



FRANCE

SURVEY QUESTIONS & RESPONSES¹

Survey conducted as part of *Commerce, Crime, and Conflict: A Comparative Survey of Legal Remedies for Private Sector Liability for Grave Breaches of International Law And Related Illicit Economic Activities*.

I. Disclosure requirements for business entities

1. What sort of material information are business entities required to provide to their shareholders and/or public under your jurisdiction's company law or securities laws that may be relevant to potential litigants? For example, are such entities required to provide information about:

- **material civil litigation?**
- **risk factors that would impact a shareholder's investment in the company?**
- **any reported violations of law or pending proceedings arising from such violations?**
- **revenues received from, or amounts paid to or on account of, a government or its officials or agents?**

French law is fairly comprehensive in the area of corporate responsibility, with criminal offences that deal with abuses such as misappropriation of corporate assets, filing of fraudulent financial statements or spreading of false information. Following the publication of the two Viénot reports in July 1995 and July 1999, France now has extensive company rules that promote both efficiency and transparency.

¹ The initial responses to this survey of French law were provided by Abigail Hansen, Attorney-at-law and William Bourdon, Attorney-at-law, *Association SHERPA*, France. The contents of this survey response are intended for research purposes only and continue to be revised in light of peer review. The contents of this survey response are in no way intended as comment on specific cases or judgements, nor are they intended as legal advice on any of the issues covered. Due to constraints of space, many responses in this text provide only a basic introduction to the issue and the complexities of specific cases or provisions may not be fully explicated. Readers seeking practical legal advice should consult a lawyer in the relevant jurisdiction. Citations and references to this survey response should adhere to the following format: "Survey Response, Laws of France (Abigail Hansen and William Bourdon), 'Commerce, Crime and Conflict: A Survey of Sixteen Jurisdictions' Fafo AIS, [date accessed] 2006". The contents of this survey response are published by Fafo AIS under a Creative Commons Attribution-Share Alike 2.5 License.

It is Company Law, rather than the Articles or Memoranda of each company that define company responsibilities in France. The current definition of a Board of directors is to be found in article L 225-35 of the French Commercial Code, and confirms both the pre-eminent role of the board and the collegial nature of its decisions, more particularly that directors are collectively responsible for decisions that have been made². The Law of 24 July 1966 defines the respective powers within an enterprise, for example in the most common form of *société anonyme*, the President of the Board of Directors is also the Director General of the company and enjoys very broad powers – this power is however limited by the ability of shareholders to deprive him of his functions *ad nutum*, that is without any justification whatsoever.

A law of 1994 gives to share-holders the right to form an association so as to be heard, or even to legally pursue the company's management, however in such cases, shareholders are unable to claim damages. A minority shareholder may undertake legal proceedings against a majority shareholder through a civil action *ut singuli*, but any damages obtained are to the benefit of the company.

French shareholders are entitled to receive information from their companies. Corporations with shares held by the public are required to file reports with shareholders, or both, usually on an annual basis, that contain relevant information about the corporations and their businesses.

More precisely, the article L225-108 of the Commercial Code provides that :

“The board of directors or management, as the case may be, must send or make available to the shareholders the necessary documents to enable them to make decisions based on a knowledge of the facts and arrive at an informed judgment on the management and progress of the company and its business.
(...)

From the date of the delivery of documents specified in the first subparagraph, any shareholder shall be entitled to submit written questions, to which the board of directors or the management, as the case may be, shall require to reply in the course of the meeting.”

The article L225-115 is more precise:

“ Any shareholder is entitled, under the conditions and subject to the time limits determined in a Conseil d'Etat decree, to discovery of:

1. The inventory, the annual accounts and the list of directors or members of the executive board and the supervisory board, and, where applicable, the consolidated accounts;

² “The board of directors sets the direction for company operations and oversees the implementation of strategy (...) it may deal with all issues relevant to the satisfactory running of the company and deliberates and decides upon all matters related thereto.”

2. The reports of the board of directors or the executive board and the supervisory board, as applicable, and the auditors, which shall be presented to the meeting;

3. Where applicable, the text of, and the objects and reasons for, the proposed resolutions, as well as information concerning candidates for the board of directors or the supervisory board, whichever applies;

4. The total amount, certified as accurate by the auditors, of the remuneration paid to the highest-paid persons, the number of such persons being ten or five depending on whether or not the workforce exceeds two hundred employees;

5. The total amount, certified as accurate by the auditors, of the payments made pursuant to 1 and 4 of Article 238 bis of the General Tax Code, as well as a list of the registered shares under sponsorship and the registered shares under patronage;”

Moreover, “Every shareholder shall be entitled at any time to obtain the disclosure of the documents referred to in Article L.225-115 relating to the last three financial years, and the minutes and attendance sheets of meetings held during the said last three years (**Article L225-117**) and to “obtain the disclosure of a list of shareholders.” (**Article L225-116**).”

2. Is there a right to know statute enabling one to obtain information from your government?

In France, freedom of information and the accountability of public servants is a constitutional right, pursuant to the *Declaration of the Rights of Man and the Citizen*.

This is reflected in the Law of 17 July 1978³, which provides for various measures intended to improve relations between the Civil Service and the public, and which in particular creates a general rule that citizens may request a copy of any administrative document, in paper, digitized or other form. The *Commission d'Accès aux Documents Administratifs* (CADA) is an independent administrative authority that assists in this process. The Regulations to this law specify that only final versions, not working documents, may be requested.

There are however a number of exemptions to the general access rule. These include documents created in the context of certain legal proceedings, documents relating to cases before the national ombudsman, certain documents containing certain private information of individuals, documents that are already readily available to the public, documents containing national defence secrets or foreign policy, the internal deliberations of the national executive, and documents from fiscal, customs and criminal enquiries. Certain exempted documents however may be made available under other statutes.

³ *Loi n°78-753 du 17 juillet 1978 portant diverses mesures d'amélioration des relations entre l'administration et le public et diverses dispositions d'ordre administratif, social et fiscal* (Act No. 78-753 of 17 July 1978)

CADA does not have the power to order administrations to surrender documents, though it may strongly urge them to do so. Any refusal however may be challenged in the administrative courts.

II. Status of business entities under criminal law in FRANCE

3. Does your penal code (or judicial interpretations thereof) provide that business entities may be prosecuted criminally for violations of such code?

Criminal liability of legal persons constitutes one of the most important innovations introduced into French law by the new Criminal Code. This is established by **art. 121-2** of the Code, which provides that:

“Legal persons, with the exception of the State, are criminally liable for the offences committed on their account by their organs or representatives, according to the provisions set out in articles 121-4 and 121-7 and in the cases provided for by statute or regulation.

However, local public authorities and their associations incur criminal liability only for offences committed in the course of their activities that may be exercised through public service delegation conventions.

The criminal liability of legal persons does not exclude that of natural persons who are perpetrators or accomplices to the same act, subject to the provisions of the fourth paragraph of article 121-3.”

It must be emphasized that this principle does not, however, apply uniformly to all legal persons and that it does not apply to all crimes.

Thus, criminal liability may arise for:

- For-profit private legal persons (civil or commercial companies, economic interest groups)
- Not-for-profit private legal persons (associations, political parties or groups, unions, employee representative institutions)
- Public legal persons, with the sole exception of the State (territorial collectivities, public institutions).

We shall limit ourselves to the study of “companies” defined in the glossary as for-profit private and public legal persons.

Groups not endowed with legal personality cannot be declared criminally liable. The legal personality requirement can be justified for reasons of efficacy and logic: it would be difficult to convict an entity that has neither legal identity nor physical existence.

This is the case for partnerships, undisclosed partnerships, and companies in the process of formation. Concerning undisclosed partnerships, a tort committed by a representative of one partner in the partnership engages the liability of all the

companies in the venture and not that of the partner company stripped of its legal personality. (*Court of Appeal, Criminal Chamber, 14 December 1999, soc. Spie-Citra : Criminal Law Bulletin, No. 306 ; Court of Appeal Reports, p. 430 ; Criminal Law 200, Comm. No. 56, RJDA 1999, No. 351 ; Bull. Joly 2000, § 145, obs. J.-F. Barbìeri, solution implic.*)

The situation is the same for groups of companies, which cannot be convicted as such. French criminal law does not, in effect, recognize the concept of the group, by virtue of the principle of the autonomy of legal persons in relation to one another.

