



COMMISSION NATIONALE CONSULTATIVE DES DROITS DE L'HOMME

**Note to the United Nations Committee against Torture**

**Implementation of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in France**

*12 April 2010*

The French National Consultative Commission on Human Rights (CNCDDH) attaches great importance to effective implementation of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (hereafter referred to as the Convention), ratified by France in 1986, and of the Optional Protocol to the Convention ratified in 2008. On the occasion of the examination by the United Nations Committee Against Torture (hereafter referred to as the Committee) of France's 4<sup>th</sup> to 6<sup>th</sup> periodical reports, CNCDDH wishes to present an assessment, based on its work to date<sup>1</sup>, of implementation of the provisions of these instruments in France.

CNCDDH was consulted during the government's preparation of the 4<sup>th</sup> to 6<sup>th</sup> periodical reports for France and France's replies to the questions put by the Committee. The Commission sent a memo to the relevant ministry on 4 February 2010 recapping on the items which it felt were relevant to be included in these replies. The Commission was also then able to meet in person with the ministry representative regarding France's draft replies. However, CNCDDH is disappointed that little room was given to consultation in general and that its recommendations were not fully taken into consideration during the course of the process. CNCDDH therefore wishes to share the essential points of its observations with the Committee in view of the examination of France's reports on 27 and 28 April next.

**I – National mechanisms for protection of human rights**

1. CNCDDH wishes to emphasise the contribution made by independent authorities working in the human rights field, as it did when calling for these authorities to be established and in lending them its support. These authorities play a key role in monitoring compliance with France's constitutional principles and international undertakings, such as the Convention Against Torture, in terms of prevention, investigation and bringing to justice.
2. The revision of France's Constitution in 2008, which led to the creation of a 'Defender of Rights' (*Défenseur des droits*) responsible for overseeing observance of rights and freedoms, established a new institution, whose remit will be defined in a new organic law<sup>2</sup>. The current bill stipulates that the Defender of Rights would take on the roles currently performed by three separate authorities: the *Médiateur de la République* (National Mediator), the *Défenseur des enfants* (Children's Advocate) and the *Commission nationale de déontologie de la sécurité* (National Security Sector Professional Ethics Commission). It is anticipated that other independent authorities such as the *Contrôleur général des lieux de privation de liberté* (General Inspector of Custodial Facilities), a national prevention mechanism pursuant to the

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<sup>1</sup> See for example: *Sanctionner dans le respect des droits de l'homme. I Les droits de l'homme dans la prison* [Human rights observance in state punishment: I Human rights in prison], La documentation Française, 2007; *Les conditions d'exercice du droit d'asile en France* [Exercising the right to asylum in France], La documentation Française, 2006; *Avis sur le 3<sup>ème</sup> rapport périodique de la France au Comité des Nations Unies contre la torture* [Opinion on France's 3rd periodical report to the United Nations Committee Against Torture], 22 January 2004; *Avis relatif au protocole facultatif des Nations Unies contre la torture* [Opinion regarding the Optional Protocol to the United Nations Convention Against Torture], 17 June 2004; *Avis sur la mise en place d'un mécanisme national de prévention de la torture* [Opinion on the establishment of a national mechanism for the prevention of torture], 15 June 2007. CNCDDH studies may be viewed at: [http://www.cncdh.fr/rubrique.php3?id\\_rubrique=116](http://www.cncdh.fr/rubrique.php3?id_rubrique=116); CNCDDH opinions may be viewed at: [http://www.cncdh.fr/rubrique.php3?id\\_rubrique=22](http://www.cncdh.fr/rubrique.php3?id_rubrique=22).

<sup>2</sup> *Une V<sup>e</sup> République plus démocratique* [A more Democratic Fifth Republic]: Report by the Comité de réflexion et de proposition sur la modernisation et le rééquilibrage des institutions de la Ve République [Task force on the modernisation and new balance of institutions of the Fifth Republic], 29 October 2007, p.92.

Optional Protocol to the Convention Against Torture, whose establishment was welcomed by CNCDDH<sup>3</sup>, will also be incorporated into the new institution in due course<sup>4</sup>.

3. CNCDDH believes it is vital that, contrary to the direction in which the current plans are leading, this reform results in a strengthening of the independence and effectiveness of these authorities by equipping them with additional legal and human resources with which to effectively carry out their oversight role. In its opinion of 4 February 2010<sup>5</sup>, CNCDDH recommended that the specific features of each individual authority be retained, and stressed the importance of the role of effective oversight of rights observance, which is different both in nature and in operational terms from the role of mediation. In this respect, CNCDDH believes it is necessary to retain specialist expertise and a separate role in the crucial field of prevention and protection from acts of torture<sup>6</sup>.
4. CNCDDH wishes at this point to commend the outstanding work that has been carried out in just a few years by the *Commission nationale de déontologie de la sécurité* (National Security Sector Professional Ethics Commission) and the *Contrôleur général des lieux de privation de liberté* (General Inspector of Custodial Facilities) and hopes that the reform will draw upon the experience gained by these independent authorities, whose functions operate in close relationship with international bodies such as the United Nations Sub-Committee on Prevention of Torture and the European Committee for the Prevention of Torture.

