RELATIVITY OF AND GAPS IN SOURCES OF STATISTICS ON PRETRIAL DETENTION

Bruno AUBUSSON de CAVARLAY*, a researcher working at the CNRS and member of the Monitoring Commission for Pretrial Detention since 2002, presents an analysis of statistics on pretrial detention*[1] *and draws some conclusions. This discussion partially reproduces some developments to be found in the annual report. His comments on these statistical sources are purely personal.*

In France, the question of pretrial detention in the criminal justice system has always been controversial, as shown by the frequency of the legislative reforms modifying the requisites for this measure. A study of the place of pretrial detention in the French criminal justice system would require access to detailed data broken down for type of offence at each step in the penal process, from the intervention of criminal investigation departments of the police to the final procedural decision. For the time being, a follow-up of this sort – for which a few exploratory monographs do exist – cannot be conducted on the basis of standard criminal justice statistics. For each level in the system, the sources available yield figures, which can only be made to link up with considerable difficulty. On some points there are large gaps, allowing only for fragile estimates.

GLOSSARY

The English translation of the article 111-1 of the French Penal Code states that ***criminal offences*** *are categorised as according to their seriousness as felonies, misdemeanours or petty offences* :

- **felonies** stand for the French word *crimes,* which are judged by *cours d'assises*, where a jury sits ;
- **misdemeanours** stand for *délits* which are judged by *tribunaux correctionnels*
- **petty offences** stand for *contraventions*, which are judged by *tribunaux de police.*

summary trial standing for *comparution immédiate :* a fast track procedure (avoiding judicial enquiry but allowing pretrial detention) that brings the suspect under arrest for a misdemeanour before a *tribunal correctionnel* at its first possible hearing.

judicial enquiry stands for *instruction* : a procedure that is mandatory for felony and optional for misdemeanours. A judge, called *juge d'instruction*, who is the director of the criminal investigation by the police, handles the case. This procedure allows for the issuing of orders of personal restraint : the *juge d'instruction* can issue an order of judicial supervision by himself, but has to turn to another judge, called *juge des libertés* if he wants the suspect to be submitted to pretrial detention. Under this procedure, the accused person is granted all the rights of a defendant (access to his case file, assistance of a lawyer…).

judicial supervision stands for *contrôle judiciaire* : any order of personal restraint issued by the *juge des libertés*, not entailing imprisonment.

discharge, stands for *non lieu* : an order issued by the *juge d'instruction* stating that no charge is retained against the defendant.

acquittal : a non guilty verdict from a court (*acquittement* before the *cour d'assises* or *relaxe* before the *tribunal correctionnel* and the *tribunal de police*).

From arrest to pretrial detention : being committed

In practice, personal restraint prior to trial begins with police custody, decided by a Criminal Police Officer. Criminal police statistics, entered on *statement 4001*, consistently show the number of police custody measures taken, under all legal provisions (472,000 in 2004)[2], with a breakdown for the nature of the facts ascribed to the "suspect". All in all, the ratio of custodies/suspects has oscillated considerably since 1992 (between 40 and 56 %, with 47 % in 2004). This may be partially due to legal change or to the variable proportion of juveniles involved. On the long term, there is a slight upward trend, and the absolute number of custodies is clearly rising, but the trends vary by type of offence.

The same source shows the number of individuals "committed", which is to say incarcerated. This potentially very interesting piece of information only indicates the final outcome of a chain of decisions following possible police custody, including handing over to the Public Prosecutor ("*déferement*"), the Prosecutor's dispatching decision, with a possible request for a committal order and delivery of the committal order by a judge. One difficulty arises here, since some police services, especially in the Paris area, do not know what happens after they have handed over the suspect to the Prosecutor (committal or release? committal is then conventionally retained in the statistics). It would be more logical, at the police stage, to count those suspects who have been handed over to the Public Prosecutor and then at this prosecutorial stage, to hold another count (release, committal order or summary trial). Since there are no judicial statistics per individual for this first phase of the procedure, we turn to police data for an indication: the overall committal rate (6.6 % of all suspects in 2004, or 66,900 in absolute figures) declined steadily between 1976 (16.2 % or 74,400) and 2001 (6.1 % or 50,500), then rose suddenly in 2002 (6.8 %), only to decrease subsequently[3]. However, the number of suspects continued to rise sharply between 2002 and 2004, so that the absolute number of persons counted as committed continued its definitely upward trend.

