



**Follow-Up Report on the Implementation by
France of the Recommendations issued
by the Committee on Enforced Disappearances**

(CED/C/FRA/1)

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About TRIAL

Founded in 2002 TRIAL is an association under Swiss law based in Geneva. The main objective of the association is to put the law at the service of victims of international crimes (genocide, crimes against humanity, war crimes, torture and forced disappearances). TRIAL fights against the impunity of perpetrators and instigators of the most serious crimes under international law and their accomplices. The organization defends the interests of the victims before the Swiss courts and various international human rights bodies. TRIAL also raises awareness among the authorities and the general public regarding the necessity of an efficient national and international justice system for the prosecution of crimes under international law. To date TRIAL has defended more than 350 victims in the course of 132 international proceedings, submitted 40 reports to the United Nations and filed 15 criminal complaints in Switzerland.

Contact person: Dr. iur. Philip Grant (Director)

E-mail: philip.grant@trial-ch.org

Address: TRIAL, P.O. Box 5116, 1211, Geneva 11, Switzerland **Tel./Fax No.:** + 41 22 321 61 10

Website: www.trial-ch.org

Background

On **21 December 2012** France presented its initial report (CED/C/FRA/1) to the Committee on Enforced Disappearances.

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In **March 2013** TRIAL and four other national and international organisations submitted an alternative report to the Committee on Enforced Disappearances in view of the exam of the initial report submitted by the State party ("**March 2013 alternative report**").¹

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On **19 April 2013** the Committee on Enforced Disappearances adopted its **concluding observations** on France (CED/C/FRA/CO/1). At para. 42 of the concluding observations the Committee on Enforced Disappearances requested France to provide, **no later than 19 April 2014, relevant information on the implementation of its recommendations in paragraphs 23, 31 and 35.**

I. Introduction

Para. 9 of the 2013 Concluding Observations

"The Committee notes that, as at the time of the drafting of its recommendations, the legislative framework in force in the State party for preventing and punishing enforced disappearances does not fully conform to the provisions of the Convention and the obligations that it imposes on States that have ratified it. The Committee welcomes Bill No. 736 (amended), and encourages the State party to take account of the recommendations made, in a constructive and cooperative spirit, in order to shore up the regulatory framework of the draft and ensure that it fully complies with all the provisions of the Convention for its effective implementation."

1. On 5 August 2013 the draft law concerning adaptation of French criminal law to the obligations enshrined in the International Convention for the Protection of All Persons from Enforced Disappearance (hereinafter, "the Convention") was adopted and entered into force (hereinafter, **Law No. 2013-711**).² Accordingly, new provisions were inserted into the French Criminal Code.
2. However, **these provisions did not take into account the recommendations issued by the Committee on Enforced Disappearances (hereinafter, "the Committee") in its concluding observations in April 2013 (CED/C/FRA/CO/1).**

¹ The integral report (in French) submitted in March 2013 by TRIAL, the International Commission of Jurists, the International Federation of Action by Christians for the Abolition of Torture, the Action by Christian for the Abolition of Torture-France and the Collective of Families of Disappeared Persons in Algeria can be found at: http://tbinternet.ohchr.org/Treaties/CED/Shared%20Documents/FRA/INT_CED_NGO_FRA_14852_F.pdf. The summarized English version of the alternative report can be found at: http://tbinternet.ohchr.org/Treaties/CED/Shared%20Documents/FRA/INT_CED_NGO_FRA_14853_E.pdf.

² Law No. 2013-711 of 5 August 2013 concerning several implementing provisions with regard to justice in line with European Union law and the international obligations by France, at <http://www.legifrance.gouv.fr/affichTexte.do?dateTexte=&categorieLien=id&cidTexte=JORFTEXT000027805521>.

II. “Aut dedere aut iudicare” Principle

Para. 23 of the 2013 Concluding Observations

“The Committee recommends that the State party should submit any cases of enforced disappearance to the competent authorities for the purpose of prosecution, in accordance with article 11 of the Convention, regardless of whether an extradition request against the suspect has been submitted beforehand”.

