



**Summarized Submission in view of the upcoming Consideration of the Report of France regarding its Implementation of the International Convention for the Protection of All Persons from Enforced Disappearance (CED/C/FRA/1)**

by

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## I. Introduction

The organizations submitting this report (hereinafter «the organizations») appreciate the opportunity to bring to the attention of the Committee information regarding the implementation of the International Convention for the Protection of All Persons from Enforced Disappearance (hereinafter «the Convention») by France.

The organizations would like to draw the Committee's attention to the fact that most of the report submitted by France is, as the State party reports, based on a draft law concerning adaptation of French criminal law to the obligations enshrined in the Convention (*Projet de loi* No. 250). The draft law was introduced in Senate on 11 January 2012 but, more than one year later, it has not yet been scheduled for discussion in Senate and may still be subjected to modifications and amendments before being eventually adopted and enacted. France cannot therefore satisfy its obligations under the Convention just by relying on the future potential enactment of a draft law whose text may undergo substantial changes.

The present joint submission focuses on both current French legislation and practice and the draft law which has been pending before the legislature since January 2012. This approach is taken in light of the mandate of the Committee under Article 29, in particular, that its review will be based primarily on the effectiveness of current state of implementation of the Convention in law and practice, and making recommendations to ensure that future amendments to the law (including the draft currently tabled) and its practice are consistent with the State's obligations under the treaty.

Under these circumstances, the organizations submit that neither the existing legislation or practice nor the currently proposed draft legislation fully complies with all the obligations embodied in the Convention.

## II. Article 1 - Absolute prohibition of enforced disappearance

1. International law subjects the enactment of derogation measures in situations of emergency to a specific regime of restrictive safeguards and provides for the existence of a series of non-derogable rights. Article 1 (2) of the Convention affirms that the right not to be subjected to enforced disappearance is a non-derogable right.
2. French legislation does not expressly provide for an absolute prohibition of enforced disappearance that would be applicable even in the exceptional circumstances of a state of emergency, state of siege, the special powers of the President or any other state of exception.
3. For example, pursuant to Art. 1 of the Law No. 55-385 of 3 April 1955, a state of emergency may be declared «*in case of imminent danger caused by grave violations to public order or in case of events presenting, due to their nature and gravity, the character of public calamity*».
4. The regime described above is problematic in several respects. First of all, the broad wording of the law confers to this exceptional regime an unclear and ambiguous character, furthering the risk of abuses in its application. Secondly, since the power to declare a state of emergency rests with the Council of Ministers, that is the executive body, there is no counterbalance from the legislative power. Moreover,

the powers granted to the civil authorities in a state of emergency are over-broad. For instance Article 6 of Law No. 55-385 allows the Minister of Interior to «*issue house arrest orders for any person whose activity may be considered as being dangerous for public order and security*».

5. Despite the existence of a formal legal safeguard according to which «*in no case house arrest orders may bring about the establishment of internment camps*», the experience of the Algerian war of independence clearly showed that the sheer number of people subjected to house arrest led to the creation of internment camps where people were actually detained. The consequences of the state of emergency have been tragic insofar as it impacted on the lives of many people by creating conditions conducive to the violation of their human rights, in particular the right not to be subjected to an enforced disappearance.

6. **The organizations consider that, in order to meet its obligations under Art. 1 of the Convention, France must enact 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».**

III. **Articles 2, 4 and 5 - Definition and criminalization of enforced disappearance and enforced disappearance as a crime against humanity**

7. Enforced disappearance is defined in Art. 212-1 of the French Criminal Code (CC) only as a crime against humanity in line with the definition embodied in the Rome Statute for the International Criminal Court:

*«A crime against humanity is one of the following acts committed in the execution of a concerted plan directed against any civilian population in the framework of a widespread or systematic attack:*

*[para.9]*

*arrest, detention or abduction of persons, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time»* (unofficial translation).

8. Notwithstanding the commendable inclusion of enforced disappearance as a crime against humanity in French legislation, the definition of the crime presents several shortcomings and is not consistent with the requirements of Article 5 of the Convention.

9. First Art. 212-1 CC prescribes that crimes against humanity are acts «committed in the execution of a concerted plan directed against any civilian population in the framework of a widespread or systematic attack». The phrase «execution of a concerted plan» introduces a requirement that lacks any basis in international law and that would impose a further burden of proof at variance with international standards.

10. Moreover, being inspired by the definition embodied in the Rome Statute, French legislation adopts its

restrictive language by including in the definition of the crime of enforced disappearance the requirement that the perpetrator had the intention to remove a person from the protection of the law for a prolonged period of time. This expression establishes a disproportionate burden of proof and introduces an extremely vague criterion, with the formulation «prolonged period of time» lacking precision as to temporal duration.

11. **The organizations consider that, in order to meet its obligations under Art. 5 of the Convention, France must amend the definition of enforced disappearance as a crime against humanity enshrined in Art. 212-1 CC in order to ensure its conformity to the definition embodied in the Convention.**
12. Enforced disappearances committed outside the framework of a widespread or systematic attack directed against any civilian population are excluded from the scope of Art. 212-1 and are not defined as autonomous crimes in French legislation. This omission is inconsistent with France's obligations under Art. 4 of the Convention.
13. As the Working Group on Enforced or Involuntary Disappearances stated, «*States cannot limit the criminalization of enforced disappearances only to those instances which would amount to crimes against humanity in the sense of the ICC Statute, but should encompass in the definition of the offence any kind of such act*»<sup>1</sup>.
14. French criminal law codifies several offences that are often linked with enforced disappearances, such as abduction or kidnapping (Arts. 224-1 to 224-5-2 CC), grave violation of personal liberty (Arts. 432-4 to 432-6 CC) or torture (Arts. 222-1 to 222.6.3 CC). But these crimes do not cover all the elements of enforced disappearance as defined in Art.2 of the Convention and do not reflect the complexity and the particularly serious nature of enforced disappearance. Recognizing and defining enforced disappearance as a separate crime represents the *conditio sine qua non* in order to meet the obligations established in the Convention regarding the appropriate legal consequences of the crime in terms of criminal responsibility, applicable sanctions, statute of limitations, grounds of jurisdiction and reparation for victims.
15. **The organizations consider that, in order to meet its obligations under the Convention, France must take the necessary measures to ensure that enforced disappearance is defined in a manner consistent with Art. 2 of the Convention and constitutes an autonomous criminal offence in line with Art. 4 of the Convention.**
16. While the draft law No. 250 would represent a welcome step forward in adapting French legislation to the obligations under Arts. 4 and 5 of the Convention through the enactment of a specific crime of enforced disappearance and an amendment of the current definition of enforced disappearance as a crime against humanity in line with international standards, it also presents several shortcomings.

