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# French foreign fighters: The engagement of administrative and criminal justice in France\*

**Sharon Weill**

Sharon Weill (PhD, University of Geneva) is a Senior Lecturer and Associate Researcher at Sciences Po Paris (PSIA/CERI) and an Assistant Professor at the American University of Paris. Her research focuses on the engagement of courts with international law through a socio-legal approach. Currently she conducts empirical research on foreign fighters' trials in France, financed by the French Ministry of Justice. Since 2017 she has been an expert member of the French National Consultative Commission on Human Rights.

## Abstract

*Since 2012, it is estimated that 2,000 French nationals have joined jihadist armed groups listed by the UN as terrorist organizations in Syria and in Iraq. Consequently, a new prosecution policy has been introduced in France. To date, more than 200 persons have been prosecuted and 1,600 persons have been placed under criminal investigation. In parallel, after the 13 November 2015 terror attacks in Paris, a State of emergency was declared. Persisting for two years, it introduced*

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*derogative administrative measures that slowly transgressed into regular criminal law. Consequently, French administrative and criminal courts, with ordinary judges and professional routines, find themselves involved in matters related to armed conflicts – a completely new phenomenon for them. What role has been performed by French criminal and administrative judges in the global fight against terrorism?*

*This article takes a close look at France's fight against terrorism and the engagement of its domestic legal system in the context of foreign fighters and suspects of terrorism. It outlines the radicalization processes of French administrative and criminal law along with their hybridization and complementarity. While the armed conflict in Syria and Iraq and the complex geopolitical context are clearly present in French courtrooms, international humanitarian law and international criminal law frameworks are almost entirely absent. At the same time, by granting a growing power to the administration, the repressive and pre-emptive approaches introduced within criminal and administrative law transform liberal conceptions of law and justice.*

**Keywords:** foreign fighters, counterterrorism, French legal system, war on terror, domestic courts, criminal prosecution.

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## Introduction

Since 2012, around 2,000 French nationals have joined jihadist armed groups in Syria and Iraq that are listed by the United Nations (UN) as terrorist organizations. Between 2014 and 2018, over 200 persons were prosecuted and 1,600 persons were placed under criminal investigation.<sup>1</sup> In parallel, after the 13 November 2015 terror attacks in Paris, a state of emergency was declared. Persisting for two years, this state of emergency allowed the government and the legislature to introduce derogative administrative measures that have slowly transgressed into regular law. Consequently, French administrative and criminal courts, with ordinary judges and professional routines, find themselves involved in global conflicts – a completely new phenomenon for them. What role has been performed by French criminal and administrative judges as transnationalized actors in the global fight against terrorism?

This article takes a close look at France's fight against terrorism and the engagement of its domestic legal system in dealing with foreign fighters and suspects of terrorism. The first part of the article analyzes the transformation of administrative law through the study of two measures: imposing a prohibition on

1 As of May 2018, it was also estimated that over 300 French persons had been returned to France and 1,300 French individuals, including 500 children, were still present in Syria and Iraq. See Centre d'Analyse du Terrorisme (CAT), *La justice pénale face au djihadisme: Le traitement judiciaire des filières syro-irakiennes (2014–2017)*, May 2018, p. 10, available at: <http://cat-int.org/wp-content/uploads/2018/05/Rapport-Justice-p%C3%A9nale-face-au-djihadisme.pdf> (all internet references were accessed in June 2019).

leaving French territory, and house arrest. The second part of the article discusses the law, procedure and prosecution policies employed in the French criminal justice system. Together, the administrative and criminal systems form a centralized counterterrorism legal mechanism with a manifest logic of war but without specifically addressing the laws applicable in armed conflict. Instead, this mechanism introduces repressive and pre-emptive practices within domestic criminal and administrative processes that opt for their hybridization, thereby transforming liberal doctrines of law.

## The radicalization of French administrative law

In recent years, new administrative measures on surveillance and control have been introduced in French law, granting more and more power to the Ministry of the Interior and security agencies. This phenomenon reached a peak during the two-year state of emergency declared immediately after the November 2015 terror attacks in Paris,<sup>2</sup> when extensive derogative powers such as house arrests, night raids and closing of religious sites were attributed to the executive. When the state of emergency ended, five new chapters (out of a total of ten) were introduced into the Law on Internal Security under the section “Fight against Terrorism”.<sup>3</sup> A significant number of the state of emergency prerogatives were transported into regular law through this amendment, most notably in Chapter 8 of the Law on Internal Security, entitled “Individual Measures of Administrative Control and Supervision”.

The following part of this article discusses two administrative measures: the prohibition on leaving French territory, and house arrest. These measures are employed against foreign fighters and persons identified as potential foreign fighters or against suspects in terrorist-related activity in France. The discussion will illustrate (1) the constant expansion of administrative power in imposing restriction on liberties, and (2) the growing competence of administrative judges to review administrative measures *ex posteriori*, while it is the ordinary judges

2 The state of emergency was declared after the terror attacks of 14 November 2015 and lasted until 30 October 2017. The longest in French history, it was prolonged six times and further amended. Before that, a state of emergency was declared in France three times in the context of the Algerian war, in 1984 in New Caledonia, and in 2005 for five weeks following violent events in the suburban areas of Paris. The prerogatives of the government under a state of emergency are set out in the Law on State of Emergency, Law No. 55-385, 3 April 1955.

3 It is interesting to look at the process of amendments brought into the Law on Internal Security (Law No. 2012-351, 12 March 2012) under the section “Fight against Terrorism”. In 2012 the three first chapters were introduced: “Chapter 1: Fight against the Financing of Terrorist Activities”; “Chapter 2: Access to Automated Administrative Processing and Data Held by Private Operators”; “Chapter 3: Implementation of Video-Protection Systems”; in 2014 another chapter was added, “Chapter 4: Prohibition from Leaving the Territory”; in 2016, “Chapter 5: Administrative Control of Returns on the National Territory”; and finally in 2017, chapters 6–10: “Chapter 6: Perimeters of Protection”; “Chapter 7: Closing of Places of Worship”; “Chapter 8: Individual Measures of Administrative Control and Supervision”; “Chapter 9: Visits and Seizures” and “Chapter 10: Parliamentary Scrutiny”.

who should be entrusted with safeguarding individual liberties as established by Article 66 of the French Constitution.

## The prohibition on leaving French territory

The law granting the Ministry of the Interior the authority to forbid individuals from leaving French territory states that “any French national may be subject to the prohibition on leaving the territory if there are serious grounds for thinking that (s)he is planning” to travel abroad in order to participate in terrorist activities or reach a territory where terrorist groups are operating, “in conditions likely to lead” the individual to be a threat to public safety after their return to French territory.<sup>4</sup> In November 2014, when the measure was first codified, it could be imposed for up to six months and could be renewable for a maximum duration of two years. A year after it was passed, in October 2015, the Constitutional Court approved this law as constitutional. The Court based its ruling on the fact that a time limit was provided to guarantee an appropriate balance between the restriction of the liberty of movement and private life and security concerns.<sup>5</sup> However, in July 2016, less than a year after this decision (and as the two-year limit was about to be completed in the first cases issued in November 2014), the time limitation was simply removed from the law. Today, the restriction on movement can be renewed without any limit.<sup>6</sup> The following decree issued by the Ministry of the Interior may indicate that this is not merely a hypothetical scenario:

4 Appeal on the decision of prohibition against leaving the territory can be made within two months, and the administrative judge shall render his decision within four months. Law on Internal Security, Art. L. 224-1 (amendment of 13 November 2014). See Aurélie Cappello, “L’interdiction de sortie du territoire dans la loi renforçant les dispositions relatives à la lutte contre le terrorisme”, *AJ Pénal* 2014, 2014, p. 560; Hajer Rouidi, “La loi n° 2014-1353 du 13 novembre 2014 renforçant les dispositions relatives à la lutte contre le terrorisme: quelles évolutions?”, *AJ Pénal* 2014, 2014, p. 558.

5 Constitutional Council, *M. Omar K. (Interdiction administrative de sortie du territoire)*, Decision No. 2015-490 QPC, 14 October 2015, available in French at: [www.conseil-constitutionnel.fr/decision/2015/2015490QPC.htm](http://www.conseil-constitutionnel.fr/decision/2015/2015490QPC.htm). The petitioners argued that this authority constituted a disproportionate infringement on the freedom of movement and the right to an effective judicial recourse by a judicial (and not administrative) authority as guaranteed by Article 66 of the Constitution. While rejecting the petition, the Constitutional Court based its decision on three main arguments. First, it considered the justificatory motives for the prohibition to be “precisely defined”. Second, it stated that “no constitutional exigency requires such a decision to be pronounced by a tribunal” rather than an administrative body. This point, however, is contentious since some interpretations of Article 66 have concluded that any measure impeding the freedom of liberty should be imposed and controlled by the judicial authority rather than the administration or administrative justice order. Third, to justify its final ruling, the Court insisted on the fact that a prohibition’s “total duration cannot exceed two years”, and that with this limitation “the legislator has adopted measures assuring a conciliation that is clearly not unbalanced between the freedom of movement and the protection from attacks on public order”.