## **II - Definition of torture and implementation of extraterritorial jurisdiction by French courts within the respective frameworks of the Convention Against Torture and the Rome Statute**

- **Definition of torture**

5. CNCDDH considers that the definition of torture in French law<sup>7</sup>, whilst it does not repeat the exact terms of the Convention (and the precise definitions in the Convention are in fact only intended for "*the purposes of the (...) Convention*" itself), adheres both to the letter and to the spirit of the Convention and to those of all France's international undertakings, and effectively criminalises acts of torture as defined in international and European case law<sup>8</sup>.
- **Implementation of extraterritorial jurisdiction of the French courts within the framework of the Convention Against Torture**
6. Although under the terms of France's *Code de procédure pénale* (Criminal Procedure Code) the French courts have extraterritorial jurisdiction to find individuals guilty of torture as defined in Article 1 of the

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<sup>3</sup> [Avis relatif au protocole facultatif des Nations Unies contre la Torture](#) [Opinion regarding the Optional Protocol to the United Nations Convention Against Torture], 17 June 2004; [Avis sur la mise en place d'un mécanisme national de prévention de la torture](#) [Opinion on the establishment of a national mechanism for the prevention of torture], 15 June 2007; [Avis sur le projet de loi instituant un Contrôleur général des lieux de privation de liberté](#) [Opinion on the Bill introducing a General Inspector of Custodial Facilities], 20 September 2007. CNCDDH opinions may be viewed at: [http://www.cncdh.fr/rubrique.php3?id\\_rubrique=22](http://www.cncdh.fr/rubrique.php3?id_rubrique=22).

<sup>4</sup> The government confirmed the future abolition of the *Contrôleur général des lieux de privation de liberté* [General Inspector of Custodial Facilities] in its replies to the Committee Against Torture, in which it stated that, "it is anticipated that in a few years' time, the duties of the General Inspector of Custodial Facilities will be taken on by the Defender of Rights": Replies by the French government to questions put by the Committee Against Torture in relation to France's 4th, 5th and 6th reports, 19 February 2010, paragraphs 482 and 483.

<sup>5</sup> [Avis sur le Défenseur des droits](#) [Opinion on the Defender of Rights], 4 February 2010 (may be viewed at: [http://www.cncdh.fr/rubrique.php3?id\\_rubrique=22](http://www.cncdh.fr/rubrique.php3?id_rubrique=22)).

<sup>6</sup> The Council of Europe Commissioner for Human Rights is of the opinion that the brief of the Defender of Rights raises the issue of reconciling mediation roles with oversight roles. The Commissioner recognises that, "*whilst the desire to improve visibility and effectiveness is to be commended, it will be necessary to ensure that this is not done to the detriment of upholding the rights which these different bodies are intended to protect*". He commends the action by the *Commission nationale de déontologie de la sécurité* (National Security Sector Professional Ethics Commission) and recommends that its remit be widened and its budget increased. He also commends the appointment of a *Contrôleur général des lieux de privation de liberté* and calls upon the French authorities to "*equip the Inspector with the resources needed in order to carry out his or her mandate to the full*": see Report on effective human rights observance in France by the Council of Europe Commissioner for Human Rights, 15 February 2006.

<sup>7</sup> Article 222-1 of the *Code pénal* (Criminal Code) imposes a fifteen year prison sentence on the crime of "subjecting an individual to torture or barbarous acts". Under the terms of Article 222-3(7), the punishment is more severe (twenty years' imprisonment) if the offence is committed "by a person exercising a public office or carrying out a public service assignment, in the performance of or while carrying out their duties or assignment".

<sup>8</sup> See Trial Chamber, International Criminal Tribunal for the Former Yugoslavia (ICTY), *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, 22 February 2001, para. 496 and ICTY Court of Appeal, *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, 12 June 2002, para.142 et seq. See European Court of Human Rights (ECHR), *Costello-Roberts v United Kingdom*, 25 March 1993, para. 27 and 28; *HLR v France*, 29 April 1997, Reports 1997-III, p. 758, para. 40; *A v United Kingdom*, 23 September 1998, judgment and ruling reports 1998-VI, p. 2692, para. 22. See also the Rome Statute establishing the International Criminal Court. In Article 7.2.e) of the Statute, which defines the crime of torture, no distinction is made between acts committed by a person acting in an official capacity and a person acting in a private capacity. In its General Comment 7/16 of 27 July 1982 (Prohibition of Torture, para.2), the United Nations Human Rights Committee deemed that the guarantees provided in Article 7 of the International Covenant on Civil and Political Rights are not restricted to acts committed by or at the instigation of public officials, but also apply to private individuals and that states have a duty to protect individuals against acts committed by persons acting in a private capacity.

Convention<sup>9</sup>, the public prosecutor shows reluctance in prosecuting persons suspected of acts of torture who are temporarily in France or on French territory, thus forcing victims to bring civil actions, as with all the cases currently in progress. Once the judicial process is underway, the duration of the proceedings reflects the same problems, as illustrated in the condemnation of France by the European Court of Human Rights due to the excessively drawn-out procedure in a case based on the French Courts' extraterritorial jurisdiction<sup>10</sup>.

7. CNCDH stresses the need for French judicial authorities to implement a consistent policy in this area and to prosecute acts of torture which come under the French courts' extraterritorial jurisdiction. The Commission also emphasises the importance of the authorities conducting their investigations within reasonable time limits and taking the necessary measures to ensure that the individuals charged do not have the opportunity to leave the country and escape trial.

- **Extraterritorial jurisdiction of the French courts in relation to crimes which come under the Rome Statute establishing the International Criminal Court**

8. In 2006, the Committee expressed its concern regarding limitations contained in the draft bill adapting French statutes to take account of the Statute of the International Criminal Court which affect the universal jurisdiction of the French courts<sup>11</sup>. In line with its opinions to date<sup>12</sup>, CNCDH wishes to reiterate the importance which it attaches to giving the French criminal courts extraterritorial jurisdiction to enable them to recognise international crimes which come under the Rome Statute and are committed outside France, against non-French citizens or by non-French citizens, provided that there is sufficient evidence to suppose that the person is currently on French soil. Furthermore, in a recent opinion, CNCDH expressed its regret at the fact that the 'Draft Bill adapting French Statutes to Take Account of the Statute of the International Criminal Court', which was passed by the Senate on 10 June 2008, has still not been included on the National Assembly's schedule, despite the fact that it relates to matters as vital as combating genocide, crimes against humanity and war crimes<sup>13</sup>.