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<sup>1</sup> Working Group on Enforced or Involuntary Disappearances, Best practices on enforced disappearances in domestic criminal legislation, doc. A/HRC/16/48/Add.3, 28 December 2010, para. 18

17. First of all, the requirement set out in Art. 212-1 in the context of crimes against humanity - that the widespread and systematic attack has to be committed «in the execution of a concerted plan» - is not amended.
18. Secondly, the definition of the crime of enforced disappearance contained in the draft law raises several interpretative doubts and requires further consideration in order to avoid any discrepancy between the definition of the crime enshrined in the Convention and domestic legislation.
19. Concretely, the new Art. 221-12 CC proposed by the draft law No. 250 would define the crime as follows:

*«enforced disappearance is considered to be the arrest, detention, abduction or any other form of deprivation of liberty, in conditions placing the person outside the protection of the law, by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by the disappearance of the person and accompanied by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person»* (unofficial translation).

20. First of all, the expression «*in conditions placing the person outside the protection of the law*» seems to point to the necessity to prove that the first constitutive element of the crime, i.e. the deprivation of liberty, had as a consequence the placement of the victim outside the protection of the law. This would in practice render the condition of ‘the removal of the person from the protection of the law’ an additional element of the crime. Accordingly, it would appear to impose a higher burden of proof as regards the conditions of the deprivation of liberty (and the intention of the author), that would need to be intended to lead to the removal of the person from the protection of the law.
21. Moreover, the expression «*followed by the disappearance of the person and accompanied by [...]*» also seems to depart from the existing definitions of enforced disappearance in international law. Indeed, this phrasing may also have the consequence of inappropriately raising the burden of proof to be met by the prosecutorial authorities.
22. **The organizations consider that, in order to meet its obligations under Arts. 2 and 4 of the Convention, France must ensure that the definition of enforced disappearance as an autonomous crime is in line with international standards and avoid including any additional constitutive element, further conditions and vague expressions. The removal of the person from the protection of the law is a necessary result and consequence of the crime and shall not be deemed as an additional constitutive element.**

#### **IV. Article 6 - Forms of criminal responsibility**

23. French criminal law does not provide for ‘superior responsibility’ as a form of criminal responsibility in cases of enforced disappearance committed outside the framework of crimes against humanity.
24. The draft law No. 250, if adopted in its present form, would bridge this gap by providing for the insertion

in French criminal code of a new Art. 221-13 according to which it is to be considered an accomplice to the crime of enforced disappearance, as defined by Art. 221-12, «*a superior who either knew or consciously disregarded information which clearly indicated, that forces under his or her effective authority and control were committing or about to commit a crime of enforced disappearance and who failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution, provided that the crime concerned activities that were within the effective responsibility and control of the superior*» (unofficial translation)<sup>2</sup>.

25. **The organizations consider that, in order to meet its obligations under Art. 6 of the Convention, France must ensure that its domestic criminal law codifies ‘superior responsibility’ in line with international standards in all cases of enforced disappearance without delay.**
26. With regard to superior orders as a defence in cases of enforced disappearance, Art. 213-4 CC specifies that the authors or accomplices of genocide or crimes against humanity cannot avail themselves of the defence of superior orders. Consequently, the mentioned provision only covers enforced disappearances committed as crimes against humanity. No similar provision exists for crimes of enforced disappearance committed outside the framework of crimes against humanity.
27. **The organizations consider that, in order to meet its obligations under Art. 6 (2) of the Convention, France must introduce in its domestic law a provision setting out expressly that orders or instructions prescribing, authorizing or encouraging enforced disappearance are prohibited and ‘manifestly unlawful’. Any person who refuses to obey such an order will not be punished.**

#### **V. Article 8 - Statute of limitations**

28. According to Art. 7 of French Code of Criminal Procedure (CCP) crimes are subjected to a statute of limitations of ten years unless explicitly expressed otherwise. As an exception to this general rule, Art. 213-5 CC provides for the imprescriptibility of crimes against humanity and genocide.
29. Therefore enforced disappearances as crimes against humanity are not subject to any statute of limitations, whereas those that do not amount to crimes against humanity are subject to a statute of limitations of ten years. This presence of a statute of limitations for enforced disappearance clearly disregards the extreme gravity of the crime of enforced disappearance, particularly considering that the continuous nature of the crime is currently not expressly recognized by French legislation.
30. Pursuant to the draft law No. 250, the new Art. 221-18 would provide that any crime of enforced disappearance that doesn’t amount to a crime against humanity carries a statute of limitations of 30 years. Even the proposed statute of limitations is not proportionate to the extreme gravity of the offence: consistent with international standards, no statute of limitations should be applied to any act of enforced

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<sup>2</sup> For further details, see paras. 34-38 in the «Rapport alternatif».

disappearance, whatever the context in which it occurs.

