



**International Convention for
the Protection of All Persons
from Enforced Disappearance**

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Committee on Enforced Disappearances

**Concluding observations on the report submitted by France
under article 29, paragraph 1, of the Convention**

Addendum

Comments received from France on the concluding observations* **

[Date received: 18 April 2014]

* The present report is being issued without formal editing.

** The annex submitted by the State party may be consulted in the archives of the secretariat.

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I. Introduction

1. Following the consideration of the report submitted by France under article 29, paragraph 1, of the International Convention for the Protection of All Persons from Enforced Disappearance (hereinafter “the Convention”) at its 46th and 47th meetings, held on 11 and 12 April 2013, the Committee on Enforced Disappearances (hereinafter “the Committee”) adopted its concluding observations (CED/C/FRA/CO/1) at its 57th meeting, held on 19 April 2013.
2. In accordance with its rules of procedure, the Committee requested the Government of France to provide, within one year, information on the implementation of the recommendations set out in paragraphs 23, 31 and 35 of the concluding observations.
3. The Government of France thanks the Committee for the quality of the discussions that took place during the consideration of its report and has the honour to submit the following information.
4. This information was submitted for review to the National Consultative Commission for Human Rights (CNCDH), which, in accordance with the provisions of article 1 of Decree No. 2007-1137 of 26 July 2007 on its composition and functioning, “*contributes to the preparation of reports that France is required to submit to international organizations, pursuant to its human rights treaty obligations*”.

II. General comment

5. By way of introduction, it should be emphasized that, since the appearance of the delegation of France before the Committee, the applicable rules concerning enforced disappearances have changed owing to the entry into force of Act No. 2013-711 of 5 August 2013 introducing various provisions to bring French law into line with European Union (EU) law and France’s international commitments in the field of justice.
6. The entry into force of this Act, following the adoption without amendment of Bill No. 736, the tenor of which was discussed at length before the Committee, brings French legislation fully into line with the obligations arising from the Convention.

III. Information concerning paragraph 23 of the concluding observations

7. Firstly, as highlighted in the concluding observations of the Committee (para. 22), Bill No. 736, which has since become Act No. 2013-711 of 5 August 2013, allowed the introduction into the Code of Criminal Procedure of article 689-13 granting the French courts quasi-universal jurisdiction concerning cases of enforced disappearance.
8. That article reads as follows: “Article 689-13 – In the interests of the implementation of the International Convention for the Protection of All Persons from Enforced Disappearances, adopted in New York on 20 December 2006, any person guilty of or complicit in a crime defined in article 212-1 (9) or article 221-12 of the Criminal Code may be prosecuted and judged under the conditions provided for by article 689-1 of the present Code when this violation constitutes an enforced disappearance within the meaning of article 2 of the aforementioned Convention”.

9. The wording of this clause on quasi-universal competence is exactly the same as that employed in articles 689-2 to 689-10 of the Code of Criminal Procedure, which provide for identical quasi-universal competence under nine other international conventions.

10. The clause allows criminal proceedings to be brought in connection with facts constituting enforced disappearance, regardless of whether a request for extradition has been made, in full conformity with article 11 of the Convention.

11. Secondly, as indicated by the Government of France in its report (CED/C/FRA/1, para. 72), the Act of 5 August 2013 introduced the following twofold amendment to article 113-8-1 of the Criminal Code:

- Firstly, the application of French criminal law and, consequently, the competence of the French courts have been extended to cover acts committed abroad by an alien whose extradition has been refused because it might have exceptionally grave consequences owing, in particular, to that person's age or state of health. Previously, French criminal law could not be applied unless extradition had been refused on one of the following grounds: the offence in question was subject to a penalty contrary to French public order; the political nature of the offence; or the absence of guarantees of a fair trial;
- Secondly, the application of French law in the above-mentioned cases is no longer subject to a prior official complaint on the part of the authorities of the country in which the act was committed and which had requested extradition.

12. The Committee's attention should, however, be drawn to the fact that this amendment to article 113-8-1 of the Criminal Code does not affect implementation of the Convention, on the basis of which quasi-universal competence has *in any case* been established by article 689-13 of the Code of Criminal Procedure, with regard to enforced disappearances committed both as an "ordinary" crime and as a crime against humanity.

13. The situations that the amendment of article 113-8-1 is designed to address are, on the other hand, quite different.

14. Previously, article 113-8-1 listed only three grounds for refusal to extradite a person against whom proceedings had been brought concerning *acts not covered by a quasi-universal competence clause* (penalty contrary to French public order, political nature of the offence, absence of guarantees of a fair trial). It was decided to introduce the amendment in question in order to address certain (rare) situations where an extradition request had been turned down on grounds other than those referred to above. One example in this regard was the case of an individual for whom extradition was sought on the grounds of major financial fraud, which had been refused owing to that person's state of health.

