

Note by the CNCDH concerning examination of France's seventh periodic report by the United Nations Committee Against Torture

28 March 2016

The National Consultative Commission on Human Rights (CNCDH) is the French National Human Rights Institution (NHRI), founded in accordance with the Paris Principles with 'A' accreditation from the United Nations.

The CNCDH has been entrusted with a general consultative and oversight role serving the Government and Parliament within the field of human rights, international human rights law and human rights action. Within this framework, it contributes in a wholly independent capacity to draft reports by France to international bodies, and in particular to the United Nations Treaty Bodies, passing on to these bodies information concerning the respect for and effectiveness of human rights in France.

In addition to its opinions, which are intended to inform political decision-making, the CNCDH is an independent authority assessing public policy through its mandates as National Rapporteur on Racism, Anti-Semitism and Xenophobia Prevention, and on Human Trafficking.

These various endeavours are therefore central to the contribution of the CNCDH to examination of France by the United Nations Committee Against Torture (hereafter "the Committee").

In the interests of succinctness and relevance, the CNCDH thought it expedient to return in a cover note to the list of points pertaining to the seventh periodic report by France set out by the Committee (CAT/C/FRA/Q/7), and to examine precisely the responses made by the French Government (CRC/C/FRA/Q/7/Add.1) in light of its seventh periodic report (CAT/C/FRA/7).

Question 6 - Trafficking in persons and exploitation

1. Concerning legislation on the prevention and punishment of trafficking in persons

At the formal level, the CNCDH takes the view that France now possesses a legal arsenal that meets both the requirements of the European Convention on Human Rights¹ and those of law derived from the European Union (EU)². The criminal policy memorandum issued by the Ministry of Justice on 22 January 2015 has provided a useful addition to legislative

¹ See ECHR 26 July 2005, *Siliadin v. France*, application No. 73316/01; ECHR 11 October 2012, *C.N. and V. v. France*, application No. 67724/09.

² Directive 2011/36/EU of 5 April 2011 *on preventing and combating trafficking in human beings and protecting its victims*.

stipulations, promoting both recourse to the designation of trafficking in persons and application of legislation in terms of prevention and punishment.

Nonetheless, the offence of trafficking in persons is most definitely a complex offence with which police and legal authorities have difficulty in dealing: low numbers of complaints, investigations, and convictions for trafficking in persons lead one to presume that the various institutional actors (magistrates, the police force and the gendarmerie) struggle to grasp the limits of incrimination as defined in article 225-4-1 of the Criminal Code. Since the definition of the offence is complex, it is highly likely that out of convenience, practitioners will chose to use those designations with which they are most familiar, namely undignified working or housing conditions or ‘pimping’. Figures from the examination of criminal records reveal that criminal policy in the field of trafficking still lacks ambition at this stage.

These same statistics attest to the insufficiency of means allocated by France to identifying potential victims of trafficking. Accordingly, no reports on certain forms of exploitation (forced labour, servitude, slavery) have been received by law enforcement forces (the figures are zero because other designations were opted for), however they are not non-existent, as was revealed in particular by the case of *Siliadin v. France* heard by the European Court of Human Rights³.

This great paucity of statistics, in comparison with the high numbers relating to pimping and recourse to prostitution, indirectly reveal the “gender bias in the detection of trafficking”, which serves to justify, in the name of trafficking prevention, all forms of prostitution prevention, rather than identifying and prosecuting exploitation that also includes forced labour, servitude, slavery and analogous practices.

In view of these considerations, the CNCDH would encourage the Committee to question France concerning the measures that it intends to implement to improve detection by French courts of the offence of trafficking in persons, so that the behaviour pertaining thereto can be correctly designated.

2. Concerning the national action plan against trafficking in persons

To meet the various challenges of trafficking and exploitation prevention, in May 2014, the French government adopted a “National Action Plan against Trafficking in Persons” which the CNCDH is happy to note. Measure 23 of this Plan creates a national rapporteur mechanism and entrusts the mission to the CNCDH. In its first assessment report on the implementation of the national action plan (published in March 2016), the CNCDH found it regrettable that the Plan was still far from being fully implemented and that a number of measures had not at that stage been deployed. The CNCDH will endeavour to elaborate on the failings that it has observed in the Plan’s implementation.

- Providing effective national coordination

The CNCDH finds that overall coordination of human trafficking and exploitation prevention remains inadequate. The CNCDH takes the view that the coordination of human trafficking and exploitation prevention and implementation of the national action plan

³ ECHR 26 July 2005, *Siliadin v. France*, previously cited.

require the creation of an inter-ministerial body reporting to the Prime Minister (delegation or mission) that is solely and specifically dedicated to human trafficking and exploitation prevention.

The Committee could therefore interrogate France on its intention to set up an inter-ministerial body reporting to the Prime Minister and not to the Ministry for Women's Rights, and whose sole mission would be the issue of human trafficking and exploitation prevention.

- *Equipping human trafficking and exploitation prevention with adequate resources*
Financing of human trafficking prevention is inadequate. The CNCDH takes the view that the coordinating body must possess the human and financial resources needed in order to operate well. This requires the creation of its own budget line, encompassing the operating budget of the inter-ministerial delegation or mission, and an intervention budget, firstly to directly finance certain actions provided for under the National Action Plan and secondly in the interests of improved management efficiency, being the single point of contact for associations for validating and managing their subsidies on the basis of accurate projected work loads and regular oversight of their commitments. The CNCDH is furthermore concerned that for 2016 almost all (80%) of the credits allocated to human trafficking prevention were in fact only allocated to prostitution prevention and the supporting of prostituted persons.

To ensure that human trafficking and exploitation prevention in France possesses relevant and sufficient resources, the Committee could question the Government regarding its proposed undertakings in human and financial terms in this regard.

