



TERROR IN COURTS

French counter-terrorism: Administrative and Penal Avenues

Report for the official visit of the UN Special Rapporteur on
Counter-Terrorism and Human Rights
May 2018

The Capstone Course on Counter-Terrorism and International Crimes

Dr Sharon Weill

PSIA, Sciences-Po, PARIS

Acknowledgments

This report was prepared for Ms. Fionnuala Ni Aolain, United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on the occasion of her official visit in France in May 2018.

It is the product of work done with the students enrolled in the Capstone Course on International Crimes and Counter- terrorism at Sciences-Po Paris (PSIA) during spring semesters in 2017 and 2018:

- Daphne Amouna, Sophie-Anne Bisiaux, Camille Kasavan, Jonas Freist-Held, Paul Leclerc, Jacob Lypp and Talya Swissa (class 2017).
- Emily Campbell, Clémence Girin, Claire Pershan, Michelle Silva, Joachim Stassart, Nicolas Tanguay-Leduc and Gabrielle Vallieres (class 2018).

I would like to extend my thanks to the experts, scholars and legal practitioners, who came to our class to give seminars:

- Magali Lafourcade (CNCDH)
- Professors Serge Slama and Vanessa Codaccioni
- Emmanuelle Ducos and Leila Bourguiba (France War Crimes Investigation Unit)
- Lawyers Clemence Witt, Arie Halimi, and Camille Lucotte
- Anne Charbord and Lisa Oldring (UN OHCHR)
- Stephane Ojeda (ICRC) and Anjaly Sualy (FIDH)

Special thanks goes also to Jean-Marie Fardeau (Vox Public), Lanna Hollow (OSJI), Jeanne Sulzer (OSIFE consultant), Carine Placzek and the lawyers who kindly agreed to answer our numerous questions.

Dr Sharon Weill
May 2018,
PSIA, Sciences-Po, Paris

TABLE OF CONTENTS

PART I - INTRODUCTION TO THE FRENCH LEGAL SYSTEM

1- The Constitutional Council	4
2- Administrative Jurisdiction	4
Who Are the Judges?	6
Notes Blanches	6
3- Penal Jurisdiction	7
Institutional Framework for Terrorism Cases	8
La Cour d'Assises spécialement composée	8

PART II - THE RADICALIZATION OF ADMINISTRATIVE LAW

1 - Administrative Measures	9
Prohibition of leaving the territory (interdiction de sortie du territoire)	9
Intelligence gathering	12
2 - From state of emergency to permanent legislation	13
State of emergency	13
Institutionalizing the state of emergency	14
3 - The Case of House arrest	15
Judicial review	16
Data	

PART III - CRIMINAL LAW : AN EVER-EXPANDING COUNTER TERRORISM PARADIGM

1 - Pre-emptive Criminal Justice	18
2 - Main accusation: Association of wrongdoers in relation with a terrorist enterprise	19
Evolution	20
Level of punishment	20
Extraterritorial competence	21
Elements of the crime	21
3 - Prosecution Policy: Expansion and Repression	23
The new prosecution policy (2016)	23
4 - Preemptive Justice: Human Rights Considerations	25

PART IV - RULE OF PROCEDURE

1 - Civil law criminal procedure - how does it work ?	26
Arrest and police custody (Garde à Vue)	26

Maximum duration of police custody	27
Access to a lawyer	27
Interrogation conditions	28
Pre-trial detention	29
Solitary confinement	30
Criminal Procedural Framework for Minors	32
2 - The penitentiary policy	33
Prison security measures	34

PART V - EXTERNALIZATION OF JUSTICE : FRENCH FOREIGN FIGHTERS DETAINED ABROAD

1 - Makeshift Tribunals in Iraq: Judicial Black Sites	36
2 - An Obligation to Repatriate French Citizens?	37
3 - Undermining Counter-Terrorism Efforts	37
4 - Consular protection	38

PART I

INTRODUCTION TO THE FRENCH LEGAL SYSTEM

The French legal system is composed of a judicial and an administrative branch, which function independently from each other in accordance with the principle of “jurisdictional dualism” (*dualisme juridictionnel*). Article 66 of the 1958 French Constitution sets out the French Habeas Corpus which provides that, ‘the Judicial Authority [and not the Administrative order], guardian the freedom of the individual.’¹

The Constitutional Council

The Constitutional Council (*Conseil Constitutionnel*) ensures that French legislation both conforms with the rights and liberties laid down by the French Constitution and provides a judicial check on executive power. Its decisions are binding on public authorities and the courts.

Prior to the enactment of a law, its constitutionality must first be examined upon the request of 60 members of Parliament.² Since 2010, an individual may challenge enacted laws by bringing a petition for judicial review (Question Prioritaire de Constatutionnalité, “QPC”). This procedure enables an individual to request the review of legislation applicable in his/her own case. The two Supreme jurisdiction courts, of either the administrative order or the judicial authority, may reject the petition or allow the QPC to be transferred to the Constitutional Court.

The Constitutional Court is composed of nine members, who sit for nine years for a non-renewable term and are appointed by the President of the Republic and the President of each of the Assemblies of Parliament (the Senate and the National Assembly). Four of them are parliamentarians. The former Presidents of the French Republic have the right to be members of the Council, although only one presently exercises this right. Designated members are not necessarily magistrates and although it exercises a jurisdictional activity of primary importance, no specific legal qualification is required.

¹Conseil Constitutionnel, ‘Constitution of 4th October 1958’ <<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/constitution/constitution-of-4-october-1958.25742.html>> (accessed 14 April 2018.)

²Article 61 of the Constitution.

Administrative Jurisdiction

The Administrative courts adjudicate upon matters of public law. They derive their authority from 1789 when, during the French Revolution, the French executive sought to prevent judicial intrusion into the executive domain. The administrative courts were thereafter established with a view to preventing any such intrusion. The administrative judicial system is composed of three instances: The administrative tribunals (first instance courts); the administrative court of appeal (*cours administratives d'appel*)³ and the State Council (*Conseil d'Etat*).⁴ The *Conseil d'Etat*, created in 1799, is the supreme administrative court. It serves an advisory function on regulatory and legislative matters to both the government and Parliament (Articles 37 and 39 of the Constitution.)

A range of administrative measures, which have conferred extensive surveillance and control powers to the Ministry of the Interior and its security agencies, have been introduced in recent years. This phenomenon reached its peak during the state of emergency (*l'état d'urgence*)⁵, which was declared in the aftermath of the November 2015 attacks and lasted for a period of two years. Subsequent legislation has transferred elements of *l'état d'urgence* into regular law.⁶

The administrative judge has the competence to review contested implemented administrative measures. Administrative measures enacted with a view to combating terrorism can only be reviewed *a posteriori* either through the procedure for an *excess of power* or by way of *référé-liberté*. In the latter, the litigant has the power to urgently request the administrative judge to stop "any serious and obviously illegal infringement" to a "fundamental freedom". Ruling in 48 hours, in the first instance, and then on appeal before the judge of *référé* of the *Conseil d'État*, the administrative court of appeal is not included in this two-step emergency procedure. The judge has extensive powers and can order any measure necessary to annul the infringing measure. These measures can be set aside where they are deemed to be an excess of power.⁷

³ There are 42 administrative tribunals, and eight administrative appeal courts in France.

⁴ The *Conseil d'État* hears direct appeals to deal with ordinances and decrees of the President and rules made by ministers, as well as appeals against the decisions of sixteen independent agencies.

⁵ The State of emergency was declared after the terror attacks in Paris, on the 14th of November 2015 and lasted until the 30th of October 2017. The competence of the administrative judges is outlined in *Loi du 3 avril 1955 relative à l'état d'urgence*, art. 7, as endorsed by *Loi no 2015-1501 of 20 Nov. 2015*, art. 4 which was prolonged six times in two years. In 2005 following violent events in the suburban areas of Paris, the state of emergency was declared in the Paris region for 5 weeks, and lastly, following the terror attacks from 14 Nov. 2015 to 1 Nov. 2017.

⁶ It attributed extensive derogative powers - such as house arrest, closure of religious sites, night search and requisitions to the administration without any warrant. See for example, *Loi n° 2015-1501 du 20 novembre 2015*, art. 4.

⁷ *Loi n° 2000-597 du 30 juin 2000 relative au référé devant les juridictions administratives*, art. 5

→ *Who Are the Judges?*

Administrative judges have very different professional backgrounds to ordinary judges, who are trained at law school and the *École de magistrature* (ENM). The administrative judges are not required to hold a law degree—they are administrators⁸. Many of them are graduates from the prestigious national school of administration *l'École nationale d'administration* (ENA), which is difficult to access and trains many of the future French political elite. Others may be recruited after obtaining work experience in the administration. As for the Conseil d'État, the government nominates a significant portion of its administrator-judges.

The proximity of the administrative order to the administration itself is likely to create a culture of proximity between the government and the administrative judge, as they mostly come from the same institution, ENA. The influence of the executive on the administrative order, as well as the latter's general understanding and empathy for the state's objectives and difficulties, may result in a general benevolence of the administrative judges when assessing the legality of a measure undertaken by state institutions.

→ *Notes Blanches*

Administrative courts rely on 'notes blanches' as evidence. This takes the form of an anonymous document provided by the security and surveillance services of the Ministry of the Interior. It transforms intelligence into evidence for use in the administrative courts. It may contain information detailing suspicious behavior or actions, including association with other suspected persons but provides no information vis-à-vis the sources of that information, and it is undated and unsigned. In practice, the court's treatment of the note blanche document is underpinned by a presumption of truth.

As the president of the Litigation section at the Conseil d'État in a Parliamentary Committee on the control of the state of emergency stated,

“We start from the principle that the intelligence services work honestly and they don't exaggerate the content of the notes blanches.”⁹

⁸ Ordinance n° 2016-1366 du 13 octobre 2016 portant dispositions statutaires concernant les magistrats des tribunaux administratifs et cours administratives d'appel, art 2.

⁹ Bernard Stirn, Assemblée Nationale: Rapport No 3784 (25th May 2016) <<http://www.assemblee-nationale.fr/14/rapports/r3784.asp>> (accessed 17th April 2018.)

Notes blanches are not admissible before the criminal courts.¹⁰ In the administrative courts, though there is no obligation on the part of the administrative judge to treat notes blanches as binding proof, there is a judicial tendency to make decisions based on these notes, without further proof being sought or established.¹¹ Their use has come to be legitimized in the jurisprudence arising in the administrative court.¹²

In practice, French commentators have observed that,

“The decisive value of these white notes and the weight they take in the majority of the cases related to the state emergency, constitute one of the most significant elements of the exceptionalism of the administrative judicial procedure... And, except in the rare cases where the applicant manages to "dismantle" the police version—often thanks to good criminal lawyers—the administrative judge generally endorses the factual elements reported by the notes blanches.”¹³

According to one administrative judge moreover,

“The control is not easy to do...you have to determine the dangerousness of a person according to an uncertain factual basis, based on fears, on a number of assumptions... The decision of the administrative police, by construction, is prospective.”¹⁴

Penal Jurisdiction

French Criminal Law distinguishes offences (*les délits*) from more serious crimes (*les crimes*), in terms of their gravity and the relevant procedural mechanism triggered to address them (Code Pénal [CP] art. 111-1). In terms of gravity, *délits* are those offences, which are punishable by up to 10 years' imprisonment whereas *crimes* denote those crimes, which carry a sentence of more than 10 years to life imprisonment (Code de procédure pénale [CPP] art.231).

Les délits fall within the jurisdiction of *Le Tribunal Correctionnel*, the court of first instance in penal matters. The *Cour d'Assises* is competent to try *crimes* and is normally composed of a judge and a popular jury. Appeals are issued to the Appeal Court and the decisions of the Appeal Court may then be appealed on points of law or procedure (but not on facts) to the *Cours de Cassation*, the highest criminal court in France, whose judgments are binding on the referring court.

