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The Legal Framework for Universal Jurisdiction in France

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The Legal Framework for Universal Jurisdiction in France

On August 9, 2010, the French Code of Criminal Procedure was amended to incorporate the Rome Statute and extend the jurisdiction of French courts to include genocide, crimes against humanity, and war crimes committed after that date.¹ The crimes are defined in line with the Rome Statute, although French law also criminalizes torture and enforced disappearance as distinct crimes and as constituent acts of war crimes and crimes against humanity.²

With the exception of war crimes, French courts only had jurisdiction over grave international crimes committed outside of France prior to that date where an international treaty obligated France to prosecute, such as the Convention against Torture.³ Two laws passed in 1995 and 1996 implemented United Nations Security Council Resolutions 827 and 955 establishing the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) and gave French courts jurisdiction over genocide, crimes against humanity, and war crimes committed in these two countries or by Rwandan citizens in neighboring countries.⁴

¹ Loi n° 2010-930 du 9 août 2010 portant adaptation du droit pénal à l'institution de la Cour pénale internationale ("ICC Implementing Legislation"), No. 2010-930, entered into force on August 11, 2010, http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=DA7956739FD101F26E23CD144B032676.tpdj002v_1?cidTexte=JORFTEXT000022681235 (accessed September 10, 2014).

² Code Pénal ("French Penal Code"), entered into force on March 1, 1994, arts. 211-1, 212-1, 222-1, and 461-1 to 461-31, <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070719> (accessed September 8, 2014), official English translation, 2005, http://www.legifrance.gouv.fr/content/download/1957/13715/version/4/file/Code_33.pdf (accessed September 8, 2014); Code de Procédure Pénale ("French Code of Criminal Procedure"), entered into force on March 2, 1959, arts. 689-2 and 689-13, <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006071154> (accessed September 9, 2014), official English translation, 2006, <http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations> (accessed September 9, 2014). Revised French Code of Criminal Procedure as of September 1, 2014, http://www.legifrance.gouv.fr/affichCode.do;jsessionid=DA7956739FD101F26E23CD144B032676.tpdj002v_1?cidTexte=LEGITEXT000006071154 (accessed September 9, 2014). One interesting distinction with the Rome Statute is that French law requires "a concerted plan" to prove criminal responsibility for genocide and crimes against humanity. French law also does not make a distinction between war crimes committed during an international armed conflict and a non-international armed conflict and instead divides war crimes into two categories: war crimes against individuals and war crimes related to the way in which hostilities have been conducted.

³ French Code of Criminal Procedure, arts. 689 and 689-2. French courts did not have jurisdiction over grave breaches of the Geneva Conventions or other war crimes despite the fact that the Geneva Conventions and Additional Protocols contain an express obligation to investigate and prosecute or, alternatively, to extradite the person to another jurisdiction to face justice. Other crimes over which France had a duty to prosecute under international treaties, which were included in the French Code of Criminal Procedure, included terrorism (arts. 689-3, 689-9, 689-10), piracy (art. 689-5), hijacking (arts. 689-6 and 689-7), corruption of European officials (art. 689-8) and offenses committed by means of nuclear materials (art. 689-4).

⁴ 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 ("ICTY Law"), No. 95-1 of 1995, entered into force on January 2, 1995, <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000532676&fastPos=1&fastReqId=1448169861&categorieI>

Jurisdictional Requirements

At the same time that the Criminal Procedure Code was amended, four conditions were introduced to restrict French courts' ability to exercise universal jurisdiction.⁵ The conditions vary depending on the crime, effectively creating two different legal frameworks: one that applies to cases involving torture, enforced disappearance, and crimes committed in the former Yugoslavia and Rwanda, and another for all other grave international crimes cases. The disparity is derived from France's legal obligations under international treaties, in particular the *aut dedere, aut judicare* principle which requires states to prosecute certain crimes such as torture and enforced disappearance where they do not extradite a person to another state for trial.⁶ Nonetheless they create an arbitrary distinction and should be eliminated so that all grave international crimes are subject to the same legal requirements.

