



# **Preempting Justice**

## **Counterterrorism Laws and Procedures in France**

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## I. Executive Summary

Since the mid-1980s, when it suffered a wave of terrorist attacks, France has refined a preemptive criminal justice approach to countering terrorism, which many of its officials regard as a model worthy of emulation elsewhere. France's approach is characterized by the aggressive prosecution of alleged terrorist networks operating on French territory. It is founded on close cooperation between specialized prosecutors and investigating judges and the police and intelligence services, coupled with limitations on the procedural guarantees that apply to ordinary crimes.

Central to this preemptive approach is the broadly defined offense of “criminal association in relation to a terrorist undertaking” (*association de malfaiteurs en relation avec une entreprise terroriste*, hereafter “association de malfaiteurs”). Established as a separate offense in 1996, it allows the authorities to intervene with the aim of preventing terrorism well before the commission of a crime. No specific terrorist act need be planned, much less executed, to give rise to the offense. Intended to criminalize all preparatory acts short of direct complicity in a terrorist plot, an association de malfaiteurs charge may be leveled for providing any kind of logistical or financial support to, or associating in a sustained fashion with, groups allegedly formed with the ultimate goal of engaging in terrorist activity.

French counterterrorism officials argue that the flexibility of the French criminal justice system allows the authorities to adjust legal responses to address effectively the threat of international terrorism. Even some analysts who recognize that this has led to a trade-off in rights contend that the government's ability and willingness to adapt the system has averted the need to resort to extrajudicial or administrative measures in the fight against terrorism, such as those pursued by the United States and United Kingdom governments, which they argue have far worse consequences for rights protection.

Human Rights Watch is convinced that effective use of the criminal justice system is the best way to counter terrorism. But too much flexibility in the system will stretch the rule of law to the breaking point. France's duty to protect its population from acts

of terrorism is matched by its obligations under European and international human rights law to ensure that measures taken to counter terrorism are compatible with coexisting human rights protections, including the rights of those deemed to pose a threat.

In practice, French counterterrorism laws and procedures undermine the right of those facing charges of terrorism to a fair trial. The broad definition and expansive interpretation of association de malfaiteurs translate into a low standard of proof for decisions to arrest suspects or to place them under investigation by a judge. Indeed, casting a wide net to ensnare large numbers of people who might have some connection with an alleged terrorist network has been one of the characteristics of investigations into association de malfaiteurs.

Once arrested, terrorism suspects may be held in police custody for four days, and in certain circumstances up to six days, before being brought before a judge to be placed under judicial investigation or released without charge.

Suspects are allowed to see a lawyer for the first time only after three days in custody (four days in some cases), and then only for 30 minutes. The lawyer does not have access to the case file, or information about the exact charges against his or her client, leaving little scope for providing legal advice. Suspects may be subjected to oppressive questioning, at any time of the day or night, without a lawyer present. Police are under no obligation to inform suspects of their right to remain silent.

Testimonies from people held in police custody on suspicion of involvement in terrorism suggest that sleep deprivation, disorientation, constant, repetitive questioning, and psychological pressure during police custody are common. There are credible allegations of physical abuse of terrorism suspects in French police custody. Limited access to a lawyer during police custody makes suspects vulnerable to ill-treatment in detention.

Once the suspect is brought before a judge, minimal evidence of relation to an alleged terrorist network is usually sufficient to remand a suspect into pretrial detention for months or in some cases years. A reform introduced in 2001 giving

responsibility for decisions about custody and provisional release to a separate “liberty and custody judge” has made little difference to the effective presumption in favor of detention in terrorism cases, because these judges are reluctant or lack sufficient information and time to go against the wishes of the investigating judge or prosecutor.

Intelligence material, including information coming from third countries, is often at the heart of association de malfaiteurs investigations. Indeed, most if not all investigations are launched on the basis of intelligence information. The appropriate use of intelligence material in judicial proceedings can play an important role in the effective prosecution of terrorism offenses. But the close links between specialist investigative judges and the intelligence services in terrorism cases undermine the skepticism and consideration for the rights of the accused with which the judges should approach any potential evidence or source of information. The right of defendants to a fair trial is seriously undermined when they cannot effectively probe or question the source of the evidence against them.

The use of evidence obtained from third countries where torture and ill-treatment are routine raises particular concerns, including about the nature of cooperation between intelligence services in France and those countries. Some defendants in France who credibly allege they were tortured in third countries into confessing have successfully had the confessions excluded as evidence.

But the courts appear to have allowed as evidence in some cases statements allegedly made under torture by third persons. Trips by investigative judges to third countries with poor records on torture to verify material for use in French prosecutions raise questions about the willingness of French judges to turn a blind eye to allegations of abuse.

The overly broad formulation of the association de malfaiteurs offense has led, in our view, to convictions based on weak or circumstantial evidence. As long as there is evidence that a number of individuals know each other, are in regular contact, and share religious and political convictions, there is considerable room for classifying a

wide range of acts, by even the most peripheral character, as the “material actions” demonstrating participation in a terrorist undertaking.

Excesses in the name of preventing terrorism, even if the overall strategy is based on use of the criminal justice system, are likely to be counterproductive insofar as they alienate entire communities. Injustice feeds resentment and erodes public trust in law enforcement and security forces among the very communities whose cooperation is critical in the fight against terrorism. Over the long term, these abuses may actually feed into the grievances exploited by extremists.

As the “cradle of human rights,” France has been at the forefront of efforts to advance respect for international human rights law, as well as expand its boundaries, worldwide. It has also become an authoritative voice on counterterrorism issues, both within the European Union and beyond. France can best demonstrate leadership in both fields by ensuring that its criminal justice system holds to the highest standards of procedural guarantees.

## **Key Recommendations**

Human Rights Watch urges the French government to take the following key steps:

- Refine the definition of criminal association in relation to a terrorist undertaking in the Criminal Code to provide a non-exhaustive list of the types of behavior likely to attract criminal sanction, and require the demonstration, beyond a reasonable doubt, of intent to participate in a general plan to commit terrorist acts;
- Improve safeguards in police custody, including access to a lawyer from the outset of detention and presence of counsel during all interrogations;
- Impose an obligation on investigating judges to order official inquiries into any allegation of mistreatment in police custody;
- Strengthen the role and independence of liberty and custody judges by ensuring continuous training and continuity in their case-load;
- Ensure that as a matter of law and practice any evidence shown to have been obtained under torture and ill-treatment, irrespective of where and from whom it was obtained, is unequivocally inadmissible in any criminal

proceedings, including the investigative phase (except as evidence in proceedings to establish that torture or other prohibited ill-treatment occurred).

## II. Background

The French counterterrorism model has developed over decades of experiences of domestic, binational, and transnational terrorism. Like other European countries, France has a history of internal violence and terrorist acts by extreme left-wing groups (for example, Action Directe) and regional separatist groups advocating independence or greater autonomy in the Basque country, Brittany, and Corsica.<sup>1</sup>

The brutal eight-year war that led to Algeria's independence from France in 1962 was distinguished by extraordinary savagery, including widespread violence against civilians and terrorist bombings in Algeria, as well as widespread torture by French forces. It was in the mid-1980s, however, that France experienced a new form of "de-territorialized" terrorism.<sup>2</sup> Over a dozen attacks in Paris in 1986 on department stores, trains, subways, and public buildings claimed 11 lives and injured over 220 people. A previously unknown group called the Committee for Solidarity with Near Eastern Political Prisoners took responsibility for the strikes. In 1995 another wave of attacks between July and September—including a bomb at the Saint Michel subway station in Paris—killed 10 and injured over 150 people. French authorities attributed the attacks to the Algerian Armed Islamic Groups (Groupes Islamiques Armees, GIA).

In response to the threat of international terrorism, France adopted a preemptive approach characterized by an emphasis on intelligence-gathering; aggressive prosecution to dismantle terrorist networks in formation; and removals of foreign terrorism suspects and those accused of fomenting radicalization and recruitment to terrorism.<sup>3</sup> Indeed, by the time the fight against Islamist terrorism had become an international priority following the September 11, 2001 attacks in the United States,

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<sup>1</sup> Action Directe was a left-wing group active in the late 1970s and 1980s that used violence to further its political goals.

<sup>2</sup> Antoine Garapon, "Is There a French Advantage in the Fight Against Terrorism," *Analisis del Real Instituto (ARI)*, Issue 110/2005, September 1, 2005, El Cano Royal Institute, <http://www.realinstitutoelcano.org/analisis.807.asp> (accessed October 10, 2006). The term "de-territorialized" refers to terrorism that is not linked to a country-specific cause, such as Algerian independence, but is rather an expression of transnational goals.

<sup>3</sup> For a detailed analysis of France's use of national security removals, see Human Rights Watch, *France – In the Name of Prevention: Insufficient Safeguards in National Security Removals*, vol. 19 no. 3(D), June 2007, <http://hrw.org/reports/2007/france0607/>.

France already had in place perhaps the most developed counterterrorism machinery in Europe.

France is one of only a few Western nations that have prosecuted its citizens or residents formerly held in US military detention at Guantanamo Bay. Seven French citizens were repatriated to France in 2004 and 2005, after spending from two to three years in US military custody. While one was released immediately, six were charged with criminal association in relation to a terrorist undertaking for “integrating terrorist structures” in Afghanistan. These men spent between one and one-and-a-half years awaiting trial in France. In December 2007 the 16<sup>th</sup> Chamber of the Paris Correctional Court convicted five of the men and sentenced them each to one year in prison. All free at the time of the verdict, they remained at liberty due to time already served in pretrial detention. The sixth man was acquitted.

## French Criminal Justice System

The criminal justice system in France is based on the inquisitorial approach, in which the Office of the Public Prosecutor opens a judicial investigation of a criminal offense but can ask an investigating judge (*juge d'instruction*) to oversee the investigation with the help of police assigned to him or her for that purpose. The investigating judge is supposed to be an impartial arbiter who seeks to establish the truth, and is entrusted with uncovering both incriminating and exculpatory evidence. He or she can order arrests and wire taps, issue warrants and orders to appear as a witness or produce documents instead, and require the police to conduct any lawful inspection. Prosecutors, defendants, and any civil parties to a criminal case may ask the investigating judge to order particular inquiries, which the judge may authorize or deny.<sup>4</sup> These decisions may be appealed to the higher Investigative Chamber (*Chambre d'Instruction*).

In theory, the investigating judge is an impartial arbiter who searches for all relevant evidence, including information that could help the defense.<sup>5</sup> In practice,

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<sup>4</sup> Article 82-1 of the Code of Criminal Procedure (CCP) provides a non-exhaustive list of investigative steps.

<sup>5</sup> CCP, art. 81.

investigating judges are often accused of working more to build a solid case against the accused than trying to seek “the truth.”

There are also concerns that there are insufficient checks on their power, to the detriment of the rights of the accused. In 2006 a special parliamentary committee investigating the so-called “Outreau Affair,” which saw 13 people falsely accused of pedophilia, went so far as to consider the suggestion that France should abandon the inquisitorial procedure in favor of the adversarial system used in common law jurisdictions such as the United Kingdom and the United States.<sup>6</sup> The committee recommended that investigating judges work on cases in “colleges” of three to avoid miscarriages of justice. A March 2007 law implemented this recommendation.<sup>7</sup>

In ordinary criminal cases in France, police may arrest and hold suspects for up to 24 hours, with the possibility of one 24-hour extension, before either releasing them or bringing them before the investigating judge (*premiere comparution*). Detainees have the right to see a lawyer at the outset of detention. The right to see a lawyer while in police custody was instituted only in 1993. Longer periods of police custody with delayed and limited access to a lawyer are permitted for a number of serious offenses, including drug-trafficking, organized crime, and terrorism (for the latter, see Chapter V, Police Custody in Terrorism Cases).

When a suspect is brought before an investigating judge, the judge can either order the person released without charge or place him or her under formal investigation (known as judicial examination, *mettre en examen*) if there is “strong and concordant evidence making it probable that [the suspect] may have participated, as perpetrator or accomplice, in the commission of the offenses he is investigating.”<sup>8</sup> The judge may then recommend to the prosecutor that the detainee be remanded into pretrial detention (*detention provisoire*).

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<sup>6</sup> National Assembly, "Rapport No. 3125 de la commission d'enquête chargée de rechercher les causes des dysfonctionnements de la justice dans l'affaire d'Outreau et de formuler des propositions pour éviter leur renouvellement," June 6, 2006, pp. 337-343, <http://www.assemblee-nationale.fr/12/pdf/rap-enq/r3125.pdf> (accessed April 9, 2008).

<sup>7</sup> Law 2007-291 of 5 March 2007 tending to strengthen the balance in criminal procedure, article 1.

<sup>8</sup> CCP, art. 80-1.

A separate judge, known as the liberty and custody judge (*juge des libertes et de la détention*), makes the decision. The investigating judge prepares the committal proceedings, containing the state’s case against the accused, and then transfers it to the prosecutor who will represent the state’s interests in the case before the appropriate trial chamber.

France operates a system of “free proof” in which an offense “may be proved by any mode of evidence.”<sup>9</sup> The only two restrictions are that the evidence must be obtained in a legal fashion and subject to debate at an adversarial hearing.

Minor felonies (*delits*)—punishable by up to 10 years in prison—are tried by three-judge panels in Correctional Court (*Tribunal Correctionnel*). Serious felonies (*crimes*) are tried by a nine-member jury and three judges in the Court of Assize (*Cour d’Assise*). Rulings by the Correctional Court may be appealed to the regional Court of appeal (*Cour d’Appel*), and then to the Court of Cassation (*Cour de Cassation*), the highest judicial body. Rulings by the Court of Assize may be appealed to another chamber of the Court of Assize, with a 12-member jury and three judges, and then to the Court of Cassation. The Court of Cassation reviews points of law only.

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<sup>9</sup> Ibid., art. 427.

### III. Counterterrorism Laws and Procedures in France

#### The Judicial Preemptive Approach

Over the past 30 years France has relied primarily on the criminal justice system to combat terrorism. In 1981 the government of President François Mitterrand abolished the State Security Court, a special tribunal that had tried all national security cases since 1963. The court, composed of three civilian judges and two military officers, had conducted its proceedings in secret with no right of appeal. The year after it was abolished, the French parliament modified the Code of Criminal Procedure to enshrine the principle that in times of peace, crimes against the “fundamental interests of the nation” are to be dealt with in the ordinary criminal justice system.<sup>10</sup>

Although the French preemptive approach is grounded in the ordinary justice system, terrorism investigations and prosecutions are subject to exceptional procedures, and managed by specialized prosecutors and judges. Since the mid-1980s all terrorism cases have been centralized in Paris among specialized prosecutors and investigating judges who work in close cooperation with national intelligence services.

The basic counterterrorism statute, adopted in 1986, fashioned the centralized judicial system for terrorism-related offenses that today defines the French model. Law 86-1020 of September 9, 1986, created a specialized corps of investigating judges and prosecutors based in Paris—the Central Counterterrorism Department of the Prosecution Service, otherwise known as the “14<sup>th</sup> section”—to handle all terrorism cases. The 1986 law also instituted trials by panels of professional judges for serious terrorism-related felonies in the Court of Assize in Paris, an exception to the rule of trial by jury in these courts.<sup>11</sup> The law extended maximum police custody to 96 hours (four days) in terrorism-related cases.<sup>12</sup>

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<sup>10</sup> Ibid., art. 702 (as amended by Law No. 82-621 of July 21, 1982). The official English-language translation of the Code of Criminal Procedure is available at [www.legifrance.gouv.fr](http://www.legifrance.gouv.fr).

<sup>11</sup> The Constitutional Court ruled that replacing a popular jury by professional judges in terrorism-related cases was a legitimate means of avoiding pressure and threats. Decision No. 86-213 DC, September 3, 1986.

<sup>12</sup> The 96-hour period of police custody is also applicable to drug trafficking and organized crime suspects.

The centerpiece of the French judicial counterterrorism approach is the broadly defined charge of “criminal association in relation to a terrorist undertaking” (*association de malfaiteurs en relation avec une entreprise terroriste*). The charge, introduced by Law 96-647 of July 22, 1996, gives the authorities the ability to take preemptive action well before the commission of a crime.

The vast majority of terrorism suspects are detained and prosecuted on this charge. According to government statistics, 300 of the 358 individuals in prison for terrorism offenses in September 2005—both convicted and those awaiting trial—had been charged with association de malfaiteurs in relation to a terrorist undertaking.<sup>13</sup>

As Christophe Chaboud, the head of the special anti-terrorism unit of the Ministry of Interior stated in mid-October 2005, “Our strategy is one of preventive judicial neutralization. The anti-terrorism laws ... put in place in 1986 and 1996 are our strength. We have created the tools to neutralize operational groups before they pass to action.”<sup>14</sup>

The offense is defined as “the participation in any group formed or association established with a view to the preparation, marked by one or more material actions, of any of the acts of terrorism provided for under the previous articles.”<sup>15</sup> In most cases, this charge is a minor felony offense tried in the Correctional Court, and is punishable by up to 10 years in prison. A 2006 law made the offense a serious felony punishable by up to 20 years in prison when the criminal association was formed with the purpose of preparing attacks on life and physical integrity, as well as abduction, unlawful detention, and hijacking of planes, vessels, or any other means of transport.<sup>16</sup> The punishment for being the leader of such a criminal association was raised from 20 to 30 years.<sup>17</sup>

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<sup>13</sup> The term “association de malfaiteurs” can be used with respect to numerous crimes. In this report, we use it to refer exclusively to the offense of belonging to a criminal association in relation to a terrorist undertaking. This statistic is from the Ministry of Justice, as reported in Piotr Smolar, “Les prisons françaises comptent 358 détenus pour activisme,” *Le Monde* (Paris), September 9, 2005.

<sup>14</sup> Jacky Durant and Patricia Tourancheau, “La menace terroriste contre la France est élevée,” *Liberation* (Paris), October 18, 2006.

<sup>15</sup> Criminal Code (CC), art. 421-2-1.

<sup>16</sup> The law stipulates the higher penalty for membership in a group whose purpose is to prepare attacks on persons as listed in article 421-1 (willful attacks on life, willful attacks on the physical integrity of persons, abduction and unlawful detention and

The 2006 law, which was enacted in response to the July 7, 2005 bombings in London, also increased the maximum period of police custody in terrorism cases to six days under certain conditions.<sup>18</sup>

Four other major pieces of legislation adopted since 2001 further reinforced counterterrorism measures. These laws broadened police powers to conduct vehicle and building inspections, imposed data retention and disclosure obligations on internet and telecommunications services, required disclosure of encryption codes where necessary in relation to a terrorism investigation, shored up security measures at airports and seaports, increased surveillance measures generally, and instituted new measures to fight financing of terrorism.<sup>19</sup>

The Criminal Code also lists a series of offenses that are considered acts of terrorism “where they are committed intentionally in connection with an individual or collective undertaking the purpose of which is seriously to disturb the public order through intimidation or terror.”<sup>20</sup> In addition, any criminal offense is subject to a higher sentence when committed in connection with a terrorist purpose. For example, an attack on life, subject to a maximum prison term of 30 years, may give rise to life in prison if perpetrated in connection to a terrorist act.<sup>21</sup>

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also the hijacking of planes, vessels or any other means of transport); attacks with explosives or fire in places and at times where such attacks are likely to cause the death of one or more persons; or the introduction into the atmosphere, the ground, waters, foodstuffs or ingredients of any substance liable to cause the death of one or more persons. Law No. 2006-64 of 23 January 2006 concerning the fight against terrorism and adopting different measures for security and border controls. As of February 2008, no one had yet been charged with association de malfaiteurs as a serious felony offense. See National Assembly, Law Commission Information Report on the implementation of Law No. 2006-64 of 23 January 2006, February 5, 2008.

<sup>17</sup> Law No. 2006-64 of January 23, 2006.

<sup>18</sup> Ibid.