¹⁰ For the Intelligence- to- Evidence process see: Antoine Mégie, Working Paper of Institut de formation judiciaire, February 2017, “Terrorisme et droits fondamentaux : la phase d'enquête et de renseignement.”

¹¹ Juge des référés du Conseil d'État, Ordonnance n° 395622 du 6 janvier 2016.

¹² Arrêt DIOURI (CE, Ass., 11 octobre 1991) ; Ministre de l'Intérieur c/ M. RAKHIMOV, CE, 3 mars 2003.

¹³ Stéphanie Hennette, Vauchez et Serge Slama, “Harry Potter au Palais royal? La lutte contre le terrorisme comme cape d'invisibilité de l'état d'urgence et la transformation de l'office du juge administrative,” (2017) 2 Cahiers de la justice, 288.

¹⁴ Guillaume Odinet, “Le rôle du juge administratif dans le contrôle de l'état d'urgence,” (2017, 2) Les Cahiers de la Justice, 278 ; For background see Pierre Alonso, *Libération*, “Notes blanches : les corbeaux de la place Beauvau,” (Paris, 15th February 2016).

→ *Institutional Framework for Terrorism Cases*

The law n° 86-1020 of 9th September 1986, centralised the judicial procedure for terrorist offences within the Paris Judiciary.¹⁵ Thereafter, prosecution, investigation and trials for terrorist offences fall within the competence of the Paris regional court. The 1986 Law created a specialised corps of investigating judges and prosecutors based in Paris-the Central Counterterrorism Department of the Prosecution Service to handle all terrorism cases. This centralising provision has been regularly update, but remains the base for legal competence in proceedings vis-à-vis terrorist matters in France. The decision not to create an exceptional jurisdiction, specially tasked with adjudication on terrorist matters, served to depoliticise those legal proceedings having a sensitive terrorist subject matter.

→ *La Cour d'Assises spécialement composée*

The 1986 law created a specially composed Assize Court (*La Cour d'Assises spécialement composée*), mandated to adjudicate on terrorist-related offences. This specially composed court, contrary to the composition of the regular Cours d'Assises with respect to non-terrorist-related criminal matters, is without a jury. Instead, it is composed of the Court's President as well as professional judges, of which there are 4 at first instance and 6 on appeal¹⁶. The specialty of this regime is derogatory but its application by ordinary magistrates ensures it derives its origin from within French Law itself.¹⁷

The prosecution of terror-related *délits*, which incur a penalty up to 10 years of imprisonment, takes place before the 16th Chamber of the Court of first instance in Paris, which is composed of a bench of three judges. The prosecution of terror-related *crimes*, which incur a penalty above 10 years, are judged by the Paris Cour d'Assises specially composed of professional judges only.

A terrorism investigation takes an average of two to three years. The trials related to the Iraqi-Syrian front for example commenced in 2015.¹⁸ Since then, the 16th Chamber has been prosecuting over 200 cases. In contrast, very few cases have been heard before the specially composed Cour d'Assises. Therefore, unlike its name may suggest, this chamber is not specialized in terrorism. It is composed of a different bench of judges in each trial. The Presiding judge is chosen from the regular pool of Assises judges, and the four other magistrates ('assessors') who can be any magistrates - investigative or sitting judges, without any particular experience in terrorism or radicalisation. In practice, the specialised bench is rather the 16th chamber of the court of first instance, rather than the Assises court.

¹⁵ This jurisdiction extends to cover terrorist acts committed outside the French Republic. See CPP art. 706-17.

¹⁶ Article 698-6 of the CPP (2017 amendment).

¹⁷ The *Cour d'assises spécialement composée* derives its origin from a law of 21st July 1982 that established its competence over crimes related to the military and the safety of the State, replacing the Cour de sûreté de l'État which was abolished in 1981. In 1986, following threats on members of the jury it was decided to extend the competence of this special chamber to cases dealing with acts of terrorism. Today, it also has competence over organised crime. Unlike the jury courts, decisions are adopted upon regular majority.

¹⁸ Antoine Mégie and Jeanne Pawella study these trials. See: 'Juger dans le contexte de la "guerre contre le terrorisme". Les procès correctionnels des filières djihadistes', (2017) 2 *Les Cahiers de la Justice*, 235.

PART II

THE RADICALIZATION OF ADMINISTRATIVE LAW

Administrative law has acquired an increasingly important role in the French antiterrorism apparatus. It has developed an impressive capacity to counter terrorism, not through repression, but in the name of prevention, anticipation and vigilance.¹⁹

The “administrative police”²⁰ refers to any administrative action taken with a view to maintaining public order. Incrementally, this has become a central pillar of the French counterterrorism apparatus. So much so that in 2006, the Commission Nationale Consultative des Droits de L’Homme (CNCDH) expressed its concern with “the increasing power of administrative police to the detriment of judicial authority, which is normally “the sole guardian of liberty.”²¹ The CNCDH has criticized the ambiguity and imprecision surrounding the administrative police, which it deems to be fundamentally opposed to civil liberties.

1 - Administrative Measures

1.1 - Prohibition of leaving the territory (interdiction de sortie du territoire)

On November 2014, France took stringent measures to prevent individuals becoming foreign fighters by enacting the Law 2014-1353 *reinforcing dispositions relative to the fight against terrorism*. This law applies independently from state of emergency measures, and indicates France’s willingness to rely on administrative measures in the fight against terrorism, even prior to the Paris and Saint-Denis attacks of 2015.

Article L224-1 accords the administration (without judicial approval) the competence to cancel and seize passports and ID cards of French nationals when ‘there are serious reasons to believe that the individual is planning to travel abroad to join a terrorist group or to engage in terrorist activities.’²² Once a reasoned decision is taken and provided in writing, the

¹⁹ Secrétariat général de la défense nationale, “La France face au terrorisme - Livre blanc du Gouvernement sur la sécurité intérieure face au terrorisme,” (La Documentation Française, 2006) page 42. Its authority derives from the Prime Minister’s Constitutional Prerogative; Art.21 and 20 of the Constitution.

²⁰ *Police judiciaire* is the institution in charge of repressing infractions under the supervision of the judicial authority. *Police administrative* refers broadly to everything other than the judicial police.

²¹ CNCDH, “Note sur le projet de loi relatif à la lutte contre le terrorisme,” (14th December 2015) <<http://www.cncdh.fr/fr/publications/note-sur-le-projet-de-loi-relatif-la-lutte-contre-le-terrorisme>> (accessed 4 April 2017.)

²² Library of Congress, ‘France: Six French Citizens Prohibited from Living Under New Anti-Terrorism Law,’ (Global Legal Monitor, 26th February, 2015.) <<http://www.loc.gov/law/foreign-news/article/france-six-french->

individual is informed by the competent service of the interior department, of the decision made against them. Following this decision, passport and ID cards are invalidated and the database is updated, as well as the French signaled objects and vehicle databases,²³ the Schengen Information System and the SLTD Interpol Database.²⁴

Where such administrative measures are breached, penal provisions apply. Any attempt to leave the French territory in breach of a prohibition on leaving the territory are punished by imprisonment of three years and a €45,000 fine. Where a person notified of a prohibition on leaving the territory must return their national identity card and/or passport to the state administration within just 24 hours. Circumventing this obligation is punished by imprisonment of two years and a €4,500 fine.

As for any administrative decision, the defendant's capacity to repeal a prohibition on leaving the territory exists only *a posteriori*. Then, it is only possible to go to the local prefecture within eight days to contest the decision, notwithstanding the individual's right to appeal through the emergency procedure of *référé-liberté*. In these instances, unlike state of emergency administrative measures, the burden of proving the existence of an emergency falls on the applicant. In the majority of instances, the excess of power procedure is used.²⁵ There, the defendant may appeal to the administrative tribunal for the annulment of the prohibition within two months following the decision. This tribunal rules within four months for the appeal. All such cases are centralized in Paris, which may preclude access to justice for applicants in other parts of France.

There is yet any sufficient data on the subject. However, from interviews with lawyers it appears that many people prefer not to appeal the administrative decision namely because they are afraid to challenge the authorities; prefer not to trigger additional problems; they do not have the material possibility or the information on how to access a lawyer and/or the court or may simply prefer to wait until the measure is over.

In two decisions in January 2016, the administrative tribunal confirmed that administrative measures are not sanctions. The information contained in a "note blanche" creates a picture of the individual. Such elements enable dots to be connected and conclusions drawn, which are sufficient to justify an administrative measure being taken against the individual. In one case, a combination of false facts and the absence of a link with the jihadi movement was

citizens-prohibited-from-leaving-under-new-anti-terrorism-law/> (accessed 14 February 2018.) For analysis see: Hajer Rouidi, 'La loi n°2014-1353 du 13 novembre 2014 renforçant les dispositions relatives à la lutte contre le terrorisme : quelles évolutions ?' (2014) AJ Pénal, 558. Aurélie Cappello, 'L'interdiction de sortie du territoire dans la loi renforçant les dispositions relatives à la lutte contre le terrorisme,' (2014) AJ Pénal, 564.

²³ Order of 17th March 2014, portant autorisation à titre expérimental d'un traitement automatisé de données à caractère personnel dénommé « Fichier des objets et des véhicules signalés » (FOVeS), Annex.

²⁴ Minister of Interior Directive of 18th February 2015 relative à la mesure administrative d'interdiction de sortie du territoire des Français prononcés en application de l'article L. 224-1 du code de la sécurité intérieure, NOR : INTD1504320J 6 <http://circulaire.legifrance.gouv.fr/pdf/2015/02/cir_39252.pdf> (accessed 23rd February 2018.)

²⁵ Observation based on 41 cases, we were able to access, from April 2015 to June 2017. Only 4 of them were made through the *référé-liberté* procedure.

enough to overturn it.²⁶ In another case, the fact that someone has family fighting in Syria and Iraq, but yet has no link with the jihadi movement, was enough to favor the restriction. In this case, the prohibition on leaving the territory must be understood as a measure that trades-off individual liberty for public security,²⁷ underlined by the logic of maximized security efficiency.²⁸

This law was the object of a Petition for Judicial Review (QPC) in 2015, on the basis that it constituted “a disproportionate infringement on freedom of movement” and that it breached the right to an *effective appeal* since it is not made by the judicial authority (Article 66 of the Constitution). The Conseil Constitutionnel however rejected the claim and upheld the constitutionality of the prohibition to leave the territory, finding that “no constitutional exigency requires such a decision to be pronounced by a tribunal,” rather than an administrative order.²⁹ It based its ruling on the fact that a two years limit was provided by the law which thereby guaranteed a balance between freedom of movement and private life.³⁰ However, in July 2016, less than a year after the Court’s decision, and as the two years limits period approached for the first cases issued in November 2014, this limitation was simply removed from the law: the 6 months restriction can now be renewed without limit.³¹

Data

There is no available data on how many travel bans have been issued. As of April 2016, it was reported that 308 travel bans have been issued and in December 2017, the number was 500.

However, as a measure independent from the state of emergency, no parliamentary control is exercised and data are not publicly available.

²⁶ Tribunal administratif de Paris, Decisions : N° 1601549, §7, 25 May 2016.

²⁷ Aurélie Cappello, 560.

²⁸ Hajer Rouidi, 558.

²⁹ Conseil Constitutionnel, Décision n°2015-490 QPC du 14 October 2015, M. Omar K. [Interdiction administrative de sortie du territoire].