Presence

For torture and crimes committed in the former Yugoslavia and Rwanda, courts have jurisdiction where the suspect is present in France at the time that a judicial investigation is opened.⁷ This allows judicial authorities to pursue a case even if the suspect flees the country after an investigation has been opened. *In absentia* trials are permitted under French law. In fact, the first two universal jurisdiction trials in France—that of former

en=cid&oldAction=rechTexte (accessed September 10, 2014). 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 droit international humanitaire commis en 1994 sur le territoire du Rwanda et, s'agissant des citoyens rwandais, sur le territoire d'Etats voisins ("ICTR Law"), No. 96-432 of 1996, entered into force on May 22, 1996, <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000742868&fastPos=1&fastReqId=1630566506&categorieIen=cid&oldAction=rechTexte> (accessed September 10, 2014).

⁵ French practitioners refer to these conditions as "*les quatre verrous*."

⁶ As noted above, French courts did not have jurisdiction over grave breaches of the Geneva Conventions or other war crimes despite the fact that the Geneva Conventions and Additional Protocols contain an express obligation to investigate and prosecute or, alternatively, to extradite the person to another jurisdiction to face justice.

⁷ French Code of Criminal Procedure, art. 689-1. The law is not entirely clear on when the accused's presence should be assessed by courts, leading to debate over whether presence should be required at the time a victim files a complaint with prosecutors or investigating judges or at the time a judicial investigation is actually opened by the prosecutor or investigating judge. France's highest court, the *Cour de Cassation*, ruled that presence is required at the start of the proceedings, which suggests that it is at the time a judicial investigation is opened by prosecutors or investigative judges. See *In the Appeal of Norbert X et al. (Disappeared of the Beach case)*, Supreme Court (Criminal Chamber), Case No. 07-86.412, Decision, April 9, 2008, <http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000018642947&fastReqId=1023500599&fastPos=1> (accessed September 15, 2014); *In the Appeal of the International Federation of Human Rights (FIDH) et al.*, Supreme Court (Criminal Chamber), Case No. 07-88.330, Decision, January 21, 2009, <http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000020181483&fastReqId=164315041&fastPos=1> (accessed September 15, 2014). See also Human Rights Watch interview with French official, June 3, 2014.

Mauritanian captain Ely Ould Dah in 2005 and former Tunisian diplomat Khaled Ben Saïd in 2010, both convicted of torture—took place in their absence after the accused had fled France.⁸

For all other grave international crimes, courts only have jurisdiction where the accused regularly resides in France.⁹ Trials may nonetheless occur even if the suspect leaves France after an investigation has been opened.

Subsidiarity

No subsidiarity requirement exists for torture and enforced disappearance, meaning that French courts do not need to decline jurisdiction and give priority to the courts of the country where the crimes occurred or international criminal tribunals. For crimes committed in the former Yugoslavia and Rwanda, French courts defer to the ICTY and ICTR which have primary jurisdiction.¹⁰ However, judicial authorities can exercise jurisdiction concurrently with other states, thereby enabling them to proceed with a case in the event that a trial does not ultimately occur elsewhere. If another state proceeds to try a person, French courts will relinquish jurisdiction.¹¹

For all other grave international crimes cases, there is a subsidiarity requirement.¹² This means that prosecutors must first verify whether any national or international court has asserted jurisdiction over a suspect or has requested the person's extradition before opening an investigation. Prosecutors must expressly ask the International Criminal Court (ICC) to decline jurisdiction over the case, which appears at odds with the principle of complementarity.¹³

⁸ For a history of the *Ely Ould Dah* case, see FIDH, "Mauritanie: Affaire Ely Ould Dah," November 2005, http://fidh.org/IMG/pdf/GAJ_Ely_Ould_Dah_nov2005_OK.pdf (accessed September 15, 2014). For a history of the *Ben Saïd* case, see FIDH and Ligue des Droits de l'Homme (LDH), "Condamnation de Khaled Ben Saïd: Une victoire contre l'impunité en Tunisie," November 2010, <http://fidh.org/IMG/pdf/Bensaid55ofr.pdf> (accessed September 15, 2014).

⁹ French Code of Criminal Procedure, art. 689-11.

