



International Convention for the Protection of All Persons from Enforced Disappearance

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Summary record of the 46th meeting

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Chairperson: Mr. Camara

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In the absence of Mr. Decaux, Mr. Camara (Vice-Chairperson) took the Chair.

The meeting was called to order at 3.05 p.m.

Consideration of reports of States parties to the Convention (*continued*)

Initial report of France (CED/C/FRA/1; CED/C/FRA/Q/1 and Add.1)

1. *At the invitation of the Chairperson, the delegation of France took places at the Committee table.*
2. **Mr. Niemtchinow** (France), introducing the initial report of France (CED/C/FRA/1), read out a message on behalf of the Minister of Justice.
3. He said that enforced disappearance as a distinct criminal offence was not yet provided for in French domestic criminal law but that that would shortly be addressed through the adoption of bill No. 736. Nevertheless, in accordance with the State party's obligations under the Convention, enforced disappearance was strictly prohibited in France, even when committed pursuant to an order from a legitimate authority. Furthermore, none of the exceptional circumstances set forth in the French Constitution could be invoked as a justification for enforced disappearance.
4. Ordinary law provided for the effective implementation of the major principles enshrined in the Convention, relating to the conduct of investigations, requests for extradition, non-refoulement and the best interests of children of the victims of enforced disappearance. However, his Government recognized that French domestic law would fully comply with the Convention only upon the enactment of bill No. 736, currently before Parliament and whose adoption was imminent. The crime of enforced disappearance would thereafter be incorporated into a new article 221-12 of the Criminal Code and its definition would embrace all the provisions of article 2 of the Convention, including the concept of placing a person outside the protection of the law, which France understood in a material sense.
5. Notwithstanding that, the fact that enforced disappearance was not systematically recognized in French domestic law as a crime against humanity was not inconsistent with the provisions of the Convention.
6. **Mr. Garcé García y Santos**, speaking as a member of the task force for France, asked whether civil society had been involved in the consultation process leading to the preparation of the report. Article 55 of the French Constitution stipulated that duly ratified treaties and agreements, once promulgated, took precedence over domestic law "subject to their implementation by the other party". He wondered whether that involved a condition of reciprocity and requested clarification of the phrase. As to the prohibition of enforced disappearance, including in exceptional circumstances, was that reflected in domestic law?
7. Referring to paragraph 17 of the State party's replies to the list of issues (CED/C/FRA/Q/1/Add.1), he asked how the judge determined whether a treaty provision was directly applicable. Lastly, he wondered whether French law contained any provision explicitly prohibiting enforced disappearance under any circumstances whatsoever.
8. **Ms. Janina**, speaking as a member of the task force for France, requested information on the time frame for the enactment of bill No. 736 and asked whether, at the current stage of the legislative process, it could be amended to include recommendations made by the Committee.
9. Given that enforced disappearance was not yet established as an offence under criminal law, did the provisions of the Criminal Code referred to in paragraph 21 of the replies to the list of issues take into account the particular gravity of acts of enforced

disappearance? She also questioned the rationale for making the placing of a person outside the protection of the law part of the definition of enforced disappearance.

10. She asked how the State party intended to fulfil its obligation under article 3 of the Convention — in the absence of a provision to that effect in bill No. 736 — to investigate and prosecute acts of enforced disappearance committed by persons or groups of persons acting without the authorization, support or acquiescence of the State. Moreover, how would article 421-1 of the Criminal Code, relating to acts of terrorism, apply to those acts and what penalties were imposed for acts of terrorism?

11. **Mr. Garcé García y Santos**, speaking as a member of the task force for France, asked under what circumstances French law considered an order “manifestly unlawful” and what the precise distinction was between “unlawful” and “manifestly unlawful”. What recourse was available to subordinates who refused to carry out such an order?

12. He wondered whether civilian officials found guilty of acts of enforced disappearance were liable to different penalties from those applicable to military officials, and whether they were subject to different jurisdictions. Bill No. 736 provided for life imprisonment for the crime of enforced disappearance; what was the minimum penalty applicable to such acts under the current legislation and in the bill? Under the new system, would persons sentenced to life imprisonment be eligible for parole or conditional release and, if so, in what circumstances? He suggested that, pursuant to article 7 of the Convention, the bill should also provide for extenuating and — in particular — aggravating circumstances in cases of enforced disappearance, taking into consideration the gravity of the acts. Lastly, was the national court which heard such cases competent to investigate and prosecute cases of enforced disappearance?