- *Creating relevant training actions*
As regards education and training, although in France there are a number of training actions targeting professionals likely to come into contact with victims of human trafficking, these are unfortunately disparate, scattered and jointly coordinated by the various actors concerned, which undeniably undermines their efficacy. Measure 2 of the National Action Plan on Human Trafficking Prevention provides for the creation of training for professionals in identifying and protecting trafficked persons. Whilst the CNCDH applauds the pertinence of the mechanisms provided for by this measure, it is nevertheless concerned about the delay in their implementation. The CNCDH calls upon the Government not to further delay the creation and publication of new training tools that are harmonised and shared, and to ensure that these tools will actually take into account all forms of exploitation addressed by the treaty, and not just trafficking for sexual or labour exploitation. Police officers, gendarmes, magistrates, and more broadly professionals likely to come into contact with the victims of trafficking (workplace inspectors, personnel of child protection services, hospital personnel, etc.), must be able to receive training in how to identify and support victims, within the framework of basic or continuous training. In France, no formalised procedure or identification criteria exist for victims or trafficking. However, it is vital that all of the services concerned be made able to detect a potential case of trafficking or exploitation using common criteria, particularly since the persons who are victims do not consider themselves as such and are presumed to have committed other offences (unlawful presence in the country, touting in public, repeated thefts, etc.).

The CNCDH therefore calls upon the Government to enact measure 1.2 of the National Action Plan as swiftly as possible, since harmonisation of the victim identification process within the various government departments is a key component of protection of victims of trafficking.

The CNCDH feels that it would be useful for the Committee to recommend that France implement the training and awareness-raising component of the National Action Plan.

- *Providing better care for victims of trafficking in persons*

Victims of trafficking and exploitation are entitled to safety and the full re-establishment of economic and social rights. However, the CNCDH has observed a number of failings: access to the right to information remains piecemeal and insufficient; the Plan makes no mention of the social, medical and psychological care of victims; and it is almost as silent concerning the pathway out of exploitation towards social and professional inclusion, since measure 9 concerns only pathways out of prostitution, and fails to address the other forms of exploitation.

In order for the victims of trafficking or exploitation to receive the appropriate assistance, the CNCDH recommends:

- setting in place tailored support for each victim of trafficking and making the supported person a totally autonomous actor in the creation and implementation of his or her inclusion project;
- granting the benefit of all assistance and protection measures provided for by measure 9 of the National Action Plan to all persons who are victims of trafficking, without discrimination as to gender or to the type of exploitation;
- providing the material and financial resources to specialist organisations tasked with a *de facto* public service mission since they care for victims of trafficking and exploitation.

The CNCDH takes the view that it would be expedient for the Committee to request from France a presentation of the measures undertaken or to be undertaken so as to address the lacunae in terms of the care of victims of trafficking in persons.

- *The specific case of minors who are victims of trafficking in persons*

In France, the CNCDH, with its trafficking prevention associations, highlight the scant care provided to victims who are minors: Child Welfare Mechanisms (ASE) are saturated, minors who are victims of trafficking rarely receive real schooling/training and the presumption of minority status is not respected. This low level of care is a problem that is likely to make the insecure situation of victims a long-term one. The CNCDH notes that within the framework of French law, neither the mechanism for care of unaccompanied foreign minors⁴, nor the Child Welfare Mechanism, nor the Youth Legal Protection Programme (PJJ) make provision for the specific support of and care for minors who are victims of trafficking and exploitation, even though article 14 of Directive 2011/36/EU requires Member States to take into account the atypical and unique situation of such minors. Consequently, at-risk minors are not provided with a specially adapted set of rules, even though the serious nature of the events experienced and the trauma resulting from these undoubtedly require specific psychological and physical supervision.

⁴ Memorandum issued by the Justice Ministry on 31 May 2013, concerning care modalities for foreign unaccompanied young persons: national sheltering, assessment and orientation mechanism (NOR: JUSF1314192C)

The CNCDH takes the view that the prevention of trafficking in minors must involve protection and support of children and also reparation. To this end, the CNCDH calls upon the public authorities:

- to ensure that full protection is extended to minors who are victims of trafficking. Throughout the territory of the Republic of France, these minors must always be treated as victims and not as “offenders” or “irregular migrants”; and in any case, the presumption of minority must automatically be granted to them and the transition towards adulthood must be prepared and supported beyond the age of 18. These minors must systematically receive the support of an *ad hoc* administrator if they are unaccompanied or at risk within their family, and the best interests of the child must always be taken into account.
- Ensuring minors receive unconditional support and care that is adapted to their circumstances. Close and constant coordination between the public services and the associations working with minor victims or potential victims is imperative. It must provide them with conditions for accessing fundamental rights and ensuring their access to health, safe accommodation, tailored education, training, and decent living conditions without neglecting access to culture and leisure activities. This requires a clear commitment from the State through long-term financing, constant joint and shared approaches and means of accessing rights with the network of specialist associations.
- Ensuring that reparation mechanisms are set in place for these minor victims. When monitoring these young people, public bodies must incorporate the concept of the long-term at every level (justice, training, living conditions). They must in particular ensure that becoming an adult does not rupture the reparation process and that it is incorporated into the rebuilding of the young person.

The CNCDH wishes to draw the attention of the Committee to the seriousness of the situation encountered by young persons who are victims of trafficking in persons and the low level of care they are afforded. In order to remedy this, the Committee could question France concerning the measures that it intends to take in order to implement the recommendations formulated by the CNCDH concerning this specific issue, in its capacity as national rapporteur in the field.

Questions 7 and 8 - Asylum applications

Within the context of its consultancy mission to the public authorities, the CNCDH undertook a meticulous examination of asylum law reform in its opinion issued in November 2014⁵, the salient points of which, as regards the area of competence of the Committee, are detailed below.

1. Placement into the accelerated procedure (Question 7)

The new article L. 723-2 of the CESEDA Code, introduced by the asylum law reform, further extends the possibility of recourse to the accelerated procedure and takes up the ten grounds for placement provided for under article 31-8 of the “Procedures” Directive⁶. The CNCDH is concerned by the extension of the accelerated procedure as currently

⁵ CNCDH 20 November 2014, *Avis sur le projet de loi relatif à la réforme de l’asile [Opinion on the Asylum Reform Bill]*, JORF No. 0005, 7 January 2015, text No. 57

⁶ European Parliament and Council Directive 2013/32/EU dated 26 June 2013 on common procedures for granting and withdrawing international protection

adopted, due to the fewer safeguards associated with it, specifically oversight by a single judge of the National Asylum Law Court (*Cour nationale du droit d'asile*), which has the effect of removing the High-Commissioner for Refugees from the court panel even though his/her presence is a fundamental component of the French asylum mechanism.

