Implementing the principle of universal jurisdiction in France

I – SCOPE OF THE UNIVERSAL JURISDICTION IN FRANCE

Although French law has incorporated universal jurisdiction based on treaty obligations in respect of certain offences, absolute universal jurisdiction based on customary international law has not been established. As a result, universal jurisdiction cannot generally be exercised in French courts in respect of certain *jus cogens* crimes, including crimes against humanity and crimes of genocide. A limited exception is provided by *Law No. 95-1* of 2 January 1995 and *Law No 96-432* of 22 May 1996 which allow for the exercise of absolute universal jurisdiction in relation to international crimes committed in Yugoslavia and Rwanda respectively, enacted in order to adapt French law to the requirements of UN Resolutions 827 (Yugoslavia) and 955 (Rwanda), adopted by the United Nations Security Council to establish the two *ad hoc* International Criminal Tribunals.

1. Extent of Treaty-Based Universal Jurisdiction before French Courts

Article 689 of the French Code of Criminal procedure (CCP) defines the mechanism of universal jurisdiction before French courts in the following terms:

> "Perpetrators of or accomplices to offences committed outside the territory of the Republic may be prosecuted and tried by French courts either when French law is applicable under the provisions of Book I of the Criminal Code or any other statute, or when an international Convention gives jurisdiction to French courts to deal with the offence"[1].

Article 689-1 CCP provides that persons guilty of committing any of the offences under the international conventions listed in the subsequent paragraphs (689-2 to 689-9 CCP), whatever their nationality, if they are present in France, can be prosecuted and tried by French courts.

In addition to the crime of torture (a), three categories of offences can be distinguished: those relating to the Physical Protection of Nuclear Material[2]; those concerning the Protection of the Communities' Financial Interests and the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union[3]; and those defined as terrorist acts. The failure to implement the Geneva Conventions, which are not referred to under article 689 despite the fact that they require the exercise of universal jurisdiction, makes it difficult, if not impossible, to rely on it before French courts (b).

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[1] All translations of the French Criminal Code and Code of Criminal Procedure are taken from the official site of the French government, Legifrance, available at http://www.legifrance.gouv.fr/html/codes_traduits/liste.htm.

[2] France ratified the Convention of 1987 on the Physical Protection of Nuclear Material on 6 September 1991. Article 8 § 2 provides for the exercise of universal jurisdiction in respect of offences defined in article 7 of the Convention. Article 689-4 CCP transposes the provisions of the Convention.

[3] Convention against Corruption of 26 May 1997 and the Protocol of 27 September 1996 on the protection of the European Communities' financial interests aim to define the offences of active and passive corruption committed by EC or national civil servants. Article 689-8 CCP transposes the provisions of these conventions.

a. Universal jurisdiction for crimes of torture

The provisions of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment adopted by the General Assembly on 10 December 198 which entered into force on 26 June 1987[4], require states firstly to adopt legislation criminalising torture, and secondly to provide for the exercise of universal jurisdiction to prosecute perpetrators of torture.

Torture is defined under Article 1 of the UN Convention against Torture[5].

France ratified the Convention against Torture on 18 February 1986. According to Article 4 of the convention, states parties have a duty to ensure that all acts of torture are criminal offences under national law. The same applies to attempts to commit torture and to acts by any person which constitute complicity or participation in torture. States Parties are obliged to make these offences punishable by appropriate penalties, which reflect their grave nature.

French law conforms to these provisions, under article 222-1 CCP, the subjection of a person to torture or to acts of barbarity is an offence punishable by fifteen years' imprisonment.

Article 5, paragraph 2 of the Convention against Torture provides for the exercise of universal jurisdiction: States Parties are obliged to prosecute crimes of torture even when the crime has no direct link to the state. The only requirement in such a case is the presence of the alleged offender on the territory of the State Party.
After the ratification by France of the Convention against Torture, and in accordance with the obligations it imposes, national legislation was enacted in order to implement the principle of universal jurisdiction in respect of the crime of torture in French courts. The combined provisions of Articles 689-1 and 689-2 CCP provide that "a person guilty of committing [torture as defined in article 1 of Convention against Torture] outside the territory of the Republic and who happens to be in France may be prosecuted and tried by French courts."

