Human Rights Law Clinic Papers 2016

CRIMINAL AND ADMINISTRATIVE MEASURES AGAINST 'FOREIGN TERRORIST FIGHTERS'

To: Lucile Sengler, Office for Democratic Institutions and Human Rights, Organization for Security and Co-operation in Europe; and Massimo Frigo, International Commission of Jurists

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Introduction

Counter-terrorism is shaped by the danger that it aims to prevent. Terrorism is a fluid threat, constantly evolving and shifting the parameters of the debate and the areas of conflict. This poses a challenge to those charged with understanding and reacting to terrorist groups. The evolution of terrorism has seen a resurgence in the phenomenon of the foreign terrorist fighter (FTF). According to the United Nations Security Council (UNSC), FTFs are those "who travel to a State other than their States of residence or nationality" for the purpose of carrying out terrorist activity.[1] Such individuals' experience, including handling weapons and explosives, renders them a significant threat to security should they return to their countries of origin with the aim of carrying out a terrorist attack.

Recent attacks, notably in Europe, have given priority to the objective of countering FTFs. States are obliged by various instruments to take criminal and administrative action pursuant to this objective, and the implementation of these obligations can take many forms. This memorandum assesses the compliance of States with international human rights and humanitarian law when implementing their counter-terrorism obligations in the context of FTFs. It provides a background to the obligations themselves, clarifying their legal antecedents along with their background more generally. It then considers criminal and administrative measures against FTFs.

Given the sheer multiplicity of counter-FTF responses it is logically beyond the scope of this memorandum to assess every permutation. As such, the assessment of criminal measures focuses on domestic law provisions that criminalise giving material support or assistance to terrorists across the Organisation for Security and Cooperation in Europe (OSCE). After conducting a trend analysis, the tension between these laws and international humanitarian law and human rights is assessed, before recommendations are made regarding how States can better comply with international law while implementing relevant obligations. The memorandum then scrutinises denationalisation as an example of an administrative measure in countering FTFs, assessing its compliance with international human rights law and its effectiveness. This is supported by a case study of the United Kingdom's denationalisation policy in practice. The memorandum then presents its conclusions.

Background

Since 11 September 2001, the UNSC has obliged UN Member States to criminalise an array of activities associated with terrorism: from financing and incitement, to travelling abroad to fight for or support terrorist organisations. As proposed by Stefan Talmon, once terrorism was identified as a threat to international peace and security, the Security Council has effectively acted as a single-issue legislator,[2] embellishing what has been described as the

[1] UNSC Res 2178 (24 September 2014), UN Doc S/RES/2178, preamble [8].

[2] Stefan Talmon 'The Security Council as a World Legislature' (2005) 99 *American Journal of International Law* 175, p. 182; cf., Daniel Joyner, *International Law and the Proliferation of Weapons of Mass Destruction* (New York: Oxford University Press, 2009), pp. 192-194; see also, Masahiko Asada 'Security Council Resolution 1540 to Combat WMD Terrorism: Effectiveness and Legitimacy in International Legislation' (2009) 13(3) *Journal of Conflict and Security Law* 303, pp. 322-325.

"evolving code of terrorist offences"[3] enshrined under various UN conventions.[4] The Security Council's efforts culminated in Resolution 2178 (2014)[5] which has been labelled one of the most important quasi-legislative efforts of the Council to date;[6] a claim borne out, as the provisions have trickled down leading the European Union (EU) to produce a Draft Directive on Combatting Terrorism, intended to harmonize EU law with Resolution 2178.[7] The Council of Europe and the OSCE have also taken action in a similar vain.[8] In short, the Resolution is a call to action designed to galvanise States around the threat posed by FTFs – a threat described by Aaron Zelin and Jonathan Prohov as the "biggest security challenge for Western nations since the September 11th attacks".[9]

The focus of the criminal measures section of this memorandum is on the Resolution's operative paragraph 6, which calls on States to bring terrorists to justice by ensuring that their domestic criminal codes make it an offence to travel abroad to engage in terrorism, or to support those who do so by providing them with funding and/or by organising or facilitating acts of recruitment.[10] States have in response added numerous criminal offences to their counter-terror arsenals, punishing everything "from bombing to blogging"[11] and the Security Council continues to closely monitor implementation at domestic level, having so far produced three reports documenting the progress of Member States in this respect.[12]

This influx of criminal provisions has brought with it a number of issues that share a common root: the blurred line between foreign *terrorist* fighters and foreign fighters. The latter have been defined by Sandra Kräehenmann as "individuals, driven mainly by ideology, religion and/or kinship, who leave their country of origin or their country of habitual residence to join a party engaged in an armed conflict",[13] a definition closely mirroring that given to FTFs. Frequently, foreign fighters carry out activities defined as 'terrorist' while

[3] Daniel O'Donnell 'International Treaties Against Terrorism and the Use of Terrorism during Armed Conflict and by Armed Forces' (2006) 88 *International Review of the Red Cross* 864, p. 855.

