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March 17, 2008

Patrice Gillibert
Secretary of the Human Rights Committee
UNOG-OHCHR
CH 1211 Geneva 10
Switzerland

Re: Pre-Sessional Review of France

Dear Patrice Gillibert,

Please find enclosed thirty copies of Human Rights Watch's submission to the Committee's pre-sessional review of France.

Yours sincerely,

Julie de Rivero
Geneva Advocacy Director

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March 17, 2008

Members of the United Nations Human Rights Committee
Attn: Patrice Gillibert, Secretary of the Human Rights Committee
UNOG-OHCHR
CH 1211 Geneva 10
Switzerland

Re: Pre-Sessional Review of France

Dear Committee Members,

We write in advance of the Human Rights Committee's ("the Committee") upcoming pre-sessional review of France to highlight a few areas of concern we hope will inform your consideration of the French government's ("the government") compliance with the International Covenant on Civil and Political Rights ("the Covenant"). Our comments are focused primarily on counterterrorism measures that the government has introduced which we believe breach Covenant standards. For fuller analyses, please see Humar Rights Watch report *France: In the Name of Prevention: Insufficient Safeguards in National Security Removals* (available at http://hrw.org/reports/2007/france0607/); *Letter to French Parliament: Improve Safeguards in Expulsion Cases* (available at http://hrw.org/english/docs/2007/09/14/france16878.htm); and *Letter to French Senators: More Safeguards Needed in Anti-Terrorism Bill* (available at http://hrw.org/english/docs/2005/12/09/france12182.htm). Our analysis of French criminal laws and procedures in terrorism investigations and prosecutions is based on research conducted between July 2007 and February 2008. A report is forthcoming.

Insufficient safeguards in national security removals (Covenant articles 7, 17 and 19)

Over the past five years, France has forcibly removed dozens of foreign residents accused of links to terrorism and extremism. 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. Though not a new policy, national security removals now form an integral part of France's national strategy to counter violent radicalization and recruitment to terrorism.

The procedures for national security removals do not provide sufficient guarantees to prevent violations of fundamental human rights, including the right to be free from torture and ill-treatment and the related protection against refoulement guaranteed under Covenant article 7; the right to hold opinions and the right to freedom of expression under Covenant article 19; and the right to family and private life under Covenant article 17.

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 petition for interim relief (*référé-liberté*), and the interim relief judge must decide within 48 hours whether to suspend the expulsion order and/or the 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 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 Court 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." Legislative reforms in November 2007 gave individuals seeking to enter France to apply for asylum the right to an in-country appeal against refusal to enter, in compliance with the Court's ruling, but 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 can lead to immediate removal even if the individual has appealed the decision to the independent refugee appeals board.

The UN Committee Against Torture (CAT) 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 CAT 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.

Our second concern with removal procedures in France involves the preference for administrative expulsions in lieu of criminal prosecutions to deal with foreigners accused of extremism and fomenting radicalization. Using immigration powers allows the government to bypass the more stringent procedural safeguards built into the criminal justice system. A 2004 reform to the Immigration code broadened the scope of which speech can lead to administrative expulsion, to include "incitement to discrimination, hatred or violence against a specific person or group or persons." This is far more expansive than the previous language, which allowed for expulsions for incitement to discrimination, hatred or violence on the grounds of ethnicity or religion. At least fifteen men described by authorities as imams have been expelled since 2001, many of whom on the grounds they preached ideas that advocated extremism and fomented radicalization.

The government's evidence in these cases, produced only if the expulsion order is appealed to the administrative court, is contained in intelligence reports commonly referred to as

"notes blanches" because they are unsigned and do not disclose the sources or the methods used to obtain the information. These reports are shared with the defense but by their very nature cannot be independently verified or easily contested. Council of State jurisprudence requires that a note blanche be rejected if it is too brief, does not provide sufficient details, or is limited to assertions (as opposed to facts). In practice, however, the lack of precision of the legal concept of a threat to public order, the comparatively low standard of proof in the system of administrative justice, and the benefit of the doubt most judges accord the intelligence reports, make it difficult for a person effectively to contest the expulsion.