That rate varies considerably depending on the offences considered. In 2004, for instance, the committal rate was 3 % for shoplifting, 4 % for use of drugs, 17 % for sexual violence, 25 % for drug trafficking and robbery, while homicide took a strong lead with 62 %. The overall rate then depends on the relative shares of these various types of offences. This kind of structural effect may affect all of the indicators pertaining to pretrial detention, and should be taken into account when assessing global outcomes. In fact, committal rates do not all show the same evolution, although there is an overall upward trend. Finally, between 2001 and 2004, the rise in the number of suspects (+ 22 %) "explains" to a large extent the rise in the number of persons committed (+ 32 %), but as it turns out, there definitely is an intensification of committal rates per types of offences[4]. For some kinds of offences (thefts of or from

[1] Instituted by Parliament (Act of June 15, 2000, article 72) at the Ministry of Justice.

[2] The absolute figures have been rounded out.

[3] Bad checks, decriminalized in 1992, have been excluded to make the rates comparable over the whole the period.

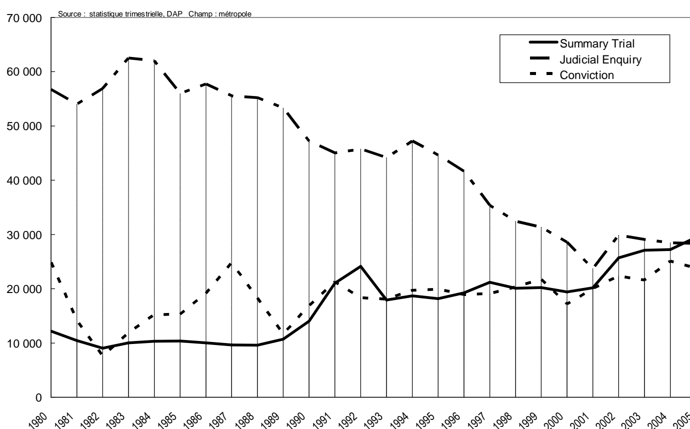
[4] The committal rate is 6.57 % in 2004. Had the distribution per types of offenses remained constant (the 2001 one), the overall committal rate for 2004 would have been 6.62 %, as against 6.05 in 2001. This measures a rate-linked effect. The structural effect (had the 2001 committal rates been maintained constant) yields an overall fictitious rate of 6.02, and therefore plays almost no role.

motor vehicles) this intensification had a lesser effect on the absolute number of those committed, since the number of suspects dropped.

Impact of summary trial

The judicial enquiry phase, which is optional for misdemeanours, is declining notably, both in proportion and in absolute figures. Summary trials (ST) largely balance out that drop: national criminal justice policy orientations have recommended that shift – the development of "real-time processing" – at least since the mid 1990s. According to this policy, judicial enquiry is to be reserved for serious, complex cases. It remains to be seen whether the quite massive swing from judicial enquiry procedures to summary trial is – or is not – attended by increased recourse to pretrial detention in either the strict sense (detention prior to trial) or in the broader sense (detention prior to final conviction). A positive response would lend some weight to the argument according to which the choice of summary trial makes both the public prosecutors and the bench more dependent on the formatting of the paper work by the police. Police officers hardly conceal that they consider immediate incarceration as an important indication that their action has been successful, and ST paper files are less rich in personal information about the suspect on the basis of which judges might consider alternatives to imprisonment.

Chart 1. Evolution of prison-entering according to status



Whereas, starting in 2002, the number of cases tried by ST (38,300) exceeded the number of enquiries (37,400), it was in 2005 that the number of prison enterers under the summary procedure (29,500) exceeded those entering under judicial enquiry (28,400: see chart 1). It is, alas, impossible to chart those "shifts", firstly because of the lack of detailed statistics on the dispatching of cases per type of offence, and secondly for lack of data on prosecuted individuals and on the measures inflicted on them under a ST procedure. Little is known, then, on the frequency of pretrial detention in case of summary trial or even on the frequency of the issuing of a committal order following immediately the sentence. A rough estimate then, can only be made indirectly, by using other sources.