31. **The organizations consider that, in order to meet its obligations under Art. 8 of the Convention, France should ensure that criminal prosecution for all cases of enforced disappearance must not be subject to statute of limitations.**
32. French legislation admits a distinction between instantaneous crimes and continuous crimes. Accordingly, for the latter the statute of limitations can only commence when the crime ceases, that is, when the temporal force of its constitutive elements has come end. International law and jurisprudence has consistently identified enforced disappearance to be a continuous crime. Judicial and other relevant authorities have ordered or recommended that States provide that acts constituting enforced disappearance shall be considered a continuous offence as long as the perpetrators continue to conceal the fate and the whereabouts of persons who have disappeared and until these facts are not fully clarified.
33. **The organizations consider that, in order to meet its obligations under Art. 8 of the Convention, France must introduce in its domestic legislation a provision explicitly providing that enforced disappearance is a continuous offence and is to be considered as an on-going crime until the fate and whereabouts of the disappeared person are established with certainty.**
34. Art. 8 (2) of the Convention obliges States to guarantee the right of victims of enforced disappearance to an effective remedy.
35. As far as the possibility to introduce a civil claim before of a criminal jurisdiction is concerned, Art. 10 CCP prescribes that the applicable rules are the same as those followed during criminal proceedings, that is, ten years of statute of limitation in isolated cases of enforced disappearance and no statute of limitations for cases of enforced disappearance amounting to crimes against humanity. The draft law No. 250 would extend the former to 30 years.
36. As for civil compensation claims made in the framework of civil proceedings, the general rule enshrined in Art. 2224 of French Civil Code foresees a statute of limitations of five years. The only exceptions envisaged are in cases where the crime caused physical harm to the victim (ten years) or in cases of torture (20 years). These delays are too short and are not in line with the obligation established by the Convention to guarantee the right to an effective remedy to victims of enforced disappearance.
37. **The organizations consider that, in order to meet its obligations under Art. 8 of the Convention, France must 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.**

## **VI. Articles 9, 10 and 11 - Universal jurisdiction and the «*aut dedere aut judicare*» principle**

### **1. Definition of universal jurisdiction**

38. Pursuant to Arts. 9 (2) and 11 of the Convention, States Parties have the obligation to extradite or prosecute any person suspected to be responsible for a crime of enforced disappearance under the principle of universal jurisdiction in all circumstances, whether it constitutes a crime against humanity or not.
39. In this respect French legislation does not comply with the obligations embodied in the Convention insofar as it does not provide for universal jurisdiction on the crime of enforced disappearance. Art. 689-1 CCP prescribes universal jurisdiction for a set of crimes established in international instruments but the list does not include enforced disappearance.
40. Only for those instances of enforced disappearance amounting to crimes against humanity, Art. 689-11 CCP provides for a quasi-universal ground of jurisdiction dependent on four cumulative conditions inexistent in international law: the residence of the suspect in France, the double criminality requirement, the principle of subsidiarity requiring a prior explicit refusal of the International Criminal Court to prosecute in order to exercise jurisdiction on the case and the exclusive competence of the public prosecutor to start a legal action in these cases, thus depriving victims of the possibility to trigger a criminal investigation by filing a complaint with *partie civile* participation.
41. The restrictive conditions foreseen in the mentioned provision considerably curtail the effectiveness of universal jurisdiction proceedings and have been repeatedly criticized by national and international authorities<sup>3</sup>. It is interesting to note that a draft law (No. 753) aimed at eliminating the four above-mentioned conditions has recently been discussed by the Senate and adopted on 26 February 2013 in a slightly amended form, namely with the monopoly of legal action to the public prosecutor in cases of international crimes reintroduced in the text of the draft law. The draft law is now under consideration by the National Assembly.
42. As far as draft law No. 250 is concerned, the current text of the bill would include the crime of enforced disappearance, both for isolated instances and for crimes against humanity, among the crimes subjected to the rules of jurisdiction set out in Art. 689-1 CCP, that is a proper universal jurisdiction without unnecessary and restrictive conditions. This solution is clearly advisable for the crime of enforced disappearance, but this would leave the restrictive regime of Art. 689-11 CCP still applicable for all the other crimes against humanity, war crimes and genocide contrary to the international obligations of France with respect to the repression of international crimes.
43. **The organizations consider that, in order to meet its obligations under Art. 9 of the Convention, France must amend without delay its domestic legislation concerning universal jurisdiction on crimes under international law, including the crime of enforced disappearance, bringing it in line with international standards and the recommendations issued by national and international authorities. In particular France shall delete the four conditions present in Art. 689-11 CCP, that is:**

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<sup>3</sup> For further details, see para. 71 in the «Rapport alternatif».



- **the exclusive competence of legal action to the public prosecutor;**
- **the condition of residence of the suspect in France;**
- **the condition of double criminality;**
- **the condition of subsidiarity *vis-à-vis* the International Criminal Court.**

44. **France shall ensure that any act of enforced disappearance is subjected to universal jurisdiction in line with international standards on the matter.**

45. **France shall ensure that draft law No. 753 recently adopted by the Senate is brought in line with international standards.**

## **2. Shortcomings in the implementation of universal jurisdiction in France**

46. The Convention obliges States Parties to take into custody any person reasonably suspected of having committed a crime of enforced disappearance or to take other legal measures that are necessary to ensure his or her presence on the territory and to immediately carry out a preliminary inquiry or investigations to establish the facts (Art. 10). Moreover, if the State does not extradite that person or surrender him or her to another State in accordance with its international obligations or surrender him or her to an international criminal tribunal whose jurisdiction was recognized, the State shall submit the case to its competent authorities for the purpose of prosecution (Art. 11).

47. The International Court of Justice recently interpreted the almost identical provisions of the Convention against Torture shedding light on the meaning of obligations that can be applied *mutatis mutandis* to the interpretation of the Convention. First, the International Court of Justice underlined that, as far as the obligation to carry out a preliminary inquiry is concerned, the Convention requires that steps must be taken as soon as the suspect is identified on the State's territory in order to investigate those allegations. Secondly, the International Court of Justice held that the obligation to submit the case to domestic authorities for prosecution must be implemented within a reasonable time and that, therefore, «*proceedings should be undertaken without delay*»<sup>4</sup>.

