



# Asamblea General

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## Consejo de Derechos Humanos

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**Promoción y protección de todos los derechos humanos, civiles, políticos, económicos, sociales y culturales, incluido el derecho al desarrollo**

## Visita a Francia

### **Informe de la Relatora Especial sobre la promoción y protección de los derechos humanos y las libertades fundamentales en la lucha contra el terrorismo\* \*\***

#### *Resumen*

La Relatora Especial sobre la promoción y protección de los derechos humanos y las libertades fundamentales en la lucha contra el terrorismo, Fionnuala Ní Aoláin, realizó una visita oficial a Francia del 14 al 23 de mayo de 2018 para evaluar la conformidad de las leyes, políticas y prácticas del país en la esfera de la lucha contra el terrorismo con sus obligaciones internacionales en materia de derechos humanos. La Relatora Especial encomia la constructiva colaboración del Gobierno a lo largo de la visita y subraya que es consciente y sensible al hecho de que Francia lleva muchas décadas enfrentándose a problemas violentos persistentes y afronta problemas contemporáneos asociados al terrorismo, como el regreso de combatientes franceses procedentes de zonas de conflicto.

También encomia a Francia por su firme papel en la integración de los derechos humanos y el derecho internacional humanitario en la práctica mundial de la lucha contra el terrorismo y reconoce su continuo liderazgo regional e internacional en el desafío mundial de la lucha contra el terrorismo.

Francia tiene una gran experiencia en la gestión del terrorismo con un enfoque basado en el estado de derecho y el compromiso continuado de respetar las obligaciones en materia de derechos humanos en sus prácticas nacionales. La Relatora Especial reconoce en particular la excepcional labor emprendida y perfeccionada por Francia en relación con las víctimas del terrorismo y el marco jurídico que prevé la protección jurídica y la indemnización de las víctimas. Francia presenta un modelo de práctica positiva extraordinaria con respecto a las víctimas del terrorismo.

\* Este informe se presenta con retraso para poder incluir en él la información más reciente.

\*\* El resumen del presente informe se distribuye en todos los idiomas oficiales. El informe propiamente dicho, que figura en el anexo, se distribuye únicamente en el idioma en que se presentó y en francés.



A pesar de sus numerosas observaciones positivas, la Relatora Especial presenta su opinión sobre varios problemas relacionados con los derechos humanos y formula recomendaciones, entre otras cosas sobre el estado de emergencia, las nuevas medidas administrativas, la supervisión no judicial y judicial de las medidas de lucha contra el terrorismo, las debidas garantías procesales en el contexto de las medidas administrativas, la protección de la libertad de expresión y el delito de “apología del terrorismo”, las definiciones excesivamente amplias de los delitos relacionados con el terrorismo y las preocupaciones relativas a la elaboración de perfiles raciales y religiosos en el contexto de la lucha contra el terrorismo, que afectan profundamente al disfrute de los derechos por parte de determinadas minorías y a las obligaciones en materia de derechos humanos contraídas con los ciudadanos en el extranjero. La Relatora Especial recomienda, entre otras medidas, que se cree un órgano de expertos plenamente independiente y dotado de recursos suficientes que supervise la totalidad de las competencias en materia de lucha contra el terrorismo y de seguridad nacional existentes en Francia; que se revisen las violaciones persistentes de los derechos humanos derivadas del estado de emergencia para restablecer la confianza de los ciudadanos y las comunidades; que se evalúe la necesidad de la Ley de Fortalecimiento de la Seguridad Interna y la Lucha contra el Terrorismo con arreglo a los requisitos de necesidad, proporcionalidad y discriminación; que se refuerce la supervisión parlamentaria de las competencias en materia de terrorismo y seguridad nacional; que se habilite un acceso continuo y transparente a los datos sobre seguridad nacional y terrorismo para permitir el control y la participación de la sociedad civil; que se subsane la falta de seguimiento y evaluación de las estrategias destinadas a prevenir el extremismo violento; y que se adopten medidas proactivas para combatir los efectos negativos, estereotipados y estigmatizantes sobre la comunidad musulmana en Francia.

[Inglés únicamente]

## Annex

### **Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on her visit to France**

#### **I. Introduction**

1. The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Fionnuala Ní Aoláin, conducted an official visit to France from 14 to 23 May 2018 at the invitation of the Government to assess the country's counter-terrorism laws, policies and practices, measured against its international human rights obligations.

2. The Special Rapporteur commends the constructive and cooperative way in which the Government facilitated her visit, which enabled a frank and open dialogue. She is particularly grateful for the efforts made by the Human Rights and Humanitarian Affairs Sub-Directorate in ensuring the efficient conduct of the visit and in coordinating the follow-up.

3. The Special Rapporteur met with the Minister of Justice; the Head of the Human Rights and Humanitarian Affairs Division of the Ministry of Foreign Affairs; the Ambassador for Human Rights, the international dimension of the Holocaust, spoliations and the duty to remember; the Deputy Director of the Cabinet of the Minister for Europe and Foreign Affairs; the National Consultative Commission on Human Rights (CNCDH); the Rapporteur of the National Assembly Oversight Commission for the law of 30 October 2017 on internal security (*Loi renforçant la sécurité intérieure et la lutte contre le terrorisme*); the President of the National Commission for the Control of Intelligence Techniques (CNCTR); the Secretary-General of the Interministerial Committee for the Prevention of Radicalization and Crime; the Director of Public Freedoms and Legal Affairs of the Ministry of the Interior (DLPAJ); the Deputy President of the Litigation Section and President of the Specialized Intelligence-Gathering Unit of the Council of State; the Deputy President of the Domestic Section of the Council of State; the Director of the Cabinet of the Prefect of Police of Paris; the Diplomatic Adviser and member of the Cabinet of the Prefect of Police of Paris; the Human Rights Ombudsperson; the Diplomatic Adviser to the Minister of the Armed Forces; the Paris Public Prosecutor; the President of the French National Bar Association; the Director General of Internal Security (DGSI); and the Director General of the National Police (DGPN).

4. The Special Rapporteur visited the Val-d'Oise detention centre in Osny, where she met prison officials and experts. She interviewed several prisoners convicted of terrorism offences or identified as having potentially been radicalized in prison.

5. In addition, she met with lawyers, journalists, human rights defenders and civil society representatives, broadly defined. She met the Founder and Director of the French Association of Victims of Terrorism (AfVT) and representatives of that organization. The Special Rapporteur was particularly grateful to have had the opportunity to meet with victims of terrorism, whose lives have been irrevocably affected by the experiences of injury, trauma and loss.

#### **II. Legal and political context**

##### **A. International context**

6. France is a party to multiple core international human rights treaties including the International Covenant on Civil and Political Rights and its two Optional Protocols; the

International Covenant on Economic, Social and Cultural Rights and its Optional Protocol; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention on the Rights of the Child and its Optional Protocols; the Convention on the Rights of Persons with Disabilities and its Optional Protocol; the International Convention on the Elimination of All Forms of Racial Discrimination; and the International Convention for the Protection of All Persons from Enforced Disappearance.

7. As a member State of the Council of Europe and the European Union, France is also bound by relevant regional instruments, including the European Convention on Human Rights and the Charter of Fundamental Freedoms of the European Union.

8. France has also ratified a range of legal instruments designed to prevent and regulate terrorist acts, including Convention for the Suppression of Unlawful Seizure of Aircraft and its 2010 Protocol, the Convention on Prevention and Punishment of Crimes against Internationally Protected Persons, the International Convention against the Taking of Hostages, the International Convention for Suppression of Terrorist Bombings and the International Convention for Suppression of the Financing of Terrorism.