6 Amendment introduced to Art. L224-1 of the Law on Internal Security by Art. 11 of Law No. 2016-987, 21 July 2016. According to a memo by the Ministry of Justice, “[t]he measure can now be renewed without limitation as long as the conditions for its delivery continue to be met”. See “Circulaire du 5 novembre 2016 relative à l’articulation des mesures administratives et des mesures judiciaires en matière de lutte contre le terrorisme et la prévention de la radicalisation”, *Bulletin Officiel du Ministère de la Justice*, 5 November 2016, available at: [www.textes.justice.gouv.fr/art\\_pix/JUSD1633563C.pdf](http://www.textes.justice.gouv.fr/art_pix/JUSD1633563C.pdf).

Personal data [of persons banned from leaving French territory] will be kept for three years, from the date of the issue of the prohibition from leaving the territory. In the case of a renewal of the prohibition within this three-year period, the retention period of the data is extended by three years from the date of this new decision. In all cases, the maximum storage period may not exceed twenty years.<sup>7</sup>

The National Commission on Informatics and Liberty (Commission Nationale de l'Informatique et des Libertés, CNIL), a national body entrusted, *inter alia*, with surveying the impact of legislation related to data collection on individual rights, gave a favourable opinion on the above decree prior to its issue. It observed that “in a context of expanding threat of terrorism, the use of prohibition from leaving the territory is becoming more and more frequent”.<sup>8</sup> Still, there is little data available on how this prohibition has been imposed since 2014. According to a Senate report, the minister of the interior had imposed a total of 430 prohibitions on leaving the territory by November 2016, 150 of which had been renewed at least once after the first six months.<sup>9</sup> In November 2017, a think tank reported that 500 French nationals have been under this regime.<sup>10</sup> In the latest report from November 2018, the government confirmed that the use of this measure is declining: in 2018 only forty-nine measures were issued, compared to 181 new measures issued the year before. According to the government, this is a result of “a decrease in the inclinations towards the theaters of operations of terrorist groups, probably due to the evolution of the political and military situation in the countries housing these operations”.<sup>11</sup>

## House arrest: From state of emergency measure to a norm in administrative law

Until 2016, individuals suspected of terrorist activities, including foreign fighters, could be placed under house arrest only as a measure taken through a judicial criminal process (as a means of pre-trial detention or as punishment after a criminal proceeding). The only derogation authorized was set under the regime of a state of emergency, in the framework of a law passed during the French–

7 Article 3 of the Decree of 7 August 2017 authorizing the processing of personal data relating to the investigation and monitoring of exit bans, available in French at: [www.legifrance.gouv.fr/eli/arrete/2017/8/7/INTD1708806A/jo](http://www.legifrance.gouv.fr/eli/arrete/2017/8/7/INTD1708806A/jo).

8 CNIL, Decision No. 2017-229, opinion on draft order authorizing the processing of personal data relating to the monitoring of orders prohibiting leaving the territories, 20 July 2017, available at: <https://tinyurl.com/y6eya9mb>.

9 As of November 2016, 244 prohibitions were in force. See Alain Marc, “Projet de loi de finances pour 2017: Sécurités”, 24 November 2016, p. 30, available at: [www.senat.fr/rap/a16-146-15/a16-146-151.pdf](http://www.senat.fr/rap/a16-146-15/a16-146-151.pdf).

10 See CAT, “European Jihad Watch”, No. 4, November 2017, available at: <http://cat-int.org/wp-content/uploads/2017/11/EJW-Novembre2017-french.pdf>.

11 Government Report to Parliament on the Implementation of Law No. 2017-1510 of 30 October 2017 Strengthening Internal Security and the Fight Against Terrorism, 1 November 2018, p. 20, available at: [www2.assemblee-nationale.fr/content/download/75798/778106/version/1/file/Loi+SILT+-+Rapport+au+Parlement+2018.pdf](http://www2.assemblee-nationale.fr/content/download/75798/778106/version/1/file/Loi+SILT+-+Rapport+au+Parlement+2018.pdf).

Algerian liberation war in 1955.<sup>12</sup> The administrative authority to place persons under house arrest was expanded during the 2015–17 state of emergency. The 1955 law has been amended a few times to grant more powers to the authorities, such as imposing limits on communication with certain individuals, requiring individuals to come to the police station up to three times a day, and allowing convicts of terrorism to be placed under “mobile electronic surveillance”.<sup>13</sup> Until December 2016, the law limited house arrest to twelve months. However, an amendment was later added to allow the minister of the interior to request a prolongation from the administrative judge for another ninety days. Such a request can be renewed without limits.<sup>14</sup> As with most administrative measures, the government has the power to enforce them without prior legal proceedings. The administrative judge can review the measure only *a posteriori*, if an appeal is made.<sup>15</sup>

House arrest as an administrative measure was first introduced in French law outside of the exceptional state of emergency measures on 3 June 2016. This new amendment gave the government the power to place individuals who are returning from Syria, and for whom there are serious reasons to believe that they pose a threat to public security, to be placed under administrative control, including house arrest, and to be required to periodically check in at police stations up to three times a day, for a period of a month. Another amendment quickly prolonged the period to two months.<sup>16</sup> On October 2017, Chapter 8 on “Individual Measures of Administrative Control and Surveillance” was included in the Law on Internal Security. The chapter is known by its French initials MICAS (“Mesures individuelles de contrôle administratif et de surveillance”), which have become a synonym for the category of people to which it has been applied.

The new norms allow for different surveillance measures, including imposing house arrest for up to one year “for the sole purpose of preventing the

12 See Article 6 of the original Law on State of Emergency of 3 April 1955: “The Minister of the Interior and, in Algeria, the Governor General may order a house arrest in a territorial division or a specific locality of any person residing in the area fixed by the decree referred to in Article 2, whose activity proves to be dangerous for security and public order” (unofficial translation).

13 In November 2015, an amendment added the possibility of requiring the persons arrested to come to the police station up to three times a day and to be prevented from contacting certain persons, and allowing persons previously convicted of terrorism-linked offences to be placed under “mobile electronic surveillance”: Art. 4 amending Law No. 2015-1501, 20 November 2015. In December 2016, another amendment was introduced to regulate the prolongations. These were found to be in part unconstitutional by the Constitutional Court in March 2017 (Decision No. 2017-624 QPC, 16 March 2017).

14 See Art. 6(14–16) of the 1955 Law on State of Emergency as amended by Art. 2 of Law No. 2016-1767, December 2016.

15 Law on State of Emergency, Art. 14-1.

16 Law on Internal Security, Arts L225-1, L225-2 (amendments introduced in June and July 2016). The law empowers the government to limit a person’s movement into a defined geographical territory or to place him under house arrest for a maximum of eight hours; to require the person to check in at the police station up to three times a day, including during holidays and weekends; to prohibit communications with certain persons; and to impose an obligation to declare a change of address. These control measures will be abrogated if a criminal procedure related to terrorism (and only in this case) is opened; see Art. L225-5.



commission of terrorist acts”, and are not limited to returning foreign fighters.<sup>17</sup> They may be imposed on a person fulfilling two cumulative conditions: (1) if their behaviour constitutes a threat of “particular gravity” for security and public order, and (2) if they have (a) been in habitual contact with persons or organizations inciting, facilitating or participating in acts of terrorism, or (b) disseminated or adhered to ideologies inciting the commission of acts of terrorism or apology for such acts.<sup>18</sup> The government reported in November 2018 that the administrative courts interpreted “a behaviour of particular gravity” as including threats of death or violence against a person, especially against a public authority; comments promoting death as a martyr; staying in combat zones and participation in military training or in combat; the practice of combat sports; the possession of declared or undeclared weapons; and the diffusion of violent messages or images.<sup>19</sup>

Twelve hours of daily curfew, the prohibition against leaving a defined area and the requirement to come to the police station up to three times per day, every day, including during weekends, has a vast impact on all aspects of someone’s life – the possibility of working, taking care of the family, one’s health, etc.<sup>20</sup> These measures were commonly used during the 2015–17 state of emergency. Official data reports 400 persons placed under house arrest at the beginning of the state of emergency, and a total of 754 in November 2017.<sup>21</sup> At the end of the state of emergency, forty-one house arrests were still in force (sixteen of them for more than a year).<sup>22</sup> As of April 2019, measures under the new MICAS regime were used against 127 persons.<sup>23</sup> Between July and December 2018, the minister of the interior issued twenty-two individual measures of administrative control and supervision to persons released from prison who had been convicted of acts related to terrorism or reported as radicalized during the course of their incarceration.<sup>24</sup> As noted by the government, the control and surveillance measures taken with regard to those individuals are

17 See Art. L228(1–7) of the Law on Internal Security, introduced by Art. 3 of Law No. 2017-1510, 30 October 2017. The Ministry of the Interior, in practice usually upon the recommendation of the security services, can limit the movement of persons into a defined geographical zone, require them to come once a day to the police office and/or require them to declare movement beyond their municipality or any change of residency. Instead of these measures, the minister of the interior can propose to have the individual fitted with an electronic bracelet – previously only a judicial judge could impose this measure.

18 Law on Internal Security, Art. L228-1 (2017).

19 *Government Report*, above note 11, p. 42.

20 See Amnesty International, *Upturned Lives: The Disproportionate Impact of French State of Emergency*, February 2016; Commission Nationale Consultative des Droits de l’Homme (CNCDH), *Avis sur le suivi de l’état d’urgence (Assemblée plénière – 18 février 2016 – Adoption: unanimité, trois abstentions)*, 2016, p. 4, available at: [www.cncdh.fr/sites/default/files/16.02.18\\_avis\\_suivi\\_etat\\_durgence\\_1.pdf](http://www.cncdh.fr/sites/default/files/16.02.18_avis_suivi_etat_durgence_1.pdf).