Also, concerning the question put to France by the Committee, the CNCDH wishes to express its opinion on the extension of the criteria for placement into the accelerated procedure set in place by OFPRA.

- The decision to place into the accelerated procedure must be circumscribed with additional safeguards

With the asylum law reform, application of the accelerated procedure is now either automatic or at the initiative of either the administrative authority, or that of OFPRA. However, the CNCDH cannot help but note that this mechanism contravenes the recommendations of the “Procedures” Directive in that article 4.1 of the same stipulates that the decision on procedural orientation should be made only by the responsible authority.

On the basis of this observation, the CNCDH takes the view that in order to better comply with European requirements, placement into the accelerated procedure must not be automatic, and for the same reasons, it holds that the prefectural authority must not be authorised to take this decision. Regarding the latter point, it notes that the drafting of section three of article L. 723-2 of the CESEDA Code contains a certain ambiguity concerning the part to be played by the prefectural authority in the decision to place an applicant into the accelerated procedure. For these reasons, in order to prevent any contravention of the European Directive, the CNCDH seeks clarification on the new mechanisms and recommends that this competence be granted only to the determining authority.

Furthermore, the CNCDH would encourage the Committee to raise, during the course of its interactive dialogue with France, the issue of the lack of safeguards circumscribing the decision to place into the priority procedure provided for by current texts, and to recommend that the decision on procedural orientation be taken exclusively by the determining authority in order to invest the placement decision on an asylum application with all of the necessary safeguards.

- Review the grounds for placement into the accelerated procedure

The CNCDH is particularly anxious to draw the attention of the Committee to the continued existence in law of the ground of an asylum seeker coming from a “safe” country, which currently constitutes the principal ground for placement into the priority procedure. In fact, the asylum law reform retained the lists of safe countries in article L. 722-1 of the CESEDA Code, which refers to article 37 and annex 1 of the “Procedures” Directive.

The CNCDH wishes to state that it is staunchly opposed to this concept in two respects. Firstly, besides being volatile, these lists are not identical in all Member States. Therefore, being not without incidence on the processing of applications, both procedurally and on the merits, their use could further exacerbate the unequal treatment faced by asylum seekers applying for protection within the European Union depending on which State is responsible for examining the application.

Secondly, the CNCDH objects to the very existence of this list which is seriously prejudicial to nationals from the countries appearing on it, since there is a presumption that they are less credible than others in their asylum request. However, it can never be presumed that an individual is not at risk; in this regard, the CNCDH has been alerted to cases of persons being sent back to countries where they were at risk of being subjected to acts of torture or inhuman or degrading punishments or treatment, even when they were nationals from “safe” countries. For this reason, the CNCDH must oppose automatic placement into the accelerated procedure for “safe” country nationals since, as they will have less time and resources for a legal defence than others, their ability to demonstrate the risk they face and to provide a solid basis for their asylum application will be undermined.

Accordingly, because placement into the accelerated procedure of “safe” country nationals deprives them of the ability to prove the danger that they face, and further exposes them to the risk of being sent back to countries where torture and inhuman or degrading treatment continues to be practised, the CNCDH calls upon the Committee to recommend that France eliminate the “safe” countries of origin list and that it desist from making this a ground on which to place applicants into the accelerated procedure.

More generally, the CNCDH notes that a number of grounds for application of the accelerated procedure are defined in a way that is vague and therefore leaves the authorities a very broad margin of appreciation. This is particularly so in the case of an asylum seeker who “*constitutes a serious threat to public order, public safety or State security*”. The same applies to the appreciation of “*questions not relevant to the asylum application*” or “*statements that are manifestly incoherent and contradictory, manifestly false or implausible which contradict verified information pertaining to the country of origin*” or even where “*an applicant who entered France irregularly or who has remained irregularly has not submitted his or her asylum request within one hundred and twenty days from the date of entry into France*”.

The CNCDH greatly fears that these kinds of stipulations lead to almost systematic use of the accelerated procedure, even though this ought imperatively to remain exceptional and not become, in practice, the “ordinary law procedure”.

Also, the CNCDH considers it expedient that the Committee recommend that France more accurately define the grounds leading to the decision to place an applicant into the priority procedure, so that this may be applied correctly, rather than automatically.

2. Asylum application in waiting areas (Question 8)

A number of reports from civil society portray shortcomings and failings in the asylum procedure in waiting areas. For this reason, the CNCDH takes the view that it is vital to improve this mechanism, all the more so since the situation of asylum seekers in waiting areas gives cause for grave concern. The CNCDH finds that asylum law reform has not been sufficiently ambitious in this regard.

- Procedural safeguards applicable to persons requesting asylum at the border (in a waiting area)

Firstly, although the admission procedure into French territory for asylum is set by the Interior Ministry, which is competent to decide on the entry and residency of foreigners in France, the examination of asylum applications falls under the exclusive competence of OFPRA, since the asylum reform provided for its intervention in a consultative capacity, requiring the Minister to comply with its opinion. Although this legislative change is commendable, the CNCDH wishes however to set out some reservations: firstly, the linked competence of the ministry must not be overestimated, which is already the current practice, and secondly, the procedure only concerns an infinitesimal number of persons. Furthermore, it should be noted that an exception is provided for. Indeed, where access to the territory by the person concerned constitutes a serious threat to public order, the OFPRA opinion is not binding upon the Minister. However, the CNCDH takes the view that this stipulation fails to comply with the Qualification Directive.

Moreover, the asylum law reform addresses the widespread practice of border infiltration prior to requesting asylum in France, namely providing for an assessment by OFPRA of the manifestly unfounded nature of the request for admission into France for the purposes of seeking asylum. In fact, article L. 213-8-1 of the CESEDA code sets out the following definition: *“a manifestly unfounded asylum request shall be constituted by a request that, in terms of the declarations made by the foreigner and the documents produced, where applicable, manifestly lack relevance in respect of the conditions of granting of asylum or are manifestly lacking in any credibility concerning the risk of persecution or serious harm”*.