³⁰ The petitioners claimed that this authority constituted a disproportionate infringement to the freedom of movement and the right to an effective appeal by a judicial (and not administrative) authority as guaranteed by art 66 of the Constitution. While rejecting the petition, the Council based its decision on three main arguments. First, it considered the justificatory motives for the prohibition to be “precisely defined.” Second, it stated that “no constitutional exigency requires such a decision to be pronounced by a tribunal” rather than an administrative order. This point, however, is controversial since interpretations of article 66 of the Constitution have concluded that any measure impeding the freedom of liberty should be imposed and controlled by the judicial authority rather than the administration or administrative justice order. Third, it insisted on the fact that a prohibition’s “total duration cannot exceed two years” to justify its final answer, according to which “the legislator has adopted measures assuring a conciliation that is clearly not unbalanced between the freedom of movement and the protection from attacks on public order.”

³¹ Loi n° 2016-987 du 21 juillet 2016 prorogeant l'application de la loi n° 55-385 du 3 avril 1955 relative à l'état d'urgence et portant mesures de renforcement de la lutte antiterroriste, art. 11.

1.2 - Intelligence Gathering

The French Intelligence Law n°2015-912 of 24th July 2015, has the virtue of legalizing practices that were not previously clearly regulated by law.³² The law modified the wiretapping law n°91-646 of 10th July 1991, which exceptionally permitted wiretapping in certain cases.³³ The broad definition that allowed surveillance has been replaced by an even broader one.³⁴ The leading Magistrate Union raises concerns about the scope of this definition.³⁵ This position was shared by French anti-terrorism magistrate, Marc Trevedic who added that the law doesn't accord any place to judicial authority.³⁶

Instead, the law maintains the authorization procedure of the prime minister with the advice of the *Commission nationale de contrôle des techniques de renseignement (national commission of intelligence gathering regulation) (CNCTR)*, an administrative authority mandated to review intelligence practices.³⁷

It also creates an *a posteriori* administrative procedure that allows individuals to ask the Conseil d'État if they are subject to surveillance and challenge its legality. If it finds illegality, it can cancel the authorization granted and rule for the destruction of the intelligence unlawfully collected. Since the enactment, six decisions have been made through this procedure.³⁸ Yet the judge is precluded from providing detail on the matter when the

³² Felix Treguer provides a detailed overview. See: *Internet Surveillance in France's Intelligence Act*, (Working Paper, 2016) <halshs-01399548> (accessed 22nd March 2018); see also Jacques Follorou, 'Révélations sur le Big Brother français : La DGSE collecte et stocke l'ensemble des communications électromagnétiques, en dehors de tout contrôle' *Le Monde* (Paris, 5th July 2013).

³³ National security scientific and economic potential, prevention of terrorism, organized crime and dissolved groups, translated from Loi n° 91-646 du 10 juillet 1991 relative au secret des correspondances émises par la voie des télécommunications, art. 3

³⁴ 1° national independence, territorial integrity and national defense; 2° major interests in foreign policy, implementation of European and international obligations of France and prevention of all forms of foreign interference; 3° major economic, industrial and scientific interests of France; 4° prevention of terrorism; 6° prevention of: a) attacks on the republican nature of institutions; b) actions towards continuation or reconstitution of groups disbanded under Article L. 212-1; c) collective violence likely to cause serious harm to public peace; 7° prevention of organized crime and delinquency; 8° prevention of proliferation of weapons of mass destruction. translated from Loi n° 2015-912 du 24 juillet 2015 relative au renseignement, art. 2

³⁵ Union Syndicale des Magistrats, Observations de l'USM sur le projet de loi relatif au renseignement, (Working Paper, 2015)

³⁶ Éric Pelletier, 'Projet de loi sur le renseignement: les réserves du juge antiterroriste Marc Trévidic' *L'EXPRESS* (Paris, 19 March 2015) <https://www.lexpress.fr/actualite/projet-de-loi-sur-le-renseignement-les-reserves-du-juge-antiterroriste-marc-trevidic_1662838.html> (accessed 22nd March, 2018.)

³⁷ It is composed of 9 members: 4 of them are parliamentarians (2 from the National Assembly, 2 from the Senate); 2 from the Conseil d'État named by Vice President of the Council; 2 judges outside of the hierarchy of the Cour de cassation named by the 1st President of the court and the Prosecutor General at the Paris Cour de cassation. A qualified person on the matter of electronic communications, named by another independent administrative authority, is in charge of regulating electronic communication. This unbalanced composition disadvantaging the qualified knowledge on technical issues was underlined by the INRIA, a public research center on mathematic and informatics INRIA, 'Éléments d'analyse technique du projet de loi relatif au renseignement' (Working Paper, 2015) <<http://www.agrint.math.jussieu.fr/NoteInria.pdf>> (accessed 22nd March 2018.)

³⁸ Ibid; Conseil d'État, M. A...B, N° 396958, October 19, 2016; Conseil d'État, M. A...B... N° 398354, October 19, 2016; Conseil d'État, Mme A...B, N° 398869, December 7 2016; Conseil d'État, M. A...B, N° 403208, June 28 2017, Conseil d'État, M. A...B, N° 408495, November 6, 2017

legality is assessed.³⁹ In these cases, the defendants were either “not subject to surveillance” or the surveillance was held to be legal.

The mandate of the CNCTR does not cover “elements transmitted by foreign services or by international institutions.”⁴⁰ The Interior Minister has confirmed these practices,

“In general, [a decision of house arrest] is made for individuals against whom we’ve received foreign intelligence, so we can’t immediately open an investigation.”⁴¹

2 - From state of emergency to permanent legislation

2.1 - State of emergency

“The state of emergency” decentralizes the fight against terrorism, which is subsequently no longer solely a repressive judicial procedure centralized in Paris. The Préfet decides whether or not to use a state of emergency power. Each Préfet periodically conducts radicalization assessments with the local security services.⁴²

The state of emergency powers are defined by the law of 3rd April 1955.⁴³ They encompass:

- The prohibition of the circulation of vehicles and individuals in given areas and times ;⁴⁴
- The expulsion of individuals attempting to infringe public order from given areas or departments ;⁴⁵
- Closure of performance halls, meeting rooms, public houses, and religious places.⁴⁶

In addition, state of emergency powers provide the possibility to impose house searches in places for which there are “serious grounds for thinking that the place is inhabited or visited by a person whose behavior constitutes a threat to security and public order”.⁴⁷

As one Préfet commented,

³⁹ Conseil d’État, M. A...B..., N° 398356, October 19, 2016.

⁴⁰ Loi n° 2015-912 du 24 juillet 2015 relative au renseignement *op. cit.*

⁴¹ Jacques Follorou, ‘Quand Gérard Collomb compromet le secret-défense’ *Le Monde* (Paris, 22nd November 2017) 8.

⁴² Bruno Leroux, former Minister of Interior in a Parliamentary Committee on Radicalisation. Translated from Sénat, Rapport No 483 sur les collectivités territoriales et la prévention de la radicalisation, (29th March 2017) 167.

⁴³ The State of emergency was declared on the 14 of November 2015 after the Terror attack in the Bataclan in Paris and lasted until the 30 of October 2017. The prerogatives of the Executive are set in the law of 3 April 1955 relative to the State of Emergency, as endorsed by Law no 2015-1501 of 20 November 2015, which was prolonged six times and in times also amended.

⁴⁴ Loi n° 55-385 du 3 avril 1955 relative à l’état d’urgence, art. 5.

⁴⁵ *Ibid.*

⁴⁶ *Ibid*, art. 8

⁴⁷ *Ibid*, art. 11

“For some, the occasion needed to be marked. The choices of my targets of searches and seizures were only made where I knew we will find something that will justify a house arrest. The Préfet has a great discretion in the choice of their target. We felt that a drift was possible, but I can assure you that the civil servants of this country are profoundly Republican.”⁴⁸

The State of emergency has been useful for two main reasons according to one Préfet.⁴⁹ In the direct aftermath of the attack in Paris and St-Denis the government became concerned by the possibility of a new attack. State of emergency powers enabled it to pursue administrative searches and seizures to find weapons. The involvement of judiciary police meanwhile made it possible to start the judicial process the moment a crime was discovered. Secondly, the powers made it possible for the Préfet and their services to update their intelligence databases.⁵⁰ Yet the data shows that very few procedures were initiated.

2.2 - Institutionalizing the state of emergency

The state of emergency ended on the 1st November 2017, almost two years after its declaration. Then, the Loi n°2017-1510 reinforcing domestic security and the fight against terrorism (*renforçant la sécurité intérieure et la lutte contre le terrorisme* - SILT) was passed on the 30th October 2017. This served to integrate some of the emergency measures into regular law. The law allows the delimitation of security perimeters; the closing of places of worship (for a maximum of 6 months) and enables an individual to be placed under surveillance measures and house arrest. As with the state of emergency, these powers are given to the police authority and it does not require judicial authority. The law n°2017-1510, 30th October 2017 implements something akin to a permanent state of emergency in law.

The *Individual measures of Administrative Control and Surveillance* (MICAS), established through the Loi n°2017-1510 can be applied to “anyone against whom there are serious reasons to believe that (...).”⁵¹ In such instances, the ministry of the interior and thus no longer the Préfet (like during the state of emergency)⁵², can place the individual under house arrest after informing the Prosecutor (*procureur de la République*). The vagueness of the conditions raises implications for legal limitation and prevention of abuse of the law.

⁴⁸ SABATHÉ, Jean-Marc (Préfet). *L'urgence du droit - l'efficacité des mesures prises : la vision d'un préfet* (conference L'état d'urgence ou l'urgence du droit organized by the Institut national des hautes études de la sécurité et de la justice et l'université Paris Sud/Université Paris Saclay, 13 June 2016 Paris: Faculté Jean Monnet / INHESJ).

⁴⁹ *Ibid*

⁵⁰ *Ibid*

⁵¹ See Art. 3 of SILT: ‘There are serious reasons to believe that the individual’s behavior constitutes a serious threat for security and public order, and who is commonly in relation with persons or organization inciting, supporting, spread or adhere to thesis inciting terrorist acts or doing their apology’.

⁵² Directive of 16 November 2017 présentation des dispositions de la loi n°2017-1510 du 30 octobre 2017 renforçant la sécurité intérieure et la lutte contre le terrorisme NOR : JUSD1732218C 3

3 - The Case of House Arrest

Before the 2017 law, French persons could be placed under house arrest only as a measure taken through a judicial criminal process (as a means of pre-trial of detention or a punishment after a criminal proceeding), or during a state of emergency. On 3 June 2016, the law confined to the administration – for the first time outside the exceptional state of emergency prerogatives – the power to place individuals, who are returning from Syria and who are seen as posing a threat to public order and security, under administrative control, i.e. be assigned to reside in a certain territory and require them to periodically check-in at police stations (up to three times a day).⁵³ The time limit was at first set to one month, but one month later a new amendment prolonged it to two months. Then, on the 30th October 2017, the law enacted at the end of the state of emergency, introduced to the security law chapter VIII: “Individual Measures of Administrative Control and Surveillance”, known by its French initial MICAS, that has become a synonym for describing a category of people.⁵⁴ Under this amendment, Art L 228 (1)-(7) provides broad authority to “prevent the commission of terror acts” to the Ministry of Interior (in practice upon the recommendation of the information services) - limit the movement of the person into a defined geographical zone, to impose him to come once a day to the police office and/or the obligation to declare movement beyond one’s municipality or any change of residency. Instead of these measures, the Minister of interior can propose to put an electronic bracelet (Art L228-3) - a measure otherwise reserved to a judicial judge. The measure can be imposed for three months, for a renewable period of one year. In light of past practice, it can be reasonably expected that before October 2018 this time limit will be prolonged.

