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Human Rights Watch Concerns and Recommendations on France

Submitted to the UN Committee Against Torture in advance of its Review of France

March 2010

This memorandum provides an overview of Human Rights Watch’s concerns and recommendations on France, submitted to the United Nations Committee Against Torture (“the Committee”) in advance of its upcoming review of France. We hope it will inform the Committee’s consideration of the French government’s (“the government”) compliance with the International Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment (“the Convention”). Our comments are focused primarily on counterterrorism measures that the government has introduced which we believe breach Convention standards. For fuller analyses, please see Human Rights Watch reports *Preempting Justice: Counterterrorism Laws and Procedures in France* and *France* (available at www.hrw.org/en/reports/2008/07/01/preempting-justice); *In the Name of Prevention: Insufficient Safeguards in National Security Removals* (available at www.hrw.org/en/reports/2007/06/05/name-prevention); and *Submission to the Léger Committee on criminal justice reform* (available at <http://www.hrw.org/en/news/2009/06/09/human-rights-watch-submission-leger-commission-reform-france-s-criminal-procedure-an>).

Insufficient safeguards in national security removals (Convention articles 3 and 15)

Lack of an automatic in-country appeal

Since 2001, France has forcibly removed dozens of foreign nationals accused of links to terrorism and extremism, through administrative “ministerial expulsion orders” and through judicially-authorized criminal deportations following conviction and

time served. Available government figures indicate that 71 individuals described as “Islamic fundamentalists” were forcibly removed from France between September 2001 and September 2006. Fifteen of these were described as imams. A European Commission document published in March 2009 indicated, on the basis of information from the French government, that France had expelled 91 individuals suspected or convicted of terrorism activities between 2003 and 2007. National security removals form an integral part of France’s national strategy to counter violent radicalization and recruitment to terrorism.

The procedures for national security removals in France do not provide sufficient guarantees to prevent the return to a real risk of torture and ill-treatment, in violation of the non-refoulement obligation under Convention article 3.

Our primary concern is that those subject to a national security removal do not have the right to an automatic in-country appeal. Those who fear that removal would place them at risk of torture or ill-treatment can file a petition for the protection of fundamental liberties (*référé-liberté*), and the interim relief judge must decide within 48 hours whether to suspend the expulsion order and/or the separate order designating the country of return. A negative decision can be appealed to the highest administrative court in France, the Council of State (*Conseil d’Etat*). While authorities generally suspend removal while the interim relief judge considers the case, they are not obliged to do so.

Human Rights Watch is concerned that the lack of automatic suspension of removals during appeals creates a situation in which individuals facing removal do not have access to an effective remedy. This is the view taken by the European Court of Human Rights, most recently in April 2007 when it ruled in the case of *Gebremedhin v. France* that France had violated the rights of an Eritrean asylum seeker because none of the appeals available to him following a refusal to enter France to apply for asylum had suspensive effect.

In that case, the European Court of Human Rights ruled that the “practice” of suspending expulsion until a decision is made on interim relief petitions “cannot be a substitute for a fundamental procedural guarantee of a suspensive appeal.” While legislative reforms in November 2007 gave individuals seeking to enter France to apply for asylum the right to an in-country appeal against refusal of permission to

enter, in compliance with the European Court of Human Rights ruling, they failed to extend this right to others at risk of unsafe returns.

In cases involving national security, the submission of an asylum claim suspends removal only at first instance. Therefore, an initial negative decision by the national refugee office (Office français de protection des réfugiés et apatrides, OFPRA) can lead to immediate removal even if the individual has appealed the decision to the independent national court of asylum (Cour nationale du droit d'asile, CNDA).

This is also true for all asylum applications processed under the so-called priority procedure, irrespective of whether national security is invoked. This procedure is used for asylum-seekers from countries France has placed on a national list of "safe countries origin", those whose application is deemed fraudulent, abusive, or solely designed to forestall removal, as well as those considered a threat to public order. The current list of fifteen safe countries includes Bosnia and Herzegovina, Georgia, Madagascar, Mali, Senegal and Ukraine. In 2008, the national court of asylum concluded that almost 250 applicants from these countries, rejected at first instance by the national refugee office, were in fact in need of some form of protection.

The European Court of Human Rights ruled in December 2009 that France would violate its nonrefoulement obligations were it to expel Kamel Daoudi to Algeria, his country of origin. Daoudi had been convicted in France under the broad charge of "criminal association in relation to a terrorist enterprise" and had been placed in a detention center pending deportation immediately upon release from prison. The Court issued interim measures on Daoudi's behalf, and he had been assigned to compulsory residence at the time of the Court's judgment.

The December 2009 expulsion of Tunisian Yassine Ferchichi to Senegal sets a worrying precedent. Ferchichi had also been convicted of "criminal association in relation to a terrorist enterprise," and was expelled December 24, 2009, the day he was released from prison having served his prison sentence. The European Court of Human Rights had issued, on December 23, an order for interim measures to France to refrain from sending Ferchichi to Tunisia until the Court had had time to examine the case due to concerns about the risk of torture and ill-treatment, and had communicated to French authorities by phone and fax on December 24, before the

expulsion was executed, that it should not send Ferchichi to Senegal before demonstrating to the Court there was no risk of further refoulement to Tunisia.

