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## **Memorandum on maintaining public order and freedom of assembly in the context of the “yellow vest” movement in France**

### **Introduction**

1. The Council of Europe Commissioner for Human Rights, Dunja Mijatović, has been keeping close track of the events linked to the “yellow vest” movement in France since mid-November 2018. The increasing number of violent incidents, reported by a very large number of media outlets, confirmed by information passed on to her by national human rights bodies and borne out by evidence received directly by her Office, prompted her to make an official visit to Paris on 28 January 2019. Her aim was to gather more information on the circumstances of the use of force by law enforcement officers and some demonstrators, and to assess the human rights situation in the context of the various forms of action linked to the yellow vest movement.
2. During this visit, the Commissioner talked to Laurent Nunez, State Secretary to the Minister of the Interior. She also had meetings with the secretariat of the National Consultative Commission for Human Rights (CNCDH), the Defender of Rights and his deputy in charge of security ethics, representatives of human rights organisations and police and journalists’ trade unions, and law and media professionals.
3. The Commissioner would like to thank the French authorities in Strasbourg and in Paris for their assistance in organising this visit at such short notice and ensuring that it would be conducted in the best possible conditions. She is also grateful to everyone she talked to for sharing their knowledge and views with her.
4. Following this visit the Commissioner believes there is a need, as part of the constructive dialogue she has established with the French authorities, to present them with the comments, findings and recommendations contained in this memorandum, relating on the one hand to maintaining public order in the context of the yellow vest movement and on the other to the arrangements for exercising the freedom of peaceful assembly<sup>1</sup>.

### **I. Maintaining public order in the context of the yellow vest movement**

5. The public demonstrations by persons claiming to be members of the “yellow vest” movement began on 17 November 2018 in the form of weekly processions in Paris and many other French cities, along with occupations of roundabouts and roadblocks around sites such as fuel depots and the logistics platforms of major retail firms. The latter two types of action have become rarer since the evictions conducted by the law enforcement agencies in mid-December 2018 following the deaths of several persons run over accidentally by vehicles in the course of roadblocks by yellow vest protestors.<sup>2</sup> By contrast, the weekly processions had been going on uninterrupted for 13 weeks at the time of writing of this memorandum.
6. The Commissioner notes that while the demonstrations of 17 November 2018 were broadly peaceful, violence began to mar the gatherings from the second Saturday onwards. A small number of protesters began throwing missiles and setting barricades alight, causing damage which was mostly small-scale and limited to property on 24 November 2018, but the violence took on a much larger scale on 1 December 2018, a date marked in particular by the setting on fire of the Prefecture of the Haute-Loire in Le Puy-en-Velay, major physical damage on and in

<sup>1</sup> This memorandum was finalised on 15 February 2019.

<sup>2</sup> At the time of writing, 10 people had lost their lives in this way.

the Arc de Triomphe in Paris, and a large number of wounded,<sup>3</sup> including an 80-year-old woman in Marseille who was hit by pieces of a tear gas grenade as she was closing her shutters and who died the following day.

7. Despite the announcement by the French President on 10 December 2018 of measures to meet some of the yellow vest protestors' demands and the launch of a national debate, the demonstrations continued and the number of wounded has increased steadily, reaching, according to the Ministry of the Interior's figures of 4 February 2019,<sup>4</sup> a level of 2 060 among the demonstrators, including 69 "extreme emergencies", and 1 325 wounded among the law enforcement officers. The Commissioner is extremely concerned at the level of violence reflected in these figures, which many of those she talked to described as unprecedented in France in the last fifty years.
8. The Commissioner strongly condemns the use of violence as a means of expression of any form of discontent or disapproval vis-à-vis decisions taken by democratically elected institutions operating with due regard for the principles of the rule of law. She would also stress that while states may consider themselves entitled to use force, particularly to re-establish order, it should only be used as a last resort and in strict compliance with the requirements of necessity and proportionality, as the first obligation of all member states is to protect persons under their jurisdiction and their human rights. Furthermore, violence cannot on any account be used as a means of solving a social and/or political crisis.
9. The Commissioner's intention is to analyse the events linked to the yellow vest movement which have occurred in France over recent weeks in the light of these general principles and the relevant international human rights standards.

