.

The FCC relies on Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance to define the crime of enforced disappearance. As a consequence, the crimes must be committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State.

5. Torture and other inhuman treatment

French courts have universal jurisdiction over crimes of torture and other cruel, inhuman or degrading treatment or punishment.[33] The French criminal code does not define torture, but Article 689-2 of the CCP providing universal jurisdiction for crimes of torture refers to Article 1 of the United Nations Convention against Torture. Yet, domestically torture has been more broadly interpreted and is not limited to acts committed by government agents.[34]

[29] Article 461-30 to 461-31 FCC.

[30] Article 462-1 to 462-11 FCC.

[31] Article 461-7 FCC.

[32] Article 689-12 CCP.

[33] Article 689-2 CCP.

[34] Interview with a French NGO on 26 October 2018.

6. Other crimes

6.1. Crimes against cultural property during armed conflict[35]

The French authorities have jurisdiction over the crimes defined under Article 15(1)(a), (b) and (c) of the Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict:

- making cultural property under enhanced protection the object of attack;
- using cultural property under enhanced protection or its immediate surroundings in support of military action; and
- extensive destruction or appropriation of protected cultural property.

6.2. Laws on Rwanda and the former Yugoslavia

The French authorities have jurisdiction over the following crimes committed in the former Yugoslavia: acts which constitute, under Articles 2 to 5 of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY), grave breaches of the Geneva Conventions of 12 August 1949, violations of the laws or customs of war, genocide, and crimes against humanity.[36]

The French authorities also have jurisdiction over the following crimes committed in Rwanda: acts which constitute, under Articles 2 to 4 of the Statute of the International Criminal Tribunal for Rwanda (ICTR), grave breaches of common Article 3 of the Geneva Conventions of 12 August 1949 and of their Additional Protocol II of 8 June 1977, genocide, and crimes against humanity.[37]

Modes of liability

1. Direct perpetrator(s)

A direct perpetrator is a person who committed or attempted to commit the crime.[38] The Supreme Court has accepted the concept of co-perpetrators.[39] A co-perpetrator is commonly understood as the individual who, acting with another, commits material acts constituting the offense committed when each co perpetrators has individually committed or attempted to commit the offence.

In the *Pascal Simbikangwa* case [40] on genocide and crimes against humanity, the Criminal Court also considered the accused as a direct perpetrator for having

[35] Article 689-14 CCP.

[36] Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, September 2009, http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.

[37] Statute of the International Criminal Tribunal for Rwanda, 31 January 2010, http://unictr.irmct.org/sites/unictr.org/files/legal-library/100131_Statute_en_fr_0.pdf.

[38] Article 121-4 FCC.

[39] Cour de casssation, Chambre criminelle, 2 May 1984, n° 83-92934.

[40] Cour d'Assises de Seine Saint Denis, 3 December 2016, n° 51/2016.

ordered the crime of genocide: "He made others commit willful attacks on life and serious injury to the physical or psychological integrity, in execution of a concerted plan aimed at the total destruction of the Tutsi ethnic group, which constitutes, in relation to Article 211-1 of the Penal Code, the crime of genocide, and not complicity in genocide." [41]

2. Aiding and abetting

The French definition of complicity (*complicité*)[42] is similar to the Rome Statute modes of liability of aiding and abetting (Article 25(3)(c)) and ordering/soliciting/inducing (Article 25(3)(b)). Under French law, an accomplice is:

- a person who knowingly, through aiding or abetting, has facilitated the preparation or commission of a crime; or
- a person who, by gift, promise, threat, order, abuse of authority or power, provokes the commission of an offense or gives instructions to commit it.

In the *Ely Ould Dah* case, [43] the accused was sentenced as a perpetrator for committing the crime of torture, but also as an accomplice for abusing his authority and for ordering the crime.[44]

In the *Pascal Simbikangwa* case, the accused was sentenced for genocide as direct perpetrator and for complicity in crimes against humanity: "He knowingly participated by providing means and instructions for summary executions and inhumane acts, practiced in a systematic and massive manner, and thus became complicit in these acts which constitute crimes against humanity committed to the prejudice of a civilian population, in the implementation of a concerted plan."[45]

In November 2018, French prosecutors issued arrest warrants for three senior Syrian government and intelligence officials on charges of complicity in torture, enforced disappearances, crimes against humanity and war crimes.[46]

NGOs and lawyers mainly use direct perpetration and complicity as the modes of liability alleged in their complaints.[47]

[41] Cour d'Assises de Seine Saint Denis, 3 December 2016, n° 51/2016.

[42] Article 121-7 FCC.

[43] Cour d'Assises du Gard, 1 July 2005, n° 70/05.

[44] Cour d'Assises du Gard, 1 July 2005, n° 70/05.

[45] Arrêt de la Cour d'Assises du 3 December 2016, n° 51/2016 (unofficial translation).

[46] E. Vincent, "*Trois dignitaires syriens visés par des mandats d'arrêt émis par la justice française*", Le Monde, 5 November 2018.

[47] Interview with a French lawyer on 29 October 2018, and a French NGO on 26 October 2018.

3. Command / superior responsibility

Command / superior responsibility (*Responsabilité du chef militaire / Responsabilité du supérieur hiérarchique*) is applicable to genocide,[48] crimes against humanity[49] and war crimes.[50] The FCC provides that a commander or the person who was acting as such can be considered an accomplice of a crime committed.

The definition of command / superior responsibility is very similar to the one provided by the Rome Statute (see Article 28(a) of the Rome Statute), except that there is no requirement in the FCC to demonstrate that the commander has failed to properly exercise control over his or her forces or his or her subordinates.

To date, there is no jurisprudence on the FCC's command /superior responsibility provision, which entered into force on 11 August 2010. As this mode of liability only applies to Rome Statute crimes which fall under stricter requirements to trigger universal jurisdiction than the crime of torture, NGOs and lawyers who have filed complaints have not yet resorted to this form of liability.

4. Preparation of a crime

For crimes against humanity, genocide and war crimes,[51] the FCC criminalizes participation in an established group or an agreement to prepare the commission of the crimes, characterized by several material facts.

To date, there is no jurisprudence on universal jurisdiction cases using this form of responsibility.

5. Joint criminal enterprise

The concept of joint criminal enterprise is defined in the FCC under the name *association de malfaiteurs*.[52] Unlike the mode of liability "preparation of the crime" mentioned above, joint criminal enterprise is not limited to war crimes, crimes against humanity and genocide but can apply to torture and enforced disappearances.

It is defined as a group or an agreement established in order to prepare crimes. This preparation must be characterized by several material facts. One guilty of this crime can be sentenced to five to ten years in prison. Contrary to co-

[48] Articles 213-4-1 and 462-7 FCC.

[49] Articles 213-4-1 and 462-7 FCC.

[50] Article 462-7 FCC.

[51] Articles 212-3 and 461-18 FCC.

[52] Article 450-1 FCC.

perpetration, the existence of a formed group or an agreement between the parties, aimed at the perpetration of a crime, must be demonstrated.

Participation in a joint criminal enterprise can also be an aggravating circumstance.[53]

Temporal jurisdiction over crimes

1. Beginning of temporal jurisdiction

1.1. Crimes against humanity

Crimes against humanity were introduced into the FCC on 1 March 1994. According to the Supreme Court, crimes against humanity can only be prosecuted if committed after 1 March 1994.[54]

1.2. War crimes

War crimes were introduced into the FCC on 9 August 2010.[55] These crimes cannot be prosecuted if committed prior to that date.

1.3. Genocide

The crime of genocide was introduced into the FCC on 1 March 1994.[56] It cannot be prosecuted if committed prior to that date.

1.4. Enforced disappearance

The crime of enforced disappearance was introduced into the FCC on 5 August 2013.[57] It cannot be prosecuted if committed prior to that date.

1.5. Torture and other inhuman treatment

Universal jurisdiction for the crime of torture was introduced into French law by the incorporation of the UN Convention against Torture in 1985 and Article 689-

[53] Article 132-71 FCC.

[54] Cour de Cassation, Chambre criminelle, 17 June 2003, nº 02-80719.

[55] *Loi n° 2010-930 du 9 août 2010 portant adaptation du droit pénal à l'institution de la Cour pénale internationale* (Law no. 2010-930 of 9 August 2010 adapting the criminal code to the Rome Statute, unofficial translation).

[56] *Loi n° 92-684 du 22 juillet 1992 portant réforme des dispositions du code pénal relatives à la répression des crimes et délits contre les personnes* (Law no. 92-684 of 22 July 1992, amending the Criminal Code provisions on the punishment of crimes against persons, unofficial translation). Entered into force on 1st March 1994.

[57] *Loi n° 2013-711 du 5 août 2013 portant diverses dispositions d'adaptation dans le domaine de la justice en application du droit de l'Union européenne et des engagements internationaux de la France* (Law no. 2013-711 of 5 August 2013 adapting the French criminal law to the European Union law and to French international commitments, unofficial translation).

2 of the CCP on 30 December 1985.[58] Thus, French authorities have universal jurisdiction over any acts of torture committed on or after 30 December 1985.[59]

1.6. Crimes against cultural property during armed conflict

This offense was introduced into the FCC on 13 July 2018.[60] It cannot be prosecuted if committed prior to that date.