One attempted estimate is offered by the *Annuaire statistique de la Justice*, which gives, for example, about 12,800 convictions by summary trial preceded by pretrial detention (for an average of 12 days) in 2002. Since the nature of the procedure is not specified in the statistics drawn from the National Criminal Records, this estimate rests on the assumption that convictions preceded by pretrial detention may be counted as summary trial when the procedure took less than two months. For 2002, the statistics drawn from the National Inmates data base (*fichier national des détenus, or FND*) gave a higher number of pretrial incarcerations prior to summary trials (15,700). The low level of the National criminal record based estimate (12,800) may be due to defective identification of all ST pretrial detentions since the procedure probably lasts more than two months in case of appeal. Correctional data is therefore a better starting point.

In 2002, 38,300 cases received a ST, two out of five of which (an order of magnitude) involved pretrial detention and perhaps four out of five immediate incarceration (pretrial detention or committal order at the hearing : 31,500 according to the FND). These estimates are certainly very gross, as the number of charged persons by case may weigh on them, but they do show the specificity of ST, since the overall rate of sentences to unsuspended prison terms represents about one out of four sentences meted out in *correctionnel* courts. Very little is known about the trend in the rate of immediate imprisonment under a ST procedure, since the correctional source itself has recently been impoverished. As of 2003, the FND ceased to provide this piece of information. We are therefore obliged to revert to the quarterly statistical data used for chart 1 : but this causes a break in the series and an apparent drop[5] (28,600 committals under a ST procedure in 2002). On this trend as well as on the nature of the offences involved, statistical sources remain defective.

Pretrial detention and release during enquiry

The safety measures taken under a judicial enquiry procedure are described by two distinctly different data-collecting systems (which again diverge !) : a longstanding one (*cadres du parquet*, or Public Prosecutor's data) allows for a very long-term approach counting yearly decisions ; the other one, called *répertoire de l'instruction* dates only back to 1990 and yields some more detailed information on cases closed during the year. The *cadres* make it possible to calculate the rate of committal orders and of judicial supervision *ab initio* with respect to the number persons under judicial enquiry (see table 1). Over a period of about twenty years, the serious drop in the absolute number of committal orders is mostly due to the declining number of these persons. This figure is not known for the pre-1982 period. The rate of committal orders dropped between 1984 and 1994, with a particularly sharp decline for the period around the 1993 legislative reforms. Paradoxically, the year 2001 seems to be marked by a high rate although the June 15, 2000 Act *Reinforcing the Presumption of Innocence* became effective as of January 1st 2001. This stems from the introduction of an assisted witness status. The rate shown in table 1 is of the number of committal orders to that of persons under judicial enquiry. Considering that the 5,852 assisted witnesses of 2001 would also have been under judicial enquiry under the earlier provisions, we find a rate of committal orders (for the total of assisted witnesses and persons under judicial enquiry) identical to that of 2000. Conversely, the considerable rise in the rate in 2002[6] is not of this type and constitutes a momentary halt in the declining rate of committal orders issued under judicial enquiry. The 2005 figures are not yet available (as of June 2006), so that the subsequent trend is still unclear. The correctional source claims that the absolute figures are stable, and if the drop in the committal order rate seems to have resumed after

[5] This is why chart 1 is based on quarterly statistics (and on data for metropolitan France to obtain a longer series). Note that according to the FND source, in is during the 1990s that the number of incarcerations under a ST procedure began to exceed the number of committal orders issued during judicial enquiries.

[6] Monthly prison series (reporting "stocks" rather than "flows"), show this episode to have begun during what was known as the "Chinese" affair (during a burglary, the dramatic arrest – two police officers were killed – of a former convict released following pretrial detention). From that point on (October 2001), a definite trend reversal in the number of pretrial prisoners is observed. For flows, measured annually, the reversal is only visible in 2002.

the 2002 episode it is because the number of persons undergoing judicial enquiry is increasing, even if the number of cases subjected to this procedure is still declining. The absolute number of committal orders is stable. The increasing proportion of drug trafficking cases, many involving charges against a great number of persons, and especially simple users who are rarely placed in pretrial detention may account for this discrepancy and the lower committal order rate. According to the police source, the number of persons suspected of drug dealing rose by 30 % between 2002 and 2004 and the committal rate has declined, at least temporarily, owing to a slower rise in the number of suspects committed.