## **B. Domestic context**

9. France is an established representative democracy which functions as a semi-presidential republic. It is divided into 18 administrative divisions. The Constitution of the current Fifth Republic, grounded in the 1789 Declaration of the Rights of Man and the Citizen, was adopted in 1958 and has been amended periodically. The Constitution builds upon a commitment to the protection of rights and the separation of powers. France maintains a robust and independent judiciary. The judicial authority is divided between the civil and criminal jurisdiction and the administrative jurisdiction, respectively, with highest authority courts of equal but separate jurisdiction in each domain (the Council of State and the Cassation Court). France also has a Constitutional Court responsible for ruling on the constitutionality of laws through a priori or a posteriori control. The Head of State is elected by universal suffrage for a five-year term and the President appoints the Prime Minister, who forms the Government, presides over the Council of Ministers, promulgates laws and is the Commander of the Armed Forces. In exceptional circumstances, set out under article 16 of the Constitution, the President can exercise exceptional powers but cannot dissolve the National Assembly.

## **C. Terrorism context**

10. The Special Rapporteur is acutely conscious of the ongoing challenges faced by French authorities in securing the safety of the public, particularly as she arrived in France in the immediate aftermath of an attack involving a radicalized individual. Terrorism is, regrettably, not a new experience for the country. France has had sustained engagement with terrorism and counter-terrorism over many decades, including direct attacks on French territory as well as attacks directed at French citizens overseas. Over many decades, acts of violence directed indiscriminately against civilians have been carried out by Basque-, Breton- and Corsican-affiliated groups, as well as by Algerian non-State groups, Islamic extremist groups and right-wing and left-wing extremists. Extreme acts of violence have also occurred, underscoring the long-term nature and complexity of the challenges France has faced, including the Vitry-le-François train bombing of 1961 in which 28 persons were killed and over 100 injured. The regularity of such attacks has not made the costs to individuals, communities and the body politic less felt.

11. Since January 2015, France has experienced substantial acts of violence, including the attack on the office of *Charlie Hebdo* magazine and the Hypercacher supermarket in Paris; the horrific multiple attacks of November 2015 in Paris when gunmen and suicide bombers attacked a concert hall, a major stadium, restaurants and bars almost simultaneously, leaving 130 persons dead and hundreds wounded; and the horrendous

attack in Nice on 14 July 2016. In the same year, violent attacks took place in Valence, Paris, Magnanville and Saint-Étienne-du-Rouvray. In March 2018, an attack carried out in a supermarket in Trèbes left four people dead. In December 2018, five people were killed in an attack on a Christmas market in Strasbourg. France feels the costs of these attacks acutely, shows extraordinary solidarity with the victims of terrorism and is profoundly aware of its obligations to protect its population from the indiscriminate harm of terrorism.

12. The Special Rapporteur is mindful of the challenges related to the return of French fighters from conflict zones, including individuals who may have committed terrorist acts and other violations of international law, as well as the continuous threat from violent extremism. France is grappling with the return of other citizens accompanying foreign fighters, including spouses and minors.

13. Concurrent with the mandate conferred by the Security Council through its terrorism-related resolutions as well as the United Nations Global Counter-Terrorism Strategy, France provides leadership for regional and international coordination regarding the challenge of terrorism. France has played a strong and positive role in advancing the importance of integrating human rights and international humanitarian law obligations into the global fight against terrorism. It has a reservoir of experience in managing terrorism through a rule of law-based approach and a sustained commitment to upholding human rights obligations in its national practices.

14. Notwithstanding many commendable aspects of French counter-terrorism law and practice, the Special Rapporteur has some observations, concerns and recommendations with regard to various aspects of the French counter-terrorism regulatory regime. These include accountability and the review of measures applied during the formal state of emergency (November 2015–October 2017); the legal status of new administrative measures (the Strengthening Internal Security and the Fight against Terrorism (SILT) law of 30 October 2017); the independence and robustness of both non-judicial and judicial oversight related to contemporary counter-terrorism measures; the protection of procedural and substantive due process rights in the context of administrative measures; the cumulative effects of layered and multifaceted administrative and individual measures taken over several years against specific individuals; the effects on the enjoyment and protection of freedom of expression in the context of the crime of “apology for terrorism”; the concerns of racial and religious profiling in the anti-terrorism context with consequent effects on the enjoyment of rights for particular groups or minority populations;<sup>1</sup> the human rights obligations that accrue to French citizens overseas; and the necessity of undertaking prevention strategies in a human rights-compliant and non-discriminatory manner.

## D. Counter-terrorism regulations

### Institutional structures

15. Counter-terrorism law and practice are professionalized in France. The executive and the legislative branches are fully seized in the management of terrorism. There is serious public debate and discussion – the hallmarks of a mature democracy – on terrorism regulation and the appropriate balance between the protection of rights and security measures. The French judicial authorities (constitutional, civil, criminal and administrative) have been substantively engaged in the processing, management and review of State counter-terrorism practices. The courts are independent and have produced substantial jurisprudence regarding the exercise of emergency powers. The Special Rapporteur

<sup>1</sup> The Special Rapporteur notes that France takes the position that, under domestic law, the France polity contains no minorities, national or otherwise, and no communities, except “national and geographical communities”. She applies relevant international standards in her assessment of minority status and notes to that end that established international entities have applied the terms “minority” and “community” to France. They include the Independent Expert on minority issues (2008) and the Special Rapporteur on freedom of religion or belief (2018). Her use of the term is consistent with the Committee on the Elimination of Racial Discrimination (2010), which has referred to “persons of immigrant origin or from ethnic groups, within the meaning of the Convention” (CERD/C/FRA/CO/17-19, para. 13).

acknowledges the particular stresses and pressures courts experience in situations of exigency and encourages a robust and independent approach by constitutional, criminal and administrative courts to the oversight of security-, counter-terrorism- and emergency-related powers. She commends robust judicial control as an important aspect of exercising emergency powers and an example of good national practice.

16. Counter-terrorism efforts in France are coordinated at the national level through, inter alia, the establishment of the Central Counter-Terrorism Department of the Prosecution Service, centralized in Paris (law 86-1020, sect. 14), the specialization of judges and prosecutors, and the valuable and highly professional role of the Public Prosecutor in terrorism prosecutions. The Special Rapporteur, appreciating the value of a centralized national approach to terrorism prosecutions, takes note of the vote in the National Assembly on 3 December 2018 in favour of creating a national anti-terrorist prosecution department. The new department embeds the specialized crimes against humanity unit within the broader context of prosecution of terrorist crimes.<sup>2</sup> The Special Rapporteur underscores the importance of maintaining stable, independent capacity, resources and specialization with regard to crimes against humanity as a critical area of accountability, and is concerned that the merger may hinder this capacity. In this context, she encourages prosecution authorities to remain open to pursuing substantive criminal charges against members of terrorist organizations for grave violations of human rights and international humanitarian law committed overseas. In general, persons returning from armed conflict zones are charged with the crime of participating in a “terrorist enterprise” or “conspiracy”. She notes that France also has a legal basis for the prosecution of systematic or gross violations of human rights (such as genocide or crimes against humanity)<sup>3</sup> committed in other countries by French nationals or persons habitually residing in France (via the active personality principle). Were France able to pursue such prosecutions, it would help close a profound global accountability gap for systematic acts of torture, extrajudicial execution, rape and sexual violence perpetrated in Iraq and the Syrian Arab Republic.

17. Specialized intelligence and police units have defined responsibilities in countering terrorism. They include the counter-terrorism unit of the Directorate General of External Security (DGSE), the Directorate General for Internal Security (DGSI), the Directorate for Military Intelligence (DRM), the anti-terrorist coordination unit (UCLAT), the National Intelligence Council (CNRLT) and two operational police units (GIGN and RAID). The Special Rapporteur commends DGSI and police for the frankness of the discussions, illustrating positive national practice and openness to human rights-based dialogue. While challenges still remain in coordinating among the multiple security sector agencies, the Special Rapporteur acknowledges the attention paid to the importance of this issue. Coordination remains ongoing, and will deepen as trust and capacity are fostered over time.