1.7. Crimes committed in the former Yugoslavia and Rwanda

French authorities have jurisdiction over crimes committed in the former Yugoslavia[61] if they were committed in 1991 or after, and over crimes committed in Rwanda[62] if they were committed between 1 January and 31 December 1994.

2. Statute of limitations

2.1. Crimes against humanity and genocide

Pursuant to Article 7 of the CCP, statute of limitations does not apply to crimes against humanity and genocide.[63]

2.2. War crimes

Under Article 7 of the CCP, the statute of limitations for war crimes is 30 years. Yet, when committed in connection with a crime against humanity, statute of limitations does not apply.[64]

2.3. Enforced disappearance

Under Article 7 of the CCP, the statute of limitations for the crime of enforced disappearance is 30 years. The Supreme Court has held that a statute of limitations is only triggered when an offense or its effect has ended and that the crime of enforced disappearance is a continuous offense; as long as the body of

[58] *Loi n°85-1407 du 30 décembre 1985 portant diverses dispositions de procedure penale et de droit penal, article 72* (Law no. 85-1407 of 30 December 1985, introducing various provisions of criminal procedure and criminal law, unofficial translation).

[59] For cases that do not involve universal jurisdiction, i.e. committed on French territory or by a French national, French authorities are competent to investigate, prosecute and judge acts of torture and barbarity even if they were committed before the legal provisions entered into force in French law on 1 March 1994. Before the introduction of "torture" as an autonomous crime, torture was already included in the FCC as an aggravating circumstance (Cour de Cassation, Chambre criminelle, 21 January 2009, n°07-88330).

[60] *Loi n° 2018-607 du 13 juillet 2018 relative à la programmation militaire pour les années 2019 à 2025 et portant diverses dispositions intéressant la défense* (Law no. 2018-607 of 13 July 2018 on military programming for the years 2019 to 2025, unofficial translation).

[61] Law n° 95-1 of 2 January 1995.

[62] Law n° 96-432 of 22 May 1996.

[63] Article 7 CCP.

[64] Articles 212-2 and 212-7 para. 4 CCP.

the victim has not been found, the offense is still ongoing and the term of the statute of limitation has not begun.[65]

2.4. Torture

Under Article 7 of the CCP, the crime of torture is subject to a statute of limitations of 20 years.[66] However, when the crime of torture is committed against a minor of 15 years or less and has led to mutilations or to a permanent injury, the statute of limitations is 30 years.[67]

2.5. Crimes against cultural property during armed conflict

The statute of limitation of this offense is not mentioned in the criminal code. It is thus unclear what its statute of limitations is.

2.6. Crimes committed in the former Yugoslavia and Rwanda

The applicable statute of limitations is set out in the FCC. It dictates a 30-year statute of limitations for war crimes, whereas crimes against humanity and genocide do not have a statute of limitations.[68]

Universal jurisdiction requirements

In order to exercise universal jurisdiction over the above-listed crimes, certain requirements need to be met. The French legal system imposes a different set of requirements depending on the type of crime. Torture, enforced disappearance, and crimes committed in Rwanda and in the former Yugoslavia are easier to investigate and prosecute, whereas the requirements for Rome Statute crimes are stricter.

As a consequence, for crimes falling within the jurisdiction of the ICC, universal jurisdiction cases have been restricted by four barriers: 1) residence of the suspect in France; 2) double criminality or ratification of the Rome Statute by the State where the crimes were committed or the State of which the suspect has the nationality (not applicable for genocide); 3) prosecutorial discretion; and 4) subsidiarity with other jurisdictions. In practice, these barriers make the prosecution of such crimes under universal jurisdiction very difficult. Key actors, such as the specialized unit of the French police (*L'Office central de lutte contre les crimes contre l'humanité* – OCLCH), have argued that these barriers to universal jurisdiction are overly restrictive and thus should be amended.[69]

[65] Cour de cassation, Chambre criminelle, 24 May 2018, n°17-86340.

[66] Article 7 CCP.

[67] Article 7, para. 2 and Article 706-47, para. 2 CCP.

[68] Cour de cassation, Chambre criminelle, 12 July 2016, n° 16-82664.

[69] Interview with a member of the OCLCH on 28 October 2018.

1. Presence / residence of the accused

As a general principle, Article 689-1 CCP states that any person present in French territory can be prosecuted under the principle of universal jurisdiction. However, as applied, this principle differs from one crime to another.

1.1. Torture, enforced disappearance, Rwanda/Former Yugoslavia crimes

For torture, enforced disappearance, and crimes committed in Rwanda and neighboring countries and in the former Yugoslavia, French authorities have jurisdiction if the suspect is present on French territory.[70] The interpretation of when the accused must be present – at the time of filing the complaint or at the time of the opening of an investigation – is not clearly settled. The Supreme Court held in 2007 that the presence of the accused is required at the time of the opening of an investigation.[71]

Yet, when the OCLCH investigates whether the accused is present on French territory, it considers that the French authorities have jurisdiction if the accused is present on the territory **at the time of the filing of a complaint to the prosecutor**.[72] On the other hand, the prosecutor from the war crimes unit interprets it as at **the time investigations are opened** after receipt of a complaint.

The filing of a complaint in the form of a civil party petition directly to an investigating judge is generally treated as the opening of an investigation. Accordingly, presence is required when a complaint is filed in this manner (for different ways of filing complaints see below Initiation of an Investigation).[73]

For instance, such a civil party petition was filed in April 2018 against Prince Mohammed Ben Salmane of Saudi Arabia, who left France only a few hours after the complaint was filed by the civil party to the investigating judge. Although at that point an investigation had not yet been started, the investigating judge decided to open an investigation in October 2018 as it was proven that the accused was present on French territory at the time of the filing.[74]

In all cases, the investigation can be carried out even though the suspect has left French territory. Trials can also be conducted without the presence of the

[70] Articles 689-2 and 689-13 CCP; Law n° 95-1 of 2 January 1995 and Law n° 96-432 of 22 May 1996.

[71] *Affaire des Disparus du Beach*, Cour de cassation, Chambre criminelle, 10 January 2007, n° 04-87245.

[72] Interview with a member of the OCLCH on 28 October 2018.

[73] Interview with an investigating judge from the War Crime Unit (hereinafter WCU) on 15 November 2018.

[74] Interview with a French lawyer on 29 October 2018.

accused.[75] A trial by default (*défault criminel*)[76] is a trial of an accused who is absent without a valid excuse at the opening of the hearing or whose absence is noted during the proceedings when it is not possible to suspend them until his return.[77]

1.2. Rome Statute crimes

For crimes falling within the jurisdiction of the ICC and crimes against cultural property the alleged perpetrator must legally reside in France.[78] The OCLCH considers asylum seekers to be residents of France.[79]

The OCLCH, working for the prosecutor or the investigating judge, will contact the immigration services to determine whether the suspect is on French territory, whether he or she made an asylum request, or whether he or she already has a visa.[80]

A trial may nevertheless commence if the suspect leaves France after an investigation begins. Trials can take place *in absentia*.[81]

2. Double criminality

French authorities have jurisdiction over torture, enforced disappearance, crimes against cultural property, and crimes committed in Rwanda and neighboring countries and in the former Yugoslavia, even if the crime was not punishable in the country of commission at the time the crime was committed.

For crimes falling within the jurisdiction of the ICC, the double criminality principle is required in order for French authorities to have jurisdiction.[82] Thus, if the country where the crimes where perpetrated is not party to the Rome Statute, it must have criminalized the ICC crimes under its jurisdiction. Since 23 March 2019, this condition is no longer required for the crime of genocide.[83]

French authorities also require double criminality for extradition requests. Thus, the Supreme Court denied extradition requests to Rwanda on the basis that

[75] See *Ely Ould Dah* case, Cour d'Assises du Gard, 1 July 2005, n° 70/2005. See also *Khaled Ben Saïd* case, Cour d'Assises de la Meurthe et Moselle, 24 September 2010, n° 73/2010.

[76] Article 379-2 et seq CCP.

[77] Introduced by Law No. 2004-204 of 9 March 2004 (Perben II Law), this procedure replaced the old procedure of trial *in absentia*.

[78] Articles 689-11 and 689-14 CCP.

[79] Interview with a member of the OCLCH on 28 October 2018.

[80] Interview with a member of the OCLCH on 28 October 2018.

[81] Articles 379-2 et seq CCP.

[82] Article 689-11 CCP.

[83] Introduced by *Loi n° 2019-222 du 23 mars 2019 de programmation 2018-2022 et de réforme pour la justice (1)* (Law no. 2019-222 of 23 March 2019 on the 2018-2022 programme and justice reform, unofficial translation), Article 63 IV.

Rwanda had not criminalized genocide and crimes against humanity at the time the offenses took place.[84]

3. Prosecutorial discretion

For torture, enforced disappearance, and crimes committed in Rwanda and neighboring countries and in the former Yugoslavia, French jurisdiction is not dependent on the discretionary power of the prosecutor. Indeed, a civil party can directly request that an investigating judge open an investigation through a civil party petition (see below Civil Party Petition to the Investigating Judge). In the *Ibni Oumar Mahamat Saleh*[85] and the *Amesys* cases,[86] the investigating judge opened an investigation despite the refusal of the prosecutor to investigate.[87]

For crimes falling within the jurisdiction of the ICC and crimes against cultural property, the prosecutor has the discretion to decide whether to open and to close an investigation.[88] On the scope of discretion and possibilities to challenge decisions see below Completion of Investigations.