13. **Ms. Janina**, speaking as a member of the task force for France, asked for what reasons the Government had established a 30-year statute of limitations. She asked the State party to consider including in bill No. 736 a provision for the term of limitation to commence only from the moment when the offence of enforced disappearance ceased, pursuant to article 8.1 (b) of the Convention. She wished to know whether the statute of limitations could be suspended during periods where victims of enforced disappearance or their families were unable to seek justice or reparation and whether the same period of limitation applied in civil proceedings for remedies.

14. Recalling the obligation for States parties to extradite under article 9.2 of the Convention, she asked whether bill No. 736 provided for universal jurisdiction for cases of disappearance. What action could the Government take in the event that a foreign national alleged to have committed a crime of enforced disappearance was in French territory, in the absence of an extradition request? She sought clarification of the phrase “all persons found guilty” in article 689 of the Code of Criminal Procedure and asked whether the State party could extend and request mutual legal assistance to a non-State party in connection with criminal proceedings brought in respect of an enforced disappearance.

15. **Mr. Al-Obaidi**, drawing attention to the lack of specific references to enforced disappearance in French legislation, asked whether it was considered as a form of torture. While the delegation had provided extensive details regarding bill No. 736, he would welcome more information on the current legal provisions applicable to acts of enforced disappearance. Furthermore, how did the State party combat terrorism and deal with its perpetrators?

16. **Mr. López Ortega** stressed that, in order to be effective, criminal investigation and prosecution must be carried out by fully independent bodies and victims should be actively involved in the process. Echoing the concerns expressed by NGOs regarding the exclusive authority of the Public Prosecutor’s Office to institute legal proceedings in cases of enforced disappearance amounting to crimes against humanity, he wished to know what

time frame applied to such proceedings. He sought assurances regarding the independence of the judiciary and the competence of the various parties involved in investigations, as well as victims' right to participate in them. Did French domestic legislation provide for the extradition of its nationals in cases of enforced disappearance and was it in a position to surrender its nationals to stand trial in States that were neither a party to the Convention nor members of the European Union?

17. **Mr. Huhle** said that he had been surprised to read, in paragraph 34 of the replies to the list of issues, that the State party did not intend to remove the element of concerted planning from its definition of a crime against humanity. Similarly, according to paragraph 30 of the replies, French law considered the removal of a person from the protection of the law an integral element of forced disappearance. Proving intent was difficult because it required subjective judgements. The burden of proof for victims could increase if they had to prove that perpetrators of enforced disappearance had had the intention of removing victims from the protection of the law. He asked the delegation to explain why French lawmakers had chosen such an approach.

18. **Mr. Hazan**, noting that under article 4 of the Convention the widespread or systematic practice of enforced disappearance constituted a crime against humanity, asked whether including premeditation as an integral element would make it difficult to characterize widespread instances of enforced disappearance as crimes against humanity.

19. He asked the delegation to describe the approach used by the French criminal justice system to investigate enforced disappearances. Referring to a recommendation by the Committee against Torture that the French Government establish a mechanism guaranteeing that such crimes were investigated by independent bodies, he requested information on progress to date. He also wished to know whether French legislation allowed a victim to appeal a public prosecutor's decision not to prosecute a crime.

20. **Mr. Yakushiji**, commending the State party for its efforts to combat enforced disappearances, noted that, according to paragraph 49 of the replies, article 113-8-1 of the Code of Criminal Procedure applied only to persons whose extradition had been refused. Noting that the principle of *aut dedere aut judicare* was enshrined in the Convention, he requested information about any measures that the State party was taking to implement the obligation to either extradite or prosecute those suspected of perpetrating enforced disappearances until such time as the planned amendment to article 689-13 of the Code of Criminal Procedure instituted quasi-universal jurisdiction.

21. Paragraph 51 of the replies implied that immunity could result from application of the French Constitution, international conventions or international customary law. He asked whether the Constitution included provisions that broadened or narrowed the scope of immunity as recognized by international law.

The meeting was suspended at 4.10 p.m. and resumed at 4.35 p.m.