¹⁰ ICTY Law, 1995, arts. 3-4; ICTR Law, 1996, art. 2. See also Statute of the International Criminal Tribunal for Rwanda (ICTR Statute), S.C. Res. 955, U.N. Doc. S/Res/955 (1994), as amended, art. 8, <http://www.unictr.org/Portals/0/English/Legal/Statute/2010.pdf> (accessed September 18, 2014); and Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY Statute), S.C. Res. 827, U.N. Doc. S/Res/827 (1993), as amended, art. 9, http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf (accessed September 18, 2014).

¹¹ This international legal principle is known as *non bis in idem*, or the prohibition against double jeopardy, and is enshrined in article 692 of the French Code of Criminal Procedure.

¹² French Code of Criminal Procedure, art. 689-11.

¹³ Practitioners refer to this as "reverse complementarity." A number of practitioners expressed concern over this requirement since the ICC is designed to complement rather than supersede national courts and to pursue judicial action only where national courts fail to act. Rome Statute, art. 1. Human Rights Watch interview with nongovernmental organization (NGO),

Double Criminality

French courts can exercise jurisdiction over torture, enforced disappearance and crimes committed in the former Yugoslavia and Rwanda even where the crimes were not punishable in those countries at the time they were committed. However, for all other grave international crimes, double criminality is required.¹⁴ The purpose of the double criminality requirement is to avoid prosecuting individuals for crimes that were not considered offenses in the place where they occurred at that time, but it should not be applicable to grave international crimes which are well established under international treaties and customary international law.

Using similar reasoning, France's highest court, the *Cour de Cassation*, has barred extraditing genocide suspects back to Rwanda for prosecution since Rwanda had not criminalized genocide and crimes against humanity in 1994, at the time of the genocide.¹⁵ This decision makes France an outlier to other European countries which are increasingly authorizing extradition of suspects to Rwanda to face trial.¹⁶ It also means that the more than two dozen Rwandan genocide suspects currently in France will have to be tried before French courts.

Civil Party Procedure

Under French law, criminal proceedings for serious offenses can normally be initiated by prosecutors or private parties. Victims and other affected parties, including nongovernmental organizations (NGOs),¹⁷ can file a criminal complaint directly with investigative judges rather than passing through prosecutors to ensure that a judicial investigation is opened.¹⁸ They may also file a complaint with prosecutors, but this leaves the decision of whether an investigation is opened in the hands of prosecutors.¹⁹

June 25, 2013; Human Rights Watch telephone interview with French lawyer, November 26, 2013; Human Rights Watch telephone interview with NGO, November 27, 2013.

¹⁴ French Code of Criminal Procedure, art. 689-11.

¹⁵ *Case of X*, Supreme Court (Criminal Chamber), Case No. 13-86.631, Decision, February 26, 2014, http://www.courdecassation.fr/jurisprudence_2/chambre_criminelle_578/808_26_28552.html (accessed September 15, 2014);

Case of X, Supreme Court (Criminal Chamber), Case No. 13-87.888, Decision, February 26, 2014, http://www.courdecassation.fr/jurisprudence_2/chambre_criminelle_578/810_26_28535.html (accessed September 15, 2014).

¹⁶ For more information on extradition of cases to Rwanda, see "Rwanda: Justice after Genocide – 20 Years On," Human Rights Watch news release, March 28, 2014, <http://www.hrw.org/node/124218>.

¹⁷ Articles 2-1 to 2-23 of the French Code of Criminal Procedure give associations the right to assist victims in exercising their rights to initiate criminal proceedings.

¹⁸ This procedure is known as the filing of a *plainte avec constitution de partie civile*. French Code of Criminal Procedure, art. 85.

¹⁹ This procedure is known as the filing of a *plainte simple*. French Code of Criminal Procedure, art. 40.