In a letter to the Court dated January 11, 2010, the French Foreign Ministry stated it had received assurances prior to the expulsion from the Senegalese government that Ferchichi would not be transferred to his country of origin. After several days in police custody in Dakar, Ferchichi was released on December 28. Senegalese authorities have stated that he is welcome to apply for asylum in Senegal or leave the country.

While in this instance Ferchichi does not appear to be at risk of refoulement to Tunisia, his precipitous expulsion to Senegal despite a binding order from the European Court of Human Rights reflects France's disregard for its international obligations under the absolute prohibition on refoulement.

This Committee has condemned France twice since 2002 for deporting individuals who had raised fear of torture on return before their appeals had been fully examined. In both cases France ignored the Committee's requests for interim measures while the committee considered the claims. The most recent finding, in May 2007, concerned Adel Tebourski, a French-Tunisian national who was stripped of his French citizenship in order to expel him to Tunisia in August 2006.

- *The government should reform the priority procedure for assessing asylum claims to ensure that all asylum-seekers have the right to an in-country appeal. The government should also guarantee the right to an automatic suspensive appeal to national security suspects subject to ministerial expulsion orders and criminal deportations.*

Criminal law and procedure in terrorism investigations (Convention articles 11 and 15)

Insufficient safeguards in police custody

Human Rights Watch is deeply concerned that insufficient safeguards in police custody leave terrorism suspects vulnerable to ill-treatment. Terrorism suspects may be held for up to six days before being brought before a judge (in practice, a four-day detention period is standard), have severely curtailed access to a lawyer, and are interrogated at will without a lawyer present or video- or audio-recording. In the

course of our research, we learned of disturbing accounts of ill-treatment in police custody.

Pursuant to the Code of Criminal Procedure (CCP) article 63, those arrested on suspicion of involvement in terrorism have access to a lawyer only after 72 hours, or three days, in police custody (*garde à vue*). If detention is extended by an additional 24 hours before the end of the 72nd hour, first access to a lawyer is pushed back to after the 96th 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 custody. Visits are limited to 30 minutes, and the lawyer does not have access to any detailed information about the charges against their client.

Prompt and meaningful access to a lawyer during police custody is a fundamental safeguard against torture and prohibited ill-treatment. The Council of Europe European Committee for the Prevention of Torture (CPT) has repeatedly called on France to allow detainees access to a lawyer from the outset of detention in all of its reports since 1996.¹

Police may interrogate detainees at will in the absence of their lawyer, at any time of the day or night, leading to oppressive questioning. While the final police report must list the time of all interrogations, there are no rules establishing limits on these interrogations or the amount of rest a detainee must have between interrogations. Human Rights Watch has collected testimonies about sleep deprivation, disorientation, constant, repetitive questioning, and intense psychological pressure.

For example, Human Rights Watch is aware of a case in which a terrorism suspect was interrogated for a total of 43 hours during his four-day *garde à vue*, while the diabetic wife of another suspect was interrogated for a total of 25 hours during her three-day *garde à vue*. Statements made during police custody are summarized in an official statement, which is admitted into the case file whether signed by the suspect or not, and may be used against the defendant at trial.

Interrogations of terrorism suspects are neither video- nor audio-recorded. A 2007 law instituting obligatory recording of all police interrogations, as well as recording

¹ 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 www.cpt.coe.int/en/states/fra.htm.

of the first hearing with the investigating judge, in serious felony cases explicitly excluded terrorism, drug trafficking and organized crime cases.²

Article 11 of the Convention requires states to keep under systematic review interrogation rules, instructions, methods and practices, as well as arrangements for the custody and treatment of persons subjected to any form of arrest with a view to preventing any cases of torture.

As mentioned above, the presence of a lawyer from the outset of detention, including during interrogations, is a fundamental guarantee against prohibited ill-treatment. Timely, competent and impartial medical examinations constitute another important safeguard. In this regard, we believe that suspects should have the right to request a medical examination by a doctor of their own choosing. The CPT has repeatedly urged France to institute such a right, while acknowledging that this second examination may be conducted in the presence of the state-appointed forensic doctor.³

At this writing, the government was expected to present draft legislation to reform the code of criminal procedure. The bill is expected to make only minor adjustments to the rules governing police custody, which would neither go far enough nor apply to everyone. In particular, suspects in terrorism and organized crime investigations would face still the same severe restrictions on access to a lawyer as they do currently.

