The role of the military prosecution in France

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Historically the establishment of a specific military justice dates back to the establishment of permanent armies from the 14th century. It was indeed at the time of the hundred years war that French military justice was created. Indeed, King Philippe VI of Valois wanted to remove from common law justice the "sergeants and soldiers in charge of the guard of castles". In 1467, the Plessis-Lès-Tours ordinance issued by King Louis XI distinguished military offenses from non-military offenses.

It is important to specify that in France, traditionally, all civil and criminal Courts has been always incompetent since the French Revolution to judge appeals against all administrative decisions. It´s the case of disciplinary measures decided by the military hierarchy whose dispute are judged by administrative Courts.

French military criminal justice is the result of a recent development towards a gradual adaptation to the intangible principles of the independence of judges and fair trial. A radical reform thus intervened in 1981 and have been applied since 1982. It has been finalized by an ordinance of 2006 then by a law of 2007 homologating this ordinance and reforming some provisions of the wartime military justice code.

So, before 1982 there was a specific military criminal justice organization and military personnel; the Minister of Defense decided the indictments and proceedings were ruled by the justice military code.

It should be noted that this reform corresponds to the wish of the French people. Indeed, since the Dreyfus affair and the summary judgments and executions of soldiers during the first world war, military Courts have not a good reputation and they have been very frowned upon by public opinion. Moreover, in peacetime, the maintenance of military courts has been no longer necessary. In addition, these courts generated a significant cost for the State budget. The integration of military justice into the common law judicial organization have been therefore a measure of rationalization and standardization of justice and made it possible to redeploy the military judicial staff to civilian tasks.

Now in peacetime the military public prosecutor no longer depends on the Minister of Defense but on the Minister of Justice. The peacetime military courts being abolished in 1982, military criminal cases are therefore judged by common Courts composed of civilian judges and the procedure has been brought into line with common law.

However, the traditional code of military justice has not been abolished because it may be applied in wartime, so it has been recast in 2006 into a coherent whole. Only in wartime this modernized code of military justice will be applied. It will be therefore only in wartime that the Minister of Defense will decide the indictments and the military Courts will be reestablished.

Consequently, in France in peacetime, the common penal code and law code of criminal procedure are applied to militaries who have committed a criminal offense. Common law offenses (which are described by the French penal code) and special military offenses (which remain described and punished in the military justice code) are now judged by civil courts.

So, while the prosecution has important prerogatives in peacetime, it is not at all the same in wartime.

I In peacetime civil public prosecution leads the criminal military trial.

The judiciary Courts (“tribunaux judiciaires”) are competent to judge militaries. The organization (I.1) and the competence (I.2) of the prosecutor´s offices is ruled by the common procedure code. The Prosecutors are independent from the military hierarchy but the code rules their specific work (I.3).

I.1 Organization of the Military public prosecution in France.

In France, the public prosecution service of the Judiciary Courts is grouped together within a prosecutor's office called “Parquet” which has administrative autonomy within the court. There are 173 public prosecutors' offices in France but only 35 of them have military competence. So, these 35 prosecution services include a section specializing in military matters called “parquet militaire”. The secretariat is provided by non-commissioned officers seconded by the Ministry of Defense. A civil deputy prosecutor specializing in military matters controls all criminal investigations carried out by the military police (“gendarmerie”) against a military. He decides in complete independence on the follow-up to be given and if he decides to prosecute, he is responsible of the military public prosecution before the competent judiciary tribunal or the judge with military competence.

In each judiciary Court (“tribunal judiciaire”) with military competence, military criminal cases are thus judged by a chamber specializing in military matters made up by civilian judges empowered in military matters. The collegiality is the principle in France so the chamber is composed of three judges but lesser cases are tried by a single judge.

Criminal cases (offenses punishable by ten years or more of deprivation of liberty) are judged by a Court of Assize specializing in military matters made up by civilian jurors.

As it has been said, it should be remembered and emphasized that disciplinary proceedings are outside the jurisdiction of the French courts. This is a French peculiarity of the organization of the courts which divides the courts into two categories, the judiciary courts and the administrative courts. Administrative courts are thus competent to judge disciplinary matters.

I.2 Competence of the military public Prosecutor.

Specialization and training of magistrates in military matters.

All deputies ("substituts du Procureur") who deal with military criminal cases are authorized in military matters by the Attorney General of the Court of appeal. There are investigating military judges too who are empowered by the First President of the Court of Appeal on which the judicial tribunal depends.

