Opinion of 22nd May 2012
of the French Contrôleur général des lieux de privation de liberté
concerning the number of prisoners

1/ Data concerning the number of prisoners give cause for concern and attract a great deal of attention, in particular from the authorities, which is why the French *Contrôle général* has not until now considered it appropriate to publish an opinion exclusively dedicated to a subject which has often been studied by national leaders[1] and various international authorities[2]. Furthermore, drawing inspiration from the assessments of the European Court of Human Rights[3], French judges have already found the State to be liable in this area[4]. Finally, the question was, in a certain manner, settled by the Prisons Act of 24th November 2009 which provides that "cells shall be suitable for the number of prisoners accommodated in them" (article 716 of the Code of Criminal Procedure (*Code de procédure pénale*)). The French *Contrôle général* was all the less inclined to assert its own point of view since the difficulties of the French national prison system are not accurately reflected by the number of persons imprisoned, when taken in isolation, while unfortunately being too often reduced to the latter consideration.

However the current scale of prison overcrowding and the size of the growth thereof calls for an analysis of its causes in order to distinguish a number of sustainable solutions.

2/ Overcrowding cannot in itself be defined, independently of any analysis of the facts, as an infringement of prisoners' fundamental rights. However, the considerable worsening of conditions of existence and the breakdowns that can result therefrom with regard to personal and collective life within each institution can lead to such infringements, as both national judges and the European Court of Human Rights have ruled. In the reports handed over to the authorities, the French *Contrôle général* has often called attention to this aspect.

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[1] *Cf. for example the* proposition de loi *["private member's bill"] of Messrs RAIMBOURG et al., no. 2 753 (amended) of 13th July 2010.*

[2] *Cf. for example the Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on the effective respect for human rights in France, following his visit from 5th to 21st September 2005, Strasbourg, 15th February 2006, in particular § 70 to 81; the various reports of the European Committee for the Prevention of Torture, including the most recent to date, following its visit to France of 28th November to 10th December 2010, adopted on 8th July 2011 (§ 59 and 60).*

[3] *In particular, ECtHR, 26th October 2000, Kudla v. Pologne, in Les grands arrêts de la CEDH ["Major Rulings of the ECtHR"], 5th ed., no. 14, p.152, § 94; 6th March 2001, Dougoz v. Greece, no. 40907/98 (Sect. 3), ECtHR 2001-II, § 46; 19th April 2001, Peers v. Greece, no. 28524/95 (Sect. 2) ECtHR 2001-III, § 72.*

[4] *For example, Administrative Court of Appeal (CAA) of Douai (1st ch.) 12th November 2009, no. 09DA00782; ord. pdt. [order by the presiding judge] CAA Douai, 26th April 2012, no. 11DA01130.*

3/ This is not the first time that French prisons have suffered from this difficulty. In the past, institutions were even fuller than they are today. Overcrowding is a chronic problem within them. For twenty-five years, the number of prisoners has continually been greater than the number of available places, with the exception of a balance attained at the beginning of this century. However, rapid growth in recent months constitutes a worrying trend and makes it necessary to identify the causes of this phenomenon in the most precise manner possible.

The increase in the prison population does not reflect national demographic growth. The former is much more rapid than the latter. Above all, it is necessary to thoroughly rid oneself of the common idea that the number of prison inmates is linked to the state of crime in the country and that the greater the increase in the crime rate the fuller the prisons become (and moreover, as a consequence, that a higher number of prisoners constitutes more conclusive proof of levels of insecurity). The relation between the latter and the prison population is very indirect. Moreover, the observed number of indictable offences and serious crimes (the only source of criminal convictions and therefore of imprisonment) for every 1,000 inhabitants has fallen continuously over recent years (51.7 in 2001, 34.8 in 2010)[5].