### **Constitutional, legislative and administrative frameworks**

18. Article 16 of Constitution permits the President to take legislative measures while assuming emergency powers, and article 36 permits a state of siege to be declared. The distinct “*état d’urgence*”, which may be imposed in accordance with a 1955 law, gives both prefects and the Ministry of the Interior significant supplementary powers to manage threats to the nation.<sup>4</sup> This law has been modified several times in response to changing contexts and new challenges. The “*état d’urgence*” can be internal or external in nature, and is a response to immediate danger from serious breaches of public order. The law grants sizeable powers to search homes and other premises, subject persons to house arrest, dissolve associations and restrict movement without judicial warrant. The 2015 declaration

<sup>2</sup> See [www.assemblee-nationale.fr/15/amendements/1349/CIION\\_LOIS/CL999.pdf](http://www.assemblee-nationale.fr/15/amendements/1349/CIION_LOIS/CL999.pdf).

<sup>3</sup> Penal Code, art. 689-11.

<sup>4</sup> Previous states of emergency were declared in 2005 to contain extensive urban violence; in 1985 in New Caledonia and in 1987 in French Polynesia; in 1961 in the context of the Algerian war; and in 1958 in Algeria proper. The Special Rapporteur clarifies that her usage of the terms “emergency”, “exceptional”, “permanent emergency” and “de facto emergency” are based on the extensive and detailed thematic report provided to the Human Rights Council in 2017 (A/HRC/37/52).

of emergency was accompanied by formal derogations from the European Convention on Human Rights and the International Covenant on Civil and Political Rights.

19. France's counter-terrorism legislation is extensive and has expanded substantially over time. A 1986 law broadened emergency powers in the context of public order challenges.<sup>5</sup> The new Criminal Code of 1994 created additional categories, including "criminal association in connection with a terrorist enterprise". In December 2012, parliament adopted law No. 2012-1432 on security and action against terrorism. In November 2014, further counter-terrorism legislation was passed which provided for the use of administrative measures, including travel bans. A law on budgetary programming for the military (2013), two laws on intelligence gathering (2015) and legislation on organized crime, terrorism and financing (2016) have also been passed. Anti-terrorism legislation has been accompanied by penal anti-terrorism regulations which increase sanctions for terrorist acts.<sup>6</sup>

20. The Special Rapporteur particularly acknowledges the exceptional work undertaken and refined by France in respect of victims of terrorism and the legal framework supporting legal protection of and compensation to victims. France provides a model of outstanding positive practice in respect of victims of terrorism. Beginning in the 1980s, France has maintained a comprehensive and robust victims' compensation programme. The Guarantee Fund for Victims of Terrorism and Other Offences is a public service provider with a legal personality. It embodies the principle of national solidarity, supports the legal capacities and autonomy of victims and provides responsive measures to meet the immediate and long-term needs of victims. The robustness of the country's system in respect of victims is enabled by a compulsory levy on property insurance policies. The legal structure and implementing institutions are to be commended for their commitment to compensate all victims regardless of nationality, based on the principle of full reparations. Compensation procedures are generally accessible, transparent and victim-centred. France compensates both direct and indirect victims of terrorism and recognizes both pecuniary and non-pecuniary harms. The Special Rapporteur notes the organizational pressures that multiple attacks with multiple victims have posed in recent years, and the specificity of responding to younger, millennial victims who were disproportionately affected by the Paris attacks of 2015. She encourages innovation and new tactics to address contemporary needs. The Government has taken proactive steps to memorialize and honour the victims of terrorism, providing important symbolic affirmation to the families of those who have lost their lives. Civil society organizations are well organized and included in planning and responding to victims' needs on a regular basis.

### III. Key human rights challenges in countering terrorism

#### States of emergency

21. France declared a state of emergency in November 2015, which was extended six times. The extended emergency was characterized by significant and extensive use of exceptional powers. During the emergency, over two dozen mosques and Muslim associations were closed and over 4,000 administrative searches were conducted, according to official statistics from the Ministry of the Interior.<sup>7</sup> Only one tenth of the judicial proceedings for emergency searches were for terrorism-related offenses (61 out of 670).<sup>8</sup> In comparison, there were nearly three times as many judicial proceedings for emergency searches using regular criminal procedures (169 out of 670). Over 700 people were placed

<sup>5</sup> The criminal law has been the "home" of anti-terrorism legislation since 1986. The 1986 law had three important consequences: (a) automatically placing terrorist infractions in the criminal sphere; (b) the emergence of a new procedural regime to complement the legislative framework; and (c) the progressive centralization of procedural mechanisms to regulate terrorism.

<sup>6</sup> Laws of 22 July 1992, 16 December 1992 and 18 February 1995.

<sup>7</sup> See [www.interieur.gouv.fr/Actualites/L-actu-du-Ministere/Bilan-de-l-etat-d-urgence](http://www.interieur.gouv.fr/Actualites/L-actu-du-Ministere/Bilan-de-l-etat-d-urgence); and [www.lejdd.fr/Societe/32-attentats-dejoues-4457-perquisitions-752-assignations-a-residence-letat-durgence-en-chiffres-3480650](http://www.lejdd.fr/Societe/32-attentats-dejoues-4457-perquisitions-752-assignations-a-residence-letat-durgence-en-chiffres-3480650).

<sup>8</sup> See [www2.assemblee-nationale.fr/documents/notice/14/rap-info/i4281/%28index%29/depots](http://www2.assemblee-nationale.fr/documents/notice/14/rap-info/i4281/%28index%29/depots).

under house arrest from November 2015 to March 2017.<sup>9</sup> While the state of emergency has formally ended, there remain outstanding consequences from the use of these powers, including unresolved legal consequences and necessary remedies for persons whose rights were disproportionately impinged upon during the period of exigency.<sup>10</sup> Moreover, the stigma and polarization which resulted from the use of emergency powers demands a positive and proactive response by the Government, not least to enable trust and re-engagement with communities and individuals. This repair work is essential to the prevention of radicalization, affirming inclusion for all sectors of society and supporting the integration of security and rights protection in practice. During consultations, officials underscored the importance of avoiding a permanent emergency and affirmed the necessity of eschewing the indefinite entrenchment of exceptional powers. The Special Rapporteur concurs that long-term emergencies have generally nefarious consequences for the integrity of the rule of law, can lead to substantial expansions of executive powers limiting democratic and judicial control of exceptional powers, undermine accountability, and may disproportionately affect minorities and vulnerable groups (A/HRC/37/52). She acknowledges the sensitivity of government officials to the challenges that accompany the permanent use of emergency powers and highlights that, in practice, one of the most sustained challenges following the exercise of extensive and long-term emergency powers is to avoid the slippage of exceptional regulation into ordinary law.

22. The SILT law was adopted in October 2017 to avoid the spectre of an unending emergency. It makes some profound changes to the country's counter-terrorism framework by providing for the systemic use of administrative measures as the undergirding legal basis for managing and preventing terrorism and the establishment of a posteriori rather than a priori judicial review; review is then taken through administrative rather than criminal law. The law engages a perceptible shift towards the anticipatory prevention of terrorism, going beyond the historic emphasis on prosecuting completed criminal offences.<sup>11</sup> The Government's view is that this shift towards administrative regulation engages ordinary rather than emergency law.

23. The Special Rapporteur gave serious consideration to the status of this law under the prevailing international standards concerning emergency powers. While acknowledging the welcome move from constantly declaring states of emergency, the Special Rapporteur is of the view that the law, situated within the broad array of counter-terrorism powers already available to the State, constitutes a de facto state of qualified emergency in ordinary French law. She expresses her concern at the transposition of exceptional emergency-form powers into the ordinary law and the effect this may have on the protection of rights, as illustrated below.<sup>12</sup> The Special Rapporteur affirms that France may lawfully enact restrictions to protect public order, but a clear tipping point to exceptionality arises when counter-terrorism measures engage profound, sustained and potentially disproportionate effects on the enjoyment of human rights, as discussed below. Exceptional legal measures must be both consistently necessary and proportionate. Such laws must also be subject to full and transparent review to address breaches of legality, proportionality and disparate effect. The total effect of such laws from 1955 onwards on the overall protection of rights (complex and cumulative emergency powers) must be continually reviewed, as piecemeal review of certain aspects of counter-terrorism laws is insufficient to address the overall effects that they may have on rights protection.