These magistrates have received comprehensive training in military matters and receive regularly additional military training organized by the Ministry of Defense. They are therefore perfectly familiar with military laws and regulations.

In France, therefore, it is the deputy prosecutor specialized in military matters who decide on prosecutions under the control of the Public Prosecutor. As in common law, he does not have to report it to the judges who don´t have to intervene in this area.

Attribution competence.

Military criminal cases are all cases which concerns militaries whatever their grade (including generals) who commit law offenses provided by the common penal code committed in the execution of the service as well as those who have committed specifically military crimes or offenses whose criminalization and repression is provided for by the French military justice code.

So, it is important to specify that in peacetime generals and admirals do not benefit from a privileged jurisdiction. They are therefore subject to the judiciary tribunal regardless of the offense committed.

As for the civilian the competence of military judge or Court would be manifestly inconsistent with the principles of international human rights. It´s the reason why under no circumstances can a civilian be prosecuted regardless of any offense committed. In this area, France has complied with international recommendations which prohibit the prosecution of civilians before a military Court in peacetime. So, if there is a civilian in a military case, the Prosecutor must separate the proceedings in order to try this civilian before the ordinary formation of the judiciary tribunal.

Territorial competence.

Military criminal cases are grouped together within these 35 regional military prosecutors' offices (“parquets militaires”) which are sitting in the town of a Court of Appeal.

In case of emergency the local public prosecutors within the jurisdiction of the Court of Appeal can however control the custody and investigation against a military before relinquishing quickly jurisdiction in favor of the competent regional military prosecutor's office. The same when they discover during common proceeding against civilians that a military has

also committed common law offenses in the performance of his duties or some military offense; they must send the whole procedure against this military as soon as possible to the competent military prosecutor while continuing to investigate civilians.

The rules of territorial jurisdiction are those of common law with some adjustments. For example, the judiciary tribunal of Paris ("Tribunal judiciaire de Paris") has jurisdiction for all offenses committed abroad by a French military. The "parquet" of Paris therefore controls by telephone all the investigations carried out by members of military police sent to an external theater of operations (OPEX). Called "Provosts" they are non-commissioned officers or officers of "National Gendarmerie" appointed by the Ministry of Defense. They are specially authorized by the Attorney General of the Paris Court of Appeal. The military involved in a criminal case is quickly repatriated to France in order to be made available to the French justice.

Victims' claims.

In France all criminal Courts are also competent to judge victims' claims and determine the amount of their compensation. Now this principle can also be applied to military affairs. Indeed, in military matters, civil action was previously inadmissible. Military Courts were responsible only for judging the criminal aspect of the case. Now the victim whose action seeks to obtain compensation for the damage caused to him by the offense can, under the conditions set out by the Code of Criminal Procedure, obtain compensation for his entire damage.

This common law civil action is a peculiarity of French criminal code that deserves some detailed explanation and clarification.

The principle is that the victim of an offense is allowed to bring a civil action aimed at reparation of his damage before any criminal court in parallel with the prosecution carried out by the prosecution.

So, the victim may initiate a civil process either to a civil Court or to the criminal Court. Nevertheless, if the victim initiates a civil process during the criminal proceedings, the civil Court must wait the end of the criminal trial.

In fact, if the prosecutor decides to prosecute this is an opportunity given to the victim to obtain quickly compensation for his damage directly before a criminal court. The civilly responsible, the insurer or any organization that has paid benefits can intervene in parallel with the victim´s action in order to request the reimbursement of the sums they have paid.

It should be emphasized that in France this civil action must be brought in parallel with the criminal action brought by the Prosecutor. So, the victim cannot directly accuse a military before the Court because it´s the Prosecutor who leads the criminal proceedings.

If the Prosecutor decides not to prosecute, the victim may nevertheless insist. As in common law, the victim has the possibility to set in motion the public action by filing a request to the dean of the investigating judges, thereby obliging the prosecutor, after having informed the local military authority, to initiate a judicial investigation ("information judiciaire") by writing an introductory indictment ("réquisitoire introductif") to this investigating judge. Nevertheless, this judge must empower the military investigating judge for the facts mentioned in this writing. So, the Prosecutor is relieved of the case.