3. Pursuant to Art. 11 of the Convention States parties have the obligation to extradite or prosecute (“*aut dedere aut iudicare*”) all persons suspected of responsibility for an enforced disappearance, whether or not the enforced disappearance was committed in the framework of crimes against humanity. Under the “*aut dedere aut iudicare*” principle, the only condition for the obligation to prosecute to arise is the factual absence of extradition, regardless of whether or not an extradition request against the suspect has been submitted beforehand.³
4. French legislation does not comply with the obligation under consideration because Art. 113-8-1 of the French Criminal Code subordinates the obligation to submit a case to the prosecuting authorities to the previous reception of an extradition request and the previous refusal of the request by French authorities for a specific set of motivations.
5. The entry into force of Law No. 2013-711 did not change anything in this regard.⁴ Therefore the **current French legislation and practice are still not in conformity with the international obligation regarding the prosecution or extradition of all persons suspected of responsibility for the crime of enforced disappearance as enshrined in the Convention.**⁵

III. Prevention of Enforced Disappearance

³ In interpreting Art. 7, para. 1, of the UN Convention against Torture (that corresponds almost verbatim to Art. 11 of the Convention), the International Court of Justice clarified that the “*aut dedere aut iudicare*” principle requires the State concerned to submit the case to its competent authorities for the purpose of prosecution, irrespective of the existence of prior request for the extradition of the suspect, see International Court of Justice, Questions relating to the obligation to prosecute or extradite (*Belgium v. Senegal*), judgment, 20 July 2012, para. 95.

⁴ The new version of Art. 113-8-1 of the French Criminal Code is “[...]la loi pénale française est également applicable à tout crime ou à tout délit puni d'au moins cinq ans d'emprisonnement commis hors du territoire de la République par un étranger dont l'extradition ou la remise a été refusée à l'Etat requérant par les autorités françaises aux motifs, soit que le fait à raison duquel l'extradition avait été demandée est puni d'une peine ou d'une mesure de sûreté contraire à l'ordre public français, soit que la personne réclamée aurait été jugée dans ledit Etat par un tribunal n'assurant pas les garanties fondamentales de procédure et de protection des droits de la défense, soit que le fait considéré revêt le caractère d'infraction politique, soit que l'extradition ou la remise serait susceptible d'avoir, pour la personne réclamée, des conséquences d'une gravité exceptionnelle en raison, notamment, de son âge ou de son état de santé”.

⁵ In this respect, the recent reaction of the French government to the decision of a French judge on 20 February 2014 to summon Mr. Abdellatif Hammouchi, the Moroccan chief of intelligence, present on French territory, for questioning in connection with criminal lawsuits concerning multiple episodes of torture Mr. Hammouchi is allegedly involved in, confirms the unwillingness by France to uphold the obligation to investigate and prosecute all persons suspected of responsibility for international crimes, at <http://www.acafrance.fr/communiqué-de-presse/la-torture-au-maroc-n-est-pas-un-incident-regrettable>.

Para. 31 of the 2013 Concluding Observations

“The Committee recommends that the State party should establish the right of appeal before a sitting judge to ensure that coercive measures are lawful and to enable detainees to be present in court. The Committee also recommends that a sitting judge should rule on the extension of police custody beyond 24 hours and should limit that possibility. The Committee recommends that any person in pre-trial or administrative detention should have the right to communicate with the outside world and that this right should not be restricted beyond 48 hours. The Committee recommends that the State party should repeal article L221-2 of the Code on the Entry and Residence of Aliens and the Right of Asylum in the version introduced by the law of 16 June 2011 as far as detention procedures in ad hoc holding areas are concerned”.