<sup>19</sup> Law No. 2001-1062 of 15 November 2001 concerning everyday security; Law No. 2003-239 of 18 March 2003 for internal security; Law No. 2004-204 of 9 March 2004 adapting justice to the evolution of criminality; and Law No. 2006-64 of 23 January 2006 concerning the fight against terrorism and adopting different measures for security and border controls.

<sup>20</sup> CC, art. 421-1. These acts include attacks on life, physical integrity, abductions, hijackings, and theft and stockpiling of explosives. The article was incorporated into the CC in 1996 and was modified in 1998 and again in 2001.

<sup>21</sup> CC, art. 421-3.

### *A “flexible” approach*

Counterterrorism officials and government authorities cite the lack of a terrorist attack in France since the mid-1990s as proof of the system’s effectiveness. The key to this success, according to many, has been the willingness and ability to adapt criminal laws and procedures to respond to the particular exigencies of the fight against international terrorism. In this view, it is precisely the flexibility of the French criminal justice system that has eliminated the need to resort to extrajudicial or administrative measures in the fight against terrorism.<sup>22</sup>

In an interview with Human Rights Watch, Jean-Louis Bruguière, France’s most famous and controversial counterterrorism judge (now retired), compared the French judicial approach favorably to abuses committed by the United States at the Guantanamo Bay detention facility, and by the United Kingdom, where foreign terrorism suspects were detained indefinitely without charge from 2001 to 2004 until the highest court ruled the measures illegal.<sup>23</sup>

According to Bruguière,

Every government has an obligation to react to the threat. But the common law system is too rigid, it can’t adapt because its procedural laws are more important than the criminal laws at the base, and the procedure depends on custom so it doesn’t change easily. The civil law system is more flexible because it functions according to laws voted by parliament and can react faster.<sup>24</sup>

Flexibility and adaptability may be critical elements in an effective counterterrorism strategy, but they must not stretch the rule of law to breaking point. An appropriate criminal justice approach must be based on fundamental procedural guarantees ensuring the right to a fair trial, which are engaged from the outset of a criminal investigation.

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<sup>22</sup> Antoine Garapon, “Is There a French Advantage in the Fight Against Terrorism?” ARI.

<sup>23</sup> Human Rights Watch, *U.K.: Law Lords Rule Indefinite Detention Breaches Human Rights*, December 16, 2004, <http://hrw.org/english/docs/2004/12/16/uk9890.htm>.

<sup>24</sup> Human Rights Watch interview with Jean-Louis Bruguière, former investigating judge, Paris, February 26, 2008.

## Role of the Investigating Judge in Terrorism Cases

The role and power of the specialized counterterrorism investigating judges—referred to by one analyst as “informed, independent and pitiless adversaries of terrorism in all its forms”—cannot be underestimated.<sup>25</sup>

There are currently seven investigating judges specialized in terrorism cases.<sup>26</sup> Bruguière was the best known among them. He was head of the pool of specialized counterterrorism judges when he stepped down in 2007 after 20 years.<sup>27</sup> During his tenure, Bruguière earned a reputation for uncompromising dedication to his work. Known by nicknames such as “sheriff” and “the admiral,” Bruguière claimed in 2004 he had arrested over 500 people in the previous decade.<sup>28</sup>

The significant authority of the investigating judge in the French system is magnified with respect to terrorism cases. The logic is that a security-cleared, specialized, and experienced judge will, on the basis of all relevant information, including sensitive intelligence material, be able to connect the dots: discern the existence of a terrorist network, even where the material acts demonstrating this existence are limited to common crimes (for example forgery of identity documents) and determine the identities of the members of the network.<sup>29</sup>

Defense lawyers complain, however, that the way in which judicial investigations in terrorism cases are conducted seriously undermines the right of each defendant to

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<sup>25</sup> Jeremy Shapiro and Bénédicte Suzan, “The French Experience of Counter-Terrorism,” *Survival*, vol. 45, no.1, Spring 2003, p. 78.

<sup>26</sup> There are eight positions in the division of specialized counterterrorism investigating judges; at the time of writing, however, there were only seven active judges. Human Rights Watch interview with Philippe Maitre, counterterrorism prosecutor, Paris, February 27, 2008. The judges tend to further specialize in different types of terrorism (for example, international or Islamist, nationalist or separatist).

<sup>27</sup> In early March 2008, the European Commission designated Bruguière to undertake a review of implementation of a cooperation agreement between the European Union and the United States in the fight against financing of terrorism. “EU Review of the United States’ Terrorist Finance Tracking Programme,” European Commission press release, March 7, 2008, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/400&format=HTML&aged=0&language=en&guiLanguage=en> (accessed March 12, 2008).

<sup>28</sup> Craig Whitlock, “French Push Limits in Fight on Terrorism,” *Washington Post*, November 2, 2004.

<sup>29</sup> Shapiro and Suzan, “The French experience of counterterrorism.”

an effective defense.<sup>30</sup> This right is a cornerstone of the right to a fair trial. The International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR) stipulate the minimum guarantees necessary to ensure the right to a fair trial to all persons accused of a criminal offense. These include timely and confidential access to counsel, and adequate time and facilities to prepare the defense. Another key element is respect for the principle of “equality of arms,” which requires that the prosecution and the defense have equal opportunity to prepare and present their cases, including the obligation on the prosecution to disclose all material information.<sup>31</sup>

### *Motions denied*

Almost all defense attorneys we spoke with complained that investigating judges routinely deny their requests for investigative steps to be undertaken in the course of the judicial investigation.

The experience of Sébastien Bono during his defense of Christian Ganczarski is only slightly extreme: only one of his 24 requests for investigative steps was accepted (an inquiry commission to Saudi Arabia).<sup>32</sup> Ganczarski is a German national alleged to be a significant al Qaeda figure. He was arrested in France in June 2003 after being expelled from Saudi Arabia in what his lawyer called a “disguised extradition.” He faces charges before the Paris Court of Assize for involvement in a 2002 suicide attack on a synagogue in Tunisia that left 21 people dead. Among the 23 motions denied was a request by Ganczarski’s lawyer for an actual copy, and not just a

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<sup>30</sup> Human Rights Watch interviews with Sébastien Bono, Paris, June 21, 2007, and February 28, 2007; Henri De Beauregard, Paris, July 6, 2007; Fatouma Metmati, December 13, 2007; Bernard Darteville, Paris, June 21, 2007; Nicolas Salomon, Paris, July 5, 2007; Sophie Sarre, Paris, July 6, 2007; Antoine Comte, Paris, May 10, 2007; Dominique Tricaud, Paris, December 10, 2007.

<sup>31</sup> International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, ratified by France on November 4, 1980, art. 14; European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 213 U.N.T.S. 222, entered into force September 3, 1953, as amended by Protocols Nos 3, 5, 8, and 11 which entered into force on September 21, 1970, December 20, 1971, January 1, 1990, and November 1, 1998, respectively, art. 6. See also European Court of Human Rights judgments: *Dombo Beheer B.V. v. the Netherlands*, judgment of 27 October 1993, Series A no. 274, p. 19, § 33; *Ankerl v. Switzerland*, judgment of 23 October 1996, Reports 1996-V, pp. 1567-68, § 38; *Ruiz Mateos v. Spain*, judgment of 24 June 1993, Series A no. 262, p. 25, § 63; *Nideröst-Huber v. Switzerland*, judgment of 18 February 1997, Reports 1997-I, p. 108, § 24; and *Beer v. Austria*, no. 30428/96, § 17, 6.2.2001.

<sup>32</sup> Human Rights Watch interview with Sébastien Bono, defense attorney, Paris, February 28, 2008.

transcript, of the tape of a conversation on the morning of the synagogue bombing between Ganczarski and Nizar Naouar, the suicide bomber who carried out the attack.

The lawyer for a young man accused of association de malfaiteurs, who asked not to be identified because the case is still in the judicial investigation phase, said all three motions he has filed thus far have been denied. These included two motions for a joint deposition between defendants, and the extradition of an individual from Algeria whose alleged confession is pivotal in the case against his client.

Also denied were requests for the return of a relatively small amount of money confiscated at the time of client's arrest (his client is out of jail under judicial supervision after spending over a year in pretrial detention), as well as for the authorization to give a copy of the case file to his client, who was still in pretrial detention at the time. Without such authorization, defense attorneys are not allowed to give copies of any elements of the case file to their clients; they can only show, read or summarize the documents. The investigating judge denied the request on the grounds that there was a risk of his client using the information to pressure others involved in the case.<sup>33</sup> The inability to share the case file with the accused has a negative impact on the lawyer's ability to mount an effective defense, according to this attorney, because "the case file is so big, there are details that we [lawyers] can miss but the client could consider important."<sup>34</sup> The parliamentary commission that conducted an inquiry into the Outreau Affair recommended that all suspects under judicial investigation, including those in pretrial detention, have an unrestricted right to their case files.<sup>35</sup> The requests described here are not technically motions for investigative steps.

As noted above, lawyers can appeal against any decisions by an investigative judge to the Investigating Chamber. The president of the Chamber has the authority to reject the appeal in a reasoned judgment or transmit the appeal for examination by

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<sup>33</sup> This procedure is laid out in article 114 of the Code of Criminal Procedure.

<sup>34</sup> Human Rights Watch interview, defense attorney who requested anonymity, Paris, February 28, 2008.

<sup>35</sup> National Assembly, *Rapport No. 3125*, June 6, 2006, p. 397.

the full chamber; this decision cannot be appealed.<sup>36</sup> All of the motions discussed above were rejected by the president of the Chamber.

### *Unmanageable case files*

Defense attorneys argue that the length and complexity of judicial investigations in terrorism cases considerably obstruct their ability to mount an effective defense. As discussed in greater detail below, investigations into Islamist terrorism are often protracted, complicated inquiries into alleged networks of like-minded individuals, leading often to voluminous case files tracing the phone calls, travels, meetings, as well as opinions, of a large number of people. According to lawyer Dominique Tricaud, this means case files built on “an idea, a movement, and not on the accused. And then the defense becomes impossible.”<sup>37</sup> Henri de Beauregard, a court-appointed attorney for one of the defendants in a major terrorism trial involving eight defendants, complained at trial that he had been unable to effectively defend his client:

There are 7.5 meters of case file, 78 volumes ... 325 kilos of paper. That represents 541 hours of reading time, in other words three and a half months. The lawyer’s fee for Mr. Charouali [his client] is 450 euro. So when you do the math, I have the right to 75 cents per hour to guarantee his defense. And I didn’t have two to three months to prepare my case like the prosecutor did, but one-and-a-half months. The defense lawyer cannot do his job.<sup>38</sup>

In mid-2007 De Beauregard filed a complaint against France before the European Court of Human Rights for violation of article 6(1)—the right to a fair trial—and article 6(3)—right to necessary time and facilities to prepare the defense. At this writing the Court has not made a decision on admissibility of the complaint.

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<sup>36</sup> CCP, art. 186-1.

<sup>37</sup> Human Rights Watch interview with Dominique Tricaud, defense attorney, Paris, December 10, 2007.

<sup>38</sup> “Extraits d’un proces antiterroriste des presumes membres de la ‘cellule francaise’ du ‘GICM’ (‘Groupe islamique combattant marocain’) et presumes soutiens financier et logistique aux attentats de Casablanca,” <http://paris.indymedia.org/IMG/pdf/doc-46372.pdf> (accessed January 28, 2008). Translation by Human Rights Watch.

While the investigation is ongoing, lawyers may consult the case file at the Palais de Justice (in cramped conditions), or request paper copies at the expense of the state. But lawyers complained that even if they were to obtain these copies, they wouldn't have enough room in their offices for the entire case file in the major terrorism investigations. Lawyers are entitled to receive a copy of the entire file on CD-rom once the investigative phase is completed; because electronic copies allow for conducting keyword searches and cross-referencing information with relative ease, access to an electronic copy at an earlier stage would facilitate proper and timely preparation of the defense.

## IV. Criminal Association in Relation to a Terrorist Undertaking

The particularity of the law is that it enables us to prosecute individuals involved in terrorist activity without having to establish a link between that activity and a specific terrorist project. That's the big difference with the situation abroad where you have to have a link to a specific project. This text allows us to take action well ahead of the threat and to move against clandestine support networks or logistical support for these organizations.

—Jean-Louis Bruguière, then chief counterterrorism investigating judge<sup>39</sup>

This chapter examines five related concerns arising from the association de malfaiteurs offense. First, the offense lacks legal precision, making it difficult for individuals to know what conduct is prohibited, and giving too much latitude to law enforcement authorities for arbitrary action. Second, decisions to arrest suspects and place them under formal investigation are based on a low standard of proof and an approach that favors casting a wide net. Third, there is a presumption in favor of pretrial detention, despite decisions being taken by a separate “liberty and custody judge,” with suspects subject to lengthy periods of pretrial detention while judicial authorities pursue complex investigations with multiple suspects. Fourth, the prominent use of intelligence material in judicial investigations, in the context of the close links between judges and the intelligence services, raises concerns about procedural fairness and reliance on evidence obtained from third countries where torture and ill-treatment are routine. Finally, some convictions appear to be based on weak evidence.

### Lack of Legal Precision

As already noted in Chapter III, the French Criminal Code defines association de malfaiteurs as “the participation in any group formed or association established with a view to the preparation, marked by one or more material actions, of any of the acts

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<sup>39</sup> Jon Boyle, “France trumpets anti-terror laws,” Reuters, August 25, 2006.

of terrorism provided for under the previous articles.”<sup>40</sup> The elements of the crime, as developed in jurisprudence, include: the existence of a group of several people united in a collective criminal purpose; each member must have full awareness of this purpose and the fact that it is a criminal undertaking; and this purpose must be demonstrated through one or more material acts. There is no requirement that any of the participants take concrete steps to implement execution of a terrorist act.

From its inception, the definition of association de malfaiteurs has raised considerable concerns about the lack of legal precision. The well-established principle of legality, enshrined in article 7 of the European Convention on Human Rights, requires that criminal laws be sufficiently clear and well-defined so that people are able to regulate their conduct to avoid infringement and to limit the scope for creative judicial interpretation by the courts.<sup>41</sup>

Human Rights Watch notes that the then European Commission of Human Rights rejected as inadmissible a 1997 complaint alleging, *inter alia*, that the definition of association de malfaiteurs violated article 7 of the European Convention.<sup>42</sup> This decision is based on Criminal Code article 421-1—establishing specific acts of terrorism such as murder, kidnapping, and unlawful weapons possession when committed with intent to seriously disturb the public order through intimidation or terror—and article 450-1 that provides a general definition of association de malfaiteurs in relation to any crime. Article 421-2-1 establishing association de malfaiteurs in relation to a terrorist undertaking as an autonomous terrorist act had not been inserted into the Criminal Code at the time of the acts at issue in this case.<sup>43</sup>

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<sup>40</sup> CC, art. 421-2-1.

<sup>41</sup> European Court of Human Rights, *Kokkinakis v. Greece*, Judgment of May 25, 1993, Series A, no. 260-A, available at [www.echr.coe.int](http://www.echr.coe.int), para. 52.

<sup>42</sup> European Commission for Human Rights, *Karatas and Sari v. France*, no. 38396/97, Partial decision on admissibility, 21 October 1998.

<sup>43</sup> The case involved two Turkish nationals, Dursun Karatas and Zerrin Sari, who were convicted in absentia in France in 1997 of association de malfaiteurs for membership in a Marxist-Leninist Turkish group the court defined as terrorist. It is interesting to note that the Court of Appeal in Antwerp, Belgium, acquitted Karatas and Sari of membership in a terrorist cell on February 7, 2008. See Thomas Renard, “Presence of Turkish Terrorists in Belgium Leads to Dispute with Ankara,” *Terrorism Focus*, vol. 5, issue 13, April 1, 2008, <http://www.jamestown.org/terrorism/news/article.php?articleid=237070> (accessed May 8, 2008).

In a 1999 report, “Paving the Way for Arbitrary Justice,” the International Federation for Human Rights (Federation Internationale des Droits de l’Homme, FIDH) called article 421-2-1 “open-ended” and concluded that it lent itself to “arbitrary interpretation and implementation”:

The intention of the article is quite clear: the investigating and prosecuting authorities ... are statutorily absolved from any duty to link the alleged participation with any actual execution of a terrorist offense or even a verifiable plan for the execution of such a plan.... [L]ittle or no effort seems to have been made in the context of the legal prosecutions of the cases that have been drawn to our attention ... to establish precisely which terrorist act, let alone which category of terrorist act, was allegedly being prepared ... That failure to concretize the alleged object of the association or conspiracy inevitably allows almost any kind of “evidence” however trivial to be invested with significance.<sup>44</sup>

Both the letter of the law and the jurisprudence establishing an expansive interpretation of association de malfaiteurs remain unchanged since the FIDH report, and Human Rights Watch research suggests that the charge continues to be used to arrest, detain, and even convict on the basis of weak evidence.

Counterterrorism prosecutor Philippe Maitre explained that the association de malfaiteurs statute criminalizes the preparatory acts that are the furthest from the actual commission of a terrorist act. Drawing three concentric circles on a piece of paper, Maitre identified the central circle as the terrorist act, the surrounding circle as direct complicity—acts that immediately and directly contribute to the commission of the crime—and the outer circle as any and all acts, no matter how removed in time and space, that have contributed to a terrorist enterprise. Even if these acts themselves are not crimes, “the mere fact of having participated in an

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<sup>44</sup> Federation Internationale des Droits de l’Homme (FIDH), “France: paving the way for arbitrary justice,” no. 271-2, March 1999, <http://www.fidh.org/IMG/pdf/271fran.pdf> (accessed October 10, 2005), pp. 9-10.

enterprise is punishable behavior. When it comes to terrorism the consequences are so serious that any behavior that revolves around this objective is criminalized.”<sup>45</sup>

Lack of precision in the law means there is no clarity as to what behavior is likely to give rise to a criminal sanction, and speech and association that would normally be protected under international human rights law—no matter how offensive—can be used as evidence of criminal intent.

The requirement that a law is formulated with sufficient precision to enable an individual to regulate his or her conduct, is relevant not only for article 7, but also because of the impact that the law could have on the legitimate exercise of rights of association, expression, religious freedom, and personal life (articles 8 – 11 of the European Convention on Human Rights). These rights are not absolute and may be subject to lawful interference, but this interference can be arbitrary where overly broad laws give undue discretion to authorities or lack adequate safeguards in how that discretion is exercised.<sup>46</sup>

Our research indicates that the interpretation of the association de malfaiteurs statute and the conduct of terrorism investigations raise concerns about illegitimate interference with these protected rights, in particular freedom of expression and freedom of association. Unlike investigations into violent Basque separatism—with ETA as a structured organization with clearly identifiable goals and tactics—most investigations into alleged Islamist terrorist activity in France are based on mapping of networks of contacts. This can lead to the arrest and indictment of family members, friends, neighbors, members of the same mosque, coworkers, or those who frequent a particular restaurant. Similarly, there appears to be too much scope for criminal action to be undertaken against individuals who share extremist views and may even express support for Jihad, for example, but who have not taken any identifiable steps toward engaging in terrorist violence.

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<sup>45</sup> Human Rights Watch interview with Philippe Maitre, February 27, 2008.

<sup>46</sup> See ECtHR, *Klass and Others v. Germany*, judgment of 6 September, 1978, Series A28; *Rotaru v. Romania*, judgment of 4 May 2000, Reports of Judgments and Decisions 2000-V; *Larissus and Others v. Greece*, judgment of 24 February 1998, Reports of Judgments and Decisions 1998-I; and Metropolitan Church of Bessarabia, judgment of 13 December, 2001, Reports of Judgments and Decisions 2001-XII. All judgments are available at [www.echr.coe.int](http://www.echr.coe.int).

