

**Submission to the UN Special Rapporteur on  
Violence against Women**

**Criminalisation and Prosecution of Rape  
FRANCE**

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## **Table of Contents**

<b>Summary</b> .....	3
<b>Definition and Scope of Criminal Law Provisions</b> .....	4
Criminal Law Provisions .....	4
French Criminal Code .....	5
French Code of Criminal Procedure .....	8
Definition of Rape .....	12
Lack of Consent and Violence, Coercion, Threat, or Surprise .....	12
Forms of Penetration .....	13
Legal Age for Sexual Consent .....	14
<b>Aggravating Circumstances</b> .....	18
<b>Prosecution</b> .....	19
Ex Parte and Ex Officio Prosecutions .....	19
Plea Bargain .....	19
Statute of Limitations .....	19
<b>War and/or Conflict</b> .....	20
Rape as a War Crime or Crime against Humanity .....	20
Statute of Limitations .....	20
<b>Data</b> .....	21
<b>Other Issues: ‘Correctionnalisation’ of Rape Cases</b> .....	22
<b>Conclusion</b> .....	23

## **Summary**

1. This report is submitted by four French international human rights experts. Following a decision of the Investigation Chamber of the Paris Court of Appeal of 19 March 2020, confirmed by the Court of Cassation on 14 October 2020, which set a very disturbing definition of the elements of rape, a group of French lawyers sent an open letter to the Minister of Justice and the Minister Delegate for Gender Equality, Diversity and Equal Opportunities, attached to the Prime Minister, which was signed by 73 international experts and members of the ATLAS Network.<sup>1</sup>
2. This case brought to light legal, procedural, and systemic issues regarding the definition and judicial treatment of rape in France. In this context, the drafters committed to answering the call for submission of the UN Special Rapporteur on Violence against Women, to highlight the main issues identified.
3. This submission draws the Special Rapporteur's attention to the problematic definition of rape, especially regarding the elements of consent and penetration, to the gaps in the legal protection of minor victims, and finally to the practice of 'correctionnalisation' of rape cases.<sup>2</sup> The submission will also address the gaps in the legislation regarding the accountability for rape as a war crime.
4. We respectfully request that the Special Rapporteur draw attention in its report to the issues highlighted in this submission, as well as sends a communication to the Government of France urging to adopt a definition of rape in line with international standards, ensure accountability of perpetrators of rape and effective protection of victims, especially minors, in such cases.

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<sup>1</sup> ATLAS is an active global community of female-identifying lawyers, activists, and jurists with expertise in various facets of public international law. It empowers, supports, and connects women working in, or embarking on, a career in public international law ([www.atlaswomen.org/](http://www.atlaswomen.org/)).

<sup>2</sup> 'Correctionnalisation' describes the practice of the prosecution to prosecute acts of sexual penetration as sexual assaults, a misdemeanour, instead of rape, a felony. See para. 47 for more details.

## Definition and Scope of Criminal Law Provisions

### **Criminal Law Provisions**

5. Acts of sexual violence are listed in the French Criminal Code in Chapter II, Section 3. While articles 222-22 to 222-22-2 apply to all forms of sexual violence, articles 222-23 to 222-26-1 only apply to rapes and articles 222-27 to 222-31 and article 227-25 to other forms of sexual assault.
6. Provisions related to sexual violence have been changed on several occasions since the adoption of the Criminal Code in 1992. This submission highlighted the latest changes in the section below. The main recent changes were introduced by:
  - **Law n ° 2010-769 of 9 July 2010 on violence specifically against women, violence within couples and the impact of the latter on children**, which, among others, removed the presumption of consent within marriage, created the victim protection order and related sanction for its violation.
  - **Law No. 2018-703 of 3 August 2018 strengthening the fight against sexual and gender-based violence**, which, among others, amended the definition of rape, introduced a new crime of administering to a person a substance to commit rape, as well as clarified the definition of the elements of coercion and surprise, and extended the statute of limitations for sexual crimes committed against minors.
  - The latest change was introduced by **Law No. 2020-936 of 30 July 2020** which created article 222-26-1.

**Chapter II: Violation of the physical or psychological integrity of persons**

**Section 3: Sexual assault**

**Article 222-22 (amended three times since the adoption of the Criminal Code in 1992–amended last by Law No. 2010-769 of 9 July 2010)**

Sexual assault is any sexual abuse committed with violence, coercion, threat, or surprise.

Rape and other sexual assaults shall constitute rape and other sexual assaults when they have been imposed on the victim in the circumstances set out in this section, regardless of the nature of the relationship between the aggressor and the victim, including if they are in a marital relationship.

When sexual assaults are committed abroad against a minor by a French national or by a person habitually resident on French territory, French law is applicable by derogation to the second paragraph of article 113-6 and the provisions of the second sentence of article 113-8 are not applicable.

**Article 222-22-1 (introduced by Law No. 2010-121 of 8 February 2010 and amended by Law No. 18-703 of 3 August 2018)**

The coercion provided for in the first paragraph of article 222-22 may be physical or moral.

When the acts are committed on a minor, the moral coercion mentioned in the first paragraph of the present article or the surprise mentioned in the first paragraph of article 222-22 may result from the age difference between the victim and the perpetrator of the acts and from the de jure or de facto authority that the latter exercises over the victim, this de facto authority being characterised by a significant age difference between the minor victim and the major perpetrator.

When the acts are committed on a minor under the age of fifteen, moral coercion or surprise are characterised by the abuse of the vulnerability of the victim who does not have the necessary discernment for these acts.

**Article 222-22-2 (introduced by Law No. 2013-711 of 5 August 2013)**

The act of forcing a person by violence, threat, or surprise to undergo a sexual attack by a third party also constitutes a sexual assault.

These acts are punishable by the penalties provided for in articles 222-23 to 222-30 depending on the nature of the violation suffered and the circumstances mentioned in these same articles.

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<sup>3</sup> The relevant provisions can be accessed here (in French): [www.legifrance.gouv.fr/codes/section\\_lc/LEGITEXT000006070719/LEGISCTA000006165281/#LEGISCTA000006165281](http://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006070719/LEGISCTA000006165281/#LEGISCTA000006165281). They have been translated by the drafters of the present submission. There is no up-date official translation of the French Criminal Code.

**Attempting the offense provided for in this article is punishable by the same penalties.**

**Paragraph 1: Rape**

**Article 222-23 (amended once since the adoption of the Criminal Code by Law No. 2018-703 of 3 August 2018)**

Any act of sexual penetration, of any nature whatsoever, committed on another person or on the perpetrator by violence, coercion, threat, or surprise is rape.

Rape is punishable by fifteen years of imprisonment.

**Article 222-24 (amended eleven times since the adoption of the Criminal Code – amended last by Law No. 2018-703 of 3 August 2018)**

Rape is punishable by twenty years' imprisonment:

1° When it resulted in mutilation or permanent infirmity;

2° When it is committed on a fifteen-year-old minor;

3° When it is committed on a person whose particular vulnerability, due to age, illness, infirmity, physical or psychological disability or pregnancy, is apparent or known to the perpetrator

3° bis When it is committed on a person whose particular vulnerability or dependence resulting from the precariousness of her/his economic or social situation is apparent or known to the perpetrator;

4° When it is committed by an older relative or by any other person having de jure or de facto authority over the victim;

5° When it is committed by a person who abuses the authority conferred on him by her/his functions;

6° When it is committed by several persons acting as perpetrators or accomplices;

7° When it is committed with the use or threat of a weapon;

8° When the victim has been put in contact with the perpetrator using an electronic communication network for the dissemination of messages to an unspecified public;

9° (repealed)

10° When it is committed in conjunction with one or more other rapes committed on other victims;

11° When it is committed by the victim's spouse or cohabitee or the partner in a civil partnership;

12° When it is committed by a person acting in a state of manifest drunkenness or under the manifest influence of narcotics;

13° When it is committed, in the exercise of this activity, on a person who engages in prostitution, including on an occasional basis;

14° Where a minor was present at the time of the offense and was present at the scene of the offense;

15° Where a substance has been administered to the victim, without her/his knowledge, to impair her/his discernment or control over her/his acts.

**Article 222-25**

Rape is punishable by thirty years of imprisonment when it resulted in the death of the victim.

The first two paragraphs of article 132-23 relating to the period of unconditional detention are applicable to the offense provided for in this article.

**Article 222-26**

Rape is punishable by life imprisonment when it is preceded, accompanied, or followed by torture or barbaric acts.