6. Art. 17, para. 2 (f) obliges States parties to guarantee that any person deprived of liberty and, in the case of a suspected enforced disappearance, any person with a legitimate interest, is entitled to initiate proceedings before a court to decide without delay on the lawfulness of the deprivation of liberty and order the person’s release if such deprivation is not lawful.
7. Since April 2013 the regulation of the ‘*garde à vue*’⁶ (that is deprivation of liberty taken by the police) has not been modified. Its use continues to be at variance with international standards embodied in the Convention in several respects.
8. First of all, under French legislation it is the role of the public prosecutor to decide on the lawfulness of the deprivation of liberty and to authorize the prolongation of custody beyond 24 hours for serious crimes, for instance crimes of terrorism.⁷ As repeatedly affirmed by the European Court of Human Rights, “*the public prosecutor is not a ‘competent legal authority’ within the meaning the Court’s case-law gives to that notion [...] he lacks the independence in respect of the executive to qualify as such*”.⁸ Indeed, France has, so far, not guaranteed the right of appeal before an independent and impartial judicial authority to ensure that coercive measures are lawful. This is in contravention with Art. 17 of the Convention.
9. Secondly, the mere possibility, but not the obligation, to promptly bring the person in ‘*garde à vue*’ before the prosecutor entitled to rule on the legality of the detention and on the prolongation of custody⁹ is contrary to international standards and to the jurisprudence of the European Court of Human Rights in the sense that the authority in charge must hear the individual brought before him or her in person.¹⁰
10. Thirdly, Art. 145-4 of the French Code of Criminal Procedure still allows for the limitation of the right of **any person in pretrial or administrative detention to communicate with the outside world until 20**

⁶ This measure of deprivation of liberty is regulated by Law No. 2011-392 of 14 April 2011, which was not modified by Law No. 2013-711.

⁷ Arts. 62-2 of the French Code of Criminal Procedure.

⁸ European Court of Human Rights, Case *Moulin v. France*, judgment of 23 November 2010, para. 58. For more on this issue, see the March 2013 alternative report by TRIAL, paras. 200-210.

⁹ This is prescribed by Art. 63 (II) of the French Code of Criminal Procedure.

¹⁰ For more on this issue, see the March 2013 alternative report by TRIAL, paras. 211-214.

days, thus exceeding the limit of 48 hours recommended by the Committee. This limitation might weaken the situation of the detainees rendering them vulnerable to potential forms of ill-treatment.

11. Fourthly, **the regime regarding *ad hoc* ‘waiting zones’ as provided in Art. L. 221-2 of the Code of Entry and Residence of Aliens and the Right to Asylum was not abrogated or amended.** This provision does not respect the principles of accessibility, precision and predictability that are required for a provision that purports to limit personal freedom. Moreover, the asylum procedure conducted therein does not grant appropriate and sufficient guarantees against *refoulement*.¹¹

IV. Rights of Victims

Para. 35 of the 2013 Concluding Observations

“The Committee recommends that the State party should take adequate legislative measures to adopt a definition of victim that complies with the definition set out in article 24, paragraph 1, of the Convention, recognizing a victim as any person who has suffered harm as the direct result of enforced disappearance, without requiring that such harm should also be personal. The Committee recommends that the State party should make explicit provision for the right of victims to know the truth regarding the circumstances of an enforced disappearance, in accordance with article 24, paragraph 2, of the Convention, without needing to be represented by a lawyer. The Committee also recommends that the State party should take 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”.

12. Since April 2013 there was **no amendment to the French Code of Criminal Procedure with respect to the definition and the rights of victims.** Art. 2 of the French Code of Criminal Procedure still holds that, in order to be recognized as a victim, a person shall demonstrate the existence of a direct and personal harm as a consequence of the crime. As confirmed by the Committee in its concluding observations, this burden of proof unduly restricts the definition of victim provided in Art. 24 of the Convention.
13. Even though French legislation recognizes the possibility for relatives of a disappeared person to take part in criminal proceedings as *partie civile* and their right to be informed of the progress of the procedure,¹² the right to have access to the files of the case and to be informed of the progress of the procedure is still not foreseen for a victim who is not represented by a lawyer¹³ and, more in general, **the right to know the truth regarding the circumstances of the enforced disappearance is not explicitly provided for in French law as required by Art. 24, para. 2, of the Convention.**
14. Finally, Art. 2 of the Code of Criminal Procedure only provides for financial compensation. There was no amendment in order to broaden the scope of measures of reparation for victims of enforced disappearance, in particular with restitution, rehabilitation, satisfaction and guarantees of non-repetition in accordance with Article 24, para. 5, of the Convention.

¹¹ For more on this issue, see the March 2013 alternative report by TRIAL, paras. 150-162.