<sup>9</sup> See [www.interieur.gouv.fr/Actualites/L-actu-du-Ministere/Bilan-de-l-etat-d-urgence](http://www.interieur.gouv.fr/Actualites/L-actu-du-Ministere/Bilan-de-l-etat-d-urgence).

<sup>10</sup> See <https://antiterrorisme-droits-libertes.org/spip.php?article53>. The Special Rapporteur notes the reports and recommendations of the Human Rights Ombudsperson in respect of a range of rights infringements during the state of emergency (see [www.defenseurdesdroits.fr/fr/mots-cles/etat-d-urgence](http://www.defenseurdesdroits.fr/fr/mots-cles/etat-d-urgence)), particularly those related to minors and the need for access to adequate compensation for damages.

<sup>11</sup> This anticipatory track in French counter-terrorism law has antecedents, including legislative measures concerning surveillance. See, for example, the law of 21 January 1995 on the use of video surveillance; and anticipatory regulation of terrorism, including incitement (article 421-2-4 of the Penal Code).

<sup>12</sup> The Special Rapporteur recognizes that portions of the SILT law have been deemed constitutional. She notes that the standard of review applied in the present report is that of the full corpus of international human rights law.



### Administrative counter-terrorism regulation and its human rights effects

24. The SILT law activates wide-ranging powers premised on elevated public security risks, operated and reviewed through the administrative law system. They include the delimitation of security perimeters and the closing of places of worship (for a maximum of six months), and allow an individual to be placed under house arrest, assigned residency and surveillance measures. These measures engage significant restrictions on liberty, create limitations on private and family life and pose constraints on individual capacity to participate in public life.<sup>13</sup> Measures of house arrest and geographical containment pose measurable risks for intrusions on liberty. A newly passed justice law that contains measures concerning house arrest/geographical constraints appears to prevent an individual from attending legal hearings and are of particular concern.<sup>14</sup> This concern is not ameliorated by having the individual's lawyer attend, as the person concerned is deprived of a fundamental right to a public and participatory hearing. While the circumstances under which individuals may be placed under house arrest are constitutional,<sup>15</sup> in the Special Rapporteur's view individuals are unable in practice to appeal renewals of house arrest expeditiously.<sup>16</sup> The SILT law states that an individual cannot be placed under house arrest for more than three months, subject to a maximum renewal of three months, but if new or additional elements are presented the duration may be extended for an additional six months (art. 3). In practice, it appears that the Council of State rarely questions the new or additional elements presented in the intelligence information which underpins the measure (*notes blanches*).<sup>17</sup> Moreover, the seamless move from emergency to administrative measures means that the cumulative effect of multiple measures applied in sequence to the same individuals has been excessive and disproportionate.<sup>18</sup> Sequential and cumulative use of overlapping and sometimes duplicative powers engages violations of the right to fair process as protected by human rights treaties.<sup>19</sup> The Special Rapporteur conveys her concern at the restrictions that house arrests place on freedom to work in practice, despite a formal framing that the restriction should enable family and professional life.<sup>20</sup> Freedom to work is guaranteed by international treaties,<sup>21</sup> and can be limited by proportionate and non-discriminatory measures. The Special Rapporteur is concerned that the application of these measures taken during the state of emergency and extended by the SILT law is not compliant with these human rights obligations. Unemployment compensation and national assistance are not substitutes for work.<sup>22</sup> Disabling an individual's capacity to fully engage in society has significant effects on broader terrorism prevention goals, including integration and inclusion.<sup>23</sup>

<sup>13</sup> The Special Rapporteur notes the danger that exceptional administrative measures designed for the scourge of terrorism will be applied in other contexts, including but not limited to public demonstrations, including environmental protests. She encourages the French Government and judicial authorities to guard against such slippage.

<sup>14</sup> See [www.assemblee-nationale.fr/15/amendements/1349/CION\\_LOIS/CL1088.asp](http://www.assemblee-nationale.fr/15/amendements/1349/CION_LOIS/CL1088.asp).

<sup>15</sup> Constitutional Council, decision No. 2017-695 QPC of 29 March 2018 (finding article L.228-1 of the Internal Security Code constitutional).

<sup>16</sup> *Ibid.*, para. 53. The Special Rapporteur acknowledges and welcomes proposed legal reforms.

<sup>17</sup> Council of State, decision No. 421791 of 16 July 2018; see also National Consultative Commission on Human Rights opinion of 17 July 2006.

<sup>18</sup> Amnesty International, *Punished with Trial: The Use of Administrative Control Measures in the Context of Counter-Terrorism in France* (2018).

<sup>19</sup> European Convention on Human Rights, art. 5; and International Covenant on Civil and Political Rights, art. 9.

<sup>20</sup> Internal Security Code, art. L.228-2.

<sup>21</sup> International Covenant on Economic, Social and Cultural Rights, art. 6.

<sup>22</sup> Council of State, decisions No. 398960 of 28 April 2016 (holding that the applicant's professional life was not impinged upon by house arrest because of the availability of unemployment compensation and national assistance); No. 409677 of 25 April 2017; and No. 413369 of 25 August 2017.

<sup>23</sup> Secretary-General's Plan of Action to Prevent Violent Extremism (A/70/674), paras. 3, 4, 9, 25 and 26.

25. Searches and seizures are a fundamental component of the SILT law. Police officers may conduct searches and seizures to prevent the commission of terrorist acts where there is a reasonable belief that premises are frequented by a person whose behaviour constitutes a threat of particular gravity for public security/public order.<sup>24</sup> The anticipatory dimension of the law engages powers that would otherwise be abrogated by regular criminal procedures, reflecting a continuity with state of emergency powers and posing ongoing infringements on individuals' property and privacy rights.<sup>25</sup> The Special Rapporteur is concerned about potential abuse of personal information seized under article 229 of the Internal Security Code and the SILT law. She is also troubled by the humiliation, defamation, hardship and stigmatization that result from searches and seizures. She expresses disquiet at the use of profiling and the disparate impact regarding searches and seizures.

26. The Special Rapporteur welcomes the refined criminal elements included under the SILT law as well as efforts towards defining terrorist acts. However, she maintains that prevailing definitions such as "terrorism" or "apology for terrorism" remain overly broad and ambiguous. Her mandate has consistently held that the international legal definition of terrorism remains insufficiently precise, creating ongoing practices of arbitrariness by States and enabling domestic legal lacunae (A/73/361).<sup>26</sup> Precision is essential in the use of exceptional counter-terrorism powers, and ambiguity must be remedied to ensure adherence to international human rights obligations.

27. The Special Rapporteur highlights additional effects of administrative measures. These include the reliance by administrative courts on *notes blanches*. These notes may rely on private electronic data (e.g., pictures on cellular phones/browsing history), informants, frequenting locations associated with terrorism or having (even generic) contact with individuals associated with terrorism. Notes are unsigned, undated and, thus, their origin indeterminate as a legal matter. There is a presumption of veracity regarding information contained in the notes.<sup>27</sup> The Special Rapporteur viewed a number of such notes and consulted with a number of legal experts on their use in practice. While she appreciates research and the establishment of patterns of association for individuals or involvement in acts falling under the SILT law, she is concerned that using undated evidence sets a dangerous precedent for administrative abuse. Despite a trend towards sourcing more detailed notes, confirmed by officials to the mandate, the notes continue to lack the legal and factual rigor that a properly comprised evidential source needs to base substantial liberty-depriving consequences upon. In the view of the Special Rapporteur, these notes create undue challenges to the presumption of innocence, function to reverse the burden of proof and lessen defence rights in court. Access to administrative judicial oversight does not remedy these deficiencies, not least because of the inherent challenges for judges to adjudicate such evidence and the perceived burdens of ignoring intelligence information. Finally, under the SILT law, private persons have been included in the exercise of general public surveillance missions.<sup>28</sup> While the Special Rapporteur recognizes measures limiting the power of private persons in these surveillance measures, she expresses concern at the potential for private persons to abuse this power.