The first two paragraphs of article 132-23 relating to the period of unconditional detention are applicable to the offense provided for in this article.

**Article 222-26-1 (introduced by Law No. 2020-936 of 30 July 2020)**

The act of making offers or promises to a person or offering gifts, presents or advantages of any kind to a person to commit rape, including outside the national territory, is punishable, when this crime has not been committed or attempted, by ten years' imprisonment and a fine of 150,000 euros.

**Paragraph 2: Other forms of sexual assault (Articles 222-27 à 222-31)**

(...)

**Article 222-30-1 (introduced by Law No. 2018-703 of 3 August 2018)**

Administering to a person, without her/his knowledge, a substance likely to alter her/ his understanding or the control of her/ his acts to commit rape or sexual assault against her/ him is punishable by five years' imprisonment and a 75,000 euros fine.

When the acts are committed against a fifteen-year-old minor or a particularly vulnerable person, the penalties are increased to seven years' imprisonment and a 100,000 euros fine.

## ***French Code of Criminal Procedure***

### **Article 2-3**

Any association duly registered for at least five years at the time of the acts and whose statutory object includes the defence or assistance of children in danger and victims of all forms of abuse may exercise the rights recognised to civil parties with regard to wilful attacks on life and integrity, sexual assaults and other forms of sexual assaults committed against a minor and offenses of endangerment of minors punishable under articles 221-1 to 221-5, 222-1 to 222-18-1, 222-23 to 222-33-1, 223-1 to 223-10, 223-13, 224-1 to 224-5, 225-7 to 225-9, 225-12-1 to 225-12-4, 227-1, 227-2, 227-15 to 227-27-1 of the Criminal Code, when the public action has been initiated by the public prosecutor's office or the injured party.

The action of any association, registered with the Ministry of Justice under the conditions set by decree of the Council of State, are admissible even if the public action has not been initiated by the public prosecutor or the injured party with respect to the offense mentioned in article 227-23 of the Criminal Code. The same applies when the provisions of the second paragraph of article 222-22 and article 227-27-1 of the said code are applied.

Any foundation declared of public utility may exercise the rights recognised to civil parties under the same conditions and under the same reservations as the association mentioned in the present article.

### **Title XIX: Procedure applicable to sexual offenses and the protection of minor victims**

#### **Article 706-47**

The present title is applicable to proceedings related to the following offenses:

(...)

3° Crime of rape provided for in articles 222-23 to 222-26 of the present Code;

(...)

### **Chapter I: General Provisions**

#### **Article 706-47-1**

An individual convicted of one of the offenses provided for in article 706-47 may be subject to a measure of treatment imposed either on sentencing, as part of a socio-judicial follow-up in accordance with article 131-36-4 of the Criminal Code, or after it, as part of this follow-up, of a conditional release, of a judicial oversight or a close supervision, in accordance with articles 706-53-19, 723 -30, 723-37, 731-1, 763-3 and 763-8 of this Code, in the cases and conditions provided by these articles.

When a measure of treatment is ordered, the attending physician may prescribe a libido inhibitor treatment in accordance with article L. 3711-3 of the Public Health Code.

An individual prosecuted for one of the offenses mentioned in article 706-47 must be subject, before any judgment on the merits, to a medical evaluation. The expert shall be questioned on the appropriateness of a measure of treatment as part of a socio-judicial follow-up.



This evaluation can be ordered as early as the investigation stage by the public prosecutor.

This evaluation is communicated to the prison administration in the event of an imprisonment, to facilitate the medical and psychological follow-up in detention provided for in article 717-1.

#### **Article 706-47-2**

The judicial police officer, acting during the investigation or a rogatory commission, may proceed with a medical examination and a blood test of any person against whom there are serious or concordant indications they have committed rape, sexual assault or sexual violation provided for by articles 222-23 to 222-26 and 227-25 to 227-27 of the Criminal Code, to determine whether this person is not suffering from a sexually transmitted disease.

The physician, nurse, or person authorised by the provisions of the Public Health Code to perform the acts reserved for these professionals, which is required for this purpose by the judicial police officer, must endeavour to obtain the consent of the person concerned.

At the request of the victim or when her/his interest justifies it, this operation may be carried out without the consent of the person concerned with the written instructions of the public prosecutor or the investigating judge, which shall be included in the record of the proceedings.

The result of the screening shall be brought, as soon as possible and through a physician, to the knowledge of the victim or, if the victim is a minor, of her/his legal representatives, or of the ad hoc administrator appointed pursuant to the provisions of article 706-50.

Refusal to submit to the screening provided for in this article is punishable by one year's imprisonment and a fine of 15,000 euros. Notwithstanding the provisions of articles 132-2 to 132-5 of the Criminal Code, these penalties are cumulative, without possibility of confusion, with those that may be pronounced for the crime or misdemeanour that was the subject of the proceedings.

#### **Article 706-48**

Minors who are victims of one of the offenses mentioned in article 706-47 may be the subject of a medico-psychological evaluation intended to assess the nature and extent of the damage suffered and to establish whether it requires appropriate treatment or care.

Such an evaluation may be ordered by the public prosecutor as early as the investigation stage.

#### **Article 706-49**

The public prosecutor or the investigating judge shall inform the juvenile court judge without delay of the existence of proceedings concerning a minor who is a victim of one of the offenses mentioned in article 706-47 and shall provide him with all the relevant documents, once a procedure for educational assistance has been initiated in respect of the minor who is a victim of that offense.

#### **Article 706-50**

The public prosecutor or the investigating judge addressing the alleged acts committed voluntarily against a minor, shall appoint an ad hoc administrator when the protection of the

minor's interests is not fully ensured by her/his legal representatives or by one of them. The ad hoc administrator ensures the protection of the minor's interests and exercises, if necessary, on her/his behalf the rights recognised to the civil party. If a civil action is launched, the judge shall appoint an attorney for the minor, if one has not already been appointed.

The above provisions are applicable before the trial court.

#### **Article 706-51**

The ad hoc administrator appointed in application of the article above is designated by the competent judge, either among the child's relatives or among a list of personalities whose procedures governing their establishment is determined by a Council of State decree. This decree shall also specify the conditions of their compensation.

#### **Article 706-52**

During the judicial investigation and inquiry, the hearing of a minor who is a victim of one of the offenses mentioned in article 706-47 shall, with her/his consent or, if s/he is not able to give it, that of her/his legal representative, be the subject of an audio-visual recording.

The recording provided for in the paragraph above may be exclusively limited to sound if the minor or her/his legal representative so requests.

The public prosecutor, the investigating judge, or the judicial police officer in charge of the investigation or acting by rogatory commission may request any qualified person to make such a recording. The provisions of article 60 shall apply to such person, who shall be bound by professional secrecy under the conditions of article 11.

A copy of the recording shall also be prepared for the purpose of facilitating subsequent access during the proceedings. This copy shall be placed on file. The original recording shall be placed under seal.

By decision of the investigating judge, the recording may be viewed or listened to during the proceedings. However, the copy of the latter may be viewed or listened to by the parties, lawyers, or experts, in the presence of the investigating judge or a court clerk.

The last eight paragraphs of article 114 of the Code of Criminal Procedure do not apply to the recording. However, the copy of the latter may be viewed by the parties' lawyers at the courthouse under conditions that guarantee its confidentiality.

When the recording cannot be made due to a technical difficulty, it shall be mentioned in the hearing report which specifies the nature of this impossibility. If the hearing takes place during the investigation or a rogatory commission, the public prosecutor or the investigating judge shall be immediately notified.

Disseminating a recording or a copy made in application of this article is punishable by one year of imprisonment and a fine of 15,000 euros.

At the expiry of a period of five years from the date of the termination of the public action, the recording and its copy shall be destroyed within one month.

**Article 706-53**

At all stages of the procedure, the minor victim of a crime or a misdemeanour may, at her/his request, be accompanied by her/his legal representative and, where applicable, by the adult of her/his choice, unless article 706-50 has been applied or unless a reasoned contrary decision has been taken by the competent judicial authority.

In the course of the judicial investigation or inquiry, examinations or confrontations of a minor who is a victim of one of the offenses mentioned in article 706-47 shall be conducted pursuant to the decision of the public prosecutor or the investigating judge, where appropriate at the request of the minor or her/his legal representative, in the presence of a psychologist or a doctor specialising in children or a member of the minor's family or of the ad hoc administrator appointed pursuant to article 706-50 or of a person mandated by the juvenile court judge.