### **III – Matters common to law enforcement authorities: professional training, use of weapons, preventing and combating ill treatment by public agents**

- **Professional training**

9. CNCDH wishes to stress the importance of appropriate initial and continuing professional training for all law enforcement agents, in order to prevent ill treatment and to make public officials accountable at all levels of the hierarchy. The Commission wishes to draw attention to what, if any, human rights training municipal police forces and private security companies deliver to their personnel<sup>14</sup>. The Commission considers it vital that initial and continuing training modules be developed for these groups of personnel as well as for state agents.

10. With regard to the use of weapons, CNCDH recommends that in order for France to comply with her undertakings, observance of United Nations standards<sup>15</sup> be incorporated into the training of law enforcement authorities as part of their law enforcement role. The Commission also asks that law

<sup>9</sup> Articles 689-1 and 689-2 of the *Code de procédure pénale* (Criminal Procedure Code).

<sup>10</sup> ECHR, *Mutimura v France*, 8 June 2004.

<sup>11</sup> *Conclusions and recommendations of the Committee Against Torture following its examination of the 3rd periodical report by France* (CAT/C/FRA/CO/3), 3 April 2006, §13.

<sup>12</sup> [Avis sur la loi portant adaptation du droit pénal à l'institution de la Cour Pénale Internationale](#) [Opinion on the Act Adapting Criminal Law to Take Account of the Establishment of the International Criminal Court], 6 November 2008; [Avis sur le projet de loi adaptant la législation française au statut de la Cour pénale internationale](#) [Opinion on the Bill Adapting French Statutes to Take account of the Statute of the International Criminal Court], 29 June 2006; [Avis sur un avant-projet de loi portant adaptation de la législation française au Statut de la Cour pénale internationale](#) [Opinion on a Draft Bill Adapting French Statutes to Take Account of the Statute of the International Criminal Court], 15 May 2003; [Avis sur la mise en œuvre du Statut de la Cour pénale internationale](#) [Opinion on the Implementation of the Statute of the International Criminal Court], 19 December 2002; [Avis sur l'adaptation du droit interne au statut de la Cour pénale internationale](#) [Opinion on the Adaptation of French National Law to Take Account of the Statute of the International Criminal Court], 23 November 2001. CNCDH opinions may be viewed at: [http://www.cncdh.fr/rubrique.php3?id\\_rubrique=22](http://www.cncdh.fr/rubrique.php3?id_rubrique=22).

<sup>13</sup> [Avis sur l'adaptation de la législation pénale française au Statut de Rome relatif à la Cour pénale internationale](#) [Opinion on the Adaptation of French Criminal Legislation to Take Account of the Rome Statute establishing the International Criminal Court], 4 February 2010 (the opinion may be viewed at: [http://www.cncdh.fr/rubrique.php3?id\\_rubrique=22](http://www.cncdh.fr/rubrique.php3?id_rubrique=22)).

<sup>14</sup> In 2007, CNDS, the *Commission nationale de déontologie de la sécurité* (National Security Sector Professional Ethics Commission) asked a private company to "improve its agents' training, to enable them to deal with conflict situations without the use of verbal or physical violence, given the consequences which, as in this instance, can be extremely serious", CNDS Opinion 2007- 44.

<sup>15</sup> Code of Conduct for Law Enforcement Officials, adopted by the United Nations General Assembly on 17 December 1979 (Resolution 34/169); Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress for the Prevention of Crime and the Treatment of Offenders, held in Havana, Cuba, 27 August - 7 September 1990.

enforcement officers be regularly reminded of the legal and ethical rules governing the use of their service weapons and that refresher theoretical training be accompanied by practical exercises<sup>16</sup>.

- **Use of electric stun guns and flashballs**

11. As regards the use of electric stun guns, also known as Tasers, CNCDH shares the concerns expressed by several different bodies (*Conseil d'Etat*<sup>17</sup>, *Commission nationale de déontologie de la sécurité*<sup>18</sup>, European Committee for the Prevention of Torture<sup>19</sup>, non-governmental organisations<sup>20</sup>) both regarding the threat they entail to individuals' health and regarding the fact that their use is insufficiently regulated within police forces. These concerns also apply to the use of flashballs, which can seriously damage an individual's health<sup>21</sup>.
12. CNCDH recommends that the use of stun guns and flashballs be banned in custodial facilities (prisons, immigration holding centres, etc.) and in the context of forced removal of aliens, as well as by municipal police officers, in compliance with the *Conseil d'Etat* ruling. The Commission also calls for their use in other situations to be permitted only as a last resort and to be governed by a strict framework.
- **Effective recourse for victims of torture or inhuman or degrading treatments or punishments**
13. CNCDH pays close attention to the effective exercise of the right to recourse by any individual who believes they have been the victim of torture or cruel, inhuman or degrading treatment or punishment and to whether complaints that are lodged are dealt with in a serious and impartial manner throughout the entire procedure. The Commission is concerned about the practice among some police officers or gendarmes of refusing to register complaints made against themselves or their 'colleagues', in breach of the law<sup>22</sup>. It is also concerned about the rising number of actions being brought on the grounds of insulting an official, resisting authority or malicious accusation against individuals who protest or attempt to intervene when they witness ill treatment or who have complained of ill treatment by the officers in question<sup>23</sup>. CNCDH recommends that individuals who wish to make a complaint or act as a witness should be given better protection against potential reprisals.
14. CNCDH also deplors the fact that CNDS (*Commission nationale de déontologie de la sécurité - National Security Sector Professional Ethics Commission*) frequently comes up against obstacles to the effective implementation of its mission, especially in relation to on-site inspections or delays in sending information<sup>24</sup>. CNCDH is concerned that such obstacles hamper the investigation of allegations of torture or ill treatment under the terms of international standards.