→ *Judicial review*

Placing a person under house arrest without oversight of the judicial system, could be interpreted as a violation of individual freedoms within the meaning of article 66 of the French Constitution, pursuant to which “the Judicial Authority, guardian of the individual liberty, shall ensure compliance” with the prohibition of arbitrary detention. However, the Constitutional Council repeatedly rejected this interpretation and validated the principle of the administrative review over house arrest.⁵⁵ This is because house arrest was interpreted as a limitation of freedom of movement – that is under the competence of administrative courts -

⁵³ Code of Internal Security, Art.L225-1 and Art. L225-2 (amendments of July 2016). The law empowers the government to limit a person’s movement into a defined geographical territory or to place him under house arrest for a maximum of 8 hours; to check in at the police station up to three days a week including holidays and weekends, prohibition to communicate with certain persons, obligation to declare change of address; first the assignation of residence was limited for a month, but only a few weeks later it was modified for two months. These control measures will be abrogated if a criminal procedure related to terrorism (and only in this case) is opened; see Article L225-5.

⁵⁴ Other measures are Chapter VI: Perimeters of protection; Chapter VII: Closing of places of worship ; Chapter IX: Search and Seizures – providing vast authorities, previously only available under a situation of state of emergency to regular administrative law.

⁵⁵ Ass. Avis, 6 juillet 2016, *M. Napol et M. Thomas*, n° 398234 et 399135, conformément à la décision du Conseil constitutionnel n° 2016-536 QPC du 19 février 2016

and not as detention/restriction of liberty (which is exclusively under the competence of a judicial judge). The question for determination concerned whether house arrest is a restriction on individual freedom. The Constitutional Council decided that it is not (as distinct from freedom of movement) – because it was limited to 12 hours a day. It found that house arrests do not constitute a deprivation of individual liberty, and fall outside the scope of ordinary courts. The competence of the administrative courts was reaffirmed.⁵⁶ The Constitutional Council did however specify that a law that would allow for house arrest exceeding 12 hours per day would constitute a deprivation of individual liberty, and require review by the judicial judge under Article 66 of the Constitution.⁵⁷

On 16th February and 29th March 2018, the Constitutional Council declared parts of article 228-2 and 228-5 unconstitutional. Finding the prohibition on seeing family members to be disproportionate and that the appeal procedure is too restrictive and in need of extension from 1 to 2 months.⁵⁸

→ *Data*

Under the state of emergency, House arrest measures have given rise to 521 cases⁵⁹ (mostly in the immediate aftermath of the Paris and Saint-Denis attacks) and 20 since the passage of the new law.⁶⁰ This measure was already denounced in 2015 for its disproportionate

⁵⁶ Conseil Constitutionnel, Décision n°2015-527 QPC du 22 décembre 2015, M. Cédric D. [Assignations à résidence dans le cadre de l'état d'urgence] , para 5 and 6. Later, the CE will similarly find that closure of religious workshop and requisition do not impair individual liberties. Cons. constit., déc. no 2016-536 QPC du 19 févr. 2016, LDH, cons. 4, 6

⁵⁷ Considering secondly that, in relation to a house arrest order issued by the Minister of the Interior, the individual "may also be required to remain in the place of residence determined by the Minister of the Interior during specific hours set by the latter, up to a maximum of twelve hours out of every twenty-four hours"; that the maximum period of time during which an individual placed under house arrest is required to remain at home, which is set at twelve hours per day, cannot be extended, otherwise the placing under house arrest would then be regarded as a measure restricting freedom, and accordingly subject to the requirements laid down by Article 66 of the Constitution.

⁵⁸ Constitutional Council decision n° 2017-691 (QPC), 16 February 2018 ; Constitutional Council decision n° 2017-695 (QPC), 29 March 2018

⁵⁹ Assemblée Nationale, *Bilan Statistique de l'état d'urgence depuis le 14 novembre 2015*. <http://www2.assemblee-nationale.fr/static/15/lois/bilan_contentieux.pdf> (accessed 17th April 2018); Administrative police measures taken from articles 1 to 4 of the loi n° 2017-1510 du 30 octobre 2017 renforçant la sécurité intérieure et la lutte contre le terrorisme from: *Ibid*; Further data can be found on the parliamentary control committee website, Assemblée Nationale, *Contrôle parlementaire de la loi renforçant la sécurité intérieur et la lutte contre le terrorisme*. <<http://www2.assemblee-nationale.fr/15/commissions-permanentes/commission-des-lois/controle-parlementaire-silt/controle-parlementaire-de-la-loi-renforçant-la-securite-interieure-et-la-lutte-contre-le-terrorisme/donnees-chiffrees/mesures-de-police-administrative2>> (accessed 17 April 2018); Assemblée Nationale, *Contrôle parlementaire de l'état d'urgence : données relatives à l'application de l'état d'urgence du 14 novembre au 21 juillet 2016*. <<http://www2.assemblee-nationale.fr/14/commissions-permanentes/commission-des-lois/controle-parlementaire-de-l-etat-d-urgence/controle-parlementaire-de-l-etat-d-urgence/donnees-de-synthese/donnees-relatives-a-l-application-de-l-etat-d-urgence-du-14-novembre-2015-au-21-juillet-2016/mesures-administratives-prises-en-application-de-la-loi-n-55-385-du-3-avril-1955>> accessed 17 April 2018; For the data covering all period see: Assemblée Nationale, *Contrôle parlementaire de l'état d'urgence* <<http://www2.assemblee-nationale.fr/14/commissions-permanentes/commission-des-lois/controle-parlementaire-de-l-etat-d-urgence/controle-parlementaire-de-l-etat-d-urgence/donnees-de-synthese/>> (accessed 17th April 2018.)

⁶⁰ Note by the CNCDH concerning examination of France's seventh periodic report by the United Nations

application, the lack of respect of the principle of equality before the law, and the vagueness of the law concerning the ‘*serious ground of thinking*’ threshold justifying house arrest.

The Conseil d’Etat decisions on house arrest have represented three quarters of the decisions concerning the State of emergency. From the beginning of the state of emergency on 14th November 2015 until February 2016 the Ministry of Interior indicates that 400 persons were placed under house arrest, 179 people had recourse to a judge and 12 of these procedures were accepted.⁶¹

In practice :

- The perimeter of arrest is extended to a minimum of the communal territory and can possibly be extended to having departmental reach if the individual is wearing an electronic bracelet;
- Only one check in a day, instead of up to three in the state of emergency, is required. This however still includes Sundays and holidays.

People placed under house arrest are however still compelled to:

- Hand in their ID and passport
- Provide the authorities with their phone information
- May be prohibited from seeing specific persons.

Committee Against Torture; Amnesty International, *op. cit.* : Freedom of movement and right to liberty under international human rights law; Right to a private and family right (Article 17 ICCPR and Article 8 ECHR) by imposing unnecessary and excessive difficulties on those placed under arrest to take care of their families or to look after their children. ; Right to work ; Right to education (as the frequent and time consuming reporting to police station heavily constrained the capacity of the concerned individual to carry out their work or to attend their studies.); Access to healthcare (individuals targeted by house arrest under the state of emergency have been often prevented to attend medical checks, thus disproportionately infringing on individual rights to seek and receive adequate medical assistance).

⁶¹ Assemblée Nationale, *op.cit.*

PART III

CRIMINAL LAW : AN EVER EXPANDING COUNTER-TERRORISM PARADIGM

The French criminal approach to terrorism has followed a primarily “accomodatory”⁶² trajectory. Terrorist matters are prosecuted and tried within the ordinary French judicial system, however, they are all centralized in Paris and managed by specialized units. For France, criminal law is the principal legal weapon employed against terrorism.⁶³

1 - Pre-emptive Criminal Justice

The predictability of the dangerousness is not a domain reserved to administrative law. It has moreover seen practice in the French criminal sphere. It is not a new phenomenon as it is based on legislation from the 90s, that has its roots from earlier practices, but it has reached an unprecedented peak in its application, expansion and repression in recent years, in light of the terror attacks committed in France by its own citizens, and growing engagement of its young people with Islamic jihadists on the Iraqi-Syrian front.

Through a proactive prosecution policy that introduces broad assumptions of risk assessments, accompanied by offences incorporating notions of predictability and dangerousness, which through interpretation of signs, such as behaviour, belief, social habits presumption on future conduct are established; it is a form categorization, where the individual in his complexity, multiple identity and reasoning for actions, is reduced into a certain model or profile, that will provide the basis to predict his future action. As noted by Garapon, by requesting the Law to punish prior to the commission of a crime, the fight against terrorism challenges the foundations of the criminal law: it replaces the idea of prevention, with the less certain notion of pre-emption. This pre-emptive approach is explicitly adopted by justice authorities.

For example the French Vice Counter -Terrorism Prosecutor Camille Hennetier has noted that,

“The current era is marked by the growing power of the judicial system in terrorism cases to neutralize actors. The cursor seems to have moved further in time, as part of an anticipation of risk, and also of "political" management of the current crisis. We are confronted with a dilemma and condemned to efficiency...to search for a balance

⁶² Oren Gross, “Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?” (2003) 112 Yale Law Journal.

⁶³ Council of Europe, Committee of Experts on Terrorism, “Profiles on Counter-Terrorist Capacity: France,” September 2013 <<https://rm.coe.int/1680641029>> (accessed 13th April 2018)

between the criminal characterization of earlier preparatory elements, the search for a confirmed intentionality and the measuring of risk.”⁶⁴

2 - Main accusation: Association of wrongdoers in relation with a terrorist enterprise (AMT)

Although the criminal code has evolved to include more criminal offences specifically adapted to the changing face of international terrorism, as reflected by security council resolutions,⁶⁵ such as the use of new technologies, financial support of terrorism⁶⁶, recruitment and travel, almost of all the prosecution of terrorism in France including Foreign Fighters remains the longstanding offence “Association of wrongdoers in relation with a terrorist enterprise”.

Codified in Article 421-2-1 of the French Criminal Code, the AMT offence today penalises as a terrorist offence “the fact of participating in a group formed or in an agreement struck for the purposes of the preparation – characterised by one or several material facts – of one of the acts of terrorism mentioned”⁶⁷. These acts of terrorism include attacks on life and physical integrity; the hijacking of planes and other modes of transport; theft, extortions, destructions, degradations; membership in or support of dissolved armed groups and movements; offences in relation to armaments, explosives, and nuclear materials; dealing in stolen goods related to these offences; as well as some aspects of money laundering and financing. These acts become ‘terrorist’ provided that they occur with the additional qualification of “aiming to seriously trouble public order [*ordre public*] by intimidation or terror”.⁶⁸

The AMT defines a terrorist act as the mere participation in a group in view of the preparation of an act of terrorism. The prosecution of an AMT is directly linked to the project of the group, without necessarily establishing that the individual contributed materially to the terrorist act itself. There is no requirement that the plan will be achieved, nor that the person intends to commit a specific crime. It is enough that an individual joins the group, with the knowledge that the group has a terrorist project. This is referred to as conspiracy in Anglophone writings. In many ways, it resembles criminalization of membership of an

⁶⁴ Cited in Antoine MÉGIE Rapporteur du projet européen, « L'ENQUÊTE JUDICIAIRE DANS LA LUTTE CONTRE LE TERRORISME: RENSEIGNEMENT, JUDICIARISATION ET RESPECT DES LIBERTES », February 2017, p. 18.

⁶⁵ UN Security Council Resolution 1373 (2001); UN Security Council Resolution 2178 (2014) and more recently UN Security Council Resolution 2396 (2017).