Almost twenty-four thousand persons were on remand or serving sentences in France at 1st May 2012. If from this number one removes those serving their sentences in whole or in part under various different regimes on the outside, there remain more than sixty-seven thousand persons in permanent detention for a total of more fifty-seven thousand prison places. Furthermore, on the one hand, the ratio of overcrowding (117%) drawn from comparison of the number of places and occupants is nothing more than a meaningless average, since a de facto *numerus clausus* operates in prisons for convicted prisoners, leading to levels of occupation which never exceed 100%. Conversely, however, occupation levels can, by way of consequence, be much higher in remand prisons. In one of the latter institutions, in the East of France, inspected by the French *Contrôle général* last year, 163 prisoners were living in a facility providing seventy-seven places (i.e. a rate of overcrowding of 212%); the same year, another institution inspected, in the Centre West region of France, numbered seventy-eight inmates for thirty-five places (i.e. a rate of overcrowding of 223%). Moreover, the concept of a prison "place" is remarkably flexible. Thus, one West Indian remand prison inspected in theory contained one hundred and thirty places, but 244 beds[6] (that is to say an excess capacity of 188%); another in the centre of Metropolitan France theoretically possessed twenty-two places, but actually had 154 "in practice" (i.e. an excess capacity level of 126%); in order to increase the "theoretical" number it suffices, for example, to simply place two bunks in an individual cell or three in a double cell, without moreover the rest of the furniture generally being increased to the same extent, due to lack of space. This situation prevails in spite of the assertion of the principle of placement in individual cells, which is subject to a moratorium until 2014 in remand prisons[7].

4/ Three causes of increase in the number of persons imprisoned should be identified.

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[5] La criminalité en France*, Report of the* Observatoire national de la délinquance et des réponses pénales *(the French National Supervisory Body on Crime and Punishment) for 2011; Report of the French Contrôleur général des lieux de privation de liberté for 2011.*

[6] *The particularly worrying situation in French overseas territories (cf. Opinion of the French Contrôleur général des lieux de privation de liberté of 30th June 2010 concerning the remand prison of Mayotte* – Journal officiel *of 25th July 2010 – and recommendation concerning the prison of Nouméa* – Journal officiel *of 6th December 2011; also cf. the report of the French Contrôleur général des lieux de privation de liberté for 2011, loc. cit. p. 71) merits special examination which will not be undertaken within the framework of this opinion.*

[7] *Article 100 of the Prisons Act of 24th November 2009.*

In the first place, offences which lead to the pronouncement of prison sentences vary over time, according to changing definitions of offences and contemporary sensibilities. By way of example, without any intention of here making value judgements about these changes, in contrast to the past, simple larceny henceforth hardly ever leads to prison; on the other hand, "road traffic violence" is now punished with imprisonment, which represents a change as compared with the recent past. Offences which were not prosecuted in the past now give rise to charges and, possibly, to the imprisonment of greater numbers of people than was previously the case.

In the second place, the law has developed more rapid trial procedures and judges now give harsher sentences than in the past for similar offences. The prison population is therefore growing with numerous prisoners placed in detention, that is to say pending trial, for short sentences; however, it is also increasing "at the other end", due to considerable growth in the number of long and very long sentences passed. In addition to these long term considerations, well-known specific measures, which have the result of making imprisonment easier through the introduction of mandatory sentencing, a common practice under Anglo-Saxon law, have been adapted in France by means of "minimum sentencing" measures. A report from the French Senate has pointed out that, pursuant to measures of this kind (the Californian Three-Strikes Law of I994), an American citizen having committed similar previous offences ended up serving life imprisonment for the theft of a spare car wheel. In the third place, short-term measures can be a factor adding extra prisoners. Current overcrowding is partly explained by the efforts made in the courts, in the course of the last eighteen months, to ensure faster enforcement of (short) sentences passed, until then unevenly followed up due to overloading of the courts.

These factors provide the principal explanation for the fact that, were current rulings to resemble those of forty years ago, all things being equal, the number of prisoners in French prisons would be approximately halved.

5/ The consequences of this situation are less well-known, apart from the ritually (but well-justified) mention made of mattresses on the ground[8]. It naturally worsens lack of privacy and risks of conflict within cells; consolidates inactivity due to greater shortage of access to work and activities; reduces possibilities of dialogue and care on the part of prison officers and the possibility of relations (telephone, visiting room sessions) with the outside; reduces the effectiveness of rehabilitation efforts; and damages working conditions for staff, as manifested in the current strong feeling of abandonment, and all the more so since workforce levels are calculated according to prisoner numbers that correspond to the number of places. The European Commissioner for Human Rights thus notes (aforementioned report) with regard to persons accommodated in overcrowded cells: "Their life becomes even more difficult since the State does not succeed in procuring the conditions that are provided for them under its legislation. These persons are thus doubly punished". In short, by making prison into a caricature of itself[9], the current prison system is at great risk, against its role and in spite of the resources invested, of leading to inadequately prepared releases, which therefore, *nolens volens*, promote repeat offending and recidivism.