A liberty and custody judge we interviewed referred to association de malfaiteurs as an “intangible” and “difficult to define” offense with “very broad constitutive elements”, adding that in many cases involving Islamist terrorism the only element is contact among a group of people. The judge described a case in 2007 involving a group of six or seven young Muslim men who talked about going to Iraq to fight. “They would get together, and some of them had contact with someone who had actually gone to Iraq. And so you ask yourself if this is a network. You wonder if the fact of having these contacts [means] maybe there are other things behind.”<sup>47</sup> The judge sent most of them into pretrial detention, while two or three were placed under judicial supervision. The judge does not know what has happened with the case and no longer has the dossier.<sup>48</sup>

A former JLD described the kinds of cases he saw: “Young Frenchmen from the Maghreb, between 20 and 25 years old, who dreamed of finding an Islamic ideal. Small fry, just these young guys with posters of Bin Laden in their bedrooms. They were accused above all of going to training camps somewhere, nothing in France, which is already problematic. You send people to prison in counterterrorism matters for very weak reasons. There was usually some kind of evidence, but of what? You had numbers in cell phones, trips, intense religiousness, consultation of certain websites ...”<sup>49</sup>

## Low Standard of Proof behind Decision to Arrest

The goal is to have as many ongoing investigations as possible to allow for coercive measures like wiretaps and above all it allows for putting people in pretrial detention right away. There is this excess, [when] there are no elements, when there is evidence that would be insufficient in ordinary criminal law, but once it’s stamped terrorism, it’s enough to jail someone.<sup>50</sup>

—Nicolas Salomon, defense attorney

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<sup>47</sup> Human Rights Watch interview with JLD #3, Paris, February 27, 2008.

<sup>48</sup> Ibid.

<sup>49</sup> Human Rights Watch interview with JLD #1, Paris, February 1, 2008.

<sup>50</sup> Human Rights Watch interview with Nicolas Salomon, defense attorney, Paris, July 5, 2007.

The expansive interpretation of what can constitute participation in a criminal association in relation to a terrorist undertaking translates into a relatively low standard of proof for arrest and the decision to place a suspect under judicial examination.

### *Casting a wide net*

One characteristic of investigations into association de malfaiteurs has been the arrest of large numbers of people who might have some connection with an alleged terrorist network. The strategy of casting a wide net (“*coup de filet*”) or “kicking the anthill” (“*coup de pied dans la fourmilière*”) is based on the faith among counterterrorism practitioners, according to sociologist and expert on French counterterrorism intelligence services Laurent Bonelli, in the strategy’s “ability to destabilize the networks, and to undermine logistics. And it matters little if a good number of the accused are found to be innocent after spending one or two years in pre-trial detention.”<sup>51</sup>

Arrests and searches are ordered and supervised by investigating judges. Former judge Bruguière explained that the investigative judge oversees these actions “in real time”—the arresting officers will call the judge for instructions, for example on whether to arrest other individuals besides the initial targets of the operation.<sup>52</sup>

In some instances, counterterrorism officials have engaged in spectacular raids, referred to as “*rafles*” in French.<sup>53</sup> On November 9, 1993, 110 people were questioned and 87 taken into custody on suspicion of involvement in terrorism, in a police action code-named “Operation Chrysanthemum.” Only three people were eventually placed under official investigation.

In November 1994, 93 people were arrested in a single day, the first of a series of arrests over the next two years of alleged members of a network in support of

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<sup>51</sup> Laurent Bonelli, “An ‘anonymous and faceless’ Enemy. Intelligence, exception and suspicion after September 11, 2001,” *Cultures and Conflicts*, no. 58 (2005), pp. 101-129. Bonelli is a researcher at the University of Paris-X (Nanterre) and a member of the French team of the European Commission programme “The Changing Landscape of European Security.”

<sup>52</sup> Human Rights Watch interview with Jean-Louis Bruguière, February 26, 2008.

<sup>53</sup> The same term is used to describe the round-ups of Jews during the Second World War in occupied France.

Islamist combatants in Algeria. On June 25, 1995, 131 people were arrested in five different cities across France, again on suspicion of involvement in terrorism. Ultimately, 138 people were tried in 1998 for association with a terrorist group, referred to in France as the “Chalabi network.” The highly controversial trial was held in a prison gymnasium on the outskirts of Paris because of lack of space in the central court house. Fifty-one people were acquitted, in some instances after spending three years in pretrial detention, while 87 were found guilty. Four more were acquitted on appeal. Of those convicted, 39 were given sentences of less than two years, while the four prime defendants, including Mohamed Chalabi, the presumed ringleader, received sentences ranging from six to eight years.

On May 26, 1998, nearly 80 people were arrested in various European countries in a coordinated operation to prevent what was described as a plot to commit a terrorist attack in France during the 1998 Soccer World Cup. Fifty-three people were arrested that day; 40 of them were released within 48 hours. In the end, 24 people were taken to trial, and only eight were found guilty in 2000 of association de malfaiteurs. Their prison sentences ranged from four months to four years.

According to one counterterrorism official, the resort to mass arrests during this period reflected the need for intelligence about radical Islamist networks: “[W]e were forced to arrest lots of people just to get more information, which we didn’t have. Sometimes a number in a cell phone registry was enough [to warrant an arrest]. It was all to learn more about the networks, to get their cell phones and computers. We didn’t have to do that with the Basques and the Corsicans [because we already knew enough about them].”<sup>54</sup>

He argues that this technique is no longer necessary to obtain intelligence on radical Islamist networks, and when used, it is usually for political reasons: “There can be political manipulation, when a politician comes to say, you have to arrest so and so on a particular day, even if we don’t have the proof.”<sup>55</sup>

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<sup>54</sup> Human Rights Watch interview with counterterrorism official who requested anonymity, Paris, December 12, 2007.

<sup>55</sup> Ibid.

A counterterrorism official with the domestic intelligence service Renseignements Généraux (General Intelligence, RG) confirmed this, recalling an investigation he was ordered to conduct, in the absence of evidence, that led to three people being arrested. They were released a few days later: “There are lots of stories like that—lots of people arrested, it makes big news but then there’s nothing. I know because I’ve seen it. There are political reasons, interests of circumstance. It’s traumatic for the children and for the communities.”<sup>56</sup>

While spectacular raids are now less common, there have been more recent exceptions. On June 17, 2003, for example, police officers raided the offices of the Iranian People’s Mojahedin (MKO, an armed Iranian opposition group in exile) and arrested 165 people, including Maryam Radjavi, the wife of the group’s leader Massoud Radjavi. Only 17 were eventually placed under formal investigation for terrorism-related offenses. On a smaller scale, police arrested 14 alleged members of the Liberation Tigers of Tamil Eelam (LTTE, an armed separatist group in Sri Lanka) in April 2007 and five others in September 2007 on association de malfaiteurs charges. In February 2007, 14 alleged members of the Kurdistan Workers’ Party (PKK) were arrested in one day. After four days in police custody and two weeks in pretrial detention, all 14 were released on provisional liberty. They remain under investigation for criminal association in relation to a terrorist undertaking.

Nowadays, the majority of counterterrorism investigations are prolonged and involve numerous arrests spread out over a significant amount of time. The investigation and prosecution of the so-called Chechen Network is illustrative. Over sixty people were arrested between 2002 and 2005, including sixteen couples, but only 27 people were eventually brought to trial.<sup>57</sup> Fourteen of the wives or partners of suspects were held in police custody for three or four days and subsequently released without charge. Rachida Alam, for example, was subjected to 25 hours of questioning during the three days she spent in police custody in May 2004. During this time she had no access to or right to consult with a lawyer. A diabetic, Alam was taken to the detention facility’s hospital three times before the doctor finally ordered that she

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<sup>56</sup> Human Rights Watch interview with Renseignements Généraux official who requested anonymity, Paris, June 30, 2006.

<sup>57</sup> Of the 27 individuals brought to trial, 24 were convicted of association de malfaiteurs, while three were acquitted of this charge.

remain there.<sup>58</sup> Of the two women prosecuted, one was convicted, while the other was acquitted after spending one year in pretrial detention with her infant daughter. Eight of the men in these couples were convicted at trial, one was acquitted, and the remaining seven were not prosecuted in this case.

The Ministry of the Interior statistical office told Human Rights Watch it was unable to provide data on the numbers of arrests for association de malfaiteurs, the number of individuals placed under judicial examination, or the number of these who were remanded into pretrial detention.<sup>59</sup> A Europol study indicated that 130 suspected Islamists were arrested in France in the first 10 months of 2005. Of these, 30 were remanded into pretrial custody.<sup>60</sup> In 2006, 139 suspected Islamists were arrested, according to a Europol report (over half of all suspected Islamists arrested in the EU that year), while that number decreased to 91 in 2007.<sup>61</sup> The Europol reports for 2006 and 2007 do not contain statistics on remand into pretrial detention. Nicolas Sarkozy said in November 2005 that over 367 individuals had been arrested on suspicion of terrorism since the beginning of 2002; of these, fewer than 100 had been placed under judicial examination and incarcerated.<sup>62</sup>

## Presumption in Favor of Detention

It's easier to be more efficient in the French system where the investigating judge can detain someone for several months on a very general reasoning.

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<sup>58</sup> Human Rights Watch interview with Rachida Alam, Paris, January 29, 2008.

<sup>59</sup> Human Rights Watch telephone inquiry to the Centres d'Etudes Statistiques sur la Securite (Center for Statistical Studies on Security), Paris, February 15, 2008.

<sup>60</sup> EUROPOL, "Terrorist Activity in the European Union, Situation and Trends Report, October 2004-October 2005," May 2, 2006, p. 23.

<sup>61</sup> EUROPOL, EU Terrorism Situation and Trend Report 2007, March 2007, [http://www.europol.europa.eu/publications/EU\\_Terrorism\\_Situation\\_and\\_Trend\\_Report\\_TE-SAT/TESAT2007.pdf](http://www.europol.europa.eu/publications/EU_Terrorism_Situation_and_Trend_Report_TE-SAT/TESAT2007.pdf) (accessed February 21, 2008), p. 16; and EUROPOL, EU Terrorism Situation and Trend Report 2008, April 2008, [http://www.europol.europa.eu/publications/ EU\\_Terrorism\\_Situation\\_and\\_Trend\\_Report\\_TE-SAT/TESAT2008.pdf](http://www.europol.europa.eu/publications/ EU_Terrorism_Situation_and_Trend_Report_TE-SAT/TESAT2008.pdf) (accessed April 9, 2008), p. 11.

<sup>62</sup> Nicolas Sarkozy, then-minister of the interior, speech to day-long conference, "Prevailing against Terrorism" (Les Francais face au terrorisme), November 17, 2005, [http://www.interieur.gouv.fr/misill/sections/a\\_l\\_interieur/le\\_ministre/interventions/archives-sarkozy-2005-2007/17-11-2005-seminaire-terrorisme/view](http://www.interieur.gouv.fr/misill/sections/a_l_interieur/le_ministre/interventions/archives-sarkozy-2005-2007/17-11-2005-seminaire-terrorisme/view) (accessed January 30, 2006).

—Antoine Garapon, executive director, Institut des Hauts Etudes sur la Justice<sup>63</sup>

The crime of association [terrorism] is deduced from proximity to the devil: you are a young Muslim, you shared an apartment with some Salafists, unwisely, you exchanged some letters ... The level of proof is weak because it's about a presumed intention. The fact of having been close to a Salafist ... means you might have had the intention of committing a terrorist act, [so] we should put you in prison.

—William Bourdon, defense attorney<sup>64</sup>

Until January 2001, investigating judges had the authority to remand suspects into pretrial detention. Now that authority rests solely in the hands of special “liberty and custody judges” (*juges des libertes et de la detention*, JLD) created by a 2000 reform of the Code of Criminal Procedure.<sup>65</sup>

They make decisions about remand into pretrial detention after a suspect’s first hearing with the investigating judge. They also decide on prosecution applications to renew detention and defense appeals against decisions by the investigative judges to refuse applications for provisional liberty (see below). Although there are no JLDs specialized in terrorism, the fact that all terrorism cases are centralized in Paris means that the seven JLDs covering Paris are called upon to take decisions concerning custody in all of these cases.

Under French law, pretrial detention can be ordered and extended if deprivation of liberty is considered the only way to preserve material evidence, to prevent either witnesses or victims being pressured or to prevent those under judicial investigation and their accomplices from agreeing on false testimony; to protect the person under

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<sup>63</sup> Antoine Garapon, “Les dispositifs antiterroristes de la France et des Etats-Unis,” *Revue Esprit* (Paris), August/September 2006, p. 137.

<sup>64</sup> Human Rights Watch interview with William Bourdon, defense attorney, Paris, October 5, 2005.

<sup>65</sup> Law 2000-516 of 15 June 2000, art. 48.

judicial examination; to prevent the person from absconding; or to put an end to the offense or to prevent its recurrence.<sup>66</sup>

In minor felony cases, where the maximum prison sentence is 10 years, initial remand into pretrial detention is for four months. This period may be renewed for a maximum period of three years in terrorism cases (the Investigating Chamber can extend pretrial detention by four months beyond the three-year limit in exceptional circumstances).<sup>67</sup> In serious felony cases, for crimes punishable by over 10 years in prison, pretrial detention is initially imposed for one year, renewable by six-month periods to a maximum of four years in terrorism cases (the Investigating Chamber can further extend pretrial detention by two four-month periods beyond the four-year limit in exceptional circumstances).<sup>68</sup> When making an initial decision about whether to impose pretrial detention, and every time detention needs to be renewed, the JLD must hold a hearing with the defendant and the public prosecutor. The first hearing to decide on remand into pretrial detention can only take place if the individual is represented by a lawyer. However, subsequent hearings to determine extensions of pretrial detention can proceed whether or not the individual's lawyer is present, though counsel must be duly informed of any upcoming hearings within a reasonable amount of time. The JLD does not hold a hearing when examining a defense application for provisional liberty.

The investigating judge retains significant authority over custody issues. For example, investigating judges can order a detainee's release under judicial supervision or unconditionally at any time, whether in response to an appeal for provisional liberty or of his or her own initiative. Judicial supervision measures can include: house arrest; limiting movement to a particular geographic area; a prohibition on meeting certain people or going to certain places; the wearing of an electronic tracking bracelet (with the suspect's consent); lodging a sum of money with the court as a guarantee; and the surrender of identification papers, including passport.<sup>69</sup>

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<sup>66</sup> CCP, art. 144.

<sup>67</sup> Ibid., art. 706-24-3, in conjunction with art. 145-1.

<sup>68</sup> Ibid., art. 145-2.

<sup>69</sup> Ibid., art. 138.

If an investigating judge opposes an application for provisional release, he or she must transfer the appeal to the JLD within five days. The JLD rules on the matter within three days without hearing the parties.<sup>70</sup> Applications for provisional release cannot be made directly to the JLD.

On paper, the JLD constitutes an important improvement and a critical safeguard against arbitrary detention. In practice, however, the introduction of this second layer of control does not appear to have made a significant difference. A 2006 parliamentary report found that JLDs followed the view of the investigating judge 89.7 percent of the time in 2004.<sup>71</sup> “It’s a *trompe-l’oeil* guarantee,” according to Emmanuelle Perreux, president of a judge’s union called the Magistrates Syndicate.<sup>72</sup> “You have to imagine his role. He has the prosecutors and the investigating judge who want detention, and he is all alone, and he has only the case file on which to base his decision.”

In cases of remand into pretrial detention or renewal of detention in the course of an ongoing terrorism investigation, the JLD is usually confronted with a case file running to thousands of pages. There is insufficient time for the judges to read the entire case file, and they make no attempt to do so. As one JLD explained, “You don’t have to read the whole case file. We’re not there to judge the facts, we’re there to evaluate whether detention is necessary for the requirements of the investigation. We have the investigative judge’s written referral. We can read the summary of the facts, the last two or three volumes of the case file.”<sup>73</sup>

A March 2007 reform gave the JLD the authority to postpone the initial hearing to decide on remand into pretrial detention for up to four days, precisely in order to have more time to study the case file.<sup>74</sup> The parliamentary report on the reform emphasized that the JLD “must base his [or her] decision on the merits of the case file and not only on the mere criteria for pretrial detention ... the JLD was created

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<sup>70</sup> Ibid., art. 148.

<sup>71</sup> National Assembly, Report No. 3125, June 6, 2006, p. 223.

<sup>72</sup> Human Rights Watch interview with Emmanuelle Perreux, president, Syndicat de la Magistrature, Paris, January 31, 2008.

<sup>73</sup> Human Rights Watch interview with JLD #2, Paris, February 26, 2008.

<sup>74</sup> Law no. 2007-291 of 5 March 2007, article 10 modifying article 145 of the Code of Criminal Procedure.

precisely to add a second pair of eyes to the procedure, including incriminating and exculpatory elements, and not just to perform a simple juridical verification with respect to the criteria for remanding into detention.”<sup>75</sup> One of the JLDs we spoke with did not immediately recall this reform, and then said the authority to delay the hearing had probably never been exercised by any of the JLDs in the year since it was instituted.<sup>76</sup>

Conversations with one former and two current liberty and custody judges suggest that a bias towards caution in terrorism cases, exacerbated by a lack of detachment and the length and complexity of the terrorism investigations, creates a presumption in favor of detention. All three of the judges we spoke with said there were probably higher rates of pretrial detention in terrorism cases, though none could point to official statistics. One JLD suggested that the liberty and custody judges followed requests for pretrial detention from investigating judges and prosecutors in the vast majority of cases, and certainly in terrorism cases.<sup>77</sup>

All three judges spoke openly about the pressure, at times self-imposed, to err on the side of detention in terrorism cases. “We’re afraid to let people go free and to make a mistake. I don’t give myself the same freedom of evaluation that I take in other cases. In ordinary criminal cases, I stick to what the investigators have already found. In terrorism cases, I ask myself, what might they still find?” one explained.<sup>78</sup>

The former JLD quoted above describing “small fry, just these young guys with posters of Bin Laden in their bedrooms” nevertheless acknowledged the same pressure towards presumption in favor of detention: “We recognized that it [detention] was partly to scare them. But also it was very difficult to take the risk of letting them go free.”<sup>79</sup>

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<sup>75</sup> National Assembly Law Commission, Report No. 3499 on the bill concerning training and responsibility of judges, by Representative Philippe Houillon, December 6, 2006, <http://www.assemblee-nationale.fr/12/pdf/rapports/r3499.pdf>. (accessed March 10, 2008), p. 221.

<sup>76</sup> Human Rights Watch telephone interview with JLD #3, Paris, March 28, 2008. The defense has the right to request a delay as well, and the JLD stressed that this occurs often, perhaps even one-fourth of the time, and that the JLD must grant the delay in these cases.

<sup>77</sup> Human Rights Watch interview with JLD #2, Paris, February 26, 2008.

<sup>78</sup> Human Rights Watch interview with JLD #3, Paris, February 27, 2008.

<sup>79</sup> Human Rights Watch interview with JLD #1, Paris, February 1, 2008.

Investigating judges, liberty and custody judges, and prosecutors come from the same judicial corps and undergo the same training. In the course of a career in the administration of justice system, the same person can serve in all three roles. JLD are appointed and supervised by the president of the Tribunal de Grande Instance.

All of the JLDs we spoke with had been investigating judges, one had also been a prosecutor. This “interchangeability,” as one judge put it, makes it difficult for JLDs to maintain the necessary distance. “The JLD is a very good idea, but in a system where the judges and the prosecutors all come from the same judicial corps, the JLD doesn’t have all of the desired independence ... There’s too much esprit de corps. It’s not about pressure, but this esprit de corps that translates into solidarity.”<sup>80</sup>

There may in fact be cases of direct pressure. A former JLD told Human Rights Watch that he had to explain himself to his superiors when he failed to abide by the wishes of an investigating judge for pretrial detention in a terrorism case:

It was the case of an Algerian living in Japan, married to a Japanese woman, with two Shintoist children. He was arrested at Roissy [Charles de Gaulle airport, Paris] en route to Algeria because his telephone number was in some terrorism suspects’ cell phones. He said it was because these people had come through Japan, and he hosted them ... They wanted to put him in pretrial detention but I said no. I said he could be placed under judicial supervision at his sister’s house in Lyon.<sup>81</sup>

The man, Djamel Hamouni, spent three years under judicial supervision before a different investigating judge lifted the orders and allowed him to leave the country in November 2007. During those three years, he was prohibited from leaving the Lyon region, had to report to the police every week, and was unable to work. At this writing,

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<sup>80</sup> Human Rights Watch interview with JLD #3, Paris, February 27, 2008.