When contemplating implementation of the Rome Statute in 2010, French lawmakers and other government officials expressed concern that allowing civil party complaints in grave international crimes cases might result in the filing of frivolous, abusive, or ill-founded complaints and could create diplomatic tensions in sensitive cases.²⁰ They therefore removed victims' rights to file civil party complaints in cases of genocide, crimes against humanity, and war crimes and instead vested sole authority to initiate criminal proceedings with prosecutors.²¹ Complaints may still be filed directly with investigative judges for torture, enforced disappearance, and crimes related to the former Yugoslavia and Rwanda due to the *aut dedere, aut judicare* principle.²²

Lawyers and NGOs emphasize the importance of civil party complaints, arguing that they are a deeply enshrined tradition under French law and that they are necessary because prosecutors may be reluctant to bring charges where a suspect is a high-ranking official from another country.²³ In fact, victims and NGOs have been the main instigators of judicial action in France with respect to grave international crimes—all but three cases have originated through the filing of civil party complaints.²⁴ Of the three cases initiated by prosecutors, one was undertaken just days before they knew an NGO planned to file a complaint with the court.²⁵

Due to the limitations on the civil party procedure, lawyers and NGOs often assert claims for torture even where other charges such as war crimes may be available. This allows them to file the complaint directly with investigative judges and to force the opening of a

²⁰ Assemblée Nationale (“National Assembly”), “Rapport fait au nom de la commission des lois constitutionnelles, de la législation et de l’administration générale de la république, sur le projet de loi, adopté par le sénat (N° 951), portant adaption du droit pénal à l’institution de la Cour pénale internationale,” May 19, 2010, <http://www.assemblee-nationale.fr/13/rapports/r2517.asp> (accessed September 18, 2014).

²¹ French Code of Criminal Procedure, art. 689-11.

²² *Ibid.*, arts. 689-2 and 689-13; ICTY Law, art. 2; ICTR Law, art. 2.

²³ Human Rights Watch telephone interview with French lawyer, November 22, 2013; Human Rights Watch telephone interview with NGO, November 27, 2013; Human Rights Watch telephone interview with French lawyer, December 9, 2013; Human Rights Watch telephone interview with French lawyer, November 26, 2013.

²⁴ Human Rights Watch interview with French officials, May 13, 2014; Human Rights Watch interview with additional French officials, May 13, 2014; Human Rights Watch interview with French lawyer, May 14, 2014.

²⁵ This was the Pascal *Simbikangwa* case. Simbikangwa was arrested in Mayotte in October 2008 on charges of forgery of administrative documents. Rwanda requested his extradition on charges of genocide, but a court in Mayotte denied the request. After becoming aware of Simbikangwa’s presence in Mayotte, the Rwandan Collective of Civil Parties (CPCR) began preparing a criminal complaint and notified French authorities of its intent to file the complaint. Just days before the complaint was to be filed, prosecutors opened a criminal investigation. Human Rights Watch interview with French lawyer, May 14, 2014.

judicial investigation.²⁶ Nonetheless they sometimes file a complaint with prosecutors even where they could file directly with investigative judges, most often when they do not have adequate evidence to support their allegations or where they seek immediate action—like the arrest of an accused—since prosecutors can act more swiftly than investigative judges.²⁷

It seems paradoxical that the civil party procedure would be withheld from victims of genocide, crimes against humanity, and war crimes but afforded to victims of other serious crimes. It also seems at odds with the underlying rationale for allowing universal jurisdiction, namely enabling courts to ensure justice for the most egregious crimes. Lawmakers should reinstate the civil party procedure.

Possible Legislative Reform

Legislative reform to harmonize the jurisdictional requirements for all grave international crimes has been on the horizon since 2012 but has stalled. If adopted, the new legislative proposal would mean that a suspect need only be present on French soil (as opposed to resident), victims could file civil party complaints directly with investigative judges, double criminality would not be required, and the subsidiarity requirement would be eased insofar as requiring the ICC to expressly decline jurisdiction before prosecutors could initiate criminal proceedings.²⁸ The most controversial part of the bill has been the proposal to remove the gatekeeping function of prosecutors and reinstate the civil party procedure.²⁹ In February 2013, the Senate adopted an amended version of the bill dropping three of the requirements but maintaining prosecutor’s exclusive authority to institute criminal proceedings for most grave international crimes.³⁰ The bill was sent to the National

²⁶ Human Rights Watch interview with French lawyer, May 14, 2014; Human Rights Watch interview with French official, December 11, 2013; Human Rights Watch telephone interview with French lawyer, December 9, 2013.

²⁷ Human Rights Watch interview with French lawyer, May 14, 2014; Human Rights Watch interview with French official, December 11, 2013.