6/ For more than ten years, it has been believed that difficulties could be resolved by attempting to identify the "dangerousness" of each convicted person in order to personalise their penal sanctions and, within certain limits, by using such personalisation to separate the length of the

[8] *In this field see the Report of the French Contrôleur général des lieux de privation de liberté for 2008, pp.28-30.*

[9] *In this situation, the principle of placement in individual cells, once again reasserted by the Prisons Act of 24th November 2009 and continually deferred, obviously cannot be applied.*

stay and type of imprisonment from the seriousness of the offence. However, this approach is largely illusory. Apart from endangering the principles of our criminal law and raising questions as to the possibility of determining the risk of reoffending present within an offender's personality, the fact cannot be ignored that all prisoners are ultimately intended for release and that the question of their rehabilitation is therefore posed: our society should be organised accordingly, rather than pretending to believe in some impossible (because unrealistic) *lex talionis.*

Over the last twenty-five years the construction of new institutions was also believed to provide a response. Several justifications were put forward in support of this choice. Two of these can hardly be disputed: in the first place, it is necessary to put right the dilapidation typical of far too many prisons, which gives rise to living and working conditions unworthy of the persons deprived of liberty and staff employed there; the second justification was the attempt to succeed in offering individual cells to prisoners who so wished, in accordance with the principle of French law recalled above. However, other justifications, of a clearly more security-oriented tone, have also been put forward, dispensing with the need to determine levels of effectiveness as far as prison is concerned, including with regard to security, justifications which are, all in all, paradoxical in a society in which observed crime is decreasing.

A programme of this kind cannot be pursued without reflection on its cost[10] and above all about the kind of institutions to which it leads, a difficulty to which the French *Contrôleur général* has already called the authorities' attention. Public funds should be redirected to the renovation of remand prisons, wherever possible. Only where existing premises do not enable the development of activities pertaining to a prison worthy of the name should the reconstruction of urban institutions of small dimensions be considered.

However, the number of prison places that our country intends to have at its disposal indeed needs to be determined in a rational manner and, to this end, a certain number of short and long-term projections need to be made with regard to crimes leading to prison sentences, the length thereof, the use made of pre-trial detention, the scope of reduced sentencing and the place of individual cells in prison. The only justification provided in the impact study for the recent act on the enforcement of sentences was the "average annual level of growth" in the number of custodial sentences observed for the 2003-2011 period, which constitutes a weak basis[11]. In all probability, on the condition of the implementation of the whole of the measures suggested below, it is unnecessary to go much further than the construction programme currently in course of completion, except in the specific cases of certain institutions requiring replacement, in Metropolitan France and overseas.

Under these conditions, is it necessary to introduce a *numerus clausus*, as has been called for, applicable to the system as a whole, so that prisons are only able to accommodate numbers of inmates that correspond to the number of places they possess? Apart from the fact that the latter is, as already mentioned, relatively flexible, it appears highly delicate to make committal to prison or the shortening of sentences dependent upon practical factors devoid of any relation with the principles governing criminal law, the offender's personality and the seriousness of the act committed, and carries the risk of endangering the principle of sentencing according to defendants' individual requirement, which the Constitutional Council (of France) draws from article 8 of the

[10] *The planned public-private partnerships will place a long-term burden upon ministerial operational funding and endanger the Ministry's adaptation to future changes.*

[11] *The reference to the average number of prisoners in relation to the number of inhabitants (100 out of 100,000) in the countries of the Council of Europe is similarly fragile, France being judged to be below this average (from which it is inferred that the prison population should be increased): this is to forget that, for reasons connected to their history, which is very different to our own, in many Eastern European countries (members of the Council of Europe), the number of prisoners often remains considerably higher, in Russia in particular.*

Declaration of the Rights of Man[12]. On the other hand, as the French *Contrôle Général* has already observed, knowledge of the situation in prisons coming within the jurisdiction of courts among members of the national legal service within the State Prosecutor's Office, may be an element for reflection with regard to prison committal intake flows.