21 Ministry of the Interior, “Bilan de l’état d’urgence”, 3 November 2017, available at: [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).

22 For official data, see *Bilan statistique de l’état d’urgence (sur la base des données transmises par le ministère de l’intérieur)*, 14 November 2015, available at: [www.assemblee-nationale.fr/static/15/lois/bilan\\_AAR.pdf](http://www.assemblee-nationale.fr/static/15/lois/bilan_AAR.pdf).

23 For official data provided by the Ministry of the Interior, see: <https://tinyurl.com/y4ag2scy>.

24 See *Government Report*, above note 11, pp. 48, 79.



of great interest, since it is difficult to anticipate their behaviour, based on the one they adopted in detention. This surveillance makes it then possible to observe their relationships ..., their religious practice (attending this or that mosque), their activity on social networks, their reintegration efforts, etc.<sup>25</sup>

The imposition of house arrests without a proper judicial review procedure could potentially violate individual freedoms. The French *habeas corpus* is established in Article 66 of the 1958 French Constitution. It entrusts ordinary judges (and not administrative judges) with safeguarding individual liberty.<sup>26</sup> Placing a person under house arrest as a preventive measure without judicial oversight of an ordinary judge was argued by petitioners to constitute a violation of individual freedoms within the meaning of Article 66.<sup>27</sup> The Constitutional Court rejected this interpretation. According to the Court, house arrest was viewed as a limitation of freedom of movement, which is under the competence of administrative courts, and not a restriction of liberty, which is exclusively under the review competence of an ordinary judge. As house arrest is limited by law to twelve hours a day, the Court found that this provision did not constitute a deprivation of individual liberty, thus falling out of the exclusive scope of ordinary courts.<sup>28</sup> It noted, however, that if a legislation would allow for house arrest of more than twelve hours per day, it would constitute a deprivation of individual liberty, thus signalling to the government that an amendment of such a kind could be declared unconstitutional.<sup>29</sup>

## The judicial review by French administrative courts

The proliferation of administrative prerogatives not only confers more power to the executive authorities to limit individual liberties, but also transfers the competence of judicial review to the administrative judge, who has exclusive jurisdiction over acts by State authorities.<sup>30</sup> Thus, although administrative courts are structurally

25 *Ibid.*, p. 79.

26 According to Article 66 of the French Constitution of 1958, “[n]o one shall be arbitrarily detained. The Judicial Authority, guardian of the freedom of the individual, shall ensure compliance with this principle in the conditions laid down by statute.”

27 Constitutional Council, *M. Cédric D.*, Decision No. 2015-52, Appeal for Judicial Review (QPC), 22 December 2015, available at: [www.conseil-constitutionnel.fr/decision/2015/2015527QPC.htm](http://www.conseil-constitutionnel.fr/decision/2015/2015527QPC.htm).

28 *Ibid.*, paras 5, 6. Later, the Council of State similarly found that the closure of places of worship does not necessarily impair individual liberties. Constitutional Council, *Ligue des Droits de l’Homme*, Decision No. 2016-535, Appeal for Judicial Review (QPC), 19 February 2016, paras 4, 6.

29 “Considering secondly that, in relation to a house arrest order issued by the Minister of the Interior, the individual ‘may also be required to remain in the place of residence determined by the Minister of the Interior during specific hours set by the latter, up to a maximum of twelve hours out of every twenty-four hours’; that the maximum period of time during which an individual placed under house arrest is required to remain at home, which is set at twelve hours per day, cannot be extended, otherwise the placing under house arrest would then be regarded as a measure restricting freedom, and accordingly subject to the requirements laid down by Article 66 of the Constitution.” Constitutional Council, *M. Cédric D.*, above note 27, para. 6.

30 This separation dates from the French Revolution, when the revolutionary powers sought to restrain the powers of the judiciary, who were represented by the bourgeoisie. Still today the French legal system is constituted as a dual system: administrative (public law) and judicial (civil and criminal matters).

less impartial and independent than courts with ordinary judges, they are gaining more and more competence through the expansion of administrative legislation and its legitimization by the Constitutional Court as demonstrated above.

Administrative judges have very different professional backgrounds from ordinary judges, who are trained at law school and the National School of Magistrates. Administrative judges are not required to hold a law degree. Many of them are graduates of the prestigious National School of Administration, which is difficult to access and trains many of the future French political elite. Others may be recruited after obtaining work experience in the administration. As for the Conseil d'État (Council of State), the highest administrative jurisdiction, the government nominates a significant portion of its administrator-judges. These educational and professional networks are likely to create a culture of proximity between the government and administrative judges, which may result in a general benevolence on the part of administrative judges when assessing the legality of a measure undertaken by State institutions.<sup>31</sup>

Administrative courts differ considerably from ordinary courts when it comes to procedural rules. For example, administrative courts rely on *notes blanches* (white notes) as evidence. These take the form of anonymous documents provided by the security and surveillance services of the Ministry of the Interior. They transform intelligence into evidence for use in the administrative courts. Such notes may contain information detailing suspicious behaviour or actions, including association with other suspected persons, but provide no information vis-à-vis the sources of that information, and are undated and unsigned. While white notes cannot be admissible before the criminal courts, their use has come to be legitimized in administrative courts by administrative jurisprudence.<sup>32</sup> In practice, the administrative courts' treatment of white notes is underpinned by a presumption of truth, as can be seen in numerous decisions citing a white note as the sole evidence upon which a decision is based. As the president of the litigation section at the Conseil d'État, in a Parliamentary Committee on the state of emergency, stated: "We start from the principle that the intelligence services work honestly and they don't exaggerate the content of the white notes."<sup>33</sup> According to an administrative judge, "[Judicial review] is not easy to do .... [Y]ou have to determine the dangerousness of a person according to an uncertain factual basis, based on fears, on a number of assumptions .... The decision of the

31 For a fascinating socio-legal study on the Council of State, see Bruno Latour, *La fabrique du droit: Une ethnographie du Conseil d'État*, Collection Sciences Humaines et Sociales, Éditions La Découverte Poche, Paris, 2004.

32 The legality of the white notes was first approved by the Council of State in 1991 and 2003 (Council of State, *Ministre de l'Intérieur c. Diouri*, Case No. 128128, 11 October 1991; Council of State, *Ministre de l'Intérieur c. Rakhimov*, Case No. 238662, 3 March 2003). It was confirmed again by Council of State Case No. 394991 of 11 December 2015, where the Council upheld that there is no legislative provision or principle that prevents the administrative judge from considering facts provided by the white notes if they were submitted to an adversarial process and were not seriously disputed by the applicant.

33 Bernard Stirn, President of the State Council's litigation section, Report No. 3784, National Assembly, 25 May 2016, available at: [www.assembleenationale.fr/14/rapports/r3784.asp](http://www.assembleenationale.fr/14/rapports/r3784.asp).

administrative police, by construction, is prospective.”<sup>34</sup> There is a clear tendency to rely heavily on white notes in administrative jurisdictions without further proof being sought or established. As long as the white notes “are not seriously contested by the appellant”,<sup>35</sup> they are usually accepted and thus the burden of proof is *de facto* transferred to the individual, who has to convince the court that he is not dangerous – an uneasy task in light of a general hostility and prejudice against Muslim appearance and religious practices, which has been much reinforced in a post-terror-attack Paris.

As stated by French scholars Stéphanie Hennette Vauchez and Serge Slama:

The decisive value of these white notes and the weight they take in the majority of the cases related to the state of emergency constitute one of the most significant elements of the exceptionalism of the administrative judicial procedure .... And, except in the rare cases where the applicant, often thanks to good criminal lawyers, manages to “dismantle” the police version, the administrative judge generally endorses the factual elements reported by the white notes.<sup>36</sup>

Researchers who studied the administrative decisions at lower levels during the state of emergency found that the administrative judges exercised only a “façade of control”. They found that in half of the cases, the judges based their decisions only on the white notes of the intelligence services.<sup>37</sup>

According to State statistics, the jurisprudence of the Council of State, the highest administrative jurisdiction on house arrest, represented 75% of decisions concerning the State of emergency. Out of eighty-two decisions, sixteen reached total or partial satisfaction.<sup>38</sup> As for administrative courts at a lower level, it was reported by the Ministry of the Interior that from November 2015 until February 2016 the Ministry of the Interior indicated that 400 persons were placed under house arrest. Out of them, 179 persons had recourse to an administrative judge to review the decision; only twelve procedures ended in favour of the appellant revoking the house arrest.<sup>39</sup> It can be concluded that even if the Council of State has at times played its role of guardian of civil liberties and cancelled specific

34 Guillaume Odinet, “Le rôle du juge administratif dans le contrôle de l’état d’urgence”, *Les Cahiers de la Justice*, Dalloz, 2017, p. 278 (author’s translation). For background, see Pierre Alonso, “Notes blanches: Les corbeaux de la place Beauvau”, *Libération*, 15 February 2016, available at: [www.liberation.fr/france/2016/02/15/notes-blanches-les-corbeaux-de-la-place-beauvau\\_1433587](http://www.liberation.fr/france/2016/02/15/notes-blanches-les-corbeaux-de-la-place-beauvau_1433587).