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<sup>16</sup> CNDS Opinion 2005-49.

<sup>17</sup> In a ruling of 2 September 2009, the *Conseil d'Etat* revoked the decree of 22 September 2008 authorising the use of electric stun guns by municipal police officers, one of the principal grounds for its decision being that the decree "does not require specific training in the use of the weapons to be delivered to municipal police officers before they are authorised to carry them". The *Conseil d'Etat* also stated that, "the use of electric stun guns entails serious health risks... [and] these risks can lead directly or indirectly to death...". 'Association réseau d'alerte et d'intervention pour les droits de l'homme' Ruling by the *Conseil d'Etat*, Applications No 318584 and No 321715.

<sup>18</sup> CNDS Annual Reports 2004, 2005 and 2006; CNDS Opinions 2008-25 and 2008-29.

<sup>19</sup> The European Committee for the Prevention of Torture (CPT) states that it is opposed to the use of electric stun guns in immigration holding centres and in the context of forced removal of aliens and has also expressed "strong reservations regarding the use of stun guns inside penal institutions", CPT Report on its visit to Switzerland, 24 September - 5 October 2007; CPT Report on its visit to the French overseas département of French Guyana, 25 November - 1 December 2008.

<sup>20</sup> In several of its reports, Amnesty International has signalled cases of death occurring following use of electric stun guns. The organisation recorded 351 victims between 2001 and 2009, half of whom had been hit directly in the chest. The organisation has been supported in the course of its research by scientists such as Pierre Savard, a professor in biomedical engineering and a specialist in electrocardiology. He has established a causal link between some deaths and electric shock inflicted on sensitive subjects. The conclusions of the Braidwood Commission in July 2009 went further and stated that conductive energy weapons such as Tasers can upset the heartbeat severely enough to lead to death, including in healthy individuals.

<sup>21</sup> CNDS has received complaints from several people who have lost the use of an eye following the questionable use of flashballs during street demonstrations.

<sup>22</sup> CNDS recommends that police officers dealing with an individual making allegations of police violence who wishes to make a formal complaint should systematically take a report recording the complaint, in accordance with their duty under the terms of Article 15-3 of the *Code de procédure pénale*. They should forward the complaint to the *Procureur de la République* (Attorney General), who having been duly informed of the content of the complaint, has sole authority to decide what course of action to take. If they do not register the complaint, police officers should give the individual the contact details for the *Procureur de la République*, the *Inspection générale des services* or the *Inspection générale de la police nationale*, the two national police supervisory bodies, and a record should be kept of this procedure having been carried out, to be signed by the complainant: CNDS Opinions 2006-74, 2006-114, 2007-9 and 2008-28.

<sup>23</sup> Amnesty International has received a growing number of complaints by individuals claiming to have been the victims of reprisals in the form of arrest, detention or unfounded charges of insulting officials and resisting authority and has been told countless times by victims or their lawyers that although they felt they had legitimate grounds for complaint against a police officer, they did not intend to bring legal action as they felt that the complaints investigation procedures both within law enforcement bodies and in the criminal courts were not impartial and hence ineffective - Amnesty International, *France – des policiers au dessus des lois [France – police officers above the law]*, April 2009.

<sup>24</sup> CNDS has noted the 'deliberate intention on the part of Interior Ministry officials, who are necessarily aware of the commission's work, to obstruct a commission member from carrying out on-site inspections, in violation of Articles 5(2) and 6 of the law of 6 June 2000 [which stipulates that the

#### IV - Police custody

15. CNCDH, which intends to participate fully in the current debate regarding police custody, wishes to stress, in the light of European Court of Human Rights case law, the prime importance of a lawyer being present within the first few hours of an individual being placed in police custody. Furthermore, the broad interpretation of acts of terrorism over the last few years to include situations which cannot be strictly defined in these terms, is worrying in that it gives rise to significant restrictions on the guarantees which individuals in police custody enjoy. CNCDH reiterates its doubts as to "whether the provision allowing the intervention of the *Juge des libertés et de la détention* [Judge in charge of custody and release] after four days in police custody is in keeping with European Court of Human Rights case law"<sup>25</sup>. CNCDH hopes that the criminal procedure reform will be an opportunity to bring the legislation into line with the provisions of the European Convention on Human Rights.

- **Medical assistance**

16. CNCDH wishes to reiterate the importance of medical assistance for individuals held in police custody. In particular, the Commission wishes to stress the need for adequate physical and human resources in order to provide prompt, appropriate medical treatment for individuals in custody. In particular, this medical assistance should assess whether a person's state of health is incompatible with custody measures, in which case the person must be taken to hospital as quickly as possible so that they can receive proper treatment<sup>26</sup>.