The CNCDH finds it regrettable that this definition, which is partly linked to the criteria stipulated for the granting of international protection, could lead to an appreciation on the merits of an asylum application. The admissibility procedure for border applications already goes far beyond the mere evaluation of the “manifestly unfounded” nature of the application; it entails a pre-examination on the merits under conditions that fail to uphold the minimum safeguards associated with the normal procedure for examining a protection application, due namely to the brevity of the deadlines.

Also, the CNCDH must reiterate its recommendations, namely as regards appreciation of the admissibility of asylum applications, which must not go beyond the simple assessment of the “manifestly unfounded” nature of the application and which may not, under any circumstances, involve an examination on the merits of the fear of persecution invoked by the person concerned.

Accordingly, the CNCDH thinks it would be expedient for the Committee to recommend that France circumscribe the examination of border asylum applications with more safeguards, pointing out specifically that under no circumstances may appreciation of the admissibility of these applications be based on an examination on the merits of fears of persecution invoked by the person concerned.

- Increase the presence of counsel during interviews and throughout the procedure

The CNCDH wishes firstly to express its regret concerning the silence of the law on the presence in waiting areas of the association sector and counsel, who constitute an essential safeguard for asylum seekers, through the provision of information, aid and assistance. It calls upon the State to set in place an information hotline and a legal aid hotline, and recommends that sufficient and adequate financing be provided to this end.

Also, concerning this issue, the asylum law reform introduced a new paragraph into article L. 723-6 of the CESEDA Code which stipulates that “*the applicant may attend the interview accompanied either by a lawyer, or by a representative from an association defending human rights, the rights of foreigners or of asylum seekers, the rights of women or children, or an association fighting to prevent persecution on the basis of gender or sexual orientation [...]. The lawyer or association representative may only intervene once the interview has ended, in order to set out observations*”.

With this wording, the CNCDH finds it regrettable that the decision was taken to transpose *a minima* the stipulations of the Procedures Directive in this regard. Indeed, it wishes to point out that the presence of counsel ensures that the individual interview is conducted in an adversarial and transparent manner, which can only improve its quality. For this reason, it recommends firstly that the applicant be informed prior to the interview of the possibility of being assisted by counsel, and secondly, that counsel be allowed to play an active role in the interview and not merely at the end of it.

Also, in order for the representation and assistance of asylum seekers to be fully effective, the CNCDH would like the role played by lawyers and associations to be supported by law, particularly during the interview with OFPRA, and also at the time the asylum application is submitted and throughout the procedure.

Question 10 - Prosecution of cases of torture as an international crime

The CNCDH attaches particular importance to the granting of extra-territorial competence to French criminal courts to enable these to rule on international crimes designated by the Rome Statute committed abroad, against foreigners by a foreign national, where there are sufficient grounds to suspect that the individual is located in France, in order to ensure coherence with the regime of charges based on the International Convention Against Torture.

For this reason, in an opinion in 2008⁷, whilst applauding the introduction of the new article 689-11 into the Criminal Procedural Code to vest French courts with extra-territorial competence to try crimes falling within the competence of the International Criminal Court, it finds the choices made in law to be regrettable⁸. Indeed, this mechanism, which is nonetheless vital in order to counter the impunity of perpetrators of the most serious crimes, is combined with unjustified cumulative conditions that contravene pre-existing stipulations in this field, leading one to fear that they may prove to be inoperative.

The CNCDH therefore wishes once again to point out its concern regarding such legal conditions.

⁷ CNCDH 6 November 2008, *Avis sur la loi portant adaptation du droit pénal à l'institution de la Cour Pénale Internationale [Opinion on the law to adapt criminal law to the institution of the International Criminal Court]*.

⁸ Law No. 2010-930 of 9 August 2010 concerning the adaptation of criminal law to the institution of the International Criminal Court

With regard to the first of these, the CNCDH finds that by imposing the habitual residence condition upon the perpetrator of acts in France, prosecution by French courts of what are deemed to be the most serious crimes is made more difficult. In fact, this condition is more strict than the one provided for by article 689-1 of the Criminal Procedural Code, applicable to the crimes of torture and terrorism, amongst others.

Regarding the second condition pertaining to double criminality, the CNCDH finds that it leads to prosecution by France of the most serious crimes being made conditional upon the existence of a foreign national law, even though France is a party to the International Convention that defines and punishes these crimes.

Concerning the third condition, the CNCDH takes the view that continuing to grant a monopoly on prosecution to the public prosecutor is a violation of the victims' right to an effective remedy and of their status as subjects of international law. In this regard, the CNCDH can only deplore the resulting infringement of equal access to justice and the discrimination created between victims by the law in terms of bringing a prosecution.

Finally, the fourth condition must also be criticised, since it is based on an erroneous interpretation of the principle of complementarity. Indeed, the law provides that "*the Public Prosecutor shall ensure that the International Criminal Court shall expressly waive its competence*", whereas the spirit of the Rome Statute to the contrary establishes the primacy of national courts, by conferring upon them primary competence to rule on crimes falling within the jurisdiction of the International Criminal Court.

The CNCDH notes with satisfaction that some of its recommendations were taken into account in the bill to amend article 689-11 of the Criminal Procedural Code concerning the universal competence of a French judge with regard to offences set out by the Statute of the International Criminal Court. However, the bill elicits questions on two fronts. The first is that the monopoly by the Public Prosecutor persists in the new wording of article 689-11 of the Criminal Procedural Code. The CNCDH notes that this stipulation is problematic if the objective sought is to effectively combat impunity, as the Public Prosecutor is sometimes seen to be reticent in bringing prosecutions against foreign nationals suspected of acts of torture when they are located in France and fall under the extra-territorial jurisdiction of the French justice system. The same observation may be made for prosecution of the suspected perpetrators of international crimes, which is still all too rare in France.