¹² Arts. 80-4 and 90-1 of the French Code of Criminal Procedure.

¹³ For more on this issue, see the March 2013 alternative report by TRIAL, paras. 255-257.

V. Other Matters of Concern

15. Besides the various issues of concern highlighted in the previous paragraphs and on which the Committee expressly requested France to provide follow-up information, there are other matters that TRIAL would like to bring to the attention of the Committee.
16. In fact TRIAL has a number of concerns with regard to the implementation by France of the recommendations formulated in April 2013 by the Committee.¹⁴
17. The new Art. 221-12 of the French Criminal Code introduced by Law No. 2013-711 **does not incorporate an absolute prohibition of enforced disappearance as it does not explicitly mention its application in exceptional circumstances** such as “a state of war or a threat of war, internal political instability or any other public emergency granting special powers to the President of the Republic”.¹⁵
18. The new Art. 221-12 of the Criminal Code introduced by Law No. 2013-711 **includes the reference “in conditions that place such a person outside the protection of the law” in a position in the text of the provision that differs from the text of Art. 2 of the Convention and that would impose a higher burden of proof as regards the conditions of the deprivation of liberty and the intention of the author.** Moreover the text of Art. 221-12 introduces vague phrases such as “when such actions are followed by a person’s disappearance” that are absent from the wording of Art. 2 of the Convention. The current wording of Art. 221-12 may be thus be interpreted as requiring intent to be demonstrated in order to incriminate the conduct.¹⁶
19. The adoption of Law No. 2013-711 **did not amend the definition of enforced disappearance as a crime against humanity as contained in Art. 212-1 of the Criminal Code. This definition requires that crimes against humanity are committed “as part of a concerted plan”, an additional condition that lacks any basis in international law** and that would impose a further burden of proof at variance with international standards as embodied in Art. 5 of the Convention and Art. 7 of the Rome Statute for the International Criminal Court.¹⁷
20. The new Art. 221-18 of the French Criminal Code introduced by Law No. 2013-711 **prescribes a statute of limitations of 30 years for the crime of enforced disappearance. However, the starting point of the limitation period – which is the moment in which the offence of enforced disappearance ceases in all its elements – is not mentioned in the provision.** Moreover, the statute of limitations foreseen for civil compensation claims for victims of disappearances, which amounts to 5 years pursuant to Art. 2224 of the French Civil Code, has not been amended by Law No. 2013-711 in

¹⁴ The omission of other subjects does not imply by any means that TRIAL considers that France fully complies with all its obligations under the Convention or that it has implemented all the recommendations contained in the concluding observations adopted by the Committee in April 2013.

¹⁵ Contrary to the recommendations formulated by the Committee in para. 11 of its Concluding Observations.

¹⁶ Contrary to the recommendations formulated by the Committee in para. 13 of its Concluding Observations.

¹⁷ Contrary to the recommendations formulated by the Committee in para. 15 of its Concluding Observations.

order to be in conformity with international standards and, at least, similar to that applied to other offences of comparable gravity.¹⁸

21. France has not yet established a mechanism to guarantee that any person with a legitimate interest has the right and a real possibility of access to information concerning the fate of a person presumed disappeared in accordance with Art. 17, para. 3, and Art. 18, para. 1, of the Convention.¹⁹
22. Under French legislation no legal mechanism has been introduced - nor is it under consideration - to ensure that any police force that is suspected of the crime of enforced disappearance does not participate in the investigation in the very same case.²⁰ Moreover, pursuant to Art. 40-3 of the French Code of Criminal Procedure, the right of any person reporting an enforced disappearance to challenge the legal merits of the prosecutor's decision not to investigate or prosecute a certain case before an independent judicial body is not guaranteed.²¹