However different companies belonging to the same group could, in certain situations, through joint action and complicity, be criminally convicted as a result of a crime committed by one of them (*See V.M. Pariente, Groups of Companies and Criminal Liability of Legal Persons: 1993 Company Review, p. 247*).

Thus, although a group of companies may not actually have legal personality, they may nevertheless commit crimes in the name of the collective interest they are pursuing.

Likewise, while in law connected companies may be autonomous, this may be contradicted by their interdependence in the areas of economics, finance, banking and accountancy.

It is for this reason that a group of Cameroonian plaintiffs instituted proceedings under French law in March 2002 against the ROUGIER Group and its Cameroonian subsidiary for acts of fraud, forgery and use of forgery, receiving stolen property and destruction of property belonging to another.

It was considered that the ROUGIER Group's liability arose since the Cameroonian subsidiary, the SFID, was either acting out of necessity, or was in a state of effective domination by the parent company (SA ROUGIER), resulting from [the latter's] economic power.

Effectively, a subsidiary that has acted under the cover of the holding group cannot be punished alone on the basis of article 121-2 of the new Criminal Code in a situation where the punishable act was committed on the order of the group, in its interests, and with adequate means to do so provided by it, in other words where the subsidiary is reduced to an instrument through which the crime was committed.

Consequently, the Cameroonian victims of the acts of the Cameroonian subsidiary of the ROUGIER Group considered that the guilty activity had been dictated by the ROUGIER Company, given the resources at its disposal and the goals it sought to attain.

It would, furthermore, be particularly paradoxical and unfair for the real instigator and beneficiary of the crime to be immune from legal responsibility, on the pretext that the principal perpetrator of the crime was a foreign subsidiary.

In addition, to encumber a subsidiary company with criminal sanctions could amount to an injustice; this would be considerably more important if the company being sued were insolvent, whereas the company group was in a prosperous position.

As a result, maintaining collective criminal liability obviously reflects to a greater degree the reality of a given situation.

Indeed, a company group has never been the subject of any legal definition.

Nevertheless, despite the lack of a clear definition, one cannot regard the company group as a non-legal party: law and case law have repeatedly referred to their obligations, and to suggest otherwise would allow the impunity of a parent company, even in the event it controlled and benefited from the acts of a subsidiary, which would itself be immune from prosecution since it was situated outside French territory.

Obviously, the liability sought in the ROUGIER case is not liability for the acts of another. The plaintiffs are not suing the parent company for the acts of its subsidiary. The ROUGIER company is simply being prosecuted on the grounds that it is personally liable, in that it placed its subsidiary in the position of a simple performer.

The case law may well evolve when evidence is brought of the totally artificial and fictitious character of this autonomy, particularly where there exists all the characteristics of interference in the business of different legal entities.

Companies in the course of liquidation remain criminally responsible, and in the case of mergers and acquisitions, one company cannot be held criminally liable for crimes committed by the other. (*Court of Appeal, Criminal Chamber, 20 June 2000 : Bulletin of Criminal Law, No. 237 ; Reports of the Court of Appeal, Criminal Chamber 2000, p. 440 ; D ; affaires 2001, No. 10, p. 853, note H. Matsopoulou ; Bull. Joly 2001, § 12, obs. C. Mascala*).

Article 121-2 of the Criminal Code however does not state that a legal person may commit a crime, but defines the conditions under which a crime may be imputed to it that are committed on its account by one or more natural persons. The class of representatives includes, in particular, a person entitled to the delegation of the power of an organ of the legal person.

While it may be necessary to establish that all of the components of the crime were committed by an organ or representative, it is not necessary that the organ or the representative should itself have been declared guilty of the crime for that crime to be imputed to the legal person. Furthermore, the identification of a guilty natural person is not always imperative.

Finally, criminal liability of legal persons does not exclude principal or accomplice liability of physical persons for the same acts. The Prosecutor is not, however, obliged to prosecute the guilty organ or representative, and in any event, there are certain cases where such proceedings would be impossible.

In order to provide for the initiation of criminal liability for legal persons, procedural regulations, particularly for the prosecution and sentencing of legal persons, have been inserted into the code of criminal procedure.

Moreover, the principle of criminal liability of legal persons does not concern all crimes. In fact, it can only be applied on the condition specifically provided for by the text (statute or regulation), which defines and prohibits the particular crime.

Thus, following the reform of the Criminal Code and Law No. 2001-504, criminal liability of legal persons is provided for in the case of the following crimes:

- In Book II of the Criminal Code relative to felonies and misdemeanors against persons, liability is provided in particular for crimes against humanity (arts. 213-3)⁴; murder and involuntary manslaughter (Art. 221-7); intentional attacks on life: murder and poisoning (art. 221-5-1); intentional attacks on the integrity of the person: torture and acts of barbarism, violence and threats of violence (arts. 222-6-1, 222-16-1, 222-18-1); unintentional attacks on the integrity of the person (art. 222-21); rape and sexual assault (art. 222-33-1); drug trafficking and money laundering (art. 222-42); risking the death of another (art. 223-2); illicit medical experimentation (art. 223-9); discrimination (art. 225-4); solicitation (art. 225-12); work or living conditions against the dignity of the person (arts. 226-7 and 226-9).

- In Book III, devoted to felonies and misdemeanors against property, criminal liability of legal persons is applied more broadly and almost all the crimes provided for by this book are included, specifically: theft (art. 311-16); extortion and blackmail (art. 312-15); fraud and fraudulent abuse of a particularly vulnerable person (art. 313-9); receiving stolen goods (art. 321-12)...

- In Book IV, regarding felonies and misdemeanors against the State, criminal liability is allowed for legal persons for all Title I crimes concerning attacks against State interests (art. 414-7); for all Title II crimes relative to terrorism (art. 422-5); for certain Title III crimes, including active bribery, trading of favors, creation of a group for combat, etc.

Furthermore, implementing legislation has provided for criminal liability of legal persons for certain crimes that appear in other codes or statutes, notably: atmospheric pollution (*Law no. 61-842*, 2 August 1961, art. 7-1); crimes against the provisions of the Water Law (*Law no. 92-3*, 3 January 1992, art. 28-1).

4. What type of sanctions are applied to business entities, as opposed to natural persons?

Specific penalties have been instituted in order to criminally sanction legal persons convicted of a misdemeanor or felony.

⁴ **Article 213-3** : Legal persons may incur criminal liability for crimes against humanity on the conditions set out under article 121-2. The penalties incurred by legal persons are : 1. The penalties enumerated under article 131-39 ; 2. the confiscation of any or all of their assets.

Ten different forms of punishment, placed on a strict plane of legal equality, are thus provided for by the Criminal Code against legal persons. These are, with the exception of certain penalties specific to certain crimes : fines, dissolution, prohibition to undertake certain activities, placement under judicial supervision, closure of the establishments, disqualification from public tenders, the prohibition to make public appeals for funds, prohibition on the use of cheques or credit cards, confiscation of anything used for the commission of the offense, the public display or broadcasting of the sentence.

Fines are always imposed, and are equal to five times the fine incurred by natural persons for the same crime.

As stated in article 131-39 of the Criminal Code⁵, dissolution constitutes, in a certain way, “capital punishment” for legal persons. The particular seriousness of this penalty explains why its area of application should be so limited concerning the crimes for which it is incurred and the conditions of its application.

Dissolution is applied for only for the most serious crimes or crimes that present a particular danger when committed by a legal person. One can, in this vein, cite the following crimes: felonies and misdemeanors against persons, crimes against humanity and conditions of work or shelter contrary to human dignity.

In addition, specific penalties exist for certain crimes, which are shared by natural persons, such as the confiscation of all assets, incurred notably in the case of a crime against humanity.