Our third concern is that forced removals can interfere with the right to family and private life of the individuals removed and their relatives in a way that infringes international human rights law. This is especially true for individuals who were born in France or lived there for the better part of their lives, are married to French citizens or residents, and have children with French citizenship. The European Court of Human Rights has found France in violation of the right to family life in a number of forced removal cases involving long-term residents convicted of serious crimes, although it has yet to rule on a case involving national security.[1]

Human Rights Watch believes the government should be urged to institute an automatic in-country appeal that automatically suspends any removal, allowing any person subject to forced removal from France to remain in France until the determination of any appeal in relation to the risk of torture or other ill-treatment. All individuals claiming asylum should be allowed to remain in France until the conclusion of the asylum determination procedure. The government should clarify, in law, the scope of materiality and intensity of the threat to national security allowing for expulsions, especially in cases involving speech offenses and those involving interference with the right to family and private life.

Criminal law and procedure in terrorism investigations (Covenant articles 10 and 14)

France's criminal justice approach to countering terrorism is based on a centralized system in which specialized investigating magistrates have broad powers to detain potential terrorism suspects for up to six days in pre-arraignment police custody (*garde à vue*) and charge them with an ill-defined offense of "criminal conspiracy in relation to a terrorist undertaking" (*association de malfaiteurs en relation avec une entreprise terroriste—AMT*). Investigations into alleged international terrorism networks in France can often last for years, during which time large numbers of people are detained, interrogated and remanded into pre-trial detention on the basis of minimal proof, including the wives and partners of primary suspects. In the investigation of the so-called "Chechen Network" between 2002 and 2005, sixteen couples were arrested. Fourteen of the women were held in garde à vue detention and subsequently released without charge. Of the two women prosecuted, one was convicted, while the other was acquitted after spending one year in pre-trial detention with her infant daughter. Eight of the men in these couples were convicted at trial, one was acquitted, and the remaining seven were not prosecuted in this case.

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[1] See for example Beldjoudi v. France, judgment of 26 March 1992, Series A no. 234-A; *Mokrani v. France*, no. 52206/99, 15 July 2003; *Mehemi v. France*, judgment of 26 September 1997, *Reports of Judgments and Decisions 1997-VI*; *Ezzouhdi v. France*, no. 47160/99, 13 February 2001; and *Nasri v. France* judgment of 13 July 1995, Series A no. 320-B. All ECtHR judgments are available at www.echr.coe.int.

Human Rights Watch is concerned that the lack of safeguards during police custody undermines the right of detainees to an effective defense guaranteed under Covenant article 14 at a critical stage. During garde à vue, detainees have severely curtailed access to legal counsel. Access to a lawyer is granted only after 72 hours (or 96 hours if garde à vue is extended to six days). Subsequent visits are permitted after a further 24 hours. Each visit is limited to 30 minutes, and the lawyer does not have access to any detailed information about the charges against their client. Such a system flouts one of the most basic safeguards against miscarriages of justice and risk of ill-treatment, which is the right of access to a lawyer from the outset of detention. The Council of Europe Committee for the Prevention of Torture has repeatedly criticized these restrictions on access to a lawyer and has urged France in every report since 1996 to improve safeguards in police custody, including access to a lawyer from the outset of detention.[2]

Police may interrogate detainees at will during garde à vue in the absence of their lawyer, at any time of the day or night, leading to oppressive questioning. 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. Although all detainees in France have the right to silence, they are not notified of this right, and all statements made under interrogation are admissible in court. A recent reform instituting audio and video-recording of all police interrogations as well as hearings with the investigative magistrate explicitly excluded terrorism cases.