4. Political approval

Formal political approval is not necessary for a case to be opened and investigated. The Ministry of Foreign Affairs may provide an opinion in cases involving a diplomatic officer, but the prosecutor or the investigating judge is free to make his or her own decision.[89]

In practice, the OCLCH will contact the Ministry of Foreign Affairs when the investigation is aimed at a diplomat or when it has a question concerning the potential immunity of the suspect.[90]

Bilateral conventions ratified by France may affect the OCLCH's ability to open and conduct an investigation. For example, a bilateral convention was signed on 23 June 2015 between France and Morocco providing that complaints launched in France against Moroccan nationals must be sent as a priority to Rabat or be closed in France.[91]

---

[84] Cour de cassation, Chambre criminelle, 26 February 2014, n° 13-87888 and n° 13-86631.

[85] "*Dix ans sans Ibni Oumar Mahamat Saleh, victime d'un crime d'Etat tombe dans l'oubli*", Clément Boursin, Association des Chrétiens pour l'Abolition de la Torture (ACAT) News Release, 2 February 2018, https://acatfrance.fr/app/items/print/actualite/-dix-ans-sans-ibni-oumar-mahamat-saleh--victime-dun-crime-detat-tombe-dans-loubli--.

[86] "The Amesys Case", Report, FIDH, 11 February 2015, p.7, https://www.fidh.org/IMG/pdf/report_amesys_case_eng.pdf.

[87] Interview with a French NGO on 26 October 2018.

[88] Articles 689-11 and 689-14 CCP.

[89] Interview with a member of the OCLCH on 28 October 2018.

[90] Interview with a member of the OCLCH on 28 October 2018.

[91] *Protocole additionnel à la convention d'entraide judiciaire en matière pénale entre le gouvernement de la République française et le gouvernement du Royaume du Maroc* (Additional Protocol to the Convention on Mutual Legal Assistance and Criminal Matters between the

This convention excludes any possibility of universal jurisdiction cases in France regarding Moroccan suspects. It is to date the only bilateral convention signed by France containing such provisions which limit the possibility of using universal jurisdiction over crimes perpetrated in a third country.

5. Subsidiarity

For torture, enforced disappearance, and crimes against cultural property the principle of subsidiarity does not apply. French courts do not have to make sure that there is no other jurisdiction, international or national, competent to try the case before assuming jurisdiction.

For crimes that fall within the jurisdiction of the ICTR/ICTY, at the request of the residual mechanism, French courts must withdraw the case and refer it to the mechanism.[92]

For the crimes falling within the jurisdiction of the ICC, the prosecutor must make sure that no national or international court has asserted its jurisdiction over the case or has asked for the extradition of the suspect.[93] The prosecutor must expressly ask the ICC to decline its jurisdiction over the case. If the ICC is already investigating the case, French authorities will withdraw their jurisdiction.[94] In practice, the OCLCH only investigates crimes when the ICC does not have jurisdiction (Syria, Iraq, etc).[95]

Key steps in criminal proceedings

1. Investigation stage

1.1. Initiation of an investigation

An investigation may be initiated either by the judicial police, including the OCLCH, a prosecutor, a victim(s), or NGOs (see below Standing to File Complaints and Civil Party Petitions), under the conditions defined by the CCP.[96]

Government of the Republic of France and the Government of the Kingdom of Marocco, unofficial translation), signed in Rabat on 6 February 2015, https://www.legifrance.gouv.fr/eli/decret/2015/10/19/MAEJ1523832D/jo/texte.

[92] Article 3 Law n° 95-1 of 2 January 1995 and Article 1 para. 2, Law n° 96-432 of 22 May 1996.

[93] Article 689-11 CCP. See also Cour de cassation, Chambre criminelle, 4 January 2011, n° 10-87760.

[94] Interview with a member of the OCLCH on 28 October 2018.

[95] Interview with a member of the OCLCH on 28 October 2018.

[96] Article 1 CCP.

1.1.1. By authorities

Judicial police

The OCLCH[97] is a specialized unit of the judicial police that investigates crimes against humanity, genocide, war crimes, torture and enforced disappearance,[98] including when committed abroad by a foreign national who is present on French territory or habitually resides in France. The OCLCH is mandated to conduct judicial investigations in France and abroad, to coordinate investigations with all relevant French agencies, and to cooperate with other States, EU organs, and international organizations.[99]

The OCLCH can open an investigation on the following bases: 1) at the request of judicial authorities; 2) at the request of gendarmerie units, police services, and services of other ministries concerned; and 3) on its own initiative (*proprio motu*).[100]

In practice, it has not opened any *proprio motu* investigations yet due to a lack of human resources (as of 24 October 2018, it had 19 agents for 102 criminal investigations).[101] Since 2015, the immigration services in France are required to inform the OCLCH of any cases in which they have refused asylum protection due to serious reasons to believe that the applicant has committed an international crime pursuant to Article 1F of the 1951 Convention Relating to the Status of Refugees. As a consequence, an average of 5 new cases per month arrive on the desk of the OCLCH, with different contexts (Sri Lanka, Chechnya, Syria, etc.), which OCLCH is required to investigate making it impossible to investigate other cases *proprio motu*.[102]

Prosecution

In December 2011, a specialized judicial unit for the prosecution of crimes against humanity and war crimes (War Crime Unit) was established within the Paris district court,[103] with three prosecutors and three investigating judges. They are competent to investigate and prosecute universal jurisdiction cases.[104]

---

[97] *Décret n° 2013-987 du 5 novembre 2013 portant création d'un office central de lutte contre les crimes contre l'humanité, les génocides et les crimes de guerre* (Decree n°2013-987 of 5 November 2013 creating the Central Office for Crimes Against Humanity, unofficial translation); hereinafter: Decree 5 November 2013; http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000028160634&categorieLien=id.

[98] Decree 5 November 2013, Article 2.

[99] Decree 5 November 2013, Articles 4 and 9.

[100] Decree 5 November 2013, Articles 5 and Article 71 CCP.

[101] Interview with a member from the OCLCH on 28 October 2018.

[102] Interview with a member from the OCLCH on 28 October 2018.

[103] Law n° 2011-1862 13 November 2011 *relative à la répartition des contentieux et à l'allègement de certaines procédures juridictionnelles*, Article 22 (Law n°2011-1862 of 13 December 2011 related to the distribution and reduction of court proceedings, unofficial translation).

[104] Law n° 2011-1862 of 13 December 2011, entered into force 14 December 2011, Article 22.

The public prosecutor must act in accordance with the principle of impartiality.[105] According to his or her discretionary power, he or she can decide to open an investigation or request that an investigating judge be mandated to conduct a judicial investigation.

On 23 October 2018, a draft bill was adopted by the French Senate, providing a fusion between the War Crime Unit and the Anti-Terrorism Unit, at the prosecution level, as well as at the police level. On 23 March 2019, the law was adopted and the Anti-Terrorism Unit will now have jurisdiction to investigate war crimes, crimes against humanity, genocide, torture and enforced disappearance.[106]

1.1.2. By victims / NGOs

Under the French legal system victims and NGOs can trigger the opening of investigations by filing a complaint to a public prosecutor or by submitting a civil party petition to an investigating judge. Standing to file complaints and civil party petitions

Individual victims

Individuals can file a criminal complaint[107] if they have personally suffered a harm directly caused by an offense.[108] In addition, pursuant to Article 2 of the CCP, individuals who obtain status as civil parties can claim reparation within the criminal proceedings for damages suffered if he or she has personally suffered damage directly caused by the offense.[109]Victims do not need to be French to be a civil party in the criminal proceedings, and they do not need to be represented by a lawyer to file a complaint.

NGO

NGOs can file a complaint if they are acting on behalf of a victim or in their own right. Under Articles 2-1 to 2-24 of the CCP, NGOs can file complaints in their own right and obtain civil party status (independently of a natural person) if they defend a special interest listed in the CCP. In universal jurisdiction cases, NGOs can use Article 2-4 which allows an association fighting against crimes against humanity and genocide to apply for civil party status.[110] This Article has been interpreted broadly and includes torture and enforced disappearance as independent offenses.[111] Thus, NGOs can become civil party, without being a

[105] Article 31 CCP.

[106] Introduced by *Loi n° 2019-222 du 23 mars 2019 de programmation 2018-2022 et de réforme pour la justice (1)* (Law n. 2019-222 of 23 March 2019 on the 2018-2022 programme and justice reform, unofficial translation), Article 63 IV.

[107] Article 1, para. 2 CCP.

[108] Article 2 CCP. See also Cour de Cassation, Chambre criminelle, 12 September 2000, n° 00-80587.

[109] Article 3 CCP.

[110] Interview with a French NGO on 26 October 2018.

[111] Interview with a French NGO on 26 October 2018.

victim of the crimes or without representing a victim. Once accepted as a civil party, NGOs have the same rights as any other civil party.