So, the victim can become a civil party at all stages of the procedure. he can do it at the hearing of the tribunal or the Court but especially at the latest before the requisitions of the public prosecutor at the end of the case hearing. If he does it before the investigating judge, he must, however, confirm its constitution at the court judgment hearing. He can thus constitute himself or confirm his constitution either personally by appearing at the court hearing, or through a lawyer of its choice, or quite simply by sending a

registered letter with acknowledgment of receipt to the President of the Court. In all cases, he must encrypt his request.

I.3 The specific work of the Military Prosecutor in France is ruled with precision by the common criminal code.

The French penal code has provided for specific adaptation measures which govern the work of the Prosecutor in all military criminal cases.

We remember that the French military public prosecutor has not the competence to control the disciplinary procedures initiated by the military authority. The litigation of disciplinary sanctions falls, as it has been said, of the administrative jurisdiction. Nevertheless, administrative Courts are binded by the assessments and decisions made by criminal judges or Courts on the reality or the attribution to a soldier of the facts that could justify disciplinary proceedings; so that a soldier who is released for these reasons by a criminal Court cannot be condemned by the administrative Court.

Public Prosecutor controls the inquiries.

The inquiries are carried out by military police. They are called "gendarmes" provided by "National Gendarmerie". These "Gendarmes" have passed a special judicial police examination but the officers of Gendarmerie are exempt from this examination. Some of them are authorized by the Attorney General of each Court of Appeal to be "OPJ" (judicial police officers) in order to lead judicial investigation and decide custody under the conditions set by the code of criminal procedure.

The military deputy prosecutor controls the inquiries and the custodies. The "OPJ" (Judicial police officer) who leads the inquiry decide the custody but he must inform the deputy prosecutor immediately. So, the military deputy Prosecutor must verify that the rules of custody are respected and can

order the release of the military. In France the duration of police custody called "Garde á vue" is limited to 24 hours. Exceptionally, the deputy Prosecutor may authorize in writing the extension of the custody for a further period of 24 hours. Among these inquiries, a distinction is made between blatant inquiries and preliminary inquiries. Blatant investigations follow a more rapid procedure since the military in custody is charged before a judge or the Court within the conditions and time limits provided for by the code of criminal procedure. Only preliminary military investigations are especially regulated by formalities imposed on the public prosecutor before any decision to prosecute.

Peculiarities of French public criminal action.

Before describing the military public prosecutor´s work, it´s necessary to explain the peculiarities of French public criminal action which deserve some explanation.

The public criminal action in France.

It is the Public Prosecutor of the judiciary court, head of the public prosecutor's office at this court, who controls the exercise of public action by his deputies. This magistrate and his substitutes are civilian magistrates independent from the military hierarchy. The Public Prosecutor reports on his activity to the Attorney general of the competent Court of Appeal. The Attorney general keeps the Minister of Justice, informed, if necessary. This is a peculiarity of the French system which has maintained a link between the Minister of Justice and the prosecution´s offices but Public Prosecutors are independent, they must only inform their hierarchy about important cases. Unlike what existed before 1982, there is no longer any hierarchical link in military justice between the public prosecutors and the ministry of defense.

The Prosecutor has the power to discontinue a case and class it without continuation.

The initiation of public action is a possibility for the public Prosecutor or his deputies to prosecute an offense punishable by French criminal law, either directly before the court or by empowering an investigating judge. Thus, the Prosecutor has the power to discontinue a case either for legal reasons (for example prescription, abrogation of the criminal law, immunity of the author etc.) or if he considers that the elements constituting the offense are not sufficiently characterized. He can even simply classify the case as an opportunity if he considers that the offense committed is of minor gravity and has not disturbed public order after having verified, if necessary, that the victim has been compensated for the damage caused. In case of classification the judges do not have to intervene or criticize the Prosecutor. As it has been said, only the victim can oblige the Prosecutor to prosecute by becoming a civil party before the dean of the investigating judges of the court.

The specific work of the public Prosecutor in military matters.

In military matters, the public prosecutor has the same power so his action and decisions must not be contested or criticized by the Minister of defense and military authorities.

Nevertheless, it has been necessary to maintain a link between the military authorities and the Prosecutor. So, the code of criminal procedure requires the public prosecutor, before taking a prosecution decision, to seek the prior opinion of the Minister of Defense or the local military authority empowered for this purpose by the Minister. Besides sometimes the Minister of Defense or the authorized military authority can officially denounce this offense; in this case a later request for an opinion from the military prosecutor´s office is not necessary.