48. However, French authorities have often been reluctant to comply with these obligations and have generally failed to launch investigations and prosecute foreigners suspected of international crimes when found on the French territory. In many cases the length of the judicial proceedings seems attributable to the lack of willingness on the part of French authorities. The detailed submission includes a number of concrete examples in this sense<sup>5</sup>.

49. **The organizations consider that, in order to meet its obligations under Arts. 10 and 11 of the Convention, France must ensure that, when there are reasons to suspect that a person on**

<sup>4</sup> International Court of Justice, Questions relating to the obligation to prosecute or extradite (Belgium v. Senegal), judgment, 20 July 2012, para. 115.

<sup>5</sup> For further details, see paras. 88-91 in the «Rapport alternatif».

**French territory or otherwise subject to French jurisdiction has committed a crime of enforced disappearance, the prosecuting authorities carry out a preliminary investigation as soon as the suspect is identified on the territory of the State in order to establish the facts of the case.**

50. As a consequence of States Parties' duty to investigate and prosecute acts that could amount to a crime of enforced disappearance, suspects must not be granted immunities from prosecution contrary to international law. Yet, experience shows that, in France, the risk of political interference and discretion is considerable. Indeed, the prosecutor in charge of the investigation of a case potentially raising immunity issues has the obligation to refer the case to the Ministry of Foreign Affairs, whose view will considerably impact on the examination of the case.
51. **The organizations consider that, in order to meet its obligations under the Convention, France must ensure that national legislation and practice do not admit any privilege, immunity or special exemption in trials related to enforced disappearance.**

### **3. «Aut dedere aut judicare» principle**

52. The International Court of Justice recently elaborated on the principle «extradite or prosecute» as contained in the Convention against Torture. The Court's considerations are applicable *mutatis mutandis* to the interpretation of the Convention. The Court clarified that the 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 and that «*extradition is an option offered to the State by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State*»<sup>6</sup>.
53. French law does not comply with the obligation under consideration because Art. 113-8-1 CC 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 specified set of motivations.
54. **The organizations consider that, in order to meet its obligations under Art. 11 of the Convention, France must 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.**

### **4. Further obligations to enhance the effectiveness of the repression of enforced disappearance**

55. The Convention is part of a series of international instruments requiring States to fight against impunity for the perpetrators of international crimes, notably the Rome Statute of the International Criminal Court, the Updated Set of principles for the protection and promotion of human rights through action to combat impunity and many others. States have therefore the obligation to eliminate any obstacles to the repression of international crimes, including enforced disappearances. The detailed submission

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<sup>6</sup> *Ibid.*, para. 95.

contains a more articulated reasoning in this respect<sup>7</sup>.

56. **The organizations consider that, in order to meet its obligations under the Convention, France must delete the condition included in Art. 113-8-1 CC according to which the prosecution of a crime of enforced disappearance committed abroad by a foreigner must be preceded by an official denunciation by the authorities of the State where the crime was committed.**
57. **France should consider ratifying and implementing the Kampala amendments to the Rome Statute for the International Criminal Court. France should conclude agreements with the International Criminal Court related to the execution of sentences and to witness protection or relocation. France should ensure a substantive and regular contribution to the International Criminal Court Victims Fund and to other funds dedicated to help the victims of international crimes.**
58. **France must explicitly provide in its domestic legislation that persons who have or are alleged to have committed enforced disappearance do not benefit from amnesty, pardon or similar measures that might have the effect of exempting those persons from criminal proceedings or sanction.**

## **VII. Article 12 - Obligation to investigate**

59. The Convention requires competent State authorities to examine any allegation of enforced disappearance promptly and impartially and, where necessary, undertake without delay a thorough and independent investigation, also *ex officio*. To do so, the competent authorities must be provided the necessary resources to conduct the investigation effectively.
60. There are aspects of French criminal procedure that might weaken the effectiveness of an investigation into an allegation of enforced disappearance.
61. First, the “principle of opportunity” confers to the prosecuting authorities a broad discretionary power to launch an investigation. If normally this discretionary power does not harm the victims’ right to an effective remedy because of the possibility to file a complaint with *partie civile* participation, under Art. 689-11 CCP this is not the case for international crimes. French judicial practice in this respect tends to point to a certain reluctance of prosecuting authorities to launch proceedings on their own initiative, as the detailed submission more thoroughly describes<sup>8</sup>.
62. **The organizations consider that, in order to meet its obligations under Art. 12 of the Convention, France must abolish the exclusive competence of legal action to the public prosecutor in cases of crimes under international law or, alternatively, provide for an exception to the principle of opportunity so as to make clear that there is an obligation of competent authorities to open an impartial investigation *ex-officio* in any case where there is a reasonable allegation of a crime of**

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<sup>7</sup> For further details, see paras. 105-109 in the «Rapport alternatif».

<sup>8</sup> For further details, see para. 115 in the «Rapport alternatif».