In addition, the Supreme Court also allowed NGOs whose mandate is not listed in Article 2-1 to 2-24 to file complaints in their own right under the general provision of Article 2 of the CCP which provides civil party status for direct victims. [112] It allowed, for instance, the NGO Transparency International (fighting against corruption) to file a complaint for corruption against three Heads of State, based on Article 2 of the CCP. The Supreme Court considered that the facts alleged in the complaint corresponded to the actions carried out by this association, which, committing all its resources to this activity, suffered personal, economic, direct harm caused by the offenses in question, which undermined the collective interests it defends and formed the very foundation of its action. [113]

Yet, in January 2018 the Supreme Court departed from this earlier case law, and declared the civil party petition of the NGO ANTICOR (NGO fighting against corruption) inadmissible based on Article 2 CCP. The Supreme Court considered that ANTICOR could not justify that it had personally suffered a damage directly caused by the offense.

This recent interpretation of Article 2 narrows the right of NGOs to apply for civil party status as a direct victim. [114] Yet, NGOs whose mandates do not enter in Articles 2-1 to 2-24 of the CCP could still try to use Article 2 of the CCP, based on the more favorable case law of the Supreme Court before 2018. In March 2019, a case was pending regarding the admissibility as civil parties of the NGOs SHERPA, the European Centre for Constitutional and Human Rights (ECCHR), as well as the Coordination of the Eastern Christians in Danger (CHREDO), in the case against the French cement company *Lafarge*. [115]

NGOs do not need to be French to be found admissible as a civil party. [116]

In practice, lawyers will try to have both NGO and natural person apply as civil party when filing a complaint to make sure the complaint will be found admissible. [117]

Complaint procedure

The complaint procedure differs between torture, enforced disappearance, and Rwanda/Former Yugoslavia crimes, on one hand, and Rome Statue crimes on

[112] Cour de Cassation, Chambre criminelle, 16 June 1998, n° 97-82171; Cour de Cassation, Chambre criminelle, 16 February 1999, n° 98-80537. See also Cour de Cassation, Chambre criminelle, 9 November 2010, n° 09-88272.

[113] Cour de Cassation, Chambre criminelle, 16 June 1998, n° 97-82171; Cour de Cassation, Chambre criminelle, 16 February 1999, n° 98-80537. See also Cour de Cassation, Chambre criminelle, 9 November 2010, n° 09-88272.

[114] Interview with a French lawyer on 29 October 2018.

[115] Interview with the FIDH on 26 October 2018.

[116] Interview with an investigating judge from the WCU on 15 November 2018.

[117] Interview with a French lawyer on 29 October 2018.

the other hand. This reflects the different treatment of these two groups of crimes with regard to the requirements for universal jurisdictions described above.

Victims of torture, enforced disappearance, and crimes committed in Rwanda and neighboring countries, and in the former Yugoslavia have two options: filing a complaint with a prosecutor (*plainte simple*) or filing a civil party petition (*plainte avec constitution de partie civile*) directly with an investigating judge. In the latter situation, the investigating judge has the obligation to investigate whereas in the former situation, the prosecutor has discretion to open an investigation or not.

For victims of crimes falling within the jurisdiction of the ICC and crimes against cultural property, the investigation can only be initiated at the request of the prosecutor. Yet, there are two interpretations of this requirement: 1) victims can only file a complaint with the prosecutor (*plainte simple*)[118]; or 2) victims can also file a civil party petition with the investigating judge (*plainte avec constitution de partie civile*), but the latter can only investigate after the prosecutor has issued a request regarding the opening of an investigation (*réquisitoire*).[119] This latter interpretation has been validated by the Supreme Court regarding the interpretation of Article 113-8 FCC (French jurisdiction for offenses committed outside French territories by French nationals), which also requires that the investigation be opened at the request of the prosecutor.[120] Yet it has not been applied to Article 689-11 CCP which deals with universal jurisdiction for crimes committee abroad by non-French nationals.

Victims and NGOs generally prefer to file a civil party petition directly to the investigating judge, triggering the obligation to open a judicial investigation.[121] Yet, when a suspect is present only for few days in France, NGOs prefer to launch their complaints to the prosecutor in order to hasten a potential arrest.[122] This is due to the power of the prosecutor to directly take the suspect into custody.[123] The investigating judge in a universal jurisdiction case, on the other hand, will not be able to order the custody of the suspect without being requested to do so by the prosecutor.[124] However, once a judicial investigation has been opened , the investigating judge is be able to issue an arrest warrant or to summon the suspect to appear before him or her.[125]

One risk for filing a civil party petition to the investigating judge lies in the delay between the launching of the complaint and the opening of an investigation

[118] Interview with a prosecutor from the WCU on 6 November 2018.

[119] Interview with an investigating judge from the WCU on 15 November 2018.

[120] Cour de Cassation, 11 June 2003, n° 02-83576; Cour de Cassation 8 December 2009, n° 09-82120 and n° 09-82135. See also interview with a French lawyer on 29 October 2018.

[121] Interview with a French lawyer on 29 October 2018, and a French NGO on 26 October 2018.

[122] Interview with a French NGO on 26 October 2018.

[123] Articles 62-2, 62-3 and 63 CCP.

[124] Interview with an investigating judge from the WCU on 15 November 2018.

[125] Article 81 CCP.

which can take more than eight months and this time lapse could allow the suspect to leave the country.[126] This was the case in the investigation against the Prince *Mohammed Ben Salmane* from Saudi Arabia: a civil party petition was launched to the investigating judge in April 2018, and the investigation was only opened in October, allowing the suspect to flee the country in the meantime.

As of 24 October 2018, 57 investigations were led by prosecutors and 42 by investigating judges.[127] Among them, three investigations aimed at arresting a fugitive suspect wanted by an international jurisdiction (ICC) or by foreign criminal jurisdiction (Bosnia).

(a) Complaint to the public prosecutor (*plainte simple*)

The prosecutor receives complaints from victims or NGOs and denunciations from any person who has witnessed a crime or has information on a crime and decides how to proceed. [128] Victims can go directly to the police / gendarmerie to report the crimes they have suffered. They can also send a letter to the competent prosecutor.[129] The police / gendarmerie is obliged to receive and review complaints filed by victims.[130] After reviewing the complaint, they will transmit it to the prosecutor who will decide on the further action to be taken.

The complaint can be filed against an unknown suspect, a legal person, or an individual. Yet, in universal jurisdiction cases, the complaints mainly concern suspects who can be identified, and are present or residing on French territory.[131]

One so-called "structural investigation" regarding Syria was opened in September 2015 following the transmission of a report on abuses in detention facilities to the French judiciary by the French Minister of Foreign Affairs. Such structural investigations refer to a situation where the suspects are initially not identified. French jurisdiction in this case was based on the potential residency in France of some perpetrators that could seek asylum in France, or the potential French nationality of some of them, or the potential double nationality of victims. [132] This structural investigation is led jointly with Germany since 2018.[133]

When the prosecutor determines that a criminal offense may have been committed, he or she can initiate a public prosecution by opening an

[126] Interview with a French NGO on 26 October 2018.

[127] Interview with a member of the OCLCH on 28 October 2018.

[128] Article 40 CCP.

[129] Articles 52 and 628-1 CCP.

[130] Article 15-3 CCP.

[131] Interview with a member of the OCLCH on 28 October 2018.

[132] Interview with a member of the OCLCH on 28 October 2018.

[133] Interview with a member of the OCLCH on 28 October 2018.

investigation. The prosecutor can also decide to discontinue the case.[134] In any case, he or she must inform the victim of his or her decision.[135]

In practice, complaints are often closed by the prosecutor on grounds such as immunity or lack of evidence of the suspect's presence on French territory.[136]

Any person who has reported an offense to the district prosecutor may lodge an appeal with the prosecutor general if, following his or her report, a decision is made to close the case without taking further action. The prosecutor general may instruct the district prosecutor to initiate a prosecution. If the prosecutor general feels that the appeal has no grounds, he or she can inform the relevant parties.[137] The decision of the prosecutor general is definitive and cannot be appealed.

In practice, appeals to the prosecutor general are not considered an effective recourse by NGOs or victims. None of the interviewees were able to provide examples of a successful recourse to the prosecutor general.[138]

(b) Civil party petition to the investigating judge (*Plainte avec constitution de partie civile*)

Any victim, i.e. person claiming to have suffered harm from a crime, may petition to become a civil party by filing a petition with the competent investigating judge.[139] This also applies to certain NGOs (see above Standing to File Complaints and Civil Party Petitions).

The investigating judge requested by a civil party has the duty to investigate.[140] The investigating judge may decide not to investigate,[141] but the conditions for him or her to render an order not to investigate (*ordonnance de refus d'informer*) are very strict: the facts must not give rise to a criminal act[142] or the public action itself is extinguished (due to statute of limitations or a case where the prosecutor has a discretionary power to exercise the public action,[143] etc.).[144]

In principle, the potential immunity of a suspect cannot justify an order not to investigate.[145] The opening of an investigation against *Mohammed Ben Salmane*

[134] Article 40-1 CCP.

[135] Article 40-2 CCP.

[136] Interview with a French lawyer on 29 October 2018 and a French NGO on 26 October 2018.

[137] Article 40-3 CCP.

[138] Interview with a French lawyer on 29 October 2018 and a French NGO on 26 October 2018.

[139] Article 85 CCP.

[140] Cour de Cassation, Chambre criminelle, 21 February 1968, n° 67-92180; Cour de Cassation, Chambre criminelle, 21 September 1999, n° 98-85051. See also Cour de Cassation, Chambre criminelle, 16 November 1999, n° 98-84800.

[141] Article 86 CCP.

[142] See, for example, Cour de Cassation, Chambre criminelle, 13 June 2018, n°17-83885.