35 As required by the jurisprudence; see above note 32.

36 Stéphanie Hennette Vauchez and Serge Slama, “Harry Potter au Palais Royal? La lutte contre le terrorisme comme cape d’invisibilité de l’état d’urgence et la transformation de l’office du juge administrative”, *Les Cahiers de la Justice*, Dalloz, 2017, pp. 287, 288 (author’s translation).

37 Syndicat de la Magistrature, *Projet de loi renforçant la sécurité intérieure et la lutte contre le terrorisme: Observations du Syndicat de la magistrature devant la commission des lois de l’Assemblée nationale*, 26 July 2017, pp. 3–4.

38 See official data in *Bilan statistique de l’état d’urgence*, 14 November 2015, available at: [www2.assemblee-nationale.fr/static/15/lois/bilan\\_contentieux.pdf](http://www2.assemblee-nationale.fr/static/15/lois/bilan_contentieux.pdf).

39 National Assembly, *Mesures administratives prises en application de la loi n° 55-385 du 3 avril 1955*, 18 July 2016, available at: <https://tinyurl.com/y4x459c7>. For the next period, see: <https://tinyurl.com/y3bndqja>.

abusive house arrests, it has predominantly upheld and legitimized administrative decisions linked to the state of emergency and has generally supported and facilitated the State's actions.<sup>40</sup>

Thus, under the state of emergency, the role and prerogatives of the administrative judge vastly expand at the expense of those of the ordinary judge, thereby broadening the scope of administrative procedures, which are generally less protective of defendants' rights, and blurring the frontier between the traditional roles of ordinary and administrative judges.<sup>41</sup> The next part will address the function of the criminal law and judges.

## Criminal justice: An expanding pre-emptive paradigm

Pre-emptive approaches are not domains reserved to administrative law. They are practiced in the French criminal justice system for the prosecution of French foreign fighters who have returned to France, and persons suspected of adherence to terrorist groups in France. This is not a new phenomenon, since it is based on legislation and policies from the 1980s that have their roots in earlier practices.<sup>42</sup> In recent years, however, these practices have reached an unprecedented peak in their application and expansion because of the terrorist attacks committed in France and the growing engagement of young French persons with jihadist groups in the Iraqi–Syrian front. As noted by French vice counter-terrorism prosecutor, Camille Hennetier:

The current era is marked by the growing power of the judicial system in terrorism cases to neutralize the actors. The cursor seems to have moved back in time, as part of anticipation of risk, and also of a “political” management of the current crisis. We are confronted with a dilemma and condemned to efficiency ... to search for a balance between the criminal characterization of earlier preparatory elements, the search for a confirmed intentionality and the measuring of the risk.<sup>43</sup>

40 See Carine Placzek and Camille Lucotte, *Terrorisme et état d'urgence – Jurisprudence des hautes juridictions françaises*, Capstone Course on International Crimes and Counterterrorism, under the direction of Sharon Weill, Sciences Po Paris, April 2017, available at: <https://tinyurl.com/y6c5ofpz>. This report compiles and provides an analysis of all highest French courts' decisions dealing with terrorism until 2017.

41 Thérèse Renaud, “Du rififi chez les juges: Le juge administratif est-il le nouveau gardien des libertés publiques?”, *AJDA* 2016, 2016, pp. 1677–1678.

42 On earlier practices, see Jeremy Shapiro and Bénédicte Suzan, “The French Experience of Counterterrorism”, *Survival*, Vol. 45, No. 1, 2003; Olivier Cahn, “Le dispositif antiterroriste français, une manifestation du droit pénal de l'ennemi”, *Archives de Politique Criminelle*, Vol. 2016/1, No. 38, 2016, pp. 91–99.

43 Camille Hennetier, cited in Antoine Mégie, *La réponse judiciaire au terrorisme au regard de la Charte des droits fondamentaux de l'UE*, Brussels, February 2017, p. 18.

## The institutional counterterrorism framework

Academic literature characterizes the French legal counterterrorism framework as centralized, specialized and adjustable.<sup>44</sup> In 1963, during the Algerian War of Independence, terror and political offences came under the competence of the State Security Court, a special court that operated for almost twenty years. Composed of military officers as judges, its proceedings were held behind closed doors and it had no provision for appeal.<sup>45</sup> This procedure produced thousands of cases, many of them in order to dissolve political groups. It was abolished in 1981 with the election of the socialist government, and a new counterterrorism framework was introduced in 1986: terror-related infractions were to be prosecuted within the regular judicial system, but in a centralized and specialized manner and with specific derogations in terms of procedure.<sup>46</sup> It created a specialized corps of investigating judges and prosecutors based in Paris to handle all terrorism cases. It is composed today of thirteen magistrates at the special National Antiterrorism Prosecution Service, and thirteen investigative judges.

Unlike investigations carried out by specialized magistrates, the trial of cases related to terrorism is done within regular criminal jurisdiction. The prosecution of terrorism-related offences, which incur a penalty of up to ten years' imprisonment, takes place before the 16th Chamber of the Court of First Instance in Paris, which is composed of a bench of three judges. The prosecution of terrorism-related crimes, which incur a penalty of over ten years, is judged by the Paris specially composed Assize Court (Cour d'Assises), which is composed of professional judges only, without popular jury, contrary to the composition of the Assize Court with respect to non-terrorism-related criminal matters.<sup>47</sup> Instead, its bench is composed of a president and four judges (and six on appeal). However, the Assize Court does not specialize in terrorism. It is composed of different judges in each trial. The presiding judge is chosen from the regular pool of assizes judges, and the four other magistrates ("assessors") can be any magistrate – investigative or sitting judges in all matters, without any particular experience in terrorism or radicalization. In contrast, the first instance trial

44 See, among others, Antoine Garapon, "Is There a French Advantage in the Fight against Terrorism?", *Analisis del Real Instituto Elcano*, No. 110/2005, 1 September 2005; Franck Foley, *Countering Terrorism in Britain and France*, Cambridge University Press, Cambridge, 2014.

45 Vanessa Codaccioni, *Justice d'exception*, CNRS, Paris, 2015, p. 143.

46 This includes the Paris public prosecutor, the counterterrorism investigative units and the trial courts, which hold concurrent jurisdiction over terrorist offences. See Code of Criminal Procedure (Code de Procédure Pénale, CPP), Art. 706-17, and Law No. 86-1020 of 9 September 1986. In practice, as a matter of policy all cases are held in Paris. This jurisdiction extends to cover terrorist acts committed outside France (see Criminal Code, Art. 113-13, amendment introduced in 2012).

47 The origin of the Cour d'Assises Spécialement Composée is a law of 21 July 1982 that established its competence over crimes related to the military and the safety of the State, thus replacing the Cour de Sécurité de l'Etat abolished in 1981. In 1986, following threats on members of the jury by the extreme left group Direct Action in a terror case, it was decided to extend the competence of this special chamber to cases dealing with acts of terrorism. Today it also includes a competence over organized crime. Until recently the Court was composed of seven magistrates, but due to the flow of terrorism cases it has been reduced to five – one president and four assessors – who can be any magistrate (investigating or sitting judges). Unlike the jury courts, decisions are adopted upon a regular majority.

chamber competent to hear terrorism and foreign fighter cases of up to ten years' punishment – the 16th Chamber – is composed of the same panel of three judges and has become very specialized since it has heard over 200 cases related to the Iraqi–Syrian conflict since 2015.<sup>48</sup> Thus, foreign fighters prosecuted in France are prosecuted upon their return within the ordinary French criminal justice system, yet within a centralized and to a large extent specialized system.

### Main accusation: Association of wrongdoing in relation to a terrorist enterprise

Although the French Criminal Code has continuously evolved to include more and more criminal offences specifically adapted to the development and changing modes of international terrorism, such as the new offences concerning apology for terrorism, financial support of terrorism and recruitment, almost of all the prosecution of foreign fighters involves the long-standing offence of “association of wrongdoing in relation to a terrorist enterprise” (*association de malfaiteurs en relation avec une entreprise terroriste*, AMT).<sup>49</sup> Codified in Article 421-2-1 of the French Criminal Code, AMT penalizes as a terrorist offence participation in a group constituted for the purposes of the preparation of a terrorist act.<sup>50</sup> There is no requirement that the individual contributes materially to the commission of the terrorist act in itself, nor that the terrorist plan is executed.

AMT is sometimes translated in English as a conspiracy offence. At the same time, it resembles in many aspects the criminalization of a membership of an illegal organization, because the mere participation in a group that has a plan to commit a terrorist act, with the knowledge that the group has a plan to commit such an act, is enough to qualify as a terrorism-related crime.

According to the French Ministry of Justice, AMT is “the keystone of the fight against terrorism”.<sup>51</sup> The prosecution of AMT is a central element in the

48 As indicated by the CAT, between 2014 and 2017, 238 people related to the Syria–Iraq zone were prosecuted. As of 15 May 2018, the Counter terrorism Prosecutor's Office had dealt with 513 files related to the Syria–Iraq zone, involving 1,620 individuals. See CAT, above note 1, p. 4. In 2017, only four cases related to the Syrian–Iraqi front were held before the chamber. However, this is going to change radically due to the new prosecution policy – see discussion below. Currently, ninety criminal cases are waiting to be heard by the Assize Court. For an article on first instance cases trials before the 16th Chamber, see Antoine Mégie and Jeanne Pawella, “Juger dans le contexte de la ‘guerre contre le terrorisme’: Les procès correctionnels des filières djihadistes”, *Les Cahiers de la Justice*, Dalloz, 2017.