*a. A movement with distinctive features*

10. The Commissioner notes that France has a long tradition of protest, allowing for the free expression in public of the most diverse demands and opinions, most frequently in opposition to decisions taken by the executive and the legislature and sometimes in support of the latter.
11. She also notes that the doctrine on maintaining public order whose aim is to allow the effective exercise of the rights to freedom of expression and peaceful assembly while preserving public order and safety has been built up, as the Defender of Rights points out, "around a process of pacification of the management of demonstrations", based on the following principles: (i) keeping demonstrators at a distance so as to avoid physical contact between law enforcement agencies and demonstrators and the violence to which this can give rise; (ii) the organisation and functioning of units tasked with preserving law and order according to collective hierarchical rules; (iii) resorting to force only in cases of absolute necessity; (iv) gradation of the use of force; v) reversibility of the use of force.<sup>5</sup> This goes hand in hand with a so-called negotiated management of maintaining public order, in which the authorities will establish dialogue with the organisers of a demonstration as soon as it is notified to them with a view, in particular, to determining the route it will take and how it will be made safe.
12. However, the Commissioner notes that the yellow vest movement has distinctive features which seem to make it difficult to put this doctrine into practice.<sup>6</sup> It has little structure or hierarchy and it has mainly been organised through the social networks, on which regular calls for demonstrations are posted, which are generally not notified to the authorities, thus preventing the negotiated management referred to above. In addition, the large number of demonstrations and their scattered geographical distribution have resulted in the mobilisation of law

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<sup>3</sup> According to figures from the Ministry of the Interior 263 people were wounded on 1 December 2018, including 81 law enforcement officers. The wounded on 24 November 2018 had numbered 84, including 30 law enforcement officers.

<sup>4</sup> 4 February is the date on which the most recent figures were sent to the Commissioner by the Ministry of the Interior.

<sup>5</sup> Defender of Rights, [Report](#) on law enforcement with due regard for professional rules of conduct, December 2017, p. 6 et seq.

<sup>6</sup> See, on this issue, the [hearing](#) held by the French National Assembly's Law Commission on 3 December 2018, during which the Minister of the Interior stated that there was a need to "question current doctrine and thoroughly rework it".

enforcement officers belonging not only to units specialising in preserving public order<sup>7</sup>, but also to other units with no specialisation in this area. In the talks held during the official visit, it became clear that the reinforcement provided by the latter was also accounted for by the presence at demonstrations of a small number of mobile and violent individuals, often referred to by the authorities as “*casseurs*” (“rioters”), as well as minor extremist groups, which also engage in various forms of violence including fighting one another.

13. In this connection, the Commissioner is alarmed that racist, anti-Semitic and homophobic comments, graffiti and assaults have been reported, albeit admittedly in limited numbers, during or on the side lines of demonstrations. For example, a man and his partner were the victims of a [homophobic assault](#) on 17 November 2018 at a yellow-vest roadblock in Bourg-en-Bresse and racist comments are said to have been made the same day to a car driver in Cognac. On 2 February 2019, [anti-Semitic comments](#) are reported to have been made in front of the Strasbourg synagogue during yellow vest demonstrations and anti-Semitic graffiti was found in various places in Paris on the day following 9 February, although the direct involvement of yellow vest protesters in this has not as yet been established in court. The Commissioner also notes that persons calling themselves “Judeophobes” are reported to have been dismissed from a demonstration in Paris on 12 January by other protesters.
14. The Commissioner is also highly concerned that demonstrators have been able to physically assault journalists and/or the security guards accompanying them in the exercise of their reporting duties,<sup>8</sup> for example in Rouen on 12 January 2019, when a team from the LCI rolling news channel was assaulted by demonstrators and their security guard was severely beaten.