[143] Cour de Cassation, Chambre criminelle, 26 October 2010, n° 10-81342.

[144] Article 86 CCP. See also Cour de Cassation, Chambre criminelle, 21 February 1968, n°67-92180.

[145] Cour de Cassation, Chambre criminelle, 17 June 2014, n°13-80158.

is a recent illustration of this principle, but in many other cases, immunity has been raised as an obstacle to start an investigation.[146]

An order not to investigate is challengeable by the victim before the Investigating Chamber of the Court of Appeals (*Chambre de l'instruction de la Cour d'appel*).

A civil party petition may be filed at any time during the judicial investigation: it can trigger the investigation, but it can also join an ongoing investigation.[147] A civil party petition may be challenged by the district prosecutor or by a party. In the event a civil party petition is declared inadmissible, the victim may appeal to the investigating chamber.[148]

When the civil party petition has been received by an investigating judge, the latter will set the amount of the deposit (*consignation*) that should be paid by the civil party, if he or she does not obtain legal aid. This deposit should be paid at the registry within the time frame set by the judge, otherwise the complaint will be inadmissible. The investigating judge may exempt the civil party from the deposit.[149]

The investigating judge immediately refers the case to the OCLCH or any other competent investigating team, after launching the investigation, in particular to find evidence of the presence of the suspect on French territory.[150]

Competent authorities

Victims may choose whether to file their complaints with the Paris prosecutor (*plainte simple*) or an investigating judge (*plainte avec constitution de partie civile*), or to request the prosecutor/ investigating judge who has local jurisdiction, based on: 1) the place where the offense was committed; 2) the residence of one of the persons suspected to have taken part in the commission of the offense; 3) the place where one of these persons was arrested, even where this arrest was made on other grounds; or 4) where any of the said persons is detained, even where this detention was for another reason.[151]

Pursuant to Article 628-1 CCP, for the investigation, prosecution, and judgment of crimes against humanity and war crimes, the public prosecutor, the investigating judges and the Criminal Court of Paris exercise concurrent jurisdiction with the traditional prosecutors.

[146] Interview with a French NGO on 26 October 2018.

[147] Article 87 CCP.

[148] Article 87 CCP.

[149] Article 88 CCP.

[150] Interview a member of the OCLCH on 28 October 2018.

[151] Articles 43, 52 and 628-1 CCP.

In practice, universal jurisdiction will be dealt with by the War Crime Unit, while other extraterritorial cases of active or passive personality will be dealt with by traditional prosecutors.

1.2. Time limits for investigations

The district prosecutor, who orders the investigation, fixes a time limit. This limit can be extended depending on the evolution of the investigation.[152]

In cases where the judicial police carry out inquiries at their own initiative, they must submit a progress report to the district prosecutor within six months.[153]

Where the investigating judges initiates investigations, the investigation must be completed within a reasonable time, considering the seriousness of the charges brought against the accused, the complexity of the case, and the exercise of the rights of the defense, especially when the suspect is in custody.[154]

The European Court of Human Rights (ECtHR) ruled against France several times for breaching the "reasonable length of time" requirement.[155] In the *Mutimara v. France* case,[156] involving the accused *Wenceslas Munyeshyaka* who was charged with genocide, the ECtHR recalled that the "reasonable length of time" should be determined in relation to the complexity of a case, the behavior of the accused, and the diligence of the national authorities. In this case, the investigation was opened in August 1995 and in 2004, the ECtHR held that France had violated Article 6 of the European Convention of Human Rights, the investigation being still ongoing at the time, after nine years.

More recently, in 8 February 2018,[157] in its decision in the *Goetschy v. France* case, [158] the ECtHR did not merely check the "chronological appearance" of the proceedings, but also carefully examined the materiality and the merits of the acts then carried out. The accomplishment of very simple acts, such as ordering rogatory commission to search for addresses or responding to the accused's

[152] Article 75-1, para. 1 CCP.

[153] Article 75-1 CCP.

[154] Article 6 of the European Convention of Human Rights (ECHR) and Preliminary article, III, para 5 CCP: "*Il doit être définitivement statué sur l'accusation dont cette personne fait l'objet dans un délai raisonnable*" ("It must be definitively ruled on the charges against an accused in a reasonable time", unofficial translation). See also Article 175-2, para 1. CCP.

[155] See ECtHR, 27 November 1991, *Kemmache v. France*, n[os] 12325/86 and 14992/89, 60; 31 March 1992, *X v. France*, n°18020/91, §32; 25 March 1999, *Pélissier et Sassi v. France*, n° 25444/94, §67. See also *Mutimara v. France*, 8 June 2004, n° 46621/99, §69.

[156] ECtHR, 8 June 2004, *Mutimara v. France,* n° 46621/99.

[157] ECtHR, 8 February 2018, *Goetschy v. France*, n° 63323/12.

[158] ECtHR, 8 February 2018, *Goetschy v. France*, n° 63323/12.

request for closing the investigation, could not justify five years of investigation.[159]

1.3. Completion of investigations

1.3.1. Complaint to the public prosecutor

When the investigation is led by the prosecutor (*enquête préliminaire*), once he or she has identified the suspect and gathered enough evidence, he or she will refer the case to the investigating judge. The investigating judge takes over and can issue the same orders as if he or she received a civil party petition directly.

The prosecutor can also issue a dismissal decision that can be challenged by the supervising prosecutor (prosecutor general).

1.3.2. Civil party petition to investigating judge

At the end of the investigation, the investigating judge can order the indictment of the accused.[160] The investigating judge can indict any person against whom there is strong and concordant evidence making it probable that they participated, as perpetrator or accomplice, in the commission of the offences under investigation.

The investigating judge can issue any of the closing orders:

- An order not to investigate (*ordonnance de refus d'informer*).
- A dismissal order (*ordonnance de non-lieu*). [161] After having investigated the facts, when the judge considers that they do not constitute an offense, if the perpetrator has remained unidentified, or if there are insufficient charges against the person under judicial investigation, the investigating judge will issue a dismissal order.
- Referral order (*ordonnance de mise en accusation*). When the charges against the person indicted constitute a crime, the investigating judge orders their referral to the criminal court.[162]

The person under judicial investigation and the civil parties are notified of all orders issued by the investigating judge. A victim who has filed a complaint but not petitioned to become a civil party may also be informed of a referral order.[163]

When the investigating judge issues a dismissal order, the prosecutor, an accused, and a civil party can challenge it.

[159] ECtHR, 8 February 2018, *Goetschy v. France*, n° 63323/12, §34.

[160] Article 80-1 CCP.

[161] Article 177, para 1. CCP.

[162] Article 181, para 1.CCP.

[163] Article 183, para 1. CCP.

An accused has the right to appeal an indictment (and other judicial orders and decisions).[164] A civil party has the right to appeal orders affecting his or her civil claims.[165]

However, in no case may a civil party appeal against an order made in respect of the detention of the person under judicial examination or in respect of judicial supervision.[166]

The district prosecutor and the prosecutor general may lodge an appeal against any order made by the investigating judge, including indictments and dismissals.[167]

1.4. Arrest warrant

An arrest warrant is an order issued by an investigating judge to the police/gendarmerie to find and to arrest a suspect. It can be issued against any person in respect of whom there exists serious or corroborated evidence making it likely that he participated, either as principle or accomplice, in the commission of an offence.[168] After being arrested, the suspect must be presented to the investigating judge in the next 24 hours for the judge to decide on his detention.[169]

The investigating judge can also issue an international arrest warrant against any suspect of crimes, after having sought the prosecutor's opinion, if the crimes carries a prison sentence:

- When the suspect has left French territory; or
- If the suspect resides outside French territory.[170]

It is not necessary for the suspect to be indicted for the judge to issue an arrest warrant.

Victims or civil parties cannot request either an arrest warrant or an indictment, as these are not considered as acts necessary for the manifestation of the truth. The Supreme Court considers an arrest warrant as an act aiming to ensure the presence of the person against whom it is issued.[171]

1.5. Victim rights and participation at investigation stage

During investigations by the prosecutor, victims have

[164] Article 186, para 1. CCP.

[165] Article 186, para 2. CCP.

[166] Article 186, para. 2 CCP.

[167] Article 185 CCP.

[168] Article 122 CCP.

[169] Article 133, paras. 1 and 2 CCP.

[170] Article 131 CCP.

[171] Cour de cassation, Chambre criminelle, 19 January 2010, n° 09-84818.

- The right to be informed of their rights;[172]
- The right to apply for reparation, by financial compensation or by any other means;[173]
- The right to become a civil party;[174]
- The right to be assisted by a lawyer;[175]
- The right to be supported by a NGO;[176]
- The right to be informed of the protective measures possible;[177]
- The right to have a translator;[178]
- The right to be informed by the prosecutor of his or her decision to investigate or to close the case;[179] and
- The right to challenge a dismissal decision.

During investigations by the investigating judge, victims have

- The right to be informed that an investigation has been opened and that he or she is entitled to petition for civil party status (and, as such, to be part of the proceeding) and to be represented by a lawyer.[180]
- The right to become a civil party[181].