The principle of universal jurisdiction in respect of crimes of torture was recognised in France in the case of *Ely Ould Dah,* first on appeal and more recently by the Supreme Court *(Cour de cassation)*.
In its judgement of 23 October 2002, the French *Cour de cassation* considered that the application of the Mauritanian amnesty law by French courts would result in depriving the principle of universal jurisdiction of all useful effect. The Court concluded that: "with regard to the principle of the application of national law, only an amnesty granted by the French authorities could be taken into consideration, otherwise the principle of universal jurisdiction would be deprived of any effect"[6].

Captain Ely Ould Dah, a Mauritanian national accused by victims in France, was arrested for crimes of torture and acts of barbarity on the basis of Article 689-2 CCP. On 25 May 2001, the

[4] General Assembly Resolution 39/46 of 10 December 1984

[5] The term "torture" means *"any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions".*

[6] Unofficial translation.

investigating judge decided to remit the case to the *Cour d'assises*, recognizing the principle of universal jurisdiction: "article 682-2 introduced into the Code of Criminal Procedure by the Law of 30 December 1985 implemented the principle of universal jurisdiction into French law by authorising the investigation and prosecution in France of all persons who are present in French territory who are suspected of committing acts abroad which constitute crimes of torture under the Convention". The decision further states: "It is therefore the duty of France, as a State P arty to the New York Convention, to prosecute acts which are not subject of amnesty or statutes of limitation in France which fall within the field of application of the Convention, whatever the situation in Mauritania regarding the existing outstanding indictments and statutes of limitation and amnesties"[7]. The Supreme Court confirmed this position in a judgement of 23 October 2002 remitting the case to the *Cour d'assises* in Nimes for Ely Ould Dah to be judged *in absentia*.

On 1 July 2005, the *Cour d'assises* in Nîmes took a historic decision, sentencing the Mauritanian Captain Ely Ould Dah to ten years in prison, for torturing Black-African members of the military in 1990 and 1991. FIDH and its affiliated organizations in Mauritania, AMDH, and in France, LDH, emphasized that although Ely Ould Dah was tried *in absentia*, he was legally represented.

The Court convicted him on all charges of acts of torture committed directly, ordered or organized at the "Jreïda death camp". This case, the first time universal jurisdiction has been applied in France, represents a significant step forward in the fight against impunity.

b . Gaps in French law regarding the criminalisation and prosecution of war crimes

Grave breaches of the Geneva Conventions of 1949 are subject to universal jurisdiction. As a result, France has an obligation to apply these provisions.

According to article 55 of the French Constitution of 1958, which confirms the superiority of treaties duly ratified and approved over national law, international conventions should be applied in French law. However, in the case of the Geneva Conventions and grave breaches this position has never been accepted by French courts.
Currently, under French law, war crimes are crimes like any others. There are no specific provisions defining war crimes, either in the Criminal Code or in the Code of Military Justice. Thus, war crimes can only be prosecuted under the ordinary provisions of the Criminal Code, for example as murder, torture, rape or attacks on physical integrity.

On 20 July 1993, Javor, Kusuran, Softic and Mujdzic, Bosnian nationals, brought a complaint with an application to join proceedings as a civil party ("*partie civile")* for torture, war crimes, crimes against humanity and genocide. The complainants escaped from Serb detention camps. The Tribunal of First Instance (*Tribunal de Grande Instance*) in Paris, on 6 May 1994, ruled that it had partial jurisdiction and accepted the victim's application to participate as "*partie civile"*. Reversing this decision, the Court of appeal (*Chambre d'accusation)* of Paris based its ruling on two reasons: firstly, the Court considered that the Convention against Torture of 1984 was not applicable, since the *partie civile* had failed to provide sufficient evidence of the presence of the alleged perpetrators in France. Secondly, the Court found that the Geneva Conventions were not directly applicable in national law and that no implementing legislation had been introduced. The Supreme Court re-examined this last argument, after the legislation implementing the Statute of the ICTY had been introduced.