The last paragraph of article 131-39 forbids the imposition of the penalty of dissolution, notably against public legal persons. This prohibition is justified in particular by the principle of the continuity of public service, but can, nevertheless,

⁵ **Article 131-39** : Where a statute so provides against a legal person, a felony or misdemeanour may be punished by one or more of the following penalties:

1. dissolution, where the legal person was created to commit a felony, or, where the felony or misdemeanour is one which carries a sentence of imprisonment of three years or more, where it was diverted from its objects in order to commit them;
2. prohibition to exercise, directly or indirectly one or more social or professional activities, either permanently or for a maximum period of five years;
3. placement under judicial supervision for a maximum period of five years;
4. permanent closure, or closure for up to five years, of the establishment, or one or more of the establishments, of the enterprise that was used to commit the offences in question;
5. disqualification from public tenders, either permanently or for a maximum period of five years;
6. prohibition, either permanently or for a maximum period of five years, to make a public appeal for funds;
7. prohibition to draw cheques, except those allowing the withdrawal of funds by the drawer from the drawee or certified cheques, and the prohibition to use credit cards, for a maximum period of five years
8. confiscation of the item which was used or intended for the commission of the offense, or of the thing which is the product of it;
9. the public display of the sentence or its dissemination either by the written press or by any type of broadcasting.

The penalties under 1. and 3. above do not apply to those public bodies which may incur criminal liability. Nor do they apply to political parties or associations, or to unions. The penalty under 1. does not apply to institutions representing workers.

lead to inequities: a nationalized bank convicted of money laundering cannot be dissolved, in contrast with a private bank that committed the same acts.

Among the penalties incurred particularly for crimes against humanity and crimes of torture and acts of barbarism is the prohibition to exercise, directly or indirectly, one or more professional or social activities. Enshrined in the second paragraph of article 131-39, this penalty is quite frequently incurred, even though it is particularly serious, since it can result indirectly in the dissolution of a legal person, especially a commercial company, if the prohibited activity constitutes the very purpose of the company or if the prohibition places its financial equilibrium in danger.

5. What are the standards applied in your jurisdiction for attributing liability to a business entity for the actions of individual servants?

As far as conditions for the attribution of liability to legal persons are concerned, article 121-2 provides that liability presupposes that the crimes was committed “on their account, by their organs or representatives.”

This liability thus appears at the same time to be both indirect and personal. It is not against the legal person, but against the natural person(s), organ or representative, that the constituent elements of the crime must be made out.

The concept of the *de jure* organ covers all persons invested, individually or collectively, by statute or by the by-laws of the legal person, with the power to act in its name. For example, in the case of commercial companies, the solutions are provided by the Commercial Code. In general partnerships and private limited companies, the organ is the manager. Concerning limited stock companies, when these are provided with a Board of Directors, the [*de jure*] organ is recognized by the Chairman and Managing Directors; in limited stock companies with a Directorate, the organs are made up of the Board of Directors, the president and those of the general directors, who are specially authorized by the Supervisory Council to represent the company.

This, however, raises a question concerning the liability of managers *de facto*, who are not appointed in accordance with the law or regulations, notably in the case of commercial companies. One will recall that one of the first judgments handed down on the subject of criminal liability of legal persons convicted a company by reason of the acts of its *de facto* managers (*T. corr. Strasbourg, 9 February 1996 : Les annonces de la Seine 1996, No. 24, p. 10*).

The concept of a representative covers persons to whom power has been delegated by the managing organ of the legal person.

In addition, the criminal liability of the legal person is only engaged if the organ or representative acted “on the account of” the legal person. Thus, crimes committed in the financial or economic interests of the legal person, and/or committed in the course of activities that further the operation of the legal person, even if they do not result in any profit, engages the criminal liability of the legal person.

As a result, the legal person will not be responsible for crimes committed by a manager in the exercise or on the occasion of the exercise of her functions, if this manager acted on her own behalf and in her own personal interest. Equally, the criminal liability of the legal person will not be engaged if the crimes were committed in the exercise or on the occasion of the exercise of her functions, by one of its employees as long as that employee acted on her own initiative and even if the legal person could have benefited from the crimes.

In contrast, the criminal liability of a legal person could be engaged in the absence of the deliberate intention of its organs or representatives. Legal persons can, in fact, be prosecuted for crimes of negligence or recklessness, particularly in the case of murder or involuntary injury resulting from the non-application of a rule of security that the organs or representatives of the legal person did not respect.

In sum, the principal criminal liability of a legal person is engaged when its organs or representatives have committed, on its account, as the principal perpetrator, the material moral element of a crime.

On the subject of the disassociation of civil and criminal liability, the rule concerning concurrent liability applied in a criminal case is cast aside in a civil matter when the fault of the manager is “inseparable from the exercise of his functions”. It can happen that the company manager, who committed the crime on its account, finds his criminal liability triggered when only the civil liability of the company can be engaged, since the crime is inseparable from his functions.

6. Under your criminal law (penal code) what is the legal standard for convicting someone of being an accomplice to or aiding and abetting the commission of a crime by another (complicity)? What is the legal standard for convicting someone of plotting with another to commit a crime (criminal conspiracy)?

Repression of complicity presupposes the existence of a principal crime, according to the legal principle of “assumption of criminality”.

Articles 121-6 and 121-7 of the Criminal Code provide for the suppression of conspiracy.

Article 121-6 states that :

“the accomplice to the offense, in the meaning of article 121-7, is punishable as a perpetrator”.

Accordingly, the accomplice incurs the same penalties, as if he had himself been the principal perpetrator of the crime.

Article 121-7 distinguishes, in its two paragraphs, complicity by aiding or abetting and complicity by instigation. It thus states that:

“The accomplice to a felony or misdemeanor is the person who, by aiding or abetting, facilitates its preparation or commission.

Any person who, by means of a gift, promise, threat, order or an abuse of authority or powers, provokes the commission of an offense or gives instructions to commit it, is also an accomplice.”

It follows from this article that in order to engage a person’s accomplice liability, that person must have participated in the reprehensible act of the principal perpetrator; her participation must have taken one of the aforementioned material forms and must have been intentional in character. The theory of assumed criminality requires that the participation of an accomplice must be linked to the principal punishable act, i.e. the act designated a felony or misdemeanor by law.

In so far as acts committed abroad are concerned, article 113-5 of the Code states that:

“French criminal law is applicable to any person who, on the territory of the French Republic, is guilty as an accomplice to a felony or misdemeanor committed abroad if the felony or misdemeanor is punishable both by French law and the foreign law, and if it was established by a final decision of the foreign court”.

Conversely, crimes committed abroad as an accomplice that are linked to a principal crime punishable in France are, of course, punishable in France. (*Court of Appeal, Criminal Chamber, 13 March 1891 : Bull. Crim., n° 66 – 7 September 1893 : Criminal Bulletin., n° 252 – 30 April 1908 : S. 1908, 1, p. 553, note A. Roux – 2 July 1932 : Gaz. Pal. 1932, 2, p. 532 – CA Lyon 27 December 1892 : DP 1894, 2, p. 254 – T. Corr. Paris, 11 April 1983 : Gaz. Pal. 1983, 2, p. 372, note J.-P. Doucet*).

While complicity, in order to be punishable, must be linked to a punishable principal act, it is not necessary that the perpetrator of the act is also effectively punished. It is possible that the perpetrator evades punishment for reasons either of fact or law, without changing the fate of the accomplice.

All felonies and misdemeanors are in principle capable of having accomplices, except, of course, in cases where the law provides otherwise.

To be punishable as an accomplice presupposes material participation corresponding to one of the forms started in article 121-7 of the Criminal Code. Complicity also indisputably presupposes the accomplishment of a positive act and it has been concluded from that, that there can be no complicity by abstention.

An individual, who assists in the commission of a crime as a neutral spectator, will not be held criminally responsible as an accomplice, even if he could have opposed the realization of the crime.

This principle, has, however, been criticized in theory. In fact, one, who participates as a spectator in the commission of a crime is not necessarily a passive and indifferent witness. There are people whose presence implies moral support for

the crime and constitutes aid from the perpetrator's perspective, since she finds her criminal activity facilitated, in other words, people, whose presence can be considered to have played a causal role in the realization of the crime. (Cf. especially *R. Beraud, Omission, punishable, JCP 1944, éd. G, I, 433* – *A. Chavanne : op. cit., no. 71ff. – Note ss CA Bourges, 16 February 1950 : JCP 1950, ed. G, II, 5629*.)

It also follows from the terms of article 121-7 of the Criminal Code that the participation of accomplices must necessarily occur before or during the commission of the crime, and not afterwards. Nevertheless, such acts can be punishable under the head of accomplice liability if they result from an agreement made before the realization of the crime.