⁶⁶ See the case of a mother who was convicted in September 2017 for financing terrorism while sending money to her son, and received two years in prison: Emilie Brouze, ‘Deux ans de prison pour la mère d'un djihadiste : "J'aurais pu sauver mon fils" (L'Observateur, 6 September 2017) <<https://www.nouvelobs.com/rue89/rue89-nos-vies-connectees/20170906.OBS4330/deux-ans-de-prison-pour-la-mere-d-un-djihadiste-j-aurais-pu-sauver-mon-fils.html> > (accessed 10 April 2018)

⁶⁷ CP Article 421-2-1. For an overview, see Yves Mayaud, *Terrorisme* (Paris: Dalloz, 2016). This offense was the basis of up to 80 percent of the convictions for Islamist offenders between 1995 and 2005 Frank Foley, *Counter-terrorism in Britain and France: Institutions, Norms and the Shadow of the Past* (Cambridge: Cambridge University Press, 2013), p. 202.

⁶⁸ CP Article 421-1.

illegal organization because the mere participation in the terrorist group (that has a plan to commit a terror act) satisfies the elements of the crime.

→ *Evolution*

According to the French Ministry of Justice, the AMT is “the keystone of the fight against terrorism”.⁶⁹ The general notion of an ‘association of wrongdoers’ has a long history in French criminal law.⁷⁰ First introduced in 1893 to tackle anarchist groups, it subsequently re-emerged in the context of the Algerian War (1954-1962). In the years from 1963 to 1981, the *Cour de sûreté de l’État*, which handles political crimes against the state, relied heavily on this offence in its verdicts. Abolished by the Socialist administration in 1983 for its negative impact on civil liberties, the *association de malfaiteurs* made its reappearance in 1986, following a string of Islamist attacks on French soil. The creation of a specifically terrorism-linked conception of *association de malfaiteurs en relation avec une entreprise terroriste* (AMT) occurred in 1996 – again after a number of attacks, carried out by the Algerian Groupe Islamique Armé (GIA).

→ *Level of punishment*

Legal reforms to the AMT after 1996 have involved increases in fines and prison sentences, as well as a differentiation in punishments between those merely *participating* in the AMT and those *leading* it. Traditionally, the association of wrongdoer had been defined as an offence (*délit*) attracting 10 years imprisonment, and falls within the competence of the first instance court.⁷¹ In 2004 for the first time in the legislation history of France, a participation/conspiracy legislation was set to be prosecuted as a felony through distinction that was made between the prosecution of simple participants, which remained defined as an offense punishable by 10 years, and the leaders of the group, who could incur 20 years imprisonment. Once this barrier was surmounted, the escalation followed rapidly. Only two years later, in 2006, despite its first objection in the parliamentary debates of 2004, the punishment of the mere participation in a group with a criminal aim (such as attack on persons or the destruction of property with explosives) was raised to 20 years and 30 years for leaders. In July 2016, this harshening process has reached its final peak with the punishment set at 30 years for participation and life imprisonment for directing the group.⁷²

Moreover, the legislative innovations of 2016 brought procedural changes, including the prolongation of pre-trial detention: those suspected of membership in an AMT can now be held for up to three years prior to trial, compared to only two years for those suspected of any

⁶⁹ ‘La lettre du porte-parole : 23rd November 2016’. *Ministère de la Justice*. <<http://www.presse.justice.gouv.fr/info-justice-11598/la-lettre-du-porte-parole-23-novembre-2016-29479.html>> (accessed 11 May 2017)

⁷⁰ Vanessa Codaccioni, *Justice d’exception: L’État face aux crimes politiques et terroristes* (Paris: CNRS Éditions, 2015), 282.

⁷¹ This was the case for any kind of conspiracy not necessarily related terrorist crime (Art 450-1 of CP).

⁷² CP Article 421-6.

other terrorist offence.⁷³ This underscores the fact that the notion of AMT serves not only the purpose of securing convictions but also of justifying and expanding pre-trial investigative action.⁷⁴

→ *Extraterritorial competence*

The 2012 reforms were of particular significance for the present-day foreign fighter phenomenon were the reforms of 2012 that provided for extraterritorial jurisdiction and thus enabled the prosecution of French citizens or residents for participation in an AMT abroad, and the 2016 legislation which criminalizes foreign fighters for returning.⁷⁵

→ *Elements of the crime*

In order to rein in the extremely wide latitude of AMT provisions, French legal doctrine has sought to concretise three core requirements necessary to obtain a conviction for AMT:⁷⁶ (1) the existence of a *group* with a terrorist *aim*; (2) an *individual* act of participation in the group, without necessarily contributing to the terrorist acts in itself nor that a terrorist act is actually done; (3) the individual *intention* to participate in the group while being *conscious* of its terrorist project or of its potential of being terrorist.

(1) Both the notion of a *group* and the idea of a *terrorist aim* are ambiguous. Beyond the fact that a ‘group’ must comprise at least two individuals, the precise degree of organisation necessary remains unclear. While the *Cour de cassation* asserted that the notion of terrorism “implies a minimum of organisation”,⁷⁷ it also held that an AMT did not presuppose “a structured organisation among its members”.⁷⁸ Defence lawyers have highlighted that this ambiguity has allowed investigators to proceed on the basis of “a criminality of capillarity” – i.e. to prosecute vast networks of suspects only very loosely related to one another.⁷⁹ Comparable uncertainties persist with respect to the conceptualisation of the ‘terrorist aim’ this group must pursue. The only definitional indication given is that it must seek to “trouble public order through intimidation and terror” as stipulated in article 421-1 of the criminal code, an exceedingly vague notion.

(2) Although the *Cour de cassation* has stressed that individuals need to “provide an effective support” in order to be convicted for AMT,⁸⁰ the International Commission of Jurists has

⁷³ See Article 706-24-3 of the Code of Penal Procedure, modified by Loi n° 2016-731 du 3 juin 2016 renforçant la lutte contre le crime organisé, le terrorisme et leur financement, et améliorant l'efficacité et les garanties de la procédure pénale, art. 7

⁷⁴ Julie Alix, “Réprimer la participation au terrorisme”, *RSC*, 2014, pp. 849f.

⁷⁵ For an overview of these changes, see Yves Mayaud, *Terrorisme* (Paris: Dalloz, 2016), pp. 24 ff.

⁷⁶ Alix, “Réprimer la participation au terrorisme”.

⁷⁷ Cour de cassation, decision 93-14.837,

available at <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007035042>.

⁷⁸ Cour de cassation, decision number 14-88.329,

available at <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000030869110>.

⁷⁹ Interview with a defence lawyer, Paris, April 2017.

⁸⁰ Cour de cassation, decision number 13-83.758, available at

<<https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000028976488>

complained that the provisions on AMT “are broad enough to permit detention of persons who have merely associated with others”, stretching the notion of effective support beyond all recognition.⁸¹ More generally, it has been observed that a wide interpretation of this criterion has enabled convictions for what might be viewed as minor and ineffective contributions to the terrorist enterprise.

(3) Regarding the element of *intentionality*, this need not imply an *individual* willingness to commit a terrorist attack oneself. Being “independent of the crimes prepared or committed by any of its members”, the offence of AMT is based on an “adhesion to a *collective* project of trouble to public order through intimidation”.⁸² Put differently, the proof of participation in an AMT does not rest on the individual’s personal terrorist intentions but rather on the terrorist aim of the collective association, coupled with the individual’s conscious and knowing “adherence” to that association.⁸³ In practice, however, “evidence of a minor action, such as providing lodging or giving one’s passport to terrorists, will suffice *without* any further evidence showing that the suspect had knowledge of, or intended to assist, the terrorist activity concerned”.⁸⁴

In the 2017 case of Merah, the first person in France to commit a Jihadist terrorist attack, Malki (the individual who sold the weapon to Merah) was found guilty of AMT. This is despite the fact that Malki did not know that Merah had the intention to commit a terrorist act. The court endorsed the prosecutor’s position that it was sufficient that Malki should have known of the potential that Merah could commit a terror act in light of the fact that Malki could not ignore Merah’s radicalisation process due to their relations of proximity.

Indeed, as the Prosecution stated during the trial:

"The prosecution never argued that Malki knew that Merah was going to hit soldiers and Jews but he knew the terrorist potential of the two brothers ... in fact, it is not necessary to share the terrorist ideology to be prosecuted for criminal association... just knowing that the project was potentially terrorist is sufficient." ⁸⁵

The court subsequently held that it was not convinced by Malik’s argument that he was unaware of Mohamed Merah’s radical Islamism.”

Attempts to limit the scope of AMT through legal doctrine have proven unsuccessful: the interpretational leeway inherent in terms such as ‘terror’, ‘group’, ‘effective support’, etc.

&fastReqId=420235320&fastPos=1>

⁸¹ International Commission of Jurists, “International Commission of Jurists submission to the Committee Against Torture on the 6th Periodic Report of France”, April 2010, p. 2.

⁸² Cour de cassation, decision number 16-84.596 (emphasis added), available at <https://www.courdecassation.fr/jurisprudence_2/chambre_criminelle_578/5993_10_35897.html>

⁸³ As stipulated by the Cour de cassation in its decision 13-83-758.

⁸⁴ Foley, *Countering Terrorism in Britain and France* 203

⁸⁵ Closing statement of the Prosecutor before the court, 30 October 2017. See

<<http://www.lefigaro.fr/actualite-france/2017/10/30/01016-20171030LIVWWW00021-proces-merah-abdelkader-mohamed-fettah-malki-terrorisme-derniere-semaine-en-direct.php>> accessed March 18, 2018

remains extremely broad and ambiguous. French policy-makers and courts in fact strive to maintain the largest possible scope for interpretation, with the *Cour de cassation* noting that “Parliament and the Constitutional Council have left it to the judicial authority to interpret the outline of the notions of ‘intimidation’ and ‘terror’”.⁸⁶ This highlights the tremendous importance of prosecutorial policy (*politique pénale*). In this area, France has witnessed important changes in recent months and years.

3 - Prosecution Policy: Expansion and Repression

The prosecution of AMT is a central element in the French counter-terrorism judicial machinery because it represses the potential criminal project established by way of preparatory acts, and thus makes it possible *to prevent* the perpetuation of terrorist acts. Thus, the prosecution of AMT has a very broad scope and allows even remote acts to fall under its scope, and ever-expanding boundaries.

"The evolution of the threat in France, the attacks, the multiplication of the desire for action by individuals on the national territory, leads to the desire to judicialize as early as possible, to neutralize individuals deemed potentially dangerous, to achieve risk zero. In practical terms, with regard to the Iraqi-Syrian zone, this allows the judicialization of people at early stages – people who only wish to go there in a context of a radicalization process, even though the integration of a terrorist group on an area is not yet effective. Previously, the judicialization occurred once the integration into the terrorist group was established or presumed. In the case of projects for violent action on French soil, this allows the interpellation of suspects at the stage of intentionality, materialized by exchanges more or less operational, sometimes at the commencement of the preparatory act".
(*Vice Procureur, Camille Henriet*).⁸⁷

3.1 - A new prosecution policy (2016)

Returnees from the Levantine battlefields have been systematically prosecuted under the provisions of AMT. The French judiciary has shown only a minimal interest in the substantive acts (including war crimes) committed by fighters during their stay in Middle Eastern warzones, preferring to pursue easier convictions under counter-terrorism law. Their participation in an AMT had been prosecuted as a *délit* as the following: 10 years imprisonment for those who have been integrated for several years into a terrorist organization abroad (in particular Daesh, and who are usually judged *in absentia*); 6-9 years imprisonment for Foreign Fighters who returned to France, depending on the length of their

⁸⁶ Cour de cassation, decision number 16-84.596

⁸⁷ Henriet, *opt ct.*

‘Six « velléitaires » du djihadisme condamnés à des peines de 15 mois à 6 ans de prison ferme’ (Le Monde, 20 February 2017) http://www.lemonde.fr/police-justice/article/2017/02/20/six-velleitaires-du-djihadisme-condamnes-a-des-peines-de-15-mois-a-6-ans-de-prison-ferme_5082580_1653578.html#JYbDc54Bm1oUFqyr.99>

stay in the zone and their acts; 4-6 years for people who were about to go and finally, 2-4 years imprisonment for accused who logistically supported travels.⁸⁸

A major change was introduced in April 2016, when the Paris-based counter-terrorism prosecutor announced that returning foreign fighters would henceforth be systematically charged with AMT in the form of a *crime* – regardless of the nature of the actual act undertaken – for whomever joined terror groups in Syria or Iraq after 2015.⁸⁹ This policy shift, applied retroactively to ongoing investigations and was approved by the Court of Cassation.⁹⁰ This means that returnees will be faced with significantly higher prison sentences, as well as trials at the *Cour d’assises spéciale* and there subject to the derogative procedural features so outlined. The first cases emerging from this new policy were adjudicated in March 2018 before the Cour d’Assises speciale for acts committed in 2014.