[4] Collection available at, United Nations Action to Counter Terrorism 'International Legal Instruments' < http://www.un.org/en/terrorism/instruments.shtml> (accessed 20 April 2016).

[5] UNSC Res 2178, op. cit..

[6] Marko Milanovic, 'UN Security Council Adopts Resolution 2178 on Foreign Terrorist Fighters' (*EJIL Talk!* 24 September 2014) <http://www.ejiltalk.org/un-security-council-adopts-resolution-2178-on-foreign-terrorist-fighters/> (accessed 28 March 2016).

[7] European Union, 'Draft Directive of the European Parliament and of the Council on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA on Combating Terrorism', COM(2015) 625 (hereinafter, Draft Directive).

[8] Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism and related travaux préparatoires, Riga, 22.x.2015; OSCE Ministerial Council, 'Declaration on the OSCE Role in Countering the Phenomenon of Foreign Terrorist Fighters in the Context of the Implementation of UN Security Council Resolutions 2170 (2014) and 2178 (2014)', MC.DOC/5/14, 5 December 2014.

[9] Aaron Y. Zelin and Jonathan Prohov 'How Western Non-EU States are Responding to Foreign Fighters: A Glance at the USA, Canada, Australia, and New Zealand's Laws and Policies' in Andrea de Guttry et al., (eds.) *Foreign Fighters Under International Law and Beyond* (The Hague: Asser Press, 2016), p. 423.

[10] UNSC Res 2178, op. cit.[6].

[11] Helen Duffy, *The 'War on Terror' and the Framework of International Law* (Cambridge: Cambridge University Press, 2015), p. 179.

[12] All are available at, Security Council Counter-Terrorism Committee, 'Resources' <http://www.un.org/en/sc/ctc/resources/> (accessed 20 April 2016).

[13] Sandra Kräehenmann, 'Foreign Fighters Under International Law: Academy Briefing No. 7' (Geneva Academy, 2014) (hereafter Academy Briefing No. 7) p. 6.

simultaneously acting as participants in legitimate armed conflicts[14] regulated by international humanitarian law (IHL). Criminality along these blurred lines immediately risks falling foul of the principle of legality.[15] But perhaps more importantly, while laws prohibiting financing or otherwise supporting terrorism serve the legitimate and defensible policy of starving FTFs of resources, casting the net too widely risks, both literally and more widely, starving the civilians under the control of groups like the Islamic State. In this connection, some evidence suggests that humanitarian organisations will self-censor and stop providing aid to civilians living under 'terrorist' regimes in a bid to avoid prosecution.[16] These issues and the human rights and IHL violations which potentially arise from them will be fully fleshed out in the criminal measures section of this memorandum.

In addition to the criminal measures mentioned, the instruments also call on Member States to implement a number of administrative measures to counter FTFs. This is added to by operative paragraph 5 of Resolution 2178, which calls on States to "prevent and suppress the recruiting, organising, transporting or equipping of individuals who travel to a State other than their States of residence or nationality for the purposes of the perpetration, planning or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, and the financing of their travel and of their activities".[17] Little guidance is offered to States on how to implement this recommendation, meaning that a plethora of administrative measures are treated as potentially available to counter FTFs. These administrative measures can range from expanded border security and information sharing to the confiscation of travel or citizenship documents, with States employing variations of these measures according to their domestic context. The diversity of administrative measures employed does not lend itself well to broad analysis. The administrative section of this memorandum therefore focuses on deprivation of citizenship.