7/ There is no single solution for putting right a state of fact, which nobody truly controls at present. On the contrary it requires a whole range of reflection and both long and short-term measures.

8/ Naturally, in the first place it is appropriate to question the economic and social effectiveness of current forms of imprisonment. This involves three considerations: the enforcement of sanctions – it is important pay attention thereto and, in this respect, the principle of enforcement of judicial decisions cannot be questioned; the security of persons and property; released prisoners' capacity to lead their existence without committing offences; the latter two factors being connected. More practically speaking, one may ask the question of whether prison is effective, for example, in order for dependent drug addicts to free themselves from drug use having led them to commit repeated thefts. In doing so, the need for punishment is in no way called into question: this need can never be placed in doubt. The question is only concerned with the adaptation of its form to the offence committed.

This question is all the more pertinent insofar as prisons, in spite of unquestionable progress, based upon numerous praiseworthy undertakings on the part of staff, are very lacking in resources as far as this point is concerned. Provision of specialist services to prisoners who request, or may be required to receive them (orders for medical treatment etc.) is very insufficient and in some cases even pathetic. Only a minority of persons in prison follow courses of treatment or learning and engage in making fundamental changes to their behaviour. The necessary staff, space, equipment and even regulations are too often lacking[13]. It is not inconceivable to imagine that prison might be a convenient place for people (and persons suffering from mental illness in particular) in the absence of more suitable places and means elsewhere[14].

The need for adaptation of the punishment to the crime committed and to give real attention to security requires twofold reflection: with regard to certain punishments provided for in the Penal Code (*Code penal*); as well as with regard to new forms of criminal sanctions, more effective than those currently existing, in the light of the factors mentioned above.

9/ It would also be appropriate to reflect upon the manner of operation of our criminal courts, which are in an even more delicate situation, in spite of the efforts accomplished by the authorities and those who work in them. Five questions, which are at the heart of this subject, need to be mentioned in order to enable their detailed examination.

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[12] *See for example Conseil constitutionnel no. 80-127 DC, 20th January 1981 (Act reinforcing security, consid. 15 and 16) and no.* 2011-625 DC*, 10th March 2011 (LOPPSI, consid.20, 21, 26 and 27).*

[13] *Cf. Opinion of the French Contrôleur général des lieux de privation de liberté concerning access to IT for prisoners (*Journal Officiel *of 12th July 2011).*

[14] *The opening of three UHSA (Specially-equipped hospitalisation unit) in Lyon, Toulouse and Nancy is a considerable improvement; it should be followed by other planned openings. However, it should be recalled that epidemiological studies count around fifteen thousand persons suffering from mental conditions in prison.*

Access to the courts for the most modest social categories – one is here thinking of both the victims and perpetrators of offences - constitutes a real concern. Finding a counsel able to devote their time to one's case and being able to pay them for their commitment still presents great difficulties. This causes many people to feel, rightly or wrongly, that they were not defended and that they have therefore been the victims of injustice. Most prisoners endure the prison system as best they can; few give credit to the functioning of the legal system, above all with regard to the possibility provided to them of explaining themselves. It is impossible not to make a connection between these feelings and the large number of sentences delivered against persons lacking financial resources.

The time allocated to judges, the latter having had occasion to bring their questions in this respect to public attention, also deserves consideration. On the one hand, there is a striking dichotomy between the preparation of difficult cases for trial and criminal trials for which time is no object (Assize Court trials are longer today than in the past) and, on the other hand, the handling of the series of what are considered to be banal cases, which are nevertheless of decisive importance with regard to individual futures. Many persons encountered rightly or wrongly feel that they were not heard. Improved balance would be desirable. On the other hand, there is a lack of time for more invisible but nevertheless equally necessary occupations. These include the need to see the prison: admittedly, judges responsible for the execution of sentences and deputy public prosecutors in charge of the enforcement of sentences regularly go to the latter. But what about other judges, and in particular those who deliver prison sentences? “I am obliged to urge professionals to go and visit the prison” explains one renowned public prosecutor. The presence of members of the national legal service in prison should be increased alongside greater control on their part.