**enforced disappearance.**

63. A second aspect that might undermine the effectiveness of investigations into enforced disappearance is the the lack of separation between investigators and suspects in cases of crimes committed by public officials. In practice, the investigations triggered by the prosecuting authorities are actually performed by members of the judicial police, the national police or the *gendarmerie* who collect evidence and interrogate witnesses. There is no mechanism by which the section of the police that is suspected of a certain crime will be prevented *ipso facto* from undertaking investigations in the very same case. The European Committee on the Prevention of Torture has recommended to France that it guarantee that, where relevant, the public officials suspected of a certain crime do not continue to serve in the public service in charge of the investigation.
64. As for the actual repartition of competence in cases of enforced disappearance, since 1 January 2012 a national specialized judicial unit has been set up at the *Tribunal de grand instance* in Paris and tasked to investigate and prosecute international crimes. The establishment of this unit is a commendable step forward in enhancing the effectiveness of the French judicial system for the repression of international crimes but it is unfortunate that the reform has not been extended to encompass all instances of enforced disappearance.
65. Draft law No. 250 does not envisage any change in this respect. The new crime of enforced disappearance would not fall within the competence of the specialized unit and this obstructs the specialization and building up of the expertise of the judicial personnel necessary to ensure an effective repression of enforced disappearance
66. **The organizations consider that, in order to meet its obligations under Art. 12 of the Convention, France must ensure the complete independence of the officials in charge of investigating the crimes of enforced disappearance with respect to the public officials under investigation.**
67. **France should consider submitting the investigation and prosecution of all cases of enforced disappearance to the competence of the specialized unit dealing with international crimes as per Art. 22 of Law No. 2011-1862 of 13 December 2011.**
68. In order to guarantee to victims of enforced disappearance an effective judicial remedy before French tribunals and fulfill the obligation to investigate and prosecute allegations of enforced disappearance, it is necessary that victims are able to appeal the decision of the prosecutor *not* to investigate or prosecute, especially in light of the often sensitive political character of enforced disappearance cases.
69. French criminal procedure provides that the prosecuting authorities enjoy a discretionary power and may close a criminal case when the circumstances of the case so warrant. Pursuant to Art. 40-3 CCP plaintiffs can appeal a negative decision of the prosecuting authorities only before the Prosecutor General or the Minister of Justice, who are entitled to enjoin the prosecutor to go ahead with the proceedings. There is no possibility for the plaintiffs to appeal a negative decision before an independent judicial body mandated to review the legal grounds of the decision of the prosecutor.

70. **The organizations consider that, in order to meet its obligations under Art. 12 of the Convention, France must 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.**

**VIII. Articles 14 and 15 - Mutual legal assistance and international cooperation in enforced disappearance cases**

71. States Parties to the Convention shall cooperate with each other and shall afford one another the greatest measure of mutual assistance in criminal proceedings concerning enforced disappearance, with a view to assisting victims and to searching for, locating and releasing disappeared persons and, in the event of death, exhuming and identifying them and returning their remains. Accordingly, any restrictive condition unduly limiting the scope of mutual assistance shall be deleted from national legislation.

72. French legislation provides for the possibility to ask for or to grant mutual legal assistance on condition that foreign authorities would offer the same services in similar cases on a reciprocal basis. Such a condition, especially for a crime of such a grave nature as enforced disappearance, seems to be unduly restrictive<sup>9</sup>.

73. **The organizations consider that, in order to meet its obligations under the Convention, France should remove the condition of reciprocity, and any other condition unduly limiting mutual legal assistance in cases of enforced disappearances.**

74. Bilateral and multilateral agreements regulating the concession of mutual legal assistance between France and other countries generally include a clause permitting the refusal of the request of assistance if the request concerns political crimes or politically-related offences or if the execution of the request may have harmful consequences for the sovereignty, public order or other fundamental interests of the country. The lack of a legal definition of «political offences» in the domestic legislation and the ambiguous character of expressions such as «public order» or «fundamental interests» requires a clarification of the scope of these clauses in cases of enforced disappearances.

75. **The organizations consider that, in order to meet its obligations under the Convention, France must ensure that the crime of enforced disappearance cannot be considered as a political offence and that requests for legal cooperation in this respect are not deemed as harmful for national security, public order or any fundamental interest of the country.**

**IX. Article 16 – *Non-Refoulement***

76. Art. 16 of the Convention provides that no State Party shall expel, return, surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance. The prohibition of *refoulement* is entrenched in

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<sup>9</sup> For further details, see para. 115 in the «Rapport alternatif».

several international instruments and is now considered to be a norm of customary international law.

77. Although French legislation properly provides for an explicit prohibition of *refoulement* in Art. L.513-2 of the French Code on Asylum and Immigration (FCAI), this provision is in itself insufficient. States have an obligation to set up thorough and effective procedures that guarantee appropriate protection to persons at risk of serious harm or persecution in case of removal from the territory where they live.
78. Recent experience shows that, despite the recommendations of national and international human rights bodies, French procedures related to asylum, removal of people from French territory and transfer of detainees fail to duly guarantee an effective protection from *refoulement*<sup>10</sup>.
79. Pursuant to the FCAI, any asylum-seeker entering France by air, sea or rail is considered to be entering a 'waiting zone' and is not entitled to a full-fledged asylum procedure. On the contrary, these persons may be detained in the waiting zone pending the exam of their application and will be allowed to enter French territory only if their application is not considered to be 'manifestly inadmissible'.
80. The asylum procedure conducted at the border does not offer appropriate and sufficient guarantees against *refoulement* for several reasons. First, the procedure falls within the competence of the Ministry of Interior that decides following non-binding advice from the Office for the Protection of Refugees (OPR). In cases where the application is considered to be 'manifestly inadmissible', the person has 48 hours to file an appeal against his imminent removal which may suspend the order of *refoulement*. The summary nature of the procedure due to the extremely short delay to file an appeal renders this remedy ineffective in practice. Further potential appeals against the removal from French territory are not suspensive and thus cannot guarantee an effective protection against *refoulement*, contrary to the obligations established pursuant to Art. 16 of the Convention.
81. **The organizations consider that, in order to meet its obligations under Art. 16 of the Convention, France must ensure to foreigners held in the 'waiting zone' an effective protection against *refoulement* through the availability of an effective and suspensive remedy against any decision sanctioning the removal of the person from French territory.**
82. Concerning asylum requests filed from French territory, Art. 741-4 FCAI provides for the existence of an accelerated priority procedure for three categories of claimants: a) nationals of a country considered by France to be a 'safe country of origin'; b) people whose presence in France constitutes a grave threat to public order; and c) petitioners whose request for asylum is based on deliberate fraud, represents an abusive recourse or aims at unduly delaying an imminent removal from French territory.
83. The priority procedure, whose use has been steadily growing over time reaching a share of 24% of the overall asylum requests in 2010, is characterized by two fundamental features: extremely short delays to prepare and examine the request and the absence of suspensive recourse before the National Asylum Court (NAC).