As mentioned above, the definitions of FTFs and foreign fighters overlap considerably. Foreign fighters are not a novel phenomenon, and denationalisation as a response to them is no more recent: deprivation of foreign fighters' citizenship has been traced back as far as the mid-19th Century.[18] In the contemporary context, Resolution 2178 obliges States to implement administrative measures that are consistent with international humanitarian law, refugee law and human rights law. Denationalisation interacts closely with many rights, particularly the right to a nationality and the right to freedom of movement. The practical limits of this memorandum have necessitated a focus on one of these rights, and so deprivation of citizenship's legitimacy is framed here by the right to a nationality and its implications for statelessness. It is consequently beyond the scope of the memorandum to explore the implications of denationalisation on freedom of movement in detail. The administrative measures section considers the legality and effectiveness of deprivation of

[14] Ibid., p.23.

[15] Anne Peters 'Security Council Resolution 2178 (2014): The "Foreign Terrorist Fighter" as an International Legal Person, Part II' (*EJIL Talk!* 21 November 2014) <http://www.ejiltalk.org/security-council-resolution-2178-2014-the-foreign-terrorist-fighter-as-an-international-legal-person-part-ii/> (accessed 20 April 2016).

[16] Report of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc A/70/371 (2015), [36]-[40].

[17] UNSC Res 2178, op. cit. [5]

[18] L van Waas 'Foreign Fighters and Deprivation of Nationality: National Practices and International Law Implications' in Andrea de Guttry et al., (eds.) Foreign Fighters Under International Law and Beyond (The Hague: Asser Press, 2016) p. 471.

nationality, with close reference to the right to a nationality, before taking the United Kingdom's denationalisation policy as a case study.

It bears mentioning that there is a rich and ongoing debate concerning the lack of an agreed definition of terrorism. While the view taken in this memorandum is that there are strong arguments in favour of defining the term at the international level,[19] particularly where criminal and punitive administrative measures are concerned, a fuller discussion of the debate is outside of the purview of this memorandum. Instead, and as noted at the outset, the focus is on specific criminal and administrative measures and State compliance with international human rights and humanitarian law while implementing them at the domestic level.

Criminal measures against foreign terrorist fighters: implications for humanitarian actors

This part of the memorandum focuses on one set of criminal provisions enacted by States in response to the phenomenon of FTFs of particular concern for humanitarian lawyers: the criminalisation of providing 'material support' or 'other assistance' to terrorists. Material support is a flexible phrase crafted by the United States in 1994.[20] It appeared on the indictment of the majority of Guantánamo detainees[21] and was present, in 2011, on 87.5% of US terrorism case charge-sheets.[22] The provision is usually interpreted broadly,[23] suggesting that it risks falling foul of the principle of legality.[24] Furthermore, the net is cast extremely widely and the prospect of prosecution under these provisions, especially when coupled with extra-territorial jurisdiction, renders humanitarian workers vulnerable to criminal liability and has had a 'chilling effect' on many organisations.[25] The breadth of these provisions and the issues presented by them are discussed further below, before which the trend towards criminalising support across OSCE Member States is analysed. After

[19] See, Ben Saul *Defining Terrorism in International Law* (Oxford: Oxford University Press, 2008), especially pp.17-27; Report of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc A/61/267 (2006), [32].

[20] Material Support Statute, 18 US Code §2339A and §2339B; other provisions criminalise e.g., conspiracy to provide or the provision of funds, goods, and services to a designated terrorist, 50 US Code §§1701-1706.

[21] Human Rights Watch, 'The Guantanamo Trials' <https://www.hrw.org/guantanamo-trials> (accessed 28 March 2016).

[22] Centre on Law and Security, 'Terrorist Trial Report Card: September 11, 2001-September 11, 2011' (New York: University Law School, 2011) <http://www.lawandsecurity.org/Portals/0/Documents/TTRC%20Ten%20Year%20Issue.pdf> (accessed 28 March 2016), pp. 19-20.

[23] *Holder v. Humanitarian Law Project* 561 U.S. 1 (2010), especially [25]-[33].

[24] See, e.g., Report of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc A/70/371 (2015), [46]; also Duffy (2015) op. cit., p. 149. The principle of legality is enshrined, *inter alia*, under the European Convention on Human Rights and Fundamental Freedoms 1950 (as amended) (ECHR), Article 7; the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1979) 999 UNTS 171 (ICCPR), Article 15; and the Charter of Fundamental Rights of the European Union [2000] OJ C364/01 (EUCFR), Article 49.