Although the proportion of prisoners on remand within the prison population as a whole henceforth corresponds to the European average (it was long higher in France than elsewhere), in line with what is also being sought in Europe, efforts should be undertaken in order to substantially reduce use of pre-trial detention[15] and develop alternatives (of the “house arrest” type in use elsewhere).

The results and effectiveness of the legislative mechanisms that lead to the virtually automatic pronouncement of prison sentences (subject to special grounds) need to be closely examined, in accordance with the abovementioned criteria, in order to determine whether or not they should be maintained in the light of this examination.

Similarly, the reduced sentencing policy, which for several years has been in turn promoted and limited, requires consideration. In this respect, the Prisons Act of 24th November 2009 represents a real step forward which needs to be consolidated. A large increase in reduced sentencing is currently noted, in particular as part of the expansion of alternatives to imprisonment (which increased by almost 29% between May 2011 and May 2012). However, this data should not give rise to excessive enthusiasm: it is principally based upon an increase in the use of electronic tagging (2,500 tagging device “straps” at 1st January 2008; 9,500 at 1st May 2012), of which trials in countries using them henceforth indicate that they are not bearable for periods of longer than a few months. In other words, electronic tagging is a means of regulating prisoner numbers, the effects of which will remain quantitatively limited.

On the other hand, efforts need to be made in the field of day-release (neglected due to growth in the number of tagging “straps”) and partial release (for various different reasons, certain open prisons remain underused and national regulations – with regard to opening times for example – should be applied to them[16]). Deferment of sentences on medical grounds, defined under

[15] *Cf. Recommendation of the Committee of Ministers of the Council of Europe of 27th September 2006 (Rec (2006)13).*

[16] *The French Contrôleur général des lieux de privation de liberté reserves the right to return to this question.*

the Act of 4th March 2002, is not sufficiently used: the conditions thereof have subsequently hardened and need to be re-examined, at least insofar as the appointed experts need to be better informed of the realities of prison (use of doctors practicing in UCSA prison medical consultation and outpatient treatment units). Seriously handicapped persons are encountered in prison, whose conditions of existence are shameful. Finally, reflection needs to be conducted with regard to the old-fashioned mode of judicial supervision, which needs to be overhauled, as well as concerning community service, which due to the lack of a sufficient number of offers, is hardly increasing.

10/ Finally, in the short term, the implementation of short sentences that have remained unenforced for periods of one or two years, due to lack of provision of the necessary means to court registries, results in damage to the social rehabilitation of those convicted prisoners who, after the trial, have recommenced a professional life and social relations. Although no exceptions should be made to the application of sentences, as pointed out above, the latter still need to be implemented within reasonable deadlines. A decision needs to be taken in order to ensure that this principle will henceforth be strictly applied, alongside provision of the necessary means to registries. However, the past (unenforced sentences passed before 2012) needs to be wiped out by means of a special amnesty, which would apply – this point needs to be emphasised – solely with regard to offenders having received light sentences; and if a measure of this kind were to appear impossible, judges responsible for the execution of sentences should give favourable consideration, within the framework of article 723-15 of the Code of Criminal Procedure (*code de procédure pénale*), to the manner in which sentences should be enforced with regard to this population, giving preference to alternatives to imprisonment: however, in order to have an impact, this measure requires the holding of conferences aimed at establishing real reduced sentencing policies within the framework of each court of appeal, which of course need to respect the independence of judges.

More generally speaking, the authorities will be confirmed in this measure insofar as, on the one hand, no amnesty was voted at the time of the Presidential elections of 2007 and 2012 and, on the other hand, that no decree of pardon is henceforth made at the time of the *Fête Nationale* national holiday. Although the latter point ought to have unanimous support, and it would be desirable for amnesties to no longer have the character of measures taken by force of circumstance, it should nevertheless be acknowledged that amnesties constitute neither a legal incongruity, nor a strange practice within a democratic context and that the disappearance thereof from the national legislative arena should be cause for surprise. It would probably be harmful for Parliament not to be able to vote measures of this kind - though the reasons for such a situation be evident - the appropriateness and shape of which it is incumbent upon it to determine: the justification for a measure of this kind at the present time is scarcely questionable.

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