Article 121-7 of the Criminal Code outlines precisely 3 forms of material participation of an accomplice, which are : aiding, or abetting, provocation and giving instructions. It is sufficient that one of these means exists to justify a conviction. (*Court of Appeal, Criminal Chamber, 4 March 1964 : JCP 1964, ed. G, IV, p. 57 – 29 March 1971 : Criminal Bulletin, No. 112*)

The provoker or instigator of the crime is the person, who incites the person who commits the crime to do so. In certain cases, the Legislature transforms the person who provokes the crime into the principal. Thus, certain texts punish those, “who commit or cause to be committed”. (Cf. *article 211-1, 223-8 or 434-5 of the Criminal Code*). Thus, a boss, who gives the order to his employee to commit a crime has been considered to be not the accomplice, but the principal (Cf. *Court of Appeal, Criminal Chamber, 29 July 1869 : Criminal Law Bulletin No. 184-29 November 1888 : Criminal Law Bulletin, No 339-31 October 1889 : Criminal Law Bulletin, No. 324*).

Complicity includes not only a legal and material element, but also a moral element. The accomplice must have intended to participate in the crime committed by another person. This third condition is expressly formulated by the texts. Article 121-7 is in fact directed at “the person who knowingly” makes himself an accomplice.

The criminal intent required for an accomplice is distinct, however, from that of the principal. It is nonetheless made up of two elements: awareness – of law and also of fact – i.e. of the criminal character of the acts of the principal – and the will to participate in the crime.

That said, it is not necessary that the intent of the accomplice conform completely to that of the principal. The criminal chamber of Court of Appeal in its judgment of 23 January, 1997, indeed declared that: “*the last paragraph of article 6 of the Statute of the Nuremberg International Military Tribunal does not require that an accomplice to crimes against humanity adhere to the ideological policy of hegemony of the principal perpetrators, nor that he belong to one of the organizations declared criminal by that Tribunal*”.

The requirement of aware and willing participation in a specific crime leads to two types problems, that of the relation between the intent of the accomplice and the crime accomplished by the principal, and that of complicity in strict liability crimes. As to the first question, jurisprudence has traditionally decided that if the crime committed

was, as to its elements, different from the crime that was planned, the accomplice cannot be punished.

If the role of the accomplice seems so determinative that one can establish between the protagonists simultaneousness of action and reciprocal assistance, the courts do not hesitate to make the person, who was only an accomplice, into a co-principal (cf. in particular Court of Appeal, Criminal Chamber, 25 January 1962: Criminal bulletin no. 68; Rev. sc. Crim. 1962, p749, obs. A. Légal).

Concerning legal persons, they can be prosecuted not only in the capacity of principal perpetrator of a crime, but also as an accomplice - article 121-2 defines the criminal liability of legal persons, indeed by reference back to articles 121-6 and 121-7, relative respectively to liability as a principal and accomplice.

A legal person can be convicted as an accomplice for a variety of reasons:

- first, because the material act that exists in all crimes of commission is not incompatible with the liability of legal persons in the capacity of principal perpetrator, to the extent that this act could have been carried out by representative or organ of the legal person,
- and also when the crime was committed by a third party on the instruction of organs or officers of the legal person.

As a result, criminal liability of a legal person as a principal or accomplice presupposes that the criminal liability has been established, as principals or accomplices, of one or more natural persons representing the legal person, having acted on its account.

However, in certain scenarios, and more particularly when crimes of omission or negligence are concerned, characterized by the absence of criminal intent or the material act of commission, the liability of the legal person could be triggered even when the criminal liability of the natural person could not have been established. Certain acts can be committed by collective organs of the legal person without it being possible to identify the role of their members and impute personal liability for the crime to a specific individual.

Conspiracy is also criminalized by French penal Code :

Article 450-1 states that :

“A criminal association consists of any group formed or any conspiracy established with a view to the preparation, marked by one or more material actions, of one or more felonies, or of one or more misdemeanours punished by at least five years' imprisonment.

Where the offences contemplated are felonies or misdemeanours punished by ten years' imprisonment, the participation in a criminal association is punished by ten years' imprisonment and a fine of €150,000.

Where the offences contemplated are misdemeanours punished by at least five years' imprisonment, the participation in a criminal association is punished by five years' imprisonment and a fine of €75,000.”

Concerning legal persons, article 450-4 provides that :

“Legal persons may incur criminal liability pursuant to the conditions set out under article 121-2 for the offence provided for under article 450-1.

The penalties incurred by legal persons are:

1° a fine, in the manner prescribed to under Article 131-38;

2° the penalties referred to under article 131-39.

The prohibition referred to under 2° of article 131-39 applies to the activities in the course of which or on the occasion of the performance of which the offence was committed.”

7. Are there any other practical considerations or factors that must be present when the defendant in a criminal proceeding is a business entity rather than a natural person?

No.

III. Status of International Law/International Humanitarian Law in your Country's Legal Framework

8 Which international crimes have been incorporated into your domestic criminal law? Please include any crimes enumerated in the Rome Statute of the International Criminal Court such as genocide, war crimes, crimes against humanity, and other relevant instruments. Do your country's laws modify the provisions of the ICC Statute, such as concepts of aiding and abetting and conspiracy or liability of business entities rather than only natural persons? Do your criminal courts have jurisdiction over those international crimes that have not been incorporated into your domestic law?

The ratification of a Convention does not create automatically a crime under French law. When France has signed an international convention, it has to be ratified either by the Parliament or by referendum. Then France is obliged to incorporate into French Law the provisions of the ratified Convention.

Concerning crimes against humanity in domestic law, the text of reference is the Law of 26 December 1964 that declares the imprescriptibility of crimes against humanity in its only article, as follows :

“Crimes against humanity, such as are defined by the United Nations Resolution of 13 February 1946, taking note of the definition of crimes against humanity contained

in the Charter of the international tribunal of 8 August 1945, are imprescriptible by nature”. (J.O. 29 December 1964, p 11788).

The text does not, however, define the crime, limiting itself to a reference in this regard to the Resolution of the UN of 13 February 1946, which itself was inspired by and acknowledged the definition contained in article 6-c of the Statute of the International Military Tribunal of Nuremberg (IMT).

The French Legislature has, however, inserted in the new Criminal Code a whole title exclusively devoted to crimes against humanity. There are now not one, but several crimes against humanity, amongst which the crime of genocide occupies the first chapter alone, followed by the other crimes in the following chapter.

Within the first title, the Legislature has enumerated 3 types of crime: genocide, based on the UN Convention for the Prevention and Repression of the Crime of Genocide of 1948, then crimes against humanity *stricto sensu*, which originate for their part from article 6-c of the Statute of the IMT, and finally aggravated war crimes.

Genocide is enshrined in article 211-1 of the new Criminal Code.

“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:

- wilful attack on life;
- serious attack on physical or mental integrity;
- subjection to living conditions likely to entail the partial or total destruction of that group;
- measures aimed at preventing births;
- forced transfer of children.

Genocide is punished by criminal imprisonment for life.

The first two paragraphs of Article 132-23 governing the safety period apply to the felony set out under the present Article.”

Other crimes against humanity are defined in Article 212-1, which establishes that:

“Deportation, reduction to slavery or the massive and systematic practice of summary executions, of abduction of persons followed by their disappearance, of torture or inhuman acts, inspired by political, philosophical, racial or religious motives, and organised in pursuit of a concerted plan against a group of a civil population are punished by criminal imprisonment for life.

The first two paragraphs of article 132-23 governing the safety period are applicable to felonies set out under the present article.”

The crimes in this article are labelled crimes against humanity *stricto sensu* because they alone correspond to the crimes defined by article 6-c of the Statute of the IMT.

Then, article **212-2** on aggravated war crimes declares that:

“Where they are committed during war time in execution of a concerted plan against persons fighting the ideological system in the name of which are perpetrated crimes against humanity, the actions referred to under article 212-1 are punished by criminal imprisonment for life.

The first two paragraphs of article 132-23 governing the safety period are applicable to felonies set out under the present article.”

These crimes are the same crimes as in the preceding category. In addition, they must have been committed during war, a circumstance that by nature directly influences the position of the victims. The crime presupposes the concurrence of two prerequisites, the double realization of which naturally limits its field of application. Thus, the crime requires in the first place, a war, in the course of which are perpetrated, concomitantly, crimes against humanity.