[25] International Commission of Jurists, 'Assessing Damage, Urging Action: Report of the Eminent Jurist Panel on Terrorism, Counter-Terrorism and Human Rights' (Geneva: ICJ, 2009) (hereinafter: Assessing Damage, Urging Action), pp. 133-134; Kate Mackintosh and Patrick Duplat, 'Study of the Impact of Donor Counter-Terrorism Measures on Principles Humanitarian Action' (OCHA, July 2013) <https://docs.unocha.org/sites/dms/documents/ct_study_full_report.pdf> (accessed 28 March 2016), p.84.

evaluating trends and extracting the issues presented, recommendations are identified as to how States can comply with their counter-terrorism obligations, in the current context, without violating human rights and international humanitarian law (IHL).

Trend analysis

UNSC Resolution 2178, in its operative paragraph 6, obliges States to implement domestic criminal measures punishing those who assist or support FTFs. In seeking to discern the impact that the UNSC-mandated provisions have had on the domestic legislation of OSCE participating States since 2001, and continue to have since Resolution 2178, use has been made of a number of online legislation databases, alongside the Mutual Evaluations compiled by the Financial Action Task Force (FATF) and the Council of Europe Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL). [26]

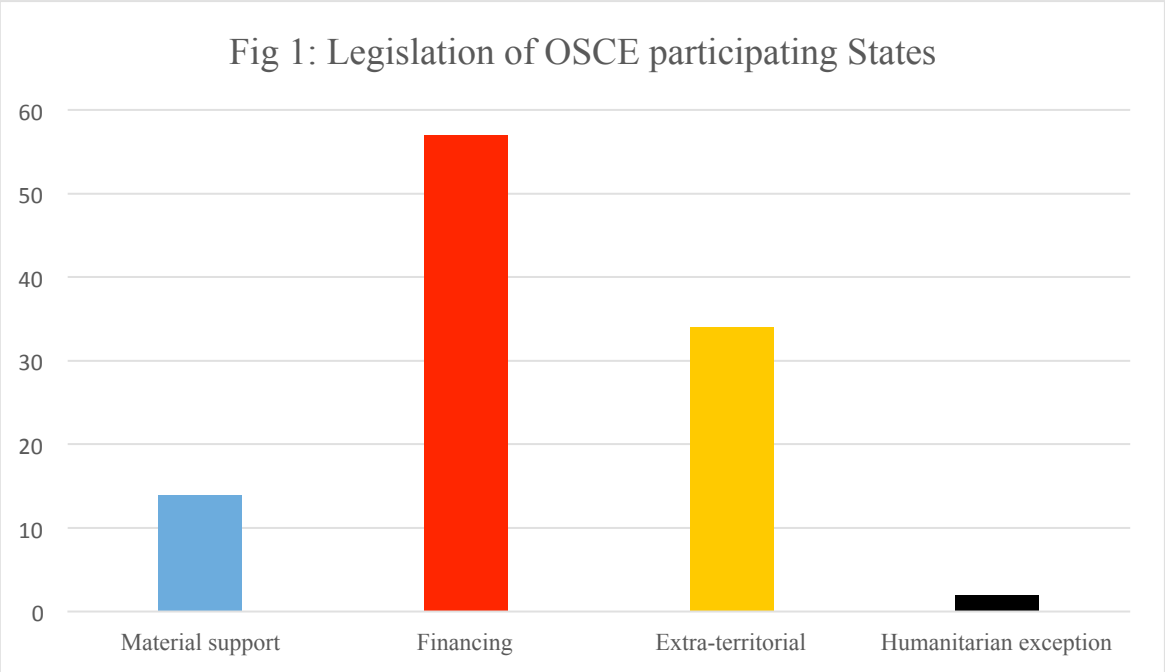
Figure 1[27] below sets out the findings of the trend analysis conducted as part of the research for this memorandum. All of the 57 participating States examined have some sort of prohibition on financing terrorism, many of which are coupled with a wide interpretation of words such as 'fund' and 'property': for example in Kyrgyzstan 'fund' is defined as any asset "whether tangible or intangible, movable or immovable irrespective of the way of their acquisition…"[28] and the Penal Code of Luxembourg prohibits the provision of "funds, securities or property of any kind" to terrorists.[29] Fifteen OSCE participating States explicitly criminalise support or material support and 33 exercise extra-territorial jurisdiction over the aforementioned crimes as such, with most of the remainder only exercising extra-territorial jurisdiction where mandated to do so by international conventions. In total, there were only two blanket legal exceptions for actions covered by international humanitarian law. Each of these findings will be analysed in more depth below.