22. **Mr. Frost** (National Consultative Commission on Human Rights), after describing the procedure followed by the National Consultative Commission for Human Rights for examining reports submitted by France to United Nations treaty bodies, said that he would comment on four areas in which the incorporation of the Convention's provisions into national legislation was, in the Commission's view, not in full conformity with the Convention: the definition of the crime of enforced disappearance, the responsibility of hierarchical superiors, extraterritorial jurisdiction and the statute of limitations.

23. In the definition of the crime of enforced disappearance in the Convention, the placement of a person outside the protection of the law seemed to be a consequence of the deprivation of liberty represented by enforced disappearance. The wording of the French bill made it possible to view the intentional placement of a person outside the law's

protection as being a prerequisite to establishing that a crime of enforced disappearance had in fact been committed. In the Commission's view that was incorrect and the wording should therefore be changed.

24. Article 221-13 of the French Criminal Code treated the hierarchical superior's responsibility as being one of complicity, an approach that in the Commission's view was not in line with that taken by international law, which considered the hierarchical superior's responsibility as being *sui generis* and defined by omission rather than complicity.

25. While article 8 of the Convention stipulated that the term of limitation for criminal proceedings in respect of enforced disappearance began when the offence itself ceased, reflecting its continuous nature, the French bill did not specify when the term began. This omission needed to be corrected.

26. Finally, while the French bill granted French judges extraterritorial jurisdiction in matters of enforced disappearance, the new article 689-11 of the Code of Criminal Procedure provided for a more restrictive regime of extraterritorial jurisdiction for crimes under the Rome Statute of the International Criminal Court. If article 689-11 entered into force without the 2010 law on the International Criminal Court having been updated, the crime of enforced disappearance as a crime against humanity would be treated under a regime different from that applied to other crimes against humanity, which would not be consistent.

27. **Mr. Stoliaroff** (France) said that he would begin by commenting on the issues raised by Mr. Frost. As to proving the intent to remove a person from the protection of the law, French jurisprudence considered that intent was a vital element of the crime in question. When someone committed a crime and was arrested, it was legally permissible for the agents of the State to withhold, for a certain period, information about where the arrest had occurred and where the person was being held. If the definition of enforced disappearance relied only on those circumstances occurring together, and not on intent to remove the person from the protection of the law, then anyone who was arrested could claim to be a victim of enforced disappearance.

28. French law treated the responsibility of hierarchical superiors as *sui generis*, and penalties for accomplices in crimes such as enforced disappearance were similar to the penalties for the principals.

29. As far as the statute of limitations was concerned, enforced disappearance was a crime of a continuous nature. Establishing provisions for this crime that did not apply to other crimes of a continuous nature would open a Pandora's box of issues.

30. His Government had not mentioned article 689-11 in its report or in the replies as it dealt with war crimes. It was important to deal with crimes of enforced disappearance separately and thus they were dealt with in article 689-13.

31. As to consultations about the bill to be debated in Parliament on 18 April, he said that the bill had been submitted to the National Consultative Commission for Human Rights for review before being submitted to Parliament.

32. **Ms. Faure** (France) said that article 55 of the Constitution was interpreted similarly by all French jurisdictions. They all agreed that, where a legal treaty such as the Convention existed, it was not necessary to ensure reciprocity.

33. Regarding the process followed by a judge to determine whether a provision of the Convention was directly applicable, the plaintiff needed to request a remedy based on failure to abide by the Convention. The judge would then decide whether the Convention applied to the case and whether the remedy was feasible and justified.

34. **Mr. Stoliaroff** (France) said that French law included a general prohibition on forced disappearance that applied even in exceptional circumstances such as states of emergency and war. Amendments to draft legislation could be proposed by individuals until the bill was actually debated in Parliament.

35. Crimes of enforced disappearance committed by non-State actors were punished according to the provisions of the Criminal Code covering the circumstances in question. His delegation would inform the Committee which articles of the Criminal Code pertained to terrorism. A manifestly unlawful order was one whose unlawful nature was obvious to everyone. Subordinates punished for refusing to execute unlawful orders could appeal on the basis of article 122-4-2 of the Criminal Code.

36. Regarding the notion of “concerted planning” in respect of crimes such as enforced disappearance, the Nuremberg Charter distinguished four types of crimes, including crimes against peace, which had recently been redefined as crimes of aggression. It was necessary to develop a criterion making it possible to distinguish rape or murder, for example, from a series of such crimes that constituted crimes against humanity. He noted that French law, in dealing with crimes against humanity, did not require perpetrators to be aware that their attacks were part of a wider pattern in order to be found guilty.