Over the long term, the substitution effect between committal orders and judicial supervision seems quite limited. For the last ten years, the frequency of judicial supervision *ab initio* definitely rose, but this measure comes in addition to pretrial detention. In 2004[7], over four out of five persons under judicial enquiry were subjected to either safety measure, as against three twenty years earlier. Decisions to release following a committal order (and before the end of the judicial enquiry) are proportionally increasingly frequent, with close to 60 % of committal orders in 2004, and in most cases accompanied by judicial supervision. In the long term this transformation of the use of pretrial detention, with the fractioning of imprisonment it entails in case of sentencing to a longer prison term, is therefore at least as important as the relatively fragile limitation of the frequency of this measure. Correlatively, the number of cases for which detention is maintained when the case is referred to *correctionnel* court decreased considerably between 1984 and 2001; in this instance, however, the reversal observed in 2002 is not quite incidental.

Table 1. Safety measures decided in the framework of an investigation

Year	Cases transmitted to the investigating judge	1 Number of persons under judicial enquiry	2 Committal order	3 ratio (2)/(1)	4 judicial supervision	5 ratio (4)/(1)	6 Released under judicial supervision	7 ratio (6)/(1)	8 Judicial supervision	9 ratio (8)/(1)	10 Total of releases	11 ratio (10)/(2)	Referral to a correctionnel court: Detention not maintained	Referral to a correctionnel court: detention maintained
1982	61 921	105 101	46 933	*44,7*	14 123	*13,4*	7 742	*16,5*			22 062	*47,0*		
1983	70 256	112 652	47 895	*42,5*	15 302	*13,6*	7 354	*15,4*			23 996	*50,1*		
1984	66 148	104 067	49 112	*47,2*	12 624	*12,1*	8 673	*17,7*	21 297	*20,5*	25 303	*51,5*	2 204	21 679
1985	60 884	92 204	39 959	*43,3*	13 038	*14,1*	7 349	*18,4*	20 521	*22,3*	17 422	*43,6*	2 236	18 447
1986	59 906	88 468	39 746	*44,9*	12 384	*14,0*	7 918	*19,9*	20 324	*23,0*	15 783	*39,7*	1 653	18 223
1987	57 680	88 391	36 959	*41,8*	12 546	*14,2*	8 364	*22,6*	21 084	*23,9*	15 453	*41,8*	1 602	17 195
1988	55 924	82 686	36 408	*44,0*	14 015	*16,9*	8 801	*24,2*	22 933	*27,7*	15 453	*42,4*	1 766	15 798
1989	54 138	80 429	34 174	*42,5*	12 981	*16,1*	8 675	*25,4*	22 698	*28,2*	13 897	*40,7*	1 299	14 681
1990	52 236	70 916	30 262	*42,7*	12 488	*17,6*	7 963	*26,3*	21 095	*29,7*	12 957	*42,8*	1 472	12 845
1991	50 586	76 078	31 160	*41,0*	12 143	*16,0*	8 329	*26,7*	21 381	*28,1*	13 149	*42,2*	1 103	12 204
1992 (*)	52 214	83 567	31 579	*37,8*	12 810	15,3	9 343	*29,6*	21 140	*25,3*	13 467	*42,6*	859	13 581
1992 (*)	53 505	86 121	32 769	*38,0*	13 157	15,3	9 563	*29,2*	23 717	*27,5*	13 846	*42,3*	864	14 166
1993	47 844	81574	28240	*34,6*	12191	14,9	9045	*32,0*	20915	*25,6*	13044	*46,2*	493	11301
1994	49 515	91419	30498	*33,4*	13079	14,3	10048	*32,9*	23161	*25,3*	13201	*43,3*	721	11847
1995	44 554	73159	29029	*39,7*	12993	17,8	9683	*33,4*	22549	*30,8*	12849	*44,3*	925	13365
1996	43 671	67230	27830	*41,4*	13557	20,2	10535	*37,9*	24088	*35,8*	13232	*47,5*	749	12706
1997	43 562	67584	26435	*39,1*	13799	20,4	10414	*39,4*	24528	*36,3*	12864	*48,7*	456	11661
1998	40 362	59905	23976	*40,0*	13391	22,4	10754	*44,9*	24162	*40,3*	13219	*55,1*	502	11417
1999	39 176	60675	24207	*39,9*	12908	21,3	9501	*39,2*	22466	*37,0*	13044	*53,9*	1142	8730
2000	37 737	56752	22793	*40,2*	16765	29,5	11144	*48,9*	27914	*49,2*	11807	*51,8*	4211	6418
2001	36 398	43711	19534	*44,7*	16308	37,3	7965	*40,8*	24273	*55,5*	9938	*50,9*	1943	4725
2002	37 444	48543	23787	*49,0*	17868	36,8	8815	*37,1*	26694	*55,0*	11446	*48,1*	1049	5750
2003	35 143	51821	24001	*46,3*	20521	39,6	8445	*35,2*	28980	*55,9*	12640	*52,7*	1369	6854
2004	34 211	55640	23808	*42,8*	21699	39,0	8440	*35,5*	30322	*54,5*	14271	*59,9*	1160	7154