[26] United Nations Office on Drugs and Crime (UNODC), 'Terrorism Legislation Database' <https://www.unodc.org/tldb/> (accessed 26 March 2016); Council of Europe, 'Committee of Experts on Terrorism' (CODEXTER) <http://www.coe.int/t/dlapil/codexter/about_en.asp?expandable=0> (accessed 26 March 2016); Organization for Security and Co-operation in Europe (OSCE), 'Legislation Online Database' <http://www.osce.org/node/43644> (accessed 26 March 2016); Council of the European Union, 'Criminal Justice Responses to the Phenomenon of Foreign Fighters: Compilation of Replies', 16 March 2015, 5206/2/15 REV 2 (hereinafter, 'Compilation of Replies'); Financial Action Task Force (FATF), 'Mutual Evaluations' <http://www.fatf-gafi.org/publications/mutualevaluations/?hf=10&b=0&s=desc(fatf_releasedate)> (accessed 26 March 2016); Council of Europe Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL), 'Mutual Evaluations' <https://www.coe.int/t/dghl/monitoring/moneyval/About/About_MONEYVAL_en.asp> (accessed 26 March 2016).

[27] The vertical axis refers to the number of OSCE participating States with the provisions set out along the horizontal axis.

[28] Kyrgyzstan Law No. 178, 8 November 2006, 'On Combating Terrorism', article 1.

[29] Penal Code of Luxembourg, article 135-5(3).



'Material support' provisions

The criminalisation of material support for FTFs has taken on a new level of urgency for EU Member States, as recital 11 of the Draft Directive will oblige them to punish "…the provision of *material support* for terrorism… in the supply of movement or services, assets and goods" (emphasis added).[30] The majority of OSCE States found to have such provisions reside within the EU[31] and of those, six make use the words 'material support' or 'material resources', namely: Belgium, the Czech Republic, Ireland, Lithuania, the Netherlands and Ukraine. The remainder of EU States refer more generally to 'support' or 'supporting in any way' a terrorist organisation or act.

In the EU context, Lithuania provides the paradigmatic example of a material support provision. A person will commit an offence if they render "other material support… with knowledge that this… should be used to commit a terrorist crime".[32] This provision has parallels with the material support offence under the US Criminal Code, which provides a definition of 'material support or resources', including everything from property, financial securities, advice, assistance and transportation, to weapons and lethal substances.[33]

[30] This goes further that the original Framework Decision: see Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism [2002] OJ L 164, Article 2(2)(b).
[31] Austria: Criminal Code, §278(3); Belgium: Criminal Code, articles 140-141; Cyprus: Law No. 110(I)/2010, Suppression of Terrorism Law, section 8; Czech Republic: Criminal Code, section 311(2); Germany: Criminal Code, section 129a(5); Estonia: Criminal Code, §237[3]; Hungary: Criminal Code, section 261(5); Ireland: Criminal Justice (Terrorist Offences) Act 2005, article 1(2)(b), implementing the EU Framework Decision, article 2(2)(b) of which prohibits 'supplying information or material resources'; Lithuania: Criminal Code, article 250[4](1); Portugal: Law No. 52/2003, Law on the Fight Against Terrorism (as amended), section 2(2); Slovakia: Criminal Code, section 297; Iceland: Criminal Code, article 100b; Uzbekistan: Criminal Code, article 155; and Ukraine: Criminal Code, article 258-4(1).
[32] Compilation of Replies, p. 53.
[33] Material Support Statute, 18 US Code §2339A(b)(1).

Notably, there is an exception for medicine or religious materials, which will be discussed further below. The sheer scale of the US provision was made clear in the controversial case of *Holder v. Humanitarian Law Project*, where a majority of the US Supreme Court found that even training members of the Tamil Tigers (LTTE) or the Kurdistan Workers Party (PKK) to petition aid agencies, negotiate peaceful agreements and engage in political advocacy, would infringe US law.[34] Chief Justice Roberts, giving the judgment of the majority, defended this position by explaining that such support "frees up other resources within the organisation that may be put to violent ends".[35]

What makes the US offence so striking is that one can be found guilty of an offence when attempting to avert crime by counselling peace rather than terror, which flies in the face of elementary principles of causation when it comes to assistance and association crimes.[36] Such a sweeping approach is counterproductive, precluding any engagement with armed groups,[37] and running counter to the UN Secretary General's own assertion that UN Member States should "not impede… efforts by humanitarian organisations to engage armed groups in order to seek improved protection for civilians".[38] One would expect that such extraordinary breadth would be coupled with a requirement of specific intent.[39] Instead, however, US law only requires knowledge that the support be used in relation to a terrorist offence,[40] or that the organisation being supported is listed as one associated with terrorism.[41]