VI. Conclusions and Recommendations

23. In general, it is the view of TRIAL that there has not been any significant progress in the implementation by France of the recommendations formulated in April 2013 by the Committee and a number of issues related to the introduction of the standards embodied in the Convention into French legislation remain of concern.
24. For the reasons explained above, TRIAL respectfully requests the Committee to engage in a follow-up dialogue with the State party with respect to the implementation of the Committee's recommendations and to urge France to:
 - ▶ introduce in its domestic legislation the obligation to submit cases of enforced disappearance to its prosecuting authorities irrespective of the previous existence of a request for the extradition of the suspect;
 - ▶ adopt the necessary measures to ensure the right for any person deprived of liberty to commence a judicial proceeding to obtain a judicial pronouncement on the lawfulness and the opportunity of his or her deprivation of liberty;
 - ▶ grant to all detainees the possibility to be presented in person and heard by the authority mandated to verify the lawfulness of their detention and to rule on the extension of the latter;
 - ▶ ensure that an independent judge or other officer authorized by law to exercise judicial power rules on the prolongation of the '*garde à vue*' beyond 24 hours;
 - ▶ guarantee that all persons held in pre-trial detention are authorized to communicate with and be visited by their family, counsel or any other person of their choice. The communication and visit

¹⁸ Contrary to the recommendations formulated by the Committee in para. 21 of its Concluding Observations.

¹⁹ Contrary to the recommendations formulated by the Committee in para. 33 of its Concluding Observations.

²⁰ For more on this issue, see the March 2013 alternative report by TRIAL, paras. 116-121.

²¹ For more on this issue, see the March 2013 alternative report by TRIAL, paras. 129-134.

cannot be restricted for more than 48 hours and provided that the person is not placed outside the protection of the law;

- ▶ repeal Art. L221-2 of the Code on the Entry and Residence of Aliens and the Right of Asylum in the version introduced by the law of 16 June 2011 as far as detention procedures in *ad hoc* holding areas are concerned and guarantee to all asylum-seekers an appropriate protection against *refoulement* through the establishment of an effective remedy in the framework of all asylum procedures;
- ▶ ensure that domestic legislation expressly recognizes the quality of ‘victim’ of enforced disappearance to any individual who has suffered harm as the direct result of an enforced disappearance, without requiring that such harm should also be personal;
- ▶ expressly codify in its national legislation the right to know the truth for all victims of enforced disappearance and take all necessary measures to ensure the respect of the right to know the truth, including by granting all victims of enforced disappearance access to the elements of the procedure without the need to be represented by a lawyer;
- ▶ provide for a broader regime of measures of reparation for victims of enforced disappearance, including in particular measures of restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition;
- ▶ ensure the absolute character of the prohibition of enforced disappearance by enacting a legislative provision that ensures that “no exceptional circumstances whatsoever, whether a state of emergency, state of siege, special powers of the President or any other public emergency, may be invoked as a justification for enforced disappearance”;
- ▶ ensure that the definition of enforced disappearance enshrined in domestic criminal legislation is in line with international standards and avoid including any additional constitutive element, further conditions and vague expressions in order to preclude the definition of the crime of enforced disappearance from being understood as requiring intent to be shown to incriminate the conduct;
- ▶ guarantee that the definition of enforced disappearance as a crime against humanity enshrined in Art. 212-1 of the French Criminal Code is in conformity with applicable international law, in particular by deleting the expression “as part of a concerted plan” so as to avoid introducing an additional condition for the prosecution of cases of enforced disappearance;
- ▶ introduce in its domestic legislation a provision explicitly providing that enforced disappearance is a continuous offence and is to be considered as an ongoing crime until the fate and whereabouts of the disappeared person are established with certainty;
- ▶ amend its domestic legislation in order to ensure that no statute of limitations applies to remedies provided to victims of enforced disappearances, whether the proceedings are of a civil, criminal or other nature. The statute of limitations for civil damages should be, at the least, in conformity with the statute of limitations applied to other offences of similar gravity, such as torture;
- ▶ set up a national mechanism to guarantee that any person with a legitimate interest has the right and a real possibility of access to information concerning the person presumed disappeared and

have such a request for information considered as a matter of priority by national authorities;

- ▶ ensure the complete independence of the officials in charge of investigating the crimes of enforced disappearance with respect to the public officials under investigation;
- ▶ guarantee to all victims the right to an effective judicial remedy, that is the possibility to appeal a decision from the prosecutor not to investigate or prosecute an allegation of enforced disappearance before an independent judge.



Philip Grant

TRIAL Director