<sup>81</sup> Human Rights Watch interview with JLD #1, Paris, February 1, 2008.

he is in Algeria waiting for a visa to return to Japan and see his family for the first time in three-and-a-half years.<sup>82</sup>

A further problem is that there is no guarantee of continuity of JLD oversight. Two or three JLDs are on call to handle new cases—individuals who have just concluded their time in police custody. But it is the head of the JLD section who allocates a dossier when it comes to renewals and petitions for provisional liberty. There is no rule or guideline to ensure that the JLD who first remanded someone into detention will decide on renewals or release.

## **Intelligence Material and Torture Evidence**

Intelligence material, including information coming from third countries, is often at the heart of association de malfaiteurs investigations. Indeed, most if not all investigations are launched on the basis of intelligence information. Intelligence material in judicial proceedings has a legitimate role in the effective prosecution of terrorism offenses. But the close relationship between specialist investigative judges and the security services raises concerns about whether judges are approaching such material as potential evidence with the necessary skepticism and concern for the rights of the accused.

The use of evidence obtained from third countries where torture and ill-treatment are routine raises particular concerns, including about the nature of cooperation between the security services in France and those countries. Some defendants in France who credibly allege they were tortured in third countries into confessing have successfully had the confessions excluded as evidence.

But the courts appear to have allowed as evidence in some cases statements allegedly made under torture by third persons. And trips by investigative judges to third countries with poor records on torture to verify material for use in French prosecutions raise questions about the willingness of French judges to turn a blind eye to allegations of abuse.

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<sup>82</sup> Human Rights Watch telephone interview with Hamouni's lawyer, Mahmoud Hebia, Lyon, March 31, 2008. Hamouni told Human Rights Watch that an immigration official in Japan informed Hamouni by phone that he would not receive a visa unless found innocent in a French court of law. Human Rights Watch telephone interview with Hamouni, Algiers, June 11, 2008.

### *Judicial cooperation with the security services*

Both domestic and international counterterrorism experts emphasize the cooperation between specialized investigative judges and French security services. One counterterrorism official told Human Rights Watch, “That’s the French distinctiveness: judges and police officers working together every day. There’s a kind of trust there. The passage between intelligence operation and judicial investigation is very easy. The judge is an ally, not an adversary, and that is a big help.”<sup>83</sup>

Investigative judges cooperate closely with the Directorate for Territorial Surveillance (Direction du Surveillance Territoire, DST) and the General Intelligence. Both agencies are part of the Interior Ministry. The DST is both an intelligence-gathering agency and a judicial police force, which means DST agents can be assigned to assist investigating judges in criminal inquiries. In practice this translates into a continuous exchange of information and joint strategizing between the investigative judges and the security service agents.<sup>84</sup>

The ease with which sensitive intelligence material is put to use in judicial proceedings without compromising intelligence sources and methods is the pride of French counterterrorism officials and the apparent envy of their counterparts in other countries. The United Kingdom Home Office, for example, has studied the investigating judge system in France with a specific interest in the way intelligence material is introduced as evidence.<sup>85</sup> The specialized investigating judge, with his or her expertise, training, and security clearance, is the designated filter of all intelligence information. Not only can unsourced intelligence reports be entered into the case file (and subsequently used at trial), investigating judges may authorize any

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<sup>83</sup> Human Rights Watch interview with counterterrorism official who requested anonymity, Paris, December 12, 2007.

<sup>84</sup> The potential for conflict between these two roles was highlighted in September 2006 when a judge suspended the trial of six former Guantanamo Bay detainees after it came to light that DST agents had interrogated the men at Guantanamo. The defense argued that the interrogations were illegal because the agents had acted in their capacity as judicial police, collecting information later used to justify the judicial investigation against the men, but without disclosing the material to the defense as required. The judge ultimately accepted the prosecution’s argument that the DST agents had acted in their capacity as intelligence officers and there had been no breach of the rules of procedure with respect to disclosure of evidence.

<sup>85</sup> See United Kingdom Home Office, “Terrorist investigations and the French examining magistrate’s system,” July 2007, <http://www.security.homeoffice.gov.uk/news-publications/publication-search/counter-terrorism-bill-2007/examining-magistrates.pdf?view=Binary> (accessed August 5, 2007).

number of investigative steps, including arrests, on the basis of intelligence information alone.

For example, the arrests in late September and early October 2005 of individuals allegedly plotting terrorist attacks on the Paris underground metro system, the headquarters of the DST, and/or a Paris airport is illustrative, and appear to be have been based largely, if not entirely, on statements allegedly made by a man named M'hamed Benyamina while in the custody of the Algerian secret service, the Department for Information and Security (Departement du Renseignement et de la Securite, DRS).

Benyamina, an Algerian residing legally in Trappes, France, was arrested at the airport in Oran, Algeria, on September 9, 2005, as he was preparing to return to France. Benyamina told Amnesty International that Algerian security officers had told him French authorities requested his arrest. A February 2006 article in the French daily newspaper *Le Figaro* raising concerns that France had “delivered” a suspected Islamist to Algeria to make him talk under torture, cited two anonymous police sources acknowledging this French connection, while another source close to the case insisted that Algiers had its own reasons for being interested in Benyamina.<sup>86</sup>

Benyamina was held in DRS custody for at least five months, during which his family had no information about his whereabouts and he was not under judicial examination in either France or Algeria, making this a case of enforced disappearance. Benyamina said he was detained in a small, dirty cell with no window or electricity, that he saw no one but his interrogators for the entire five months, and was allowed to use the toilet only twice a day.<sup>87</sup> He never saw a lawyer or had the chance to challenge the lawfulness of his detention in any way. In March 2006, according to Algerian authorities, he was placed in pretrial detention on charges of membership in an international terrorist organization. The United Nations

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<sup>86</sup> Jean Chichizola, “France-Algerie: Paris soupconnee d'avoir livre un islamiste a Alger,” *Le Figaro* (Paris), February 13, 2006.

<sup>87</sup> Amnesty International, “Algeria: Torture in the ‘War on Terror,’ A Memorandum to the Algerian President,” April 2006, <http://www.amnesty.org/en/library/asset/MDE28/008/2006/en/MDE280082006en.html> (accessed January 10, 2008).

Working Group on Arbitrary Detention has classified Benyamina's five months in DRS custody as illegal, arbitrary detention.<sup>88</sup>

Benyamina told Amnesty International that he did not want to talk about treatment in DRS detention as long as he remains in Algeria, for fear of reprisals.<sup>89</sup> There is evidence, based on dozens of cases of torture and ill-treatment collected by Amnesty International between 2002 and 2006, to suggest that the DRS routinely arrests and holds terrorism suspects in incommunicado detention, with no access to a lawyer, where they are at particular risk of torture and ill-treatment.<sup>90</sup>

Emmanuel Nieto and Stéphane Hadoux were arrested in France in early October 2005 on the basis of Benyamina's statements in DRS custody. Both claim they were subjected to physical and psychological abuse during police custody (see Chapter V for a detailed account of Nieto's experience). According to their lawyer, Benyamina subsequently exonerated Nieto and Hadoux in official judicial statements transferred to the French investigating judge in September 2006. It was on the basis of this exoneration that the lawyer secured their release under judicial supervision in January 2007, after over one year in pretrial detention.<sup>91</sup> They remain under investigation.

This case illustrates the difficulties defendants face in effectively responding to or challenging intelligence material. The lawyers for Nieto and others involved in this case have requested Benyamina's extradition from Algeria in order to cross-examine him; these requests have been denied. And while agents of intelligence services may be required to testify at trial—and can do so in a way that protects their identity—they cannot be obligated to reveal their sources. The UK Home Office study cited above concluded that while “the inability to probe or question the material underpinning the intelligence reports has never been challenged in France,” in the UK “[d]enying the defence the opportunity to respond to potentially significant parts

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<sup>88</sup> UN Working Group on Arbitrary Detention, Opinion No.38/2006 (Algeria), adopted November 21, 2006, A/HRC/7/4/Add. 1., January 16, 2008.

<sup>89</sup> Amnesty International, “Memorandum to the Algerian President.”

<sup>90</sup> Amnesty International, “Unrestrained Powers: Torture by Algeria’s Military Security,” AI Index: MDE 28/004/2006, July 10, 2006, <http://web.amnesty.org/library/index/ENGMDE280042006> (accessed September 1, 2006).

<sup>91</sup> Human Rights Watch interview with defense attorney who requested anonymity, Paris, February 28, 2008.

of the prosecution case would ... have article 6 implications,” referring to the article of the European Convention on Human Rights guaranteeing fair trial rights.

Former investigating judge Bruguière explained that the integration of intelligence information into judicial investigations is key to the fight against terrorism, and held up the French approach as an effective model. “There’s no problem with disclosure or admissibility of evidence,” he said. Bruguière stressed, however, as did counterterrorism prosecutor Maitre, that no one would ever be convicted in France on the basis of intelligence information alone. Rather, Bruguière explained, the information “allows for orienting the investigation toward material elements. The intelligence information must be corroborated by other elements.”<sup>92</sup> This essentially means that the investigating judge will take information gathered by intelligence-gathering methodology, outside the scope of a criminal investigation and related judicial oversight, and “judicialize” it by ordering investigative steps to find corroborative evidence. As Garapon indicates, the investigating judge plays a role of “interface” between intelligence and prosecution because the judicial investigation phase allows him to turn “useful intelligence information into a perfectly valid and transparent element of proof.”<sup>93</sup>

In a 2007 report on democratic oversight of security services, the European Commission for Democracy through Law (known as the Venice Commission, a body of the Council of Europe) warned that relying on control over security services by specialized judges as a form of oversight carries risks, including over-identification with security officials and a loss of the independence and external perspective necessary for proper accountability. The report cites France and Spain as examples of this approach and cautions that “[t]he necessary awareness of the suspect’s rights may gradually be lost over the years spent in the isolated world of security intelligence.”<sup>94</sup>

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<sup>92</sup> Human Rights Watch interviews with Jean-Louis Bruguière, Paris, February 26, 2008; and Philippe Maitre, February 27, 2008.

<sup>93</sup> Garapon, “Les dispositifs antiterroristes de la France et des Etats-Unis,” *Revue Esprit*, p. 137.

<sup>94</sup> European Commission for Democracy through Law (Venice Commission), “Report on the Democratic Oversight of the Security Services,” CDL-AD(2007)016, Strasbourg, June 11, 2007, para. 213.

Up until very recently, France was among a small handful of Western democracies without any mechanism in place for parliamentary oversight of its intelligence services. An October 2007 law created a special ad hoc parliamentary “delegation” composed of four representatives from each chamber of parliament.<sup>95</sup> The delegation, whose hearings will always be closed to the public and whose work is covered by national security, can formulate recommendations to the prime minister and the president. The delegation officially began its work in February 2008.

### *Use of torture evidence*

One of the greatest concerns arising from the close relationship between the investigative judges and the security services in France is that information obtained in third countries under torture or prohibited ill-treatment will be used in criminal proceedings in France. The absolute prohibition against torture is firmly embedded in customary international law and international treaties to which France is a party. The International Covenant on Civil and Political Rights, the Convention against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment, and the European Convention on Human Rights all affirm this cardinal principle. The ban on torture permits no exceptions or derogations and extends to the use of information obtained under torture in legal proceedings. Article 15 of the Convention against Torture provides that any statement that has been made as the result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made. In accordance with article 55 of the French Constitution, international treaties ratified by France take precedence over national law.

The use of evidence obtained by torture or ill-treatment is prohibited not only because it is unreliable but because, according to the European Court, its use “would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Art. 3 of the Convention sought to proscribe, or as it was so well put in the US Supreme Court’s judgment in the *Rochin* case ... ‘to afford brutality the cloak of law.’”<sup>96</sup>

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<sup>95</sup> Law 2007-1443 of 9 October 2007 creating a parliamentary delegation on intelligence, art. 1.

<sup>96</sup> European Court of Human Rights, *Jalloh v. Germany* [GC], no. 54810/00, judgment of 11 July 2006, ECHR 2006-IX, available at [www.echr.coe.int](http://www.echr.coe.int), para. 105.

Cooperation among intelligence and security services in different states is a critical component of the fight against terrorism. The existence of Alliance Base (a center in Paris for counterterrorism coordination among Western intelligence services established jointly by US and French intelligence in 2002) is one illustration of the close cooperation of French intelligence services with the majority of their counterparts in Western democracies. The DST and the RG also share information and collaborate with a wide range of services, including those with reputations for torture.<sup>97</sup>

A counterterrorism official who spoke with Human Rights Watch on condition of anonymity explained that French services normally receive a refined product, in the form of a summary or simply a tip-off, from a foreign intelligence service, rather than the raw intelligence. They then evaluate the reliability of the information taking into account the known methods and efficiency of the foreign service involved and attempt to cross-reference the information. They will also try to ensure that information coming from a trusted partner, for example the United Kingdom, is not in reality from an untrustworthy source, for example Uzbekistan. The official stressed that information obtained illegally, including through torture or ill-treatment, is unacceptable because the information is not reliable and it will ultimately be ruled inadmissible in court.<sup>98</sup>

In practice, judicial control over this phase is non-existent. As Bruguière explained, investigating judges receive information only from the DST, not directly from third-country sources: “They’re the ones who do the interfacing [with other intelligence services], and they don’t tell us where they got the information ... We don’t know whether the methods used were human or technical, or [even whether] the information comes from a third country ...”<sup>99</sup>

Counterterrorism prosecutor Philippe Maitre confirmed this, explaining, “There is no judicial control over the intelligence services. It’s the judicial procedure that verifies

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<sup>97</sup> Human Rights Watch interview with two counterterrorism officials who requested anonymity, Paris, December 12, 2007; Human Rights Watch interview with RG officer who requested anonymity, Paris, June 30, 2006.

<sup>98</sup> Human Rights Watch interview with two counterterrorism officials who requested anonymity, December 12, 2007.

<sup>99</sup> Human Rights Watch interview with Jean-Louis Bruguière, February 26, 2008.

the information that begins as intelligence ... The origin of the intelligence is not important, and we don't always know it.”<sup>100</sup> Under these circumstances, it is difficult to see how the investigating judge can exercise any control over the legitimacy of the methods used and the veracity of the information obtained when determining whether to open an official investigation or authorize certain investigative steps.

But in fact, an investigating judge can fully “judicialize” intelligence information coming from abroad by instituting an “international inquiry commission” (*commission rogatoire internationale*) to request official information from judicial authorities in a given country. The judge may travel to the country to participate in, or observe, interrogations. Information gathered under these circumstances, regardless of the conditions of confinement and treatment of the detainee before and after the international inquiry commission, enjoys considerable legitimacy.

The cases below illustrate the way in which evidence obtained under torture or prohibited ill-treatment in third countries has been used in criminal proceedings in France. Individuals subjected to the prohibited ill-treatment in a third country and then prosecuted in France have the opportunity to contest the use of this evidence, sometimes successfully, as illustrated below. There is very little scope, however, for challenging information that may have been unlawfully obtained if the victim is not one of the defendants.

Several of the cases also illustrate the concerns arising from direct contact between investigative judges and countries with poor records on torture. In particular, the cases raise questions about the willingness of investigative judges to turn a blind eye to allegations of abuse.

### **Djamel Beghal**

Djamel Beghal is a 43-year-old Algerian who has spent the last six years in solitary confinement in a French prison. He was sentenced in March 2005 to 10 years in prison, the maximum penalty for criminal association in relation to a terrorist undertaking. The Appeals Court subsequently confirmed this sentence and added the obligation to serve two-thirds of this sentence before becoming eligible for

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<sup>100</sup> Human Rights Watch interview with Philippe Maitre, February 27, 2008.

release. In December 2006 Beghal's acquired French nationality was rescinded and he was ordered expelled from France upon release from prison.

Beghal was convicted of association de malfaiteurs largely on the basis of statements he made under torture and prohibited ill-treatment in the United Arab Emirates in September 2001. All the official court documents relating to the case state that Beghal was arrested at Dubai airport on September 7, 2001, because he was using a fake French passport. Beghal was transiting through the UAE from Pakistan on his way to Morocco. He had apparently been identified, though it is not clear by whom, as an al Qaeda operative implicated in plans to attack US interests in France. Beghal has claimed that he was arrested at his hotel, hours after he had arrived in Dubai, by five or six men wearing sunglasses.<sup>101</sup> He was extradited to France on October 1, 2001.

In a written statement, Beghal described harrowing treatment in UAE custody, which included:

“Falaqa” with my feet in bowls of ice to clot my blood and hit on the soles of my feet double the intensity of the pain. And this ... many days ... Pulling out of the toe nails ... Injections of products provoking much pain, vomiting ... Sleep deprivation until loss of speech. Deafening noises. Wisdom teeth drilled without anesthetic and pain to the point of blackout.... Put in the cold in a big “fridge” or a cold room with the promise that I will die of cold. Always the eyes covered ... to the point where I stopped thinking about the bandage or the existence of light. What kept coming back without ceasing: “Bin Laden gave you a mission.” Then in the face of my negative answers, a break and – I think after September 11 and its events – they came back with a scenario: “You were charged with attacking the US embassy in Paris,” just like that, without preamble. They didn’t stop hammering me with this story.<sup>102</sup>

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<sup>101</sup> Human Rights Watch interview with Sakina Beghal and Djamel Beghal's defense attorney (who requested anonymity), Paris, February 26, 2008.

<sup>102</sup> Written statement from Djamel Beghal, March 27, 2007, on file with Human Rights Watch.

After a long flight from Dubai in which he was “suspended like a bat, hand-cuffed to the hooks used by parachutists, in the glacial cold of high altitudes,”<sup>103</sup> Beghal was taken directly to the investigating judge and subjected to a seven-hour interrogation on October 1, 2001.<sup>104</sup> His court-appointed lawyer did not advise him to remain silent, nor did the lawyer demand that the hearing be postponed.

On this occasion, Beghal denied any plot to commit a terrorist attack on US interests in France. He told the investigating judge about the conditions and treatment during detention in UAE. The forensic examination ordered by the investigating judge immediately after the interrogation revealed some traces of the kind of treatment Beghal reported—for example a bruise on his left arm, as well as marks on his left ankle and sole of the foot and a slight swelling of a toe on his left foot—and the doctor noted a “post-traumatic effect of the alleged events.”<sup>105</sup>

The 10<sup>th</sup> Chamber of the Correctional Court nonetheless allowed all of Beghal’s statements made in the UAE as evidence at trial, including his alleged confession that a high-level al Qaeda operative named Abu Zubayhdah had tasked him with organizing an attack on the US embassy in France.<sup>106</sup> Applying a circular logic, the court held, “Even if Djamel Beghal would progressively retract, and then definitively do so at the court hearing, the statements he made in the United Arab Emirates, it must be acknowledged that the essence of these, manifestly confirmed during his first hearing with the investigating judge [in France], would be in any event confirmed by numerous investigations.”<sup>107</sup> These investigations include DST reconstructions of Beghal’s travels; police operations in France, Belgium and Spain that confirmed contacts among alleged members of the group; and the statements in custody of various individuals, including Nizar Trabelsi. Trabelsi is a Tunisian national who was arrested in Belgium on September 13, 2001, and eventually convicted in 2003 of

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<sup>103</sup> Ibid.

<sup>104</sup> Court records indicate that Beghal was extradited to France on October 1, 2001, and that his first hearing with the judge took place on October 1, 2001.