Minister of Defense's opinion prior to prosecution.

The opinion is therefore the act by which the Minister of Defense or the authority he has authorized, responding to a request from the Public Prosecutor who sends him a full copy of the preliminary investigation procedure, asserts his reasoned opinion on the advisability of instituting proceedings against a military. However, this opinion does not bind the public prosecutor because he is free to initiate proceedings. Moreover, as has been said, this obligatory notice procedure requested at the diligence of the public prosecutor does not apply to the procedures of flagrant felony or misdemeanor. Only preliminary inquiries are covered by this notice procedure.

The objective of the Minister of Defense's opinion prior to prosecution is to provide the prosecutor with additional information on the context and circumstances of the offense, the particular difficulties of the military's mission and thus to shed light on specifically military issues. The Minister or the military authority thus motivates his opinion by also making appropriate legal or expedient arguments. The constituent elements of the offense detected can even be discussed and a more suitable criminal qualification can be proposed. The career of the military, the assessments of his leaders and the disciplinary measures are mentioned.

This notice procedure is mandatory. In the absence of this writing request, the proceedings initiated would be null and void. The written opinion of the minister or the authorized military authority is not secret so it is placed in the file of the procedure so that the lawyers can consult it. As has been said, this notice is only obligatory when the offense has not already been denounced by the Minister or the authorized military authority, the denunciation being considered as an opinion.

The list of local military authorities empowered to denounce an offense or give an opinion prior to prosecution is fixed by a ministerial

decree. The power conferred by the authorization does not include the possibility of delegation; it is personally exercised by the authority which holds it. However, the Minister of Defense reserves the right to personally exercise his power of denunciation or opinion in the following cases:

-accidents causing death or injuries resulting in foreseeable total incapacity for work exceeding 6 months,

-facts implicating an officer,

-facts implicating gendarmes in the law enforcement service,

-offenses imputed to military from the armament, the army health service, the army gasoline service and the military justice service (military clerks).

The Minister also gives his opinion in cases where there is no authorized authority, in particular with regard to members of the forces stationed outside the territory of the Republic. Facts others than those listed above and giving rise to a particular difficulty may be referred to him.

Obviously, the opinion supposes that a preliminary investigation of the "gendarmes" under the direction of the public prosecutor is carried out beforehand. As it has been said, the blatant investigations must not be the object of a procedure of opinion. So, the author of a flagrant offense has to appear at the end of his police custody before the judicial authority in order to be judged by the Court or investigated by a judge.

So, the military deputy prosecutor, if he plans to prosecute after reading the preliminary investigation, must therefore first refer for prior opinion, either to the minister or to the authorized military authority. However, he is not obliged to consult the minister or the authorized military authority if he immediately considers a classification decision. In fact, this notice procedure only applies if the Public Prosecutor is considering criminal proceedings before the competent Court.

The notice procedure only applied to preliminary inquiries against a named person. Since the law of December 13, 2011, this opinion procedure

now extends to complaints with the constitution of a civil party before a military investigating judge against an unnamed person as soon as the elements collected show that a military would be liable to be prosecute. It may happen also during a common investigation of a judge if new facts have revealed the involvement of a military; in this case the judge must sent the procedure to the deputy military prosecutor who, after having received the opinion of the military authority, will make a supplementary written indictment to a military judge.

The opinion of the military authority must be given within one month from the date of the request. This period can be reduced by the public prosecutor's office if it notes the urgency. In this hypothesis, the military authority gives its opinion within a shorter period of time by freeing itself, if necessary, from the usual form and replacing it with that of a message. In any case, it is important that the notice shall be written so that it can be included in the proceedings file.

The denunciation.

As for the denunciation of the minister or the authorized military authority, it should not be confused with the obligation provided for by the article 40 of the French criminal procedure code which requires any administrative authority to inform the Public Prosecutor about a crime or misdemeanor of which he is aware. The denunciation is a special official military procedure which allows the minister or the authorized military authority to request that criminal proceedings should be brought against a military. However, it leaves the public prosecutor free to initiate proceedings or to dismiss the case.

In order to motive his denunciation and allow the deputy military prosecutor to make his decision in full knowledge of the facts, the minister or the authorized military authority explain all considerations as for example the

usual conduct of the military concerned, the disciplinary punishment possibly decided, the repercussion of the facts on the discipline or of any other elements justifying an indictment.