The second is that the bill has remained a dead letter since its adoption during the first passage through the Senate on 26 February 2013.

Furthermore, in light of these various factors, the CNCDH would encourage the Committee to question the French Government concerning its intention to secure a removal of the four legal conditions that contravene the effective exercising of extra-territorial competence by French courts for the most serious international crimes. This questioning could be backed up by the finding of serious infringements of the rights of victims and discriminatory treatment between, on one hand, the victims of torture and terrorism and, on the other hand, the victims of other international crimes to which the current state of French criminal law gives rise. Moreover, specific information could once more be requested concerning deadlines for examination set by the aforementioned bill, the adoption of which would more closely align French law with the Rome Statute.

Question 11 - Combating impunity for acts of torture - The France/Morocco Convention on Mutual Assistance in Criminal Matters

The CNCDH is particularly attentive to the question posed by the Committee concerning the consequences of the conclusion of the Additional Protocol to the Convention on Mutual Assistance in Criminal Matters between the Government of the Republic of France and the Government of the Kingdom of Morocco, upon the International Convention Against Torture and France's other international commitments. In fact, the CNCDH introduced an internal referral concerning the bill authorising approval of the additional protocol⁹ since not only does it raise considerations of a political nature, it also raises questions of a legal nature, namely with regard to the rules concerning the international repressive competence of French laws and courts.

The CNCDH wishes, first of all, to return to the justifications advanced by the French Government, both in its seventh periodic report and in its responses to the Committee's questions. In fact, although it is maintained that article 23 *bis* sought to forge closer ties between the two Parties and that this cooperation was to occur in compliance with domestic law and with the international undertakings of the two Parties, the CNCDH's assessment is entirely different. Indeed, although recognising that French-Moroccan cooperation is of particular importance, it wishes to point out that this *entente* cannot be established at the expense of compliance with constitutional rights and freedoms and other international undertakings made by France.

Secondly, the CNCDH wishes to address the contents of article 23 *bis*, in order to share its grave concerns regarding its implementation.

On the whole, the CNCDH laments the lack of specifics and transparency of the article's wording, which articulates the desire to set down a *sui generis* mutual legal assistance regime allowing the two States parties to be released from the legal obligations set down by multilateral conventions.

Specifically, the CNCDH wishes to draw attention to the issues raised by paragraphs 2, 3 and 4 of the article.

With regard to paragraph 2, the CNCDH observes that in the event of acts being committed on the territory of one of the two States and in respect of which the liability of one of their nationals is likely to be invoked, the article imposes an enhanced disclosure obligation on the States parties, which is required to be immediate. Concerning the wording of this paragraph, there is cause to regret the vagueness of the concept of immediacy (which would inevitably lead to suspension of French procedure pending a reaction from the Moroccan authorities) and that the passing on of information should be through diplomatic rather than legal channels, which would be the normal route. Furthermore, there is a risk that this disclosure obligation would contravene the

⁹ CNCDH 21 May 2015, *Avis sur le projet de loi autorisant l'approbation du protocole additionnel à la Convention d'entraide judiciaire en matière pénale entre le Gouvernement de la République française et le Gouvernement du Royaume du Maroc* [Opinion on the bill authorising approval of the Additional Protocol to the Convention on Mutual Assistance in Criminal Matters between the Government of the Republic of France and the Government of the Kingdom of Morocco], JORF No. 0155, 7 July 2015, text No. 92

independence of the judiciary and the effectiveness of an investigation above and beyond any procedural safeguards. In fact, if information, including the most sensitive in order to establish the truth, were to be disclosed immediately, this would engender a serious risk of manipulation or waylaying of evidence required in order to establish the truth. Moreover, this exchange of information could provide cause for concern that pressure was being exerted on the victims and witnesses of the acts, in a way that could also jeopardise the establishing of the truth.

Paragraph 3, dealing with a scenario whereby an action is brought through the French judiciary by a person who is not a French national concerning acts committed in Morocco by a Moroccan, gives rise to further difficulties. Firstly, in making provision for the French judiciary to obtain observations or information from the Moroccan judiciary, this stipulation means that an action brought in France would grind to a halt pending the receipt of these particulars. Secondly, in making provision for the Moroccan judiciary to bring an action, where it deems this expedient, article 3 appears to disregard the fact that an action has already been brought in France. Furthermore, no provision is made for the linking of these two concomitant actions, or for the preservation of the procedural safeguards of each.

Finally, the CNCDH wishes to alert the Committee in the strongest terms to the third aspect of this paragraph which makes provision for priority referral of the case by the French judiciary to the Moroccan judiciary, and not simply for reporting acts for the purpose of prosecution. On this point, it wishes to make known its deep-seated concern that the universal competence imposed upon France, namely by the International Convention against Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment, acts which must imperatively be prohibited under international law, should be waived by ordinary Moroccan national competence. In fact, this national competence is reactivated by a bilateral agreement, even though universal competence was sought precisely in order to guard against the impunity all too frequently brought about by the exclusive exercising of national competence, namely when the suspected perpetrator of the acts has acted on behalf of or under the cover of the State.

This finding is all the more alarming given that the additional protocol could lead to an entrainment effect. In this scenario, the proliferation of such bilateral agreements would ultimately result in the International Convention Against Torture being eviscerated, and furthermore, all of the multilateral conventions providing for universal competence, to which France is a party.

The CNCDH therefore wishes to draw the attention of the Committee to the inevitable obstacle to effective prevention of impunity of the perpetrators of what are deemed to be the most serious crimes posed by the Additional Protocol to the Convention on Mutual Assistance in Criminal Matters between France and Morocco, which risks seeing the victims of acts of torture being denied justice.

Also, the CNCDH strongly recommends that the Committee include this matter in its interactive dialogue with France, in view of the notable implications for the respect for human rights raised by this agreement, not to mention the possible entrainment effect.