²⁸ Proposition de loi tendant à modifier l’article 689-11 du Code de Procédure Pénale relatif à la compétence territoriale du juge français concernant les infractions visées par le statut de la Cour pénale internationale (“Sueur law amendment”), French Senate, September 6, 2012, <http://www.senat.fr/leg/ppl11-753.html> (accessed September 8, 2014).

²⁹ Human Rights Watch interview with NGO, June 25, 2013; Human Rights Watch telephone interview with French lawyer, November 22, 2013; Human Rights Watch telephone interview with NGO, November 27, 2013; Human Rights Watch interview with French lawyer, May 14, 2014; Human Rights Watch interview with French official, December 11, 2013; Human Rights Watch interview with French official, May 13, 2014. See also French Senate, “Compte rendu analytique officiel du 26 février 2013,” February 26, 2013, http://www.senat.fr/cra/s20130226/s20130226_4.html (accessed September 15, 2014).

³⁰ The civil party procedure would remain intact for torture, enforced disappearance, and crimes committed in the former Yugoslavia and Rwanda. Proposition de loi adoptée, n° 191 (“Law amendment no. 191”), French Senate, February 26, 2013,

Assembly for consideration but has not yet been considered, partly due to a reshuffling of the government.³¹ French authorities should make the bill a priority and adopt the full legislative proposal, including reinstatement of the civil party procedure.

Barriers to Prosecution

Torture, like other felonies under French law, is subject to a statute of limitations of ten years, which runs from the date of the crime.³² War crimes are also subject to a statutory limitation of 20 to 30 years depending on the nature of the offense.³³ Genocide and crimes against humanity are not subject to any limitations.³⁴

Immunity

French law does not expressly provide for immunity, so courts tend to follow customary international law.³⁵ Like in Germany, courts have interpreted the International Court of Justice's holding in the *Arrest Warrant (Democratic Republic of Congo v. Belgium)* case expansively,³⁶ extending immunity not only to foreign heads of government but also to foreign ministers and other diplomats even after they have left office.³⁷

<http://www.senat.fr/leg/tas12-101.html> (accessed September 8, 2014). During the parliamentary debate discussing the proposal, Minister of Justice, Christiane Taubira, noted diplomatic problems faced by other countries as a result of universal jurisdiction cases but expressed support for reinstating the civil party procedure. Senate debate, French Senate, February 26, 2013, <http://www.senat.fr/seances/s201302/s20130226/s20130226004.html> (accessed September 5, 2014).

³¹ The first step toward consideration by the National Assembly is for the National Law Commission to appoint a representative to study the proposal. This has not happened due to a government reshuffle. Human Rights Watch interview with French lawyer, May 14, 2014; Human Rights Watch interview with French officials, May 13, 2014.

³² French Code of Criminal Procedure, art. 7. This period may be extended where steps to investigate or file a complaint are taken, in which case the limitation period runs 10 years from the moment of these steps. If the victim is a minor, the limitation period is extended to 20 years running from the child's coming of age. French Code of Criminal Procedure, art. 706-47.

³³ French Penal Code, art. 462-10. France's Constitutional Court, the *Conseil constitutionnel*, rejected a constitutional challenge to article 462-10 but did not rule on its conformity with the Rome Statute, finding it had no jurisdiction on the issue. Constitutional Court, Case No. 2010-612, Decision, August 5, 2010, <http://www.conseil-constitutionnel.fr/decision/2010/2010-612-dc/decision-n-2010-612-dc-du-05-aout-2010.49015.html> (accessed September 15, 2014).

³⁴ French Penal Code, art. 213-5. France has not ratified the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. It has signed but not ratified the European Convention on the Non-Applicability of Statutory Limitation to the Crimes Against Humanity and War Crimes.

³⁵ Human Rights Watch telephone interview with French lawyer, November 22, 2013; Human Rights Watch interview with French officials, May 14, 2014. See also *In the Appeal of Hubert X*, Supreme Court (Criminal Chamber), Case No. 09-84759, Judgment, September 23, 2009, <http://legimobile.fr/fr/jp/j/c/crim/2009/9/23/09-84759/> (accessed September 15, 2014) concerning special mission immunity.