The interpretation of the Court of Appeal of the application of the principle of universal jurisdiction in accordance with the Geneva Conventions, continues to apply and prevents all

[7] Unofficial translation.

application of the Geneva Conventions by the French courts.

This is particularly concerning since at the time of ratifying the Statute of the ICC, France issued a declaration under Article 124 of the Statute refusing the jurisdiction of the ICC for war crimes for a period of seven year from 1 July 2002.

The ICC, applying the principle of complementarity, will not be able to fill the gap left by French legislation and potential war crimes tried in France will not be punished as such.

2. The Absence of Universal Jurisdiction for Crimes Against Humanity and Genocide

a. From 1945 to 1994: French courts recognise crimes against humanity committed by agents of the Axis powers during the Second World War

In France, at the time of the *Barbie*, *Touvier* and *Papon* cases, the Criminal Chamber of the Supreme Court (*Chambre criminelle de la Cour de cassation*) clarified the conditions for the application of article 6 of the Charter of the International Military Tribunal, annexed to the London Agreement of 8 August 1945 which defines crimes against humanity. In the *Touvier* case[8], the Court stated that, "crimes against humanity are crimes under ordinary law, committed in certain circumstances and on certain grounds, specified in the provisions which define them[9]". These grounds are "political, racial or religious". Crimes can be committed "individually or as members of an organization" by persons acting "on behalf of the European Axis countries."

After the adoption of the 1964 law, which provides that statutes of limitations are inapplicable to crimes against humanity, the Supreme Court (*Cour de Cassation)* confirmed this position in its judgment in the Barbie case of 29 January 1984. On 1 April 1993, in the case of Boudarel[10], the Supreme Court (*Cour de Cassation)* considerably reduced the scope of application of this offence by limiting prosecution to atrocities committed by those bearing greatest responsibility within the Axis powers, and by ruling that complaints in relation to acts committed "after the Second World War cannot be defined as crimes against humanity".

b. Case law since 1994

Article 212-1 of the new French Criminal Code 1994 penalising crimes against humanity, introduces a broader definition which confirmed the existence of the customary international notion of crimes against humanity.

In the case of French General *Aussaresses*[11], the Supreme Court, rejecting the charge of crimes against humanity, emphasized that at the times of the events, the acts committed by General *Aussaresses* could not be classified as crimes against humanity in view of the absence of any

[8] Criminal Chamber of the Supreme Court, 6 February 1975, *Bull. crim. n°42*

[9] Unofficial translation.

[10] *Boudarel Sobanski et Association nationale des anciens prisonniers internes d'Indochine c. Georges Boudarel, Bull. crim. n° 143, Gaz. Pal. 24 June 1993, p. 14, Dr. penal 1994.38, obs J-H. Robert,* unofficial translation

[11] FIDH lodged a complaint with an application to join proceedings as *partie civile* on 29 May 2001, for crimes against humanity, against General Aussaresse, former co-ordinator (in 1957) of the Information Services in Alger under General Massu, and all other persons identified in the inquiry. The complaint was based on the revelations made by General Aussaresses in his book *Services spéciaux Algérie* 1955-1957, published on 3 May 2001, in which he describes acts of torture and summary executions committed in this period in Algeria, which he claims were justified.

provision in the French Criminal Code. Furthermore, the Court confirmed the ruling of the investigating judge stating that international custom cannot make up for the absence of criminal legislation defining crimes against humanity, in respect of the facts of the complaint made by the *partie civile.*

With this case, the Supreme Court missed the opportunity to fill the legal gap, which still exists for crimes against humanity committed between 1945 and 1994.

The first step towards the reversal of this position was taken in the complaint with *partie civile* of 26 October 1998, made by the beneficiaries of Enrique Ropert, executed in September 1973 by agents of the Chilean State, during the period of terror formulated and orchestrated by General Augusto Pinochet.