**Chapter II: The automated national judicial register of perpetrators of sexual or violent offenses****Article 706-53-1**

The automated national judicial register of perpetrators of sexual or violent crimes is an automated application of personal data maintained by the Judicial Records Office under the authority of the Minister of Justice and under the control of a magistrate. To prevent the renewal of the offenses mentioned in article 706-47 and to facilitate the identification of their perpetrators, it receives, stores, and communicates to authorised persons the information provided for in article 706-53-2 according to the procedure provided for in this chapter.

(Articles 706-53-2 to 706-53-12 regulate the register)

## Definition of Rape

### Article 222-23 of the Criminal Code

Any act of sexual penetration, of any nature whatsoever, committed on another person or on the perpetrator by violence, coercion, threat, or surprise is rape.

7. Provisions of the French Criminal Code refer to all persons and victims, regardless of their gender.<sup>4</sup> This also applies to the definition of rape. The definition of rape was recently amended to cover all forms of penetration (see below para. 14 for more details). Since 2010, rape is also considered to be characterised “regardless of the nature of the relationship between the aggressor and the victim, including if they are in a marital relationship”, hence including marital rape.<sup>5</sup>
8. According to article 222-23 of the Criminal Code, rape is punishable by fifteen years of imprisonment.
9. This section will address two main issues related to the definition of rape: (1) the absence of the ‘lack of consent’ element and of a legal definition of the elements of ‘violence, coercion, threat, or surprise’; as well as (2) the narrow definition of the element of penetration.

### *Lack of Consent and Violence, Coercion, Threat, or Surprise*

10. The legal definition of rape does not refer to lack of consent. Instead, the Criminal Code requires to establish that the perpetrator used ‘violence, coercion, threat, or surprise’. Judges assess the victim’s lack of consent in the light of the perpetrator’s behaviour, characterised by the acts above.<sup>6</sup> In other words, victims are considered to have consented unless her/his abuser used one of the listed acts.
11. The drafters highlight that the definition of rape in the French Criminal Code shall be amended to be based both on the absence of consent and the use of coercive circumstances in line with international standards.<sup>7</sup>
12. Further, the establishment of the coercive circumstances suffers from the lack of a clear and explicit definition of the acts of ‘violence, coercion, threat, or surprise’ in the Criminal Code. In an Opinion published on 5 October 2016, the Haut Conseil à l’Égalité entre les

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<sup>4</sup> See article 222-23 of the Criminal Code which refers to “person”.

<sup>5</sup> Article 222-22(2) of the Criminal Code. Before 2010, the Criminal Code provided for a presumption of consent for married couples.

<sup>6</sup> Council of Europe’s Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), “Baseline Evaluation Report: France”, 2019, para. 191 (<https://rm.coe.int/grevio-inf-2019-16/168098c61a>) and High Gender Equality Council, “Avis pour une juste condamnation sociétale et judiciaire du viol et autres agressions sexuelles”, Opinion No.2016-09-30-VIO-022, published on 5 October 2016, p. 27 ([www.haut-conseil-egalite.gouv.fr/IMG/pdf/hce\\_avis\\_viol\\_2016\\_10\\_05-2.pdf](http://www.haut-conseil-egalite.gouv.fr/IMG/pdf/hce_avis_viol_2016_10_05-2.pdf)).

<sup>7</sup> See CEDAW, Committee’s General Recommendation No. 35, para. 33; CEDAW, Karen Tayag Vertido v. the Philippines, 2010; R. P. B. v. the Philippines (case No. 34/2011).

femmes et les hommes (French High Gender Equality Council– ‘HCE’) highlighted that their definition are “subject to fluctuating interpretations, which creates legal uncertainty and differentiated treatment of cases of rape and sexual assault in France, thus leading to unequal access of victims to their rights and a heterogeneous condemnation of the aggressors.”<sup>8</sup> As a result, the HCE suggested to amend the definition of rape and to provide more details about each act. To date, only the acts of coercion and surprise have been defined (see section ‘Legal Age for Sexual Consent’ below).

13. The shortcomings of this definition were also highlighted by the Council of Europe’s Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), in their latest report, including the risks of “legal uncertainty generated by fluctuating interpretations of the constituent elements of violence, coercion, threat and surprise” and “the inability of such elements of proof to cover the situation of all non-consenting victims, particularly when they are in a state of shock.”<sup>9</sup>

### ***Forms of Penetration***

14. The legal definition of rape covers any act of sexual penetration, of any nature. It covers vaginal, anal, or oral penetrations of both the victim by the perpetrator or the perpetrator by the victim. According to the broad definition, the penetration can occur by using a body part (including the penis but not limited to) or any object, (article 222-23 Criminal Code). Prior to Law No. 2018-703, acts of penetration committed on the perpetrator, such as forced fellatio, were not considered as rape.
15. The judicial interpretation of the definition of penetration however still poses several concerns. In 2020, the Court of Cassation adopted a narrow definition by rejecting the classification as rape of acts of oral sex committed on a minor due to the lack of clarity on the nature of the penetration. In this case, the victim, thirteen years old at the time of the events, recounted that her mother’s ex-partner had “taken the habit of forcing her to undress, caressing her vagina and buttocks, rubbing against her and licking her vagina, under the pretext of alleged punishments intended to correct her”. The victim testified that he also “penetrated her with his tongue through persistence”. The judges held that the victim’s testimony was not “accompanied by any precision in terms of intensity, depth, duration, or movement”<sup>10</sup> and concluded that the penetration had not been “of significant depth”.<sup>11</sup>

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<sup>8</sup> High Gender Equality Council, “Avis pour une juste condamnation sociétale et judiciaire du viol et autres agressions sexuelles”, Opinion No.2016-09-30-VIO-022, published on 5 October 2016, p. 27 ([www.haut-conseil-egalite.gouv.fr/IMG/pdf/hce\\_avis\\_viol\\_2016\\_10\\_05-2.pdf](http://www.haut-conseil-egalite.gouv.fr/IMG/pdf/hce_avis_viol_2016_10_05-2.pdf)).

<sup>9</sup> Council of Europe’s Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), “Baseline Evaluation Report: France”, 2019, para. 192 (<https://rm.coe.int/grevio-inf-2019-16/168098c61a>).

<sup>10</sup> Decision of the Investigation Chamber of the Paris Court of Appeal of 19 March 2020 confirmed by the Court of Cassation on 14 October 2020, p. 15 (Please note that the drafter obtained a copy of the Court of Appeal’s decision which has not been published. The translation of the decision of the Court of Cassation can be found in Annex 2).

<sup>11</sup> Decision of the Investigation Chamber of the Paris Court of Appeal of 19 March 2020 confirmed by the Court of Cassation on 14 October 2020, p. 14.

16. Such decision is worrying, especially because the ‘intensity, depth, duration, or movement’ criteria attached to the act of penetration has no legal basis. This decision set a very dangerous precedent for rape victims, who would be responsible for establishing the facts in lieu of the prosecution. It also stands out from international standards and many domestic laws which only require a penetration, ‘however slight’.<sup>12</sup> 73 international human rights experts signed a letter addressed to the French government highlighting the danger of such decision (see Annex 1).

### **Legal Age for Sexual Consent**

17. The legal age for sexual consent, and more generally the capacity of minors to consent to sexual acts, are one of the most contentious issues related to the legal framework of rape in France and one that has been at the centre of several debates over the years.

18. The Criminal Code sets a rather confusing and weak legal framework when sexual assaults and rapes have been committed against minors, leading to differing interpretations by judges and to unfortunate judicial outcomes.

19. Under French law, sexually assaulting a minor under the age of fifteen will be charged as a misdemeanour punished with five years’ imprisonment. Article 227-25 of the Criminal Code prohibits sexual assaults (with or without penetration) on a minor under fifteen years of age without violence, coercion, threat, or surprise. As a result, an adult who sexually assaulted with penetration a minor under fifteen years of age could be prosecuted under article 227-25, a misdemeanour, and receive a maximum sentence of five years.

20. To contrast, the Criminal Code does not provide for statutory rape and fails to set any legal age for sexual consent regarding the crime of rape. Similar to cases involving adults, it must be established that the act of sexual penetration was accompanied with ‘violence, coercion, threat, or surprise’ to establish rape. We will see below that this difference has led prosecutors to charge perpetrators with a misdemeanour, rather than rape due to the difficulty to prove the elements of rape.

21. It should be noted that in 2005, the Court of Cassation set a very low judicial limit of legal age for sexual consent. The judges, in a case involving one- and five-years old children, held that surprise or even coercion were constituted for very young underage victims because of their incapacity to realise the nature and gravity of the acts imposed on them.<sup>13</sup> Since, judges have considered that children under six years of age cannot consent to any sexual act, which is an extremely low minimum age of sexual consent.