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<sup>10</sup> For further details, see paras. 149-162 in the «Rapport alternatif».

84. The only other remedy for a foreigner alleging the risk to be subjected to grave harm or persecution upon removal from French territory is a suspensive appeal before an administrative judge. In this respect the European Court of Human Rights held that the unduly summary character of the procedure voids the remedy of its effectiveness<sup>11</sup>.
- 85. The organizations consider that, in order to meet its obligations under Art. 16 of the Convention, France must guarantee to all asylum-seekers an appropriate protection against *refoulement* through the establishment of an effective remedy in the framework of all asylum procedures. In particular, France shall ensure that all decisions rejecting asylum are subjected to a suspensive appeal before the NAC within the priority procedure.**
86. In the framework of measures adopted in counterterrorism efforts, France has forcibly removed dozens of foreign nationals accused of links with terrorism and extremism through administrative orders of expulsion, issued by the prefect or the Minister of Interior on the basis of the allegation that the individual concerned represents a grave threat to public order. According to official statistics, 166 “Islamists” have been expelled from France from 12 September 2001 until the end of 2011.
87. Except in case of absolute emergency, the person has the right to be heard in front of an expulsion commission composed by magistrates that renders advice which are not binding. After the issuance of the expulsion order, the person can file an appeal before the administrative judge to annul the decision, but the appeal is not suspensive and does not authorize the person to remain on French territory.
88. The principle of *refoulement* represents an absolute prohibition admitting no exceptions even in case of serious crimes or terrorism. In light of the summary nature of French expulsion procedure in cases allegedly related to national security, together with the minimum role played by the advisory commission and the absence of a suspensive recourse, it is submitted that foreigners subjected to expulsion orders on national security grounds are not afforded appropriate protection against risks of harm or persecution upon removal.
- 89. The organizations consider that, in order to meet its obligations under Art. 16 of the Convention, France must guarantee to any person subjected to an expulsion order appropriate protection against *refoulement* through the right to a suspensive remedy against any decision of removal from French territory.**
90. A further situation raising problems with respect to the principle of *non-refoulement* is the practice of State officials abroad, in particular the transfer of detainees held in custody by a State to the authorities of another State (or between different armed contingents of a multinational coalition) on the territory of a third country in period of armed conflict, as demonstrated by the practice of several national contingents deployed in Iraq and Afghanistan.
91. The presence of French soldiers abroad in the context of civil and military missions and their implication in law enforcement and armed conflict operations may lead to the detention of individuals and their

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<sup>11</sup> European Court of Human Rights, *I.M. v. France*, judgment of 2 February 2012.

following surrender to local authorities. As an example, French troops currently deployed in the north of Mali may surrender Malian detainees to local authorities. In those cases, France is obliged by the Convention and by other international human rights law and international humanitarian law to prohibit French forces from surrendering detainees to local authorities if there are substantial grounds to believe that these persons would be in danger of being subjected to enforced disappearance or other serious violations of human rights.

**92. The organizations consider that, in order to meet its obligations under Art. 16 of the Convention, France must in all circumstances guarantee to any person transferred from French authorities to those of another State appropriate and effective protection against *refoulement*.**

**X. Articles 17 - Prevention of enforced disappearance and prohibition of secret detention**

93. Art. 17 of the Convention obliges States Parties to prohibit secret detention in ordinary law and to enact additional measures to prevent such practice. To this end States must guarantee and fully respect human rights safeguards for persons deprived of their liberty and must not allow any restrictions on these safeguards, whether under counter-terrorism or emergency legislation.

94. In line with international human rights law, Art. 17 (2) (f) obliges States 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 for the 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. The existence of a *habeas corpus* procedure before an independent and impartial judicial authority is therefore fundamental.

95. In French criminal law, the '*garde à vue*' is a measure of deprivation of liberty that can be taken by police officers in the case of persons suspected of having committed a crime in the framework of a judicial investigation. Official statistics show that the recourse to this measure is widespread and has been growing over time: in 2001 the persons subjected to '*garde à vue*' were less than 300,000, whereas in 2009 they were more than 600,000 (and up to 800,000 if traffic violations are included).

96. Notwithstanding the amendments passed in 2011 to curtail the abuses related to the '*garde à vue*', there are several aspects that are still at variance with international standards.

97. Under French criminal law the length of police custody is 24 hours, but it can be extended up to 48 hours with written and motivated authorization by a public prosecutor. According to Art. 62-2 CCP, the prosecutor ascertains the opportunity to maintain the person in detention and guarantees the rights of the person deprived of his or her liberty.

98. A first concern relates to the role of the public prosecutor as the guarantor of the detainee's rights. The European Court of Human Rights has repeatedly held France to be in violation of its ECHR obligations in this respect underlining that the judicial officer entitled to decide on the lawfulness of the deprivation of liberty and to authorize the prolongation of custody «*must offer the requisite guarantees of*



*independence from the executive and the parties, which precludes his subsequent intervention in criminal proceedings on behalf of the prosecuting authority»<sup>12</sup>. The Court clarified that «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»<sup>13</sup>.*