- **Recording of interviews**

17. The law of 5 March 2007 makes audiovisual recording of interviews conducted by court and police authorities compulsory, with the exception of interviews relating to minor offences<sup>27</sup>. However, these provisions do not apply to persons accused of acts of terrorism or organised crime and do not stipulate that video surveillance cameras should be installed throughout the police station or gendarmerie in all places where the detained individuals are likely to be, such as corridors. CNCDH recommends that compulsory recording of interviews be extended to all persons who are interviewed and that cameras be installed in all police and gendarmerie premises.

18. CNCDH also wishes to highlight the inadequacy of the physical and human resources which police stations and gendarmeries are given in order to fulfil these obligations.

#### V - Prison / detention

19. The 'Prisons Act' (*loi pénitentiaire*) of 24 November 2009 ought to have been the opportunity for France to come into line with international and European regulations, in particular the European Prison Rules<sup>28</sup>, and to address the need for "*a far-reaching reform of the prison regime and the rights of prisoners and detainees*" through "*a prison act which defines the goals of the prison service, the rights of prisoners and detainees and general detention conditions*"<sup>29</sup>. CNCDH notes that its studies and opinions on the matter have not been heeded and that the legislative approach to the new law was based on established law and maintains and indeed widens the latitude given to the prison service to restrict the rights of detainees at its discretion<sup>30</sup>.

20. Article 22 introducing the section on "the rights and responsibilities of detainees" is a perfect example of the act's failure to lay down regulatory provisions in terms which are sufficiently clear and precise as to not delegate responsibility for determining the applicable rules in practice to the administrative authorities<sup>31</sup>.

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*information requested should be provided promptly and that the information required or summons addressed to officials who have moved department should be forwarded immediately to the appropriate department]*- CNDS Opinion 2009-23.

<sup>25</sup> CNCDH Note on the 'Anti-terrorism Bill Introducing Various Provisions Regarding Security and Border Controls' (*Projet de loi relatif à la lutte contre le terrorisme et portant dispositions diverses relatives à la sécurité et aux contrôles frontaliers*), 15 December 2005.

<sup>26</sup> Article 63-3 of the *Code de procédure pénale* and the implementation circular of 1 March 1993, according to which, "*If the doctor declares that the person's state of health is incompatible with being held in custody or interviewed, these procedures must be interrupted*".

<sup>27</sup> Law No 2007-291 of 5 March 2007 'aimed at reinforcing the balance of criminal procedure'.

<sup>28</sup> Council of Europe, Recommendation Rec(2000) of the Committee of Ministers to Member States on the European Prison Rules, 11 January 2006.

<sup>29</sup> Etats Généraux de la Condition Pénitentiaire [Convention on Conditions of Prisoners and Detainees], *Final Declaration*, 14 November 2006.

<sup>30</sup> [Avis sur le projet de loi pénitentiaire](http://www.cncdh.fr/rubrique.php?id_rubrique=22) [Opinion on the Prisons Bill], 6 November 2008 (may be viewed at: [http://www.cncdh.fr/rubrique.php?id\\_rubrique=22](http://www.cncdh.fr/rubrique.php?id_rubrique=22)).

<sup>31</sup> Whilst this article appropriately stipulates that "*the prison service shall guarantee the respect of all detainees' dignity and rights*", at the same time it stipulates that, "*the exercise of these rights*" may be subjected to any "*restriction*" arising from "*constraints inherent in detention, the need to maintain*

CNCDH had recommended a complete change of perspective by giving rights precedence over restrictions. This is the only legislative approach which is capable of preventing any ambiguity regarding the fact that prisoners and detainees remain entitled to the fundamental rights of the individual and that these rights should not be subjected to any form of limitation other than the limitations arising out of their conviction, the prison service being under obligation to guarantee observance of these rights.

21. Article 89 of the act (Article 717-7 of the *Code de procédure pénale*) introduces differentiation of detention regimes based on classification of prisoners by the prison service according to subjective criteria such as personality or how dangerous they are considered to be. CNCDH was opposed to enshrining any distinctions among the prison population in the law, as was the Council of Europe Commissioner for Human Rights, on the grounds that the introduction of differentiated regimes would have consequences on all aspects of daily life in prison and on the actual conditions of enforcement of the sentence<sup>32</sup>. The very principle of differentiated regimes has the potential to reinforce the powers which the prison service has over prisoners and to significantly increase the arbitrary nature of decisions made about them.
22. Furthermore, CNCDH can only condemn the numerous provisions contained in the new act which leave it to the prison service to govern such important areas as the disciplinary regime, solitary confinement, the content of standard establishment rules and professional ethics rules via secondary legislation. To date, CNCDH has not been consulted in connection with the drafting of any decrees.

- **Prison overcrowding**

23. CNCDH wishes to emphasise the fact that prison overcrowding has dramatic repercussions on all aspects of prison life. The Commission is concerned by the fact that France's response to the problem focuses primarily on increasing the country's prison capacity. CNCDH believes that only a stable, consistent criminal policy which ceases to increase the number of criminal offences and aggravating circumstances and to increase the length of sentences will be able to end the related problems of increased use of custodial sentences and prison overcrowding. CNCDH also considers it vital that the legislator consider replacing prison terms with non-custodial sentences for a greater number of offences.