Finally, article 212-3 provides that:

“The participation in a group formed or in an agreement established with a view to the preparation, characterised by one or more material actions, of one of the felonies defined by articles 211-1, 212-1 and 212-2 is punished by criminal imprisonment for life.

The first two paragraphs of article 132-23 governing the safety period are applicable to felonies set out under the present article.”

Concerning the characteristics common to crimes against humanity, it is useful, first, to note the absence of any reference to the criminality of the State. In other words, every collective venture to degrade mankind, whatever it may be, is subject to incrimination, without it being necessary that it be linked to State criminality.

According to the definition, to invoke the particular circumstances in which the incriminated acts were committed is, at the same time, to make reference to a “concerted plan”, which is included in the definition of the various crimes in the generic category of crimes against humanity.

So, beyond the type of victims, it is the planned, organized and systematic character that is the distinctive feature of the crime. The concept of a concerted plan was first retained for genocide, before being extended to other crimes against humanity. It is therefore central to the new provision and is inspired directly by article 6-c of the IMT Statute, the fundamental point of reference in the matter.

It follows that incrimination rests less on the intent or position of the instigators and those who perform the crime, than on the very characteristics of the undertaking. To qualify as a crime against humanity, special intent no longer suffices; it is now

necessary to add to that the organized and systematic character of the material acts to be carried out, the particular circumstances governing their commission and the fate in store for the victims.

As regards genocide, the material element is multi-faceted and the text more or less reproduces the enumeration included in the 1948 Convention.

Genocide includes, in addition, other elements attached to the protagonists of the crime. Concerning victims of genocide, the incriminating act is aimed at groups only, with no mention made of the victims other than as group members.

As for the instigators of the crime, the text accords this title to those, who cause genocide to be committed in the same way as those, who commit it directly. In the same way, the distinctions between principals and accomplices are erased, the category in which instigators of a criminal scheme are traditionally placed.

The requisite moral element reproduces the 1945 text with a slight nuance: the crime must have been inspired by political, racial and religious motives, to which are also added philosophical motives. However, victims continue to belong to a group of the civilian population, the collective character thus attributed to the crime tending to obscure the distinction with genocide.

Crimes against humanity lie at the center of a process, which, from the initial criminal decision to the performance of the acts, properly speaking, necessarily implies the participation of a multiplicity of contributors, whose acts, to a greater or lesser extent, strive towards the realization of the injurious result. That result could not have been reached but for the combined action of all the participants, whose respective acts acquire a criminal complexion in relation to this goal and this result. The crime must therefore be reconstructed in order to appreciate it comprehensively and impute it to all those, who contributed to its commission, on the condition that they were willing protagonists, aware of the reprobate act with which they are charged.

In domestic French law, the Law of 26 December 1964 expressly references article 6-c of the IMT Statute, while article 213-4 of the Criminal Code, in an exception from the ordinary law of article 122-4, paragraph 1, holds that principals and accomplices of crimes against humanity cannot invoke the justification of superior orders or authorization by statute or regulation.

The text, however, concedes the possibility for the trial court to take into account the circumstances when determining the nature and extent of the sentence.

Thus, article **213-4** declares that:

“The perpetrator or the accomplice to a felony under the present Title is not exonerated from his responsibility on the sole basis that he performed an act prescribed or authorized by statutory or regulatory provisions, or an act ordered by legitimate authority. A court shall nevertheless take this circumstance into account when deciding the nature and extent of the sentence”.

According to article 213-4, the justification of superior orders from a legitimate source of authority is altogether ruled out, with one small reservation: the trial court can take this circumstance into account when it determines the nature and extent of the sentence.

It is useful to explain the rules of jurisdiction established in a case of a crime against humanity.

A specific rule was retained concerning certain crimes among which, in particular, are acts of torture (art. 689-2) and acts of terrorism in the application of France's international engagements, (art. 689-3). (Cf. infra)

With regard to crimes against humanity, no specific rule was retained in the New Criminal Code (art. 113-1 ff). In France, one continues to refer to the Moscow Declaration of 30 October 1943, which, with the exception of cases of serious criminals, provides for other than "they should be returned to the country where their abominable acts were perpetrated so that they can be punished in accordance with the laws of that country".

Appeal is thus made to the criterion of territoriality to define jurisdictional competence.

As for crimes committed extraterritorially, two specific laws were recently adopted in France. The first, of January 1995 (*JORF*, 3 January, 1995, p.71; *ALD* 1995, No. 2, pgs 55-6) directs "(...)adaptation of French law to the dispositions of Security Council Resolution No. 827 of the United Nations, establishing an International Tribunal in order to hold persons liable for grave breaches of international and humanitarian law committed on the territory of the Former Yugoslavia since January 1, 1991".

While the second, of May 22 1996, restates the same principles with regard to the crimes justiciable by virtue of Resolution 955 on the International Tribunal for Rwanda.

According to articles 1 and 2 of the Law of May 22 1996, principals or accomplices of acts carried out on the territory of Rwanda in 1994, which constitute, according to articles 2 and 4 of the Statute of the International Tribunal, grave breaches of Common Article 3 of the Geneva Convention of 12 August 1949 and to Additional Protocol II of the aforementioned Convention, of 8 June 1977, genocide or crimes against humanity can, if found in France, be prosecuted and judged by French courts under French law. These dispositions are applicable to ongoing trials by virtue of article 112-2, paragraph 1 of the Criminal Code (Criminal Appeals, 6 January, 1998: *Criminal Law Bulletin*, no. 2, *Criminal Law* 1998, Comm. No. 70, Obs. J.-H Robert; *Rev. Ss Crim.* 1998, p. 837, obs. M. Massé).

These two laws seem to establish the principle of universal jurisdiction (Cf. infra). Ultimately, they retain territorialized universal jurisdiction. French courts acknowledge their jurisdiction only in the case where the perpetrators of the crimes in question are found in France.

As to a civil suit brought by individuals, one must distinguish between a civil action brought by individuals and one brought by associations. The Criminal Chamber, in one of its Leguay cases, declared admissible an individual action for damages brought by one lone individual, alleging personal loss resulting from a crime against humanity. After having reiterated the wording according to which these crimes are a matter for the ordinary courts, the Chamber explained that “it logically follows, in the absence of contrary legislative dispositions, that articles 2 and 3 of the Code of Criminal Procedure are applicable here(...), the nature of a crime against a collectivity, which results from the definition given by international courts of a crime against humanity, does not have the effect of excluding the possibility of individual harm” (*Court of Appeals, Criminal Chamber, 21 October, 1982 : Criminal Law Bulletin, No. 231*).

Regarding a civil action brought by associations, the admissibility of their action has been declared on the basis of article 2-4 of the Code of Criminal Procedure, stemming from the Laws of 2 February 1981 and 10 June 1983. According to the text:

“Any association lawfully registered for at least five years proposing in its constitution to combat crimes against humanity or war crimes, or to defend the moral interests and the honour of the Resistance or of those of deported persons, may exercise the rights granted to the civil party in respect of war crimes and crimes against humanity.”

Concerning the applicable sentences in French law, the Criminal Code has established a repressive arsenal in the area of crimes against humanity, consisting of principal and complimentary penalties.

Violations of international law can also be prosecuted before French courts on the basis of ordinary law. For example, the New York International Convention on Torture of 1984 was incorporated in French law in 1987 and cases were brought from 1995 onwards against Rwandans alleged to have committed genocide, on the basis of article 689-1 of the Code of Criminal Procedure, which integrated the mechanism of universal jurisdiction. And it was only later that the autonomous crime of torture was integrated [into French law].

Moreover, since France ratified the International Criminal Court Statutes, she will be obliged to harmonize her criminal law in order to put herself in working order vis-à-vis the ICC. Next, she will have specifically to criminalize war crimes, because that is not the case today.

In the meantime, all crimes in humanitarian law can be prosecuted on the basis of ordinary criminal law, such as voluntary manslaughter, murder, destruction of property belonging to another, illegal confinement etc.. Thus, in August 2002, Burmese citizens brought a judicial action before French courts for acts constituting the crime of illegal confinement against Mr. Thierry DESMAREST, a French citizen, the current President Director General of TOTALFINALELF S.A. and first in charge of the Project Yadana – in the context of which acts of forced labor occurred – as Director of the Exploration and Production Division of the company TOTAL from July 1989-1995, then President Director General of TOTAL from May 1995,

therefore, at the time of the acts, and Mr. Hervé MADEO, also a French citizen, Director of the On-Site Operator, TOTAL MYANMAR EXPLORATION PRODUCTION (TMEP) from 1992 to 1999.