Portugal takes a different approach in relation to *mens rea*.[42] Support by provision of information or material means is criminalised as a 'wilfulness' offence, meaning that intent can potentially arise where the act was merely one possible occurrence arising from the use of the support provided.[43] Ukraine and Uzbekistan also criminalise support based on recklessness as to the socially dangerous/injurious consequences of the acts[44] and *mens rea* can be inferred by reference to objective factual circumstances.[45] Human Rights Watch

[34] *Holder v. Humanitarian Law Project* 561 U.S. 1 (2010), [25]
[35] Ibid.
[36] Herbert Hart and Tony Honore, *Causation in the Law* (Oxford: Oxford University Press, 2nd edn, 1995), pp. 380-381.
[37] Geneva Academy of International Humanitarian Law and Human Rights, 'Rules of Engagement: Protecting Civilians through Dialogue with Armed Non-State Actors' (Geneva: Geneva Academy, 2011).
[38] Report of the Secretary-General on the protections of civilians in armed conflict, UN Doc S/2009/277 (2009), [45].
[39] Cf., Emily Goldberg Knox, 'Social Media Companies and Material Support' (*Just Security*, 31 October 2014) <https://www.justsecurity.org/16961/social-media-companies-material-support/> (accessed 28 March 2016).
[40] Material Support Statute, 18 US Code §2339A(a).
[41] Material Support Statute, 18 US Code §2339B(a)(1).
[42] See, José Costa, 'Portugal' in Kent Roach (ed.) *Comparative Counter-Terrorism Law* (Cambridge: Cambridge University Press, 2015), especially p. 331.
[43] The offence: Law No. 52/2003, Law on the Fight Against Terrorism (as amended), section 2(2); the mental element is found under article 14 of the Criminal Code; see FATF, 'Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism: Portugal' (FATF, 13 October 2006) <http://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20Portugal%20full.pdf> (accessed 24 March 2016), pp. 33-34.
[44] Ukrainian Criminal Code, article 24 and 25 (concerning intent and recklessness); Criminal Code of Uzbekistan, article 21.
[45] FATF, 'Third Mutual Evaluation Report: Anti-Money Laundering and Combating the Financing of Terrorism: Ukraine' (FATF, 19 March 2009)

found in 2012 that mere recklessness was all that was required in relation to material support in 32 States worldwide.[46] To mitigate this, the view taken in this memorandum is that these provisions should be interpreted narrowly and not in a way that mirrors US logic regarding the 'freeing up' of other resources for terrorism.

Most of the remaining EU States criminalise material support by simply requiring knowledge that the support would be used by a terrorist organisation. Germany is the exception, where only intentional acts are considered crimes as a rule, although the requisite *mens rea* can again be inferred.[47]

Other support, assistance or association provisions

Turning away from material support specifically, many States criminalise providing funds or services to similar effect. Denmark, for example, criminalises the making of "funds, other property or financial or other services available, whether directly or indirectly" to terrorists.[48] According to Jørn Vestergaard, this provision does not distinguish between humanitarian and terrorist activities.[49] The *mens rea* element is also satisfied where there is a mere "assumption that the recipient… would have some… connection to terrorism".[50] Vestergaard explains that in one case six students were convicted of raising money for two organisations associated with terrorism,[51] despite allegedly earmarking the funds for humanitarian purposes.[52] The case is strikingly similar to the *Holy Land Foundation* litigation in the US Appeals Court,[53] where the jury, at trial, had decided that the raising of money for charitable 'zakat' committees in Palestine, which was ultimately used by Hamas, the de facto power, to provide schools, hospitals and social care, was the equivalent of providing material support to terrorists. The Appeals Court opined that this helped Hamas win the hearts and minds of Palestinians and freed up other resources for terrorism.[54]

<http://www.coe.int/t/dghl/monitoring/moneyval/Evaluations/round3/MONEYVAL(2009)4Rep-UKR3_en.pdf> (accessed 24 March 2016), p. 44; Eurasian Group, 'Mutual Evaluation Report: Anti-Money Laundering and Combating the Financing of Terrorism: Uzbekistan' (EAG, June 2010) <http://www.eurasiangroup.org/mers.php> (accessed 24 March 2016), p. 33.