22. In recent cases, the controversy around the criteria of ‘violence, threat, coercion, or surprise’ in cases involving minors confirmed that judges continue to believe that a child could knowingly consent to sexual relations:

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<sup>12</sup> See Annex 1 for a list of relevant international and national standards.

<sup>13</sup> Court of Cassation, Criminal Chamber, 7 December 2005, Decision No.05-81316 ([www.legifrance.gouv.fr/juri/id/JURITEXT000007071639/](http://www.legifrance.gouv.fr/juri/id/JURITEXT000007071639/)).

- In 2017, the prosecutor of Pontoise decided to prosecute a twenty-eight-year-old man who engaged in sexual intercourse with an eleven-year-old girl for the offense of sexual assault rather than for rape, despite the rape complaint filed by the victim's family. The classification of the act of sexual penetration as sexual assault by the prosecutor was explained by the difficulty to establish the victim's lack of consent, since she followed the man. Following public outrage, the prosecutor amended the charges to rape.<sup>14</sup>
- In another case, the Court of Assises of Seine-et-Marne acquitted a man accused of raping an eleven-year-old child in November 2017, because the elements of 'violence, coercion, threat, or surprise' were not established. In this case, the victim got pregnant. One year later, the accused was finally found guilty in appeal and sentenced to seven years' imprisonment.<sup>15</sup>

22. Following these decisions, the issue of legal age for sexual consent triggered a national debate and the drafting of Law No. 2018-703 of 3 August 2018 strengthening the fight against sexual and gender-based violence.<sup>16</sup> The government committed to drafting an article setting the legal age for sexual consent to fifteen-year-old in cases of rape. The draft article would have changed the elements of rape by establishing a presumption of lack of consent if the perpetrator knew or could not ignore that the victim was under the age of fifteen years. Prior to the tabling of the bill, this article was however removed due to a risk of unconstitutionality highlighted in an opinion of the Council of State issued on 15 March 2018.<sup>17</sup> According to the Council of State, pursuant to a constitutional principle prohibiting irrebuttable presumption,<sup>18</sup> the lack of consent for a minor under fifteen years of age cannot be presumed, unless it can be proven otherwise.

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<sup>14</sup> Le Parisien, "Val-d'Oise : après l'affaire Sarah, le projet de loi sur les violences sexuelles déçoit", 2 August 2018 ([www.leparisien.fr/val-d-oise-95/montmagny-l-affaire-sarah-n-aboutira-pas-sur-une-presomption-de-consentement-sexuel-02-08-2018-7841490.php](http://www.leparisien.fr/val-d-oise-95/montmagny-l-affaire-sarah-n-aboutira-pas-sur-une-presomption-de-consentement-sexuel-02-08-2018-7841490.php)). See also Libération, "Pontoise: vers une requalification de l'«atteinte sexuelle» sur une fille de 11 ans en «viol»", 13 February 2018 ([www.liberation.fr/france/2018/02/13/pontoise-vers-une-requalification-de-l-atteinte-sexuelle-sur-une-fille-de-11-ans-en-viol\\_1629405](http://www.liberation.fr/france/2018/02/13/pontoise-vers-une-requalification-de-l-atteinte-sexuelle-sur-une-fille-de-11-ans-en-viol_1629405)).

<sup>15</sup> Le Monde, "Un homme finalement condamné en appel pour le viol d'une fille de 11 ans", 27 November 2018 ([www.lemonde.fr/police-justice/article/2018/11/27/un-homme-finalement-condamne-en-appel-pour-le-viol-d-une-fille-de-11-ans\\_5389520\\_1653578.html](http://www.lemonde.fr/police-justice/article/2018/11/27/un-homme-finalement-condamne-en-appel-pour-le-viol-d-une-fille-de-11-ans_5389520_1653578.html)).

<sup>16</sup> French Senate, "Rapport d'information n° 574 (2017-2018) ", 14 June 2018 ([www.senat.fr/rap/r17-574/r17-574.html](http://www.senat.fr/rap/r17-574/r17-574.html)).

<sup>17</sup> Council of State, "Avis sur le projet de loi renforçant la lutte contre les violences sexuelles et sexistes commises contre les mineurs et les majeurs", 15 March 2018, JUSD1805895L, paras 16 et seq ([www.legifrance.gouv.fr/contenu/Media/Files/autour-de-la-loi/legislatif-et-reglementaire/avis-du-ce/2018/avis\\_ce\\_jusd1805895l\\_cm\\_21.03.2018.pdf](http://www.legifrance.gouv.fr/contenu/Media/Files/autour-de-la-loi/legislatif-et-reglementaire/avis-du-ce/2018/avis_ce_jusd1805895l_cm_21.03.2018.pdf)).

<sup>18</sup> Constitutional Council, Decision No. 99-411 DC, 16 June 1999 ([www.conseil-constitutionnel.fr/actualites/communiquede/decision-n-99-411-dc-du-16-juin-1999-communique-de-presse#:~:text=Saisi%20par%20plus%20de%20soixante,DC%20du%2016%20juin%201999](http://www.conseil-constitutionnel.fr/actualites/communiquede/decision-n-99-411-dc-du-16-juin-1999-communique-de-presse#:~:text=Saisi%20par%20plus%20de%20soixante,DC%20du%2016%20juin%201999)). See also Decisions No. 2009-580 DC of 10 June 2009, No. 2011-625 DC of 10 March 2011, No. 2011-164 QPC of 16 September 2011.

23. As a result, Law No. 2018-703 only intervened marginally<sup>19</sup> and introduced two paragraphs to article 222-22-1, interpreting the elements of moral coercion and surprise in cases involving minors.
24. Paragraph 2 allows judges to rely on the age difference between a victim under eighteen years of age and the perpetrator to characterise the moral coercion or surprise, as well as on the *de jure* or *de facto* authority that the latter exercises over the victim, which in turn can also be characterised by a significant age difference between the minor and the perpetrator.<sup>20</sup> According to paragraph 3, when the acts are committed on a minor under the age of fifteen, moral coercion or surprise are characterised by the abuse of the vulnerability of the victim who does not have the necessary discernment for these acts.
25. Unfortunately, rather than strengthening the legal protection of minors, article 222-22-1 creates a confusing framework. The moral coercion and surprise elements are defined differently depending on the age of the victim (under the age of fifteen years, between fifteen and eighteen years of age and above eighteen years of age). The article also does not mention whether paragraphs 2 and 3 exclude each other or are cumulative.
26. In addition to creating a complex and unclear framework, article 222-22-1(2) does not set a binding interpretation of the elements of rape. The Constitutional Council found that since the article only stated that coercion **may** result from the age difference, such wording was a simple guide for judges when determining moral coercion and could not be considered as an element of rape.<sup>21</sup> As a result, judges do not have to follow this provision. It seems however that the decision of the Constitutional Council would not apply to article 222-22-1(3) which states that moral coercion and surprise **are** characterised by the abuse of vulnerability of the victim. As a result, if the abuse of vulnerability is established, the lack of consent should be characterised when the victim is under fifteen years of age.
27. In 2020, a new decision revived the debate on the capacity of the French judicial system to protect minor victims of sexual violence. In the famous *case of Julie*,<sup>22</sup> a thirteen-year-old girl in a particular state of vulnerability at the time the events started was allegedly gang raped by twenty firefighters between 2008 and 2010. Among all the alleged perpetrators,

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19 Council of Europe's Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), "Baseline Evaluation Report: France", 2019, para. 193 (<https://rm.coe.int/grevio-inf-2019-16/168098c61a>).

<sup>20</sup> Law No. 2010-121 of 8 February 2010.

<sup>21</sup> Constitutional Council, Decision No. 2014-448 QPC, 6 February 2015, para. 7 ([www.conseil-constitutionnel.fr/decision/2015/2014448QPC.htm](http://www.conseil-constitutionnel.fr/decision/2015/2014448QPC.htm)). Although this decision concerned the formulation of article 222-22-1 in force before the adoption of Law No. 2018-703, the wording and reference to "may" remained the same in the new 2018 wording. Former article 222-22-1 read as follows: "The coercion provided for by the first paragraph of article 222-22 may be physical or moral. Moral coercion may result from the age difference between a minor victim and the perpetrator and from the *de jure* or *de facto* authority that the latter exercises over this victim.