- 99. The organizations consider that, in order to meet its obligations under Art. 17 of the Convention, France must introduce in its criminal procedure the possibility 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.**
- 100. France must 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.**
101. Another issue of concern is the mere possibility, but not the obligation, to promptly bring the person in ‘garde à vue’ before the prosecutor entitled to rule on the prolongation of custody. Art. 63 (2) CCP provides for an exception conferring *de facto* discretionary power on whether or not to present the person in custody before the prosecutor. This is contrary to the prescription of the European Court of Human Rights that the “officer” in charge must hear the individual brought before him or her in person.
- 102. The organizations consider that, in order to meet its obligations under Art. 17 of the Convention, France must 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.**
103. Especially problematic is the exceptional regime of the ‘garde à vue’ applicable to those accused of a specific set of offences listed in Art. 706-73 CCP, which foresees a further extension of detention up to six days. Moreover, pursuant to this special regime, a detainee may be denied access to a lawyer during the first 48 or 72 hours in detention. Finally, people suspected of having committed an act of terrorism might be prevented from communicating with their family for as long as it is deemed necessary for the purpose of the investigation. This exceptional regime clearly puts detainees in a situation of vulnerability leading to a heightened risk of violation of their fundamental rights, including enforced disappearance.
- 104. The organizations consider that, in order to meet its obligations under Art. 17 of the Convention, France must restrict the possibilities of extension of ‘garde à vue’ and guarantee the exercise of the right of access to a lawyer from the beginning of the deprivation of liberty and throughout the period of ‘garde à vue’, interrogations included. France must strictly limit the exceptions to the right of persons in custody to communicate freely with their family and legal representatives.**
105. French legislation provides for the existence of administrative detention facilities where foreigners who have no permit to stay on French territory are held while awaiting removal. Statistics show that more

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<sup>12</sup> European Court of Human Rights, *Moulin v. France*, judgment of 23 November 2010, para. 58.

<sup>13</sup> *Ibid.*, para. 57.

than 60,000 foreigners were held in such facilities in 2010.

106. Detention in these facilities is decided administratively, and then extended through a judicial decision if the removal of the person from French territory is not possible. Law No. 2011-672 of 16 June 2011 provides that a judge must be seized of the procedure after five days in administrative detention (before 2011, the term envisaged was “after 48 hours”). Under international law all persons deprived of their liberty have the right to access to a court in order to have the lawfulness of the deprivation of liberty reviewed without delay by a court. The European Court of Human Rights clarified that the opportunity for legal review must be provided soon after the person is detained and that a delay of six or seven days does not comply with the State’s obligations pursuant to international human rights law<sup>14</sup>.
- 107. The organizations consider that, in order to meet its obligations under Art. 17 of the Convention, France must guarantee to all persons held in administrative detention facilities the judicial review of the lawfulness of their deprivation of liberty without delay in line with international standards.**
108. Art. 17 (2) (d) of the Convention expressly requires States Parties to guarantee the right of the person deprived of liberty to communicate with the outside world and be visited by family members, counsel or any other person of his or her choice in accordance with international law. The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment specifies that *«communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days»*<sup>15</sup>.
109. According to the report submitted by France, pursuant to Art. 145.4 CCP, persons held in pre-trial detention may be prohibited from communicating with the outside world for a period of ten days, renewable once. This regime weakens the position of pre-trial detainees and risks making them vulnerable to serious violations of human rights, including enforced disappearance.
- 110. The organizations consider that, in order to meet its obligations under Art. 17 of the Convention, France must 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 cannot be restricted for more than 48 hours and provided that the person is not placed outside the protection of the law.**

#### **XI. Article 18 – Right to access to information about the detained person**

111. Pursuant to Art. 17 (3) of the Convention, States must compile and maintain one or more up-to-date official registers and/or records of persons deprived of liberty. Art. 18 adds that any person with a legitimate interest in this information (at least the relatives of the persons deprived of liberty, their

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<sup>14</sup> European Court of Human Rights, *De Jong, Baljet and Van den Brink v. Netherlands*, judgment of 22 May 1984 para. 57; Human Rights Committee, *Torres v. Finland*, 2 April 1990, para. 7.2.

<sup>15</sup> United Nations General Assembly, Resolution 43/173, UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 9 December 1988, principle 15.

representatives or counsels) must be granted access to said registers.

112. The report presented by the State holds that the right of the relatives to access information on the person deprived of liberty is limited by the latter's right to respect for private life. Although it is certainly important to guarantee the protection of personal data and the respect for the privacy of detainees (as recognized by the Convention itself in Arts. 19 and 20), the primary goal of the Convention is to prevent enforced disappearance and, in this light, the right to gather and receive information on the fate of a person deprived of liberty in order to ensure that nobody is placed outside the protection of the law and eventually subjected to enforced disappearance is paramount.
113. As a consequence, Art. 18 of the Convention shall be interpreted as an obligation for national authorities to set up a system allowing relatives of all persons deprived of liberty, their representatives or legal representatives to submit a request for information to prison administrations or security forces concerning the deprivation of liberty, and have such a request considered as a matter of priority.
114. **The organizations consider that, in order to meet its obligations under Art. 18 of the Convention, France should set up a national mechanism allowing relatives of all persons deprived of liberty to submit a request for information concerning the deprivation of liberty in point and have such a request considered as a matter of priority by national authorities.**

## **XII. Article 24 - Rights of victims**

### **1. Definition of victim**

115. Art. 24 of the Convention imposes several obligations regarding victims of enforced disappearances. First of all States Parties must ensure that the definition of 'victim' used in national law and practice covers both the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance, such as members of the family or friends of the disappeared persons.
116. Pursuant to Art. 2 CCP, 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. This burden of proof unduly restricts the definition of victim provided by the Convention.
117. **The organizations consider that, in order to meet its obligations under Art. 24 of the Convention, France must 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.**

### **2. Right to know the truth**

118. Art. 24 (2) of the Convention affirms the right of victims of enforced disappearance to know the truth, that is the right to know about the progress and results of an investigation, the fate and the whereabouts of the disappeared persons, the circumstances of the disappearances, and the identity of the perpetrator(s).