<sup>105</sup> Tribunal de Grande Instance de Paris, 10<sup>eme</sup> Chambre, Jugement du 15 mars 2005, No. D’affaire : 0125339022, Ministere Public c/Daoudi, Beghal, Bounour et autres (Beghal judgment), p. 142. The doctor concluded that the marks on Beghal’s foot “suggest mechanical injuries due to old and repetitive pressure.” On file with Human Rights Watch.

<sup>106</sup> Abu Zubaydah, whose name in French court documents is written as Abou Zubeida, is being held at the US military detention center at Guantanamo Bay. He is accused of being a high-level al Qaeda recruiter.

<sup>107</sup> Beghal judgment, p. 29.

plotting an attack on a NATO air base in Belgium. There were suggestions that Trabelsi was meant to execute the attack on the US embassy in Paris, a charge he always denied, whereas he confessed to the Belgian plot.<sup>108</sup>

The Correctional Court ruled that Beghal was a member of a terrorist network because of his contacts with certain individuals identified as high-level al Qaeda operatives. The judgment cites DST information about Beghal's movements, which included time spent in paramilitary camps in Afghanistan and contact with alleged al Qaeda recruiters Abu Qatada and Abu Doha in the United Kingdom, all of which Beghal admitted to both in the UAE and in France.<sup>109</sup> The French court held that Beghal would have engaged in a terrorist mission in France had he not been arrested in the UAE.<sup>110</sup>

Beghal did in fact confirm, in his first session with the investigating judge, that he knew certain individuals identified as members of radical Islamist movements, notably Abu Qatada in London, as well as some of Beghal's co-defendants and Nizar Trabelsi. But Beghal denied he had met Abu Zubayhdah in Afghanistan, and said his time in Afghanistan was not connected to al Qaeda.

The Appeals Court upheld Beghal's conviction in December 2005 even as it determined that the testimony from the UAE could not be held against him. Noting that the only effective proof of a plot against US interests in Paris is the testimony obtained in Dubai "under conditions not compatible with the respect for the rights of defense," the 10<sup>th</sup> Chamber of the Appeals Court nevertheless concluded that there was ample evidence to indicate Beghal's "implication ... in the most radical Islamist

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<sup>108</sup> "Terror Verdict for Soccer Pro," CBS/AP, September 30, 2003, <http://www.cbsnews.com/stories/2003/09/30/attack/main575815.shtml> (accessed May 26, 2008).

<sup>109</sup> Abu Doha, an Algerian national, is currently in prison in the UK fighting extradition to the US on charges that he masterminded the failed attack on Los Angeles international airport in 1999. Abu Qatada is a Jordanian national currently under virtual house arrest in the UK after an appeals court ruled that his deportation to Jordan would breach the UK's obligations under the European Convention on Human Rights. For more information about his case, see "UK: Appeals Court Blocks National Security Deportations," Human Rights Watch news release, April 9, 2008, <http://hrw.org/english/docs/2008/04/08/uk18478.htm>; "UK: Abu Qatada Ruling Threatens Absolute Ban on Torture," Human Rights Watch news release, March 1, 2007, <http://hrw.org/english/docs/2007/03/01/uk15437.htm>; and "UK/Jordan: Torture Risk Makes Deportations Illegal: Agreement Bad Model for Region," Human Rights Watch news release, August 16, 2005, <http://hrw.org/english/docs/2005/08/16/jordan11628.htm>.

<sup>110</sup> Beghal judgment, p. 149.

movement, that supported by al Qaeda, whose objectives of destabilizing Western regimes supporting the United States and Israel are proven.”<sup>111</sup>

In February 2008 Beghal’s lawyer concluded, “The French justice system has not done itself honor in the way the Beghal affair was conducted, from the moment he was brought here until today. We found ourselves in the obligation to prove his innocence, in a reversal of all the rules of the game, and it was impossible. Everything was understood from the start, we never once thought he would be acquitted. The judge’s mind was made up from the start. There were dozens of volumes, with nothing interesting in them, but there was an accumulation of information to make believe that he [Beghal] could commit a terrorist act in the future.”<sup>112</sup>

### **Said Arif**

Said Arif was one of the main figures in the so-called Chechen Network trial. The case involved 27 defendants, most of whom were accused of undergoing paramilitary training in camps located in the Pankisi Gorge in Georgia, with a view to returning to Europe to perpetrate terrorist attacks. The group was dubbed the “Chechen network” because many of them allegedly planned to go to Chechnya to fight, although none of those on trial actually did so.<sup>113</sup>

Arif, a 43-year-old Algerian national, was detained in Damascus by Syrian intelligence services in July 2003. He was brought to France in June 2004, under an ad hoc procedure in the absence of an extradition treaty between the two countries. A French investigating judge traveled to Damascus in May 2004 as part of an international inquiry commission and provided Syrian authorities with a list of questions to ask Arif. These questions were accompanied by “answers” in

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<sup>111</sup> Cour d’Appel de Paris, 10eme chambre, section A, Arrêt du 14 décembre 2005, Dossier No. 05/02518, p. 17. On file with Human Rights Watch.

<sup>112</sup> Human Rights Watch interview with defense lawyer who requested anonymity, Paris, February 26, 2008.

<sup>113</sup> Tribunal de Grande Instance de Paris, 14eme Chambre, Jugement du 14 juin 2006, No. D’affaire : 0231239035, Ministère Public c/Marbah, Lebik, Benhamed et autres (Chechen network judgment), p. 89. On file with Human Rights Watch.

parentheses.<sup>114</sup> The French judge did not participate in or attend personally the interrogations, and to our knowledge did not see Arif in custody.<sup>115</sup>

Arif has credibly alleged that he was tortured throughout the year he spent in Syrian custody:

I was held on premises of the Syrian secret service for one year in inhuman conditions. I was in an individual cell 1 meter by 1.9 meters, with a ceiling of 2 meters, in total darkness. I slept on the dirty floor, without access to medical care. I couldn't talk or had no notion of time, and I was hit time and again. During the winter I did not have heating or hot water ... that year in detention in Damascus, I was tortured with a television cable, and they had put me in a tire, which affected my spinal column. Getting slapped was the least of the abuse I suffered ... I was forced to admit facts I didn't know, ignoring, up until the last day of my detention, that there was an international inquiry commission and without the assistance of a lawyer.<sup>116</sup>

Torture is a serious, well-documented problem in Syria, especially during interrogations.<sup>117</sup>

Arif disavowed everything he is alleged to have said while in Syrian custody. His lawyer, Sébastien Bono, successfully argued that all pieces of evidence emanating from his detention in Syria that were included in the prosecution's case against Arif should be inadmissible at trial. The court, having heard testimony from the International Federation of Human Rights, Amnesty International and the World Organization against Torture about widespread and systematic torture in Syria,

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<sup>114</sup> Document 3685, evidence submitted at trial, cited in Bono's written conclusions, p. 71. On file with Human Rights Watch.

<sup>115</sup> Chechen Network judgment, p. 66.

<sup>116</sup> Procès-Verbal d'Interrogatoire, September 13, 2004, Tribunal de Grande Instance de Paris, Ref. Gen: 02.312.3903/5, Ref. Cab. : 1449. On file with Human Rights Watch. Translation by Human Rights Watch.

<sup>117</sup> Human Rights Watch, *World Report 2008*, chapter on Syria, <http://hrw.org/englishwr2k8/docs/2008/01/31/syria17619.htm>. See also US Department of State, Bureau of Democracy, Human Rights, and Labor, "Country Reports on Human Rights Practices – 2007: Syria," March 11, 2008, <http://www.state.gov/g/drl/rls/hrpt/2007/100606.htm> (accessed May 19, 2008).

agreed that it was “likely that the statements made by Said Arif in Syria ... were made under torture, and that his confessions were obtained by the same method.”<sup>118</sup>

The court nonetheless convicted Arif in June 2006 of membership in a criminal association in relation to a terrorist undertaking, and sentenced him to nine years in prison. The ruling found that Arif was proved to be a member of Abu Doha’s terrorist network, that he had spent time in Afghanistan in contact with “leaders of the radical Islamist movement,” that he spent time in the Pankisi Gorge in Georgia where he was in constant touch with members of a French terrorist cell, and that he was in Barcelona in March 2002 at the time when a meeting took place among radical Islamists “to define the new Jihad strategy in Europe.”<sup>119</sup> The senior judge of the 10<sup>th</sup> chamber of the Correctional Court that tried the case, Jacqueline Rebeyrotte, also presided over the trial of the so-called Frankfurt group accused of plotting an attack on the Strasbourg Christmas market in 2000. In the 2004 verdict, which convicted 10 men, the judge (and her two fellow judges) referred to Arif as one of several “big fish” and suggested that his membership in a “radical Islamist movement” was a given.<sup>120</sup>

Statements by Arif’s co-defendants, as well as alleged members of radical Islamist movements or networks, were key to the case. Most of those who provided testimony in police custody and in some cases to the investigating judge against their co-defendants later retracted these statements, alleging physical and/or psychological pressure during police custody.<sup>121</sup> Statements made by Laurent Mourad Djoumakh,

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<sup>118</sup> Chechen Network judgment, p. 65.

<sup>119</sup> Ibid., p. 189.

<sup>120</sup> As cited in Bono’s written conclusions, p. 26. The judgment also referred to Mérouane Benahmed, another defendant in the Chechen Network trial, in the same terms. Benahmed was convicted of association de malfaiteurs and sentenced to 10 years in prison.

<sup>121</sup> Maamar Ouazane, for example, claimed at trial that he was psychologically abused during police custody and pretrial detention. He told the court that the investigating judge had told him that he would be released from pretrial detention if he confirmed his statements and then fled France “in order to avoid any cross-examination,” otherwise he would “rot in prison.” Ouazane’s lawyer told the court that he was not at liberty to comment on his client’s declarations but “underline[d] that his client had been released quickly.” From Cour d’Appel de Paris, *Arret du 22 mai 2007, Dossier No. 06/05712*, p. 46 and p. 77. On file with Human Rights Watch. Ouazane, who had been placed in pretrial detention in January 2005, was released by order of the investigating judge in November 2005. He was eventually convicted and sentenced to two years’ imprisonment and a five-year ban on entering French territory; the Appeals Court increased his sentence to four years in prison and a permanent ban on entering French territory. When asked by Human Rights Watch about Ouazane, the investigating judge said, “I will not

who was convicted for participation in the Strasbourg Christmas market plot, appear to have been particularly important to the prosecution's case and the verdict. Djoumakh testified that Arif was a member of Abu Doha's network, and that Arif traveled to Georgia in 2001 using Djoumakh's passport.<sup>122</sup>

In May 2007 the Appeals Court upheld the exclusion of the testimony from Syria yet confirmed the lower court's conviction and increased Arif's prison term to 10 years—the maximum sentence—with the obligation to serve at least two-thirds of his sentence. (The Prosecutor's Office had argued before the Appeals Court that the lower court dismissed Arif's Syria testimony "improperly" because there was no evidence that Arif had been tortured, and the Syrians had no interest in torturing Arif "since they were not interested in his case and delivered him to France very quickly after his arrest"<sup>123</sup>).

The success of Arif's lawyer, Sébastien Bono, in having the testimony from Syria excluded has come at a price. The President of the Appeals Court criticized Bono for stating in his written arguments that the French investigating judges were complicit in torture, calling this language "slanderous and overstepping the bounds of freedom of speech of the defense."<sup>124</sup> In November 2007 the Prosecutor's Office asked the Disciplinary Committee of the Paris Bar Association to censure Bono for these accusations. Despite the view of the president of the Bar that Bono's actions were legitimate defense efforts, the Prosecutor's Office opened its own disciplinary action against Bono in January 2008. By law this means the Bar Association's committee must conduct an inquiry. Possible sanctions include temporary or permanent disbarment. The decision may be appealed to the same Appeals Court chamber that ruled on the Chechen Network case.<sup>125</sup>

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answer that question, everything was done within a legal framework with his lawyer." Human Rights Watch telephone interview with investigating judge, April 15, 2008.

<sup>122</sup> Chechen network judgment, p. 70.

<sup>123</sup> Appeals Court judgment of 22 May 2007, p. 73.

<sup>124</sup> Ibid., p. 89.

<sup>125</sup> Human Rights Watch email correspondence with Sébastien Bono, Paris, March 19, 2008.

## Abu Attiya

A portion of the information in the Chechen Network case file appears to have come from a Jordanian man known as Abu Attiya (who was not a defendant in the trial). A DST report dated November 6, 2002, at the outset of the judicial investigation, stated that Abu Attiya was in charge of preparations in Georgia for chemical attacks in Europe.<sup>126</sup> A French investigating judge traveled to Amman as part of an international inquiry commission and submitted questions for Abu Attiya to the Jordanian authorities. To the best of our information, the French judge neither directed nor participated in any of the interrogations. There are references to Abu Attiya in the 305-page verdict from June 2006 and the Appeals Court decision from May 2007. Indeed, the higher court lists Abu Attiya's statements while in custody in Jordan as one of the principal elements of proof of a plot to commit a chemical attack in France.<sup>127</sup>

The lawyer for Zine Eddine Khalid, one of the defendants in the Chechen Network trial, argued before the Appeals Court that Abu Attiya's testimony should be excluded given the conditions under which it was obtained and "the absence of details about the sources of the information of the DST."<sup>128</sup>

Human Rights Watch interviewed Abu Attiya in Jordan in August 2007. He gave his full name as Adnan Muhammad Sadiq Abu Najila. He told us he was arrested in Azerbaijan in mid-August 2003 and transferred to Jordan in late September 2003. He was held in custody by the Jordanian General Intelligence Department (GID) until December 30, 2007, when he was released, after over four years, without charge. The GID has a record of arbitrary arrest and abusive treatment of prisoners.<sup>129</sup> During interrogations, "they asked me about people who came from Europe. Those people

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<sup>126</sup> "Menace terroriste emanant d'un groupe de moudjahidin ayant combattu en Tchetchenie, susceptible de constituer l'infraction d'associaiton de malfaiteurs ayant pour object de preparere des actes de terrorisme," DST report from Louis Caprioli, deputy director of the DST, November 6, 2002, p. 12. On file with Human Rights Watch. French court documents refer to him as Abou Attiya.

<sup>127</sup> Appeals Court judgment of 22 May 2007, p. 100.

<sup>128</sup> Ibid., p. 81. The Appeals Court sentenced Khalid to six years in prison and a permanent ban from French territory. The lower court had sentenced Khalid to five years in prison.

<sup>129</sup> See Human Rights Watch, *Suspicious Sweeps: the General Intelligence Department and Jordan's Rule of Law Problem*, vol. 18, no. 6(E), September 2006, <http://www.hrw.org/reports/2006/jordan0906/jordan0906web.pdf>; and Human Rights Watch, *Double Jeopardy: CIA Renditions to Jordan*, ISBN: 1-56432-300-5, April 2008, <http://hrw.org/reports/2008/jordan0408>.

wanted to go to Chechnya but couldn't; I didn't have much to do with them," Abu Attiya told us. He claims he never confessed to a plot to commit attacks in Europe.

Abu Attiya said he suffered from sleep deprivation while in GID custody and that he was given pills and injections. "The injections made me nervous and shaky, so I couldn't concentrate. The pills were very small, they made me nervous and jumpy," he said. He was not allowed to read his "confession" before he signed it.<sup>130</sup>

When asked by Human Rights Watch about information from Abu Attiya being used in the Chechen Network case, the investigating judge said, "But that was an international inquiry commission to Jordan... I have only participated in non-violent inquiry commissions."<sup>131</sup> When told that Abu Attiya has alleged ill-treatment in Jordanian custody, the judge said, "I don't know anything about that."<sup>132</sup>

## Convictions Based on Weak Evidence

Terrorism association de malfaiteurs cases are tried by three-judge panels in the Correctional Court in Paris. There is no specific chamber of the Court that hears these cases, though most are tried in either the 13<sup>th</sup>, 14<sup>th</sup>, or 16<sup>th</sup> chamber. All appeals against Correctional Court verdicts are heard by the same three judges presiding over the 10<sup>th</sup> chamber of the Paris Appeals Court. Both the Office of the Prosecutor and the defendant can appeal; in many of the cases reviewed by Human Rights Watch the Appeals Court upheld convictions and often increased prison sentences, and in some cases reversed acquittals and convicted defendants.

The standard of proof in the French criminal justice system is defined in article 427 of the Code of Criminal Procedure: judges (and juries) decide according to their "innermost conviction" with respect to the innocence or guilt of the defendant in a system where all types of evidence are admissible ("free proof" system). The trial chambers of the Correctional Court must provide reasoned judgments explaining their verdicts. Judges and juries at the Assize Court, which tries the most serious

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<sup>130</sup> Human Rights Watch interview with Adnan Muhammed Sadiq Abu Najila, Swaqa, Jordan, August 21, 2007.

<sup>131</sup> Human Rights Watch interview with former investigating judge, February 26, 2008.

<sup>132</sup> Human Rights Watch telephone interview with former investigating judge, April 15, 2008.

felonies, do not have to provide a reasoned judgment. The European Court of Human Rights has held that the “innermost conviction” standard is functionally equivalent to the criminal standard of proof “beyond a reasonable doubt” used in common law jurisdictions.<sup>133</sup>

Judge Jean-Claude Kross, the senior judge presiding over the 16<sup>th</sup> chamber of the Paris Correctional Court, explained that “we rule based on the material and legal elements in the case file, including the police investigation” and stressed the importance of adversarial hearings in open court in elucidating the facts of the case.<sup>134</sup> Senior Prosecutor Philippe Maitre emphasized that any doubt should benefit the accused.<sup>135</sup>

Human Rights Watch was unable to obtain statistics on the ratio of convictions to the number of accused in cases involving alleged Islamist terrorism networks. Anecdotal evidence suggests that a majority of the accused in these often complex cases involving numerous defendants is convicted of something, either the main accusation of criminal association in relation to a terrorist undertaking, or minor crimes, such as forgery, decoupled from a terrorist intent. Europol figures indicate that France had a 5 percent acquittal rate in terrorism trials in 2007: there were 52 convictions and 3 acquittals out of the total of 55 verdicts. These included 31 verdicts involving Islamist groups defendants and 24 cases involving separatist defendants. The acquittal rate for 2006 was 0 percent, as 21 convictions were handed down in 21 verdicts.<sup>136</sup>

A number of those convicted on association de malfaiteurs charges are given sentences that appear to equate with the time already served in pretrial detention. This may reflect the often lengthy detention before trial in terrorism cases, but perhaps too an effort to “cover” the period of time already served to avoid any

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<sup>133</sup> European Court of Human Rights, *Barbera, Messegué and Jabardo v. Spain*, judgment of 6 December 1988, Series A no 146, available at [www.echr.coe.int](http://www.echr.coe.int), para. 77.

<sup>134</sup> Human Rights Watch email correspondence with Judge Jean-Claude Kross, Paris, February 21, 2008.

<sup>135</sup> Human Rights Watch interview with Philippe Maitre, February 27, 2008.

<sup>136</sup> Europol, TE-SAT reports 2007 and 2008, p. 16 and p. 14, respectively. The overall acquittal rate in all types of terrorism cases throughout the EU was 15 percent in 2006 and 26 percent in 2007.

appearance of unjust detention.<sup>137</sup> And because French law provides for automatic reductions in prison sentences, these individuals are effectively serving even longer sentences than they would have had they begun serving time only after conviction.<sup>138</sup> Hassan el Cheguer and Hakim Mokhfi were both sentenced to four years, with one year suspended, for membership in a terrorist network, having spent exactly three years in pretrial detention. Initially they were charged, along with Ghulam Mustafa Rama, with providing support to Richard Reid, the British citizen known as the “shoe bomber” because he attempted to ignite a bomb hidden in his shoe on a Paris-Miami flight in December 2001. The prosecutors ultimately admitted there was insufficient evidence on this count and instead argued that Rama had recruited the two younger men into terrorism. El Cheguer and Mokhfi admitted spending three weeks in September 2001 in a training camp in Pakistan-administered Kashmir run by an Islamist organization called Lashkar-e-Toiba. They claimed they had not been fully informed and had been surprised and scared to discover its true nature.