Question 14 - The phenomenon of prison overcrowding

With the number of persons imprisoned in France reaching a new record of just over 67,000 for 51,000 places, the CNCDH notes that prison overcrowding has a dramatic impact on all aspects of prison life. In this regard, it is concerned by the fact that the long-standing response by France has been to increase the reception capacity of the prison stock. Strikingly, in fact, over half of the justice budget is allocated to the prison service. The CNCDH takes the view that only a coherent and stable criminal policy that stops the proliferation of criminal offences and aggravating circumstances and the increase in prison sentences, is capable of bringing to an end the linked phenomena of the increasing prison population and the overcrowding of prison establishments.

Accordingly, the CNCDH takes the view that only the definition of a prison policy that is broad in scope and able to sustainably free up space in prisons will be capable of providing a response to the repeated violation of rights protected by the International Convention against Torture and of article 3 of the European Convention on Human Rights. For this reason, the Commission and the Comptroller-General of Places of Deprivation of Liberty jointly submitted a third party intervention to the European Court of Human Rights in the matter of *Yengo versus France*.

1. The shortcomings of a policy centred around increasing and renewing the prison stock to prevent the phenomenon of prison overcrowding

The CNCDH notes that the response by France to the phenomenon of prison overcrowding prior to 2012 uniquely took the form of an increase in the number of places within the prison stock. Although it is evident that the building of new prison establishments could be desirable in order to bring an end to material conditions that are a violation of human dignity, the CNCDH has found it deeply regrettable that the objective of growing the prison stock was first and foremost a response to prospective studies on trends in prison overcrowding. This approach has proven counter-productive in a number of respects. Firstly, because such a scenario, which is presented as being inevitable, appeared to show a refusal to implement a genuine policy for crime prevention and sentence adjustment. Secondly, because it did not appear to be based on an irrefutable evaluation and because it appeared to anticipate certain future criminal policy decisions, in accordance with fluctuations in the political majority.

In this regard, the CNCDH finds that it is undeniable that renewal of the prison stock following this policy did not have the effect of providing, in and of itself, any guarantees that human rights would actually be improved. Indeed, recent establishments are often excessively large, at a far remove from urban life, and prioritise security to the detriment of human and dignified living conditions, inclusion targets and recidivism prevention, which were nevertheless reaffirmed by the prison law of 2009.

Furthermore, in view of these considerations, the CNCDH would encourage the Committee to alert France to the ineffectiveness of its assessment of the phenomenon of prison overcrowding, and recommend that it completely overhaul its criminal policy. The CNCDH would encourage the Committee to remind France of the need to respect the dignity of detainees and improve detention conditions whilst respecting human rights and France's international commitments.

2. Combating prison overcrowding through an overhaul of criminal policy

In order to effectively combat the phenomenon of prison overcrowding, the CNCDH calls for a paradigm shift in France's criminal policy in which, as far as possible, alternatives to custodial sentences are given priority.

Following the change of government, from September 2012, reflection was undertaken at the national level within the framework of the consensus conference initiated by the Justice Minister. The conference took place between 14 and 15 February 2013 after parliamentary debate following on from submission of the Raimbourg report concerning means of combating prison overcrowding. Proposals essentially concerned making less use of imprisonment by establishing a probational sentence that is "disconnected" from imprisonment and giving priority to the use of sentence adjustments, some of which could become automatic. Within this context, the law of 15 August 2014 was adopted *relative à l'individualisation des peines et renforçant l'efficacité des sanctions pénales* [concerning customised sentencing and bolstering the efficacy of criminal sanctions].

For its part, the CNCDH had already finalised its thinking on the issue in 2007 (see CNCDH, *Sanctionner dans le respect des droits de l'homme*, Tome 1, *Les droits de l'homme dans la prison* et Tome 2, *Les alternatives à la détention*) [Sentencing that complies with human rights law, Part 1, *Human rights in prison* and Part 2, *Alternatives to detention*) before setting out its views in two opinions, one released on 21 February 2013¹⁰, and the other on 27 March 2014¹¹, the objective sought being the recidivism prevention.

The CNCDH recommended:

- eliminating minimum sentences (these were eliminated by the aforementioned law of 15 August 2014);
- initiating reflection on the total elimination of prison sentences of less than 6 months;
- establishing a third standard sentence alongside prison sentencing and fining, which is not the case for the new community sentencing (*peine de contrainte pénale*) created by the law of 15 August 2014, the legal regime for which is extremely complex, since it is difficult to distinguish, either in theory or in practice, from suspended sentencing with probation (*sursis avec mise à l'épreuve*). This observation very probably explains why very few community sentences have been handed down by criminal courts;
- engaging in reflection on decriminalisation and/or fining of certain acts (reflection is nearing completion for Road Traffic Code offences);
- promoting alternatives to the use of provisional detention;

¹⁰ CNCDH 21 February 2013, *Avis sur la prévention de la récidive* [Opinion on recidivism prevention] available online in French at: www.cncdh.fr

¹¹ CNCDH 27 March 2014, *Avis sur le projet de loi relatif à la prévention de la récidive et à l'individualisation des peines* [Opinion on the bill on recidivism prevention and the customisation of sentencing] JORF No. 0087, 12 April 2014, text No. 48.

- setting in place a *numerus clausus* system;
- encouraging sentence adjustment *ab initio* by the adjudging court and *a posteriori* by the sentencing judge, namely by broadening conditions for the granting of such adjustments.

Despite recommendations by the CNCDH and reflection by the Government, there are currently around 67,000 persons detained for 51,000 places, as was previously explained.

In conclusion, the most urgent priority for the CNCDH is to eliminate short prison sentences.

The second urgent priority is for judges to be made able to make use of the new community sentence. It is vital for judges to understand the advantages of this sentence over other measures enforced in a non-custodial setting, which is not easy at present given the increase in complexity of the law arising from the addition of a new sentence into the existing arsenal. Since, in order to be included, community sentencing must be easily identifiable, the CNCDH recommends merging within it all existing sentences, orders, obligations and other non-custodial measures, and adding criminal mediation and victim-perpetrator encounters. Above all, the CNCDH recommends the immediate implementation of evaluatory tools and monitoring methods that are scientifically relevant and effective in practice. This will be dependent upon the efficacy of community sentencing in decreasing recourse to imprisonment.