In the absence of any specific provision, forced labor corresponds to a crime defined by the French Criminal Code: the crime of illegal confinement.

Article 224-1 thus states four types of crimes, materially different and legally autonomous, that is to say arrest and removal, which are the immediate acts that consist in physically apprehending an individual in such a way that she is deprived of her liberty to come and go, as an adult, or taken from the authority of her parents in the case of a child.

Article 224-1 also provides for detention and illegal confinement of a person, which are the continued (*next stage*) acts and imply a deprivation of liberty of a certain duration of time.

This does not need to last very long and recent judicial interpretation is satisfied with a deprivation of liberty lasting only a few moments, even if this interpretation obscures the boundary between arrest and detention.

If it is correct that, evidently, the principle of restrictive interpretation of the criminal law should be applied concerning this article, as is always the case, and if it is correct that French jurisprudence has never had the opportunity to qualify forced labor as illegal confinement, the plaintiffs are justified in relying first on the fact that:

- French legislation on the repression of war crimes began an extension of French criminal law to crimes such as forced labor. Thus, an ordinance of 28 April 1944 assimilated illegal confinement in ordinary law (arts. 341-343 of the old Criminal Code), forced labor of civilians and deportation without regular charges, to the crime of arrest or illegal confinement, aggravated by imitation of a public authority or death threats.

This assimilation was also extended to the employment of prisoners of war or civilians on military works, as well as to illegal confinement aggravated by torture or the employment of prisoners in order to protect the enemy.

Therefore, the Burmese plaintiffs, by being constrained to do forced labor, were subjected to a situation perfectly equivalent to the definition given by French criminal law of the crime of illegal confinement. They affirm that they were not only requisitioned by force by the army to do unremunerated work, consequently against their will, but also that they were driven by force to the worksites, forced to work there and reside there during a period imposed upon them, without any possibility for them to escape this constraint.

Thus, they suffered successively all the materially and legally independent crimes enshrined in article 224-1, since first by threat of force, they were deprived of their liberty to come and go (deportation) and then, they were deprived of their liberty (illegal confinement on the worksite).

- Other jurisdictions, notably the U.S.A, have held that the dispositions of international law that led to the conviction of the German officials in 1945 (prosecuted for war crimes and crimes against humanity) had been invoked specifically to prosecute and convict them by reason of specific acts of forced labor with which they were charged.

As regards the international legal provisions, France is a party to the Geneva Convention of 28 June 1930 concerning forced or mandatory labor (as modified by the 1946 Convention and to the Geneva Convention of 25 June 1957 concerning the abolition of forced labor (on these texts, see Glaser, vol. 1 423ff.), signed under the auspices of the ILO.

Although according to article 2 of the 1957 Convention every State Party *“undertakes to take effective measures with a view to the immediate and complete abolition of forced or mandatory labor as described in article 1 of the present Convention”*, article 25 of the first Convention declares more forcefully that *“the act of illegally demanding forced or mandatory labor will be punishable by penal sanctions....”*

Furthermore, the prohibition on forced or mandatory labor is enshrined in article 8-3 of the International Covenant on Civil and Political Rights and in article 4-2 of the European Convention on Human Rights.

11. May a business entity be prosecuted for international crimes in the courts of your country, whether under domestic law or with reference to international law? If yes, under what circumstances?

The principle of criminal liability of legal persons is contained in the new Criminal Code in article 121-2.

As for the crime in question, article 121-2 indicates that the legal person will be liable in the cases provided for by the Law or by regulations, when the Legislature has enshrined this liability in the theory of crimes against humanity in article 213-3, which provides that:

“Legal persons may incur criminal liability for crimes against humanity pursuant to the conditions set out under article 121-2.

The penalties to be incurred by legal persons are:

- 1) the penalties enumerated under article 131-39;
- 2) confiscation of any or all of their assets”.

Thus, legal persons, other than the State, can also be declared criminally liable for crimes against humanity perpetrated on their account by their organs or representatives (Criminal Code, article 213-3). The penalties to be incurred are those of article 131-39 (dissolution, prohibition to exercise, closure, etc.), just as the confiscation of all or part of their assets, again under the head of a principal penalty, these sanctions are not evidently of such a type that could punish natural persons,

principals or accomplices of these crimes, as follows from the general principal established by article 121-2.

Legal persons can be prosecuted subject to the limitations mentioned above concerning crimes of domestic law committed abroad, provided that the Law has established the liability of legal persons for these crimes. For the crimes for which legal persons cannot be prosecuted, whatever the case, the managers in law or in fact of the business entity, acting on its behalf extraterritorially, can be prosecuted.

IV. Alternative Mechanisms

12. Can you think of any bases in your country's tort law (civil law) for suing individuals and /or business entities for violations of international criminal law, IHL, (whether or not incorporated into domestic law)?

In French law, a civil action can be brought jointly with a penal action, before a criminal court.

A fundamental principle is laid down by articles 1382 to 1384 of the Civil Code. Thus, if evidence is brought forward by a victim of a wrong, on the one hand of the existence of this wrong, and on the other hand of a private act of a legal person or its executive, the two can be accumulated, and from a causal link between these actions and the harm comes the fundamental basis of the principle in French law that allows every person to bring a civil action. It must be remembered that the damage must be personal and direct for each one of the victims, in the absence of which the action is inadmissible, with some narrow exceptions. Sometimes, transferred or indirect harm is, in a certain case, admissible.

V. Jurisdiction and related issues

13. On what bases do the courts of your country assert personal jurisdiction over criminal and civil defendants?

The extraterritorial jurisdiction of France is based on a connection either with the perpetrator of the crime or the victim, either with the events, or based on the concept of universality.

French jurisprudence also allows jurisdiction for a crime committed abroad where the perpetration of a connected or indivisible act occurred in France. Thus, a foreign accomplice or co-principal, acting outside French territory could be tried if the principal act was committed or reputed to have been committed in France, (Court of Appeal, Criminal Chamber, 13 March 1891 ;D. 1892,1, p. 76-17 February 1893 : D. 1894, 1, p. 32 – 7 September 1983 : S. 1894,1 249.).

Conversely, French law applies when the acts of complicity were committed in France, for a crime committed abroad, if the acts are punished both by French law and foreign law and if the felony or misdemeanor has been established by a decision of a court of final instance of the foreign jurisdiction (*Criminal Code, art. 113-5 – See*

Court of Appeal, Criminal Chamber, 10 February 1999 : Bulletin of Criminal Law, No. 15 ; D. 1999, jurisprudence p. 491, not A. Fournier).

Therefore, for acts of complicity, France will always have jurisdiction unless the act of complicity and the principal act were both committed abroad and France has no [applicable] head of jurisdiction. Another circumstance in which a State could find itself competent to prosecute and try acts committed on foreign territory is jurisdiction by representation. A State finds itself requested by the State where the crime was committed to try the events in its place. Often, the acts are not of requisite seriousness to make extradition possible.

French law thus extends to certain crimes committed outside its territory by reason of a connection to the person concerned, whether perpetrator (active personality jurisdiction) or victim (passive personality jurisdiction) of the crimes. This connection takes effect through the nationality of the person.

On active personality jurisdiction, article 113-6 of the new Criminal Code states that :

“French criminal law is applicable to any felony committed by a French national outside the territory of the French Republic. It is applicable to misdemeanors committed by French nationals outside the territory of the French Republic if the conduct is punishable under the legislation of the country in which it was committed. The present article applies although the offender has acquired the French nationality after the commission of the offense of which he is accused.”

The apparently generally-agreed upon theoretical justification for active personality jurisdiction flows from the fact that France does not extradite her nationals. Thus, a French citizen who commits a crime abroad will not remain unpunished because she could return to France.

However, France will only cooperate in the prosecution of crimes committed by French citizens abroad, if the same acts are punishable in France.

As far as the acts constituting a crime in France are concerned, the acts do not have to be criminalized in the State where they were committed. As a result, a French national can be judged by French courts for a crime, even if, in the State of commission, he did not violate any provision of criminal law.