Unjustified pretrial detention

The number of releases during or at the end of the judicial enquiry obviously raises the question of the outcome of this procedure following committal to pretrial detention, with respect to two issues: the acquittal of persons who were placed in detention prior to final conviction and the possible influence of this detention on the nature and quantum of the sentence pronounced.

The existence of cases of pretrial detention followed by discharge, or acquittal has always been viewed as a flaw in the protection of personal freedom and such cases, known as unjustified pretrial detention, now entitle the person to financial redress (June 15, 2000 Act). Such cases cannot be counted presently, for lack of a statistical follow-up of persons released. Statistics based on the Judicial Enquiry Register theoretically count all cases of pretrial detention followed by discharge, irrespective of whether or not they were preceded by release. The only source available for acquittals is the correctional statistics and by construction these only reckons those cases in which the decision has put an end to detention. It ignores those cases in which the acquitted (or discharged) person was released beforehand. In the case of discharge, the correctional source

[7] This is a ratio, but not strictly a percentage, since the release may be consecutive to incarceration decided before 2004.

[8] TOURNIER P.V., MARY F.L., PORTAS C., 1997, *Au delà de la libération. Observation suivie d'une cohorte d'entrants en prison*, Guyancourt, CESDIP, Collection "Études et Données Pénales".

[9] Note that this estimation is high: the overall discharge or acquittal rate is approximately 5 %. This implies that it is four times as high for defendants placed in pretrial detention and released before being judged.

cites, for 2004, 87 cases of release as direct consequence of this decision, whereas the Judicial Enquiry Register gives an overall figure of 599 cases of pretrial detention followed by discharge! One hopes that the gap is lesser for cases referred to court, but a little more accuracy would be helpful in shedding some light on the controversy over pretrial detention, and also, actually, on the efficiency of the compensation procedure for unjustified incarceration. A multiphased piece of research conducted by the CESDIP[8] corroborated this want. In a sample of 419 cases of releases following a "release order", taken from persons who had entered prison in February 1983, 22 % had no sentence registered on their criminal record for the corresponding case approximately 5 years after the date of their release. This includes cases ending in discharge and cases of acquittal preceded by release. There is the possibility that the criminal record does not mention some sentences, especially for minors in case of rehabilitation, cases of amnesty for offences prior to 1981 (but there was no amnesty in the period under review) or very late judgment or registration on the criminal record. An estimate of 22 % projected on the national level[9] would presently yield over 3,300 cases of unjustified detention (for slightly over 15,000 releases), added to the 611 releases resulting (in 2004) directly from discharge or acquittal. For the total number of unjustified pretrial detentions, the *Annuaire Statistique de la Justice* cites 1,133 cases for 2004, excluding cases of acquittal following release. The range is really a bit excessive, and our perplexity is further increased when we note that some 500 compensation claims for unjustified detention were filed with the appeal courts in 2004.