Hearing of the judiciary tribunal.

When the deputy military prosecutor decides an indictment, the perpetrator is, by order of the "parquet", summoned by a bailiff to a specialized hearing of the judiciary tribunal; the military authority and the victims are notified.

A particular procedure is applied for criminal cases (offenses punishable by 10 years or more of deprivation of liberty); it is the Court of Assizes composed of a civil jury which is competent and a special proceeding is applied.

The deputy military prosecutor is in charge of the public accusation at the hearing of the tribunal or the Court. The clerk is a military clerk from the corps of non-commissioned officers of the three armies who is recruited by special competition. Knowing well the military regulations, he assists the deputy prosecutor ensuring the necessary links between the military authorities and the "parquet".

The judiciary tribunal or the Court can release the accused or sentence him. In the event of a conviction, he pronounces a penalty provided for by the penal code and decides on the claim for damages from the civil party.

Appeals are simple and quick.

Appeals against judgments are fairly straightforward. In fact, the procedures are quite quick and not very formal. So, when the tribunal renders its sentence, it is automatically removed from the case and cannot under any

circumstances modify its judgment. The only possible remedy is appeal so that there are no specific remedies that could delay the course of justice. So, the military convicted can only appeal within 10 days and it´s the Court of appeal which will judge him quickly again within the limits of his notice of appeal. The victim can appeal on his civil interests only. The prosecutor can appeal too within 10 days and the attorney general can appeal within 20 days.

The Court of appeal may, on appeal by the public prosecutor, either confirm the judgment or reverse it in whole or in part in a way favorable or unfavorable to the accused. Nevertheless, on the sole appeal of the sentenced, if the public prosecutor don´t cross-appeal, the Court cannot worsen the plight of the appellant. On the sole appeal of the civil party, the civilly liable or the insurer, the Court of appeal rules on civil claims only so it cannot worsen the sentence pronounced.

All parties who did not appeal still have also 5 days to cross-appeal from the day of the main appeal. Even in the absence of cross-appeal of the convicted, the Court of appeal may also, in the event of an appeal lodged by the Attorney general prosecutor, pronounce a lesser sentence than pronounced by the judiciary tribunal.

It´s possible to lodge a request in cassation before the Court of cassation against the judgment of the Court of appeal within five days only for violation of the law.

It is important to underline that In France there is no judiciary appeal against the judgments of the Court of cassation so there is no real constitutional appeal. Indeed, the French "Conseil constitutionnel" is not a supreme Court because it´s not integrated in the hierarchy of French judiciary Courts. Nevertheless, before rendering its judgment, the Court of cassation can consult this political but independent authority if it has doubts about the constitutionality of the law on which the criminal prosecution is based. The opinion of the "Conseil constitutionnel" is caselaw so that the judges must apply it in the sentence.

If the request of cassation is rejected, the Attorney General can execute immediately the sentence of the Court of appeal. The prosecution of the tribunal or the Court is thus responsible for the execution of the sentence pronounced which have become terminated and final.

II In wartime military Courts are reestablished and the Minister of defense orders the criminal proceedings.

As for the military Courts in wartime they are described by the military justice code that determines the proceedings. These proceedings ensure a quicker and fair criminal trial while respecting the right of the defense.

The wartime in France.

It is important to underline that under French law, wartime is not a simple de facto situation. The law indeed provided that the provisions of the code of military justice applicable “in wartime” would be in force only in the following cases:

-when the declaration of war is authorized by Parliament (article 35 of the constitution);

- or when measures of mobilization or preparation for an imminent war have been taken.

In addition, in the event of major disturbances threatening the security of the country, a state of siege or a state of emergency may be ordered; in this case the government could be authorized to establish provisionally and exceptionally military courts in certain parts of the territory.

Apart from these cases, the provisions of the "Wartime" of the code of military justice can´t be applied. Thus, it must be emphasized that these provisions can´t be applied to forces deployed in foreign operations, even if they are sometimes involved in an armed confrontation.

The new wartime military code.

The wartime military justice code is an autonomous code that describes jurisdictions as well as procedures. It has been modernized by an ordinance in 2006 and then has been reformed by a law in 2007. It has thus been completely overhauled to become a coherent code considering the case law of the European Court of Human Rights as well as the main reforms of common law criminal proceedings. Finally, this new code has become practically the copy of the common law criminal procedure code in its version prior to 1973 with some adaptations.