*b. Methods used by the law enforcement agencies*

15. The large number of wounded is evidence of the repeated use of force by the authorities, which is strictly delimited by the provisions of the Criminal Code and the Internal Security Code. Under these provisions, the use of force during an operation aiming to maintain public order is only permitted in order to disperse a crowd which may cause disturbances of the peace.<sup>9</sup> Units tasked with using force must therefore do so progressively, firstly making use of physical force, possibly combined with equipment which does not constitute firearms,<sup>10</sup> before being able, if the disorder continues or worsens and after a further warning, to use certain weapons including, in particular, instant tear gas grenades and hand-held sting grenades. Provision is made, however, under the Internal Security Code, that in the event of violence or assault against law enforcement officers brought in to disperse a crowd or if these officers cannot defend the ground they occupy in any other way, use may be made of direct force without warning, deploying the weapons provided for in the previous scenario or the 40-mm “LBD 40 x 46” rubber bullet (or kinetic impact projectile) launcher (LBD), which fires non-metallic projectiles.
16. The Commissioner notes that according to figures from the Ministry of the Interior 12 122 LBD rounds, 1 428 instant tear gas grenades and 4 942 hand-held sting grenades were fired or thrown between the beginning of the yellow vest movement and 4 February 2019. She is concerned at the high level of use of these so-called intermediate weapons despite the fact that their deployment is restricted and they can cause serious injury. The Commissioner notes that according to a [count](#) carried out by an independent journalist, at the time of writing, the three types of intermediate weapon referred to above had been involved in 253 of 428 reports made to him by persons claiming to be victims of police violence, which he himself had documented and cross-checked, confirming a high prevalence of LBDs, accounting for 193 of these cases. The count highlighted 38 wounds to upper limbs including 5 lost hands, 52 wounds to lower

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<sup>7</sup> The units specialising in preserving public order are the state security police (CRS) and the mobile gendarme squadrons.

<sup>8</sup> In a [press release](#) of 2 January 2019, Reporters without Borders condemned the increasing amount of hostility towards the media and the violence on the part of police officers and demonstrators against journalists.

<sup>9</sup> Put simply, this presupposes (i) that a crowd has formed; (ii) that an authority with the power to do so has decided that the crowd must be dispersed; (iii) that repeated orders have been issued for the individuals forming the crowd to disperse; (iv) that the individuals in question have refused to obey and the crowd has not dispersed. See the National Assembly [report](#) of May 2015 prepared on behalf of the committee of inquiry tasked with assessing the situation and making proposals on the aims and means of law enforcement in France while showing due regard for public freedoms and the right to demonstrate and the need to protect people and property.

<sup>10</sup> Such as truncheons, shields, water cannons, hand-held tear gas canisters and some tear gas grenades.

limbs, 3 wounds to the genitals and 189 head wounds including 20 people who have lost an eye. The Commissioner notes that many head wound victims attribute their injuries to intermediate weapons, particularly LBDs, whereas according to instructions reiterated by the Director General of the national police force on 16 January 2019, the use of LBDs must be “targeted”, with users aiming “only at the torso or the lower or upper limbs”.<sup>11</sup>

17. The Commissioner regrets the lack of clarity as to the data on those wounded. There are several types of data, which are compiled and published according to varying criteria by various bodies – mainly the Minister of the Interior and journalists – and which, while they do not necessarily conflict, fail to provide the same degree of detail.
18. During her visit the Commissioner noted in particular that the validity of the use of rubber bullet launchers (LBDs) during demonstrations was contested by most of the people she met, who highlighted their unsuitability for the purposes of maintaining public order and the danger they posed in such contexts. In his [report](#) of December 2017 on maintaining public order with due regard for professional rules of conduct, the Defender of Rights recommended that a multidisciplinary study be carried out on the use of intermediate weapons and that LBDs should be removed from the range of equipment available to law enforcement agencies. The Commissioner notes that the Defender of Rights reiterated his recommendation for LBDs to be withdrawn in January 2019 and that many health professionals support him because of the sometimes irreversible injuries that can be caused by these weapons. Laurent Thines, Head of Neurosurgery at the University Hospital of Besançon, has even talked of the “extreme danger” of these launchers which he considers to have “all the features of weapons of war”.<sup>12</sup>
19. The Commissioner also notes that while an appeal for the use of LBDs to be suspended was [dismissed](#) by the Conseil d’Etat in an interim order of 1 February 2019, the appeal still needs to be examined on the merits, and other applications to set aside the decisions of the Minister of the Interior and the directors general of the national police force and the gendarmerie refusing to suspend the use of the LBD 40 during demonstrations were filed with the Conseil d’Etat on 6 February 2019 by the French Human Rights League.<sup>13</sup> The Commissioner also notes that an application alleging violations of Articles 3 (prohibition of torture) and 2 (right to life) of the European Convention on Human Rights has been lodged with the European Court of Human Rights. She points out that the [decision](#) of 18 December 2018 in which the European Court dismissed the application for an interim measure concerning the use by law enforcement agencies of LBDs and incapacitating liquids submitted in support of this application should not be taken as any indication of the Court’s subsequent decisions on the admissibility or the merits of the case in question.
20. The Commissioner has taken note of the instructions of 16 January 2019, in which the Director General of the national police force pointed out that the use of LBDs must be “proportionate and targeted” and the Minister of the Interior’s decision of 23 January 2019 to equip law enforcement officers carrying such launchers with body cameras. She notes, however, that these cameras must be activated before engagement by the officer using the launcher or by an adjacent officer, which makes its use somewhat difficult and unreliable in what is necessarily an emergency situation, thus giving rise to doubts as to its efficiency, even among the ranks of the law enforcement agencies themselves. It became clear to the Commissioner that the latter are divided over the use of LBDs at demonstrations and that the national police force and, in particular, the gendarmerie units specialising in maintaining public order seem less inclined to use them in this context than the units such as anti-crime or organised crime brigades and rapid-response detachments which are frequently called in as reinforcements for the former and are less familiar with the methods of maintaining public order at demonstrations than with combating organised crime and/or urban violence.