4 - Preemptive Justice: Human Rights Considerations

The decisive marker of the AMT as a criminal offence is its flexibility to repress terrorist acts before they are committed or even attempted. This preventative dimension constitutes the AMT as an *infraction obstacle* in French legal parlance. Yet while this dimension lies at the heart of the AMT’s utility for counter-terrorism prosecutors, it also raises complex questions of legality and of the presumption of innocence, given that penalised forms of conduct are so far removed from an actual terrorist attack that they are innocuous in themselves. Another cause for concern is the often inadequate specification of the individual’s contribution to an AMT. The majority of AMT convictions are based on “standardised grounds”. Defence lawyers in particular have complained that court cases are often built on “an idea, a movement, and not on the accused.” This, they argue, renders a successful defence “impossible”.

This is not to argue that convictions for AMT are always and inevitably unsound. What is particularly worrisome, however, is the convergence of the AMT’s broad sweep with a dramatic lengthening of prison sentences.

⁸⁸ Michel Mercier, “Rapport N° 252”, *Sénat*, 21 December 2016 (Proposition de loi relative à la composition de la cour d’assises de l’article 698-6 du code de procédure pénale: Cour d’assises spéciale), page 14.

⁸⁹ ‘François Molins annonce un ‘durcissement considérable’ de la politique pénale en matière de terrorisme’ (Le Monde, 2 September 2016) <http://www.lemonde.fr/police-justice/article/2016/09/02/francois-molins-annonce-un-durcissement-considerable-de-la-politique-penale-en-matiere-de-terrorisme_4991487_1653578.html> (accessed April 15 2018)

⁹⁰ Cour de cassation, chambre criminelle, 12 juillet 2016, n° 16-82.692, available at <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000032900180>

The court ruled that there is no need to prove that the person accused of criminal AMT actively participated in the preparation or the realization of the crime itself, only that he was a part of that group. The AMT as a criminal offense is “an independent offense and distinct from of the crimes prepared or committed by some of its members and from the crimes characterized by certain facts that concretize it ».

Traditionally French counter-terrorism relied upon a combination of a sweeping legal prerogatives and low-intensity punishment: while many suspects were caught in the wide net cast by the AMT, their prison sentences were comparatively light.⁹¹ The new ongoing policy, however, have disturbed this equilibrium, introducing a new practice of risking to impose highly severe punishment on relatively minor acts, which necessitate little evidence. Too much flexibility in the criminal justice system can stretch the rule of law to breaking point. France's duty to protect its population from terrorist acts ought to be as important as respecting its obligations under international human rights law, including the rights of those deemed to pose a threat.

National security v global justice paradigm

The AMT criminalization is now used to detain and punish a range of actors, without distinguishing between their alleged acts. We are witness to the expansion of the national security paradigm beyond the jurisdiction of the state, into the territory of global accountability and justice. Can France be said to justly prosecute people under the same category of offence, if they have committed crimes of vastly different magnitude? Individuals have to be held accountable for and tried according to the acts they committed. If someone commits an international crime, they must be placed under investigation for war crimes by the war crimes investigation unit. Yet, France is constructing a transnational national security network, rather than a system in which accountability will prevail for violations of international crimes in a way, which promotes global justice.

⁹¹ Foley, *Countering Terrorism in Britain and France*, p. 205 f.

PART IV

RULE OF PROCEDURE

This section assesses the evolution of French Criminal Procedural Law in response to terrorist- related offences already committed in France, as well as the ongoing threat of their commission anew. It highlights that French Criminal Procedural Law has illustrated both its responsive and pre-emptive capacity in this context. This section assesses the main moments and mechanisms of that procedural change.

Semantically, the French have avoided reference to “emergency laws” but prefer to conceptualise legal developments in the terrorism context as “special derogations” from existing law. As the French legal scholar Antoine Garapon observes :

“France has managed to fight against terrorism without imposing laws of exception but rather by adapting its institutions to the changes in terrorist practices.”⁹²

The adaptability of regular law in this way enables the use of derogatory investigative techniques; trial proceedings and sentencing measures.

1 - Civil law criminal procedure - how does it work ?

The French prosecutor (*procureur*) oversees the judicial police and opens preliminary investigations. His role is shaped by executive mandate. The Ministry of Justice lays down the prosecution policy of the *parquet*, to which the prosecutor belongs. The *procureur* has the discretion to refer cases to the investigative judge in order to initiate criminal proceedings. The investigative judge is himself precluded from triggering an investigation through the exercise of his own discretion.⁹³

The investigative judge, who is independent and impartial, leads the investigation and gathers all incriminating and exonerating information pertaining to the suspect, as preparation for an indictment and a subsequent trial in order to enable the truth to emerge at trial.⁹⁴ In practice however, the investigative judge is often more concerned with building a strong case against the accused than the contrary. Any party- that is the prosecutor, defendant or civil party - can request the investigative judge to carry out certain inquiries, who may accept or

⁹² Antoine Garapon, “Is There a French Advantage in the Fight Against Terrorism?” <<http://www.realinstitutoelcano.org/wps/wcm/connect/7cc6bf804f018614ba0efe3170baead1/Garapon807.pdf>> (accessed 9th April 2018.)

⁹³ See art. 39-1, art. 39-3, art. 51 and art. 80 of the French CPP. For an excellent account on French criminal procedure and practice in English see Jacqueline Hodgson, *French Criminal Justice* (Hart Publishing, 2005).

⁹⁴ Antoine Garapon and Ioannis Papadopoulos, *Juger en Amérique et en France* (Odile Jacob 2003).

deny those requests. Decisions of the investigating judge may be appealed to the Court of Appeal of the Chamber of Investigation.

Private parties affected by the alleged offence can file a complaint to the Prosecutor. In case of inaction or refusal to open an investigation, they file a motion to open an investigation directly to the investigating judge. In addition, they may be eligible to take part in the trial as civil parties, with a view to obtaining victim reparation (CPP art. 2 to CPP art. 3). This request can be made at any stage of the investigation (CPP art. 87). However, if there is no ongoing investigation and should the public prosecutor refuse to refer the case to an investigative judge, a civil party may directly request the latter to start an investigation (CPP art. 85).

1 - Arrest and Police Custody (Garde à Vue)

Similar to other elements of criminal rule of procedure, the police custody regime for terrorist cases has been gradually differentiated from the standard regime as the counter-terrorist paradigm has evolved. Presently, a terrorist suspect can be placed in police custody for up to six days, and his right to legal assistance can be delayed until the 72nd hour even if the detainee is undergoing interrogations.

→ *Maximum duration of police custody*

A police officer has the competence to place an individual suspected of commission of an offence punishable by a prison sentence (a *délit* or a *crime*) in police custody. Police custody is overseen by the prosecutor and lasts for a duration of 24 hours, renewable once (CPP art. 63). Exceptionally for terrorist matters, this duration can be extended for two periods of 24 hours with the approval of the liberty and detention judge (CPP art. 706-88). This judge can authorize two additional renewals of the duration in police custody, in circumstances arising from matters of international cooperation or where there is a threat of an imminent terrorist attack (CPP art. 706-88-1). This makes its maximum duration six days - one of the longest periods of detention in police custody in continental Europe.

→ *Access to a lawyer*

Where standard suspected criminals have access to a lawyer from the beginning of the case initiated against them (CPP art. 63-3-1), a law passed in 2004 legislated to preclude access to a lawyer until the 72nd hour for suspects of terrorists offences (CPP art. 706-88).⁹⁵ This was held to be a violation of the right to a fair trial by the European Court of Human Rights (EctHR) in *Salduz v. Turkey* (2008)⁹⁶ and again in *Brusco v France* (2010).⁹⁷ Following

⁹⁵ Law of March 9th 2004 (n°2004-204)

⁹⁶ *Salduz v. Turkey* App no. 36391/02 (ECHR, 27 November 2008)

Salduz, the law changed and defence lawyers are permitted to be present during police interrogations. The ECtHR however noted that a regime of this sort could be justified on the basis of “compelling reasons.” Subsequently, in 2011, the French legislature introduced this notion of “compelling reasons” to both comply with the case law of the ECtHR and in order to sustain a derogatory regime in terrorist cases (CPP art. 706-88).⁹⁸

Even when the suspect has the right to see a lawyer before and during interrogation, the access is limited. The private consultation with the lawyer lasts for only 30 minutes, and during the interrogation itself lawyers do not assume an active role; it is only at the end of the interrogation that they will intervene. The lawyer's intervention is controlled by the police officer, who may refuse to allow the suspect to answer the lawyer's questions. In case of difficulty, the lawyer can provide written observations, which will be annexed to the minutes of the interrogation, or sent directly to the Public Prosecutor.

→ *Interrogation conditions*

According to CPP art 64-1, interrogations in detention must be videotaped in ordinary criminal offences. A derogatory regime excluded this obligation for detainees suspected of terrorist acts. The *Conseil Constitutionnel* however, found that this violated the rights of defence and the principle of equality before the law.⁹⁹ In order to comply with ECtHR rulings on the subject,¹⁰⁰ the legislature reformed the rule of procedure in 2016 to enable the defence lawyer to assist in interrogations (CPP art. 63-4-2). Again in terrorism cases this possibility can be excluded until the 72nd hour (CPP art. 706-88).

Without the supervision of an independent judge or lawyer, this procedural framework for police custody makes it is very difficult to actively ensure the protection of the rights of the detainee at a critical stage. At this stage the arrested persons are most likely to be subject to ill-treatment and yet that responsibility rests with the prosecutor who arguably has additional objectives other than detainee rights protection.¹⁰¹

⁹⁷ *Brusco v. France* App no. 1466/07 (ECHR, 14 October 2010). The Strasbourg Court stressed the importance of an individual's right to exert their right to legal representation from the early stages of judicial procedure; see also *Borg v. Malta* App no. 37537/13 (ECHR, 12 January 2016)

⁹⁸ Law of April 14th 2011 (n°2011-392) ; see also Hodgson, 2015, p. 11

⁹⁹ Décision n° 2012-228/229 QPC of April 6th 2012

¹⁰⁰ See *Brusco v. France* App no. 1466/07 (ECHR, 14 October 2010)

¹⁰¹ Jacqueline Hodgson, *The Investigation and Prosecution of Terrorist Suspects in France* (2006) 21

1.2 - Pre-trial detention

In order to ensure the investigation proceeds smoothly, the person investigated for an offence can be subjected to judicial control measures such as restriction of movement, house arrest, prohibition of certain activities and periodic report to the police, etc. The investigative judge can make a request before the liberty and detention judge for pre-trial detention measures, in circumstances of an offence punishable of three years or more and only if there is already strong evidence against the suspect.¹⁰² The liberty and detention judge may order a provisional detention in the following circumstance (Art 144 CPP): for the preservation of evidence, the prevention of pressure against witnesses or victims, the prevention of fraudulent consultation with co-perpetrators or accomplices, the protection of the person under investigation, the maintenance of the person the disposition of justice, the prevention of the renewal of the offense or the end of an exceptional and persistent disturbance to public order.