49 This has always been the case. Franck Foley indicates, for example, that between 1995 and 2005 (for all forms of terrorism, including Basque and Corsican cases), out of 502 convictions by courts for terrorism, 403 were for AMT. See F. Foley, above note 44, p. 202.

50 Article 421-2-1 of the French Criminal Code defines “the participation in a group formed or in an agreement established for the preparation, characterized by one or more material facts, of one of the acts of terrorism referred to in the preceding articles” as a terrorism offence. Acts of terrorism are defined in Article 421-1 and include attacks on life and physical integrity; the hijacking of planes and other modes of transport; theft, extortions, destructions and degradations; membership in or support of dissolved armed groups and movements; offences in relation to armaments, explosives and nuclear materials; dealing in stolen goods related to these offences; and some aspects of money laundering and financing. These acts become “terrorist” if they occur with the additional qualification of “aiming to seriously trouble public order [*ordre public*] by intimidation or terror”.

51 Ministry of Justice, “La lettre du porte-parole: 23 novembre 2016”, 2016.

French counterterrorism judicial framework because it represses the criminal project at the stage of preparatory acts, and thus makes it possible to prevent the commission of terrorist acts. AMT, punishable today by a sentence of up to thirty years (and life imprisonment for AMT leaders), allows the judicial authority to intervene long before the act is committed. This was highlighted by Camille Hennetier, French vice counterterrorism prosecutor:

“The evolution of the threat in France, the attacks, the multiplication of the desire for action by individuals on the national territory, leads to the desire to judicialize as early as possible, to neutralize individuals deemed potentially dangerous, to achieve risk zero. In practical terms, with regard to the Iraqi-Syrian zone, this allows the judicialization of people at early stages – people who only wish to go there in a context of a radicalization process, even though the integration of a terrorist group in an area is not yet effective. Previously, the judicialization occurred once the integration into the terrorist group was established or presumed. In the case of projects for violent action on French soil, this allows the interpellation of suspects at the stage of intentionality, materialized by more or less operational exchanges, sometimes at the commencement of the preparatory act.”<sup>52</sup>

### *The elements of the crime*

AMT has a long history in French criminal law, and its current formulation dates from 1996. The three core requirements necessary for a conviction based on AMT as defined in Article 421-2-1 of the Criminal Code are the following:

1. the existence of a *group* with a terrorist *aim*;
2. an *individual* act of participation in the group (without necessarily contributing to the terrorist acts in itself); and
3. the individual *intention* to participate in the group while being *conscious* of its terrorist project. The terrorist act therefore does not necessarily have to be committed for a conviction based on AMT.

### *First element: A group with a terrorist aim*

When it comes to the first element, the existence of a group with a terrorist aim, both the notion of a “group” and the idea of a “terrorist aim” are ambiguous. Beyond the fact that a “group” must comprise at least two individuals, the precise degree of organization necessary remains unclear. While the Court of Cassation has asserted that the notion of terrorism “implies a minimum of organization”,<sup>53</sup> it has also ruled that AMT does not presuppose “a structured organization among

52 A. Mégie, above note 43, p. 18 (author’s translation).

53 Court of Cassation, Decision No. 93-14.837 (1st Civil Chamber), 17 October 1995, available at: [www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007035042](http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007035042).



its members”.<sup>54</sup> Defence lawyers have highlighted that this ambiguity has allowed the prosecution of vast networks of suspects only very loosely related to one another. Comparable uncertainties persist with respect to the conceptualization of the “terrorist aim” that such a group must pursue. The only definitional indication given is that it must seek to “trouble public order through intimidation and terror” as stipulated in Article 421-1 of the Criminal Code, with the Court of Cassation noting that “Parliament and the Constitutional Court have left it to the judicial authority to interpret the outline of the notions of ‘intimidation’ and ‘terror’”.<sup>55</sup>

In the context of foreign fighters, French persons who joined an armed group in Syria or Iraq have been prosecuted for AMT. In a recent case from 2018, the 16th Trial Chamber made a clear distinction between jihadist groups which are recognized terrorist organizations and those which are not, even if they are aiming at applying Sharia law.<sup>56</sup> The Court acquitted a person charged with AMT for joining the armed group Ahrar al-Sham, noting:

The group Kataeb Ahrar al-Sham appeared at the end of 2011, with the aim of overthrowing the government of Bashar al-Assad and replacing it with an Islamic emirate; it did not claim responsibility for suicide attacks or abuses committed against the civilian population.<sup>57</sup>

The Court further noted that the UN has never recognized this group as a terrorist organization and concluded that Ahrar al-Sham is not a group “that can be qualified as terrorist”.<sup>58</sup> Since the accused was a part of this armed group, which did not employ terrorist actions, he was acquitted:

There is obviously a fundamental element missing to declare the accused culpable of the charges since ... if no terrorist act can be attributed to this organization, nothing allows the claim that joining this organization, becoming its member and even fighting for it, constitute a terrorist-related offence.<sup>59</sup>

Interestingly, this person was prosecuted *in absentia*. While he was declared dead in combat by the armed group on 21 November 2013, an arrest warrant was issued by the investigative judge because of “the absence of irrefutable proof of death”, and

54 Court of Cassation, Decision No. 14-88.329 (Criminal Chamber), 8 July 2015, available at: [www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000030869110](http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000030869110).

55 Court of Cassation, Decision No. 16-84.596 (Criminal Chamber), 10 January 2017, available at: [www.courdecassation.fr/jurisprudence\\_2/chambre\\_criminelle\\_578/5993\\_10\\_35897.html](http://www.courdecassation.fr/jurisprudence_2/chambre_criminelle_578/5993_10_35897.html).

56 “The question that arises is whether or not, beyond his jihadist conception, which embraces diverse conceptions and which is not necessarily synonymous with terrorist involvement, such as his willingness to have Sharia law governing that country and to take up arms to ensure such an objective, X has actually carried out [terrorist] infractions .... In other words, did X join a terrorist organization, or at least, an organization that conducts operations that amount to acts of terrorism?” Paris Court of First Instance, Case No. 13099000941, Judgment (16th Criminal Chamber), 28 September 2018, p. 22. On file with author.

57 *Ibid.*, p. 22.

58 *Ibid.*, p. 23.

59 *Ibid.*, p. 23.

numerous previous incidents “in which a jihadist presumed dead had attempted to come back clandestinely to France”.<sup>60</sup>

In another similar case heard on December 2018, the accused openly recounted how he acquired military training with Ahrar al-Sham in Syria and was willing to fight against al-Assad’s government. If such account was provided in the context of a different armed group, the act could amount to a crime according to French law. In this case, however, it was not, as the al-Sham group was not recognized as a terrorist group despite the request of the prosecution. The judge, moreover, criticized the prosecution’s request and clarified that it is not up to the court to take such a political decision, pointing out the relativism of the term “terrorist group”.<sup>61</sup>

An entity is not terrorist in essence; it is a relative qualification, which may vary according to the countries or international organizations called upon to decide on this point, and for the same country or international organization, the qualification may vary from one period to another. ... It is easy to understand that if the Court follows the prosecution’s request to recognize the terrorist character of the group Ahrar al-Sham, while ignoring the positions of certain Western countries, which, according to the prosecution, supported this group for realpolitik purposes, the Court would venture into the sphere of geopolitical debate that cannot be its own.<sup>62</sup>

The Court, however, did not avoid ruling on the question.<sup>63</sup> It decided that al-Sham was not a terrorist organization, addressing in detail the different arguments of the prosecution. One of the prosecution’s arguments was that al-Sham’s members are allegedly responsible for numerous crimes against humanity, as affirmed by the submissions of reports by Human Rights Watch and the Independent International Commission of Inquiry on the Syrian Arab Republic. The Court distinguished the crime of terrorism from crimes against humanity and pointed out that an armed group which commits crimes against humanity is not necessarily a terrorist group. The Court further affirmed that commanders of armed forces may be found responsible for war crimes and crimes against humanity for the acts of their subordinates through the international criminal law doctrine of command responsibility. In contrast, regular fighters (such as the accused) who did not contribute by themselves to the commission of any of those

60 Paris Appeal Court, *Ordonnance de Renvoi devant le Tribunal de Correctionnel*, File No. 1309900941, 3 May 2017, p. 15 (on file with author). See also at p. 43: “An official proof of this death, coming from a country in war, with which the French authorities have cut all diplomatic relations, cannot be provided.”

61 “It appears to the court that it is not within the jurisdiction of the judicial authority to order or recognize that a group constitutes a terrorist group and that if it did, the court would encroach on the powers of the legislative and executive branches.” Paris Court of First Instance, Case No. 14108000203, Judgment (16th Criminal Chamber), 12 December 2018, p. 14.

62 *Ibid.*

63 For a discussion on avoidance doctrines, see Eyal Benvenisti, “Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts”, *European Journal of International Law*, Vol. 4, No. 2, 1993; Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law*, Oxford University Press, Oxford, 2014, pp. 13–67.

illegal acts cannot be held criminally liable.<sup>64</sup> The reader of this judgment may remain puzzled: joining a group which is listed as terrorist, even if no further act is committed by the individual, is a crime under French law, while joining an armed group which is not recognized as terrorist, but whose members commit war crimes and crimes against humanity, is not.