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<sup>11</sup> Director General of the national police force, Eric Morvan, as cited by Agence France Presse in a dispatch of 16 January 2019.

<sup>12</sup> [Petition](#) “for a moratorium on the use of sub-lethal weapons”, signed by over 155 000 people at the time of writing. See also the [press release](#) by the NGO, Physicians for Human Rights, dated 6 February 2019.

<sup>13</sup> The Human Rights League has also submitted an application for a preliminary ruling on constitutionality in support of its application to set aside these decisions, highlighting the inadequacy and unsuitability of the legal safeguards surrounding the use by the law enforcement agencies of weapons such as the LBD 40 x 46 during demonstrations.

21. Lastly, the Commissioner is concerned about the allegations of police violence targeting journalists which have been brought to her attention by professional journalists' organisations and [human rights groups](#) and which are echoed by those of [three photographers](#) who claim that they were "deliberately" targeted by the police in Toulouse at a demonstration on 9 February 2019.

*c. Administrative and judicial responses to the violence*

22. The Commissioner notes that French law provides for several types of response to the violence referred to above. Violence committed by demonstrators against persons or property may be prosecuted under the Criminal Code, which prohibits in particular assaults on persons exercising public authority, damage to public property, forming groups for the purpose of committing violence, violence using improvised weapons, and carrying weapons. According to the information of 4 February 2019 communicated to the Commissioner by the authorities, 3 441 criminal proceedings had been initiated.
23. The Commissioner is concerned about the frequent use in these cases of immediate summary proceedings enabling the prosecutor to bring the accused before a court immediately after police custody. Under the Code of Criminal Procedure such proceedings may be used for offences punishable by a prison sentence of two years or more, or six months if the accused was caught in the act, provided that it is clear to the prosecutor that there is sufficient incriminating evidence and the case is ready for trial. As of 4 February 2019, 1 290 demonstrators had been tried in immediate summary proceedings and a detention order had been issued at the hearing with respect to 313 of these. The Commissioner notes that the persons given immediate trials include first offenders who know little about the functioning of the judicial system and is concerned that hearings in such proceedings may be held at night when the accused, who have already been worn down by their custody, and judges and lawyers are in an advanced state of fatigue.
24. Persons who consider themselves victims of violence committed by law enforcement officers may make a complaint at a police station or a gendarmerie or directly to a public prosecutor, who may refer the case, where appropriate, to the Inspectorates General of the national police force (IGPN) or the national gendarmerie (IGGN) for them to investigate the allegations. These two inspectorates may also receive reports from witnesses or victims of violence committed by law enforcement officers. Lastly, such witnesses or victims may also apply to the Defender of Rights.
25. The Commissioner notes that the Ministry of the Interior's figures of 4 February 2019 reported that 131 investigations into suspected police violence had been opened and assigned to the IGPN. At the time of writing, the Defender of Rights had registered 62 applications connected with the yellow vest movement including, in particular, allegations of breaches of professional security ethics such as violence, questionable use of LBDs or other types of weapon, and preventing filming or photography.