- **Suicides and violence in prison**

24. CNCDH has noted with concern the rise in prison suicides over the last few years (93 in 2006, 96 in 2007, 115 in 2008 and 122 in 2009) and the constant particularly high rate of prison suicides in France compared with other European countries. And yet, regrettably, the approach which has governed suicide prevention since 2004 goes against the approach recommended in the Justice Ministry Circular of 29 May 1998 which states that a prevention policy can only be "*justifiable and effective*" if it focuses "*less on preventing prisoners from dying and more on restoring them to a position of having some control of their own lives*". Current strategy, which focuses primarily on training staff in detecting "at risk subjects", emergency management of suicidal episodes through physical means such as tearable clothing and non-tearable sheets, secure cells and follow-up after the event, should be revised to focus on the need to concentrate on bringing living conditions in prisons closer to those in the outside world, so as to limit the feeling of exclusion or disqualification experienced by the more vulnerable prisoners and to allow them to retain a certain degree of control over the direction of their lives. CNCDH recommends as a matter of urgency that confinement in an individual cell be used instead of confinement in the disciplinary wing, since these wings are characterised by an even higher suicide rate than that in ordinary cells. The Commission also calls for specific management measures to be provided for suicidal individuals, aimed at restoring their self-esteem. These could range from adapting individual detention conditions (relations with the outside world and rehabilitation activities) to treatment purely in a hospital setting.
25. Alongside the various forms of self-inflicted violence (suicide, self-harm), violence in the form of aggression against others is also a problem in prison settings, both between inmates and by inmates against prison wardens. CNCDH is especially concerned about the rate of violence between inmates and the comparative rates between the different types of establishment<sup>33</sup>. The Commission recommends that care be

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*security and order in the establishment, to prevent reoffending and to protect the interests of victims*". This deficiency is also found in all special provisions relating to rights (religious freedom, right to information, visiting rights, right to correspondence, etc.).

<sup>32</sup>These differentiated regimes have been practised outside the bounds of all legal frameworks for several years by the prison service management.

<sup>33</sup> According to data from the prison service, the rate per 100 inmates varies from 1.6 incidents during 2009 in open prisons (centres de semi-liberté) and resettlement prisons (centres pour peines aménagées), to 8.1 in high security prisons (maisons centrales) and high security wings, 8.6 in ordinary prisons (centres de détention) and prison wings, rising to 13 in remand prisons (maisons d'arrêt) and remand wings.

taken to ensure that prisoners' rights to individual and collective expression are put into practice and that a dialogue framework or initiative be established between prisoners and custodial staff. The Commission agrees with the view of the General Inspector of Custodial Facilities that the design and size of newly built penal institutions contribute to diminishing social relations within the institutions and consequently to exacerbating the different forms of violence which take place<sup>34</sup>.

- **Security measures and disciplinary sanctions**

26. In spite of the many calls by CNCDH for legislation to implement a wide-reaching reform of the disciplinary sanctions applied to prisoners, the new 'Prisons Act' [*loi pénitentiaire*] enshrines existing provisions and merely introduces a restriction on the maximum stay in the disciplinary wing from 45 days to 30 days. In doing so, the legislator has given the prison service ample leeway to determine what constitutes a disciplinary offence, which sanctions will be applied in relation to the severity of the offence, the makeup of the disciplinary committee and the procedure to be applied, as well as the circumstances under which prisoners may petition the summary proceedings judge.
27. The current practice in France surrounding body searches of prisoners has been condemned several times by the European Court of Human Rights on the grounds of Article 3 of the European Convention on Human Rights<sup>35</sup>. CNCDH and the *Médiateur de la République*, in a joint communication to the Council of Europe Committee of Ministers<sup>36</sup>, state that the *Frérot* judgment has not been fully implemented and that the legal framework governing body searches provided in the 'Prisons Act' makes no provision for rectifying either the excessive use or the humiliating nature of the practice and calls for a number of measures to be adopted to remedy the current excessive use in penal institutions of body searches which are not justifiable in terms of security reasons. CNCDH recommended the use of modern detection methods as a substitute, given the fact that these body searches can take the form of a full search during which the person is required to be naked. However, the legislator imposed no obligation on penal institutions to acquire these detection methods and they were not provided for in the prison service budget. Decrees implementing the Prisons Act must take into account the observations by the European Court of Human Rights on the arbitrariness experienced by inmates when they are subjected to body searches, which is compounded by the fact that the rules governing the frequency and procedure for the searches are set by the prison service and by the wide discretionary powers which prison governors enjoy.
28. After a fall in the number of individuals being placed in isolation in the wake of criticisms by the European Committee for the Prevention of Torture, the figure has begun to rise once again. The 'Prisons Act' has made no improvements to the isolation regime, in spite of condemnation of France on this subject by the European Court of Human Rights<sup>37</sup>.

- **Preventive detention**

29. CNCDH wishes to reiterate its concern over the 'preventive detention' measure (*rétenion de sûreté*)<sup>38</sup> and calls for this mechanism to be abrogated, given that it threatens the rights and dignity of the individual and legalises a break in the causal link between criminal offence and deprivation of liberty, which forms the base of a criminal law system that protects human rights<sup>39</sup>. The haphazard nature of preventive detention, which has no set term, indeed the law makes no provision for setting a term<sup>40</sup>, is of particular concern to CNCDH in view of the seriousness of the measure and the penal nature of the system. Despite the strong reactions and concerns that were provoked when this system was introduced<sup>41</sup>, the government significantly

<sup>34</sup> Contrôleur général des lieux de privation de liberté, Rapport d'activité [Annual Report] 2009.

<sup>35</sup> ECHR, *Frérot v France*, Application No 70204/01, 12 June 2007; ECHR, *Khider v France*, Application No 39364/05, 9 July 2009.

<sup>36</sup> Communication of 20 October 2009 from CNCDH and the *Médiateur de la République* pursuant to Rule 9§2 of the Rules of the Committee of Ministers for the Supervision of the Execution of Judgments and of the Terms of Friendly Settlements, on the *Frérot v France* judgment of 12 June 2007.

<sup>37</sup> ECHR, *Khider v France*, Application No 39364/05, 9 July 2009.