Some of these convictions to time already served appear to be based on evidence establishing little more than contact between certain people. A 2005 case involving six defendants prosecuted for membership in a network plotting an attack on US interests in France illustrates the concern. The main figure in the case was Djamel Beghal (discussed above). Two of the other defendants were Rachid Benmessahel, who was sentenced to exactly three years in prison, the period he had already spent in pretrial detention, and Johan Bonte, who was sentenced to one year, after having spent three years in pretrial detention.

The judgment—which documents a large number of phone calls and various meetings between the six defendants in the case, including Benmessahel and Bonte,—establishes without a doubt that these men knew each other (Bonte is Beghal’s brother-in-law).<sup>139</sup> But it does not establish any link to a specific terrorist plot in

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<sup>137</sup> Human Rights Watch interview with William Bourdon, defense attorney, Paris, October 5, 2005.

<sup>138</sup> Article 721 of the CCP guarantees that all those sentenced to a prison term automatically benefit from a remission of sentence of three months for the first year and two months for every year after that. This means that an individual sentenced to three years in prison would automatically benefit from a seven-month reduction and be required to serve only two years and five months. The CCP also provides for earned remission of sentence for good behavior (art. 721-1).

<sup>139</sup> Beghal judgment, pp. 63-79, pp.96-147.

France, and leaves significant room for doubt that these men formed a network or group with a clear terrorist purpose.

Benmessahel's wife expressed her frustration with the investigation:

I had lots of disks of articles on Islam, on all sorts of topics, including one on martyrs. All in French, which my husband doesn't even speak that well. I confirmed they were mine. My husband said they were mine, but the police insisted on saying they were his. I had proof that he went to Dusseldorf to buy a car, but no matter what I showed them, they insisted it was to meet with terrorists. Rachid stepped on an anti-personnel mine in Algeria while he was doing his military service. [The investigating judge] kept saying he'd been injured in Afghanistan, and when I gave documentation from Algeria about Rachid's injury to the lawyer to give to [the judge], he said he wouldn't take it into account, anything can be bought in Algeria. They said my husband had gone to Afghanistan in 1997-1998, and when I proved he hadn't, they said he'd gone in 2000. But he'd been operated on then, so finally they said he was the person in France tasked with coordinating everything. I had the feeling I was hitting my head against a brick wall.<sup>140</sup>

Two years after Rachid Benmessahel was released from prison his acquired French nationality was rescinded and he was expelled to Algeria. His wife, a French citizen, and their three children, continue to live on the outskirts of Paris.

Ibrahim Keita and Azdine Sayez were tried along with four others for membership in a network providing support for al-Qaeda operatives and recruitment to terrorism. Three of the other defendants were convicted of providing financial and logistical support to the two Tunisian men who killed the military leader of the National Islamic United Front for the Salvation of Afghanistan, Commander Ahmed Shah Massoud in September 2001. A fourth was sentenced to two years in prison for organizing paramilitary training camps. Although tried alongside these men, Keita was accused of providing support to Willy Brigitte, a French citizen who was ultimately convicted

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<sup>140</sup> Human Rights Watch interview with Salima Benmessahel, Paris, January 29, 2008.

of plotting a terrorist attack in Australia. Keita, a pious Muslim, shared a small spartan room with Brigitte in Paris: Keita slept there during the day, while Brigitte could use it at night while Keita worked as a truck driver. This, and the fact that he participated in what he called hiking trips organized by the mosque he attended, appear to be the only basis for the association de malfaiteurs accusation. After spending roughly a year-and-a-half in pretrial detention, Keita was acquitted by the Correctional Court. The Office of the Prosecutor appealed, however, and the Appeals Court reversed the acquittal and sentenced Keita to two years in prison. With time already served and automatic reductions, Keita did not return to prison.

His co-defendant Sayez appears to have been arrested and placed under judicial examination for little more than the fact that he owned a halal pizzeria patronized by many of the other defendants in the case. Keita himself would stop there to pick up a pizza while he worked making deliveries. Sayez spent roughly eight months in pretrial detention before his acquittal. But like Keita, Sayez saw this acquittal reversed by the Appeals Court and he was sentenced to two years in prison; unlike Keita, Sayez was rearrested and incarcerated to complete his sentence.<sup>141</sup>

Foreign jurisdictions have cast doubt on the evidential basis of some association de malfaiteurs convictions. In 2002, a German court refused to extradite Abdellah Kinai, an Algerian with refugee status in Germany, to France to complete a five-year prison sentence.

Kinai, now 64 years old, had been initially arrested on May 26, 1998, in France as part of the operation to avert an alleged terrorist plot targeting the soccer World Cup in France that year. Kinai was eventually accused of being a leading figure in a group formed to provide material and logistical support to the GIA in Algeria, and of giving his approval of a plot to murder Paris mosque imam Dalil Boubaker. Kinai spent 11 months in pretrial detention in France before being released under judicial supervision. On December 12, 2000, the Correctional Court acquitted him of all charges. In this trial, 16 out of 24 defendants were acquitted of the most serious

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<sup>141</sup> Human Rights Watch interviews with Sébastien Bono, defense attorney, Paris, July 3, 2007, and February 28, 2008.

charges related to membership in a terrorist association de malfaiteurs.<sup>142</sup> The prosecution appealed the acquittal, however, and on March 14, 2002, the Paris Appeals Court found Kinai guilty and sentenced him to five years in prison.

Kinai had returned to Germany after the acquittal by the lower court, and he was arrested in Stuttgart on July 1, 2002, pending extradition to France to serve his prison sentence. After examining the case documents, however, the Higher Regional Court in Stuttgart revoked the arrest warrant on November 22, 2002, and definitively declared Kinai's extradition to France inadmissible on April 7, 2003, citing lack of legal grounds for the extradition request. With respect to the alleged membership in a criminal association to commit terrorism, the Court concluded that "it is impossible to determine from the documents provided by the French authorities whether the network allegedly led by the accused even fulfills the criteria of a criminal or terrorist organization ... there are no specific allegations that would allow the Court to determine the organizational structure of this network." With respect to the alleged plot to murder the imam of the Paris mosque, the Court also found it could not determine the existence of any criminal offense.<sup>143</sup>

A Canadian court also took the view that a French conviction for association de malfaiteurs was unfounded. Abdellah Ouzghar, a dual Canadian-Moroccan citizen, was convicted in absentia in April 2001 in France for association de malfaiteurs and passport forgery and sentenced to five years in prison.<sup>144</sup> Twenty-three others were convicted at the same time of belonging to the so-called Montreal Group. The group was allegedly linked to Ahmed Ressam, convicted in the United States in April 2001 of attempting to smuggle explosives from Canada in order to blow up Los Angeles International Airport. France sought Ouzghar's extradition from Canada shortly after the 9/11 attacks in the US, leading to his arrest in October 2001 and lengthy extradition proceedings. In January 2007 a Toronto judge dismissed the claim that Ouzghar was a member of an international terrorist group but allowed his extradition

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<sup>142</sup> Of these sixteen, nine were acquitted of all charges, like Kinai, while seven were convicted of minor crimes. Kinai's first name is spelled Abdallah in all French court documents.

<sup>143</sup> Stuttgart Higher Regional Court ruling of April 7, 2003, quoted in Abdellah Kinai's complaint to the European Court of Human Rights against France for violations of articles 5, 6, 7 and 8, filed in August 2003. Four years later, on September 11, 2007, the Court rejected the complaint as inadmissible. Original in German, translation by Human Rights Watch.

<sup>144</sup> French law allows for a retrial in cases where the conviction was handed down in absentia.

on the lesser charges (for example, passport forgery). A year later, in January 2008, the Canadian Minister of Justice ignored the judge's finding and allowed extradition also on the basis of the terrorism charge. As of May 2008, Ouzghar remained in Canada with appeals pending.<sup>145</sup>

In France, anyone who spends time in pretrial detention and is subsequently released without charge or acquitted of all charges at trial has the right to compensation.<sup>146</sup> Saliha Lebik spent one year in pretrial detention with her infant daughter before being acquitted of all charges by the Correctional Court in June 2006. Both Lebik, the wife of one of the principal defendants in the Chechen Network trial, and her daughter contracted tuberculosis in prison. Her husband Mérouane Benahmed was convicted of terrorism association de malfaiteurs and sentenced to the maximum of ten years in prison. The Appeals Court upheld Lebik's acquittal in May 2007, paving the way for her to receive compensation. At this writing, no decision had yet been rendered on Lebik's suit for over €220,000 in damages.<sup>147</sup> Those who are convicted but sentenced to a shorter time in prison than already spent awaiting trial, like Johan Bonte (see above) do not have the right to compensation.

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<sup>145</sup> Human Rights Watch telephone interview with John Norris, Ouzghar's lawyer, Toronto, May 2, 2008. The case raises interesting issues of jurisdiction because all of Ouzghar's alleged criminal acts took place in Canada. As his lawyer said, "At the time, Ouzghar is in Montreal. A guy comes from Turkey and ends up with Ouzghar's passport. The alteration of the passport took place in Belgium, and the man who tried to use Ouzghar's passport was stopped in Taiwan on his way to Canada. There's absolutely no connection to France."

<sup>146</sup> CCP, art. 149.

<sup>147</sup> "Demand for reparation on behalf of Saliha Lebik and Sarah Behahmed," December 4, 2007. On file with Human Rights Watch. Human Rights Watch email correspondence with Isabelle Coutant-Peyre, lawyer for Saliha Lebik, Paris, May 27, 2008.

## V. Police Custody in Terrorism Cases

### French Law and Procedure

French law provides one of the longer periods of police custody—before an individual is taken before a judge and either charged or released—in terrorism cases in continental Europe.<sup>148</sup> Under the French Code of Criminal Procedure (CCP), terrorism suspects may be held for up to six days before being brought before a judge. Standard police custody in criminal investigations is set at 24 hours with the possibility of one extension to 48 hours. In cases involving terrorism suspects, police may request judicial authorization to extend detention to 96 hours, or four days, and to 144 hours, or six days, in certain circumstances.

Police have an additional 20 hours from the official end of police custody to produce the detainee before an investigating judge. Police are not allowed to interrogate the detainee during this period, which is meant to allow only for any necessary travel time.

In practice, a four-day detention period in terrorism investigations is standard; extensions are virtually systematic. The CCP stipulates that the judicial authority—which in practice can be the investigating judge or the liberty and custody judge—must see the detainee before authorizing the extension. Anecdotal evidence suggests that judges do regularly visit suspects in the place of detention before authorizing extensions, for what are usually brief, on-site exchanges.

The power to hold terrorism suspects for up to six days was introduced in January 2006 in cases where there is a serious risk of an imminent terrorist attack or if the complexity of the case and the need for international cooperation impose the

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<sup>148</sup> Police custody in terrorism cases in select European countries: Spain and Italy—5 days; Denmark and Norway—3 days; Germany—48 hours. Pre-charge detention in terrorism cases in the United Kingdom, which operates a common law system, is 28 days, and at this writing the government had introduced draft legislation to allow for 42-day pre-charge detention in some cases. For an analysis of our concerns, see Human Rights Watch, *UK: Counter the Threat or Counterproductive? Commentary on Proposed Counterterrorism Measures*, no. 1, October 2007, <http://www.hrw.org/backgrounder/eca/uk1007/uk1007web.pdf>.

need.<sup>149</sup> According to counterterrorism prosecutor Philippe Maitre, this power has been used so far only once, to allow an extension to five days.<sup>150</sup>

Under the Code of Criminal Procedure, terrorism suspects, like all detainees, have the right to be informed of the reason for the arrest, the right to request a medical examination, and a qualified right to inform someone of their arrest.<sup>151</sup> Detainees do not have the right to a medical examination by a doctor of their own choosing, and the prosecutor, on advice from the police officer in charge, may deny the right to inform a third party of the detention if such contact is considered prejudicial to the ongoing investigation.<sup>152</sup> This denial appears to be standard in terrorism cases; none of the individuals we spoke with who had been arrested on terrorism charges were able to make any phone calls during their time in police custody.

During police custody, terrorism suspects have severely curtailed access to legal counsel. While most suspects have the right to ask to see a lawyer of their choice or court-appointed from the outset of detention, terrorism suspects have access to a lawyer only after 72 hours, or three days, in police custody.<sup>153</sup> If the judge extends police custody by an additional 24 hours before the end of the 72<sup>nd</sup> hour, first access to a lawyer is pushed back to after the 96<sup>th</sup> hour, or after four days in custody. The detainee in this case would be able to see a lawyer for the second time 24 hours later, or after five days in police custody. Each visit is limited to 30 minutes, and counsel does not have access to any detailed information about the charges against their client. The lawyer must be given access to the case file before the session with the investigating judge, and anecdotal evidence from numerous interviews with defense attorneys suggests this usually takes place three or four hours before the hearing.

All detainees in police custody in France, regardless of the reasons for their arrest, are questioned without the presence of a lawyer, they are not informed of the right to

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<sup>149</sup> CCP, art. 706-88 (as amended by Law No. 2006-64 of 23 January 2006, art. 17).

<sup>150</sup> Human Rights Watch interview with Philippe Maitre, February 27, 2008. At this writing, no terrorism suspect had yet been held for the full six days.

<sup>151</sup> CCP, art. 63.

<sup>152</sup> Ibid., art. 63-2.

<sup>153</sup> CCP, art. 63-4.

remain silent, and anything they say may be used against them at trial. While the final police report must list the length of all interrogations, there are no rules establishing time limits on these interrogations or the amount of rest a detainee must have between interrogations.

The same strict rules seriously limiting access to a lawyer apply whether counsel is privately hired or appointed. The Paris bar association (*Barreau de Paris*) maintains lists of criminal lawyers who volunteer to be “on duty” to assist those detained on criminal charges for the duration of police custody who do not designate a private lawyer. A different lawyer, either another legal aid attorney or a private lawyer, takes over the case as of the first session with the investigating judge (*première comparution*). In terrorism cases, detainees who are unable to hire a private lawyer are assisted from this point on by one of the 12 “*secrétaires de la conférence*,” an elite group of young lawyers elected each year after a competitive process.

A 2007 law instituting obligatory video- and audio taping of all police interrogations, as well as audio and video recordings of the first hearing with the investigating judge, in serious felony investigations explicitly excluded terrorism, drug trafficking, and organized crime cases.<sup>154</sup> While all interrogations of minors had been recorded since 2002, it was the Outreau Affair that created the momentum for instituting more generalized recording of interrogations in order to better protect the rights of detainees as well as protect the police from false accusations of mistreatment. A special parliamentary inquiry into the Outreau Affair recommended recording all police interrogations, regardless of the nature of the offense.<sup>155</sup> Terrorism, drug trafficking, and organized crime cases were excluded in the end because of the “complexity” of these investigations.<sup>156</sup>

The combination of constraints on the rights of suspects in police custody in terrorism cases—severely delayed and limited access to counsel, no information about the right to remain silent, the likelihood of being unable to notify a third party,

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<sup>154</sup> Law 2007-291 of March 5, 2007, arts. 14 and 15. These articles entered into effect in June 2008.

<sup>155</sup> National Assembly, *Rapport No. 3125*, June 6, 2006, p. 311.

<sup>156</sup> See the parliamentary debates of December 19, 2006, at <http://www.assembleenationale.org/12/critique/2006-2007/20070100.asp>.

and the lack of limits on the duration of interrogations—create a situation in which detainees are denied the right to an effective defense at a critical stage and are at risk of prohibited ill-treatment.

## Limited Access to Counsel

The right of all persons accused of a crime to the assistance of a lawyer is a fundamental procedural guarantee. Article 14 of the ICCPR and article 6 of the ECHR stipulate that everyone charged with a criminal offense has the right “to defend himself in person or through legal assistance of his own choosing” or be assigned free legal assistance if necessary. The UN Human Rights Committee and the European Court of Human Rights have considered these provisions applicable to periods before trial, including the period in police custody.<sup>157</sup> The European Court of Human Rights found the United Kingdom in violation of article 6 of the Convention because it denied a detainee access to a lawyer for the first 48 hours of police questioning. The Court held,

[T]he concept of fairness enshrined in Article 6 (art. 6) requires that the accused has the benefit of the assistance of a lawyer already at the initial stages of police interrogation. To deny access to a lawyer for the first 48 hours of police questioning, in a situation where the rights of the defence may well be irretrievably prejudiced, is - whatever the justification for such denial - incompatible with the rights of the accused under Article 6 (art. 6).<sup>158</sup>

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<sup>157</sup> The Human Rights Committee held that the provision of the UK’s Terrorism Act 2000 allowing suspects to be detained for 48 hours without access to a lawyer was of “suspect compatibility” with articles 9 and 14 of the ICCPR. CCPR/CO/73/UK, para. 19 (2001); the European Court of Human Rights similarly held that article 6 of the ECHR applies even in the preliminary stages of a police investigation. In the *Imbroscia v. Switzerland* judgment, the Court stated that “[c]ertainly the primary purpose of Article 6 as far as criminal matters are concerned is to ensure a fair trial by a ‘tribunal’ competent to determine any criminal charge, but it does not follow that the Article (Art.6) has no application to pre-trial proceedings,” and that the requirements of article 6(3), including the right to legal assistance, “may ... be relevant before a case is sent to trial if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with them.” *Imbroscia v. Switzerland*, Judgment of November 24, 1993, Series A, No. 275, available at [www.echr.coe.int](http://www.echr.coe.int), para. 36.

<sup>158</sup> European Court of Human Rights, *Murray v. United Kingdom*, Judgment of 8 February 1996, Reports of Judgments and Decisions 1996-I, available at [www.echr.coe.int](http://www.echr.coe.int), para. 66.

The UN Basic Principles on the Role of Lawyers requires that

All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality.<sup>159</sup>

A 2003 European Commission Green Paper on procedural safeguards for suspects and defendants in criminal proceedings reflects these standards in confirming that the right to legal representation “arises immediately upon arrest” and that the suspect is entitled to such representation “throughout the questioning and interview stages of the proceedings.”<sup>160</sup>

French tradition and current practice stand in stark contrast to these international standards. The right to see a lawyer in police custody was only introduced in 1993, and remains limited even in ordinary criminal cases. The police custody regime in terrorism cases in particular appears to be organized to be as oppressive as possible with a view to obtaining confessions. “The principle in the French justice system is that there is no defense against the police,” according to defense attorney Henri Leclerc. The lawyer’s visit after 72 hours “is not very effective ... [because] the lawyer doesn’t assist his client during the interrogations [and] the person is defenseless,” Leclerc contended.<sup>161</sup>

Numerous international human rights authorities have criticized the terms of police custody in France. In 1997 the UN Human Rights Committee expressed concern about “prolonged detention in police custody” and delayed access to counsel under France’s counterterrorism legislation, and urged France to bring its laws into

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<sup>159</sup> Basic Principles on the Role of Lawyers, adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 118 (1990), number 8.

<sup>160</sup> European Commission, Green Paper from the Commission, Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union, COM(2003) 75, February 19, 2003, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0075:FIN:EN:PDF> (accessed February 15, 2008), para. 4.3(a).