*d. Conclusions and recommendations*

26. The Commissioner points out that, as persons exercising public authority, law enforcement officers have particular responsibilities, and their main task is to protect citizens and their human rights. Yet, the number and seriousness of injuries inflicted on demonstrators raise questions about the compatibility of the methods used in operations aimed at maintaining public order with due regard for these rights, particularly the right not to be subject to violence or treatment in breach of Article 3 of the European Convention on Human Rights.
27. In this respect, the Commissioner encourages the authorities to publish data specifying who the wounded are (demonstrators, passers-by, law enforcement officers, etc.) and the seriousness and location of injuries, and their cause where this is known.
28. The Commissioner is extremely concerned about the number of serious, concurring and credible allegations of police violence causing mutilation and serious injury, particularly to the head. She considers that head wounds caused by LBD fire show a disproportionate use of force and the unsuitability of this type of weapon in the context of operations aimed at maintaining public order.
29. Noting with interest that the [Minister of the Interior](#) considers it necessary to review the rules on the use of intermediate weapons, she encourages the authorities to carry out this review as

soon as possible so as to clarify the provisions governing the proportionate use of force by law enforcement officers at demonstrations. For this purpose, she calls on the authorities to make a thorough assessment of the dangers posed by all these weapons and to base themselves on the [guidelines](#) of the OSCE/ODIHR and the Venice Commission on freedom of peaceful assembly, the UN's [Basic Principles](#) on the Use of Force and Firearms by Law Enforcement Officials and the work of the European Committee for the Prevention of Torture and Inhuman or degrading Treatment or Punishment<sup>14</sup> and the Defender of Rights in this area. Pending this review, the Commissioner recommends that the authorities suspend the use of LBDs during operations aimed at maintaining public order.

30. The Commissioner also points out that the authorities must guarantee the safety of journalists during demonstrations so as to enable them to perform their duties properly, and emphasises in this respect that the European Court of Human Rights has [found](#) that violence committed against journalists, particularly by agents of the State, may constitute breaches not only of Articles 2 and 3 of the European Convention on Human Rights but also of the right to receive and impart information guaranteed by Article 10.
31. The Commissioner is particularly keen to ensure that Council of Europe member states will not allow impunity with regard to police violence so that breaches of professional ethics and criminal law are punished, trust and co-operation between the public and law enforcement bodies is enhanced and justice is done for the victims. She points out that the European Court of Human Rights has [consistently held](#) that all allegations of police misconduct must be investigated effectively so that the perpetrators can be identified and punished,<sup>15</sup> and therefore invites the authorities to ensure that all persons claiming to be the victims of such misconduct may not only report it to the IGGN, the IGGN and the Defender of Rights but also bring a complaint in court and claim compensation.
32. The Commissioner is entirely aware of the fact that operations aimed at maintaining public order are particularly complex and the officers mobilised to carry them out are working in a context of high tension and fatigue, given that the yellow vest movement has now been going on for nearly three months. She strongly condemns the violence committed against law enforcement officers, regrets the large number of wounded among their ranks and will be closely monitoring the criminal proceedings taken in response to this violence.
33. The Commissioner also considers that respect for the economic and social rights of law enforcement officers is a key factor in reducing the risk of misconduct and excessive use of force. It is therefore essential to ensure that they are paid a sufficient salary and granted periods of rest and recuperation along with appropriate psychological support. She also highlights the importance of providing them with sound human rights training throughout their career, as recommended by the [European Code of Police Ethics](#). As to operations aimed at maintaining public order, she invites the authorities to favour the use of specialised units in this type of operation and to ensure that if, exceptionally, other law enforcement officers are mobilised, all have received recently updated training in public order maintenance techniques. She also calls on the authorities to provide all personnel involved in operations aimed at maintaining public order with the equipment needed to protect themselves and be identifiable.
34. Preventing misconduct also implies avoiding as much as possible placing law enforcement officers in situations of extreme tension, particularly through the development of so-called de-escalation methods, whose aim is to make dialogue and communication strategic principles of maintaining public order. She encourages the authorities to draw on the work carried out in this field by law enforcement agencies in other European countries, particularly as part of the [GODIAC](#) project, and the recommendations made in this respect in the joint [report](#) of the UN Special Rapporteurs on the rights to freedom of peaceful assembly and of association and on extrajudicial, summary or arbitrary executions on the proper management of assemblies. It is all

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<sup>14</sup> In its [report](#) on its visit to Spain in 2011, the Committee considered that the criteria for the use of projectile-firing weapons by police officers should at least closely correspond to those governing the use of firearms, and their use should be thoroughly regulated and monitored. The Committee also recommended that all persons against whom these weapons were deployed be subsequently examined by a doctor.