15. Thus, the amendment of the above-mentioned article 113-8-1 must be viewed as being completely separate from the legislative adaptations made to the Criminal Code and the Code of Criminal Procedure for the purposes of the implementation of the Convention. Confirmation of the above can be found in point 12 of the preamble to the Act, which states: "*Article 18 [amending article 113-8-1 of the Criminal Code] allows the competence of the French courts to be extended to cover certain situations of impunity, such as the case in which the extradition of a person suspected of having committed serious acts (offence punishable by a sentence of more than 5 years' imprisonment) was not granted because of the exceptionally serious consequences that extradition might have, notably, owing to that person's age or state of health*".

16. Similarly, and thirdly, the Government should emphasize that article 689-11 of the Code of Criminal Procedure was not introduced into French legislation in order to meet the obligations arising from the Convention. The purpose of this provision, which results from Act No. 2010-930 of 9 August 2010, is to establish, under certain conditions, the

competence of the French courts in the matter of offences that are within the jurisdiction of the International Criminal Court but *for which no provision is made under any specific convention for quasi-universal competence*, which is not the case with enforced disappearances.

IV. Information concerning paragraph 31 of the concluding observations

17. The recommendation made by the Committee in paragraph 31 of its concluding observations covers: (a) the supervision of custodial measures by a sitting judge; (b) the right to communicate of persons deprived of their liberty; and (c) the as yet unimplemented possibility of creating ad hoc holding areas.

(a) Concerning the right of appeal before a sitting judge to ensure that coercive measures are lawful and to enable detainees to be present in court

18. The Government of France takes note of the Committee's recommendation, while observing that, without prejudice to its appropriateness, it would seem to go beyond the obligations contained in the international instruments to which France is a party and which are referred to in article 17, paragraph 2, of the Convention.

19. In particular, article 5 (3) of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the "European Convention on Human Rights"), as interpreted by the European Court of Human Rights, establishes the systematic supervision of custodial measures by a judge enjoying guarantees of independence but only once a certain period of time has expired.

20. Thus, it is clear from European Court of Human Rights case law, and particularly from the *Brogan and Others v. the United Kingdom* judgement of 29 November 1998, that the period within which a person in police custody must be brought before a judge under article 5 (3) must not, in any case, exceed four days and six hours. The *Moulin v. France* judgement of 23 November 2010 confirms that case law because, in this case, the applicant had been deprived of liberty for a period of slightly more than five days, prior to being taken before a liberties and detention judge.

21. On the other hand, the Court ruled that, in the case of a person taken before a judge two days after arrest (*Aquilina v. Malta* judgement of 29 April 1999) and in the case of an individual who was detained in police custody for 87 hours and 30 minutes before being taken before a judge (*Sar and Others v. Turkey* judgement of 5 December 2006), there had been no violation of article 5 (3) of the European Convention on Human Rights.

22. In general comment No. 35 on article 9 of the International Covenant on Civil and Political Rights, a draft version of which was adopted by the Human Rights Committee at its 110th session (March 2014), the Committee considers (para. 33) that this article must be interpreted in the sense that the period within which an individual deprived of liberty must be brought before an independent judge should not exceed "a few days", adding that "*any delay longer than 48 hours must remain absolutely exceptional and be justified under the circumstances*".

23. In France, under ordinary law, individuals cannot be held in police custody for more than 48 hours; that delay can only be extended through the intervention of a sitting judge fulfilling the twofold condition of independence established by the European Convention

on Human Rights: the liberties and detention judge in the case of a preliminary inquiry and the examining judge in the case of a judicial inquiry.

24. Moreover, the legality of detention in police custody can be challenged since it is subject to review by the trial judges (the sitting judges) at the trial stage through the defence of nullity, which may be submitted by the defendant or his/her lawyer prior to any defence on the merits, under article 385 of the Code of Criminal Procedure.

25. It should also be pointed out that, since the adoption of the Act of 14 April 2011 reforming police custody, in cases where the authorities seek to extend the period of police custody, the person in police custody in question must be brought before the public prosecutor, unless there are exceptional grounds for the requirement to be waived. Thus, the circular issued by the *Garde des Sceaux* (Minister of Justice), dated 23 May 2011, applying the Act of 14 April 2011, states that:

“[...] Irrespective of the procedural framework, the principle of bringing persons in police custody before the public prosecutor can only be waived in exceptional circumstances: the pre-existing provisions applicable to preliminary inquiries, or on receipt of letters rogatory, are thus extended to cover expedited investigation procedures. In cases where it is not possible to bring the detained person before the public prosecutor, the duty prosecutor must state the reasons for that omission in the decision authorizing the extension.