In order to achieve this, large numbers of inclusion and probation officer posts will need to be created. Growing the prison stock has never been a solution. Furthermore this has not been resorted to since May 2013.

Question 16 - Suicide prevention in prison

The CNCDH is concerned by the rise in suicides in detention and by the permanently high prison suicide rate in France, finds it regrettable that the approach taken to prevent suicides is at odds with previous goals, since a prevention policy can only be legitimate and effective if it seeks less to prevent a detainee from dying and more to rebuilding him as a person and a protagonist in his own life.

The current strategy, essentially centred around training staff to detect “at-risk” persons, and in the emergency management of a suicide crisis using equipment such as tearable clothing, anti-rip sheets, and emergency protection cells, as well as in postvention, ought rather to be oriented towards the need to make living conditions in prison more like those on the outside, so as to limit the feeling of exclusion or disqualification of the most vulnerable prisoners and to allow them to maintain a degree of control over the direction of their lives.

Furthermore, the CNCDH recommends that provision be made for specific measures to care for suicidal persons, that are able to restore self-esteem, ranging from the adaptation of individual conditions of detention to care in a strictly clinical setting.

The CNCDH would also encourage the Committee to request from France that a genuine evaluation be undertaken of the 2009 national action plan to combat and prevent suicide

in prisons, so that failings and malpractice can be identified, lead to reflection on improved detection and management of the phenomenon. For example, it may be beneficial to require that during the interactive dialogue, France presents the initial observations from the inspection carried out in 2015 on application of the Plan.

Questions 17 and 18 - Ill-treatment at the hands of law enforcement and security forces

The CNCDH has expressed a long-standing concern for the practice of certain police officers and gendarmes refusing to record complaints against themselves or their colleagues, which is a violation of the law. This finding is all the more alarming given that obstacles to the effective exercising of the right to press charges to report violence are greatly increased when acts are committed by persons in a prison setting.

The CNCDH is also concerned by the proliferation in verbal abuse and obstruction charges brought against persons who protest or attempt to intervene when they are victims of ill-treatment by law enforcement officers, or against persons who have complained of having suffered ill-treatment at the hands of the officers concerned. Such practices must be strenuously condemned since they have a chilling effect on persons trying to obtain justice, be these witnesses or victims.

It is therefore imperative that the Committee call upon France to provide better protection for persons wishing to press charges or testify against potential reprisals, and to conduct effective and impartial surveys that meet international standards on allegations of torture or ill-treatment.

In this regard, the CNCDH wishes to draw the attention of the Committee to two problematic cases of ill-treatment at the hands of law enforcement officers currently taking place in France, namely in Calais and in relation to the state of emergency.

1. Excessive use of force by security officers against migrants and asylum seekers in Calais

In its opinion from 2015 on the situation in Calais, which drew upon both a number of hearings, conducted during the investigation carried out *in situ* by a CNCDH delegation in Calais and the surrounding areas, and upon documents from civil society and national and international institutions, the CNCDH noted the existence of illegal practices by law enforcement officers, and the suspected commission of acts of violence.

Although the CNCDH easily understands the imperatives of government operations to maintain order, and their impacts, it must nonetheless point out that all law enforcement interventions must be carried out with the utmost respect for the law and for the fundamental rights and freedoms of migrants.

Furthermore, the utmost attention must be accorded to the opinions and recommendations of the Defender of Rights, and criminal and disciplinary proceedings must be systematically brought in the event of evidence of the suspected commission of criminal offences by law enforcement officers.

The CNCDH cannot but be astonished by the low numbers of charges being pressed, and by the fact that, according to the responses provided by the Government to the Committee's questions, only one of these has thus far resulted in the conviction of a police officer.

Consequently, the CNCDH suspects that the phenomenon has been minimised by the French authorities and would encourage the Committee to satisfy itself, during the interactive dialogue, that every effort has been made to enable migrants and asylum seekers to have access to a police station or gendarmerie in order to be able to report offences, without fear of reprisals, and that everything is being done to ensure that an impartial and effective investigation is carried out on the basis of these allegations.

2. Excessive use of force concerning measures adopted during the state of emergency

Following the declaration of the state of emergency in France, by the law of 20 November 2015, the CNCDH has been petitioned by the President of the National Assembly's Commission on Legislation concerning monitoring of the state of emergency in respect of which it issued an opinion in February 2016¹².

During its examination, the CNCDH reported human rights failings in the implementation by law enforcement forces of administrative policing measures under the state of emergency specifically pertaining to searches.

Concerning the manner in which searches are organised, the CNCDH has been informed of a number of failings and of the disproportionate nature of the measures used.

Among the excesses observed, the CNCDH has identified, within the scope of the Committee's competence: failure to take into account the presence of minors or vulnerable persons in searched premises, with operations that could therefore cause them to experience shock and psychological damage; the commission of physical violence by officers of the police force and gendarmerie, and of psychological violence and the practice of handcuffing under conditions contrary to requirements set down by the Criminal Procedural Code.

Although the CNCDH understands the security imperative governing the implementation of these administrative measures relating to the state of emergency, it wishes the Committee to point out that these operations must be carried out with the utmost respect for the law, and for the freedoms and fundamental rights of the persons concerned, along with France's international undertakings.

Also, the CNCDH would encourage the Committee to raise this new factor when examining France, in view of the risk of these measures contravening respect for the International Convention on Torture.

Question 21 - The need to abolish secure detention

The CNCDH deeply regrets that in the law of 15 August 2014 secure detention, a "punishment after punishment", was maintained, on the basis of the vague notion of posing a danger. It can only reiterate its staunch opposition to this measure, which breaks the causal link between the proven commission of an offence and the deprivation of

¹² Op. cit.

liberty. Depriving an individual of liberty for a potentially unlimited period based on an assessment of the level of danger posed and a prognosis for re-offending, which are by definition uncertain, is likely to be a violation of articles 3 and 7 of the European Convention on Human Rights. Secure detention contravenes the fundamental principle of legality in criminal law due to the absence of any objectively definable and foreseeable material factors and due to the absence of any causal link between the offence and the punishment applied. Moreover, the measure, which possesses no time limit, is also liable to raise questions with regard to article 16 of the Convention against Torture.