<sup>24</sup> The Special Rapporteur notes that in its decision No. 2017-695 QPC, the Constitutional Council defines the conditions for seizure of documents and objects.

<sup>25</sup> Constitutional Council decision No. 2017-695 QPC, paras. 69–70.

<sup>26</sup> Notwithstanding Security Council resolution 1566 (2004), General Assembly resolution 46/90 and the 1999 International Convention for the Suppression of the Financing of Terrorism, which only partially resolve the international legal lacunae.

<sup>27</sup> Stéphanie Henneville-Vauchez, *Ce qui reste(ra) toujours de l'urgence* (University of Paris, Nanterre, 2018).

<sup>28</sup> Constitutional Court, decision No. 2017-695 QPC, para. 27.

28. The Special Rapporteur highlights the potentially disproportionate effects of administrative measures on individual and collective rights occasioned by the SILT law. She is particularly conscious of encroachment on religious freedom implicated by the closure of some mosques,<sup>29</sup> allied with the broader social and religious consequences of judicial power over religious exercise, and recalls that any restriction on the right to freedom of religion or belief must strictly comply with the limitation regime stipulated by international human rights law (A/73/362 and A/HRC/31/65). She notes that while freedom of religious belief and practice is an individual right, it has distinct collective dimensions in order to be fully realized for many faith traditions. There is a grave danger that broadly constructed and applied closures will institute “[d]iscriminatory practices that intentionally or unintentionally target individual adherents or groups of persons of a particular faith who are perceived to be predisposed to terrorist or other violent acts” (A/73/362, para. 3).<sup>30</sup> Moreover, the risks of securitizing certain religious practices is immense (A/HRC/7/10/Add.3, para. 41). While the SILT law permits the closure of places of worship for a maximum of six months, it is worrisome that seven mosques have been closed since the introduction of the law.<sup>31</sup> The factual basis for closure (including *notes blanches*) makes the burdens to disprove allegations concerning the members of any mosques or prayer rooms onerous. The Special Rapporteur is concerned that the actions of an imam or congregants, related to activities in the mosque or wholly outside, are dispositive to disproportionately affecting the rights of entire congregations. She underscores the exceptionality of collective measures that have sizeable effects on groups whose connections to any wrongdoing might be tenuous. She encourages the State to ensure that, after the closing of a mosque or prayer room, worshippers continue to have an appropriate venue to congregate. The State should restrain from criminalizing prayers in the street outside closed mosques. While the Special Rapporteur recognizes that this may constitute a challenge to public safety, she underscores the necessity of ensuring limited impingement on the freedom of religion and association. She reaffirms the complementary, interdependent and mutually reinforcing relationship between protecting rights, including freedom of religion and belief and security.

### **Criminal measures to regulate terrorism**

29. Administrative legal measures are only one aspect of the legal counter-terrorism tools available to France. Ordinary criminal law provides a range of both established and newer offences. The Special Rapporteur highlights the weighty effects of the offence of “apology for terrorism” on the right to freedom of expression. This crime constitutes in absolute numbers the criminal measure which is most frequently used in France under the counter-terrorism regime. The equation of apology with “positive moral judgment” is of particular concern.<sup>32</sup> The Special Rapporteur notes that 85 per cent of cases relating to terrorism fall under “apology for terrorism” enforcement.<sup>33</sup> She observes that the penalties for “apology for terrorism”, which include up to five years in prison and a fine of up to €75,000, including for online activity, appear disproportionate. The law is broadly drafted, engaging significant legal uncertainty, enabling discretionary overreach and affecting protection of free expression and the open exchange of ideas in a robust democracy. The Special Rapporteur accepts that there are genuine cases in which exhortation to terrorism must be constrained. Nonetheless, the extent to which this crime captures a broad and indiscriminate range of expression and actors evidences an undue restriction on the freedom of expression as protected by international human rights law. She recommends that authorities be guided by the standards found in the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to

<sup>29</sup> Article L.227-1 of the Internal Security Code is directed to the closure of places of worship, and in practice primarily to mosques and prayer rooms.

<sup>30</sup> The Special Rapporteur notes that 51 mosques/prayer rooms have been closed since 2012 and that even short-term closures have substantial effects, including stigma, on communities of faith.

<sup>31</sup> Note on parliamentary monitoring of the SILT law, 3 December 2018, para. 3. Available at [www.assemblée-nationale.fr](http://www.assemblée-nationale.fr).

<sup>32</sup> Ministry of Justice circular of 12 January 2015. The law was upheld by the Constitutional Court in decision No. 2018-706 QPC.

<sup>33</sup> Nadim Houry, “France’s creeping terrorism laws restricting free speech”, Just Security, 30 May 2018.

discrimination, hostility or violence (A/HRC/22/17/Add.4, annex, appendix, para. 29), in particular the six-part threshold test set out therein. The Special Rapporteur is particularly concerned at the evidence that indicates that the law has been used extensively against minors.<sup>34</sup>

30. Membership in and support to terrorist organization is criminalized in France (“criminal association with a terrorist enterprise”). The Special Rapporteur warns of expansive interpretations of these provisions and stresses that conduct criminalized as a terrorist offence must be truly terrorist in nature, require specific intent and thus restricted to activities with a genuine link to the operation of terrorist groups and acts (A/70/371, paras. 31–44). She highlights that construing support to terrorist organizations in an over-broad manner may effectively result in criminalizing family and other personal relationships. She notes that the support related to ensuring that a person enjoys “minimum essential levels” of economic and social rights, including the rights to food, health and housing, should not be criminalized as support to terrorism, recalling the position of the General Assembly that counter-terrorism measures should not impede humanitarian activities and engagement.<sup>35</sup> The Special Rapporteur further asserts that assisting a person in exercising their right to return to their country of nationality should not per se be equated to criminal support to terrorism.<sup>36</sup>

31. The Special Rapporteur is concerned that there has been a diminution of the meaningful exercise of attorney-client privilege resulting from the use of exceptional powers and the administration of justice in terrorism cases. The shift to administrative measures, the constrained scope for lawyers to meaningfully review the intelligence basis for administrative measures, the shift in the burden of proof and the intensity of resources required to successfully challenge both criminal charges such as membership and administrative measures amount in practice to a diminution of legal access and representation. The Special Rapporteur reminds France of the importance of ensuring full and meaningful legal representation in the context of counter-terrorism measures, criminal prosecution and sentencing.<sup>37</sup>

### **Remedies and oversight**

32. The Special Rapporteur notes that some remedies and review are available in respect of the SILT law and other counter-terrorism legislation. She affirms the importance of vigorous parliamentary review and underscores the value of the parliamentary review process in both chambers. However, existing review capacity is limited and circumscribed. It only applies to a defined number of measures under the SILT law, is primarily focused on engaging the authorities, primarily addresses operational implementation and appears to have little sustained consultation with affected communities and individuals. The Special Rapporteur is concerned that SILT law review has eschewed transparent engagement with civil society and with affected communities and individuals. The statutorily mandated assessment of the effectiveness and operation of the law had not been made publicly available by December 2018. The Special Rapporteur notes serious concerns about the adequacy of existing review and the marginality of human rights to its process to date, and encourages substantive civil society engagement and human rights mainstreaming in the reviews to be completed.

33. The Special Rapporteur has continually stressed the importance of transparent, independent and human rights-compliant review of exceptional legal powers. France is ideally situated to deliver such oversight given the robustness of its legal process, the vibrancy of its civil society and the sophistication of its constitutional order, and it is disappointing to note that this integrated, rights-based approach has not been pursued. Going forward, given the scope, depth and range of French counter-terrorism law and practice, there is a pressing need for inclusive and independent review where the

<sup>34</sup> In 2016, 20 per cent of the 840 people accused of “apology for terrorism” were minors.