It should be recalled that, under the provisions of pre-existing article 77, the Criminal Division of the Court of Cassation had already ruled that any decision to extend the period of police custody taken without the detainee being brought before the public prosecutor had to be in writing and substantiated, failing which the interests of the detainee were necessarily deemed to have been harmed, without that person having to provide any justification thereof [...].”

26. As long as the guarantees described above are in place, the French system of police custody would seem to comply with the provisions of the relevant international instruments, including article 17, paragraph 2 (f), of the Convention.

27. Lastly, in response to the concern expressed by the Committee about the frequent use of police custody, the Committee is referred to the enclosed data compiled by the French National Supervisory Body on Crime and Punishment (ONDRP).¹

28. These data in fact highlight a decrease in the number of cases of police custody over recent years, as well as a decrease in the ratio of the number of cases of police custody to the number of persons charged with offences from 39.4 per cent in 2008 to 31.2 per cent in 2013.

(b) Concerning the right to communicate

29. With regard to administrative detention centres, the Government considers that there is a need to clear up the misunderstanding that appears to surround the right to communicate. All aliens placed in administrative detention during the period of organization of their departure have the right to communicate with the outside world. Following arrival at the detention centre, aliens are informed, as soon as possible and in a language that they understand, of their right to request the assistance of an interpreter, a counsel and a doctor. Aliens are also informed that they can communicate both with their

¹ Also available at the following website: www.inhesj.fr/sites/default/files/tb3pn-2014.pdf?bcsi_scan_76859af71b923077=0&bcsi_scan_filename=tb3pn-2014.pdf.

national consulate and with any person of their choosing. This right to communicate may be exercised from the moment of arrival at the detention centre and throughout the period of detention. The public prosecutor and the liberties and detention judge are responsible for ensuring that those rights are respected throughout the period of detention, being able, to that end, to visit the centre in question and consult the registers containing information on the conditions under which detainees are held.

30. As to pretrial detention, the “right to communicate” is made up of three distinct components: (i) permission to communicate with a counsel; (ii) the visiting permit; and (iii) access to a telephone.

(i) Communication permit

31. Accused persons may communicate freely with their lawyer, either orally or in writing. In no circumstances may the prohibition against communicating be applied to the exercise of the right of defence (Code of Criminal Procedure, arts. 145-4 and D. 56). Accused persons are in fact permitted to effect all communications and enjoy all facilities compatible with the requirements of prison discipline and security for the purposes of the exercise of the right of defence (Code of Criminal Procedure, art. 716 (2)). Furthermore, the lawyer must be in possession of a communication permit in order to visit his client, the sole requirement being that the lawyer must have been effectively appointed by his client.

32. This right is not subject to any time limit and can be exercised as from the beginning of the period of detention.

(ii) Visiting permit

33. The judge “responsible for the file of the proceedings” is also responsible for issuing visiting permits (Code of Criminal Procedure, art. R. 57-8-8). Persons placed in pretrial detention may receive a minimum of three visits per week (Code of Criminal Procedure, art. D. 410).

34. Thus, subject to the provisions of article 145-4 (2) of the Code of Criminal Procedure, all persons placed in pretrial detention may, with the authorization of the examining judge, receive visits at their place of detention. Once the period of one month from placement in detention has elapsed, the examining judge may refuse to issue a visiting permit to a member of the family of the detainee only on the basis of a specially substantiated decision in writing relating to the needs of the investigation. An appeal may be lodged with the president of the investigation division, who must within five days issue a written and substantiated ruling, against which no appeal may be lodged.

35. Visiting permits are valid until the accused person is convicted in a final decision and can, with the agreement of the judge responsible for the case, be used as from the beginning of the period of placement in detention.

(iii) Access to a telephone

36. Detainees have the right to telephone family members and may also be authorized to telephone other persons in order to prepare for their reintegration into society.

37. In all cases, accused persons must obtain authorization from the judicial authority. Access to a telephone may, therefore, be refused, suspended or withdrawn on grounds relating to the maintenance of order and security or to the prevention of offences and needs of the examination under article 39 of Act No. 2009-1436 of 24 November 2009.

38. The judge in charge of the case is responsible for issuing the relevant authorization (Decree of 23 December 2010, art. R. 57-8-21). Some examining judges require the detainee concerned to send them the telephone bill of the person they wish to call, a

photocopy of the identity card of that person, and the written authorization of that person confirming that they wish to receive telephone calls from the detainee. The detainee may, however, freely telephone his or her lawyer, who will henceforth be authorized to enter the detention centre with a dictaphone and a laptop computer for professional use.