<sup>38</sup> A preventive detention measure brought in by Law No 2008-174 of 25 February 2008 'on preventive detention and declaration of lack of criminal responsibility due to mental disturbance', as supplemented by Law No 2010-242 of 10 March 2010 'to reduce the risk of repeat criminality and introduce various criminal procedure measures'.

<sup>39</sup> *Avis sur le projet de loi relatif à la rétention de sûreté et à la déclaration d'irresponsabilité pour cause de trouble mental et réponse du gouvernement* [Opinion on the bill on preventive detention and declaration of lack of criminal responsibility due to mental disturbance, and the government's response], 7 February 2008 (may be viewed at: [http://www.cncdh.fr/rubrique.php3?id\\_rubrique=22](http://www.cncdh.fr/rubrique.php3?id_rubrique=22)).

<sup>40</sup> P. Mistretta spoke about a "preventive measure which has a fixed term but may be renewed indefinitely and may end by being perpetual", *De la répression à la sûreté, les derniers subterfuges du droit pénal*, JCP 2008. Actu. 145.

<sup>41</sup> *Avis sur le projet de loi relatif à la rétention de sûreté et à la déclaration d'irresponsabilité pour cause de trouble mental et réponse du gouvernement* [Opinion on the bill on preventive detention and declaration of lack of criminal responsibility due to mental disturbance, and the government's response], 7 February 2008 (may be viewed at: [http://www.cncdh.fr/rubrique.php3?id\\_rubrique=22](http://www.cncdh.fr/rubrique.php3?id_rubrique=22)). For example, Thomas Hammarberg, *Memorandum by the Council of Europe Commissioner for Human Rights following his visit to France from 21 to 23 May 2008*, 20 November 2008, pp. 12-14: "The Commissioner shares some of the concerns raised, however, particularly as regards the risk of arbitrary decisions arising from the assessment of an

widened its scope in the law of 10 March 2010. In the light of France's obligations under international treaties, CNCDH is also concerned over the retrospective application of the preventive detention measure via the implementation of preventive surveillance applied to individuals who were sentenced before the law came into force or sentenced after it came into force for crimes committed prior to this date.

- **Mental health**

30. CNCDH is concerned about the way in which the legal system and the courts deal with mental illness and highlights the prevalence of mental illness in prisons in its work of June 2008<sup>42</sup>. In this work, the Commission condemns the fact that the legal system is occupying a growing position in the treatment of mental illness, partly out of the necessity to fill the gaps left by state psychiatric services, and the fact that the respective roles of psychiatric services and the legal systems in this field are not clearly enough defined. In its opinion of 6 November 2008, CNCDH recommended that all necessary steps be taken to ensure that suitable procedures are arranged for resettling inmates who need access to psychiatric treatment in the community<sup>43</sup>, however this recommendation has not been followed. Furthermore, CNCDH wishes to draw attention to the fact that the procedure of handing down suspended sentences on medical grounds does not apply to psychiatric illnesses and calls for the scope of the procedure to be widened in this respect.
31. CNCDH is also deeply concerned that the government's response to mental ill health in prison does not focus on redirecting the management of individuals suffering from mental illnesses or mental disturbances into the mainstream mental health system, but is introducing the prospect of special psychiatric treatment services for the prison population. CNCDH fears that by legally confirming the principle of imprisoning these individuals, the creation of Special Hospital Units (*Unités hospitalières spécialement aménagées* - UHSAs)<sup>44</sup> produces a greater risk of imprisonment being used as a measure for such individuals. CNCDH notes that locating the units within a hospital establishment or attaching them to the prison departments of regional medical and psychological services (*Services médico-psychologique régionaux* - SMPR) does not hide the fact that they amount to prison annexes in a psychiatric setting, are supervised by custodial staff and are governed by the rules in force in prisons.

## **VI - Immigration / Asylum**

- **Role of voluntary organisations in immigration holding centres**

32. Before the reform of voluntary organisation assistance, which split immigration holding centres into eight separate geographical groups and allocated these groups to several different immigrants' rights organisations, for over 25 years Cimade had been the only voluntary organisation working in all immigration holding centres and premises<sup>45</sup>. CNCDH is concerned by the impact which this breakdown of Cimade's activities will have on the independent nature and continuity of its work, since it will prevent the organisation from having an overview of the situation of immigrant detainees throughout French mainland and overseas territories. This reform entails a potential risk of inequality in the quality of legal assistance provided to aliens. It also introduces an element of competition between the voluntary organisations, to the detriment of effective protection of human rights.

- **Procedure for asylum seekers and deportation to 'at risk' countries.**

33. CNCDH has been alerted to cases of deportation of individuals to countries where they risked being subjected to torture or cruel, inhuman or degrading treatment or punishments and cases of individuals who were deported to their home country reporting having being arrested and subjected to ill treatment on their

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offender's dangerousness [...]. A zero-risk approach must not become the rule, to the detriment of individual freedoms". Following its examination of France's 4th report, on 22 July 2008 the United Nations Human Rights Committee adopted its final observations, in which it expressed concern over the system which had been introduced and called on France to "review the practice of seeking to detain criminal defendants for "dangerousness" after they have served their prison sentences, in the light of the obligations imposed by articles 9, 14 and 15 of the Covenant".

<sup>42</sup> *Avis et Etude sur la maladie mentale et les droits de l'homme* [Opinion and Study on mental illness and human rights], June 2008. The opinion may be viewed at: [http://www.cncdh.fr/rubrique.php3?id\\_rubrique=22](http://www.cncdh.fr/rubrique.php3?id_rubrique=22); the study may be viewed at: [http://www.cncdh.fr/rubrique.php3?id\\_rubrique=116](http://www.cncdh.fr/rubrique.php3?id_rubrique=116).