II.1 In France, the main characteristic of wartime military jurisdiction is the presence of militaries depending on a military hierarchy among the court assessors.

The solution in France for wartime is therefore to make the military participate in the judgment of their peers while integrating one or more professional civilian magistrates in the composition of the court, one of them ensuring the presidency and leader the debates.

In France there are two kinds of wartime military courts:

a) Permanent courts created for the duration of the conflict: these are the "territorial courts of the armed forces".

They are distributed throughout the national territory. Their jurisdiction extends over all or part of one or more military regions.

They are made up by 5 members, two civilians and three militaries. The titular president, the presidents of chambers and their deputies are professional civil judges appointed for each calendar year in the forms and conditions of appointment of judges (Decree of the President of the Republic

after opinion of the Superior Council of the Magistracy). The judicial assessor is also a civil judge. He is chosen by the first president of the Common Law Court of Appeal from among the judges of one of the courts whose jurisdiction coincides, in whole or in part, with that of the territorial court of the armed forces.

As for the other three judges, they are militaries up to the rank of colonel, naval captain or similar, inclusive, appointed by the military authority for a period of 6 months. For the composition of the court formation, the judge must be of the same rank as that of the accused but of greater seniority. Thus, it is considered the rank or rank held by the accused at the time of the alleged offenses or, in the event of subsequent promotion, when appearing at the first hearing.

There is an investigating chamber composed of three members: a president and an assessor who are civil judges and a military judge with at least a higher rank of officer.

The public prosecution service is provided by the "government commissioner" who is a mobilized civilian magistrate appointed by the Minister of Defense from among the corps of military justice reservists. The secretariat is provided by a non-commissioned officer from the standing corps of military clerks, those who provided the secretariat in peacetime.

In these Courts there are also "Provost judges" who deal with small offenses punishable by a minor fine (750 Euros maximum) which are committed by any person subject to the courts of the armed forces. These single judges are mobilized military reservists from civil justice appointed by the Minister of Defense. The public prosecution is provided by an officer of "Gendarmerie" appointed by the military authority.

When a territorial court of the armed forces has not yet been established, cases relating to military justice are brought before the competent common law court and are prosecuted, investigated and judged according to

the rules applicable before it. This jurisdiction is relinquished in favor of the territorial tribunal of the armed forces as soon as it asserts its competence.

Competence.

Militaries up to the rank of colonel included or civilians following the army are subject to the territorial courts of the armed forces. All civilians who are perpetrators or accomplices of an offense against the French armed forces or against their establishments or equipment, are also subject to these jurisdictions, if the offense is punished by French criminal law. In addition, the territorial courts of the armed forces have jurisdiction over all crimes and offenses committed since the opening of hostilities by enemy nationals or by all persons in the service of the administration or enemy interests, on the territory of the Republic or in a territory subject to the authority of France or in any war zone. It is sufficient that these offenses are committed against a French person or a person protected by France, or a soldier serving or having served under the French flag, or even a stateless person or refugee residing in one of these territories.

The territorial courts of the armed forces are also competent when these offenses are detrimental to French property when these offenses, even committed on the occasion or under the pretext of wartime, are not justified by the laws and customs of war.

Crimes and misdemeanors against the “fundamental interests of the nation” are also investigated and judged by these courts which have the possibility of asserting their jurisdiction for ongoing cases opened before their creation.

b) Provisional jurisdictions with a strong military component can follow a body of troops in France or abroad.

These are the "military courts to the armies" when the troops are stationed or operate outside the territory of the Republic in a period of war declared by the parliament. Thus, as soon as mobilization measures are taken or in the event of war declared by Parliament, a decree may set the number, the territorial limits and the headquarters at which they are established. These courts may have one or more chambers and an investigating chamber.

It is obvious that the military specificity of the composition increases, with the distance of litigants from the national territory. This tribunal is thus composed of five military members. The presidency of this jurisdiction as well as that of the investigating chamber is ensured by a mobilized civilian magistrate appointed by the Minister of Defense from among the special corps of military justice reservists. The court assessors are four militaries taken from militaries wounded in the fire or belonging to fighting troops. The instruction chamber is made up by three members: a president who is a mobilized civilian magistrate and two soldiers with rank of senior officer.