<sup>15</sup> Under this case-law and the guidelines of the Committee of Ministers of the Council of Europe, for an investigation to be effective it must be thorough, impartial, independent and prompt, and enable a sufficient element of public scrutiny. Victims should also be allowed to take part in such investigations.

the more important to think about this in view of the risk that relations between the police and the public may be profoundly and lastingly damaged by this period of violence.

35. The Commissioner also believes that a police-based response cannot in any circumstance be the only response to a social movement. She notes that a major national debate has been launched and hopes that lines of dialogue will be re-established, alongside other forms of response to the movement, making it possible to alleviate the tensions tied up with it throughout French society.
36. Lastly, she underlines that the European Court of Human Rights has repeatedly found that while Article 6 of the Convention provides that judicial proceedings must be reasonably short, it also establishes the more general principle of good administration of justice, which may justify lengthier but fairer proceedings.<sup>16</sup> Accordingly, the Commissioner invites the authorities in charge of proceedings against persons involved in the yellow vest demonstrations to show due care and restraint in their use of immediate summary proceedings. Likewise, out of respect for the principle of good administration of justice, she recommends that hearings in such proceedings not be held at night.

## II. Prerequisites for exercising freedom of peaceful assembly

### a. Exercising freedom of peaceful assembly in the context of the yellow vest movement

37. Under Articles L211-1 et seq. of the Internal Security Code, all processions, marches and gatherings of persons and, more generally speaking, all public demonstrations must be notified in advance to the town hall, the prefecture or, in Paris, police headquarters. This notification must be made at least three full days before the date of the demonstration and contain information on its purpose, location, date, timetable and route. One of the main aims of this is to enable the so-called negotiated management of maintaining public order referred to in the previous section of this memorandum by establishing a dialogue between the authorities and the organisers of the demonstration on the means of ensuring people's safety. The Internal Security Code also provides that the mayor or the prefect may prohibit an event if it is liable to disrupt law and order. Under Article 431-9 of the Criminal Code, organising a public demonstration in spite of its prohibition or without prior notification is punishable by a sentence of up to six months' imprisonment or a fine of up to €7 500.
38. As the Commissioner has already pointed out,<sup>17</sup> according to the information she has managed to gather, a large number of demonstrations held as part of the yellow vest movement have not been notified to the authorities while others have been prohibited in certain cities or neighbourhoods. She notes that many of the demonstrations which were held despite such prohibitions have given rise to clashes between some demonstrators and the law enforcement agencies. A one-month suspended prison sentence and €500 fine were called for on 15 February 2019 by the Paris deputy state prosecutor against one of the leaders of the yellow vest movement, who was accused of having "organised a public demonstration without prior declaration" on 22 December 2018 and 2 January 2019. By contrast, she does not have any information on any proceedings which may have been initiated against other organisers of prohibited or undeclared demonstrations on the basis of Article 431-9 of the Criminal Code, as cited above. She notes, moreover, that these offences are not mentioned in the list of "criminal charges likely to be brought" contained in the [circular](#) on the judicial processing of offences committed in connection with the yellow vest movement issued by the Minister of Justice on 22 November 2018.
39. During her visit, the Commissioner's attention was drawn to other offences covered by this circular, particularly the offence, punished by Article 222-14-2 of the Criminal Code, of being a member of a group formed to prepare wilful violence against persons or destruction of or damage to property. Combined with Article 78-2-2 of the Code of Criminal Procedure, which allows state prosecutors to issue requisitions for the purposes of identity checks, vehicle inspections, visual inspections and searches of bags, which are useful when attempting to detect and investigate certain offences, this measure has led to the questioning and custody of

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<sup>16</sup> See, in particular, the [Intiba v. Turkey](#) judgment of 24 May 2005, § 54.

<sup>17</sup> See above, § 12.

many persons, who have sometimes been questioned in a railway station or at a motorway service area several tens of kilometres away from a town where a demonstration was taking place because they have had objects in their possession such as a yellow vest, a tool or even a diving mask. According to some legal professionals whom the Commissioner was able to talk to, only a few of these arrests have actually resulted in criminal proceedings, which raises the suspicion that the aim may have been to prevent persons from taking part in demonstrations rather than to punish an offence. Leading lawyers and human rights defenders have publicly denounced such cases as “preventive arrests”.<sup>18</sup>