The prosecution of less serious acts that constitute a misdemeanor in French law, requires, however, supplementary conditions : that the acts are not only punishable in France, but also in the State of commission. This is the reciprocity of criminal law, called “double incrimination” (art. 113-6, paragraph 2).

But if this reciprocity is to be established, it is of little importance that the foreign label given to the acts is not the same as the French characterization of the same acts. Identical incrimination is not required.

If the misdemeanor was committed in several countries, it suffices that the events are punishable by the law of one of them (*C. Lombois, International Criminal Law, 2nd edition, Précis Dalloz, 1979, No. 374*).

In the case of crimes committed abroad by a legal person, it seems that a French judge must establish not only that the act is criminalized in the country of commission, but also that the criminal law engages the liability of legal persons for such acts.

A persons prosecuted for crimes (felonies or misdemeanors) committed abroad must be a French national at the moment of the commission of the crime. It is irrelevant whether the person is natural or legal, a legal person that has its principle place of business in France is considered to be French.

Article 113-7 of the New Criminal Code provides that:

“French Criminal law is applicable to any felony, as well as to any misdemeanor punished by imprisonment, committed by a French or foreign national outside the territory of the French Republic, where the victim is a French national at the time the offense took place.”

The duty of the French State to protect its citizens is the reason put forward to justify passive personality jurisdiction. (*Bigay, The New Provisions on the Jurisdiction of the French courts with regard to Crimes Committed Abroad: D. 1976, chron. P. 51*).

As for active personality jurisdiction, French law must punish crimes and the crimes must have been committed outside of French territory. The condition of double incrimination is not required.

On the conditions for prosecution of misdemeanors under the head of passive personality jurisdiction, article 113-8 adds a condition to articles 113-6 and 113-7. Thus, it declares that:

“In the cases set out under Articles 113-6 and 113-7, the prosecution of misdemeanors may only be instigated at the behest of the public Prosecutor. It must be preceded by a complaint made by the victim or his successor, or by an official accusation made by the authority of the country where the offense was committed.”

The accusation or complaint is required “in order to show well that the crime is of sufficient seriousness to justify a prosecution” (*See A. Vitu, Court of Appeal, Criminal Chamber, May 1972: Bulletin of Criminal Law, No. 164*).

As regards the requirement of a prosecution at the request of the public Prosecutor, it is suggested that should reduce the risks that can result from “possible bias on the part of foreign authorities” (*J. Pradel, General Criminal Law, 11th edition, 1996, Cujas, No. 223*). This condition would also be justified by “evident reasons of diplomatic appropriateness”. (*Note, A. Vitu, op.cit*).

There are thus two main conditions concerning misdemeanors committed by French nationals abroad: prosecution can only be instigated by the public Prosecutor, after a complaint or accusation.

If the initiative to take public action is left entirely to the public Prosecutor, he cannot act *ex officio* [unprompted/independently]. He must be seized either by a complaint made by the victim or her successors, or by an official accusation by the authorities of the country where the crime was committed. (Cf. Article 113-8).

For this complaint or accusation to be admissible, it must be submitted before the expiration of the statutory time limit for public action – the period starts to run from the day on which the crimes were committed.

On universal jurisdiction

Universal jurisdiction accords to the State in which the perpetrator of the acts is present, the right to prosecute him, regardless of the place where the crimes were committed or the nationality of the persons concerned. Connected not to a person, whether perpetrator or victim of the crime, neither to the territory where the crimes were committed, nor to a factual circumstance, universal jurisdiction applies in principle only to certain serious crimes.

The articles concerning universal jurisdiction are contained in the Code of Criminal Procedure. Thus, article 689 of the Code of Criminal Procedure holds that:

“Perpetrators of or accomplices to offenses 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 offense.”

Article 689-1 of the Code of Criminal Procedure adds that:

“In accordance with the international Conventions quoted in the following articles, a person guilty of committing any of the offenses listed by these provisions outside the territory of the Republic and who happens to be in France may be prosecuted and tried by French courts. The provisions of the present article apply to attempts to commit these offenses, in every case where attempt is punishable”.

Among the conventions in question is the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, (Article 689-2⁶), which was adopted in New York on 10th December 1984. Its article 7 requires every State Party, when it does not extradite, to submit the matter to its competent authorities to take public action. This Convention entered into force for France on 26 June 1987. Article 689-2 is only, therefore, applicable to crimes committed after that date.

Universal jurisdiction has few required conditions. The alleged perpetrator must be found in France. The Court of Appeal has held that the French jurisdiction provided for by articles 689-1 and 689-2 of the Code of Criminal Procedure cannot be

⁶ **Article 698-2** : For the implementation of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted in New York on 10th December 1984, any person guilty of torture in the sense of article 1 of the Convention may be prosecuted and tried in accordance with the provisions of article 698-1.

invoked when no “sign” of the presence of the alleged perpetrators exists on French territory. (*Court of Appeal, Criminal Chamber, 26 March 1996: Bulletin of Criminal Law, No. 132*).

A recent application of this text concerned a Rwandan priest, who was in France and had collaborated in the extermination of the Tutsis in Rwanda in 1994. “Armed and wearing a bullet-proof vest, he participated in a) the selection of Tutsi refugees destined to be massacred, he left them to die of hunger and thirst, delivered to the authorities on-site persons who tried to keep them safe and committed rape against several women in exchange for sparing their lives”. (*Court of Appeal, Criminal Chamber, 6 January 1998 : Criminal Law Bulletin, No. 2, Criminal Law 1998, Comm. No. 70, note J.-H. Robert ; B. Bouloc : RD. Pén. Crim. 1998, No. 3, p. 262ff.; J.-P. Dinthilac : Review of Criminal Science 1998, p 346ff. – See also Court of Appeal, Criminal Chamber, 3 May 1995 : Criminal Law Bulletin, No. 5*).

An investigation had been opened against this person for genocide, crimes against humanity and participation in a group formed or agreement reached with a view to planning these crimes on the basis of articles 211-1, 212-1 and 212-3 of the Criminal Code and articles 689, 689-1 and 689-2 of the Code of Criminal Procedure and of the first article of the UN Convention of 10 December 1984 against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

The Court of Appeal overturned the decision of the trial chamber, which rejected the jurisdiction of the investigating judge. The Court of Appeal held on 6 January 1998 that “*it results from article 689-2 of the Code of Criminal Procedure that French courts have jurisdiction, on the conditions stated in article 689-1 of the same Code, to try persons, who have perpetrated torture abroad according to article 1 of the New York Convention of 10 December 1984, since criminal acts can assume such a character as to enter into the purview of this article, according to French law.*”

It should be remembered that article 689 concerns “an international Convention”, thus, if France signs and ratifies an international treaty creating a new subject of international jurisdiction, according to article 655 of the French Constitution, it is the treaty, once duly ratified, that trumps [French] statutory law.

Article 113-9 of the Criminal Code states, furthermore, that:

“ In the cases set out under article 113-6 and 113-7, no prosecution may be initiated against a person who establishes that he was subject to a final decision abroad for the same offense and, in the event of a conviction, that sentence has been served or extinguished by prescription”.

French courts apply French law to crimes committed abroad, which France has authority to try. In the case of a civil matter, a resident or citizen of another country can also be sued in France even if he or she is not resident in France.

In French law, a civil action can be brought jointly with a penal action, before a criminal court. The article 85 of Code of Penal Procedure states that : “Any person

claiming to have suffered harm from a felony or misdemeanour may petition to become a civil party by filing a complaint with the competent investigating judge.”

- 14. When parent and subsidiary entities are involved in a multinational setting, how does a court assert personal jurisdiction over parents or subsidiaries located out of country? What are the standards for overcoming limitations on jurisdictions over business entities within a multinational corporation?**
- 15. How may a court attribute the actions of a subsidiary to a parent business entity, i.e. “pierce the corporate veil”?**
- 16. What types of actions (civil and criminal) might be asserted against a business entity with respect to activities taking place outside of your jurisdiction by a business entity over which your courts have jurisdiction?**

France has the right, if certain conditions occur, to prosecute and judge persons, who commit crimes outside of French territory. French law can thus apply to prosecute crimes committed outside her territory when the perpetrator or victim of the crimes are French citizens.

The jurisdiction of French law also extends to crimes detrimental to French interests. The effects of certain crimes are so serious that they touch not only the State where they were committed, but also the international community. The State in which the perpetrator is therefore located would also have jurisdiction to try him.