37. Regarding the respective responsibility of military and civilian perpetrators of enforced disappearances, French legislation in that regard satisfied the requirements of the Convention.

38. Minimum sentences did not exist in France, as sentences needed to fit the corresponding crimes. Early release of prisoners was possible, and his delegation would provide the Committee with a summary of the conditions for early release. Legal entities could be held responsible for crimes in the same way as natural persons. Punishments meted out to legal entities ranged from fines to more severe measures, such as closing down the business in question.

39. France had not taken advantage of the option of extenuating circumstances provided by the Convention: for a crime as serious as enforced disappearance, considering extenuating circumstances was not appropriate. As the maximum sentence was life imprisonment, considering aggravating circumstances was not meaningful. All courts in France were competent to try cases of enforced disappearance.

40. The statute of limitations for civil and criminal offences was 30 years; no statute of limitations applied for crimes against humanity. The statute of limitations could be interrupted or suspended under certain circumstances.

41. Regarding universal jurisdiction, anyone could be tried for an act committed on French soil. Legal aid was available to all, subject to a means test. France provided assistance to other States in connection with the implementation of the Convention, whether or not they were parties to the Convention.

42. Offences committed by the military during a conflict of any kind were always tried in civilian courts under the Criminal Code and the Code of Criminal Procedure. Criminal investigations in France were directed by a judge who was independent of the Government and the public prosecution service. Investigative police were under the authority of the investigating judge. There was no monopoly of public prosecution for enforced disappearance in France. It was important to maintain the principle of discretion to prosecute since it was a long-standing concept of French law which applied to all crimes. Cases were never dropped based on discretion to prosecute.

43. All victims in France could institute civil proceedings. In so doing, they had complete access to prosecution files and could request documents. The examining judge was required to take a reasoned decision on a victim’s application, which in turn could be

challenged in the court of appeal and court of cassation. France was not able to extradite its own nationals but could ensure that they stood trial, even if a violation was committed abroad. If, however, the individual was subject to a European arrest warrant and another EU member State requested that they be handed over, France must acquiesce. France had an inquisitorial and not an adversarial judicial system, which meant that none of the burden of proof fell on the victim, and so the burden of proof was no greater where the victim had to show removal from the protection of the law.

44. The procedure in the French judicial system was firstly for the public prosecution service to receive a complaint, and then to designate an independent investigating judge who had full judicial and investigative powers. Those were significant powers, and it was therefore difficult to cover up the facts, as the judges could even investigate in police stations, prisons and detention centres. As requested by the Committee against Torture, when an investigating authority was accused of an act of torture or implicated in an accident, investigators would be brought in from outside. The rules on prosecution or extradition in domestic legislation complied in full with the obligations under the Convention. When extradition was refused solely on the basis of nationality, the matter was referred to the French authorities except if the statute of limitations had already expired.

45. **Ms. Faure** (France) said that French ordinary law had a triple system of jurisdiction for prosecution: either the victim was French or the perpetrator was French or the crime was committed on French territory. A paragraph was to be added to article 689-13 of the Code of Criminal Procedure stipulating that all persons on French territory suspected of enforced disappearance could be tried in French courts. Where a request for extradition was received and there was no jurisdiction under French law, there was no extradition treaty or the other State was not party to the Convention, extradition would be treated under ordinary law.

46. France guaranteed immunity to the highest officials of the State, such as the President, ministers and members of parliament. In 2000, the Constitution had been amended to prevent immunity being used as a defence in proceedings brought by the International Criminal Court. Immunity was also granted for diplomats, foreign heads of State or ministers on French territory, in respect of whom French courts applied relevant international treaties, such as that of the United Nations Educational, Scientific and Cultural Organization (UNESCO). Various other immunities were recognized by international custom.

47. **Mr. Stoliaroff** (France) added that in his view there were no cases where prosecution could not be instituted. The President could be prosecuted by the International Criminal Court; ministers and the Prime Minister enjoyed judicial privileges rather than actual immunity, since they could not be called before the ordinary courts but could be brought before the Parliamentary Court of Justice; and members of parliament could be summoned by the investigating judge. Moreover, failure to prosecute could be challenged either by the State Prosecutor or the Public Prosecutor. Once article 689-13 was added to the Criminal Code, it would also be possible to prosecute individuals for crimes committed abroad.