*b. Bill on strengthening and guaranteeing public order at demonstrations*

40. During her visit, the Commissioner was alerted by many of those she met to the bill on strengthening and guaranteeing public order at demonstrations, which has had its first reading and vote in both houses and will shortly be debated on a second reading in the Senate. The bill was initially tabled by a senator and had already been voted on following a first reading in the Senate in October 2018 when, on 7 January 2019, the Prime Minister announced his intention to take measures, through an amendment to this bill, to “punish those who broke the rules” during demonstrations. The stated aim of the government in introducing these amendments was to protect freedom of peaceful assembly against troublemakers who jeopardised the exercise of this freedom – referred to as “[casseurs](#)” (rioters) by the Minister of the Interior. The Commissioner can only support such an aim, but she notes that some of the provisions of this text may nonetheless undermine freedom of assembly.
41. The measures provided for by this text included, at the time of writing of this memorandum, granting the power to prefects, in other words the administrative authorities, to ban a person constituting “a particularly serious threat to law and order” from participating in a demonstration. The ban must be justified by violence committed at previous demonstrations by the person concerned. It may be extended to the entire country, for no more than one month, “where there are serious reasons to think that the person [covered by the measure] is likely to take part in any other concomitant demonstration or a series of demonstrations”. The Commissioner notes that the Internal Security Code already contains another form of ban on demonstrating, which can be imposed not by an administrative authority but by a court, as a supplementary penalty on persons found guilty of offences of violence, destruction, defacement or damage.
42. The Commissioner notes that this provision has given rise to very substantial concerns among legal and human rights professionals. In a [press release](#) of 14 February 2019, a group of UN human rights experts<sup>19</sup> stated that this administrative ban on demonstrations was one of the measures in this text which constituted “severe restrictions on the right to freedom of peaceful assembly” and could be “applied arbitrarily and lead to extremely serious abuses”. The Defender of Rights, for his part, regrets that this provision assigns the administrative authority the power “to deny people the constitutionally recognised right to exercise the freedom to demonstrate without the prior review of a court and proceedings subject to safeguards, particularly respect for the adversarial principle”.<sup>20</sup> Others fear that persons may be given an administrative ban on demonstrating because of mere suspicions or subjective grounds, which it would be difficult to contest as part of the urgent application procedure provided for by the bill to dispute such a ban.
43. A series of other measures provides for more severe punishments for offences already prohibited by the Criminal Code. This is the case with the provision whose aim is to make it a more serious offence to intentionally hide all or part of one’s face in or within the immediate vicinity of a demonstration “without a legitimate reason”. The Commissioner notes that the Criminal Code already contains a provision punishing the same facts as a petty offence (*contravention*) with a fine of €1 500. Besides increasing the penalty, to a €15 000 fine and one year’s imprisonment, re-categorising these facts as a more serious offence (*délit*) will make it possible to take persons covered by this measure into police custody. During her interviews, the Commissioner noted that many legal and human rights professionals fear that this measure may

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<sup>18</sup> In particular, Henri [Leclerc](#), honorary president of the Human Rights League, on 10 December 2018.

<sup>19</sup> The group is made up of Seong-Phil Hong, Chair-Rapporteur of the Working Group on Arbitrary Detention, Michel Forst, Special Rapporteur on the situation of human rights defenders, and Clément Nyaletsossi Voule, Special Rapporteur on the rights to freedom of peaceful assembly and of association.

<sup>20</sup> Defender of Rights, Opinion No.19-02, 18 January 2019.

be used to prevent persons from exercising their right to demonstrate by depriving them of their liberty when they have not committed the slightest act of violence. The “without legitimate reason” clause does not seem to them to constitute sufficient protection against possible abuses, which may consist for example in taking a person in the vicinity of a demonstration whose face is partly covered by a scarf in for questioning on the ground that this accessory is intended to prevent them from being identified when it could just as easily be intended to protect the person from the cold.

44. The bill also increases the penalties applied to the offence of organising a public demonstration without declaring it by adding the supplementary penalty of a ban on demonstrating to the existing penalties of six-months of imprisonment and a €7 500 fine which the criminal courts may already impose under Article 431-9 of the Criminal Code, as cited above.<sup>21</sup>