Oddly, the prosecution had appealed these two decisions rendered by the same judge. It seems that the appeal came as a result of a policy concern: the prosecution would otherwise have to close numerous investigations, as it is not always possible to prove which exact armed group the accused belonged to.

### *Second element: Act of participation*

As for the second element of AMT, the individual act of participation, although the Court of Cassation has stressed that individuals need to “provide effective support” in order to be convicted for AMT,<sup>65</sup> it seems that the notion of effective support was broadly interpreted to enable convictions for what might be seen as minor and ineffective contributions to the terrorist enterprise.<sup>66</sup> In the case of foreign fighters, individuals have been convicted for AMT solely for joining a terrorist group in Syria and receiving training, whether they participated in combat or not.<sup>67</sup>

### *Third element: Intention to participate in the group and being conscious of the project*

Regarding the third element of intentionality, this need not imply an individual willingness to commit a terrorist attack oneself. Being “independent of the crimes prepared or committed by any of its members”, the offence of AMT is based on an “adhesion to a collective project of trouble to public order through intimidation”.<sup>68</sup> Put differently, the proof of participation in an AMT rests not on the individual’s personal terrorist intentions, but rather on the terrorist aim of the collective association, coupled with the individual’s knowledge of or adherence to that association.<sup>69</sup> In the case of Abdulkaher Merah and Fettah

64 *Ibid.*, p. 15. See also: “The fact of participating in an insurrection or an armed conflict, which is by nature disorganizing, prejudicial to public order, and likely to cause death and misfortune, cannot in itself be regarded as a terrorist act .... [S]uch an engagement can only be reprehensible if it is done within a group that is itself a terrorist group or if it is accompanied by specific acts of terrorism allegedly committed by the French citizen.” *Ibid.*, p. 20.

65 Court of Cassation, Decision No. 13-83-758 (Criminal Chamber), 21 May 2014, available at: <https://tinyurl.com/yy3zlym7>.

66 International Commission of Jurists, “International Commission of Jurists Submission to the Committee against Torture on the 6th Periodic Report of France”, April 2010, p. 2; Human Rights Watch, *Preempting Justice: Counterterrorism Laws and Procedures in France*, July 2008.

67 See, among many others, Paris Court of First Instance, Case No. 13099000941, Judgment (16th Criminal Chamber 2), 28 September 2018.

68 Court of Cassation, Decision No. 16-84-596 (Criminal Chamber), 10 January 2017, available at: [www.courdecassation.fr/jurisprudence\\_2/chambre\\_criminelle\\_578/5993\\_10\\_35897.html](http://www.courdecassation.fr/jurisprudence_2/chambre_criminelle_578/5993_10_35897.html).

69 As stipulated by the Court of Cassation in its Decision No. 13-83-758. In practice, however, evidence of a minor action showing that the suspect had knowledge of the terrorist activity concerned will suffice. See F. Foley, above note 44, p. 203.

Malki, the Assize Court went one step further.<sup>70</sup> Malki admitted that he had sold a weapon to Mohamed Merah, the brother of Abdulkader Merah, who committed the first jihadist attack on French soil in 2012 against Jewish children and French soldiers. He was accused and convicted of AMT despite the fact that he denied being aware of Merah's intention to commit a terrorist act. According to Malki, he sold the weapon following Merah's request in order to commit a robbery. The investigative judge noted that the elements in the file could not establish that Malki knew about a concrete plan and that this kind of weapon could indeed be used for "regular criminality".<sup>71</sup> However, according to the prosecution, Malki should have known that there was potential for Merah to commit a terrorist act:

The prosecution never argued that Malki knew that Merah was going to hit soldiers and Jews, but he knew the terrorist potential of the two brothers .... [I]n fact, it is not necessary to share the terrorist ideology to be prosecuted for criminal association ...[:] just knowing that the project was potentially terrorist.<sup>72</sup>

The Court followed this reasoning in its judgment, stating: "This Court was not convinced by the explanations of Fettah Malki that, when he entrusted the Micro Uzi and the protective jacket [to Merah], he was unaware of Mohamed Merah's radical Islamism".<sup>73</sup>

According to the Court's assumption that Malki could not possibly ignore Merah's process of radicalization since they had been friends since childhood, selling Merah a weapon – even if Malki thought that it was for an ordinary criminal purpose – made Malki criminally responsible for being part of Merah's conspiracy, which aimed at waging armed jihad, since he should have known that Merah could potentially use the weapon to commit a terrorist act. This decision was ruled even though nothing pointed to the assumption that Malki actually knew about Merah's intention to commit a terrorist act. Quite the contrary, in fact: Merah was the first person to ever commit a jihadist terrorist attack on French soil. Even the security services, which had surveyed him for years and which testified during the trial, described Merah in their notes as a curious person who liked to travel, and whom they wanted to recruit as an informant.<sup>74</sup> Other policemen described him as a lone wolf and were surprised by the attack.<sup>75</sup>

70 Specially Composed Assize Court, *Public Prosecutor v. Merah*, Case No. P/12079000/4, 2017. The court's decision is available at: [www.dalloz-actualite.fr/sites/dalloz-actualite.fr/files/resources/2017/11/motivation.pdf](http://www.dalloz-actualite.fr/sites/dalloz-actualite.fr/files/resources/2017/11/motivation.pdf).

71 Paris Appeals Court, Case No. 2016/0184, Appeal on Indictment (First Investigation Chamber), 17 June 2016, pp. 26, 27. On file with author.

72 Closing statement of the prosecutor before the Court, 30 October 2017, available at: <https://tinyurl.com/y6kc56wo> (author's translation).

73 Specially Composed Assize Court, *Merah*, above note 70, p. 9.

74 The testimonies were given before the Court on 16 October 2017. They are not available, as in France there are no official transcriptions of the proceedings. For a media report, see: "Quand le Renseignement voulait recruter Mohamed Merah", *Le Figaro*, 16 October 2017, available at: <https://tinyurl.com/y5bndkje>.

75 *Ibid.*

This decision was appealed, and on 18 April 2019 Malki was found not guilty of AMT.

### *Pre-trial detention*

French returnees from Syria who are suspected of having joined a jihadist group there are in most cases detained until the end of the trial proceedings. The legislative innovations of 2016 brought procedural changes, including the prolongation of pre-trial detention exclusively for those who could be tried for AMT: those suspected of AMT can now be held for up to three years prior to trial in cases of offence and four years in cases of felony, compared to only two years for those suspected of any other terrorism-related offence. The term can be prolonged twice for an additional period of four months each time.<sup>76</sup> This underscores the fact that the notion of AMT serves the purpose not only of securing convictions but also of justifying and prolonging pre-trial detention.<sup>77</sup>

In practice, the decision on pre-trial detention is taken by the liberty and detention judge,<sup>78</sup> in the nearby office of the investigative judge, behind closed doors, with the presence of defence lawyers. No public access to these procedures or to the decisions is available. In practice it is very rare for the detention and liberty judge not to follow the request of the investigative judge<sup>79</sup>. Once the investigation is completed, the accused may await their trial for another year; this period can be prolonged twice for an additional six months.<sup>80</sup> As a result of the prolonged period of pre-trial detention and the waiting period to be judged, persons who are presumed innocent can be held in detention for an extremely long time. For example, in the *Merah* case that was ruled in first instance in 2017, the Assize Court adjudicated facts from 2012, and the accused was in pre-trial detention – and isolation – during this entire period. As of the beginning of 2019, the 16th Criminal Chamber of the Court of First Instance has been hearing cases dating from 2015–16.

76 See Article 706-24-3 of the CPP, modified by Law No. 2016-731 of 3 June 2016, Art. 7.

77 Julie Alix, “Réprimer la participation au terrorisme”, *Revue de Science Criminelle et de Droit Pénal Comparé*, Vol. 2014/4, No. 4, 2014.

78 The liberty and detention judge may order a provisional detention in the following circumstance (CPP, Art. 144): for the preservation of evidence, the prevention of pressure against witnesses or victims, the prevention of fraudulent consultation with co-perpetrators or accomplices, the protection of the person under investigation or the prevention of the renewal of the offence, or to end an exceptional and persistent disturbance to public order. It should be noted that the use of alternatives to detention – such as restriction of movement and house arrest – depend also on the political environment. For example, electronic bracelets have been practically abandoned in favour of pre-trial detention since the attack at Saint-Étienne-du-Rouvray, which was committed by an individual placed under such a judicial control measure (interview with a defence lawyer specializing in terrorist cases, 24 April 2018, on file with author).

79 Interview with a French counterterrorism magistrate, Paris, March 2018. On file with author.

80 CPP, Art. 181. Thus, a suspect in pre-trial detention, once indicted, can wait for his trial in detention for two more years. However, according to the Court of Cassation, an extension of the time period cannot be granted because of institutional material problems such as lack of judges. See Michel Mercier, Report No. 252, Senate, 21 December 2016, p. 13, available at: [www.senat.fr/rap/116-252/116-2521.pdf](http://www.senat.fr/rap/116-252/116-2521.pdf).