The *Chambre d'Instruction* (Indictment Division) of the Court of Appeal in Paris delivered a judgement reversing the ruling of 22 March 2000, which had dismissed the case for lack of evidence, and remitting the case to another investigating judge of the *Tribunal de Grande Instance* in Paris to pursue the investigation. The court considered that since the case concerned the definition of crimes against humanity, the judge was "obliged to investigate in order to determine if the facts complained of could constitute such an offence and to examine whether they were punishable under treaty provisions and on several other legal bases raised by the *partie civile*"[12].

c. The absence of universal jurisdiction for genocide

Although France ratified the Convention on Prevention and Punishment of the Crime of Genocide of 1948, in October 1950, it was only with the new Criminal Code of 1994 that a specific definition of the crime of genocide was introduced into French law[13].

The ruling in the case of *Javor* on 6 May 1994, referred to Article 6 of the Convention on Prevention and Punishment of the Crime of Genocide, which provides: "Persons charged with genocide (…) shall be tried by a competent tribunal of the State in the territory of which the act was committed (…)." The Court considered that, "as a result, French Courts cannot have jurisdiction in respect of the facts complained of in the instant case since they were committed outside French territory"[14]. This decision was confirmed by the Court of Appeal in Paris on 24 November 1994, which held that, "the Convention on Prevention and Punishment of the Crime of Genocide does not contain any rule of universal jurisdiction"[15].

Similarly, in March 1996, in the case of the Rwandan priest Wenceslas Munyeshyaka, a refugee in France investigated for genocide, torture, and inhuman and degrading treatment, the Indictment Division of the Court of Appeal in Nîmes found that it did not have jurisdiction to try offences

[12] Unofficial translation.

[13] Article 211-1 of the new Criminal Code gives a definition of the crime of genocide: *Genocide occurs where, in the enforcement of a concerted plan aimed at the partial or total destruction of a national, ethnic, racial or religious group, or of a group determined by any other arbitrary criterion, one of the following actions are committed or caused to be committed against members of that group: willful attack on life; serious attack on psychic or physical integrity; subjection to living conditions likely to entail the partial or total destruction of that group; measures aimed at preventing births; enforced child transfers.*

[14] Unofficial translation.

[15] Unofficial translation.

committed abroad by a foreigner against foreigners since the Code of Criminal Procedure did not at the time provide for the jurisdiction of French courts in such a case. However, on 6 January 1998, the *Cour de Cassation* ordered the reinstatement of the proceedings in France against *Wenceslas Munyeshyaka,* first opened in 1995*,* holding that the Indictment Division had erred in only considering the definition of genocide, when the acts committed could have been considered as crimes of torture, over which Article 689-2 CCP provides for universal jurisdiction.

3. *Ad hoc* universal jurisdiction for crimes committed in the genocide in Rwanda and the war in the former Yugoslavia

France is the only European country to have enacted implementing legislation permitting the exercise of absolute universal jurisdiction in the limited context of the international criminal tribunals.

France adopted two laws in this respect: on 2 January 1995, to implement the provisions of the Statute of the ICTY; and on 22 May 1996, implementing the provisions of the ICTR. These laws established the exercise of universal jurisdiction by French courts over war crimes, crimes against humanity and genocide in the following three cases:

- Crimes committed since 1991 in the former Yugoslavia;
- Crimes committed during 1994 in Rwanda;
- Crimes committed during 1994 by Rwandan citizens in neighbouring states.

The implementation of the statutes for the ICTY and ICTR into French law had immediate consequences, as in the case of *Javor*, cited above. Similarly, in the case of *Munyeshyaka* on 6 January 1998, the *Chambre d'accusation* (Indictment Division) of the *Cour d'appel* in Paris went back on its initial position, concluding that French courts were competent to investigate the full range of facts of the allegations against Wenceslas Munyeshyaka, whether constituting the crime of torture or the crime of genocide. Since this reversal other investigations have been opened into alleged perpetrators of the Rwandan genocide.

II – Practical considerations concerning the exercise universal jurisdiction before French courts

1. Burden of proof of presence of the alleged perpetrator of torture on national territory

If the condition of presence required by French law to exercise universal jurisdiction cannot be challenged, it is not so in respect of the condition imposed by the courts on victims to provide absolute proof of the presence of the accused on French territory.