[46] Human Rights Watch, 'In the Name of Security: Counterterrorism Laws Worldwide Since September 11' (HRW, 29 June 2012) <http://www.hrw.org/report/2012/06/29/name-security/counterterrorism-laws-worldwide-september-11> (accessed 25 March 2016).

[47] Criminal Code, section 15, cited in FATF, 'Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism: Germany' (FATF, 19 February 2010) <http://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20Germany%20full.pdf> (accessed 24 March 2016), p. 71.

[48] Danish Criminal Code, section 114b(3).

[49] Jørn Vestergaard, 'National Rapporteur: Evaluation study of the legal framework applicable to combatting terrorism' <http://forskning.ku.dk/find-en-forsker/?pure=files%2F91173827%2FTerrorism_legislation_National_report_J_rn_Vestergaard_Denmark_final_version.pdf> (accessed 24 March 2016), p. 12; see also, Mackintosh and Duplat (2013) op. cit., p. 28.

[50] Ibid., p. 14.

[51] Sam Jones and Helen Pidd, 'Danish T-Shirt Sellers Convicted of Financing Terrorism' (*The Guardian*, 25 March 2009) <http://www.theguardian.com/world/2009/mar/25/danish-t-shirt-sellers-financing-terrorism> (accessed 4 April 2016).

[52] Ibid., p. 13.

[53] *United States v. Mohammed El-Mezain and Ors*., 664 F. 3d 467 (2011).

[54] Ibid. For comment, see Fiaza Patel and Adrienne Tierney, 'The Reasons Why Dylann Roof Wasn't Charged with Terrorism' (*Just Security*, 30 July 2015) <https://www.justsecurity.org/25071/reason-dylann-roof-charged-terrorism/?print> (accessed 26 March 2016).

By contrast, in other jurisdictions the judiciary has played a significant role in tempering overly-broad legislation. Canadian criminal law prohibits providing a skill or expertise for the benefit of a terrorist group, knowing that this will further the group's activity.[55] In *Khawaja*,[56] the Canadian Supreme Court found that: "The… purpose of the Terrorism section… is to provide means by which terrorism may be prosecuted and prevented. *This purpose commands a high mens rea threshold*" (emphasis added).[57] The threshold decided upon was a requirement of specific intention to enhance the ability of the group to engage in terrorist activity. It is not, however, entirely clear whether the Court's interpretation extends to the other provisions prohibiting facilitation of terrorist activity,[58] or financing[59] and providing related services to a terrorist group.[60]

A large portion of the remaining States had furnished their criminal codes with provisions proscribing 'any other assistance' or 'collaboration' with terrorist groups or fighters.[61] The International Committee of the Red Cross (ICRC) has explained that these offences, as much as those prohibiting material support, can "result in the criminalisation of the core activities of humanitarian organisations".[62] Indeed, such offences frequently provide no elaboration and are designed to act as 'catch-all' provisions.

Similarly, the UK criminalises the suspected use of property for the purpose of terrorism,[63] alongside a general offence of 'furthering the activities' of proscribed organisations.[64] Lord Ashton of the Home Office in this context expressed the view that paying money to a terrorist controlling a toll-gate would amount to an offence.[65] In a similar vain, Maltese law only requires that an individual making property available to a terrorist group have "*reasonable cause to suspect* [that it] will *or may* be used for the purposes of terrorism" (emphasis added).[66] Of all of the States examined in the trend analysis, the form of

[55] Canadian Criminal Code, section 83.18.
[56] *R v. Khawaja* [2012] 3 R.C.S. 555.
[57] Ibid., [557].
[58] Canadian Criminal Code, section 83.19. See Robert Diab, 'Canada' in Kent Roach (ed.) *Comparative Counter-Terrorism Law* (Cambridge: Cambridge University Press, 2015), especially pp. 83-84.
[59] Ibid., section 83.02.
[60] Ibid., section 83.03.
[61] Andorra: Penal Code, article 366(2); Austria: Penal Code, §278(3); Armenia: 'Law on the Fight Against Terrorism', 22 March 2005, article 5(2); Azerbaijan: Law No.687-IQ, 18 June 1999, 'On Fight Against Terrorism', article 3(3); Belarus: Law No. 77-Ç, 3 January 2002, 'Law on the Fight Against Terrorism', article 3; Holy See: Vatican City State Law No. VIII, 11 July 2013, containing Supplementary Norms on Criminal Matters, article 19(2); Luxembourg: Penal Code, article 135-4(2); Macedonia: Criminal Code, article 394; Moldova: 'Guidance for the Identification of Transactions Suspected of Financing of Terrorism', 18 March 2011, CCECC Order No. 40, article 1; Kyrgyzstan: Law No. 178, 8 November 2006, 'On Combating Terrorism', article 1; San Marino: Criminal Code, article 337*bis*(3); Spain: Criminal Code, article 575; Tajikistan: Criminal Code, article 10; Turkmenistan: 'The Law of Turkmenistan on the Fight Against Terrorism', 15 August 2003, article 1(2).
[62] International Conference of the Red Cross and the Red Crescent, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' (Geneva: ICRC, 2015), p. 20.
[63] Terrorism Act 2000, sections 15 and 17.
[64] Ibid., section 12(3).
[65] Joint Committee on the Draft Protection of Charities Bill, *Report: Draft Protection of Charities Bill* (2015, HL 108, HC 813), p. 54.
[66] Criminal Code of Malta, articles 328F, 328G, 328H. It had been confirmed that 'any financing which in any manner… would help, assist or support… is criminalised': see Council of Europe Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL), 'Report on