<sup>35</sup> Resolution 72/284, para. 79. See Committee on Economic, Social and Cultural Rights, general comment No. 3 (1990) on the nature of States parties’ obligations.

<sup>36</sup> French law does not criminalize return to France. See article 421-1 of the Penal Code.

<sup>37</sup> Basic Principles on the Role of Lawyers.

complementary, interdependent and mutually reinforcing necessity of human rights protection in both law and practice is at the core of the review's raison d'être. Inclusive and independent review will necessarily consult meaningfully with affected individuals and communities, civil society and independent experts.

34. Human rights- and rule of law-informed oversight of counter-terrorism-related intelligence collection, management, sharing, use and storage is essential. The Advisory Commission for the Control of Intelligence Techniques was created since intelligence-gathering powers were placed on a defined statutory footing. The establishment of this advisory body is a positive step. However, it does not go far enough in creating an entirely independent, fully legally empowered entity to oversee the data-gathering powers of all intelligence services and entities engaged in data gathering, processing, sharing and retention for counter-terrorism purposes. This is a noticeable gap given the country's strong commitment to private life.<sup>38</sup> The Commission remains an advisory body even if, in practice, it is reported that its advice is usually acted upon. The Special Rapporteur was unable to verify this assertion. With regard to the Commission, the Special Rapporteur particularly recommends increased judicial representation as well as sufficient technical expertise in its composition, sufficient resources to oversee an increasingly dense regulatory arena, commitment to a priori authorization as the regular approach of oversight given the balance and implications of the rights limitations concerned, and greater transparency through the publication of an annual report to detail the number of measures taken.

35. The Special Rapporteur urges French authorities to ensure compliance with European legal obligations in respect of mandatory general data retention and to fully implement European judicial decisions concerning the need to protect electronic communications in a way that does not compromise the "essence" of the fundamental right to respect for private life and through measures that are "strictly proportionate" to their intended purpose.<sup>39</sup> She reminds France that mandatory retention of metadata for an extended period of time and general data retention are contrary to European Union law, with particular reference to the military planning law (2013) and the surveillance law (2015),<sup>40</sup> and also flags the country's international human rights obligations.<sup>41</sup> She affirms that, while progress has been made, further improvements are required to ensure that adequate procedural safeguards and oversight of interception of communications and surveillance are in place. In particular, prior authorization – best ensured with a judicial element – and ongoing independent oversight of surveillance should be the norm, and the right to an effective remedy must be meaningfully incorporated in the context of secret surveillance measures.

36. The Special Rapporteur notes her concerns regarding cross-border intelligence-sharing. She has already warned against such practices falling short of international human rights norms and standards, in particular the lack of a human rights-compliant legal basis and effective oversight (A/69/397 and A/HRC/13/37). She emphasizes that such practices must be underpinned by a domestic legal basis that is sufficiently foreseeable and accessible and that provides for adequate safeguards against abuse and subject to meaningful oversight by an independent oversight body.

<sup>38</sup> Civil Code, arts. 9 and 226, setting penalties for violation of privacy; and article 1 of Act No. 78-17 on information technology, data files and civil liberties (1978).

<sup>39</sup> European Court of Justice, joined cases *Tele2 Sverige AB v. Post-och telestyrelsen* (C-203/15) and *Secretary of State for the Home Department v. Tom Watson and others* (C-698/15).

<sup>40</sup> European Court of Justice, joined cases *Digital Rights Ireland Ltd. v. Minister for Communications, Marine and Natural Resources and others* (C-293/12) and *Kärntner Landesregierung and others* (C/549/12), Judgment of 8 April 2014; law No. 2013-1168 of 18 December 2013; and law No. 2015-912 of 19 March 2015.

<sup>41</sup> Council of Europe Commissioner for Human Rights, *The Rule of Law on the Internet and in the Wider Digital World*, Issue paper (2014), p. 22; CCPR/C/FRA/CO/5, para. 12; and 13 pending complaints before the European Court of Human Rights.

37. Finally, the Special Rapporteur notes that administrative review is available to persons adversely affected by counter-terrorism-related administrative measures. In practice, the Special Rapporteur is aware that such appeal processes are slow and affected persons are generally not well placed to take legal review measures. The individual subject of such measures is at a significant disadvantage in accessing justice and meaningful remedy. The small number of remedies sought in the context of the high number of administrative measures taken during the state of emergency underscores the remedial lacunae (e.g., comparing the number of house searches undertaken with the subsequent number of proceedings, judicial decisions and incarcerations in this category). For remedies to be meaningful, access to justice has to be direct, accessible and prompt and provide an appropriate remedy to the affected individual. The Special Rapporteur urges France to address the continuing lacunae in access to remedies in respect of harms occasioned during the state of emergency. The passage of time has not narrowed the breaches of trust for affected individuals and/or communities. Effective past-focused remedies are an essential component of limiting polarization, ensuring responsiveness to measures taken in situations of extremism and demonstrating the responsive capacity of the law.

### **Addressing radicalization in a human rights-compliant manner**

38. Like many countries, France faces the challenges of addressing and countering radicalization, including its violent manifestations, and has taken active steps since April 2014 to develop strategic policy in this regard. Heeding the call of the Secretary-General in presenting his Plan of Action to Prevent Violent Extremism, France adopted an initial plan in 2014 identifying 22 measures. A more detailed National Plan to Prevent Radicalization was launched by the Prime Minister in February 2018. The plan mandates 60 measures, 30 of them new, aimed primarily at government departments/administrators across multiple sectors (e.g., education, sport, health, prisons, counter-narrative and business) so that they receive training, counter or identify radicalization, and report and then deal with persons identified as radicalized.

39. The mandate concurs with the view that radicalization and its violent manifestations pose concrete and significant challenges. Radicalization is also a dynamic process. Nuanced, legally based and empirically sound responses to radicalization are sorely needed. The mandate highlights the lack of internationally accepted definitions of concepts such as “violent extremism” and “radicalization” (A/HRC/31/65). She underlines the importance of a clear distinction between radical thought and ideologies, on one side, and violent extremism or radicalization towards violence on the other. The mandate has concerns regarding the empirical and scientific basis for the identification and management of radicalization in national policies and practices, echoing expert assessments as to the lack of robust peer review, flawed scientific methodology and a consistent failure to assess the implementation of policies to prevent violent extremism in national settings, including human rights impact assessments.<sup>42</sup>

40. Many of the proposed measures implement broader legal obligations and are not *stricto sensu* directed anti-radicalization measures, e.g., updating Passenger Name Recognition (PNR) systems and engaging judicial efficiency by automating judicial records. The conflation of broadly necessary security measures in a policy framework rhetorically focused on prevention has a number of adverse results, not least that the focus on preventing radicalization in constructive, community-supported, bottom-up and inclusive ways may be entirely lost on the target audiences. It may underplay the necessary

<sup>42</sup> Sergio Bianchi, “Radicalisation: no prevention without juridicalisation”, Security Paper, February 2018. Controversial underpinnings of these policies include psychological manipulation, predictive profiling of suspects, technological surveillance, broad use of administrative practices and public-private partnerships. Pre-crime identification policies dominate, associated with measurement scales such as Violent Extremist Risk Assessment 2 Revised (VERA-2R) and Extremist Risk Guidelines (ERG22+), and checklists including Europol’s Foreign Terrorist Fighters Risk Indicators Guide. Concerns about these psychometric systems include, inter alia, their mixing of structured forensic analysis models traditionally focused on mental illness and deviance from other models of intelligence analysis containing strong ideological and political connotations.

social and economic integration and empowerment of communities generally recognized as central to the long-term prevention of radicalization.<sup>43</sup>

41. A number of measures provide for prevention policies against radicalization, including developing sweeping programmes to detect and manage radicalization in prison (e.g., increasing the number of Muslim prison chaplains in order to curb extremist discourse), monitoring the behaviour of returnees from conflict sites overseas, addressing mental health capacities for dealing with radicalized persons and disseminating a new interministerial guide for the prevention of radicalization to municipalities. The policy envisages involving various State professionals in detecting and reporting radicalization. The Special Rapporteur recommends the development of a clear and human rights-compliant legal framework on the role of professional secrecy and other confidentiality obligations in the context of countering radicalization towards violence.