<sup>43</sup> *Avis sur le projet de loi pénitentiaire* [Opinion on the 'Prisons Act' Bill], 6 November 2008 (may be viewed at: [http://www.cncdh.fr/rubrique.php3?id\\_rubrique=22](http://www.cncdh.fr/rubrique.php3?id_rubrique=22)).

<sup>44</sup> UHSAs were introduced by the 'Justice strategy and planning act' (*loi d'orientation et de programmation de la justice*) of 9 September 2002. In its comments on the draft bill, CNCDH "drew attention to the fact that the very serious matter of incarcerating individuals suffering from mental illness or keeping them in prison remains and the problem of psychiatric services in a prison setting cannot be dealt with simply by altering the management procedures for patient-prisoners".

<sup>45</sup> Decree of 27 May 2009 'establishing the list of humanitarian associations authorised to put forward representatives for access to immigration holding areas' (consolidated version of 10 June 2009). See also *Tribunal administratif de Paris*, judgment of 8 December 2009 and *Conseil d'Etat* Minister for immigration, Integration, National Identity and Community Development - Association Collectif Respect, Cimade ruling, 16 November 2009.

arrival, in spite of requests by the European Court of Human Rights and the Committee Against Torture to make interim provisions<sup>46</sup>.

34. Due to the conditions surrounding the asylum application procedure (short deadlines, difficulties accessing a lawyer or interpreter, etc.), the necessary guarantees that detained individuals will not be sent back to a country where they risk being subjected to inhuman or degrading treatment cannot be given<sup>47</sup>.
35. Furthermore, in cases where the application for asylum is rejected at the first hearing, applicants placed on the priority procedure list risk being removed before they have been able to apply to the National Asylum Court for a stay of enforcement. This means that an asylum seeker may be sent back to a risk country without their case having been examined by the asylum courts. This is all the more serious if the administrative judge has not adequately investigated the possibility of torture or cruel, inhuman or degrading treatment or punishment. In the view of CNCDH, it is therefore essential that a system of interim application, before the specialist asylum courts in particular, be introduced into the overall framework of asylum procedures<sup>48</sup>.
36. As regards asylum applications at borders, the effectiveness of the new interim application procedure brought in by the 2007 act<sup>49</sup> is hampered by the extremely short period within which asylum seekers must make their application, as well as by the authority of the administrative judge to reject the application via an order on due grounds, thus depriving asylum seekers of essential procedural guarantees such as the right to an interpreter and to counsel and the right to a hearing which would allow them to effectively defend their application<sup>50</sup>. The border procedure therefore does not prevent at-risk deportations. Furthermore, CNCDH feels obliged to reiterate its recommendation of 29 June 2006, which is still pertinent in the current situation, in which the Commission stated that, "*the assessment of admissibility of applications at the border must not go beyond the assessment of whether an application is "clearly unfounded" and under no circumstances must it be viewed as an in-depth appraisal of the applicant's claim of fear of persecution*"<sup>51</sup>.

- **Removal procedure**

37. In the event of violence committed at the time of removal, the rapidity of the procedure, the inability of individuals to have contact with a lawyer or voluntary organisation at the time of embarkation and the immediacy of embarkation make it impossible to substantiate allegations of ill treatment<sup>52</sup>. CNCDH wishes to question whether there is a protocol which police officers must adhere to during the removal procedure and if so what this protocol stipulates. The Commission recommends that measures be implemented to allow individuals to contact and meet with a doctor or any other person or association of their choosing.

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<sup>46</sup> Communication by Committee Against Torture, *Tebourski v France*, (300/2006); ECHR, *Daoudi versus France*, 3 December 2009 (Application No 19576/08).

<sup>47</sup> *Avis et Etude sur les conditions d'exercice du droit d'asile en France* [Opinion and Study on Exercising the Right to Asylum in France], La documentation Française, 2006 (may be viewed at: [http://www.cncdh.fr/rubrique.php3?id\\_rubrique=116](http://www.cncdh.fr/rubrique.php3?id_rubrique=116) and [http://www.cncdh.fr/rubrique.php3?id\\_rubrique=116](http://www.cncdh.fr/rubrique.php3?id_rubrique=116)).

<sup>48</sup> *Avis sur le projet de loi relatif à la maîtrise de l'immigration, à l'intégration, et à l'asile* [Opinion on the "Immigration control, integration and asylum bill"], 20 September 2007 (may be viewed at: [http://www.cncdh.fr/rubrique.php3?id\\_rubrique=116](http://www.cncdh.fr/rubrique.php3?id_rubrique=116)).

<sup>49</sup> Law No 2007-1631 on Immigration control, Integration and Asylum of 20 November 2007.

<sup>50</sup> See CNCDH/Médiateur de la République letter of July 2008 pursuant to Article 9 of the Committee of Ministers' Rules of Procedure regarding *Gebremedhin v France*, 26 April 2007.

<sup>51</sup> *Avis sur les conditions d'exercice du droit d'asile en France* [Opinion and Study on Exercising the Right to Asylum in France], 29 June 2006 (may be viewed at: [http://www.cncdh.fr/rubrique.php3?id\\_rubrique=116](http://www.cncdh.fr/rubrique.php3?id_rubrique=116)).

<sup>52</sup> It is especially difficult both for voluntary organisations and for the *Commission nationale de déontologie de la sécurité* to work within immigration holding areas, as an immigrant who has been the victim of ill treatment may have been removed from the country before the file has even been referred to the inspection systems.