39. This right is not subject to any time limit and can be exercised as from the beginning of the period of detention.

(c) Concerning ad hoc holding areas

40. The Act of 16 June 2011 supplements article L.221-2 of the Code on the Entry and Residence of Aliens and the Right of Asylum, stating that: *“In cases where it is clear that a group of at least 10 aliens has just arrived in France at a point other than a border crossing, at the same location, or at a number of locations no more than 10 kilometres distant from one another, the holding area shall be established for a maximum duration of 26 days and shall extend from the location(s) at which the persons concerned were discovered to the nearest border crossing”*.

41. The purpose of this provision, which in exceptional cases authorizes the creation of an ad hoc holding area in the vicinity of the point of disembarkation, is to adapt the existing legislation to take into account exceptional situations which may arise on the external land borders by providing a relevant legal framework.

42. As noted by the Committee, to date this legal provision has never been applied.

43. The implementation of this provision is governed by a number of strict conditions and, in any case, any aliens affected by it would enjoy all the rights and guarantees afforded by the law to aliens placed in holding areas. The requirements of the right of asylum would be fully complied with and any applications for asylum made under such circumstances would be considered in line with all the guarantees provided for by law (hearing before the French Office for the Protection of Refugees and Stateless Persons, ministerial decision against which an appeal with full suspensory effect may be lodged with the administrative court).

44. It should be noted in particular that among the guarantees afforded to persons who might find themselves placed in an ad hoc holding area would be the right to inform directly and by any means the Inspector-General of Places of Deprivation of Liberty or the Defender of Rights.

V. Information concerning the recommendations made in paragraph 35 of the concluding observations

45. Firstly, with regard to the definition of victim under article 24, paragraph 1, of the Convention, it may be pointed out that, under the case law of French criminal jurisdictions, the concept of victim is applied very broadly, and includes all persons with close ties to the direct victim, regardless of whether the latter is deceased. In addition, actions brought by such persons are deemed to be admissible, even where harm has not been proven but is simply alleged. Victims are thus considered to include grandparents (*Cass. Crim.*, 16 June 1998), unmarried partners (*Cass. Crim.*, 8 January 1985), aunts and great-aunts (*Cass. Crim.*, 23 June 2010).

46. The condition concerning personal harm is thus easily fulfilled so long as family ties or simply affective ties exist between the direct victim of the offence and the person(s) with close ties also claiming victim status.

47. On the other hand, the Government of France is puzzled at the suggestion that the authors of the Convention had intended to define as a “victim” a person who had suffered harm which, although direct, was nevertheless “impersonal”.

48. Secondly, as to the right of victims to know the truth regarding the circumstances of an enforced disappearance, according to article 24, paragraph 2, of the Convention, the States parties are obliged to “*take appropriate measures in this regard*”, but are left free to make their own arrangements regarding the exercise of this right.

49. Under French law, victims have the right to initiate civil party proceedings. Under articles 53-1, 75, 80-3, 90-1, 114 and 183 of the Code of Criminal Procedure, victims are entitled to receive information concerning the case and to receive copies of all case file materials, to apply for investigative measures (such as examinations of witnesses, cross-examinations, searches, medical examinations, genetic examinations and IT reports) and to appeal against certain decisions (including decisions to dismiss proceedings or to refuse to allow investigative measures).

50. These provisions allow victims to exercise their right to know the truth.

51. Furthermore, according to the bill transposing Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, currently being examined by Parliament, civil parties to a given case may have direct access to the case file, without needing to be represented by a lawyer.

52. Thirdly, with regard to measures to broaden forms of reparation, in particular restitution, rehabilitation, satisfaction and guarantees of non-repetition, in accordance with article 24, paragraph 5, of the Convention, it may be pointed out that “restitution” seems scarcely imaginable in cases of enforced disappearance.

53. In all cases, victims may obtain the return of objects kept under seal as part of a criminal proceeding.

54. In addition to the financial compensation provided for under article 2 of the Code of Civil Procedure and article 706-3 et seq. of the Code of Criminal Procedure, victims are also eligible to receive assistance from a victim support association, in accordance with article 41 of the Code of Criminal Procedure, in order to obtain advice and psychological support, if necessary through referral to the competent services.

55. There are 167 such victim support associations that offer free and confidential multidisciplinary support, including personalized assistance, information on the rights of victims, social support and emergency assistance, as well as specialized support for particularly vulnerable or debilitated persons.

56. These associations receive State funding under agreements reached with the appeal courts.

57. Lastly, experiments are being conducted in France concerning restorative justice, particularly in the form of meetings between perpetrators of crimes and victims, as occurred recently at the central prison of Poissy between three persons convicted of murder and persons with close ties to their victims.

58. Although so far no meetings have involved the perpetrators or victims of enforced disappearances, in principle, such experiments with restorative justice can only contribute to the achievement of the objectives of rehabilitation, satisfaction and non-repetition referred to in article 24, paragraph 5, of the Convention.