42. Despite the new action plan (see para. 38 above), it is not clear what constitutes the legal bases for the categorization of radicalization, how such criteria conform to best practice and, ultimately, how such criteria function to suppress the legitimate and protected arenas of civic expression and religious practice. The national plan does not articulate what remedies may be available to persons inaccurately identified as violently radicalized or where radicalization labels have been inappropriately applied to persons with radical ideas protected by free expression under international law.

43. While confirming that reporting and oversight is an important aspect of countering radicalization, the Special Rapporteur is concerned that other central dimensions are not integrated or adequately recognized in the governmental approach.<sup>44</sup> The Special Rapporteur notes that there appears to be little emphasis in the counter-radicalization approach on engaging with and supporting a bottom-up as well as a top-down approach to countering radicalization and prioritizing sustained relationships with affected communities as a central plank of counter-radicalization policy. The policy has an unrelenting emphasis on Islamic radicalization without addressing other genres of violent radicalization now also evidencing in France, specifically extreme-right violent radicalization. Moreover, there appears to be a significant risk that the approach to identifying radicalization conflates genuine and protected religious practice with terrorist radicalization, and there appear to be few safeguards against this. The Special Rapporteur recommends that the Government pay close attention to the push-pull factors of radicalization and, in particular, comprehensively address the conditions conducive to radicalization, encompassing not only essential security-based counter-terrorism measures but also addressing the underlying social, economic and cultural conditions that drive individuals to radicalize and join violent extremist groups. Such underlying structural analysis appears missing from the current approach. Given the estimated scale of the radicalization challenge in France (including the number of persons considered radicalized on the “S list” (“*fiche S*”)), a comprehensive, balanced and human rights-centred approach is essential for both the protection of rights and the security of all.<sup>45</sup>

44. The Special Rapporteur paid a visit to Osny prison. She was given a substantive overview of the radicalization evaluation, separation and assessment regime, inspected that section and met with several convicted prisoners. The prison staff were well informed and reflective on assessment practices being implemented in French prisons to assess and manage radicalized prisoners through multidisciplinary approaches. She heard a sober analysis of the challenges, acknowledgement that the assessment of evidence of outcomes and effectiveness was still to be undertaken and a clear appreciation of the human rights

<sup>43</sup> United Nations Development Programme, *Journey to Extremism in Africa* (2017).

<sup>44</sup> By contrast, the innovative interdisciplinary and courageous research and policy thinking being carried out by the Association française des victimes du terrorisme and the Association dialogues citoyens attests to innovative approaches to detection, evaluation, inclusion and management. See *Détection et prise en charge de la radicalisation religieuse des personnes détenues en milieu carcéral* (2018).

<sup>45</sup> According to the news outlet BFMTV, it was estimated that some 20,000 names were on the *fiche S* as of 2015. The Special Rapporteur notes that various categories of persons may be identified on the *fiche S* (including extreme-right- and extreme-left-affiliated individuals), but addresses specific complexities with regard to the number of persons identified as Islamic radicals.

dimensions of managing this incarcerated group, which was welcome. She encourages and supports the prison authorities' intention to undertake documentation, research and evidence-building of the assessment processes and the measurement of recent strategies. Prison conditions were adequate, religious practice appeared unhampered, and educational and other opportunities appeared meaningfully available. She notes that while conscious of the risk involved in allowing free movement of prisoners, measures that segregate individuals in solitary confinement for prolonged periods of time may raise issues of inhuman and degrading treatment.<sup>46</sup>

### **Foreign fighters and accompanying family members**

45. France has several preventive measures in place aimed at discouraging persons from leaving French territory and becoming foreign fighters, including a travel ban applicable for six months and renewable for up to two years.<sup>47</sup> The prohibition is subject to a posteriori and not a priori review and is generally based on intelligence information which is not divulged. In parallel with other observations, the Special Rapporteur notes her concern at the cumulative effect on liberty protections when citizens may be subject to limitations of movement, including travel overseas to countries of family origin or for religious practice, family reunification and other justifiable purposes. Limits on freedom of movement on the basis of public order should be strictly necessary and proportionate, factually motivated and, when cumulatively sustained, subject to stringent and ongoing review.<sup>48</sup> The Special Rapporteur singles out the use of cumulative pretrial detention applied sequentially for returnees and emphasizes the need for proportionality and reasonableness in the duration of pretrial detention.

46. It is estimated that approximately 1,700 French nationals have travelled to join armed groups since June 2011, and 280 have returned.<sup>49</sup> The Special Rapporteur has information concerning a sizeable number of fighters, their spouses and offspring who have French nationality being held in detention camps or pending trial in territories overseas. In tandem with international humanitarian organizations, she is deeply disturbed by conditions of detention which may constitute torture or inhuman and degrading treatment breaching international human rights norms. She is further concerned about the fairness of trial, the access to meaningful legal representation and the risk of torture or inhuman and degrading treatment, including sexual violence, while in custody or detention overseas. French nationals also risk being sentenced to death in trials that evidence manifest unfairness. Disturbingly, there is information in the public domain that indicates French nationals are being held under the control of armed non-State actor groups.<sup>50</sup> The Special Rapporteur recognizes the difficulties France faces in protecting its nationals, including the lack of consular representation in some areas where French nationals are present<sup>51</sup> and the shortage of information on the whereabouts of and conditions faced by nationals in armed conflict zones who frequently find themselves in the power of armed groups operating as de facto authorities.

47. France has taken the view that such citizens shall generally be managed and processed by the Government or armed groups operating as de facto authorities in the case of the north-eastern part of the Syrian Arab Republic. The Special Rapporteur holds the view that the absence of active engagement with the conditions and status of these French nationals constitutes an abrogation of responsibility to citizens, including minors, being

<sup>46</sup> United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), paras. 44 and 45.

<sup>47</sup> Law 2014-1353.

<sup>48</sup> Here the position of returnees not charged with terrorism enterprise but subject to sustained house arrest is noted.

<sup>49</sup> European Parliament, *The Return of Foreign Fighters to EU Soil: Ex-Post Evaluation* (2018); United Nations Counter-Terrorism Committee Executive Directorate, *The Challenge of Returning and Relocating Foreign Terrorist Fighters: Research Perspectives* (2018); and Richard Barrett, *Beyond the Caliphate: Foreign Fighters and the Threat of Returnees* (The Soufan Center, 2017).

<sup>50</sup> Sharon Weill, "Terror in courts: French counter-terrorism law and practice: administrative and criminal avenues" (2018).

<sup>51</sup> AL FRA 10/2018, sent on 8 October 2018.



held in extremity, many of whom are owed special obligations due to their age, destitution and vulnerability under international law.<sup>52</sup> The Special Rapporteur reminds France of the standards established in the 2018 addendum to the guiding principles on foreign terrorist fighters (Madrid Guiding Principles), which affirms the need to address gender, age and the best interest of the child as well as ensuring respect for human rights in addressing the challenge of foreign fighters. The mandate urges France to proactively address through all possible means the deficiencies of courts adjudicating their nationals which do not observe essential rights to fair trial or the humane treatment of prisoners. France should take all available measures to protect nationals facing the death penalty. France is also in a strong position to assist women and children associated with foreign fighters who may be victims of terrorism or trafficking. She affirms the important role that effective consular assistance plays as a preventive tool when faced with a risk of flagrant violations or abuses of human rights, while also noting the circumscribed remedial nature of diplomatic protection proceedings.<sup>53</sup>

48. She encourages France to provide appropriate prosecution, rehabilitation and reintegration measures as a matter of urgency. Finally, the Special Rapporteur notes the severe stigma and sustained surveillance experienced by France-based family members of fighters or those accompanying them. Many of them are traumatized, marginalized and deeply compromised by the actions of family members. In many cases, these individuals are allies in the fight against terrorism and are strong advocates against radicalization.