<sup>22</sup> Guardian, "Firefighters accused of gang rape in Paris", 5 May 2019 ([www.theguardian.com/world/2019/may/05/firefighters-accused-of-gang-rape-in-paris](http://www.theguardian.com/world/2019/may/05/firefighters-accused-of-gang-rape-in-paris)). See also The Canadian, "Firefighters prosecuted for sexual assault will not be prosecuted for rape", 12 November 2020 (<https://thecanadian.news/2020/11/12/firefighters-prosecuted-for-sexual-assault-will-not-be-prosecuted-for-rape/>).



only three were charged, and with sexual assault rather than rape. On 12 November 2020, as the judges found that the victim had consented to the acts, the Versailles Court of Appeal rejected the request to reclassify the alleged acts as rape. The three firefighters will be tried before a lower criminal court for the misdemeanour of sexual assault unless the family files an appeal before the Court of Cassation.

28. The above-mentioned decisions, and their recurrence, show that the Criminal Code still fails to provide sufficient guarantees for the protection of young victims of sexual assault. The recent GREVIO report found the French legislation to be “unsatisfactory” and “that it provides no solution to the need to protect children from sexual relations to which they cannot give their free and informed consent.”<sup>23</sup>
29. Two reports of the delegation for women's rights and gender equality in the Senate also called for the introduction of a legal age for sexual consent.<sup>24</sup> In this context, a new Bill was introduced on 26 November 2020,<sup>25</sup> which proposes to set the legal age at thirteen by introducing a new article defining rape against a minor in section 5 of chapter VII dedicated to ‘endangering minors’. In 2018, the HCE also suggested to set the legal age for consent at thirteen years of age.<sup>26</sup>
30. This complex and weak legal framework, coupled with the very unfortunate judicial outcomes, demonstrate the dire need to strengthen the legal protection of minors in cases of rape. The introduction of a reasonable legal age for sexual consent is therefore key to ensure effective and equal protection of minors. CEDAW found that twelve years of age was too low and recommended to set the minimum age of sexual consent to at least sixteen.<sup>27</sup>

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<sup>23</sup> Council of Europe’s Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), “Baseline Evaluation Report: France”, 2019, para. 193 (<https://rm.coe.int/grevio-inf-2019-16/168098c61a>).

<sup>24</sup> Senate, “Rapport d’information au nom de la délégation aux droits des femmes et à l’égalité des chances entre les hommes et les femmes sur les violences faites aux femmes”, n° 564 (2017-2018), 12 June 2018 ([www.senat.fr/notice-rapport/2017/r17-564-notice.html](http://www.senat.fr/notice-rapport/2017/r17-564-notice.html)), and “Rapport d’information au nom de la délégation aux droits des femmes et à l’égalité des chances entre les hommes et les femmes sur le projet de loi renforçant la lutte contre les violences sexuelles et sexistes”, n° 574 (2017-2018), 14 June 2018 ([www.senat.fr/rap/r17-574/r17-5741.pdf](http://www.senat.fr/rap/r17-574/r17-5741.pdf)).

<sup>25</sup> Bill No. 158 aiming to protect the young minor of crimes sex ([www.senat.fr/leg/pp120-158.html](http://www.senat.fr/leg/pp120-158.html)).

<sup>26</sup> High Gender Equality Council, “Avis pour une juste condamnation sociétale et judiciaire du viol et autres agressions sexuelles”, Opinion No.2016-09-30-VIO-022, published on 5 October 2016, p. 30 ([www.haut-conseil-egalite.gouv.fr/IMG/pdf/hce\\_avis\\_viol\\_2016\\_10\\_05-2.pdf](http://www.haut-conseil-egalite.gouv.fr/IMG/pdf/hce_avis_viol_2016_10_05-2.pdf)).

<sup>27</sup> CEDAW, Concluding observations on the combined seventh and eighth periodic reports of the Philippines, CEDAW/C/PHL/CO/7-8, 25 July 2016, para. 26.

## **Aggravating Circumstances**

31. If the following aggravating circumstances are characterised, rape is punishable by twenty years of imprisonment according to article 222-24 of the Criminal Code:

1° When it resulted in mutilation or permanent infirmity;

2° When it is committed on a fifteen-year-old minor;

3° When it is committed on a person whose particular vulnerability, due to age, illness, infirmity, physical or psychological disability or pregnancy, is apparent or known to the perpetrator;

3° bis When it is committed on a person whose particular vulnerability or dependence resulting from the precariousness of her/his economic or social situation is apparent or known to the perpetrator;

4° When it is committed by an older relative or by any other person having de jure or de facto authority over the victim;

5° When it is committed by a person who abuses the authority conferred on him by her/his functions;

6° When it is committed by several persons acting as perpetrators or accomplices;

7° When it is committed with the use or threat of a weapon;

8° When the victim has been put in contact with the perpetrator using an electronic communication network for the dissemination of messages to an unspecified public;

9° (repealed)

10° When it is committed in conjunction with one or more other rapes committed on other victims;

11° When it is committed by the victim's spouse or cohabitee or the partner in a civil partnership;

12° When it is committed by a person acting in a state of manifest drunkenness or under the manifest influence of narcotics;

13° When it is committed, in the exercise of this activity, on a person who engages in prostitution, including on an occasional basis;

14° Where a minor was present at the time of the offense and was present at the scene of the offense;

15° Where a substance has been administered to the victim, without her/his knowledge, to impair her/his discernment or control over her/his acts.

32. According to article 222-25 of the Criminal Code, if the rape resulted in the death of the victim, it is punishable by thirty years of imprisonment.

33. Finally, rape is punishable by life imprisonment when it is preceded, accompanied, or followed by torture or barbaric acts as per article 222-26 of the Criminal Code.

## **Prosecution**

### **Ex Parte and Ex Officio Prosecutions**

34. French criminal procedure is governed by the principle of discretionary prosecution. The Prosecutor can decide to prosecute rape cases or not.<sup>28</sup>
35. Ex parte prosecutions are only possible for petty felonies and misdemeanours in France, as a result private prosecutions are not possible for rape classified as a crime (felony).

### **Plea Bargain**

36. Plea bargaining is not allowed in rape cases. The ‘Comparution sur reconnaissance préalable de culpabilité’ only applies to misdemeanours, excluding sexual assaults.<sup>29</sup>

### **Statute of Limitations**

37. The statute of limitations for rape is twenty years starting from the last act characterising the offense (article 7 of the Code of Criminal Procedure).
38. Law No. 2018-703 of 3 August 2018 extended the statute of limitations for rapes against minors. In such cases, the statute of limitations is thirty years and only starts running when the victims reach eighteen years of age.<sup>30</sup> Law No. 2018-703 is not retroactive; thus, this statute of limitations applies only to crimes occurring after its adoption or when the statute did not already apply at the time this law was adopted.
39. A bill was presented to Parliament on 15 July 2020 which foresees the non-applicability of statute of limitations on rapes committed against minors<sup>31</sup> by amending article 7 of the Code of Criminal Procedure. To the best of our knowledge, the bill has not been discussed yet.

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<sup>28</sup> Article 40 of the Code of Criminal Procedure.

<sup>29</sup> Article 495-7 of the Code of Criminal Procedure.

<sup>30</sup> Article 7(3) of the Code of Criminal Procedure.

<sup>31</sup> [www.assemblee-nationale.fr/dyn/15/dossiers/viols\\_mineurs\\_imprescriptibles](http://www.assemblee-nationale.fr/dyn/15/dossiers/viols_mineurs_imprescriptibles).

## **War and/or Conflict**

40. France deposited its instrument of ratification of the Rome Statute on 9 June 2000. The domestic implementation of the Rome Statute was conducted through Law No. 2010-930 of 9 August 2010 on harmonising criminal law with the establishment of the International Criminal Court.

### **Rape as a War Crime or Crime against Humanity**

41. The provisions of the Criminal Code incorporating the international core crimes is incomplete. Although rape is listed as a crime against humanity in the Criminal Code,<sup>32</sup> it is not expressly mentioned as a war crime.

42. To date, only article 461-4 of the Criminal Code addresses forms of sexual violence in an international and non-international armed conflict, without expressly mentioning rape. The article reads as follow:

*Forcing a person protected by international law of armed conflict into prostitution, forcing her/him to have an unwanted pregnancy, sterilising her/him against her/his will or performing any other form of sexual violence of comparable gravity against her/him is punished by life imprisonment.*

43. A bill was presented to Parliament on 29 April 2019 to include rape as a war crime.<sup>33</sup> The bill is currently being reviewed by the Law Commission.