### c. Conclusions and recommendations

45. The Commissioner underlines that freedom of peaceful assembly is guaranteed by Article 11 of the European Convention on Human Rights and Article 21 of the International Covenant on Civil and Political Rights. It is closely linked to freedom of expression and is a vital component of the political and social life of a democracy, whose essence has been found by the European Court of Human Rights to lie in its capacity to solve problems through public debate.<sup>22</sup>
46. The Commissioner shares the French authorities’ desire to prevent violence which may hamper the exercise of the freedoms of assembly and expression. She points out, however, that under the European Convention on Human Rights, it is permitted to introduce restrictions to freedom of peaceful assembly only if they are provided for by law, pursue a legitimate aim such as preserving law and order, and are necessary in a democratic society. The well-established case-law of the European Court of Human Rights invites member states to show moderation when introducing restrictions, stating that “it goes without saying that any demonstration in a public place may cause a certain level of disruption to ordinary life and encounter hostility”.<sup>23</sup> The Commissioner also points out that the Court has found repeatedly that “an individual does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration, if the individual in question remains peaceful in his or her own intentions or behaviour”.<sup>24</sup>
47. The Commissioner is concerned about the taking in for questioning and custody of persons wishing to go to a demonstration when no offence was identified and no proceedings were brought subsequently. She considers that such practices constitute serious interferences with the exercise of the freedom of movement and the freedoms of assembly and expression, which are guaranteed by the European Convention of Human Rights, and whose implementation the Court supervises, ensuring in particular that any restriction that is made to them is strictly necessary. She therefore invites the authorities to comply scrupulously with this requirement and to refrain from using such procedures as preventive tools for maintaining public order.
48. As to the bill on strengthening and guaranteeing public order at demonstrations, the Commissioner is concerned about the deterrent effect that all the measures it includes at the time of writing might have on the exercise of the right to freedom of assembly. Introducing an administrative ban on demonstrating would be a serious interference in the exercise of the right to freedom of assembly, given that a ban on demonstrating is already provided for in the Internal Security Code as a supplementary penalty that may be imposed by the judicial authorities. It is neither useful nor advisable to assign such a power, set out in insufficiently clear terms, to the administrative authority without some prior review by the judicial authorities. In general, the Commissioner would invite lawmakers to refrain from introducing into ordinary law measures based on those applied in states of emergency, which pose threats to human rights and fundamental freedoms that were highlighted by her predecessor.<sup>25</sup>

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<sup>21</sup> See §37 above.

<sup>22</sup> European Court of Human Rights, [Stankov and Others v. Bulgaria](#), 2 October 2001.

<sup>23</sup> European Court of Human Rights, [Oya Atam v. Turkey](#), 5 December 2006.

<sup>24</sup> European Court of Human Rights, [Frumkin v. Russia](#), 5 January 2016.

<sup>25</sup> Nils Muižnieks, “Lutons contre le terrorisme dans le respect du droit” (“Combating terrorism with due regard for human rights”), [opinion piece](#) published in *Le Monde*, 2 February 2016.

49. The Commissioner also invites the French parliament to abandon its plans to make hiding part or all of one's face in or within the vicinity of a demonstration "without a legitimate reason" a more serious offence (*délit*). She understands and shares the desire of the authorities to make it possible to identify the perpetrators of violence whoever they are, but she considers that increasing the severity of the penalties incurred will not facilitate identification and is liable to result in disproportionate infringements of the freedom of peaceful assembly and the freedoms of movement and expression.
50. The Commissioner also considers that failing to declare a demonstration is not sufficient in itself to justify an infringement of the demonstrators' freedom of assembly and should not be punished by a ban on demonstrating. Consequently, the Commissioner invites France's lawmakers to abandon the idea of extending the scope of the supplementary penalty of a ban on demonstrating to the offence of failing to declare a demonstration. She also encourages the authorities to investigate the possibility of reducing the formalities for declaring demonstrations, drawing on the recommendations made in this regard in the joint [report](#) of the UN Special Rapporteurs on the rights to freedom of peaceful assembly and of association and on extrajudicial, summary or arbitrary executions on the proper management of assemblies<sup>26</sup> and with due regard for the principles relating to prior declaration of demonstrations set out in the [guidelines](#) of the OSCE/ODIHR and the Venice Commission on freedom of peaceful assembly.
51. Lastly, the Commissioner notes with satisfaction that the National Assembly has dismissed the proposed measure to enable prefects to order searches and frisking within the vicinity and on the edges of demonstrations, which, as the Defender of Rights states in his opinion of 18 January 2019, would disproportionately increase the powers of the administrative authority and the means of coercion of the law enforcement agencies. She invites the government and the senators to refrain from reintroducing this proposal on the second reading.

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<sup>26</sup> Which include a deadline for notification 48 hours before the event and the possibility of on-line notification.