³⁶ The International Court of Justice ruled that certain foreign government officials, such as accredited diplomats, heads of state and government, and foreign ministers, are entitled to temporary immunity from prosecution by foreign states, even with regards to grave international crimes. The Court was not explicit in whether the immunity ceases to exist once the person leaves office, and the judgment has been open to differing interpretations on this point. Many advocates, including Human Rights Watch, interpret the judgment not to bar later prosecutions for grave international crimes. *The Democratic*

The case that drew the most media attention was that of former US Defense Secretary Donald Rumsfeld. In October 2007, four NGOs filed a complaint against him for torture in connection with Abu Ghraib, Iraq and Guantanamo Bay, Cuba.³⁸ Relying on an opinion from the foreign ministry, the national prosecutor in Paris dismissed the complaint on the grounds that Rumsfeld had immunity.³⁹ The NGOs appealed the decision to the general prosecutor, but he confirmed the granting of immunity.⁴⁰

Immunity was also an issue in cases against Zimbabwean President Robert Mugabe,⁴¹ former Libyan President Muammar Gaddafi,⁴² former Algerian Defense Minister Khaled Nezzar,⁴³ former Mauritanian Interior Minister Lemrabott Sidi Mahmoud Ould Cheick

Republic of Congo v. Belgium, International Court of Justice, Judgment, April 14, 2002, <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&case=121&p3=4> (accessed September 2, 2014).

³⁷ *In the Appeal of l'Association Fédération Nationale des Victimes d'Accidents Collectifs et al.*, Supreme Court (Criminal Chamber), Case No. 09-84818, Decision, January 19, 2010, <http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXTooo021729943&fastReqId=782534797&fastPos=1> (accessed September 15, 2014).

³⁸ Letter from Patrick Baudouin, lawyer for the complainants and Honorary President of the FIDH, to Jean-Claude Marin, Public Prosecutor, Office of the Prosecutor of the Paris Court of Appeal, October 25, 2007, http://ccrjustice.org/files/rumsfeld_o.pdf (accessed September 2, 2014). For a summary of the case, see Center for Constitutional Rights (CCR), "French War Crimes Complaint Against Donald Rumsfeld, et al." undated, <http://ccrjustice.org/ourcases/current-cases/french-war-crimes-complaint-against-donald-rumsfeld> (accessed September 2, 2014).

³⁹ Letter from Jean-Claude Marin, Public Prosecutor, Office of the Prosecutor of the Paris Court of Appeal, to Patrick Baudouin, lawyer for the complainants and Honorary President of the FIDH, November 16, 2007, <http://www.fidh.org/IMG/pdf/reponseproc23nov07.pdf> (accessed September 15, 2014).

⁴⁰ Letter from Patrick Baudouin, lawyer for the complainants and Honorary President of the FIDH, to Jean-Claude Marin, Public Prosecutor, Office of the Prosecutor of the Paris Court of Appeal, November 23, 2007, http://www.fidh.org/IMG/pdf/courrier_REPONSE_FIDH-LDH-CCR-ECCHR-JCMARIN-23nov07.pdf (accessed September 2, 2014); and Letter from the Public Prosecutor, Office of the Prosecutor of the Paris Court of Appeal, to Patrick Baudouin, lawyer for the complainants and Honorary President of the FIDH, February 27, 2008, http://ccrjustice.org/files/Rumsfeld_FrenchCase_%20Prosecutors%20Decision_02_08.pdf (accessed September 2, 2014).

⁴¹ While President Mugabe attended a Franco-African summit in Paris in February 2003, a British human rights activist filed a criminal complaint against him for torture. The case was later closed on the grounds that Mugabe had immunity from prosecution as a sitting head of state. Jon Henley, "Mugabe rides out storm of protest in Paris hotel," *The Guardian*, February 20, 2003, <http://www.theguardian.com/world/2003/feb/20/zimbabwe.france> (accessed September 9, 2014); Reporters without Borders, "Classement sans suite d'une plainte contre le président du Zimbabwe," February 21, 2003, http://archives.rsf.org/article.php?id_article=5033 (accessed September 15, 2014).