The investigative judge or the liberty and detention judge can order the applicability of solitary confinement for detainees in pre-trial detention.<sup>81</sup> A detainee in pre-trial detention (or a convict in prison) can be subject to solitary confinement also as a result of a decision taken by the penitentiary administration, where it could be justified on the basis of the threat posed by the individual as well as the risk of proselytism and influence over other detainees.<sup>82</sup> There is no available data on how many people have been placed in solitary confinement, but it seems to be a growing practice.<sup>83</sup>

### *Level of punishment*

A constant legislative increase in the level of punishment for AMT, as well as a differentiation in punishments between those merely participating in AMT and those leading it, can be observed. Traditionally, AMT had been defined as an offence (*délit*) bearing up to ten years' imprisonment, and has fallen within the competence of the 16th Criminal Chamber. In 2004, for the first time in the history of French legislation, association of wrongdoing was set as a felony (*crime*) through a distinction that was made between the prosecution of simple participants, which remained defined as an offence punishable by ten years' imprisonment, and the leaders of the group, who could incur twenty years' imprisonment. Once this barrier was overcome, the escalation of sentences followed rapidly. Only two years later, in 2006, the punishment for mere participation in a group with a criminal aim (such as an attack on persons or destruction of property with an explosive, which could affect the life of persons) was raised to twenty years, and thirty years for the leaders. This harshening process reached its final peak in July 2016, with the punishment set at thirty years for participation and life imprisonment for directing the group.<sup>84</sup>

### *The prosecution policy*

As shown above, AMT is a very broad offence and allows for even remote acts to be qualified under its scope, with its perimeter still increasing. Significant for the prosecution of foreign fighters was the amendment of 2012 that provided for extraterritorial jurisdiction of AMT and thus enabled the prosecution of French

81 CPP, Art. 145-4-1.

82 This is for up to one year, with a periodic review every three months. Beyond one year, the confinement measure can be extended by the Ministry of Justice, in the absence of any maximum duration provided by the CPP. See CPP, Arts 726-1, R57-7-64 to R57-7-67, R57-7-68. The Council of State ruled in 2008 that solitary confinement could only be used in circumstances of strict necessity and that detainees had the right to appeal against a decision of solitary confinement. Council of State, Litigation Section, Decision No. 293785, 31 October 2008.

83 At the end of 2016, 15% of detainees convicted for terrorism-related offences were in isolation. Telephone interview carried out by the author's graduate student Joachim Stassart with the French Section of the International Observatory of Prisons, 28 March 2018. The author thanks Mr Stassart for his research assistance on this question.

84 Criminal Code, Art. 421-6.

citizens or residents for participation in AMT abroad based on the principle of active personality.<sup>85</sup> Further important expansions have been introduced by the legislation and the prosecution policy in 2016. Those reforms should be seen against the backdrop of the string of attacks that have hit France since 2015, which have placed tremendous public pressure on the counterterrorism magistrates of the prosecution office and the investigative judges. In the words of a leading magistrate, this pressure has led to “the comprehensible yet dangerous temptation to lock everybody up”.<sup>86</sup> This section will analyze the new prosecution policy introduced in 2016 and the recent amendments that defined a longer period of pre-trial detention in cases of AMT.

### *The 2016 shift: The presumption of foreign fighter’s criminal intention*

Until 2016, AMT had been essentially prosecuted as an offence – i.e., up to ten years’ imprisonment, with administration of the following penalties: ten years’ imprisonment for those who had been integrated for several years into a terrorist organization abroad (in particular Daesh), and who were usually prosecuted *in absentia*; six to nine years’ imprisonment for foreign fighters who had returned to France, depending on the length of their stay in the Iraqi/Syrian conflict zone and their acts; four to six years for people who had joined a terrorist armed group in France and were about to travel to Syria or Iraq; and finally, two to four years for those who had logistically supported persons who travelled to Syria or Iraq to join terrorist armed groups.<sup>87</sup> In April 2016, however, this prosecution policy changed radically. From the perspective of the authorities, prosecuting very diverse profiles under AMT, with the ceiling of a sentence of up to ten years’ imprisonment, led to a situation in which the degree of punishment did not sufficiently correspond to the differences in gravity of behaviour. It was therefore decided to qualify the joining of a jihadist terrorist group in the Syrian–Iraqi front (or participation in combat, within a terrorist organization) as a felony in view of committing crimes of attack on persons (up to twenty or thirty years’ imprisonment), instead of prosecuting such acts as an AMT offence (up to ten years’ imprisonment) as had been done until then. It has been considered as a presumption that joining a terrorist group after January 2015 (the Charlie Hebdo attacks) means adhering to and knowingly participating in an organization that commits terrorist felonies against persons. Thus, all returning foreign fighters who had joined a jihadist armed group after January 2015 would be charged with AMT as a felony.<sup>88</sup> This prosecution policy, passed in April 2016, has been applied retroactively to cases already under investigation by investigating judges and was approved by the highest criminal court, the Court of

85 *Ibid.*, Art. 113-13 (amendment introduced in 2012).

86 Interview with a high-ranking French counterterrorism magistrate, Paris, February 2017. On file with author.

87 M. Mercier, above note 80, p. 14.

88 “François Molins annonce un ‘durcissement considérable’ de la politique pénale en matière de terrorisme”, *Le Monde*, 2 September 2016, available at: <https://tinyurl.com/z7yz78g>.



Cassation.<sup>89</sup> Interestingly, the prosecutorial office took this decision autonomously after the French National Assembly had explicitly rejected suggestions to elevate activity on the battlefields of Iraq and Syria with jihadist armed groups to the status of felony two months earlier.<sup>90</sup>

This policy shift means that returnee foreign fighters face significantly higher prison sentences and will be judged by the specially composed Assize Court. In practice, however, the prosecution policy can still decide whether to prosecute a foreign fighter who has returned to France as a felony or an offence.<sup>91</sup> The fact that “the prosecution retains a pragmatic appreciation”<sup>92</sup> on whether to qualify certain behaviour as a crime or an offence may raise questions concerning the equality of treatment of defendants and the principle of legality. Also, as discussed in the next section, it is not clear on what basis the sentences have been imposed, as the penalty spectrum has significantly increased.

### *Prison sentencing: Between repression and prevention*

Traditionally French counterterrorism criminal legislation relied upon a combination of sweeping legal prerogatives and low-intensity punishment: while many suspects were caught in the wide net cast by AMT, their prison sentences were comparatively light.<sup>93</sup> The 2016 prosecution policy, however, has disturbed this equilibrium, introducing a new practice of imposing highly severe punishment for relatively minor acts which necessitate little evidence and for which a defence is difficult to establish. Interestingly, in a number of cases judged before the Special Assize Court in 2017–19, the Court ordered less severe punishment than that required by the prosecutor, and even rendered several acquittals, which is

89 Court of Cassation, Decision No. 16-82.692 (Criminal Chamber), 12 July 2016, available at: [www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000032900180](http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000032900180). The Court ruled that there is no need to prove that the person accused of criminal AMT actively participated in the preparation or the realization of the crime itself, only that he was a part of that group. AMT as a criminal offence is “an independent offence and is distinct from the crimes prepared or committed by some of its perpetrators and from the crimes characterized by certain facts that concretize it” (author’s translation).

90 Colette Capdeville and Pascal Popelin, Report No. 3515, National Assembly, 18 February 2016: “This change in the scale of sentences would undoubtedly upset the balance established by the legislator to this day. Such a criminalization would have the effect of having these offences tried by the Paris Special Assize Court, with the risk of overcrowding of the antiterrorist justice system and a loss of flexibility for the magistrates. For these reasons, my opinion is unfavourable. The Commission rejects the amendment.”

91 See Catherine Champrenault, Attorney-General of the Court of Appeal of Paris, in a recent interview by Jean-Baptiste Jacquin, Soren Seelow and Elise Vincent, “Justice antiterroriste: ‘Nous constatons un durcissement de la répression’”, *Le Monde*, 29 March 2018.

92 M. Mercier, above note 80, p. 15. As of 1 December 2016, the prosecution had opened 183 criminal inquiries (i.e., inquiries on the grounds of a *crime* rather than a *délit*) under the future competence of the Special Assize Court, targeting 483 individuals for AMT in relation to the ongoing jihadist violence in Iraq and Syria. This represents a massive increase over the case numbers of previous years.

93 F. Foley, above note 44, p. 205.

extremely rare in the French legal criminal system.<sup>94</sup> This indicates that the judges of the Assize Court confirm their independence from the prosecution policy; it also shows that the prosecution (along with the investigative judges) is “over-charging” and requesting heavy punishments in a rather harsh manner.

Among the first cases resulting from the new policy is the case against D. that was adjudicated in March 2018 by the Paris Special Assize Court. The facts concern acts committed in 2014. The prosecution policy was applied retroactively to the investigation that started prior to 2015, with the Court of Cassation – France’s highest criminal jurisdiction – validating this policy to be applied retroactively, imposing on the investigative judge a duty to comply with the request of the prosecutor to submit an indictment for AMT as a felony (and not as an offence).<sup>95</sup> The indictment stated the following:

The terrorist nature of the two jihadist groups, Al-Nusra Front and ISIL, that commit criminal acts, such as suicide bombings, assassinations, and other summary executions, ... with the aim of disturbing public order through intimidation and terror, for the purpose of creating an Islamic state, cannot be disputed and could not be ignored by the accused persons, who share the same radical and pro-jihadist convictions. Integration in such a terrorist group, followed by religious indoctrination, military training and participation in criminal activities of these groups, in this case at least combat, constitutes association with criminal terrorist wrongdoers, with the intention of committing crimes of injury to persons. All that must be demonstrated is that the accused had knowledge of the criminal nature of the offences prepared by the group; the association does not have to be linked to the preparation of a specific act of terrorism.<sup>96</sup>

The prosecutor requested twenty years’ imprisonment since the act was prosecuted as a crime. Interestingly, the Assize Court did not follow the prosecutor’s request and imposed fourteen years’ imprisonment.