On 26 March 1996, the Cour de cassation rejected an appeal on the basis that, "the presence in France of the victims of such crimes is in itself insufficient to justify setting public proceedings in motion where, as in the instant case, the alleged perpetrators and their accomplices have not been

found on French territory"[16], as required by article 2 of the French implementing legislation of the Statute of the ICTY.

Neither the spirit nor the letter of the Convention of 10 December 1984 (Convention against Torture) impose such an obligation on victims or their representatives to put in place methods of surveillance and detection to inform them of the movements of their torturers. A study of the travaux preparatoires of the Convention reveals that the drafters did not make absolute proof of the presence of an alleged torturer on the territory of the state concerned a precondition for the initiation of an investigation, and merely required that the state has information relating to the presence of the suspect on its territory.

The problem posed by the condition of presence lies in its implementation by the authorities in charge of the investigation. Although they refer specifically to the International Criminal Tribunals (ICTR and ICTY), two circulars from the Ministry of Justice are of interest in that they indicate that, even where the alleged perpetrator of the crime is absent from the territory, prosecutors can proceed with the interviewing of victims[17].

In the same vein, the French National Consultative Commission for Human Rights (CNCDH) recommended that prosecutors systematically investigate violations of humanitarian law, including violations of the Convention against Torture, in order to avoid the burden of proof falling on the victims.[18]

The prosecutor at the *Tribunal de Grande Instance* in Paris, in charge of the complaint lodged by FIDH and LDH, in January 2000 agreed to order the opening of a preliminary investigation in order to confirm the presence in France of those accused of genocide in Rwanda, whose presence on French territory had been reported by the complainants. Thus, on 25 January 2000, the prosecutor referred the complaint to the national anti-terrorist division to carry out a national investigation "to locate the Rwandan nationals, alleged to be perpetrators and accomplices of genocide in Rwanda, on national territory"[19]..

2. At what point in time must the condition of presence be fulfilled?

At what point in the procedure must the condition of presence of the accused on the territory be

[16] Unofficial translation.

[17] J.O No. 44, 21 February 1995, page 2757, NOR: JUSD9530006C, unofficial translation.
- Circular of 22 July 1996, concerning the application of the law of 22 May 1996, which implemented the Security Council resolution establishing the ICTR into French law, states that: "French courts have been given competence to hear cases the facts of which fall within the competence of the International Criminal Tribunal for Rwanda, where the perpetrator is present on French territory. *However, as indicated in the circular of 10 February 1995, the limited nature of this competence does not prevent prosecutors, in the course of a preliminary investigation, from proceeding with interviewing the victims of these crimes who have sought refuge in France*. Thus, the prosecutors with competence in the areas in which the victims reside should respond to their request and proceed to take their statements" (emphasis added).
- Circular of 10 February 1995, concerning the law of 2 January 1995, which implemented the Security Council resolution establishing the ICTY into French law, states that, "as indicated in the course of debates before the National Assembly *(JO AN CR 20 December 1994, p. 9446*), the impossibility of setting proceedings in motion against persons who are not present on French territory does not prevent prosecutors, as a measure of preservation and in the course of a preliminary enquiry, from proceeding with interviewing the victims of these crimes who have sought refuge in France"

[18] Advisory opinion adopted by the full assembly on 16 February 1998, concerning the adaptation of the French legal system to humanitarian law conventions

[19] Unofficial translation.

examined in order to establish the competence of the French courts? If the entire investigation is subject to having established the presence of the accused, there is a great risk that no prosecution would ever be undertaken. In order to show the presence of the accused it is necessary to conduct a search, which can be assisted by evidence gathered during the preparatory phase of the procedure. Whereas, if the initiation of a search is itself subject to the condition of presence of the accused, the entire system is blocked.