- *The government should reform police custody rules to strengthen safeguards against ill-treatment and oppressive questioning. These reforms should ensure that all detainees, regardless of the suspected crime, have the right to:*
 - *Access to a lawyer from the outset of detention and throughout the period of detention;*
 - *Speak privately with a lawyer without time limits;*
 - *Be interrogated only in the presence of a lawyer;*
 - *Be notified of their right to remain silent;*
 - *Have their interrogations video and audio-recorded; and*
 - *Request a medical examination by a doctor of their own choosing.*

² Law 2007-291 of March 5, 2007, articles 14 and 15. These articles entered into effect in June 2008.

³ CPT reports on visits conducted to France in 1996, <http://www.cpt.coe.int/documents/fra/1998-07-inf-fra.pdf>, para. 40 and in 2000, <http://www.cpt.coe.int/documents/fra/2001-10-inf-fra.pdf>, para. 35.

The use of evidence obtained under torture

Human Rights Watch is concerned that French criminal procedures in terrorism cases lack sufficient safeguards to ensure that evidence obtained under torture or prohibited ill-treatment is not used at any stage of proceedings in France.

Intelligence material, including information coming from third countries with poor records on torture, is often at the heart of terrorism investigations. Our research indicates that there is insufficient judicial verification of intelligence material in terrorism investigations. In practice, security services provide prosecutors and specialized investigating judges with information they have obtained through intelligence-gathering methodologies, including cooperation with third countries with poor records on torture. Investigating judges may then order any number of investigative steps, including arrests, on the basis of this intelligence, without exercising any control over the legitimacy of the methods used to obtain the information.

As the Committee made clear in *P.E. v. France*, states have a positive obligation “to ascertain whether or not statements constituting part of the evidence of a procedure for which it is competent have been made as a result of torture.”⁴ The absence of any mechanism or requirement on the part of investigative judges to verify whether the information was obtained under any form of ill-treatment is a breach of that obligation, because the information constitutes evidence for the purposes of a judicial investigation.

The 2005 arrests of individuals allegedly plotting terrorist attacks in Paris are illustrative. These arrests appear to have been based largely on statements allegedly made by a man named M’hamed Benyamina while in custody of the Algerian secret service, the Department for Information and Security (Département du Renseignement et de la Sécurité, DRS). Benyamina, an Algerian residing legally in France, was arrested at an airport in Algeria in September 2005 as he was preparing to return to France. Benyamina told Amnesty International that Algerian officers told him French authorities had requested his arrest. Benyamina was held in

⁴ UN Committee Against Torture, Decision: *P.E. v. France*, CAT/C/29/D/193/2001, December 19, 2002, para. 6.3.

illegal, arbitrary DRS custody for at least five months.⁵ Benyamina said he did not want to talk about treatment in DRS detention as long as he remains in Algeria for fear of reprisals.

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.⁶ Two men, Emmanuel Nieto and Stéphane Hadoux, were arrested in France in October 2005 on the basis of statements made by Benyamina during his detention, which he later retracted. Nieto and Hadoux were convicted of criminal association in relation to a terrorist undertaking in October 2008.

Some defendants in France who credibly allege they were tortured in third countries and made alleged confessions have successfully had the confessions excluded as evidence at trial.

An example is the case of Said Arif, an Algerian national, who was detained in Damascus, Syria in 2003. A French investigating judge provided Syrian authorities with a list of questions to ask Arif, accompanied by “answers” in parentheses, and traveled to Damascus to observe the interrogation. Arif credibly alleged he was tortured throughout the year he spent in Syrian custody and disavowed everything he is alleged to have said during that period. All pieces of evidence emanating directly from his detention in Syria were eventually excluded from his trial. Arif was nonetheless convicted of criminal association in relation to a terrorist undertaking in June 2006.

But the courts appear to have allowed as evidence in some cases statements allegedly made under torture by third persons. Part of the evidence against Arif and his co-defendants, for example, came from a Jordanian man known as Abu Attiya, who was interrogated while in Jordanian custody using questions submitted by a French investigating judge.

⁵ The UN Working Group on Arbitrary Detention classified Benyamina's time in DRS custody as illegal, arbitrary detention. Opinion 38/2006 (Algeria), adopted November 21, 2006, A/HRC/7/4/Add.1, January 16, 2008.

⁶ 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).

Abu Attiya told Human Rights Watch of mistreatment he had suffered during the four years he spent in the custody of the Jordanian General Intelligence Department (GID). (He was released in December 2007 without charge). The GID has a record of arbitrary arrest and abusive treatment of prisoners.⁷ Defense arguments to exclude Abu Attiya's testimony on the grounds that it was obtained through torture were unsuccessful.

We are concerned that there are insufficient safeguards in place to ensure that investigating judges do not rely on evidence obtained in third countries under torture or ill-treatment in their investigations or to ensure the exclusion of such material as evidence in criminal trials of terrorism suspects.

- *The government should amend the code of criminal procedure to state explicitly that evidence extracted under torture or ill-treatment, regardless of its provenance, is not admissible at any stage of legal proceedings and investigations; and to impose a statutory obligation on the competent judicial authority to assess whether intelligence material was obtained under torture or ill-treatment.*

⁷ 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://www.hrw.org/reports/2008/jordano408>.