<sup>161</sup> Human Rights Watch interview with Henri Leclerc, defense attorney, Paris, October 5, 2005.

conformity with articles 9 and 14 of the ICCPR.<sup>162</sup> Then Council of Europe Commissioner for Human Rights Alvaro Gil-Robles in 2005 similarly recommended reforming access to counsel in order “to ensure that the fundamental rights of persons in police custody are respected.”<sup>163</sup> Finally, the European Committee for the Prevention of Torture (CPT), an authoritative human rights body of the Council of Europe that conducts country visits, has repeatedly called on France to allow detainees access to a lawyer from the outset of detention in all of its reports since 1996 (see also below, section “Ill-treatment in Custody”).<sup>164</sup>

Defense attorneys spoke of their frustration with the system. Fatouma Metmati, who defended two accused in the Chechen Network case, complained that the delayed access reflected “a distrust of lawyers, how else can you justify it?”<sup>165</sup> Another lawyer with experience defending terrorism suspects, Nicolas Salomon, said of the 30-minute interview, “It’s pointless. It’s only for ensuring the health of the detainee. We can’t see him at the first hour, so we can’t even verify if injuries were done at arrest or during *garde à vue*.<sup>166</sup> The National Bar Association has long advocated access to counsel from the very outset of detention in all cases, and the “active presence” of the lawyer during all interrogations.<sup>167</sup>

The majority of suspects detained on international terrorism charges are assisted, at least initially, by court-appointed lawyers.<sup>168</sup> Several people told Human Rights Watch that the lawyer they saw was of little or no assistance. Abdul N., who has been arrested four times on terrorism charges since 1998 (to date he has not been convicted of any terrorism-related offense) said of one occasion, “I saw a lawyer, but

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<sup>162</sup> Human Rights Committee, *Concluding Observations of the Human Rights Committee: France, 04/08/97, CCPR/C/79/Add.80*, 4 August 1997, para. 23.

<sup>163</sup> Report by Mr. Álvaro Gil-Robles, Council of Europe Commissioner for Human Rights, on the Effective Respect for Human Rights in France following his visit from 5 to 21 September 2005, CommDH (2006)2, February 15, 2006, para. 54.

<sup>164</sup> European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), reports on visits conducted in 1996, 2000, 2003, and 2006. All CPT reports on France are available at <http://www.cpt.coe.int/en/states/fra.htm>.

<sup>165</sup> Human Rights Watch interview with Fatouma Metmati, defense attorney, Paris, December 13, 2007.

<sup>166</sup> Human Rights Watch interview with Nicolas Salomon, defense attorney, Paris, July 5, 2007.

<sup>167</sup> See Conseil National des Barreaux, “La garde à vue dans tous ses états,” *Les Cahiers du Conseil National des Barreaux*, May 2005, pp. 121-123.

<sup>168</sup> The vast majority of Basque and Corsican terrorism suspects, by contrast, appear to be assisted by private lawyers from the first contact in *garde à vue*.

he told me, ‘I’m just here as a formality, I can’t do anything for you.’”<sup>169</sup> On another occasion, he said the lawyer urged him to admit knowing other individuals arrested in the course of the same investigation if he wanted to get out of police custody.<sup>170</sup>

Several individuals said they didn’t see a lawyer at all during their time in police custody. In 2006 Abdul N. was held in police custody for four days and met his court-appointed lawyer for the first time for the hearing with the investigating judge: “We had just five minutes in front of the judge’s door. And the same lawyer had to represent the woman [defendant] in the case too.”<sup>171</sup>

Rachida Alam, who was arrested along with her husband in the investigation of the so-called Chechen Network, spent four days in police custody without ever seeing a lawyer, and was then released without charge.<sup>172</sup>

Emmanuel Nieto was arrested in early October 2005 on suspicion of plotting attacks in Paris. The arrest was based on statements allegedly by a man named M’hamed Benyamina while arbitrarily detained in Algeria.<sup>173</sup> Nieto told Human Rights Watch that he said no when he was asked if he wanted to see a lawyer. “They made me sign a piece of paper, but then I changed my mind and I said I wanted one but they grabbed the paper away from me and said it was too late.”<sup>174</sup> He didn’t see a lawyer until right before his first hearing with the investigating judge, after four brutal days in police custody. The court-appointed lawyer told him it would be best for him to cut a deal.<sup>175</sup> Abdellah Kinai, who also claims he was psychologically and physically ill-treated in custody, did not see a lawyer until just before the hearing with the judge. Their stories are detailed below.

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<sup>169</sup> Human Rights Watch interview with Abdul N. (pseudonym), Paris, February 25, 2008.

<sup>170</sup> Ibid.

<sup>171</sup> Ibid.

<sup>172</sup> Human Rights Watch interview with Rachida Alam, Paris, January 29, 2008.

<sup>173</sup> Benyamina’s case is discussed in Chapter IV.

<sup>174</sup> Human Rights Watch interview with Emmanuel Nieto, Paris, February 28, 2008.

<sup>175</sup> Ibid.

### *Right to silence and the right to an effective defense*

The right to silence to avoid self-incrimination in criminal proceedings is a generally recognized international standard. The European Court of Human Rights has interpreted article 6 of the ECHR on the right to a fair trial as encompassing the right to remain silent, considered to be intimately linked to the principle of presumption of innocence. As a result, the 2003 European Commission Green Paper on procedural safeguards emphasized that suspects be advised of “any right to silence ... of the consequences of making any confession and of the weight to be given in any subsequent proceedings to any answers he makes.”<sup>176</sup>

While the right to remain silent under police questioning is generally understood to apply in France because of European Court of Human Rights jurisprudence, it is not explicitly guaranteed in the CCP or the French Constitution.

Notification of the right to silence for those in police custody was incorporated into the French Code of Criminal Procedure in 2000. But it was removed again in 2003 under intense lobbying from law enforcement.<sup>177</sup> Council of Europe Commissioner for Human Rights Gil-Robles criticized France for the decision in a 2006 report: “I regard France’s retreat on this point as highly deleterious, since concealing legal rights is never a good thing.”<sup>178</sup> The National Bar Association (Conseil National des Barreaux) also supports the right of those in police custody to remain silent.<sup>179</sup>

The Constitutional Court has ruled that delayed access to a lawyer is permissible because police custody is subject to judicial supervision and because this deferment “cannot determine the subsequent course of proceedings.”<sup>180</sup> Yet police custody constitutes a critical stage in the criminal investigation. Statements made during

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<sup>176</sup> European Commission, Green Paper, para. 4.3(b).

<sup>177</sup> Law 2000-516 of June 15, 2000, established that detainees were “immediately informed ... [of] the right to not answer any questions”; Law 2002-307 of March 4, 2002, modified the language to ensure that detainees were told they had the “choice to make statements, to answer questions posed to them or to keep silent.” Law 2003-495 of March 18, 2003, deleted the provision entirely.

<sup>178</sup> Report by Mr. Álvaro Gil-Robles, Effective Respect for Human Rights in France, February 15, 2006, para. 44.

<sup>179</sup> Conseil National des Barreaux, “La garde à vue dans tous ses états,” Les Cahiers du Conseil National des Barreaux, pp. 122-23.

<sup>180</sup> Constitutional Court Decision No. 2004-492 DC, March 2, 2004, <http://www.conseil-constitutionnel.fr/decision/2004/2004492/2004492dc.htm> (accessed May 27, 2008), para. 33.

police custody are summarized in an official statement, which is admitted into the case file whether signed by the suspect or not. These statements are often used against defendants at trial.

Confessions are not the “queen of all evidence,” as a trial judge explained to Human Rights Watch, and convictions may not rest solely on avowals.<sup>181</sup> Defense lawyers can and do challenge the confessions made by their clients in police custody. There is no doubt, however, that incriminating statements made in police custody carry significant weight and influence the “innermost conviction” of the judge.

As one lawyer argued, “Anybody is ready to confess to anything after five days. The only limit is that the police can’t put so much pressure as to make someone confess too much. Not many people resist. A confession that hasn’t been retracted—that’s almost enough to convict, you just need a bit more. A retracted confession—not enough for a conviction, but it’s taken into account along with other evidence.”<sup>182</sup>

In contrast to the position in police custody, suspects are informed of their right to remain silent in the first hearing with the investigating judge. Lawyers we spoke with generally stressed that they advised their clients at this stage to remain silent. But as one lawyer pointed out, the investigating judge will then ask the suspect to confirm what he or she said in police custody and “this is dangerous because someone can say yes without thinking about it.”<sup>183</sup>

More generally, the limited amount of time lawyers have to meet with clients and to acquaint themselves with the investigation and the charges against their client places severe restrictions on the lawyer’s ability to effectively defend his or her client at a critical stage in the proceedings. Lawyers have no access to the case file until a short time, normally three or four hours, before the first hearing with the investigating judge. As one lawyer explained, “You don’t have time to study anything

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<sup>181</sup> Human Rights Watch email correspondence with Judge Jean-Claude Kross, Paris, February 21, 2008.

<sup>182</sup> Human Rights Watch interview with Dominique Tricaud, defense attorney, Paris, December 10, 2007.

<sup>183</sup> Human Rights Watch interview with Henri De Beauregard, defense attorney, Paris, July 6, 2007.

but your client's interrogations. You don't have the time to look at the interrogations of the other people arrested at the same time.”<sup>184</sup>

## Ill-treatment in Custody

Prompt and meaningful access to a lawyer during police custody is a fundamental safeguard against torture and prohibited ill-treatment. A half-hour meeting with a lawyer three days after arrest is an insufficient safeguard against such treatment. The presence of a lawyer from the very outset of detention and during all questioning is a far more effective protection.

French law provides for medical examinations of detainees in police custody, another safeguard. Under the specific regime for terrorism suspects, detainees may request a medical exam at any time, and judicial officials may order it on their own authority.<sup>185</sup> If detention is extended beyond 96 hours, the exam becomes automatic and obligatory.<sup>186</sup> The primary mission of the forensic doctor is to certify that the detainee's state of health is compatible with continuing police custody.<sup>187</sup>

Our research suggests that the right to access to a medical examination is generally respected and we did not gather evidence of systematic problems. The CPT has commended France for progress in ensuring this right, while noting in successive reports continuing problems such as superficial examinations, failure to record injuries, and lack of respect for confidentiality.<sup>188</sup> A few of the cases of alleged abuse in French custody discussed below raise serious concerns, however. Emmanuel Nieto, for example, was examined by the medical doctor in his cell in the presence of

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<sup>184</sup> Ibid.

<sup>185</sup> CCP, art. 63-3.

<sup>186</sup> Ibid., art. 706-88, as modified by Law No. 2006-64 of 23 January 2006, art. 17.

<sup>187</sup> CCP article 63-3 states that the medical certificate “must specifically state the fitness of the person to be held further in custody.” A 2004 conference on the role of forensic doctors concluded that the “principal mission of the doctor is to certify or not the fitness for continuing custody.” Conference de consensus: Intervention du medecin aupres des personnes en garde a vue. 2 et 3 decembre, Paris, “Texte des recommandations (version longue),” p. 13. Conference organized by the Agence nationale d'accréditation et d'évaluation en santé, Collégiale des médecins légistes hospitaliers et hospitalo-universitaires, and the Société de Médecine Légale et de Criminologie de France.

<sup>188</sup> See CPT reports on visits conducted in 1996, para. 25; 2000, para. 36; and 2006, para. 16. All CPT reports on France are available at <http://www.cpt.coe.int/en/states/fra.htm>.

police officers.<sup>189</sup> Abdellah Kinai told us, “When the doctor saw what terrible shape I was in, he said he couldn’t do anything for me, he didn’t even examine me.” Kinai said he had never seen any medical report.<sup>190</sup> The CPT has repeatedly recommended that detainees in police custody have the right to request a second examination by a doctor of their own choosing.<sup>191</sup>

The European Court of Human Rights has consistently underlined the vulnerability of individuals in police custody to abuse at the hand of state officials, and the duty of authorities to protect them from torture and prohibited ill-treatment. In at least three cases involving abuse of detainees in police custody, the Court has found France in violation of article 3 of the European Convention on Human Rights prohibiting torture or cruel, inhuman or degrading treatment or punishment.<sup>192</sup> In all of these cases, one of which involved a French citizen accused of participating in a terrorist attack in Corsica, the Court has stressed the absolute nature of the prohibition under article 3 so that,

The requirements of the investigation and the undeniable difficulties inherent in the fight against crime, particularly with regard to terrorism, cannot result in limits being placed on the protection to be afforded in respect of the physical integrity of individuals.<sup>193</sup>

In a report based on a visit in May 2000, the CPT criticized conditions of detention in police custody. The CPT interviewed two men who had recently been held in police custody for four days on suspicion of involvement in terrorism. Both complained that they had been interrogated day and night, and this was corroborated by police

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<sup>189</sup> Human Rights Watch interview with Emmanuel Nieto, February 28, 2008.

<sup>190</sup> Written statement from Abdellah Kinai, March 3, 2008, on file with Human Rights Watch.

<sup>191</sup> CPT reports on visits conducted in 1996, para. 41; 2000, para. 35.

<sup>192</sup> European Court of Human Rights, *Tomasi v. France*, Judgment of 27 August 1992, Series A no. 241-A; *Selmouni v. France* [GC], no. 25803/94, ECHR 1999-V; and *Rivas v. France*, no. 59584/00 of 1 April 2004. The Court has found France in violation of article 2 of the Convention, guaranteeing the right to life, at least once for death in custody and at least once for death at the time of arrest resulting in part from physical abuse. See *Tais v. France*, No. 39922/03 of 1 June 2006, and *Saoud v. France*, no. 9375/02 of 9 October 2007. In these two cases, having found a violation of article 2, the Court did not consider separately whether there had been a violation of article 3. Available at [www.echr.coe.int](http://www.echr.coe.int).

<sup>193</sup> European Court of Human Rights, *Tomasi v. France*, judgment of August 27, 1992, Series A no. 241-A, available at [www.echr.coe.int](http://www.echr.coe.int), para. 115.

records. The CPT also verified that the counterterrorist police in charge of the interrogations had given explicit instructions in one man's case to withhold a blanket and leave the cell light on at all times.<sup>194</sup>

Human Rights Watch spoke with, or obtained the testimonies of, 13 terrorism suspects subjected to relentless, oppressive questioning and in some cases psychological and physical ill-treatment. Interrogations can take place at any time of the day or night, and there are no rules about the amount of rest a detainee must have between sessions. We heard of sleep deprivation, disorientation, constant, repetitive questioning, and psychological pressure. A pattern of extended questioning and sleep deprivation was corroborated by the details in five police reports examined by Human Rights Watch. These reports must list the beginning and end of every interrogation.

Abdel N., who has been held in police custody four times on suspicion of terrorism, said, "It's worse than prison. We're mistreated the whole time. You don't know if it's day or night. They do it on purpose to break you down. By the third day you'll say no matter what."<sup>195</sup>

Over a four-day period, Emmanuel Nieto was questioned for a total of over 45 hours in 13 different sessions. These included a session from 11:30 p.m. to 4:20 a.m. his second night in custody, and from 11 p.m. to 2:15 a.m. and 3:30 a.m. to 5 a.m. his third night.<sup>196</sup> While in police custody, the longest amount of rest Nieto had between sessions was five hours; the shortest was an hour and fifteen minutes, in the middle of the night. Bachir Ghoumid, one of the defendants in a trial of alleged members of the Moroccan Islamic Combatant Group (GICM, its French acronym) accused of participation in the planning of the 2003 Casablanca bombings said at trial that he had been subjected to 40 hours of questioning during his four-day police custody.<sup>197</sup>

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<sup>194</sup> CPT, *Rapport au Gouvernement de la République française relatif à la visite en France effectuée par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants du 14 au 26 mai 2000*, CPT/Inf (2001) 10, July 19, 2001, <http://www.cpt.coe/documents/fra/2001-10-inf-fra.pdf> (accessed March 27, 2008), para. 16.

<sup>195</sup> Human Rights Watch interview with Abdul N., February 25, 2008.

<sup>196</sup> Human Rights Watch interview with Nieto's defense lawyer who requested anonymity, Paris, February 28, 2008.

<sup>197</sup> "Extraits d'un procès antiterroriste des présumés membres de la 'cellule française' du 'GICM.'"

(Forty-five people, including 12 suicide bombers, died in simultaneous attacks in Casablanca on May 16, 2003.)

Mohammed Y. was interrogated 17 different times for a total of 34 hours during his four days in police custody.<sup>198</sup> Saliha Lebik endured 13 interrogations for a total of 30 hours during her four days in police custody in December 2002.<sup>199</sup> Rachida Alam was subjected to 12 interrogations for a total of over 25 hours during the three days she spent in police custody in May 2004, including sessions in the middle of the night.<sup>200</sup>

Everyone we spoke with recounted extreme psychological pressure while in police custody. Some mentioned specific threats. Redouane Aberbri, one of the defendants in the GICM trial along with Bachir Ghoumid, says that when the investigating judge visited him before extending his time in police custody, he complained about being handcuffed to a chair and the sleep deprivation. “He didn’t want to take it into consideration. He threatened me saying that I still had two more days to talk since I hadn’t yet said much, or else he’d send me as a ‘gift package to the Moroccans who have different ways of doing things.’ What could I say?<sup>201</sup> Human Rights Watch was unable to get a response from the investigating judge about this allegation.<sup>202</sup> Another recounted how an officer told him, “You’re lucky we’re in France or I’d put a bullet in your head.” You could feel the hatred against Muslims.”<sup>203</sup>

We also learned of four disturbing accounts of physical violence and ill-treatment.

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<sup>198</sup> Human Rights Watch interview with Fatouma Metmati, defense attorney for Mohammed Y. (pseudonym), Paris, December 13, 2007.

<sup>199</sup> “Demand for Reparations on behalf of Saliha Lebik and Sarah Benahmed,” December 4, 2007. On file with Human Rights Watch. Lebik was separated from her six-month-old baby for the duration of her time in police custody.

<sup>200</sup> Police document releasing Rachida Alam from custody at 2 a.m. on May 13, 2004, viewed by Human Rights Watch.

<sup>201</sup> Written statement to the Comité citoyen d’action civique (Citizens Committee for Civic Action), published in “Une Justice d’Exception pour Les Musulmans?” May 2006. On file with Human rights Watch.

<sup>202</sup> Human Rights Watch submitted this allegation in writing in late May 2008 to the investigating judge asking for his response by June 6, 2008. The letter was mailed on May 29, 2008, by US Postal Service registered mail; emailed to two separate email addresses on the same day; and faxed on June 2, 2008. At the time of publication, the judge had not responded.

<sup>203</sup> Human Rights Watch interview with Emmanuel Nieto, February 28, 2008.

Emmanuel Nieto spent four days in police custody in Orleans being interrogated by officers who told him they were from Paris. He said the abuse started during the first interrogation after he was taken to the police station:

There were four or five of them in the room, one really big guy who was there to make an impression on me, to scare me. Then there were just two. One of them sat at the typing machine and laughed while the other one walked around me and hit me on the head or in the stomach if I didn't answer. He pulled on my ears, hit me in the head. He made me sit on the floor like a dog and he sat over me looking down and hit me on the top of my head. The whole time was like that. Once I took a big blow to the ear, my ear rang.

Nieto described being handcuffed behind the back, grabbed by the throat and pushed up against the wall, and forced to kneel for long periods. He was forced to kneel with his hands shackled behind his back, with his feet in a particular position or the officer would come and press down on his legs with his foot until he signed his formal statement. “One man held one hand behind my back and I signed with the other. A police officer turned the pages. I didn’t have the concentration to read it.”

According to police records, Nieto was examined twice by a doctor, though he could only remember one visit.<sup>204</sup> He told us the examination took place in his cell in the presence of police officers. He only complained to the doctor about the handcuffs. “I was so tired, and then it’s the French system, I wasn’t surprised. When they don’t have the proof they have to do everything to make you talk ... I’m not someone who complains ... For us Muslims it’s not this life that matters, it’s what comes after.” The two doctors’ certificates do not attest to any physical traces of ill-treatment.<sup>205</sup>

Lahouari Mahamedi was arrested early in the morning of April 22, 2003. He spent four days in police custody. He lodged a criminal complaint alleging he was beaten after the medical examination and that he was denied a second examination he requested. He reported this to the investigating judge. An examination conducted on

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<sup>204</sup> Human Rights Watch interview with Nieto’s defense lawyer, who requested anonymity, February 28, 2008.