The CNCDH would also encourage the Committee to request that the Government purely and simply abolish secure detention.

Question 26 - Antiterrorism

With regard to the scope assumed by antiterrorism in France in response to the tragic events that the nation has experienced, the CNCDH is committed to pointing out potential human rights violations that have occurred or that are liable to occur, incurred by the most recent measures at the time of writing, namely those taken under the state of emergency and those provided for by the current criminal reform bill.

1. Concerning implementation of the state of emergency

On the day after the terrorist attacks that befell France, the state of emergency was declared and the National Assembly's Commission on Legislation decided to implement, from 2 December 2015, "continuous monitoring" ("*veille continue*") intended to enable effective and permanent oversight over implementation of the state of emergency. This mission petitioned the CNCDH in order to gather all of the information that it considered it relevant to pass on. The Committee also created an internal working group to monitor how the state of emergency is being implemented. It called upon its members (qualified persons, associations and trade unions), and non-member ONG to share their observations concerning any excesses or abuses, in the implementation of the measures concerned. Alongside this, the CNCDH organised a number of hearings and created a reporting mechanism that is accessible on its website. From these various sources, the Commission then selected and cross-referenced information before reporting its findings and recommendations in an opinion adopted on 18 February 2016¹³.

Article 6 of law No. 55-385 of 3 April 1955 concerning the state of emergency regulates house arrests which are administrative policing measures subject to *a posteriori* oversight by the administrative courts. In this regard, the CNCDH has been informed of practices liable to transform house arrest, a measure that restricts freedom of movement, into deprivation of liberty provided for under article 66 of the Constitution, and consequently, oversight by the judiciary. This may be the case namely where:

- the obligations imposed upon the persons concerned are excessive, such that they constitute an infringement upon the very essence of the normal exercising of private and family life (article 8 of the European Convention on Human Rights);

¹³ CNCDH 18 February 2016, Avis sur le suivi de l'état d'urgence [Opinion on oversight of the state of emergency] JORF No. 0048, 26 February 2016, text No. 102

- the obligations are not adapted to the individual circumstances (personal, family, professional, social etc.) of persons placed under the measure.

Furthermore, the CNCDH has observed that the majority of actions brought in relation to the state of emergency concerned the challenging of house arrest measures. In this regard, although the Commission is pleased to note recent developments in administrative case law, it has nevertheless wondered if it would not be more opportune from a juridical standpoint to transcribe these into the aforementioned 1955 law by providing for an injunctive relief procedure specific to the state of emergency, so as to prevent in future certain administrative courts manifesting excessive prudence before aligning their position with that of the *Conseil d'Etat*. The efficacy of the guaranteeing of rights would thereby be increased.

As for proceedings brought before an administrative judge, the number is minuscule. A number of reasons may explain this very low number of challenges, namely the person concerned not having received a search warrant or not having received a docket setting out the procedure thereto pertaining. Above all, however, there arises the issue of the use of legal action since the administrative judge would necessarily rule on the measure once all of its effects had been produced. In the opinion of the CNCDH, therefore, there is a need to envisage an *a priori*, oversight regime, which ought to be entrusted to the judiciary.

Lastly, and most importantly, however, administrative policing measures pertaining to the state of emergency are often ordered on the strength of information reported in “*notes blanches*” drafted by civil servants within the Directorate General for Domestic Security (DGSJ), which means that their probative force is in practice extremely difficult to assess. In the opinion of the CNCDH, a *note blanche* may only be considered probative where it is sufficiently substantiated and specific, subject to adversarial debate in order to be seriously refuted, and backed up by additional extrinsic elements. Providing precise grounds for these notes would assist an effective remedy within the meaning of article 13 of the European Convention on Human Rights.

Also, in light of these considerations, and owing to possible infringements, in law and in practice, of the fundamental safeguards that the measures taken under the state of emergency could lead to, the CNCDH would encourage the Committee to seek an assurance from the Government that every effort has been made to ensure that these measures, which are necessary in order to deal with the threat of terrorist acts, are carried out with the utmost respect for human rights. This also means that any alleged violation must be duly examined, with means of effective remedy open to persons targeted by anti-terrorist measures.

2. Concerning the criminal reform bill currently before Parliament

Article 18 of the bill *renforçant la lutte contre le crime organisé, le terrorisme et leur financement, et améliorant l'efficacité et les garanties de la procédure pénale* [scaling up the fight against organised crime, terrorism and the financing thereof and improving the effectiveness and safeguards of criminal procedure] allows law enforcement agencies

during an identity control or verification to hold any person for four hours “*where there are serious grounds to believe that he is linked to activities of a terrorist nature*”. These new provisions enshrine a deprivation of liberty due to the exercising of coercion, irrespective of its brevity, that must meet the requirements of article 5 of the European Convention on Human Rights. In this regard, the grounds for holding an individual for four hours are difficult to distinguish from those for which provision is made for being taken into custody (articles 62-2 and 77 of the Criminal Procedural Code). In the opinion of the CNCDH, the new provisions ought not to be used to circumvent the rights of persons in custody. Also, the necessity, suitability and proportionality of being held for four hours are difficult to ascertain.

As far as the purpose of this deprivation of liberty is concerned, the new provisions stipulate that it is intended for an in-depth verification of the circumstances of the person concerned by a judicial police officer “*enabling consultation of automated personal data processing*”. The impact assessment helpfully specifies in this regard that the purpose of these verifications is information gathering. Consequently, CNCDH cannot help wondering how compatible the new provisions are with article 5 of the European Convention on Human Rights which prohibits depriving an individual of liberty for the sole purpose of gathering information, it being stipulated that the prohibition on interviewing the person concerned is not liable to lessen the risk of violating the Convention. These reservations are all the more valid concerning the holding of minors, which is not prohibited by the new provisions.

Within the context of the future adoption of the aforementioned bill, the CNCDH would encourage the Committee to seek an assurance from France that this reform will be applied in a manner that respects human rights, and that any contraventions of fundamental rights outlined by the CNCDH will be corrected or removed.