#### ***La laïcité, inclusion, discrimination and equal protection***

49. *La laïcité* is an essential value in France. There exists a constitutional prohibition on discrimination. Discrimination is also legislatively prohibited on multiple grounds, including ethnic origin and religious belief. One complex challenge in assessing the effects of counter-terrorism laws on specific communities, including racial profiling and disparate effect, is the constraint on gathering national data concerning minorities or specified faith groups. Despite the formal barriers to data disaggregation, based on independent reports, the views of policy bodies and multiple interviews, the Special Rapporteur considers that the French Arab and/or Muslim communities have been primarily subject to exceptional measures both during the state of emergency and presently from the SILT law, in tandem with other counter-terrorism measures.<sup>54</sup> The Special Rapporteur is deeply concerned that these minority communities are being constructed in political discourse and legal practice as a per se “suspect group” through the sustained application of counter-terrorism law. She is further troubled by the danger that the genuine and protected right of persons to freely practise their culture and religion is being constrained by counter-terrorism law and practice.<sup>55</sup> The Special Rapporteur is concerned at the increase of anti-Muslim incidents reported in France following terrorist attacks. France experienced 133 anti-Muslim incidents in 2014, 429 in 2015 and 182 in 2016.<sup>56</sup>

<sup>52</sup> Convention on the Rights of the Child, arts. 3 and 5; Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict; and CRC/C/VAT/CO/2, para. 8 re extraterritorial application.

<sup>53</sup> International Law Commission, draft articles on diplomatic protection, art. 1 (A/61/10, chap. IV.E.1).

<sup>54</sup> Amnesty International. *Punished with Trial*, pp. 29–30; Hennette-Vauchez, *Ce qui reste(ra) toujours de l’urgence*; and CAT/C/FRA/CO/7, paras. 12–13. The Special Rapporteur notes that a lack of systematic national data collection constitutes a significant impediment to addressing the scale of effects on specific groups/communities. However, data collection is possible on distinct effects, evidenced by the positive capacity to garner data on anti-Semitism, including criminal acts. See [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2018-antisemitism-update-2007-2017\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-antisemitism-update-2007-2017_en.pdf).

<sup>55</sup> Noting the 2004 French law banning burkas/niqabs in public. The Human Rights Committee has held that the French law violates articles 18 and 26 of the International Covenant on Civil and Political Rights. *Yaker v. France* (CCPR/D/123/D/2747/2016), decision adopted on 17 July 2018; and *Hebbadi v. France* (CCPR/C/123/D/2807/2016), decision adopted on 17 July 2018.

<sup>56</sup> Hennette-Vauchez, *Ce qui reste(ra) toujours de l’urgence*.

50. The Special Rapporteur is deeply conscious that the sometimes conflation of Islam with terrorism in Government anti-radicalization policy and in the implementation of administrative measures unduly singles out this community,<sup>57</sup> alienates it from the State, and creates a form of political and social disenfranchisement that is inconsistent with the State's own constitution and laws, let alone obligations under international human rights law. France must work in genuine partnership with all affected communities and take specific steps to prevent this conflation, including by applying best practice on independent oversight, community consultation, prevention and remedy when violations of human rights are established through legal and administrative action.

#### IV. Conclusions and recommendations

51. The Special Rapporteur underlines that counter-terrorism action undertaken by the Government of France must be rooted in, and comply with, international law, including human rights, humanitarian and refugee law, and must address not only manifestations of terrorism but conditions conducive to its spread. Effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing.

52. The Special Rapporteur recommends that a fully independent, adequately resourced expert oversight body be created to oversee the totality of counter-terrorism and exceptional national security powers operational in France. This body would undertake independent review of the overall operation of all counter-terrorism and national security powers, laws and policies in the country. Such oversight should also be tasked to ensure that laws and policies are compatible with international human rights and, as applicable, international humanitarian law.

53. Given the mandate's finding that the composite effect of counter-terrorism measures in France constitutes a de facto state of qualified emergency, the Special Rapporteur urges root and branch review of the necessity, proportionality and discriminatory effects of such laws. France is, in the first instance, encouraged to use its existing review processes to rebalance its use of exceptional legal norms; to deepen its use of ordinary law, whose strength and fortitude have been proven; and to harness remedies for human rights breaches occasioned by the use of counter-terrorism powers.

54. The Special Rapporteur affirms the value of parliamentary oversight. The current role of parliamentary review is limited, and is primarily focused on institutional effectiveness and coordination. It would be useful to augment it to encompass a range of counter-terrorism oversight matters, including assessing and monitoring the effects of new counter-terrorism powers; human rights oversight of the deployment of military personnel in counter-terrorism actions overseas; citizenship stripping for dual nationals or revocation of residence rights related to national security; increased concerns about unlawful profiling where counter-terrorism laws and policies may stigmatize persons of the Muslim faith; and stop and search practices by the police in counter-terrorism contexts that create concerns about racial or ethnic profiling.

55. The Special Rapporteur encourages the Government to make broadly available and easily accessible national data pertaining to the application, use and consequences of counter-terrorism measures. Such data would include measurement of effects on particular communities and groups. Such accessibility fundamentally enables a much-needed public awareness, and debate, so as to assess the necessity, legitimacy and effectiveness of certain exceptional measures. Accessing such data is essential for civil society and legal process to measure the disparate impact, if any, on certain

<sup>57</sup> National Consultative Commission on Human Rights, *Statement of Opinion on the Prevention of Radicalisation* (2017). See, for example, section 3, National Plan to Prevent Radicalization (23 February 2018) (media kit).

communities, and it enables the essential work of tracking patterns of use as well as the effectiveness of such measures.

56. The Special Rapporteur urges the Government to deploy its considerable resources to effect community-involved, bottom-up, transparent and evidence-based prevention strategies to counter the conditions conducive to terrorism, and engage communities and civil society fully in prevention efforts.

57. The Special Rapporteur stresses that proactive measures must be taken to combat the negative, stereotyped and stigmatizing effects of counter-terrorism and extremism-prevention strategies on the Muslim community in France. France's greatest asset in the long-term prevention of terrorism lies in inclusive citizenship and a shared belief by all citizens of their full equality before the law.

58. The Special Rapporteur recommends that fully independent and comprehensive oversight of the work of intelligence entities be implemented. Such oversight should have the resources and technical capacity to enable adequate oversight, taking account of technological developments.

59. The Special Rapporteur urges the Government to proactively protect religious freedom, including the freedoms of distinct religious communities and minority groups. This requires protection of both individual and collective rights to religious worship and places of worship.

60. The Special Rapporteur is acutely conscious that the composite effect of administrative counter-terrorism measures in France is to significantly shift the regulation of persons' liberties to the pre-criminal or precautionary space. This represents a potentially serious challenge to the overall balance of security and rights. She urges that the judicial branch play a full a priori role, and that oversight to determine the necessity, proportionality and legality of such measures be constantly reviewed and entrenched.

61. The Government is strongly encouraged to activate positive legal and diplomatic protection for French citizens in conflict zones overseas, particularly children. This includes taking positive steps to support nationality determination and interventions where French nationals face serious human rights violations in detention, including but not limited to torture, extrajudicial execution, sexual violence and the imposition of the death penalty. Meaningful action towards rehabilitating and reintegrating returning foreign fighters and, if applicable, family members is consistent with the spirit of international solidarity and cooperation as required by Security Council resolutions 2178 (2014) and 2396 (2017) and is in the long-term interest of international peace and security.

62. The Special Rapporteur urges the Government to prioritize the modalities of repatriating children as a matter of priority, including the applicable procedure for the determination of citizenship and adequate rehabilitation and reintegration programmes.