119. French legislation recognizes the possibility for relatives of a disappeared person to take part in criminal proceedings as *partie civile*. Pursuant to Art. 90-1 CCP, the judge shall inform the *partie civile* every six months concerning the progress of the procedure. The right of the *partie civile* to be generally informed of the state of the procedure is not sufficient as held by the Working Group on Enforced or Involuntary Disappearances: «*Providing general information on procedural matters, such as the fact that the matter has been given to a judge for examination, is insufficient and should be considered a violation of the right to the truth. The State has the obligation to let any interested person know the concrete steps taken to clarify the fate and the whereabouts of the person. Such information must include the steps taken on the basis of the evidence provided by the relatives or other witnesses*»<sup>16</sup>.
120. Art. 114 CCP provides that the lawyer representing the *partie civile* may request a copy of the entire dossier and transfer it, in whole or in part, to his or her client with the authorization of the judge. This possibility is not foreseen for a victim who submitted a criminal complaint with *partie civile* participation but who is not represented by a lawyer. This distinction seems to be overly restrictive in light of the fact that «*the right of the relatives to know the truth of the fate and whereabouts of the disappeared persons is an absolute right, not subject to any limitation or derogation. No legitimate aim, or exceptional circumstances, may be invoked by the State to restrict this right*»<sup>17</sup>.
121. Even in cases where the necessities of a criminal investigation may justify restricting the transmission of certain information, the Working Group on Enforced or Involuntary Disappearances held that «*there must be a recourse in the national legislation to review such a refusal to provide the information to all interested persons. This review should be available at the moment of the initial refusal to provide information, and then on a regular basis to ensure that the reason for the necessity that was invoked by the public authority, to refuse to communicate, remains present*»<sup>18</sup>. Even in this respect an unjustified discrepancy exists between the situation of victims represented by a lawyer (that may seize the judge to appeal the refusal of disclosure) and that of victims who are not.
- 122. The organizations consider that, in order to meet its obligations under Art. 24 of the Convention, France must expressly codify in its national legislation the right to know the truth for all victims of enforced disappearance.**
- 123. France must 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.**

**3. Obligation to investigate, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains.**

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<sup>16</sup> Working Group on Enforced or Involuntary Disappearances, General Comment on the Right to the Truth in Relation to Enforced Disappearances, para. 3

<sup>17</sup> *Ibid.* para. 4.

<sup>18</sup> *Ibid.* para. 3.

124. Art. 24 (3) of the Convention obliges States Parties to take all appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains.
125. In French legislation there is no provision concerning location, identification, respect and return of remains of disappeared persons in the event of their death.
- 126. The organizations consider that, in order to meet its obligations under Art. 24 of the Convention, France must introduce in its domestic legislation a specific provision obliging the competent authorities to take all necessary measures to locate and release disappeared persons and, in the event of death, to locate, identify, respect and return their remains.**
- 127. France should share with the Committee the data on the forensic and other resources available in order to respect the obligation to locate, exhume, identify, respect and return the remains of disappeared persons. In this view France shall adopt the necessary measures to secure the funding for these activities.**

#### **4. Measures of Reparation**

128. Art. 24 (4) - (5) obliges States Parties to guarantee the right of victims of enforced disappearance to obtain full and effective reparation for material and moral harm, including in the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.
129. Pursuant to French legislation, the range of reparation measures is limited to monetary compensation and, under certain circumstances, restitution. This is not adequate to comply with international standards on enforced disappearance and the obligations stemming from the Convention. As highlighted by the Working Group on Enforced or Involuntary Disappearances, *«the obligation to provide redress to victims of enforced disappearances is not limited to the right to monetary compensation, but includes, inter alia, medical and psychological care and rehabilitation for any form of physical or mental damage as well as legal and social rehabilitation, guarantees of non-repetition, restoration of personal liberty and similar forms of restitution, satisfaction and reparation that may remove the consequences of the enforced disappearance»*<sup>19</sup>.
130. Furthermore, contrary to international standards, French legislation does not seem to provide for gender-sensitive or child-sensitive reparation measures in case of gross human rights violations, including enforced disappearance.
- 131. The organizations consider that, in order to meet its obligations under Art. 24 of the Convention, France must provide for a broader regime of measures of reparations for victims of enforced disappearance, including in particular measures of restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.**

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<sup>19</sup> Working Group on Enforced or Involuntary Disappearances, Annual Report, doc. A/HRC/22/45, 28 January 2013, para. 53.

**132. France should adopt the necessary legislation and concrete measures of reparation for victims of enforced disappearance in order to take into account the special vulnerability of women and children.**

**XIII. Article 25 - Special protection of children**

133. Art. 25 of the Convention requires States Parties to take several steps to prevent, investigate, end and punish the wrongful removal of children who are subjected to enforced disappearance, children whose father, mother or legal guardian is subjected to enforced disappearance or children born during the captivity of a mother subjected to enforced disappearance.

134. In particular Art. 25 (1) of the Convention obliges States to take the necessary measures to prevent and punish under their criminal law the mentioned conducts, as well as the falsification, concealment or destruction of documents attesting to the true identity of such children.

135. French legislation properly criminalizes the abduction of children but it does not codify all the other crimes listed in Art. 25 (1)(a).

136. Art. 25 also requires States Parties to set up legal procedures allowing the possibility to review national adoption or placement procedures and, where appropriate, to annul any adoption or placement of children that originated in an enforced disappearance. The conditions set out in the French Code of Civil Procedure under which it is possible to review and annul adoptions seem to be unduly restrictive and not precise enough to meet the requirements set forth by the Convention.

**137. The organizations consider that, in order to meet its obligations under Art. 25 of the Convention, France must amend its national legislation with a view to codify the autonomous crimes of wrongful removal of children whose father, mother or legal guardian is subjected to enforced disappearance or children born during the captivity of a mother subjected to enforced disappearance, and the falsification, concealment or destruction of documents attesting to the true identity of such children.**

**138. France must introduce in its code of civil procedure a specific provision allowing the annulment of any adoption or placement procedure that originated in an enforced disappearance.**