### **Statute of Limitations**

44. Pursuant to article 7(4) of the Code of Criminal Procedure, crimes against humanity, which include the act of rape, are not subject to any statute of limitations. To contrast, war crimes are subject to a statute of limitations of twenty years.<sup>34</sup>

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<sup>32</sup> Article 212-1 of the Criminal Code.

<sup>33</sup> <https://www.senat.fr/dossier-legislatif/ppl18-469.html>.

<sup>34</sup> Article 7(2) of the Code of Criminal Procedure.

## **Data**

45. The French National Observatory on Violence Against Women noted that, since 2007, the number of rape convictions has been steadily decreasing (40% in ten years).<sup>35</sup> Between 2011 and 2018, each year, an average of 77,000 adults aged 18 to 75 years are victims of rape (no statistical data could be found for victims under the age of eighteen years).<sup>36</sup> However, only 17% of victims file a complaint<sup>37</sup> and less than one in ten complaints leads to a conviction.<sup>38</sup>
46. The following data were collected, among others, by the National Observatory on Violence Against Women:

<b>Year</b>	<b>Number of cases reported to the Police</b>	<b>Number of cases prosecuted</b>	<b>Number of cases sanctioned</b>
2019	23,670 (incl. 12,100 minors)	4,474	N/A
2018	20,010 (incl. 10,170 minors)	4,141	1,031
2017	17,110 (incl. 8,840 minors)	3,632	1,010
2016	14,670 (incl. 7,570 minors)	4,477	1012
2015	12,116	N/A	1,074

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<sup>35</sup> Letter (n°14) from the French National Observatory on Violence Against Women, published on November 25, 2019 presenting data for 2018, p. 20 (<https://arretonslesviolences.gouv.fr/les-lettres-de-l-observatoire-national-des-violences-faites-aux-femmes#les-lettres-annuelles-de-l-observatoire-national>).

<sup>36</sup> “Rapport d’enquête ‘Cadre de vie et sécurité’: Victimization, délinquance et sentiment d’insécurité”, CVS, INSEE-ONDRP 2019, published by the Ministerial Internal Security Statistical Department in December 2019, p. 184 (<https://www.interieur.gouv.fr/Interstats/L-enquete-Cadre-de-vie-et-securite-CVS/Rapport-d-enquete-Cadre-de-vie-et-securite-2019>).

<sup>37</sup> Ibid.

<sup>38</sup> High Gender Equality Council, Press Release of 5 October 2016 ([www.haut-conseil-egalite.gouv.fr/violences-de-genre/actualites/article/publication-de-l-avis-pour-une-1137](http://www.haut-conseil-egalite.gouv.fr/violences-de-genre/actualites/article/publication-de-l-avis-pour-une-1137)).

## **Other Issues: ‘Correctionnalisation’ of Rape Cases**

46. Several barriers to the reporting and prosecution of rape, as well as to the accountability of perpetrators subsist in France, such as the rape culture, regrettable shortcomings during the investigations, lesser credit given to the victims’ declarations, or judicial conservatism (as highlighted above). In this section, the drafters would like to highlight one particularly worrying trend: the ‘correctionnalisation’ of rape cases.
47. In many cases, the prosecution chooses to prosecute acts of sexual penetration as sexual assaults, a misdemeanour, instead of rape, practice called ‘correctionnalisation’. A recent publication by the statistical service of the Ministry of Justice analysed the outcomes of the investigations for sexual violence closed in 2016<sup>39</sup> and brought to light the use of
48. such practice by showing that for 29% of the perpetrators, the initial qualification of rape was withdrawn during the investigation (22% in favour of the qualification of sexual assault and 7% in favour of those of other forms of sexual assault or violence). Among those whose indictment ended with a qualification of rape, 34% of the cases were totally dismissed, 38% were sent to the Court of Assises, 13% before a tribunal for minor, and 15% were referred to a lower criminal court for sexual assault (misdemeanour). This proportion of referrals to lower criminal courts rises to 38% for acts qualified as marital rape after the investigation.<sup>40</sup>
49. In 2013, the HCE already urged the French authorities to take measures to prevent the correctionnalisation of rapes. The reclassification of the facts as sexual assault, thus trying the facts as misdemeanour, has important consequences in terms of statute of limitations, support for the victims, awareness of the seriousness of her/his act by the perpetrators, damages, sentences, and the legal framework related to repeated offenses.<sup>41</sup> As a result, the HCE recommended to “recall that rape is a crime, and that as such, it falls exclusively within the scope of Court of Assises”.<sup>42</sup>
50. According to the French High Gender Equality Council, this judicial practice of rejecting the qualification of rape is often justified on grounds of expediency so that the case can be tried more quickly in lower criminal courts. The High Council also highlighted that such practice may also be used to relieve the caseload in the Courts of Assises and has the effect of minimising the seriousness of acts of rape and of challenging the principle of equality before the law.<sup>43</sup>

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<sup>39</sup> Infostat n°160, “Violences sexuelles et atteintes aux mœurs : les décisions du parquet et de l’instruction”, Ministry of Justice, March 2018 ([www.justice.gouv.fr/art\\_pix/stat\\_infostat\\_160.pdf](http://www.justice.gouv.fr/art_pix/stat_infostat_160.pdf)).

<sup>40</sup> Infostat n°160, Figure 6, p.5 ([www.justice.gouv.fr/art\\_pix/stat\\_infostat\\_160.pdf](http://www.justice.gouv.fr/art_pix/stat_infostat_160.pdf)).

<sup>41</sup> High Gender Equality Council, “Avis sur le projet de loi pour l’égalité entre les femmes et les hommes”, Opinion No. 2013-0912-HCE-007, published on 13 September 2013, p. 40 ([www.haut-conseil-egalite.gouv.fr/IMG/pdf/60\\_recommandations\\_projet\\_de\\_loi\\_pour\\_l\\_egalite\\_entre\\_les\\_femmes\\_et\\_les\\_hommes\\_-2.pdf](http://www.haut-conseil-egalite.gouv.fr/IMG/pdf/60_recommandations_projet_de_loi_pour_l_egalite_entre_les_femmes_et_les_hommes_-2.pdf)).

<sup>42</sup> Ibid.

<sup>43</sup> High Gender Equality Council, “Avis pour une juste condamnation sociétale et judiciaire du viol et autres agressions sexuelles”, Opinion No.2016-09-30-VIO-022, published on 5 October 2016, p. 29 ([www.haut-conseil-egalite.gouv.fr/IMG/pdf/hce\\_avis\\_viol\\_2016\\_10\\_05-2.pdf](http://www.haut-conseil-egalite.gouv.fr/IMG/pdf/hce_avis_viol_2016_10_05-2.pdf)).

51. In 2019, GREVIO also expressed its concerns about the judicial treatment of sexual violence and the practice of ‘correctionnalisation’.<sup>44</sup>

## **Conclusion**

52. In light of the information presented above, we respectfully request that the Special Rapporteur draw attention in its reports to the issues highlighted in this submission, as well as send a communication to the Government of France urging to adopt a definition of rape in line with international standards, ensure accountability of perpetrators of rape and effective protection of victims, especially minors, in such cases.

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<sup>44</sup> Council of Europe’s Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), “Baseline Evaluation Report: France”, 2019, paras 195-6 (<https://rm.coe.int/grevio-inf-2019-16/168098c61a>).

## Annex 1

December 1, 2020

### **Open letter from international experts regarding the definition and judicial treatment of rape in France**

Dear Mr. Minister of Justice,

Dear Ms. Minister Delegate for Gender Equality, Diversity and Equal Opportunities, attached to the Prime Minister,

We are international experts in human rights and public international law working, among others, as lawyers, prosecutors, jurists, academics, members of international organisations and civil society in France and around the world. Following the decision of the Investigation Chamber of the Paris Court of Appeal of 19 March 2020, confirmed by the Court of Cassation on 14 October 2020 (see Annex 2), we express our indignation regarding the reclassification of a forced cunnilingus from rape to sexual assault.

In the present case, the victim, thirteen years old at the time of the events, recounts that the ex-companion of her mother had “*taken the habit of forcing her to undress, caressing her vagina and buttocks, rubbing against her and licking her vagina, under the pretext of alleged punishments intended to correct her*”. The victim testifies that he also “*penetrated her with his tongue through persistence*”.

Denying that sexual penetration occurred, the decision of the Court of Appeal, confirmed by the Court of Cassation, notes that the victim's statement evoking penetration was “*not accompanied by any precision in terms of intensity, depth, duration or movement*” and deduced that the penetration had not been “*of significant depth*”. The judges found that an act of penetration had indeed taken place, however not “*beyond the edge of the vagina*”.