In addition to those rights, civil parties, both individuals and NGOs (see above Standing to File Complaints and Civil Party Petitions), have

- The right to be informed of the development of the investigation every six months.[182] Moreover, the investigating judge must inform the civil party of his or her right to request judicial acts.[183]
- The right to be represented by a lawyer.[184] Depending on the civil party's income, he or she can benefit from legal aid from the State.
- The right to request the dismissal of the investigating judge for a legitimate cause (suspicion of partiality for example).[185]
- The right to have access to the investigation files: the civil party and his or her lawyer have access to the file of the procedure.[186]

[172] Article 10-2 CCP.

[173] Article 10-2, para. 1 CCP.

[174] Article 10-2, para.2 CCP.

[175] Article 10-2, para. 3 CCP.

[176] Article 10-2, para. 4 CCP.

[177] Article 10-2, para. 6 CCP.

[178] Article 10-2, para. 7 CCP.

[179] Article 40 CCP.

[180] Article 80-3, paras. 1 and 2 CCP.

[181] Articles 85, 88, 89 CCP.

[182] Article 90-1, para. 1 CCP.

[183] Article 89-1, paras. 1 and 2 CCP.

[184] Article 114, paras. 1 and 2 CCP.

[185] Article 662, paras. 1 and 2 CCP.

[186] Article 197, para. 3 CCP.

- The right to request investigative acts by the judge: civil parties can ask the judge to conduct all acts that could be **necessary to the manifestation of the truth** (audition, confrontation, etc.).[187] They can ask for expert evidence,[188] including a medical or psychological examination.[189]
- Civil parties do not have the right to request the indictment of the accused (*mise en examen*), as the Supreme Court considers that this is not an act necessary for the manifestation of the truth.[190]
- By the same logic, civil parties cannot request an arrest.[191]
- The right to be heard by the judge.[192] In practice, NGOs that obtained the status of civil party are not heard systematically by the judge.[193] Yet, the practice of the War Crime Unit seems to have evolved more recently as some NGOs have started to be heard by the investigating judge.[194]
- The right to ask questions and make observations during hearings / confrontations[195] organized by the investigating judge.
- The right to request investigative acts from the investigating judge in order to establish any possible harm and to determine its nature and importance.[196]
- The right to request the investigating judge to issue a settlement order (*ordonnance de règlement*), referring the accused to the criminal court, or a dismissal order.[197]
- The right to file legal submissions, for example, on statute of limitations, before the investigating judge,[198] or a motion for annulment before the investigating chamber.[199]
- The right to challenge an order (see above Completion of Investigations).

2. Trial Stage

[187] Article 82-1 CCP.

[188] Article 156 CCP.

[189] Article 81, para. 9 CCP.

[190] Cour de cassation, Chambre criminelle 15 February 2011, n° 10-87.468.

[191] Cour de cassation, Chambre criminelle, mardi 19 January 2010, n° 09-84818.

[192] Articles 82-1, 89-1 and 90-1 para 4 CCP.

[193] Interview with a French NGO on 26 October 2018.

[194] Interview with a French NGO on 26 October 2018.

[195] Article 120 CCP.

[196] Article 81-1 CCP.

[197] Article 175-1 CCP.

[198] Article 82-3 CCP.

[199] Article 173 CCP.

If the investigating judge following investigations triggered by a civil party petition or a referral by the prosecutor decides to refer the case to the competent Criminal Court by way of indictment, the case will go to trial.

2.1. Competent authorities

Since international crimes fall under the category of felonies (*crimes*), they are tried in criminal courts (*Cour d'Assises*). The court is composed of three judges and a jury of six citizens randomly selected from the electoral register.

2.2. Appeal

The accused and the Office of the Public Prosecutor have the right to appeal any judicial decision.[200] A civil party can also appeal, but only as regards the reparation awarded, for example when the damages granted are lower than requested (see below on Reparation). The appeal must be lodged within ten days of the pronouncement of the judgment.[201] However, the appeals process is not available to persons tried by default, as, upon their arrest, they will have the right to request a new first instance trial before the Criminal Court.[202]

The appeals hearing will be heard by a jury of twelve citizens selected randomly.[203] Where the accused or a civil party are the only appellants, the Criminal Court of Appeal may not impose a more severe sentence.[204]

The parties can then appeal to the Criminal Chamber of the Supreme Court (*Cour de cassation*).

2.3. Victim rights and participation at the trial stage

During trial stage, victims have the right to become a civil party and to apply for reparation in the form of monetary damages against the convicted perpetrator, at any time during the trial until the closing of the debates. Civil parties who are already part of the procedure since the investigation stage do not have to apply again for civil party status at trial. At this stage, the standard to become a civil party is higher than during the investigation stage. The victim must be able to demonstrate that he or she suffered personal damages directly caused by the offense.[205]

Once victims are accepted as civil parties, they have

- The right to be represented by a lawyer.

[200] Article 380-2 CCP.

[201] Articles 380-9 and 380-10 CCP.

[202] Article 379-5 CCP.

[203] Articles 380-1, 380-14 and 296 CCP.

[204] Article 380-3 CCP.

[205] Cour de Cassation, Chambre criminelle, 12 September 2000, n° 00-80587.

- The right to a closed hearing when the trial concerns the crime of torture committed with sexual violence.[206]
- The right to call witnesses and experts.[207]
- The right to question witnesses.[208]
- The right to have an interpreter if the civil party does not understand French.[209]
- The right to request the recusal of the judge based on a legitimate suspicion.[210]
- The right to file legal briefs.[211]
- The right to have a free copy of all procedural files.[212]
- The right to be heard by the Court.[213] The civil party is not a witness, and does not testify under oath.[214]
- The right to reparation.[215]
- The right to appeal the judgment.

The same applies to NGOs who obtain civil party status (see above on Standing to File Complaints and Civil party Petitions).

Rules of evidence

Criminal offenses can be proven by any form of evidence.[216] There are no applicable rules of admissibility or requirements regarding evidentiary chain of custody.

1. At investigation stage

[206] Article 306 para. 3 CCP.

[207] Articles 281, 329 and 330 CCP.

[208] Articles 312 and 332 CCP.

[209] Article 344 CCP.

[210] Article 662 CCP.

[211] Article 315 CCP.

[212] Article 279 CCP.

[213] Article 346 CCP.

[214] Article 335 CCP.

[215] Articles 2 and 3 CCP.

[216] Article 427 CCP.

Investigations are considered confidential.[217] Lawyers are bound by this rule.[218] Yet the accused, victims, and civil parties are not bound by confidentiality and can freely communicate regarding the investigation.[219]

1.1. Necessary information for a complaint

1.1.1. Complaint to the public prosecutor

When filing a criminal complaint to the public prosecutor, the only requirement is to bring to his or her attention facts that constitute one or more offenses.[220] When the prosecutor is of the view that the facts that were brought to his or her attention in a complaint or a denunciation constitute an offense, he or she has the discretion to decide whether to commence an investigation.

There are no particular requirements for the form or type of evidence, it can include written testimonies or physical evidence. The prosecutor works with all evidence he or she can obtain.[221] It can be a complaint, or a simple denunciation by a third party. The standard of proof to open an investigation is very low.

When NGOs file complaints, they generally rely on testimonies and reports from various sources, including the United Nations and other organizations. In particular, when the complaint concerns a context where the OCLCH and the War Crime Unit will not be able to investigate in the field, such as in Syria, NGOs can be an important source for finding evidence.[222]

1.1.2. Complaint to the investigating judge

The Supreme Court's jurisprudence has established that the mere plausibility of facts alleged in a complaint is enough to allow a victim to petition to be a civil party before the investigating judge and to seek the opening of an investigation.[223]

When it comes to evidence, the complaint before the investigating judge must be justified and motivated, otherwise the civil party can heard and/or asked to produce more evidence.[224]

---

[217] Article 11 CCP.

[218] *Décret n°2005-790 du 12 juillet 2005 relatif aux règles de déontologie de la profession d'avocat* (Decree n°2005-790 of 12 July 2005 on the code of ethics of lawyer, unofficial translation), Articles 4 and 5.

[219] Cour de cassation, Chambre criminelle, 9 October 1978, n° 76-92075.

[220] Article 40-1 CCP.

[221] Interview with a member of the OCLCH on 28 October 2018 and with a prosecutor from the WCU on 6 November 2018.

[222] Interview with a French NGO on 26 October 2018.

[223] Cour de Cassation, Chambre criminelle, 16 February 1999, n° 98-80537; Cour de cassation, Chambre criminelle, 16 June 1998, n° 97-82171.

[224] Article 86 CCP.

In practice, lawyers and NGOs submit details of the facts and a legal analysis.[225] They will only file a complaint with the investigating judge when they have a strong case.[226]

1.2. Necessary evidence to open an investigation

There is no formal requirement for specific forms of evidence to open an investigation. Once a complaint is filed with the prosecutor or the investigating judge, the first investigative act will be to demonstrate the presence or residence of the suspect in French territory (see above Universal Jurisdiction Requirements). Any proof can be used to demonstrate this criterion: witness or victim testimonies, press articles, plane tickets, hotel listings, recordings of a phone call to a hotel confirming the suspect has a room, social media pictures or videos, confirmation from a hospital, etc.[227]

1.2.1. Investigation by the prosecutor

In practice there is no minimum threshold to open an investigation. A mere suspicion based on anonymous information can be enough.[228]

Witnesses will have to be heard directly by the investigators and their testimony must be officially recorded (*Procès verbal*). As the principle of free evaluation of the evidence applies, any and every piece of evidence can be admitted to open an investigation. Facebook and other social media evidence, for example, can be used as evidence, and can be used as a way to identify a suspect by a facial recognition mechanism.[229]

1.2.2. Investigation by the investigating judge

No particular evidence must be introduced in the civil party petition. In practice, victims / NGOs present the facts in detail and submit legal arguments.[230] If that is not the case, the investigating judge can ask to hear the civil party or can ask him or her to produce materials supporting the allegations.[231] The investigating judge must investigate any complaint that has been sent to him or her.[232] Upon request by any party, the investigating chamber may review the decision of the investigating judge to make sure he or she investigated the complaint before issuing a dismissal order.