48. **Ms. Janina** expressed concern that France interpreted the removal of the person from the protection of the law as an additional and intentional element of the crime, as it could limit the classification of enforced disappearance in law and in practice and increase the burden of proof, which in turn could lead to impunity. She asked whether the State party had considered submitting an interpretative declaration of the Convention regarding the definition of enforced disappearance. She wondered whether applying a period of limitation to enforced disappearance could lead to impunity for other offences in French law, and whether the need for reciprocity for the provision of mutual legal assistance truly took victims into account, as required under article 15. Lastly, she requested clarification on

whether the law providing for an equal statute of limitations for both civil and criminal proceedings had come into effect or was still at the drafting stage.

49. **Mr. Garcé García y Santos** said that he disagreed with the State party's view that establishing extenuating or aggravating circumstances was optional; the Convention stated that they could be useful in certain cases.

50. **Mr. Mulembe** requested confirmation that, under article 55 of the Constitution, the courts had considerable discretion to apply treaties on a case-by-case basis, with no requirement to indicate reciprocity and on the basis of the relevance of their contents. In practice was the trend for the treaties actually to be applied?

51. **Mr. Hazan** asked whether the fact that superiors were defined in French law as accomplices led to different sentences, such that, for example, the superior officer received a less severe sentence than that of the direct perpetrator of an act. Similarly, was the legal concept of direct perpetration applied in assigning liability to superiors?

52. **Mr. Huhle** said that, with regard to placing a person outside the protection of the law, the definition of subjective and objective elements remained unclear. The Rome Statute contained no mention of such elements, only of widespread and systematic elements, and so the wording in the French texts could arguably lead to misunderstanding. If, for example, a police officer detained a suspect and prevented access to communication, would there be no requirement to find out the officer's thinking as the subjective element of the crime?

53. **Mr. Al-Obaidi** asked how liability was apportioned between legal entities and the persons running them.

54. **Mr. López Ortega** said that, in his personal opinion — though not necessarily the Committee's — although the Convention did not explicitly refer to the extradition of a State party's own nationals, States parties should conclude bilateral treaties on that form of extradition under conditions of reciprocity. Such treaties would ensure that reparations were made and heinous crimes were prosecuted.

55. **Mr. Stoliaroff** (France) said that there were other States that considered the removal of the person from the protection of the law as a constitutive element. France had even amended the wording of the bill from "with the intention of removing" to "removing" to provide for the objective element, which was easier to prove, rather than the intentional element. Similarly, there was no need to enter an interpretative declaration of the Convention since France's interpretation was valid and possible.

56. The period of limitations began when the crime ceased. If further specification was provided for enforced disappearance, the State party would need to do the same for all continuing crimes. France did not cast doubt on the principle of reciprocity; however, the French courts never took reciprocity into account in any case of extradition or mutual assistance.

57. As a rule, superiors and subordinates did not tend to receive very different sentences and, if anything, the superior would receive a more severe sentence than the perpetrator for having organized the crime.

58. As to legal entities and their officers, both were held liable. The removal of a person from the protection of the law was an entirely objective element and, as such, was more effective in preventing enforced disappearance than a subjective one. In the case of the police officer mentioned by Mr. Huhle, the registers required under the Convention would provide objective and material evidence of the officer's intention. Elements of the crime in that case would be intentional and objective, not subjective.

59. As to “concerted planning”, he said that the Rome Statute referred to “a widespread or systematic attack ... with knowledge of the attack”. French legislation adopted the expression “concerted planning” to encompass the notions of “widespread” and “systematic”, but was less restrictive than the Rome Statute by not referring to the subjective criterion of having knowledge of the attack.

60. Lastly, he suggested that extradition of nationals was indeed mentioned in the Convention, in article 13, paragraph 6, and consequently, States parties should “recognize the offence of enforced disappearance as an extraditable offence between themselves”.

61. **Ms. Faure** (France) confirmed that, in all French courts, reciprocity was not required for human rights treaties, and that stipulations under conventions were considered article by article. Rather than a trend, it was better to speak of case law, since decisions by trial courts and appeal courts were determined by those of the Supreme Court. France was a State party to over 20,000 international treaties: international law thus carried great weight and those treaties were applied increasingly often in French courts.

The meeting rose at 6.10 p.m.