Returnees from Syria are systematically placed in pre-trial detention. Prior to 2016, this regime was confined to men. After 2016, it applies to members of both sexes. The law allows for special period of pre-trial detention in terrorism cases - up to three years in cases of *délits* and four years in cases of *crime*. It can be prolonged twice for an additional period of 4 months each time.¹⁰³ Pre-trial detention is decided by the judge of detention and liberty, upon request of the investigative judge. In practice, the decision will be taken in the nearby office by the liberty and detention judge in closed door proceedings in the presence of the defence lawyers. The decisions are often produced in quick and undetailed reports containing little contribution from the defence.¹⁰⁴ Neither the procedures nor the decisions are public, the hearings are poorly documented and little data is available, yet there have been reports of insufficient time to devote to files.¹⁰⁵ In practice, the liberty and detention judge has generally approved requests made by the investigative judge.¹⁰⁶ Even when the liberty and detention judge rule out the requests by the prosecution and the investigative judge, his

¹⁰² It should be noted that the alternative to detention may be subjected to the actuality, and for example, electronic bracelets have been practically abandoned in favour of pre-trial detention since the attack of *Saint-Étienne-du-Rouvray*, committed by an individual placed under such a judicial control measure (interview with a defence lawyer specialised in terrorist cases, April 24th 2018).

¹⁰³ Due to the numerous amendments to the rules of procedures, the rules on pre-trial detention are quite dispersed and complex: Art 137 of the code of criminal procedure defines the reasons to order pre-trial detention; Art 706-24-3 set three years pre-trial detention for suspect of AMT when the acts are investigated as a *délit* (up to 10 years imprisonment); Article 145-2 set pre-trial detention for crimes: up to 4 years pre-trial detention for crimes of terrorism punishable more than 20 years and three years for acts committed outside France and punishable less than 20 years.

¹⁰⁴ Assemblée Nationale, *Rapport N°3125 fait au nom de la Commission d'enquête chargée de rechercher les causes des dysfonctionnements de la justice dans l'affaire dite d'Outreau et de formuler des propositions pour éviter leur renouvellement* (2006)

¹⁰⁵ Assemblée Nationale, *Rapport N°3125 fait au nom de la Commission d'enquête chargée de rechercher les causes des dysfonctionnements de la justice dans l'affaire dite d'Outreau et de formuler des propositions pour éviter leur renouvellement* (2006).

¹⁰⁶ Interview with an investigative judge, March 2018.

decision is almost systematically appealed and higher courts often have a stricter approach, more in line with the requests of the investigative judge and the prosecutor.¹⁰⁷

Once the indictment is completed, the accused persons may wait another year until trial.¹⁰⁸ The accumulation of the period of pre-trial detention and the waiting period to be judged, results in a detention period that can be extremely long. It is questionable whether this responds to the European Convention requirement to be judged within a reasonable time. In practical terms, according to the Follow-up Commission on Pre-trial Detention (*Commission de suivi de la détention provisoire*), the pre-trial detention duration is often close to its maximum limit¹⁰⁹ despite the exceptionality of that limit and the need for proportionality and reasonability in its duration (CPP art 144-1). This evolution towards a presumption in favour of detention is confirmed by the report of the *Commission*, which perceived the increase in pre-trial detention as indicative of an increasingly harsh approach by judges, motivated by the atmosphere after the 2015 terrorist attacks.¹¹⁰ This is particularly pertinent to returning foreign fighters, who tend to be systematically placed in pre-trial detention.¹¹¹

→ *Solitary confinement*

The investigative judge or the liberty and detention judge can order the applicability of solitary confinement for detainees in pre-trial detention.¹¹² A detainee in pre-trial detention (or a convict in prison) can be subject to solitary confinement also as a result of a decision taken by the penitentiary administration¹¹³. The *Conseil d'Etat* ruled in 2008 that solitary confinement could only be used in circumstances of strict necessity and that detainees had the right to appeal against a decision of solitary confinement,¹¹⁴ there is no available data on how many people were placed in isolation by judges. It seems however to be a growing practice.¹¹⁵

¹⁰⁷ Interview with a defence lawyer specialised in terrorist cases, April 24th 2018. According to Pauline Le Monnier de Gouville limited judicial oversight was retained in the law in order to negate any suggestion that the principle of legality was circumvented, yet it remains largely ineffective in practice. See, Pauline Le Monnier de Gouville, *Le juge de la liberté et de la détention entre présent et avenir* [2011] Cahiers de justice 2011/4, p 145.

¹⁰⁸ Art 181 of the CPP. This can be renewable one time for another year. Thus, a suspect can be in pre-trial detention without limit if time and once accused, he can wait his trial in detention two years more. Yet according to the Cours de cassation it cannot be delayed because of logistic issues ("Au délai de ce délai, la jurisprudence impose de justifier des raisons extérieures à l'organisation judiciaire pour permettre la prolongation de la détention provisoire). See <http://www.senat.fr/rap/116-252/116-2521.pdf> p 13.

¹⁰⁹ Commission de suivi de la détention provisoire, *Rapport 2015-2016* (2016). The Commission was set to keep track on the evolution of the pre-trial detention practices and gather MPs, judges and law experts.

¹¹⁰ Commission de suivi de la détention provisoire, *Rapport 2015-2016* (2016)

¹¹¹ Nicole Belloubet *Declaration to the Senate of Nicole Belloubet, Garde des sceaux (Minister of Justice) over the return of jihadists in France* (2017, december 13th)

¹¹² CPP art. 145-4-1

¹¹³ This is for up to one year with a periodic review every three months. Beyond one year, the confinement measure can be extended by the Ministry of Justice, in the absence of any maximum duration provided by the Code of Criminal Procedure. See art. 726-1; art. R57-7-64 to R57-7-67 and art. R57-7-68 of the CPP.

¹¹⁴ Conseil d'État, Section du Contentieux, 31/10/2008, arrêt N°293785

¹¹⁵ At the end of 2016, 15% of the terrorism prisoners were in isolation (phone interview with OIP, 28 March 2018).

Solitary confinement in the penitentiary context could be justified on the basis of the threat posed by the individual but also on the risk of proselytism and influence over other detainees.¹¹⁶ It is a source of concern as it can lead to inhumane treatment and damage the health of the detainee. According to the European Commission for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT):

“It can have an extremely damaging effect on the mental, somatic and social health of those concerned (...) and (it) increases the longer the measure lasts and the more indeterminate it is.”¹¹⁷

Table

The maximum pre-trial detention period

Maximum number of years of imprisonment for the punishment of the offence	Maximum pre-trial detention for ordinary offences	Maximum pre-trial detention for association of wrongdoers (<i>association de malfaiteurs</i>) and offences committed abroad
Punishable for less than 3 years of imprisonment (<i>délits</i>)	None	None
Punishable for between 3 years and 10 years (<i>délits</i>)	1 year (+ 4 months) reviewed every 4 months	2 years (+ 4 months) reviewed every 4 months
Punishable for between 10 years and 20 years (<i>crimes</i>)	2 years (+ 8 months) reviewed every 6 months	3 years + (8 months) reviewed every 6 months
Punishable for more than 20 years (<i>crimes</i>)	3 years (+ 8 months) reviewed every 6 months	4 years (+ 8 months) reviewed every 6 months

*Fig.1 - Maximum pre-trial detention duration*¹¹⁸

¹¹⁶ Patrick Mennucci, *Rapport d'enquête de la commission d'enquête sur la surveillance des filières et des individus djihadistes, "Face à la menace djihadiste, la République mobilisée"* (2015)

¹¹⁷ European Commission for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *21st General Report of the CPT* (2011) 39

¹¹⁸ The Code de Procédure Pénale set that duration of the pre-trial detention must be proportionate and reasonable (CPP art 144-1). The duration of pre-trial detention cannot exceed 1 year for offences punishable for up to 10 years of imprisonment (*délits*). However, a derogatory regime exists for the AMT committed abroad that allows to postpone the detention limit up to 2 years (CPP art. 145-1). For crimes (punishable for more than 10 years) the pre-trial detention cannot exceed 2 years if the offence is punishable for less than 20 years of imprisonment or 3 years otherwise. In case of AMT and offences committed abroad, the pre-trial detention can last an additional year (respectively 3 and 4 years) (CPP art. 145-2). In any case, if there is a serious risk for the security of persons and property, it can be generally further extended for 4 months, which is renewable once in case of offences punishable for more than 10 years (CPP art. 145-1; CPP art. 145-2).

According to a defence lawyer specialised in terrorist cases¹¹⁹, there is a clear tendency to prosecute and investigate suspects of terrorism under criminal offences (Criminal AMT, as outlined above) so that those individuals can be held in pre-trial detention for a longer period subject to less frequent review. However, towards the end of the procedure, they are often requalified as *délits* since the charges are usually not strong enough to constitute a crime.

1.3 - Criminal Procedural Framework for Minors

In France, any individual under eighteen years old is considered a minor. Nevertheless, according to the article 122-8 of the French Criminal Code, “minors able to understand what they are doing are criminally responsible for felonies.”¹²⁰ Minors therefore can be criminally prosecuted, and sentenced to prison. The minimum age at which an individual may be held criminally accountable is 10 years; imprisonment can be imposed upon minors from as young as 13 years old.

Juvenile courts were created in collaboration with the public prosecutor and the Youth Judicial Protection Service for cases against minors. The most serious cases related to terrorism are handled by the *Cour d’Assises Special de Mineurs*, which has jurisdiction over offences committed by minors between sixteen and eighteen years old. No criminal penalties can be imposed on minors under the age of ten years old, and from the age of ten until thirteen, educational measures can still be applied. However, if considered insufficient, the minor may be placed in an institution for juvenile offenders. From the age of thirteen to sixteen years old, the minor may be sentenced to imprisonment, but they receive half of the adult sentence. Sixteen and seventeen year old minors can be held in pre-trial detention and, depending on the accusations, may be prosecuted and sentenced as adults.¹²¹

On December 2017, it was reported that 70 minors were under investigation, nine were awaiting trial and 20 were judged.¹²² Although the French juvenile justice system was developed based on the idea that any child and teenager is an individual in a developing phase, and thus warrants assistance through educational and psychological measures, in the counter-terrorism context, the governing principle is the protection of society.¹²³ Particularly pertinent to the case of minors is those who attempt to travel to or from the Syrian-Iraq zone, as well as those who have committed or shown desire to commit acts of terrorism on national territory.¹²⁴ Many of the children prosecuted and sentenced have been exposed to terrorist organizations from a young age as an upshot of social and economic exclusion. Children do not have the capacity to discern their actions, and should not be prosecuted and investigated

¹¹⁹ Interview with a defence lawyer specialised in terrorist cases, April 24th 2018.

¹²⁰ French Criminal Code, Art 122-8.

¹²¹ *Ibid.*

¹²² *Le Journal du Dimanche*, 24 December 2017, p. 4

¹²³ Thierry Baranger, Laurent Bonelli, Frédéric Pichaud. *La justice des mineurs et les affaires de terrorisme. À l’épreuve du terrorisme.* Cah. Justice 2017/2, p. 253.

¹²⁴ *Ibid.* p. 254.

as adults. Children and adolescents are not fully responsible individuals. Their acts of transgression arise as a social symptom that gives voice to a number of vulnerabilities that make them easier to be attracted to and used by terrorist organizations.