1.3. Necessary evidence for an indictment

[225] Interview with a French NGO on 26 October 2018 and a French lawyer on 29 October 2018.

[226] Interview a French NGO on 26 October 2018.

[227] Interview with a member of the OCLCH on 28 October 2018, a French NGO on 26 October 2018 and a French lawyer on 29 October 2018.

[228] Interview with of a member of the OCLCH on 28 October 2018.

[229] Interview with a prosecutor from the WCU on 6 November 2018.

[230] Interview with a French lawyer on 29 October 2018 and a French NGO on 26 October 2018.

[231] Article 86 CCP.

[232] Cour de cassation, Chambre criminelle, 16 November 1999, n° 98-84800; Cour de cassation, Chambre criminelle, 19 March 2013, n° 12-81676; Interview with an investigating judge from the WCU on 15 November 2018.

To indict a suspect, the investigating judge (after his or her own investigations or after referral by the prosecutor) must have significant and consistent evidence (*indices graves et concordants*) that makes it likely that the suspect has participated as an author or accomplice in the commission of the offense(s).[233]

The significant and consistent evidence requirement must not be understood as complete proof of the alleged offense. Rather, it refers to evidence that proves that the suspect may have committed, or participated in the crime. The objective of the investigation is to verify if that significant and concordant evidence can become charges leading to an indictment and referral to the Criminal Court, which will consider the weight of this evidence.[234]

1.4. Admissibility of evidence

1.4.1. General rules of admissibility

The CCP consecrates the principle of freedom of proof.[235] The only condition is for the judge / jury to base the decision on evidence that has been presented in court and discussed by the parties.[236]

This freedom of proof corresponds to the principle of free evaluation of evidence. All evidence will be considered by the judges (investigating judges, trial judges and the jury) under the principle of the "intimate conviction" (see below General Rules of Admissibility at Trial Stage).

As a consequence, any type of evidence can be admissible, including photos or videos from journalists, from social media or smartphones, or from wiretapping. The OCLCH also works with some applications developed for smartphones, aimed at reporting international crimes, such as rape. To avoid any risks of being manipulated, investigators will make sure they gather enough corroborating material confirming social media evidence.[237]

1.4.2. Unlawfully obtained materials

The general principle of freedom of evidence is applied differently depending on who brings the evidence.

Police / prosecutor / investigating judge

[233] Article 80-1 CCP.

[234] Chambre d'instruction de la Cour d'appel de Paris, 18 December 2017.

[235] Article 427 CCP.

[236] Cour de cassation, Chambre criminelle, 20 May 1992, n° 91-84297; Article 427 CPP.

[237] Interview with a member of the OCLCH on 28 October 2018.

The investigating judge may order any investigation that he or she deems useful for the manifestation of the truth.[238] Yet the Supreme Court has limited the scope of such investigation: it must not affect the rights of the suspect or charged person.[239] It is prohibited for an investigating judge to try to obtain evidence through "artifice or ploy having vitiated the investigation and the establishment of the truth."[240] Yet, the Supreme Court has admitted evidence resulting from undercover missions, as long as the agents did not encourage the commission of crimes.[241]

Civil Party / defense

The Supreme Court has stated that there is no legal provision allowing criminal judges to exclude evidence produced by the civil parties or defense simply based on the fact that it was obtained unlawfully or unfairly, and ECtHR jurisprudence does not regulate the admissibility of evidence, which falls under the responsibility of each Member State. The Supreme Court considers that the judges must, however, assess the probative value of this tainted evidence.[242]

According to the Supreme Court, a party may produce a document obtained in an unfair or unlawful manner, as long as the adversarial principle is respected. For example, the Supreme Court has admitted the wiretapping of private conversations, even of a lawyer and his or her client.[243] The Supreme Court has also accepted the "testing method" used by an NGO fighting against discrimination, intended to establish discriminatory practices at the entrance of discotheques.[244]

2. At trial stage

2.1. General rules of admissibility

There is no formal rule concerning the admissibility of evidence. Article 427 of the CCP provides the principle of freedom of evidence. The only exception is evidence obtained under torture, which is excluded, pursuant to Article 3 of the European Convention on Human Rights.

The conviction of the accused must be based upon the "intimate conviction" of the judges and the jury, defined as follows: "the law does not require that each

[238] Article 81 CCP.

[239] Cour de casssation, Chambre criminelle, 12 December 2000, n°00-83852.

[240] Cour de casssation, Chambre criminelle, 17 December 2002, n°02-83679.

[241] Cour de casssation, Chambre criminelle, 30 October 2006, n°06-86175 and n°06-86176.

[242] Cour de casssation, Chambre criminelle, 7 March 2012, n°11-88118.

[243] Cour de casssation, Chambre criminelle, 31 January 2012, n°11-85464.

[244] Cour de casssation, Chambre criminelle, 11 June 2002, n°01-85559: Several members of the association "SOS Racisme" organized an operation called "testing". They were divided into different groups, one of which was constituted by a woman and men of North African origin and the others by a woman and a man of European origin to determine if the discotheque was discriminating against North African men.

of the judges and juries in the Criminal Court explain the means by which they have convinced themselves, it does not prescribe rules on how they should assess the plenitude and sufficiency of a proof; it requires them to question themselves in silence and meditation and to seek, in the sincerity of their conscience, what impression have been made on their reason, the evidence brought against the accused, and the means of his defense. The law only asks them this question, which contains all the measure of their duties: 'Do you have an intimate conviction?'"[245]

A conviction cannot be based solely on one of these elements:

- a statement made by the accused without being able to speak to and be assisted by a lawyer;[246]
- a statement from an anonymous witness;[247]
- a statement from a secret service agent, as they must testify anonymously;[248]
- a statement made by officers or judicial police officers who carried out an undercover operation, unless they testify under their true identity;[249] or
- for acts of torture, elements of the geolocation of the accused, when the identity of the agent who has done the geolocation is not revealed for security reasons.[250]

2.2. Introduction of new evidence

The President of the Criminal Court has discretion to determine what action he or she must take to uncover the truth. He or she may in the course of the proceedings summon and hear new witnesses or admit any new evidence which appears useful.[251]

The only requirement for new evidence to be admitted at trial is that the adversarial principle is respected, which means that the accused must have the chance to challenge the new evidence.

3. Open source materials

There is no formal rule of admissibility of evidence for open source materials; the principle of freedom of evidence provides that any evidence may be admitted. Any evidence can be introduced during the proceeding, as long as the accused is able to discuss and challenge it.

---

[245] Article 353 CCP (unofficial translation).

[246] *Article Préliminaire* (Preliminary Article) CCP, last para.

[247] Article 706-62 CCP.

[248] Article 656-1 CCP.

[249] Article 706-87 CCP.

[250] Articles 230-40 and 230-42 CCP.

[251] Article 310 CCP.

Social media is widely used by the police for their investigations. Indeed, they can use Facebook to locate suspects or to prove a suspect's presence on French territory.[252] Social media can also be used as evidence of a crime. Judicial warrants can be issued to different service providers to retrieve photos or videos. The authenticity of this evidence will be analyzed by the Criminal Investigation Institute of the National Gendarmerie (*Institut de Recherches Criminelles de la gendarmerie nationale, IRCGN*).[253]

Lawyers and NGOs may also use Facebook to prove the presence of a suspect in France, by following his or her profile, the profiles of relatives living in France, or a community group on Facebook.[254] There has not yet been any universal jurisdiction case where social media has been introduced as evidence at trial. Indeed, the recent case law on universal jurisdiction concerns Rwandan cases, and is based mainly on testimonies and documentary evidence.

Nevertheless, in other criminal cases, the Supreme Court has accepted social media evidence, such as comments on a Facebook page,[255] or the publication of pictures.[256]

Witness and victim protection

Witnesses and victims can resort to a number of measures to protect their identity. Witnesses and victims can use the address of a police station or gendarmerie as their registered address, with their personal addresses recorded in a confidential register.[257] Victims can also use the address of a third party (e.g., NGO or lawyer).[258]

Upon request by a district prosecutor or a judge, witnesses or victims may testify anonymously (*sous x*) in universal jurisdiction cases if their testimonies might seriously endanger their own lives or physical safety or that of a family member or other close relative.[259] A witness or victim or his or her family can also be allowed to use an assumed identity.[260] The accused may challenge the protection of a victim's or witness's identity.[261]

[252] Interview with a member of the OCLCH on 28 October 2018.

[253] Interview with a member of the OCLCH on 28 October 2018.

[254] Interview with a French NGO on 26 October 2018 and a French lawyer on 29 October 2018.

[255] Cour de casssation, Chambre criminelle, 23 May 2018, n° 17-82896.