French judges do not, in principle, only apply French criminal law even for cases that have a direct relation with a foreign State. The terms of the application of French law to a case are defined by articles 113-1 to 113-2 of the Criminal Code.

Finally, we should emphasize that a French receiver, regardless of whether a natural or legal person, of a crime committed abroad by a foreign national can be prosecuted in France in accordance with the jurisdiction of the Court of Appeal (cf. Cameroonian case).

The Penal Code criminalizes the receiving. The article 321-1 and 321-2 state that :

“Receiving is the concealment, retention or transfer a thing, or acting as an intermediary in its transfer, knowing that that thing was obtained by a felony or misdemeanour.

Receiving is also the act of knowingly benefiting in any manner from the product of a felony or misdemeanour.

Receiving is punished by five years' imprisonment and a fine of €375,000”

“Receiving is punished by ten years' imprisonment and a fine of €750,000:

1° where it is committed habitually or by using the facilities conferred by the exercise of trade or profession;

2° where it was committed by an organised gang.”

French law is also applicable for money laundering.

The Article 324-1 of the Penal Code provides that:

“Money laundering is facilitating by any means the false justification of the origin of the property or income of the perpetrator of a felony or misdemeanour which has brought him a direct or indirect benefit.

Money laundering also comprises assistance in investing, concealing or converting the direct or indirect products of a felony or misdemeanour.

Money laundering is punished by five years' imprisonment and a fine of €375,000.

It is “punished by ten years' imprisonment and a fine of €750,000;

1° where it was committed habitually or by using the facilities offered by the exercise of a professional activity;

2° where it was committed by an organized gang.” (Article 324-2)

Violation of embargo is not yet criminalized by French law.

For the implementation of the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union signed at Brussels on the 26th May 1997, article 435-1 of the Penal Code states that : “the unjustified request or acceptance at any time, directly or indirectly, by a community civil servant or national civil servant of another member State of the European Union or by a member of the Commission of the European Community, the European Parliament, the Court of Justice or the Court of Auditors of the European Community of any offer, promise, donation, gift or reward of any kind, to carry out or abstain from carrying out an act of his office, mission or mandate, or facilitated by his office, duty or mandate, is punished by ten years' imprisonment and a fine of €150,000.”

Article 435-2 adds that:

“ For the implementation of the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union signed at Brussels on the 26th May 1997, the unlawful proffering, at any time, directly or indirectly, of any offer, promise, gift, present or advantage of any kind to a community civil servant or national civil servant of another Member State of the European Union or to a member of the Commission of the European Community, the European Parliament, the Court of Justice or the Court of Auditors of the European Community to carry out or abstain from carrying out an act of his office, mission or mandate, or facilitated by his office, duty or mandate, is punished by ten years' imprisonment and a fine of €150,000.

The same penalties apply to yielding to any person specified in the previous paragraph who unlawfully solicits, at any time, directly or indirectly, any offer, promise, gift, present or advantage of any kind to carry out or abstain from carrying out an act specified in the previous paragraph.”

- 17. If plaintiffs wanted to sue a business entity in your jurisdiction, what are some of the jurisdictional and procedural obstacles that they (and their lawyers) might face?**

The principal obstacle is posed by the conditions required by article 113-5, which provides that in the case where someone commits an offense in France as an accomplice to a felony or misdemeanor committed abroad, the victims must show proof of a conviction from a court of final instance of the principal perpetrator. Therefore, often victims find it impossible in practice to have the principal perpetrator convicted before the courts of their country.

The other obstacle flows from the conditions for prosecution concerning misdemeanors fixed by article 113-8 of the Criminal Code. It declares in effect that the prosecution of misdemeanors committed abroad and provided for by articles 113-6 and 113-7 of the Criminal Code can only be initiated at “*the behest of the public Prosecutor*” and “*must be preceded by a complaint made by the victim or his successors, or by an official accusation made by the authority of the country where the offense was committed*”.

The public Prosecutor thus has the discretion to refuse to launch an investigation if he considers that the facts are not serious enough to justify the mobilization of a French investigation judge. The interpretation of this article is thus a matter of discretion.

The acts denounced by the plaintiffs, if they do not constitute a crime against humanity can, however, in relation to their personal situation, be of great seriousness.

For example, in the context of the trial instigated by 7 Cameroonian villagers against the French lumber company, ROUGIER, and its Cameroonian subsidiary before French courts, the representative of the Prosecutor’s Office considered that the facts were not of such a nature to justify investigations being conducted in France, even when it is absolutely indisputable and undisputed that the acts, on the scale of the villagers concerned, certainly had a highly significant economic, moral and personal impact.

If the situation leads the investigating judges to seek the cooperation of their colleagues abroad, in particular to combat international financial crime, this cooperation is sometimes impossible to get or delayed, either because of political interference, or by reason of the attitude of a local court, or because of the absence of a bilateral treaty of cooperation between the two countries in question. The absence of the bilateralization or indeed multilateralization of cooperation mechanisms in relation to these rationales for extraterritorial impunity complicates the actions of judges.

18. Do the civil courts of your country sometimes decline to exercise jurisdiction over matters where the events occurred in another country and/or the majority of witnesses and the bulk of other evidence is outside of your country, thereby making it more convenient for the parties to litigate in the courts of another jurisdiction (sometimes referred to as the doctrine of forum non conveniens)?

No, this doctrine does not exist in France.

However, one notices a certain form of application of this doctrine in the ROUGIER case, for example, cited above, where the Prosecutor’s Office, by virtue of

article 113-8, considered that it was inappropriate to prosecute the alleged crimes, which were misdemeanors committed by French nationals abroad. The Prosecutor can indeed decide that the acts are not of sufficient gravity to justify the launch of an investigation in France. However, in certain cases, the crimes, judged from the perspective of the lives of the victims, can be extremely serious, even if they do not rise to the level of crimes against humanity.

And this problem occurs when the aforementioned obstacles regarding judicial help and cooperation exist.

19. Are there any checks and balances on prosecutorial discretion or decision making (e.g. when a prosecutor declines to prosecute a case, are there any measures in place to review his or her decision or an appeals mechanism?)

In France, the *Procureur de la République* (public prosecutor) has exclusive power to represent the nation, and is the effective guardian of national interests within the court system. S/he is placed under the authority and control of the *Garde des Sceaux*, the prosecutorial branch of the Ministry of Justice, whose role is to ensure the application of the law. In criminal matters, the prosecutor's task is to investigate violations of the law, and to pursue criminals; s/he controls the activities of the judicial police, orders preliminary investigations of certain offences, or opens proceedings for an instructing judge (*see below*) for serious or complex crimes.

The public prosecutor in France does not have a strict obligation to commence legal proceedings for an offence, and through application of the principle of *opportunité des poursuites* s/he has the discretion to dismiss a charge, in the majority of cases for legal and evidentiary reasons.

In France, the *juge d'instruction* (instructing judge) is a magistrate who conducts judicial investigations. In general s/he may only undertake an investigation when the prosecutor has commenced proceedings. S/he may use the services of the judicial police, and is required to investigate both incriminating and exculpatory evidence. In no circumstances may s/he deliver a decision as to the guilt of an accused.

The *juge d'instruction* does not decide to conduct an investigation – the magistrates involvement is initiated by the prosecutor, or by a victim who a civil party to criminal proceedings (*partie civile*). The magistrate thereafter has almost complete independence, and may investigate as s/he sees fit, however this is not without limits – there are numerous rules which are applicable, notably that while s/he may refuse to conduct an investigation requested by a party, this must be by written decision, which is subsequently subject to appeal.

Similarly, at the conclusion of an investigation, the magistrate decides, without ruling as to the issue of guilt, whether to refer the matter before a tribunal or court. If s/he considers there is insufficient evidence to support the charges, they are dismissed. Certain decisions of the instructing judge may be appealed, which include the refusal to proceed with an investigation and decisions to dismiss. An appeal is then heard before a special hearing of the Court of Appeal, the *Chambre d'instruction*.

Section XII of the Criminal Procedure Code contains provisions relating to appeals from decisions of the *juge d'instruction*. In particular, Article 186 provides that the *partie civile* may appeal against all decisions relating to a failure to investigate or to acquit, and any decision that violates its civil interests.