Professor Lombois criticises this situation in the context of the judgment in *Javor* of the *Chambre d'accusation* (Indictment Division) of the *Cour d'appel* in Paris, 24 November 1994[20], delivered following a complaint by Yugoslav nationals concerning crimes committed on the territory of former Yugoslavia[21]:

> "Whether or not expressed, the condition of presence must be presumed for the purposes of the "search", during the course of which it will be verified. Otherwise it is a vicious circle: in order to know whether X is in hiding on our territory, it is necessary to search for him; but in order to search for him, it is necessary to have already discovered (by enlightenment or intuition) that he is present"[22].

This issue is of current interest since during the first hearing before the ICJ in the case of *Certain criminal procedures initiated in France*, *Congo v. France*, the Director of legal affairs of the Ministry of Foreign Affairs, Mr Ronny Abraham, stressed that "the French judge can only be competent in respect of acts committed abroad by foreigners, against foreign victims, on condition that the suspect is present on French territory *at the time of the initiation of prosecution, in other words at the date of the prosecutor's application and not subsequently, or if subsequently a new application by the prosecutor will be necessary*" (emphasis added)[23].

3. Link between the condition of presence and the scope of the referral to the investigating judge

Can the condition of presence form an exception to the general principle of investigation *in rem*?

In the case of *The Disappeared of the Beach*, the prosecution has adopted the position that the investigating magistrate is not competent to investigate anyone other than General Norbert Dabira.

The chief prosecutor argued that the investigating judge could only be seized of the case *in personam* by the prosecutor's application for judicial investigation, which "although improperly filed against X", an unknown person, could only be directed against at Mr Dabira, since the condition imposed by article 689-1 of the CCP of the presence of the accused on French territory must be fulfilled.

The prosecution thus adopts the official position of the French Ministry of Foreign Affairs: "… even though the complaint by the three associations referred to persons by name - the four that I mentioned. the judicial investigation was requested by the public prosecutor against unnamed

[20] Chambre d'accusation of the Cour d'appel, Paris, aff. *Javor and others*, judgment of 24 November 1994; Cour de Cassation, Chambre Criminelle, aff. *Javor and others*, judgment of 26 March 1996, Bull. Crim. No. 132.

[21] *Idem*.

[22] LOMBOIS, C. (1995), 'De la compassion territoriale', in *Revue de Science Criminelle et de Droit Pénal Comparé*, p. 401, unofficial translation.

[23] Unofficial translation

persons (persons unknown) without any name being given in his application. In reality, however, the judicial investigation, at that stage, could only be directed against General Dabira, because he alone appeared to fulfil the mandatory condition laid down by French law for the exercise of universal jurisdiction, that is to say I repeat and stress that the alleged offender has to be present on French soil"[24].

However, by adopting this position, the prosecution goes against the fundamental principle of seizure *in rem* with is one of the pillars of the criminal procedural regime in France. Article 80-1 of the CCP imposes the general principle of seizure "*in rem*" of the investigating magistrate:

"The investigating judge may place under judicial examination only those persons against whom there is strong and concordant evidence making it probable that they may have participated, as perpetrator or accomplice, *in the commission of the offences he is investigating" (*emphasis added).

Whether the preliminary application for a judicial investigation concerns named or unnamed persons, the investigating judge, who is irrevocably seized of the facts which are the subject of the application, can investigate all persons against whom there is evidence that they have participated in the commission of the offences targeted. This is a necessary consequence of the mandate of the investigating judge, which is to investigate all the acts which are the subject of the application and to establish responsibility. In particular, it is a result of this principle that the investigating judge has the necessary flexibility to arrive at the truth.

Contrary to the position of the chief prosecutor's, the principle of seizure of the investigating judge "*in rem*" is in no way called into question by the introduction of the mechanism of extraterritorial jurisdiction in French criminal provisions.

Article 689-1 of the CCP, cited by the prosecution, only has the effect of clarifying that, in the application of international conventions, any person who is guilty of committing one of the offences listed in article 689-2 and subsequent provisions, outside French territory, if present in France, can be prosecuted by the French authorities. This does not call into question the powers of the investigating judge to carry out all the necessary acts in accordance with his competence "*in rem*", without ignoring the provisions of article 689-1 of the CCP.