⁴² On March 13, 2001, France's highest court ruled that Gaddafi could not be prosecuted in connection with the bombing of a French plane over Niger in 1989 because he benefited from immunity. A lower court had previously held that he did not have immunity because acts of torture cannot be considered part of his official state duties. *In the Appeal of the Prosecutor General*, Supreme Court (Criminal Chamber), Case No. 00-87.215, Judgment, March 13, 2001, <http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXTooo007070643> (accessed September 15, 2014). See also "France: Affaire Kadhafi," FIDH news release, March 14, 2001, <http://www.fidh.org/communiq/2001/ly1403f.htm> (accessed September 15, 2014).

⁴³ In April 2001, hours after a criminal complaint had been filed against him, Nezzar precipitously left France on a private aircraft to escape possible prosecution. José Garçon, "Paris laisse partir Khaled Nezzar," *Libération*, April 27, 2001, http://www.liberation.fr/monde/2001/04/27/paris-laisse-partir-khaled-nezzar_362650 (accessed September 15, 2014). Swiss authorities arrested Nezzar in Geneva in October 2011, following a criminal complaint for torture filed by two victims.

Ahmed,⁴⁴ former Republic of Congo (Brazzaville) police chief Jean-François Ndengue,⁴⁵ and former Tunisian diplomat Khaled Ben Saïd.⁴⁶ In all but the last case, immunity precluded criminal prosecution.

In cases where immunity is an issue, prosecutors or investigative judges may seek guidance from the Ministry of Foreign Affairs.⁴⁷ The ministry issues an advisory opinion, but the final decision of whether to proceed lies with the prosecutor or investigating judge handling the case. Parties may only challenge a prosecutor's decision not to proceed on the basis of immunity with the head of the national prosecutor's office (*Procureur Général*), but parties may appeal an investigative judge's decision before the courts.⁴⁸

On February 1, 2012, a Swiss court ruled that he did not enjoy immunity and could be prosecuted. Yacine Ouchikh, "Algérie: La justice suisse refuse l'immunité à Khaled Nezzar," *Le Courrier de l'Atlas*, August 1, 2012, <http://www.lecourrierdelatlas.com/304501082012Algerie-La-justice-suisse-refuse-l-immunite-a-Khaled-Nezzar.html> (accessed September 15, 2014).

⁴⁴ Victims filed a criminal complaint against Lemrabott in 2002 alleging torture. In October 2009, he came to France as part of a Mauritanian government delegation but no judicial action was taken as the Ministry of Foreign Affairs advised the investigative judge that he had immunity. See "Le Quai d'Orsay accorde l'impunité à un présumé tortionnaire mauritanien présent sur le sol français!" FIDH news release, October 26, 2009, <http://www.fidh.org/fr/afrique/mauritanie/Le-Quai-d-Orsay-accorde-l-impunite> (accessed September 15, 2014).

⁴⁵ Among other senior officials, Ndengue was charged in connection with the disappearance of hundreds of refugees in the Republic of Congo (Brazzaville) in May 1999. Ndengue was indicted and temporarily detained in April 2004 while visiting France. It was disputed whether he was visiting France in a private capacity at the time. The Ministry of Foreign Affairs had no advance notice of the visit, suggesting Ndengue was there in a personal capacity, but the ministry later asserted that he was there on official visit. The national prosecutor's office appealed the decision placing him in detention and swiftly secured a court order to release him on the grounds that he was on an official visit and had immunity from prosecution. He immediately left the country. FIDH, "Release of Jean-François Ndengue – Paris: Complicity in Crimes against Humanity?" April 7, 2004, <http://www.fidh.org/en/africa/congo/The-Disappeared-of-the-Beach-Case/Release-of-Jean-Francois-Ndengue> (accessed September 15, 2014); FIDH, "France/Compétence Universelle : État des Lieux de la Mise en Œuvre du Principe de la Compétence Universelle," October 2005, http://www.fidh.org/IMG/pdf/gaj_compuniverselle2005f.pdf (accessed September 15, 2014), pp. 14-15. See also *In the Appeal of Norbert Dabira et al.*, Supreme Court (Criminal Chamber), Case No. W 07-86.412 FS-D, Judgment, October 23, 2002, http://www.fidh.org/IMG/pdf/ArretCCBeachgavriolo8_exp.pdf (accessed September 9, 2014).