[256] Cour de casssation, Chambre criminelle, 27 June 2018, n° 17-84889.

[257] Article 706-57 CCP.

[258] Article 89 CCP.

[259] Article 706-58 CCP.

[260] Article 706-62-2 CCP.

[261] Article 706-60 CCP.

The identity of a witness or victim will not be withheld if, taking into account the circumstances in which the offense was committed or the personality of the witness, knowledge of the witness's identity is essential to the defense case.[262]

Upon request, the identity of a witness may also be protected during the trial.[263]

The conviction of an accused cannot be based only on the testimony of a protected witness or victim.[264]

Reparation for victims in criminal proceedings

Civil parties (see above Civil Party Petition) may apply for reparation against the convicted perpetrator for the harm suffered, in the form of financial compensation or any other appropriate means, including, when appropriate, restorative justice measures.[265] Since March 2017, victims and accused can communicate in order to discuss the consequences of a crime.[266]

Any claim for monetary damages made by a civil party against an accused will be adjudicated by the three judges of the criminal court after the court has made a decision on the criminal action. A jury is not involved in this determination.[267] The court determines the sum to be paid to the victim(s), taking into account considerations of equity and the financial situation of the convicted party.[268]

In cases where the criminal action resulted in acquittal or exemption from penalty, the civil party may still apply for compensation for the damage caused by the accused insofar as it derives from the matters of which he or she was accused.[269] The criminal court may order the accused to pay financial compensation when civil responsibility can be established and the damages resulted from the acts which were the subject of the accusation.[270]

---

[262] Article 706-60 CCP.

[263] Article 706-62-1 CCP.

[264] Article 706-62 CCP.

[265] Article 10-2 CCP.

[266] *Circulaire du 15 mars 2017 relative à la mise en œuvre de la justice restaurative applicable immédiatement suite aux articles 10-1, 10-2 (et 707 du code de procédure pénale, issus des articles 18 et 24 de la loi n° 2014-896 du 15 août 2014, Annexe I, Exemples de mesures de justice restaurative* (Directive of 15 March 2017 related to the enforcement of restaurative justice immediatley applicable following Articles 10-1, 10-2 and 707 of the code of criminal procedure, created by Articles 18 and 24 of the law n°2014-896 of 15 August 2014, Annex I, examples of restaurative justice measures, unofficial translation).

[267] Article 371 CCP.

[268] Article 375 CCP.

[269] Article 372 CCP.

[270] Cour de cassation, Chambre criminelle, 2 December 2009, n° 08-87229.

Immunities

The FCC does not include a specific article on diplomatic immunities. French courts follow the rules set out by the Vienna Conventions of 18 April 1961 and 24 April 1963 and by international customary law.

The Supreme Court applies different standards depending on the status of the suspect. For example, in the case of a Vice-Consul, the Supreme Court considered that he could not benefit from immunity for acts of torture. The accused was convicted and sentenced in a trial by default to 12 years of prison.[271]

In the *Rumsfeld* case, the prosecutor (confirmed on appeal by the prosecutor general) decided to dismiss the case due to the diplomatic immunity of the suspect. The prosecutor referred to the argument made by the Ministry of Foreign Affairs that "the immunity from criminal jurisdiction of Heads of State, Heads of Government and Ministers of Foreign Affairs remains after the end of their mandate, for the acts committed in their official capacity, and as former Minister of Defense, Mr. Rumsfeld should benefit, by extension, from the same immunity, for the acts committed in his official capacity."[272]

Yet, more recently, the Supreme Court recognized that a *jus cogens* rule (in this case, the prohibition of terrorist acts) shall prevail over any other international rules and can constitute a legitimate restriction to immunities.[273] The Supreme Court added that immunity is relative and not absolute. Yet, this principle has not been applied to acts of torture, war crimes, crimes against humanity, genocide, or enforced disappearance.

In practice, the OCLCH, the prosecutor, or the investigating judge would seize the Protocol Service of the Ministry of Foreign Affairs to request an opinion on the suspect's status. This is not a legal requirement and, as a consequence, the opinion given by the Ministry of Foreign Affairs is not binding.[274] Yet, there is no example where the prosecutor has not followed this opinion.[275]

The Supreme Court has set out several principles:

- Immunities apply to Heads of State, Heads of Government or Ministers of Foreign Affairs.[276]

[271] Cour d'Assises de Nancy, 24 September 2010, n° 73/2010 (*Khaled Ben Saïd* case).

[272] Letter of the Prosecutor to the civil party, 16 November 2007 (unofficial translation).

[273] Cour de Cassation, première Chambre civile, 9 March 2011, n° 09-14743.

[274] Interview a member of the OCLCH on 28 October 2018.

[275] Interview with a prosecutor from the WCU on 6 November 2018.

[276] Cour de cassation, Chambre criminelle, 15 December 2015, n° 15-83156 (*Theodoro Obiang* case).

- Immunities also apply to ministries, organs, and entities that constitute an arm of the State, as well as their agents, for acts which fall within the sovereignty of the State.[277]
- Immunities can also apply to the Minister of Defense.[278]
- Immunities do not apply if the accused committed crimes for personal purposes, even if the crimes were committed while he or she held an official position. For example, the accused *Theodoro Obiang* was Minister of Agriculture at the time crimes were allegedly committed. He was accused of money laundering through the acquisition of real estate and movable assets in France. The Supreme Court considered that the offense was not connected to his official functions, and, as such, could not be protected by customary international law.[279]
- Immunity applies for the whole duration of an official's mandate and should remain at the end of the official's mandate only for acts performed in the exercise of the mandate.[280]
- Diplomatic immunity granted to public officials as per the 1961 Vienna Convention ceases at the end of the public official's mandate, and can only be extended for a reasonable time, allowing the person to leave the country.[281]

In any case, the investigating judge has a duty to investigate a complaint, even though immunity might be raised later on in the proceeding.[282] France is not party to the Convention on Special Missions of 8 December 1969. Yet, in 2014, in the *Prince Nasser Bin Ahmad Al Khalifa* case, a complaint was launched to the prosecutor as the suspect was visiting France **for personal reasons** (to attend a horse riding competition). The prosecutor decided not to open an investigation after the Protocol Service of the Ministry of Foreign Affairs advised the prosecutor that the Prince was granted special mission immunity. The Protocol Service of the Ministry of Foreign Affairs based its argument on the Convention on Special Missions, considering it was part of customary international law.[283]

The interpretation by the French authorities of what should be considered a special mission is unclear. In the *Ndengue* case in 2004, the French authorities granted immunity to the Director General of the National Police of Congo (Brazzaville) while he was travelling for medical reasons, without any official meetings.[284]

[277] Cour de cassation, Chambre criminelle, 19 January 2010, n° 09-84818.

[278] Cour de cassation, Chambre criminelle, 19 January 2010, n° 09-84818. See also, Cour de cassation, Chambre criminelle, 23 November 2004, n° 04-84265.

[279] Cour de cassation, Chambre criminelle, 15 December 2015, n° 15-83156.

[280] Cour de cassation, Chambre criminelle, 19 January 2010, n° 09-84818.

[281] Cour de cassation, Chambre criminelle, 12 April 2005, n° 03-83452.

[282] Cour de cassation, Chambre criminelle, 19 March 2013, n° 12-81676.

[283] Interview with a French NGO on 26 October 2018.

[284] S. Abba, *"Disparus du Beach" de Brazzaville : les familles suspendues à la poursuite de l'instruction française"*, Le Monde, 16 May 2016;

Amnesties

Consequences of amnesties are defined in Article 133-9 of the FCC. Article 6 of the CCP states that amnesties result in the dismissal of the judicial proceedings. [285] However, the Supreme Court has held that in universal jurisdiction cases an individual can be prosecuted before French courts even if a foreign law granted amnesty to this individual, a decision which was confirmed by the ECtHR.[286]

The Supreme Court has held that an accused can invoke his or her amnesty as late as a few days before the trial hearing starts.[287]

***

https://www.lemonde.fr/afrique/article/2016/05/17/disparus-du-beach-de-brazzaville-les-familles-suspendues-a-la-poursuite-de-l-instruction-francaise_4920787_3212.html.

[285] Article 133-9 FCC.

[286] Cour de cassation, Chambre criminelle, 23 October 2002, n° 02-85379 (*Ely Ould Dah* case).

[287] Cour de cassation, Chambre criminelle, 23 October 1997, n° 96-84717.

The **Open Society Justice Initiative**, part of the Open Society Foundations, uses strategic litigation and other kinds of legal advocacy to defend and promote the rule of law, and to advance human rights. We pursue accountability for international crimes, support criminal justice reforms, strengthen human rights institutions, combat discrimination and statelessness, challenge abuses related to national security and counterterrorism, defend civic space, foster freedom of information and expression, confront corruption and promote economic justice. In this work, we collaborate with a community of dedicated and skillful human rights advocates across the globe, and form part of a dynamic and progressive justice movement that reflects the diversity of the world.

TRIAL International is a non-governmental organization fighting impunity for international crimes and supporting victims in their quest for justice. TRIAL International takes an innovative approach to the law, paving the way to justice for survivors of unspeakable sufferings. The organization provides legal assistance, litigates cases, develops local capacity and pushes the human rights agenda forward. TRIAL International believes in a world where impunity for international crimes is no longer tolerated. Only when victims are heard and perpetrators held accountable can the rule of law prevail.