Adopting the reasoning of the prosecutor leads to the restriction of the application of the principle of extraterritorial jurisdiction, which France has accepted by virtue of diverse international conventions, almost to vanishing point. It would be to limit considerably the scope of activities of the investigating judge, by reducing the powers, which are granted to him under the provisions of the Code of Criminal Procedure.

Abandoning the principle of competence "*in rem*" is all the more paradoxical in the context of prosecuting the most serious crimes. The mechanism of extraterritorial jurisdiction aims, on the contrary, to strengthen the measures of procedure of use in the repression of crimes of particular seriousness for victims and the international community, as is made clear in the Convention against Torture adopted in New York on 10 December 1984.

However, in its judgement of 22 November 2004 on the application for annulment of the investigation against Jean-François Ndengue, the *Chambre d'Instruction* (Indictment Division) of

[24] Republic of the Congo v. France, Oral pleadings, 29 April 2003, official translation, available at http://www.icj-cij.org/icjwww/idocket/icof/icofframe.htm

the *Cour d'appel* in Paris considered that:

> "The application initiating public proceedings was made "against X", and therefore does not contain the necessary element to establish that the condition of the presence on French territory of the accused has been fulfilled, whereas this finding is a precondition of the application of this exceptional jurisdiction.
>
> The exceptional character of the provisions of article 689-1 of the Code of Criminal Procedure excludes the simultaneous application of the general provisions of article 80 of the Code of Criminal Procedure which allow the prosecution to make an application for an investigation against named or unnamed persons.
>
> Furthermore, in the instant case, the opening of an inquiry against X had the consequence of leading the investigating judge to have Norbert Dabira interviewed, by means of letter of request (*commission rogatoire*), who according to the prosecutor was the only person who could be investigated, whereas this is prohibited under article 113-1 of the Code of Criminal Procedure when a person is named in the application
>
> An application which fails to fulfil the legal conditions for its existence will be nullified, as will be all subsequent proceedings[25]".

This decision came when, over several months, the French and Congolese authorities had been multiplying their joint initiatives aimed at putting an end to the proceedings in France in favour of the investigation opened in Brazzaville. The latter ended, unsurprisingly, in August 2005, in the acquittal of all persons accused in the case of the "Disappeared of the Beach".

III - TOWARDS THE ABROGATION OF THE *PARTIE CIVILE* MECHANISM FOR THE MOST SERIOUS CRIMES?

In French law, the initiation of criminal investigations is not automatic. In the case of a simple complaint, in accordance with the opportunity principle, the prosecution remains free to decide whether or not to initiate proceedings and retains this freedom of action. However, in accordance with article 1, paragraph 2 of the Code of Criminal Procedure public proceedings must be initiated when the victim of an offence makes an application to join proceedings as a civil party (*partie civile*).

1. The importance of victims' access to justice for the implementation of the mechanism of universal jurisdiction: the conclusions of the *Magendie* report

It is interesting to analyse the conclusions of the Magendie report of June 2004 on the efficiency and the quality of the justice system, which aimed to suggest concrete solutions to overcome the slowness of justice in France.

One of the arguments put forward in the report is the problem of the day to day management of applications to join proceedings as *partie civile*, which are more and more numerous but not always well-founded in law.

[25] Unofficial translation.

The legitimate irritation caused by abusive applications for *partie civile* must not allow us to forget the numerous applications which are not so. *Everyone has in mind the recent proceedings for crimes against humanity held following the commencement of open investigations into complaints with applications to join proceedings as partie civile*" (emphasis added)[26].

Having recalled these principles, the Magendie report recommends the reaffirmation of the subsidiary nature of initiation of proceedings by an injured party, by subjecting the admissibility of an application to join proceedings as a *partie civile* to the condition that the prosecutor has decided, expressly or implicitly, to discontinue proceedings.

In the context of universal jurisdiction, this solution could lead to problems for victims, or even result in justice being denied, which is obviously not the aim of the authors of the report.