⁴⁶ Ben Saïd asserted that he had immunity due to his diplomatic status at the Tunisian consulate in Strasbourg, but judicial authorities disagreed and initiated criminal proceedings against him. Ben Saïd left France, but proceedings continued in his absence. In 2008, he was convicted of complicity in torture and sentenced to eight years' imprisonment. In September 2010, a court of appeals increased his prison sentence to 12 years. See "French Court Condemns Tunisian for Torture," *Radio France Internationale*, December 16, 2008, http://www1.rfi.fr/actuen/articles/108/article_2429.asp (accessed September 15, 2014). For a complete history of the case, see FIDH and LDH, "Condamnation de Khaled Ben Saïd: Une victoire contre l'impunité en Tunisie."

⁴⁷ Human Rights Watch interview with French officials, May 13, 2014; Human Rights Watch telephone interview with French lawyer, November 22, 2013; Human Rights Watch telephone interview with French lawyer, November 26, 2013; Human Rights Watch interview with French officials, May 14, 2014.

⁴⁸ Decisions not to proceed on the basis of immunity may be appealed in the same manner as all other decisions taken by prosecutors and investigative judges (see below). Human Rights Watch telephone interview with French lawyer, November 22, 2013; Human Rights Watch telephone interview with French lawyer, November 26, 2013.

French courts have declined to recognize domestic amnesties issued in foreign countries. In authorizing the trial of former Mauritanian captain Ely Ould Dah for torture, the court held that allowing the Mauritanian amnesty law to bar his prosecution before French courts would effectively place France in violation of its international legal obligations.⁴⁹

Prosecutorial and Judicial Discretion

Prosecutors have wide discretion in deciding whether to initiate criminal proceedings. If a prosecutor declines to open an investigation after receiving a private party complaint, French law only requires that the prosecutor inform the complainant and provide reasons for his or her decision.⁵⁰ The complainant can file an administrative appeal with the head of the national prosecutor's office, but that decision is final and is not subject to judicial review.⁵¹

Where a civil party complaint is filed directly with an investigative judge, the prosecutor is asked to support or oppose the opening of a judicial investigation.⁵² The investigative judge considers the prosecutor's position but makes the final decision and must inform the complainant if the judge decides to dismiss the claim.⁵³ Both the complainant and the prosecutor have the right to appeal this decision before the courts.⁵⁴

In the *Amesys* case, investigative judges decided to open a judicial investigation into whether a French company was complicit in torture through its sale of surveillance equipment to the Qaddafi regime in Libya despite opposition from prosecutors. The prosecutor appealed this decision, but in January 2013, an appeals court affirmed the investigative judge's decision and authorized the case to move forward.⁵⁵

⁴⁹ *In the Appeal of Ely X*, Supreme Court (Criminal Chamber), Case No. 02-85379, Judgment, October 23, 2002, <http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007070167> (accessed September 15, 2014).

⁵⁰ French Code of Criminal Procedure, art. 40-2.

⁵¹ French Code of Criminal Procedure, art. 40-3; Human Rights Watch interview with French official, December 11, 2013; Human Rights Watch interview with French official, June 3, 2014.

⁵² French Code of Criminal Procedure, art. 86.

⁵³ French Code of Criminal Procedure, art. 177. The investigative judge can also fine the party making the complaint where the complaint is deemed to be abusive or meant to be a delaying tactic. French Code of Criminal Procedure, arts. 177-2 and 177-3.

⁵⁴ The appeal is heard by the *Chambre d'Instruction* of the *Cour d'Assises*. French Code of Criminal Procedure, arts. 177-2, 185-186; Human Rights Watch interview with French official, December 11, 2013; Human Rights Watch interview with French official, June 3, 2014.

⁵⁵ "Amesys Case: The Investigation Chamber Green Lights the Investigative Proceedings on the Sale of Surveillance Equipment by Amesys to the Khadafi Regime," FIDH news release, January 15, 2013, <http://www.fidh.org/en/north-africa-middle-east/libya/Amesys-Case-The-Investigation-12752> (accessed September 15, 2014); Human Rights Watch interview with NGO, May 14, 2014.