<sup>205</sup> Ibid.

April 26, 2003, in Fresnes prison, where he had been remanded into pretrial detention, revealed several areas of localized swelling filled with blood (hematomas) and a bruise (contusion) on his temple. His wife, Virginie Geneix, who was held in police custody for four days as well, said she saw him at one point in his cell, with blood on his head.<sup>206</sup>

Mahamedi's lawyer lodged a complaint against four DST officers and one cell guard on April 5, 2006. An investigating judge was assigned to investigate the allegation, and apparently took testimony from some of the officers who interrogated Mahamedi, but as of the end of May 2008, no significant progress had been made in the investigation.<sup>207</sup>

Abdellah Kinai, 54 years old at the time of his arrest, says he was repeatedly beaten in police custody following his arrest in May 1998:

There were six of them hitting me, while the others held me, their captain hit me in the eyes with my big watch, saying do you use this to make bombs? Confess! Confess! Confess! They made me sleep on the cement floor, and hit me with their feet and fists, I was exhausted, hadn't slept, hadn't eaten, and hadn't washed, no stop to the interrogations. And then they asked me to sign declarations I hadn't made, with threats ...

I could barely see, my eyes were swollen from all the hits ... I asked to see a doctor at the beginning, they refused, then a doctor came, when he saw my state he said, "I can't do anything for you," and he left. I was transferred to La Santé prison after 5 days in a lamentable state, the prison doctor was at my bedside for three days ...

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<sup>206</sup> Written testimony of Virginie Geneix, dated March 16, 2006, Bordereau de pieces communiquees no. 1 submitted to the court March 31, 2006 as on file with Human Rights Watch.

<sup>207</sup> Human Rights Watch email correspondence with Sébastien Bono, Paris, May 26, 2008.

I'm just an old Muslim who wants to practice his religion in peace. I'm exiled, without my family, old and sick, I didn't do anything to anyone.<sup>208</sup>

Kinai claims the forensic doctor did not examine him, that he never saw a medical certificate, and that his court-appointed lawyer recommended against bringing suit for ill-treatment because it could prejudice his case.

Tlili Lazhar was arrested in Marseilles in October 2002, and convicted in December 2004 of participation in the plot to bomb the Christmas market in Strasbourg. He was extradited to Italy in connection with an Italian terrorism investigation in November 2006. He told Italian investigators he had been abused in police custody in France:

When I was arrested in Marseilles, I spent five days without being able to talk to my lawyer ... In those first four days I was hit during the interrogations. In particular, during the interrogations conducted by the DST in Paris. These interrogations always took place with me sitting on a chair with my hands tied behind my back and tied to the chair. During these interrogations the head of the police in Paris hit me. The first time, I was hit three or four times really hard, and then five or 6 punches in the face, and the beatings came whenever I didn't give them the answer they wanted. On that first occasion I bled from my mouth and I stayed with my face covered in blood until I was taken back to my cell ... The second time, I was hit and punched during the interrogation, always by the head of the DST in Paris ... The third time I was hit by the same person while he interrogated me ...<sup>209</sup>

The Italian investigating judge Guido Salvini noted that "these interrogations were interrupted to allow a doctor to certify that the detainee's health was compatible with the ongoing arrest measure" and concluded that "[i]f confirmed, the behavior

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<sup>208</sup> Written statement of Abdellah Kinai, on file with Human Rights Watch.

<sup>209</sup> Order remanding Tlili Lazhar into pretrial detention (Ordinanza di Applicazione della Misura della Custodia Cautelare in Carcere), June 4, 2007, signed by investigating judge Guido Salvini, Milan Tribunal. Lazhar was held in police custody in France for four days. The five days he refers to include the extra 20 hours granted police for transferring detainees to the appropriate investigating judge.

denounced by Tlili ... would not only be contrary to human rights principles as well as counterproductive in an ethical sense to the fight against terrorism, but would certainly constitute a crime according to the criminal code of any European country.”<sup>210</sup>

In May 2007, the Milan Prosecutor’s Office asked the Italian Justice Ministry to forward a note to French authorities reporting Lazhar’s allegations of ill-treatment so the French prosecutor’s office could evaluate whether to open a criminal investigation. In January 2008 the Paris prosecutor’s office informed their Italian counterparts that the statute of limitations (three years in these cases) had expired and no public action was possible.<sup>211</sup>

The CPT has repeatedly recommended that persons taken into custody in France have access to a lawyer from the outset of detention, that the lawyer be present for all police interrogations, and that no time limit be set on lawyer-detainee consultations. Indeed, while the CPT acknowledges that it may be necessary, for as brief a period as possible, to deny a detainee the right to a lawyer of his or her own choosing, the Committee concluded that “it is difficult to conceive of a convincing argument capable of justifying the total refusal of the right of access to a lawyer for three days.”<sup>212</sup>

A law adopted on October 30, 2007, created an independent monitoring body for all places of detention in France: the “General Inspector of Places of Deprivation of Liberty.” This body complies with the requirements of the Optional Protocol to the Convention Against Torture, which France has signed but not yet ratified.<sup>213</sup> The new monitoring body, which at this writing was not yet operational, will have the authority to visit, among other places of detention, all facilities used for police

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<sup>210</sup> Ibid.

<sup>211</sup> Letter dated January 17, 2008, signed by François Cordier, deputy prosecutor, Prosecutor’s Office of the Tribunal de Grande Instance of Paris. On file with Human Rights Watch.

<sup>212</sup> Rapport au gouvernement de la République française relatif à la visite en France effectuée par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants du 14 au 26 mai 2000, para 32. Unofficial translation by Human Rights Watch

<sup>213</sup> At the time of publication, a bill had been laid before parliament to ratify the Optional Protocol.

custody, and conduct private interviews with any detainee.<sup>214</sup> Access may be denied for serious reasons relating to national defense, public security, or “serious troubles” in the place of detention.<sup>215</sup>

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<sup>214</sup> Law No. 2007-1545 of 30 October 2007 creating an Inspector General of Places of Deprivation of Liberty.

<sup>215</sup> Ibid., art. 8.

## VI. Impact on Muslim Communities in France

The fight against terrorism is also and perhaps above all a long-term battle of ideas.

—Nicolas Sarkozy, then interior minister<sup>216</sup>

It's normal that they want to protect their country, but it's the way they do it! You have to avoid injustice. And then there are the assumptions, like being a Muslim means being a militant.

—Bilal M., man who served a six-month prison sentence for criminal association in relation to a terrorist undertaking<sup>217</sup>

The fight against Islamist or international terrorism has targeted a defined, if large and diverse community—Muslims—in a way that the fight against other types of terrorism never have. France is home to anywhere between three and five million Muslims, up to an estimated 10 percent of the overall population and the largest Muslim population in Western Europe. Perhaps half to three-fifths are French citizens, while the rest are nationals of other countries (though they may have lived in France for decades or even their entire lives).

A 2006 French government white paper on domestic security against terrorism affirmed the government's commitment “never [to] compromise the fundamental values of the rule of law” in the fight against terrorism, to reject any conflation of Islam with terrorism, and to pursue a communications policy designed to “build a wide consensus, integrating first and foremost the fraction of the population the terrorists claim to speak for ...”<sup>218</sup>

Excesses in the name of preventing terrorism, even if this fight is framed within the

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<sup>216</sup> Speech to day-long conference, “Prevailing against Terrorism” November 17, 2005.

<sup>217</sup> Human Rights Watch interview with Bilal M. (pseudonym), Paris, February 25, 2008.

<sup>218</sup> Dominique De Villepin, *Prevailing against Terrorism: White Paper on Domestic Security against Terrorism*, La Documentation Francaise, 2006, p. 115, [http://www.ambafrance-dk.org/IMG/pdf/livre\\_blanck\\_english.pdf](http://www.ambafrance-dk.org/IMG/pdf/livre_blanck_english.pdf) (accessed March 18, 2008). Then-Prime Minister De Villepin commissioned this inter-agency assessment of the terrorist threat and France's counterterrorism policy.

criminal justice system, are likely to be counterproductive as they alienate entire Muslim communities rather than isolate the extremists from those broader communities.

The broad scope for arrest and remand to pretrial detention under the charge of criminal association in relation to a terrorist undertaking, as well as ill-treatment and religious-based harassment in police custody, fuel a perception among Muslims that all Muslims are suspect in the eyes of French authorities. Interrogations of terrorism suspects in police custody often include questions about religious beliefs and practices.<sup>219</sup> Women who wear a religious headdress are invariably asked why; men are asked their views on women's equality.

Abusive and discriminatory measures can actually serve to radicalize individuals already vulnerable, for whatever personal, socioeconomic, or political reasons, to extremist views. One counterterrorism official acknowledged this risk, recalling,

There was one guy who was arrested because he was in someone's address book. I had the opportunity to talk with him during his four days in police custody. He worked in a garage. [After the arrest] he lost his job, he lost his girlfriend. He was diminished in his mother's eyes because he brought shame on the family when the police came to arrest him. If he wasn't a terrorist before, that experience radicalized him. If before he went to Bosnia to act the big guy, now he'll be willing to go to Iraq. And it will be our fault.<sup>220</sup>

Several lawyers also told Human Rights Watch they had seen clients become more and more alienated and vulnerable to radicalism after time in pretrial detention, while former detainees and their spouses talked also about the effects on children.

Salima Benmessahel, the wife of a man who spent three years in pretrial detention before being sentenced to exactly three years in prison on what she views as

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<sup>219</sup> Human Rights Watch interviews with Salima Benmessahel, January 29; Rachida Alam, Paris, January 29; Abdul N., February 25; Bilal M., February 25; and Emmanuel Nieto, February 28, 2008.

<sup>220</sup> Human Rights Watch interview with counterterrorism official who requested anonymity, Paris, December 12, 2007.

trumped-up terrorism charges, told us, “I can see how these guys convicted of terrorism who didn’t do anything get out of prison and want to go blow themselves up. They go in normal and come out enraged.” She told of the time her five-year-old son wanted to keep all the car windows rolled up despite the heat of the day because he was worried that if the police heard them listening to the Koran on tape “they’d send us to prison too.” Two years after Benmessahel’s husband was released from prison in March 2005, French authorities rescinded his acquired French citizenship and expelled him in April 2007 to Algeria.<sup>221</sup>

During the first of Abdul N.’s four arrests on suspicion of terrorism, he spent four months in pretrial detention and was then acquitted at trial. The second time he spent six and a half months awaiting trial and was then convicted of dealing in stolen merchandise without any connection to a terrorism offense. The third time he was placed under judicial supervision until the charges were dropped. The last time he was arrested was June 2006. On that occasion, his wife was also arrested and spent one day in police custody with her two-month-old baby. Abdul N. spent nine-and-a-half months in pretrial detention before being released under judicial supervision. He is currently awaiting trial. “Every time they arrest me, they say, ‘we know you’re not a bad guy, but you know lots of people.’”

Abdul N. says he wants to leave France, for his own sake and that of his six children. “My children are paying the price. My oldest son, he’s sick of France. He doesn’t want to go to school anymore. He’s really disoriented, he lived through all the arrests.”<sup>222</sup>

One man who was arrested and held for twenty-four hours before being released without charge said, “It’s not so much the police custody ... it’s the manipulation in the name of the fight against terrorism. They could have just called me in, I would have gone, why put on such a spectacle? They violate our principles but it’s accepted in order to defend the rights of some. They’re not going to avoid problems by

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<sup>221</sup> Human Rights Watch interview with Salima Benmessahel, January 29, 2008.

<sup>222</sup> Human Rights Watch interview with Abdul N., February 25, 2008.

harassing people, that's going to stir up rancor and hatred—that's what I'm afraid of.”<sup>223</sup>

Abusive security measures that disproportionately affect Muslims are likely to undermine confidence in law enforcement and security forces among the very communities whose cooperation is critical in the fight against terrorism. Successful policing, and preventing and prosecuting terrorism, require public cooperation and in particular tip-offs about suspicious activity. Neighbors, acquaintances, and family members are far less likely to report concerns if they lack confidence that authorities will act justly.

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<sup>223</sup> Human Rights Watch interview with Doudou F. (pseudonym), Paris, December 11, 2007.

## Detailed Recommendations

### To the Government of France

The president, the minister of justice, and other senior government officials should publicly and unequivocally affirm that torture and cruel, inhuman, or degrading treatment is unacceptable, both in France and elsewhere, and that information obtained under torture and prohibited ill-treatment must not be used at any stage of judicial investigations and proceedings in France.

### *To the Ministry of Justice*

#### **Association de Malfaiteurs**

Introduce necessary amendments to the Criminal Code to ensure that the offense of criminal association in relation to a terrorist undertaking meets the requirements of legal precision under international human rights law. In particular, the reform should aim to:

- Provide a non-exhaustive list of types of behavior likely to attract criminal sanction; and
- Clarify that intent to participate in a criminal association in relation to a terrorist undertaking must be fully demonstrated beyond a reasonable doubt.

### **The Right to a Fair Trial**

Commence legislative reforms to the Code of Criminal Procedure and adopt policy guidelines to ensure the full range of fair trial standards under the European Convention on Human Rights. In particular, these reforms should:

#### Prevent unjustified arrests

- Prohibit the practice of arresting, except where there exists probable cause, individuals other than those already identified as suspects in a judicial investigation;
- Prohibit the practice of arresting the partners of terrorism suspects except where they are suspected of criminal activities.

### Guarantee the right to an effective defense

- In police custody. All detainees in police custody should have the right to:
  - See a lawyer from the outset of detention and throughout the period of detention;
  - Confer privately with a lawyer for any amount of time as necessary;
  - Be questioned by the police only in the presence of a lawyer;
  - Be notified of their right to remain silent.
- During the judicial investigation phase:
  - Abolish centralization of all terrorism cases in Paris and increase the pool of prosecutors and investigating judges with experience of handling terrorism cases in tribunals around the country. Ensure that investigating judges working on terrorism cases rule in colleges of three;
  - Ensure that the Investigative Chamber exercise effective supervision over the work of the investigating judge. All appeals against decisions by the investigating judge refusing to take an investigative step should be heard by the full Investigative Chamber. The president of the Chamber should not have the authority to filter the demands and reject them as manifestly unfounded;
  - Ensure that electronic copies of the case file are available to defense attorneys during the investigation phase. These copies should be updated periodically;
  - Ensure that permission to share elements of the case file with clients is denied only in the most exceptional cases.

### Prevent unjustified lengthy pretrial detention

- Strengthen the role and independence of the liberty and custody judges (JLDs) by:
  - Adopting guidelines to prohibit and sanction pressure from prosecutors and investigating judges on liberty and custody judges;
  - Ensuring that decisions with respect to remand and renewal of pretrial detention are fully motivated, taking into account the particulars of the individual and the criteria in French law;

- Ensuring that JLDs are assigned permanently the dossier for an individual defendant so that they review every decision with respect to renewal of detention and appeals for provisional liberty;
- Ensuring continuing training of JLDs to guarantee they are fully aware of their responsibilities and prerogatives, including the obligation to study the merits of the case and their ability to delay the first hearing to better study the case file;
- Revisiting proposals to separate clearly the corps of prosecutors and judges, including JLDs, by instituting a distinct legal training.
- Require the presence of a lawyer in the hearing for renewal of detention. Such hearings should not proceed without the benefit of counsel except in cases where the accused has chosen to represent him or herself.

### **Torture and Ill-treatment**

The Ministry of Justice should take the lead in proposing legislative reforms to bring France fully into line with its international obligations under the Convention Against Torture:

#### Guarantee that torture evidence is not introduced into legal proceedings

- Establish guidelines for investigating judges for assessing whether intelligence material has been obtained under torture or prohibited ill-treatment. Investigating judges must be satisfied that information introduced in any way and at any stage into legal proceedings was obtained lawfully;
- Examine the possibility of creating additional oversight mechanisms to ensure these human rights compatibility assessments are undertaken, including a positive obligation on the Investigating Chamber to independently assess information obtained from third countries;
- Ensure that defense attorneys are protected from disciplinary actions for raising concerns about the use of torture evidence in legal proceedings.

#### Ensure adequate safeguards against ill-treatment in police custody

The Code of Criminal Procedure should be reformed to:

- Provide for the right of every detainee to request an examination by a doctor of his or her own choosing, in addition to that of the court-appointed doctor

and in the latter's presence if necessary, in accordance with recommendations from the European Committee for the Prevention of Torture (CPT);

- Ensure that each detainee is examined by a forensic doctor immediately upon arrival. The detainee should have the right at this stage to request an examination also by a doctor of his or her own choosing;
- Extend the obligation to video- and audiorecord police interrogations and hearings with investigating judges to all cases, including terrorism;
- Impose an obligation on investigating judges to order official inquiries into any allegation of mistreatment in police custody.

*To the future Inspector General of Places of Deprivation of Liberty (Controleur General des lieux de privation de liberte)*

- Prioritize spontaneous, unannounced visits to places of police detention, including those where terrorism suspects are being held, to inspect conditions and speak with detainees in private about treatment;
- Publicize any instance of denial of access on the basis of security concerns with a view to limiting these instances;
- Advocate for the legislative and policy reforms necessary to improve safeguards against prohibited ill-treatment in police custody.

*To the Parliamentary Delegation on Intelligence*

- Examine the information-sharing arrangements between French and foreign national security agencies to assess whether appropriate checks exist on accepting information from countries with questionable human rights records.

**To the European Union**

- Member states should review their legislation in light of the concerns raised in this report to ensure that, where relevant, their definition, scope, and implementation of the criminal charge of association in relation to a terrorist undertaking comply with international fair trial standards.
- The European Parliament Committee on Civil Liberties, Justice and Home Affairs (LIBE) should consider undertaking a report analyzing member states'

legislation and practices in light of the concerns raised in this report, in particular with respect to:

- the definition, scope, and implementation of the criminal offense of association to commit terrorist acts;
- appropriate safeguards in cooperation among national security agencies to ensure that information obtained under torture or ill-treatment or conditions that are otherwise incompatible with international human rights standards is not used as evidence in criminal proceedings, including the investigative phase.

## To the Council of Europe

- The Commissioner for Human Rights should make an assessment (in the form of a “viewpoint” or otherwise) on the appropriate definition, scope, and implementation of the criminal charge of association in relation to a terrorist undertaking.
- The Commissioner should raise with the French government the concerns detailed in this report, including the definition, scope, and implementation of the criminal charge of association in relation to a terrorist undertaking, insufficient safeguards during police custody, and the use of information in criminal proceedings obtained under torture or ill-treatment or conditions that are otherwise incompatible with France’s human rights obligations.
- The Committee for the Prevention of Torture should, on its next visit to France, inquire about steps taken to ensure that information obtained under torture or ill-treatment is never admissible in criminal proceedings, including the investigative phase (except as evidence in proceedings to establish that torture or other prohibited ill-treatment occurred).
- The Parliamentary Assembly’s Legal Affairs and Human Rights Committee should consider undertaking an analysis of legislation and practices throughout the Council of Europe region in light of the concerns raised in this report, in particular with respect to:
  - the definition, scope, and implementation of the criminal offense of association to commit terrorist acts;
  - appropriate safeguards in cooperation among national security agencies to ensure that information obtained under torture or ill-

treatment or conditions that are otherwise incompatible with international human rights standards is not used in criminal proceedings.

## To the United Nations

- The special rapporteurs on torture and on human rights and countering terrorism should conduct country visits to France to investigate the compatibility of France's counterterrorism measures with international human rights law, focusing in particular on allegations of abuse in police custody, the institutional and legislative factors that contribute to these practices, and the use of torture evidence in legal proceedings.
- The Committee Against Torture should develop an authoritative general comment on article 15 of the Convention against Torture prohibiting the use in legal proceedings of statements made under torture.
- The Human Rights Committee should use the opportunity of its upcoming review of France (scheduled to take place in July 2008) to raise concern about the policies and practices documented in this report, and formulate specific recommendations to French authorities.

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