Pretrial detention and sentencing

The data culled from the National Criminal Records give us a slightly better idea of the link between pretrial detention and the sentence pronounced. Contrary to what is still occasionally claimed, pretrial detention is not always "covered" by the sentence. In 2004, sentences other than unsuspended imprisonment represented 10.6 % of guilty verdicts following pretrial detention and in 7.3 % of cases the unsuspended prison term was shorter than the detention already served. For the latter the difference was often slight (under 2 weeks in one half of cases); a goodly share (broadly one half) of sentences not involving personal restraint was the outcome of a summary trial with short pretrial detention.
The situation of the defendant at the hearing influences the punishment option. Absence (trial by default or even a trial deemed adversarial when the defendant, despite personal summons to appear, is absent) notoriously entails a harsher sentence. Appearing as a prisoner or under arrest probably also entails increased frequency of unsuspended imprisonment. Both a detention maintained following judicial enquiry, while awaiting trial, and summary trial, are generally viewed by judges as conducive to unsuspended imprisonment, except perhaps in some large courts where summary trial is much more frequent than elsewhere and therefore represents a less selective option. Information from the National Criminal Records would help us approach this issue, provided summary trials were more clearly evidenced. This would be a first step toward analysing the relationship between length of pretrial detention and length of the sentence pronounced, for it seems clear that there are a multiplicity of patterns of recourse to pretrial detention: ST with short detention prior to sentencing, judicial enquiry of a misdemeanour with release before trial, serious cases (either misdemeanours or felonies) with imprisonment maintained until trial each involve different sentencing processes.

Length of pretrial detention

Average length of pretrial detention is either estimated on the basis of correctional statistics (such as the ratio of stocks to flows) or more accurately evaluated on the basis of The National Criminal Records data. Not only does the way of calculating change, since ultimately unjustified detentions are not entered in the Criminal Records, but the definition varies as well. Prison population counts list inmates present on a given day according to their status: convicted or awaiting trial. The latter include persons whose case is under judicial enquiry or awaiting sentencing or having filed an appeal. The latter category is not included in the estimation drawn from the Criminal Records if the first court's conviction becomes final. However, both approaches show an increase in the average length of pretrial detention. For those convicted in 1984, the average length of pretrial detention was 3.7 months, whereas it was 5.5 months for the 2004 group.
As with the committal rate, we must consider the possibility of a structural effect. The average length of pretrial detention is much higher for felonies (about two years in 2004) than for misdemeanours (4 months). Now the trends in each category take opposite courses, with a long-term increase for felonies and a drop for misdemeanours (owing to a change in prosecution modes). The outcome, then, is a longer average duration, all else being equal. For some misdemeanours (assault, thefts and violation of the immigration laws, for instance), no evident or persistent increase is observed. But for sexual violence and drug offences, detention is definitely longer. Now these are clearly the types of offences the most often mentioned as requiring an investigation because of their complexity (in the case of drugs) or their seriousness (for sexual offences).
Concerning the latter, for lack of detailed data on the nature of the offences in judicially enquired cases, we note that the Judicial Investigation Register gives an overall number of individuals initially accused of a felony in the introductory prosecution brief much higher than the number of persons referred to an *assises* court. In cases terminated in 2004, about 12,000 persons were originally prosecuted for a felony, representing 24 % of all those submitted to judicial enquiry, whereas 3;700 people were referred to an *assises* court, representing 8 % of those prosecuted at the end of this procedure. This gap is widening: for cases terminated in 1990, about 8 % of defendants (5,900 defendants) were originally charged with a felony whereas 4 % (2,500) were sent to *assises* court. Now the maximum length of detention incurred under committal orders for felonies is higher than for misdemeanours. When criminal cases are referred to *correctionnel* court (which is the explanation for the significant difference in figures), the maximum durations for misdemeanours apply automatically, possibly entailing the release of the accused. But the pretrial detention time has been already served, and affects the actual lengths of sentences. This probably plays a role for sexual violence when tried by a *correctionnel* court. The average length of pretrial detention rose from 4.8 to 7.9 months between 1984 and 2004, and the proportion of incarcerations for over one year went from 6.3 % to 25.9% of sentences preceded by that measure over the same period. These mechanisms may limit the practical effect of the upper limits set by law.

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Use of existing statistical sources on pretrial detention, however disparate and spotty, provides some most useful informational elements on the enforcement of the successive legal reforms. Emphasis has deliberately been placed here on those aspects of pretrial detention for which advances remain to be made in the statistics-collecting system or in the exploitation

of existing sources. These imply that researchers be given more complete access to databases. That would greatly enhance the quality of public and political debate on this painful problem.

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The 2005 annual report of the Monitoring Commission on Pretrial Detention is available in the Documentation Française Digital Library of Public Reports: *http://www/ladocumentation francaise.fr/rapports-publics/064000300/index.shtml*