We argue that the “intensity, depth, duration or movement” criteria attached to the act of penetration are extremely problematic and have no legal basis. This decision sets a very dangerous precedent for rape victims, who would be responsible for proving the facts in lieu of the prosecution. It also stands out from international standards and many domestic laws which only require penetration, “however slight”.<sup>45</sup> Thus, the use of the tongue for a penetration during a forced cunnilingus, like in this case, should be sufficient to constitute rape. This definition is used by, among others, the International Criminal Court, the International Criminal Tribunals for the former Yugoslavia and Rwanda and other international criminal tribunals, as well as the criminal legislation of several countries, including Gambia, Northern Ireland, Namibia, New Zealand, Kenya, Scotland, and South Africa.<sup>46</sup> It is also used by UNODC ([International Classification of Crime for Statistical Purposes](#), 2015) and WHO ([World report on violence and health](#), 2002).

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<sup>45</sup> Women’s Initiatives for Gender Justice, [The Hague Principles on Sexual Violence](#), 2019, p. 29.

<sup>46</sup> For more examples, see Human Dignity Trust, [Good Practice in Human Rights Compliant Sexual Offences Laws in the Commonwealth](#), 2019.



## English translation of the open letter

Even more surprisingly, the court of appeal refuses to consider as established the author's intent regarding the penetration on the grounds that he "*had taken care to avoid it, not having used penetration once during the multiple alleged sexual assaults*", without examining his intent during the cunnilingus in question. The alleged absence of a previous penetration cannot constitute evidence of the absence of intent to penetrate during the forced cunnilingus. It should be recalled that the victim reported a penetration using the tongue "*through persistence*".

Although the interpretation of facts falls under the discretion of judges, we wish to underline several points which seem worrying to us: (1) the decision reveals regrettable shortcomings during the investigation which had serious consequences on the establishment of facts; (2) the victim's declarations are seen as less credible than those of the accused; the judgment insisting, in the first paragraph of the court's response, on the fact that the victim declared that her attacker "*was afraid to go too far with his fingers but that he had not penetrated [her]*" and dismissing her statement "*I felt he was penetrating me with his tongue through persistence*" as insufficient, without taking into account her age and vulnerability when facing an adult having authority over her. The judges also appear to impose an obligation to corroborate evidence of rape which has no legal basis; (3) the references to the lack of a pelvic exam and to the victim's virginity are inappropriate, these elements cannot, in any way, be used to deny the commission of a rape.

We recall that the reclassification of the facts as sexual assault, thus trying the facts as misdemeanour, has important consequences in terms of statute of limitations, damages, sentences, and the legal framework related to repeated offenses.

This illustrates, in our opinion, the existence of systemic problems in the judicial treatment of sexual violence in France.<sup>47</sup> In this regard, an opinion from the French High Council on Equality between Women and Men underlines that rape is too often re-characterised as a lesser offense of sexual assault, which has the effect of minimising the seriousness of acts of rape and of challenging the principle of equality before the law. The French National Observatory on Violence Against Women notes that, since 2007, the number of rape convictions has been steadily decreasing (40% in ten years).<sup>48</sup> In fact, it should be recalled that each year in France, an average of 112,000 adults, including 94,000 women, are victims of rape or attempted rape.<sup>49</sup> However, only 17% of victims file a complaint<sup>50</sup> and less than one in ten complaints leads to a conviction.<sup>51</sup>

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<sup>47</sup> In 2019, the Council of Europe's Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) was already concerned about the judicial treatment of sexual violence and the practice of "correctionnalisation". GREVIO, "[Baseline Evaluation Report: France](#)", 2019, paras 195-196.

<sup>48</sup> Letter (n°14) from the French National Observatory on Violence Against Women, published on November 25, 2019 presenting data for 2018, p. 20.

<sup>49</sup> Figures covering the period 2011-2018, "Rapport d'enquête 'Cadre de vie et sécurité': Victimization, délinquance et sentiment d'insécurité", [CVS, INSEE-ONDRP 2019](#), published by the Ministerial Internal Security Statistical Department in December 2019, p. 185.

<sup>50</sup> "Rapport d'enquête", *op. cit.*, p. 185.

<sup>51</sup> In 2018, 13,336 rape cases were handled by the police or gendarmerie and 1,269 rape convictions were handed over. See Letter (n° 14) from the French National Observatory on Violence Against Women, *op. cit.*, p. 20 and "[Les condamnations](#)" (sentences), 2018, report published by the Ministry of Justice in January 2020, p. 8.

## **English translation of the open letter**

Considering France's international legal commitments towards combating all forms of domestic, sexual, and gender-based violence and the international awareness of the obstacles that prevent victims of sexual violence from obtaining justice, this decision represents a surprising step backwards, against the progress made in France and around the world. We regret that in 2020 there are still challenges related to the qualification of forced cunnilingus, while it is widely accepted that forced fellatio can constitute rape.

We invite the Minister of Justice and the Minister Delegate for Gender Equality, Diversity and Equal Opportunities, attached to the Prime Minister to take the necessary measures to ensure that the definition and judicial treatment of rape comply with international standards, to effectively fight impunity for sexual violence.

Signatories:

1. **Melanie Louis**, Juriste (Legal Officer)
2. **Natacha Bracq**, Senior Legal Officer
3. **Sareta Ashraph**, Barrister-at-Law, Garden Court Chambers, London
4. **Stephanie Barbour**, Sexual and Gender-based Violence Adviser
5. **Caroline Allibert-Delestras**, Sexual and Gender-based violence Investigator, UN WOMEN
6. **Sofia Candeias**, Judicial Affairs Officer, United Nations
7. **Achraf Sebbahi**, Enquêtrice, Bureau du Procureur, Cour pénale internationale (Investigator, Office of the Prosecutor, International Criminal Court)
8. **Alix Vuillemin**, Senior Advocacy Adviser, Women's Initiatives for Gender Justice
9. **Jeanne Sulzer**, Lawyer, Paris Bar
10. **Danya Chaikel**, Barrister and Solicitor
11. **Emmanuelle Marchand**, Head of Legal Unit and Senior Legal Counsel
12. **Edith Bardel**, Juriste (Legal Officer), Centres d'Information sur les Droits des Femmes et des Familles (CIDFF)
13. **Maxine Marcus**, Director, Partners in Justice International
14. **Kathy Roberts**, Co-Director, Partners in Justice International
15. **Marta Bo**, Researcher, Asser Institute
16. **Pauline Birolini**, Lawyer
17. **Carine Pineau**, Associate Legal Officer
18. **Manon Beury**, Doctorante (Phd Candidate), Institut des Hautes Etudes Internationales et du Développement
19. **Maria-Kim Vasconi-Levy**, Juriste (Legal Officer)
20. **Amélie Beauchemin**, Lawyer

## English translation of the open letter

21. **Ruby Mae Axelson**, Legal Consultant, Global Rights Compliance
22. **Julie Hotte**, Avocate membre du barreau du Québec et juriste en France (Lawyer, Quebec Bar and Legal Officer in France)
23. **Dr. Daria Sartori**, PhD, Human Rights Lawyer
24. **Verónica Hinestroza Arenas**, Independent Expert on International Human Rights Law
25. **Juliana Gil Borenstein**, Assistant Legal Officer, International Criminal Court
26. **Nora Godkin**, Human Rights Lawyer
27. **Vony Rambolamanana**, Juriste (Legal Officer)
28. **Habiba Osman**, Executive Secretary, Malawi Human Rights Commission
29. **Juleen Fatiaki**, State Prosecutor
30. **Shyamala Alagendra**, International Lawyer
31. **Claire Mathellié**, Human rights specialist
32. **Dr. Bérénice K. Schramm**, Prof. Assistant en droit, Bahçeşehir University (BAU), Turquie (Assistant Law Professor, Bahçeşehir University (BAU), Turkey)
33. **Marion Volkmann**, Juriste travaillant sur les questions de droits humains (Legal Officer - Human Rights)
34. **Alessandra Spadaro**, Doctorante en droit international (PhD Candidate in international law)
35. **Katie Rourke, Esq.**, Attorney, United States Department of Justice
36. **Elham Zareie**, Lawyer
37. **Marianne Dagenais**, Lawyer, Trudel Johnston & Lespérance
38. **Claerwen O'Hara**, Legal Policy Officer, Teaching Fellow and PhD Candidate
39. **Léa Labbé**, Juriste (Legal Officer)
40. **Kseniya Kirichenko**, International human rights lawyer
41. **Paula baldini Miranda da Cruz**, Attorney at law, researcher
42. **Marialejandra Moreno**, International criminal lawyer
43. **Anne Plouy**, Directrice (Director), Coexister France
44. **Manel Stambouli**, Human rights specialist
45. **Anna Rosalie Greipl**, Phd Candidate
46. **Coralie Klipfel**, Phd Candidate
47. **Fernanda Sostisso Rubert**, Student
48. **Margot Tedesco**, Responsable communication (Head of Communication)