Defendants, indicted or accused as well as all litigants of the armed forces have the free choice of their defense counsel. The defense of litigants can be ensured by civil lawyers registered with the bar. It can also be provided by a defense officer belonging to the framework of special assimilated defense officers of the military justice service who are appointed by the Minister of Defense.

In wartime Generals are judged by a High Court of the Armed Forces.

For the judgment of marshals and admirals of France, generals or similar officers and members of the general control of the armies, a High Tribunal of the armed forces may be established in wartime; this tribunal may

be set up anywhere in the territory of the Republic. It is also composed of five members, its president and an assessor are both civil judges, the three other judges are military personnel appointed according to the same principles as for the territorial courts of the armed forces. Public prosecution is provided by the attorney general of the Court of cassation.

II.2 The second characteristic of wartime military justice is the limited role of the public prosecutor.

The speed inherent in exceptional justice carried out in troubled times is the main goal of the procedure followed in wartime. This explains why the military authorities have an important role to maintain public order in our armies. The code of military justice thus attributes to the Minister of Defense and his local representatives' exorbitant powers for investigation and prosecution, while considering fair justice.

Thus, the major difference with peacetime jurisdictions is that it is the Minister of Defense who decides on prosecutions and not the Public Prosecutor.

Consequently, the military prosecution is limited to executing the Minister's decision to prosecute. This is in fact the main feature of wartime military justice. The right to decide on prosecutions indeed belongs to the Minister of Defense, and under his authority, to the authorized military authorities. The minister or the authority he has authorized formalizes his decision by a "prosecution order" which mentions the facts to which the prosecution will relate, their qualification and the applicable legal texts. The order to prosecute is final.

In addition, the military prosecution office does not control investigations. Before issuing a prosecution order, the military authorities delegated by the Minister indeed have exorbitant powers in the direction of investigations. Thus, the military authorities mandated by the Minister can prescribe, by written instructions, to the judicial police officers of the armed

forces, to carry out searches and seizures in military establishments, even at night. However, outside these places, unless a complaint is made from inside the house or exceptions provided for by law (for example in matters of terrorism), searches and home visits can only be started during legal hours (after six in the morning and at the latest before nine o'clock in the evening).

The rules of custody during these military investigations are not framed by the guarantees and the formalism of the common law "Garde á vue" and the public prosecutor is not allowed to control them. Thus, the person held in police custody is not notified of rights, cannot ask to be examined by a doctor or have a member of his family notified. The intervention of a lawyer during police custody is not foreseen. The public prosecutor of the Tribunal must, however, be notified of the custody measure. It is therefore only after the end of police custody that any detained person may request to speak with a lawyer of their choice, unless material circumstances prevent it.

The duration of this police custody is 48 hours while it is 24 hours in the common law "Garde á vue". It can be extended by 24 hours. There are specific extensions which can extend to 15 days the duration of police custody in the event of crimes and offenses against the fundamental interests of the nation in time of war.

At the end of the police custody and until a decision on the follow-up to be given to the case by the military authority empowered by the minister, the soldier can be detained for five days at most on order of provisional imprisonment of the representative of the Minister of Defense. Before the expiry of this period he may order its release. If no decision to prosecute has been taken by the military authority at the end of this 5-day period, the person concerned must be released automatically.

As soon as a prosecution order has been issued by the military authority against a named person, this person is made available to the public

prosecutor who executes the prosecution order of the Minister of Defense or the authorized military authority.

Thus, the powers held in peacetime by the public prosecutor are in wartime entirely vested in the Minister of Defense and the competent military authorities. The role of the Prosecutor, known as the "government commissioner", is singularly reduced in his role as public prosecutor. However, as legal advisor to the military authorities, he can give his opinion on all questions concerning the setting in motion of public action, legal qualifications, the consequences of prosecutions, as well as clemency measures.

Implementing the prosecution decision of the minister or the military authority mandated by the minister, the government commissioner refers to the competent court with a citation mentioning the prosecution decision, or in important or complex cases decides to refer the matter to the investigating judge by introductory indictment.

The work of the military Prosecutor.

As soon as the decision of indictment is submitted to the government commissioner the military prosecutor´s office take care of the implementation of the procedure. The government commissioner has thus the power to order the release of the Minister's provisional imprisonment order if necessary.