2 - The penitentiary policy

The security approach identified in the penal procedure does not stop at the trial, it is extended in prison. A sociologist specialised in the radicalisation process, explains how security was almost the single concern in the penitentiary policy and its impact.¹²⁵

The current system was established in 2016, in reaction to the 2015 attacks. Both convicted criminals and individuals in pre-trial detention are sent to Radicalisation Assessment Units, *Quartiers d'Évaluation de la Radicalisation* (QER), and, for up to 6 to 8 weeks, they undergo an individual assessment of the threat they pose in order to be sent to a facility corresponding to the security level they are assigned to.¹²⁶ For those who are waiting to be tried, the assessment report will provide the judge with information on the personality and the mindset of the accused. Unfortunately, once assigned to a specific facility, they have a very poor follow-up to consider their future after their detention.

Yet, there is no “space” for any kind of trust to emerge in order to establish an objective evaluation in such conditions: both the detainee and the person in charge of the evaluation have legitimate reasons to suspect dissimulation. On the one hand, the detainee knows that he is being evaluated and develops paranoia against a system that seems set up to “neutralize” him. On the other hand, professionals are always suspicious of what detainees could say to avoid a tougher sentence and/or detention conditions. Furthermore, the high turnover rate of the assessing staff, but also of the detainees, precludes from having the long-term follow-up that is needed to genuinely understand the person and make the difference between the very different profiles that compose the individuals involved in terrorist activities.

Finally, the sociologist underlines two threats posed by the current system. First, in addition to the tough security policy, the political discourse is such that it assumes that terrorist convicts will never be released nor escape from the state’s surveillance. Such discourse, combined with the situation of paranoia mentioned above, can create conditions that lead the

¹²⁵ Interview with Ms Ouisa Kies, Phd candidate in sociology at the *École des hautes études en sciences sociales* (EHESS) and member of the Prime Minister’s academic committee on the radicalization process (12th May 2018).

¹²⁶ For more information about the current policy, see Ministère de la Justice, *Sécurité pénitentiaire et action contre la radicalisation violente, Plan d’action de Jean-Jacques Urvoas Garde des Sceaux, ministre de la Justice* (16th October 2016).

Available at http://www.justice.gouv.fr/publication/securite_penitentiaire_et_action_contre_la_radicalisation_violente.pdf

convict to believe that he has nothing to lose and make him adopt an even tougher approach against the penitentiary system and society in general. On the other hand, a prison sentence is supposed to re-socialize convicts while setting aside their criminal behaviours. However, the current security approach includes very few concerns about the convicts' reinsertion even though some of them are going to be released in the coming years. Worse, it seems that the current system fosters conditions for further alienation.

→ *Prison security measures*

In *Khider v. France*, the ECtHR ruled that the security measures amounted to a violation of Article 3, in particular with respect to the excessive and disproportionate policy of periodic facility transfers, body searches and solitary confinement. The Court stressed that the decision to isolate a detainee cannot be automatic and cannot depend solely on the offence for which the individual is convicted. The decision shall instead be subject to a fact-based determination of the threat that individual poses. The degrading mental health of the detainee should have been taken into consideration when imposing solitary confinement. Finally, the Court ruled that the body searches and the systematic transfers violated Article 13 (the right to an effective remedy) as the detainee could not appeal against those measures.¹²⁷ Finally, the CPT reported that night controls forced detainees to wake up regularly—sometimes up to every two hours¹²⁸—and might cause psychological troubles.¹²⁹

After prison guard strikes in January 2018¹³⁰ which were motivated by an assault against a guard by a radicalized inmate, the French government was forced to reassess its penitentiary procedure for those imprisoned for terrorist offences. Indeed, in February 2018, Prime Minister Edouard Philippe unveiled a new strategy which moves France towards a policy of isolation for inmates convicted of terrorist offences. Consequently some 1,500 spots will be created in “isolation zones” for those identified as radical. The most dangerous prisoners will be housed in three “watertight” isolation zones. Past strategy had been to disperse radicalised prisoners amongst other “non-radicalised” inmates in 30 other prison locations according to an evaluation of their degree of indoctrination and danger, conducted by educators, psychologists and doctors. Past separation procedure was deemed counter-intuitive as it encouraged the radicalisation of other inmates. Now a combination of separation and isolation of terrorists from other inmates serves to prevent “contamination” of them.

¹²⁷ *Khider v. France*, App no. 39364/05 (ECHR 9 July 2009)

¹²⁸ Observatoire international des prisons, *Détenus Particulièrement Signalés : surveillance permanente et contrainte maximale* (2014) Available online at <<https://oip.org/analyse/detenus-particulierement-signalés-surveillance-permanente-et-contrainte-maximale/>> accessed 29 March 2018

¹²⁹ European Commission for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Rapport au Gouvernement de la République française relatif à la visite effectuée en France* (2015)

¹³⁰ BBC News, “French Prison Guards in Nationwide Strikes Over Attacks,” <<http://www.bbc.com/news/world-europe-42771468>> (accessed 15th April 2018.)

Eventually, it results from the above that the penitentiary policy is the product of inconsistent immediate arrangements in response to terrorist attacks and other events rather than a comprehensive policy about the purpose of sentences and prisons.¹³¹

¹³¹ Interview with Ouisa Kies, Phd candidate in sociology at the *École des hautes études en sciences sociales* (EHESS) and member of the Prime Minister's academic committee on the radicalization process (12th May 2018).

PART V

EXTERNALIZATION OF JUSTICE: FRENCH FOREIGN FIGHTERS DETAINED ABROAD

After the Arab uprisings, the foreign fighter figure has reached a new scale: The number of FTFs went from 1,000 in 2011 to almost 30,000 by October 2015 in Syria and Iraq alone, with 30% of them coming from Europe.¹³² France is one of the major sources of individuals leaving for Syria and Iraq, with official estimates reporting approximately 1,700 people having travelled to join militia groups since June 2011 and about 250 returnees so far.¹³³

The legal framework built to handle this is twofold. On one side, foreign fighters may be investigated and prosecuted on the basis of national terrorism legislation. Additionally, France is allowing many French foreign fighters to be tried before tribunals in Iraq and Syria, effectively offshoring its due process and counter-terrorism obligations to judicial black sites.

1 - Makeshift Tribunals in Iraq: Judicial Black Sites ?

Human Rights Watch reports that Iraqi and the Kurdistan Regional Government (KRG) authorities appear to be prosecuting ISIS suspects without any distinction or prioritization based on the alleged offences, and each one according to its own counter-terrorism strategy.¹³⁴ Through broad counterterrorism definitions, charges are brought, often with death sentences, against a wide range of individuals, many of whom were not actually involved in violence (doctors and cooks who worked in ISIS-run hospitals or prepared food for fighters). Under Iraq and KRG counter terrorism laws, judges can summarily convict ISIS suspects upon the mere admission of membership, without the need to gather full evidence. These trials do not inform victim communities, include victim participation, or appropriately compensate victims. The office of the UNHCR warned that these trials, which are leading to the deaths of guiltless bystanders and relatives, may be “irreversible miscarriages” of justice.¹³⁵ Today, we do not know many French Foreign Fighters face death penalty and torture before these tribunals in Iraq. Iraqi authorities have refused to give details on the number of foreign ISIS suspects they are detaining.

¹³² Tanya Mehra, ‘Foreign Terrorist Fighters’ (2016), International Center for Counter-Terrorism: 7.<
<https://icct.nl/wp-content/uploads/2016/12/ICCT-Mehra-FTF-Dec2016-2.pdf>>

¹³³ The Soufan Group, “Foreign Fighters An Updated Assessment of the Flow of Foreign Fighters into Syria and Iraq”, The Soufan Group, December 2015, 7-10. http://soufangroup.com/wp-content/uploads/2015/12/TSG_ForeignFightersUpdate3

¹³⁴ HRW, *Flawed Justice Accountability for ISIS Crimes in Iraq*, December 2017 ; HRW, *Kurdistan Regional Government: Allegations of Mass Executions*, February 2018.

¹³⁵ Margaret Coker and Falih Hassan, ‘A 10-Minute Trial, a Death Sentence: Iraqi Justice for ISIS Suspects’ *The New York Times* (New York, April 17, 2018)

2 - An Obligation to Repatriate French Citizens?

The question is currently debated as to whether or not France has an obligation to grant alleged jihadists of French nationality due process in the French justice system.

Article 3 of the Geneva Convention set the obligation to treat the prisoner humanely and prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” Human Rights Law imposes the obligation to conduct fair trials and to treat detainees humanly, thus placing requirements and limitations on the conduct of investigations and legal proceedings in courts, the level of punishment imposed and the condition of detentions and treatment of detainees.¹³⁶ To this end, France should not recognize the competence of courts that are not compatible with those requirements and should not delegate the responsibility to these makeshift courts.

France, which has been a belligerent in the conflict in Iraq and Syria, also has responsibility towards the prisoners arrested during this conflict and cannot delegate this responsibility towards the co-belligerent actors, without guaranteeing that the processes are in accordance with international law. France is in a position to exercise influence on the decision of what to do with these prisoners, and must guarantee a fair trial, adequate detention conditions, and absence of torture and death penalty. Failing to exercise such due diligence would mean both a lost opportunity for counterterrorism and conflict resolution, and also a violation of international law.

To go one step further, France’s consent to allow the prosecution of detainees in tribunals, in which they may face acts of torture and summary executions, could be seen as an outsourcing of these crimes — a strategy by which courts in Iraq serve as black sites for violations of human rights, indirectly with the compliance of the French state. Moreover, if France is involved in interrogating suspects at these locations, it may be found directly accomplice to any illegal treatment and illegal condition of detention practiced there.

3 - Undermining Counter-Terrorism Efforts?

In the latest Security Council resolution, acting under Chapter VII of the UN Charter, the Council clearly noted the potential for violations among these makeshift tribunals, stressing in particular the need to assist women and children associated with foreign fighters who may in fact be victims of terrorism, and to provide them with appropriate prosecution, rehabilitation, and reintegration strategies.¹³⁷ This resolution also called upon Member States

¹³⁶ See for example, art 14 of the ICCPR and Art 6 of the ECHR.

¹³⁷ Fionnuala Ni Aolain, ‘The UN Security Council, Global Watch Lists, Biometrics, and the Threat to the Rule of Law’ Just Security.org, 17 January 2018) < <https://www.justsecurity.org/51075/security-council-global-watch-lists-biometrics/>> (Accessed 18 April 2018)
Security Council Resolution 2396 (2017) 21 December 2017, para 31:
<https://www.un.org/press/en/2017/sc13138.doc.htm>

“to improve timely information sharing, through appropriate channels and arrangements, and consistent with international and domestic law, on foreign terrorist fighters, especially among law enforcement, intelligence, counterterrorism, and special services agencies, to aid in determining the risk foreign terrorist fighters pose, and preventing them from planning, directing, conducting, or recruiting for or inspiring others to commit terrorist attacks.”¹³⁸ France is acting in opposition to counter-terrorism strategies by rejecting the opportunity to gain potential counter-terrorism intelligence information as revealed during these cases (dossiers, testimonies, etc.). Seemingly, France’s current policies are against its own military and security interests.

4 - Consular protection

France has an obligation to engage in countries through diplomacy where its citizens are in danger. France has to protect the due process rights of their nationals through consular access and assistance in providing legal representation, through monitoring detention and trial conditions, and through other advocacy and interaction with the Iraqi government to make sure that their rights are respected. France’s refusal to protect the due process rights of this particular group of citizens can be seen as discriminatory treatment.

In conclusion, France has legal and humanitarian obligations, in addition to counter-terrorism motivations, to try its nationals facing makeshift tribunals in Iraq. Even if no positive legal obligation exists as yet, France should not exonerate itself from the responsibility of preventing of suffering, torture, and punishment by death, which are prohibited under both French and International Law.

¹³⁸ *ibid*, preamble