Regarding the need to ensure that the prosecutor has greater independence from the *partie civile*, the report questions "why the prosecutor, who on the basis of article 40 of the Code of Criminal Procedure has the discretion to decide whether to initiate prosecutions, should to a certain extent renounce this power and decide on a strictly legal basis when a complaint is lodged with an application to join proceedings as a partie civile. […] Would it not be preferable to give him the possibility to make his decision with complete independence, including with respect of considerations of appropriateness which are usually takes into account? […] It seems curious that the complainant can, by engaging this procedure, oblige the prosecution to undertake prosecutions which he had decided not to pursue".

However, the recent use of the principle of universal jurisdiction is the result of two observations by victims of the most serious crimes and human rights organizations: the incapacity or the failure of states in the fight against impunity at national level; and the growing understanding that victims could force the hand of justice by lodging complaints and by confronting states with their international obligations.

Victims can therefore get round overcautious prosecutors by initiating proceedings themselves with an application to join proceedings as *partie civile*. The novel aspect is the use of these possibilities in the context of the application of the mechanism of universal jurisdiction.

2. The French draft legislation implementing the ICC Statute and the abrogation of the *partie civile* mechanism

In relation to crimes which fall under the International Criminal Court's jurisdiction (war crimes, genocide, crimes against humanity), there is no provision for universal jurisdiction except where the crimes were committed in the context of the genocide in Rwanda or the war in former Yugoslavia. However, many reasons exist for the introduction of a principle of universal jurisdiction.
These reasons are based mainly on the system of complementarity established by the Statute of the International Criminal Court, which aims to end impunity for crimes which fall within the jurisdiction of the ICC.

This lead the French Ministry of Justice to recommend establishing a mechanism for universal jurisdiction before French courts, no longer limited to the former Yugoslavia and Rwanda.

[26] Unofficial translation.

Article 10 of the draft law implementing the Rome Statute and amending several provisions of the Criminal Code, the Code of Military Justice, the Law of 29 July 1881 on the liberty of the press, and the Code of Criminal Procedure states:

"Art. 689 – Perpetrators of offences committed outside French territory can be investigated and prosecuted before French courts either when either French law is applicable under the provisions of Paragraph 2 below, or Book 1 of the Criminal Code or any other statute, or when an international Convention gives jurisdiction to French courts to deal with the offence.

Any person who is present in France and is a national of a non state party to the Statute of International Criminal Court, Rome 18 July 1998, and who is guilty of committing one of the following offences outside French territory, can be investigated and prosecuted before the French courts:

1. Crimes against humanity defined in articles 211-1, 212-1 to 212-3 of the Criminal Code;
2. War crimes defined in articles 400-1 to 400-4 of the same Code;
3. Crimes or misdemeanours defined in articles 23 and 25 of the Law of 29 July 1881 relating to the liberty of the press where this offence constitutes incitement to commit genocide in the sense of article 25, paragraph 3 (e) of the said Convention.

The provisions of paragraph 2 apply to attempts to commit these offences, in every case where attempt is punishable.

The crimes and misdemeanours listed in paragraph 2 can only be investigated on the application of the prosecution.

In respect of the investigation and prosecution of the crimes and misdemenours listed in paragraph 2, the public prosecutor of the Tribunal de Grande Instance (Court of First Instance), the investigating judge, the tribunal correctionnel (criminal court) and the Cour d'assises in Paris have exclusive jurisdiction. Where they have jurisdiction over such offences, the prosecutor of the Tribunal de Grande Instance and the investigating judge in Paris exercise their competence over the entire national territory".

The draft does not allow an application to become *partie civile* to initiate public proceedings. This law quite clearly does away with the possibility for victims to lodge complaints with applications to join proceedings as *partie civile*. As a result, it grants the prosecution a monopoly. This serious attack on the rights of victims is all the more unacceptable on the part of France, which fought – often alone- for several years of negotiations on the Rome Statute and additional texts of the International Criminal Court for the rights of victims to be recognized and in particular for a the inclusion of provisions permitting victims to apply to join proceedings as "*partie civile",* modelled on the French procedure.