Referral to the investigating judge is sometimes essential in relatively complex or important cases besides it´s mandatory in criminal cases (Offenses punished of 10 or more years of privation of liberty). The procedure is very similar to that followed in common law. As in common law, the role of the public prosecutor is limited to referring the facts to the investigating judge by a written introductory indictment; during the investigation he may consult the investigation file and make any written

requisitions that he deems useful to the manifestation of the truth; then he must request the end of the instruction by a final indictment writing.

In most cases, in the absence of referral to an investigating judge and if he wants to maintain the soldier detained before the court, the government commissioner must have the detainee appear before the Court within the five-day period of the order provisional imprisonment issued by the military authority. This order of imprisonment, if necessary, can be confirmed by the court. It is important to underline that from the confirmation of this order, the soldier can be detained up to sixty days, the court being able to put an end to it at any time.

Trial procedure.

Paradoxically, the trial procedure nevertheless turns out to be more protective of the rights of the defense than in common law, since it is fairly directly inspired by that followed during the common law Court of assizes. This is the case, for example, with the system of questions put to judges and the president of the court has the prerogatives of a president of the assize Court. The debates are public and the public prosecutor makes oral requisitions. The defense of litigants is ensured by lawyers registered with the bar or admitted to the internship; it can also be carried out by a soldier chosen by the litigants from a list drawn up by the president of the tribunal. The defense speaks last after the requisitions of the public prosecutor.

As it has been explained, the victim has the possibility to act as a civil party. This civil action is limited to a claim for compensation for damage caused by one of the offenses only if prosecution is ordered by the Minister of Defense. Indeed, contrary to common law, the victim cannot oblige the public prosecutor to set in motion the public action by initiating the criminal trial, because, as it was said, in time of war it´s a prerogative exercised only by the Minister of defense or the authorized military authority.

The remedies.

As regards the remedies, the military justice code only provided for extraordinary remedies: the cassation appeal, which was limited to examining the legality of the decision, had to be lodged within one day but there was also the request in the interest of the law and the request for review. The law of 2007 created the appeal against the judgments of the wartime armed forces Courts. It must be lodged within five days by the convicted person or the public prosecutor. In fact, with regard to the soldiers who did not appear, there is two remedies: the opposition and the appeal. The opposition is a mean of retraction allowing the case to be re-judged by the same court when the accused do not appear at the hearing while the appeal is a mean of reformation the case being rejudged by a higher court. In common law, in order to avoid the abusive use of remedies, the opposition can only be opened to persons who have not appeared on the condition that they have not been aware of the summons. Nevertheless, in wartime military criminal proceedings, the opposition is widely open to all military personnel who do not appear, for whatever reason.

If there is no appeal or opposition the judgment is executed by the public prosecutor within twenty-four hours after the expiry of the time limits set for exercising remedies. However, another peculiarity of the procedure is that the execution of the sentence can be suspended by decision of the military authority which gave the order to prosecute. This is understandable insofar as it is necessary to return convicted soldiers to fight at the front during major armed conflicts. The military who obtains the benefit of this measure is deemed to have served his sentence for the entire time he remains in service after his conviction.

Application of penalties.

The rules relating to the application of penalties are those provided for by the common law code of criminal procedure, the judicial authorities competent to hear this dispute being civil magistrates applying common law. However, most of these rules cannot be applied because they are incompatible with the situation of a soldier fighting at the front. In the event of conditional release in wartime, when the convicted person has retained the status of military or military assimilated during the execution of his sentence, the benefit of conditional release or its revocation can only be granted by joint order of the Minister of justice and the minister of defense, after examination of the case by the judge responsible for the application of sentences. In the event of conditional release, the active soldier is placed at the disposal of the army. Revocation of conditional release may be requested by the public prosecutor; it is pronounced in the event of serious punishment, of notorious misconduct or of new convictions incurred before the final release.

CONCLUSION

We have seen that the military public prosecution has important prerogatives in peacetime. In wartime the role of the Prosecutor is limited. Nevertheless, the wartime military justice code can now be viewed as a virtual code that fortunately will never apply. Indeed it´s the parliament that decide de war and it is very unlikely that it will because France has not been at war for a long time. The last time it has been applied has been during the Algerian conflict.

It is important to emphasize that foreign operations (OPEX) are not considered to be carried out in wartime even if they sometimes involve armed

confrontation. Nevertheless, the legal framework for these operations has recently been amended in order to relax the fire opening rules.