In another similar case, an accused person, without any background of radicalization, joined the so-called Islamic State of Iraq and the Levant (ISIL) in Syria in 2014. According to the accused, he was shocked by the atrocities committed by ISIL in Syria, and he therefore volunteered to commit a terror attack in Lebanon as this was his only possibility of regaining possession of his confiscated passport and fleeing back home. Indeed immediately upon arrival in Beirut, he left for France. No evidence was found to prove the opposite, apart from the fact that for a few days upon his return to France, he was still in contact

94 See Antoine Garapon and Ioannis Papadopoulos, *Juger en Amérique et en France*, Odil Jacob, Paris, 2003, p. 98 (unofficial translation): “In France, the outcome of the assizes trial is often not in doubt, as indicated by the very low number of acquittals compared to that of the English courts .... Not because the French courts are more arbitrary, but because the cases that are heard are only those in which the facts are firmly established. The cases will reach this point after having been deliberated before by other judges, the investigating magistrate and the investigating chamber. Acquitting in the assizes trial is tantamount to invalidating the work of these magistrates, who have already taken decisions on the merits.”

95 Court of Cassation, Decision No. 16-82.692 (Criminal Chamber), 12 July 2016, available at: [www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000032900180](http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000032900180).

96 Indictment before the Assize Court, Investigation No. 2201/14/4, 20 June 2017, p 21. The accused have been detained since June 2014 and the trial started on 20 March 2018.

with ISIL members and was looking at jihadist websites. For the prosecution, this indicated that he was radicalized and dangerous, and it therefore requested fifteen years' imprisonment. The Court sentenced him to ten years' imprisonment, and the prosecution made an appeal.

These two cases demonstrate how due to the wide scope of AMT and its large spectrum of punishment, it is not entirely clear how the sentence is decided upon, especially in cases which are neither minor offences nor actual crimes. One of the main criteria for this decision seems to be the assessment of dangerousness and the level of radicalization of the accused person. This assessment is done through an "inquiry of the personality" by the judges during the trial hearings (procedurally done in most cases before looking at the facts) and through the examination of their behaviour in prison during the pre-trial detention, which usually lasts for two to three years. It appears that the sentence is imposed not only for acts committed, but also as a preventive measure, for acts that could potentially be committed. This raises several questions. First, it seems that the principle of legality is not entirely respected and that there is a risk of arbitrariness in decisions related to sentencing, as they lack clarity and objectivity. Second, while merging the goals of criminal repression and prevention (of future possible acts), liberal criminal law doctrines are being reshaped towards a hybridization. Pre-emptive criminal practices have introduced a broad understanding of risk assessments, accompanied by an evaluation of the predictability and dangerousness of the defendant. These are forms of categorization, where the individual, in his complex identity and reasoning for his actions, is reduced to a certain model or profile that will provide the basis for predicting his future actions through interpretation of his behaviour, beliefs and social habits. As a result, restrictions on liberty can then be imposed easily, and perhaps arbitrarily, as the material act is no longer at the centre of the analysis.

### *Global justice versus the war on terror paradigm*

The current policy relating to the prosecution of foreign fighters has been put in place to systematically refer cases to the counterterrorism investigation unit and not the war crimes and crimes against humanity unit, as well as to avoid conducting joint investigations. This is despite the fact that the senior investigative judge in the counterterrorism unit was previously in the war crimes unit, and it was hoped that better cooperation would be achieved between the separated units.<sup>97</sup> Thus, French

97 The Lafarge case may illustrate well this tendency. The Franco-Swiss Lafarge company, in order to maintain the functioning of its cement factory in Syria within an ISIL-controlled zone, was "paying for passes issued by the jihadist organization and buying raw materials necessary for cement production such as oil and pozzolana in areas under ISIS's control". While the lawyers representing clients in a lawsuit against the company claimed that "[b]y having business relations with the terrorist group ISIS in Syria, this company may have taken part in the financing of the group, being therefore complicit in war crimes and crimes against humanity", the investigation was not opened within the war crimes unit; instead, a joint investigation was initiated in the financial investigative division. Sherpa, "Important Step in the 'Lafarge in Syria' Case: Nomination of Three Investigative Judges", 13 June 2017, available at: [www.asso-sherpa.org/important-step-in-the-lafarge-in-syria-case-nomination-of-three-investigative-judges](http://www.asso-sherpa.org/important-step-in-the-lafarge-in-syria-case-nomination-of-three-investigative-judges); Sherpa, "Lafarge Sued for Financing ISIS", available at: [www.asso-sherpa.org/service/lafarge-sued-for-financing-isis-and-complicity-in-war-crimes-and-crimes-against-humanity-in-syria](http://www.asso-sherpa.org/service/lafarge-sued-for-financing-isis-and-complicity-in-war-crimes-and-crimes-against-humanity-in-syria).

trials do not render accountability for international crimes that may have occurred in Syria. Proceedings are being focused on the prosecution of AMT, and as AMT is defined very broadly and requires relatively little burden of evidence, it can be prosecuted more easily and rapidly than war crimes, in which the investigative judge normally has to go on site to collect evidence and hear testimonies. This policy remains problematic at several levels. First, the victims will not see justice for the crimes committed; instead, persons are prosecuted merely for being a member of a terrorist group and the danger that they may represent in France in the future. Additionally, while not all acts committed are equal in gravity (some individuals may have committed or conspired to commit only very marginal acts, while others may have contributed to the commission of actual terrorist acts and other crimes), they are all prosecuted under the same offence, instead of according to the *actus reus* of each of the accused. While more and more resources are attributed to counterterrorism investigations, investigation of international crimes is marginalized. This phenomenon reached a new peak with the recent reform that merges the counterterrorism prosecution unit and the war crimes/crime against humanity unit into one structure, the National Antiterrorism Prosecution Service.<sup>98</sup>

## Conclusion: Complementarity, exclusivity and hybridization of legal regimes

As shown, the French administrative and criminal legal systems are complementary and back each other – when the criminal system cannot operate because of a lack of evidence, the administrative framework will take over; when a convict ends a prison sentence, administrative law will provide the option for follow-up surveillance. It also functions the other way around: when an administrative order is violated, a judge in criminal cases becomes competent to restrict one's liberty more effectively. The dangerousness of individuals is assessed on a regular basis in both the administrative and criminal justice frameworks.

At the same time, the French counterterrorism legal system relies exclusively on criminal and administrative law. Even in cases directly linked to the armed conflict in Syria, and despite the fact that the geopolitical context is clearly present in the courtrooms and in the decisions of the judges, the French legal system refers neither to international humanitarian law (IHL) nor to international criminal law frameworks. Instead, administrative and criminal law keep being expanded to encompass the commission or prevention of all kinds of acts, with a growing spectrum of acts and punishments. No clear distinction is made for the treatment of persons who have committed (or who are suspected of having committed) violent criminal activity and those who participate in an

98 This reform was adopted in November 2018. Loi de la programmation 2019–2022 et de Réforme pour la Justice, No. 1349, 6 November 2018, available at: [www.assemblee-nationale.fr/dyn/15/amendements/1349/CION\\_LOIS/CL999](http://www.assemblee-nationale.fr/dyn/15/amendements/1349/CION_LOIS/CL999).

armed conflict and violate IHL. As most, if not all, prosecutions are done under the security prism of France, no accountability is provided for grave IHL and international human rights law violations committed in Syria or Iraq.

In addition to IHL being overlooked, another important characteristic of the French counterterrorism legal architecture is its accommodation and hybridization. Security goals include not only repression but also pre-emption, and as Garapon and Rosenfeld have observed, by requesting the law to punish prior to the commission of a crime, the fight against terrorism challenges the very foundations of criminal law with the quite uncertain notion of pre-emption, relying on predictability and the assumptions of risk assessments.<sup>99</sup> As a result, domestic legal boundaries are being transformed and a process of hybridization of criminal and administrative legal doctrines and approaches is being put in place. This transformation, currently introduced in law, may quickly impact other domains, such as the repression of political protest. Indeed, this is one of the main manifested results that can be observed today in France.<sup>100</sup>

Finally, while allowing little consideration to more liberal doctrines of criminology such as rehabilitation, it remains doubtful whether prosecuting and detaining persons under one broad category can provide a solution to the phenomenon of radicalization in the long run.

99 Antoine Garapon and Michel Rosenfeld, *Démocraties sous stress: Les défis du terrorisme global*, Presses Universitaires de France, Paris, 2016, p. 128.

100 See for example, CNCDH, “Quand la logique sécuritaire heurte la liberté fondamentale de manifester”, 10 January 2019, available at: [www.cncdh.fr/fr/publications/quand-la-logique-securitaire-heurte-la-liberte-fondamentale-de-manifester](http://www.cncdh.fr/fr/publications/quand-la-logique-securitaire-heurte-la-liberte-fondamentale-de-manifester); UN Office of the High Commissioner for Human Rights, “France: UN Experts Denounce Severe Rights Restrictions on ‘Gilets Jaunes’ Protesters”, press release, Geneva, 14 February 2019, available at: [www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24166&LangID=E](http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24166&LangID=E).