## English translation of the open letter

49. **Jordana Adams**, Law Lecturer and Solicitor
50. **Monica Sanchez Bermudez**, Juriste spécialisée en droits humains (Legal Officer - Human Rights)
51. **Caroline Newman**, CEO, Kids Empowerment
52. **Anca-Elena Ursu**, Director, NGO
53. **Estelle Tesson**, Juriste (Legal Officer)
54. **Garance Tardieu**, Secrétaire Exécutive
55. **Luiza Drummond Veado**, Program Officer
56. **Liemertje Sieders**, Lawyer
57. **Zhypariza Zhumagazieva**, Lawyer
58. **Anna Khalfaoui**, Litigation Fellow
59. **Victoria Amann-Lasnier**, International Human Rights Lawyer
60. **Priyanka Chirimar**, Lead Counsel
61. **Marion Wintergerst**, Responsable des campagnes (Campaign manager)
62. **Véronique Moufflet**, Anthropologist
63. **Charlotte Vercraeye**, Senior Legal Officer
64. **Tatiana Waisberg**, International Law Lecturer, Brazil
65. **Gorana Mlinarevic**, Human rights lawyer and researcher
66. **Sara Pedroso**, Avocate, Droit pénal international (Lawyer, International criminal law)
67. **Dr. Tathiana Flores**, International Law Consultant
68. **Magali Maystre**, Judicial Affairs Officer
69. **Nolwenn Guibert**, Senior Legal Officer
70. **Nathalie Tran**, Juriste en droit international (Legal Officer – International law)
71. **Léa Bozzi**, Analyst
72. **Dr Kirsten Campbell**, Academic, Goldsmiths College
73. **Mona Haghgou Strindberg**, Attorney at Law, Sweden

**Annex 2**

**Court of Cassation**  
**Criminal Chamber**  
**Public hearing, 14 October 2020**  
**N° of Appeal: 20-83.273**  
**Not published in the Bulletin**

**THE FRENCH REPUBLIC**  
**IN THE NAME OF THE FRENCH PEOPLE**

**JUDGMENT OF THE COURT OF CASSATION, CRIMINAL CHAMBER,**  
**OF OCTOBER 14, 2020**

Mrs. L ... F ..., civil party, lodged an appeal against the judgment of the investigative chamber of the Paris Court of Appeal, 3rd section, dated March 19, 2020, which, in the context of the investigation against Mr. T ... G ... on the counts of rape and aggravated sexual assault, confirmed the partial dismissal order issued by the investigating judge and referred the accused to the criminal court on the count of aggravated sexual assault.

A brief has been produced.

Based on the report of Mrs. Slove, adviser, the observations of the SCP Boré, Salve de Bruneton and Mégret, counsel for Mrs. L ... F ..., and the observations of Mrs. Caby, prosecutor, following a public hearing on October 14, 2020 in the presence of Mr. Soulard, president, Mrs. Slove, member of the bench, Mr. Moreau, member of the bench, and Ms. Coste-Floret, clerk of the chamber,

the criminal chamber of the Court of Cassation composed, pursuant to article 567-1-1 of the code of criminal procedure, of the aforementioned president and judges, having deliberated in accordance with the law, delivered this judgment.

Facts and procedure

1. Based on the contested judgment and on the proceedings' evidence:
2. On May 2, 2017, Mrs. F ..., nineteen years old, reported acts of sexual assault, committed by Mr. G ..., the ex-companion of her mother, since she was thirteen years old, Mr. G having taken the habit of forcing her to undress, caressing her vagina and buttocks, rubbing against her and licking her vagina, under the pretext of alleged punishments intended to correct her.
3. An investigation started and Mr. G ... was indicted on the basis of the aforementioned counts.
4. At the end of the investigation, the investigating judge changed the legal characterisation from rape committed by a person having authority over the victim from January 1, 2017 to

**English translation of the Court of Cassation's judgment**  
**Non official translation**

April 24, 2017, to incestuous sexual assault by a person having authority over the victim and referred the indicted person to the criminal court ('Tribunal correctionnel').

5. Mrs. F ... lodged an appeal against this decision.

Review of the grounds of appeal:

Statement of the grounds of appeal:

6. The ground of appeal criticises the contested judgment in that it upheld the order which held that the facts initially qualified as rape committed by a person having authority over the victim, an offense committed from January 1, 2017 to April 24, 2017 in Paris, in reality constituted the offense of incestuous sexual assault by a person having authority over the victim, an offense committed from January 1, 2017 to April 24, 2017 in Paris, and requalified the facts in that sense and consequently ordered the referral of Mr. G... before the criminal court of Paris for having, in Meaux and Paris, between August 15, 2016 and April 24, 2017, in any case on national territory and within a time that is not covered by statute of limitations, sexually assaulted Mrs. F... by violence, duress, threat, or surprise, in this case and in particular by touching her buttocks and vagina, by licking her vagina and by rubbing his genitals against her, facts qualified as incestuous as they have been committed by the partner of her mother having de facto authority over the victim whereas:

“1°/ the depth of sexual penetration is not a condition for qualifying rape; in holding that the penetration must have been “of significant depth”, in order to classify the vaginal penetration suffered by the applicant as sexual assault, and that, in the present case, the statement by the applicant, who had indicated that Mr. G... had “penetrated her with his tongue through persistence”, was “not accompanied by any precision in terms of intensity, depth, duration or movement”, so that it “does not sufficiently characterise a voluntary introduction beyond the edge of the vagina, deep enough to characterise a deliberate act”, the investigating chamber, which added to the law a condition that it does not include, violated article 222-23 of the Criminal Code, together with article 381 of the Code of Criminal Procedure;

2°/ in holding that Mr. G...’s intent to impose a vaginal penetration with his tongue on the applicant was not sufficiently characterised, on the improper ground that during the multiple sexual assaults he had inflicted on her in the past, he had taken “care” never to penetrate her, without seeking, as it was required to, what had been Mr. G...’s intent during the act of sexual penetration that he had subjected her to, the investigating chamber deprived its decision of any legal basis with regard to articles 121-3 and 222-23 of the Criminal Code and 381 of the Code of Criminal Procedure;

3°/ in any event, the voluntary nature of the sexual assault which degenerates into sexual penetration inflicted on the victim is sufficient to characterise the moral element of rape; by relying on his alleged intent to limit himself to a sexual assault, in order to find that the intentional nature of the vaginal penetration inflicted on the applicant by Mr. G... with his tongue was not established, when the intentional character of the act of penetration committed, resulted precisely from his intent to impose on Mrs. F... a non-consensual sexual act, the investigating chamber violated articles 121-3 and 222-23 of the Criminal Code, together with article 381 of the Code of Criminal Procedure.”

**English translation of the Court of Cassation's judgment**  
**Non official translation**

Response by the Court:

7. To confirm the order of the investigating judge and reclassify the aggravated rape charges as aggravated sexual assault charges, the judgement notes that Mrs. F..., who did not undergo any pelvic exam and claimed during the investigation that she was a virgin, said to the investigators about the only alleged sexual act involving penetration, that her abuser “was afraid to go too far with his fingers but that he had not penetrated [her]”.

8. The judges point out that during the same testimony, she explained “I felt he was penetrating me with his tongue through persistence”, without providing any precision in terms of intensity, depth, duration or movement, which does not sufficiently characterise a voluntary insertion beyond the edge of the vagina, deep enough to characterise a sexual act involving penetration.

9. From this, they deduce that the material and mental elements of rape are insufficiently characterised, so that the decision of reclassification as sexual assault, inappropriately substantiated by expediency, will be confirmed by substitution of motive drawn from the absence of these elements, in fact and in law.

10. Determining itself in this way by a sovereign assessment of the facts reported, the investigating chamber justified its decision.

FOR THE FORGOING REASONS, the Court hereby:

DISMISSES the appeal;

Thus, decided and judged by the Court of Cassation, Criminal Chamber, and pronounced by the President on the fourteenth of October two thousand and twenty.