Human Rights Watch has collected testimonies about sleep deprivation, disorientation, constant, repetitive questioning, intense psychological pressure and even physical abuse in police custody.

Intelligence material, including information coming from third countries, is often at the heart of AMT investigations. Indeed, most if not all investigations are launched on the basis of intelligence information. Human Rights Watch acknowledges the critical role of intelligence services in counterterrorism efforts. We are concerned, however, that current procedures do not allow suspects to effectively challenge intelligence information, nor are there sufficient safeguards to prevent the use of evidence obtained under torture or other prohibited ill-treatment.

The AMT charge, considered the cornerstone of the French preemptive counterterrorism model, lacks legal certainty because there is no requirement that any of the participants in an alleged conspiracy in relation to a terrorist undertaking actually take concrete steps to implement the execution of a terrorist act. Terrorism suspects are often remanded in pre-trial detention—which can last over three years in minor felony cases and nearly five years in serious felony cases—on the basis of minimal proof. While a positive reform in 2001 placed the responsibility for determining whether to remand a suspect in pre-trial detention in the hands of specialized "liberty and custody judges," in practice these judges rarely contradict

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

the recommendations of the investigating judges. This appears to be especially the case in large, complex investigations involving numerous accused and voluminous case-files.

Human Rights Watch believes the government should improve safeguards during police custody. At a minimum, detainees should have access to a lawyer from the outset of detention; lawyers should be present at all interrogations; detainees and lawyers should have a private consultation before any formal statement is signed; and detainees should be notified of their right to remain silent.

The government should be urged to take steps to improve respect for the full range of fair trial rights at risk in terrorism investigations and prosecutions. This includes reforming the Criminal Code to give greater legal precision to the definition of criminal conspiracy in relation to a terrorist undertaking (AMT); limiting the scope for warrantless arrests to cases of in flagrante delicto; specifying the standard of proof required to justify pre-trial detention in the context of a terrorism investigation; and strengthening the role and independence of the "liberty and custody judge." The government should also take steps to ensure that torture evidence is never used at any stage in judicial proceedings.

Preventive Detention Law (Covenant articles 9 and 14)

In early February 2008, the French parliament adopted a law allowing indefinite detention of certain criminal offenders after they have served their prison sentence. The law gives three-judge commissions the authority to impose an additional one-year detention term on offenders who are due to be released after serving their 15-year or more prison sentences for a violent crime. The determination is based on an assessment that the individual is dangerous and likely to reoffend. The one-year period can be renewed indefinitely, and the law provides for a limited right of appeal. Originally aimed only at those convicted of violent crimes against children, the law was broadened to include offenders convicted of serious violence against adults. When adopted, the law made the measure retroactive for all those convicted prior to the law taking effect but who had not completed their prison sentence by September 1, 2008.

A ruling by the Constitutional Council on February 21, 2008 upheld the measure, arguing it did not constitute a criminal sanction, but ruled that it could not be applied retroactively, given that it constitutes deprivation of liberty for a significant amount of time and can be renewed indefinitely. The law, stripped of retroactive effect, entered into effect on February 26, 2008.

This preventive detention scheme violates fair trial standards guaranteed under Covenant article 14, including the right to the presumption of innocence and the right not to be punished twice for the same crime. It is likely that the limited appeal available to detainees does not meet the requirement of paragraph 4 of Covenant article 9 with respect to the ability to challenge the lawfulness of the detention. France already had measures in place to ensure psychiatric confinement for those who pose a direct threat to themselves or others and who suffer from a mental illness. There are also mechanisms to monitor certain categories of criminals upon release, such as requirements to register with the police and the use of electronic bracelets.

Human Rights Watch believes the law should be repealed.

We hope you will find these comments useful and would welcome an opportunity to discuss them further with you. Thank you for your attention to our concerns, and with best wishes for a productive session.

Sincerely,

Holly Cartner
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Europe and Central Asia Division

Julie de Rivero
Geneva Advocacy Director