recklessness present in Maltese and UK law was the lowest *mens rea* threshold. As such, the UK provisions were described as 'monstrously' broad by Britain's Independent Reviewer of Terrorism Legislation,[67] who tentatively recommended crafting a humanitarian exception based on the precedent set out below.[68]

Humanitarian exceptions

Only two of the 57 OSCE participating States provide a visible exemption for conduct permitted by IHL: Switzerland and Canada. Article 260(4) of the Swiss Criminal Code provides that the prohibition on financing terrorism does not apply if "it is intended to support acts that do not violate the rules of international law on the conduct of armed conflicts". A similar exemption can be found in the Canadian Criminal Code, where the definition of 'terrorist activity' is expounded under section 83.01(1); a definition which, it is expressly stipulated, "does not include an act or omission that is committed during an armed conflict [and which is] in accordance with… international law applicable to the conflict". Of more value is the Swiss provision, as it explicitly reinforces the need for specific intention.

The United States material support statute once also contained a 'humanitarian assistance' exception. However, in 1996 Congress abolished it.[69] Now the only acceptable form of support is the provision of 'medicine or religious materials'.[70] Despite arguments put to it that '[m]edicine in a vacuum means nothing',[71] a District Court in the US found that the provision is limited to medicine itself and not services or supplies in a broader sense.[72] This renders the US exemption largely redundant, leaving aid workers open to prosecution.[73]

Outside of the OSCE there are a couple of IHL exceptions worth noting. Australian law exempts those travelling abroad to provide 'aid of a humanitarian nature'.[74] New Zealand explicitly allows for the provision of food, clothing and medicine, even to designated terrorist entities; but, it must do no more than satisfy essential needs.[75] However, regarding Australia, it is important to note that a question-mark looms over what exactly is meant by

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Fourth Assessment Visit: Anti-Money Laundering and Combatting the Financing of Terrorism: Malta' (Mutual Evaluation, 6 March 2012), p. 39.

[67] Ibid., p. 52.

[68] David Anderson, 'Fourth Report on the Operation of the Terrorist Asset-Freezing etc. Act 2010' (March 2015), pp. 24-27; see also David Anderson, 'The Terrorism Acts in 2013: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006' (July 2014), pp. 70-72.

[69] Dustin A. Lewis et al., 'Medical Care in Armed Conflict: International Humanitarian Law and State Responses to Terrorism' (Harvard Law School Programme on International Law and Armed Conflict, September 2015), p. 127.

[70] Material Support Statute, 18 US Code §2339A(b)(1). Similarly, the Provisional Criminal Code of Kosovo, UNMIK/REG/2003/25, article 109(3) allowed an exception for 'necessary medicine'.

[71] *US v. Shah* 474 F.Supp.2d 492 (2007), [11].

[72] Ibid., [6].

[73] Because material support or resources includes 'service… expert advice or assistance [and] personnel': see Material Support Statute, 18 US Code §2339A(b)(1).

[74] Australian Criminal Code, division 102.8(4)(c).

[75] Terrorism Suppression Act 2002, sections 9(1) and (2).

'aid of a humanitarian nature'.[76] These exceptions are considered further in the final part of this section of the memorandum.

The issues presented

As the Supreme Court of Canada stressed in *Khawaja*, the purpose of counter-terror laws is to prevent and punish terrorists. They should, therefore, be interpreted strictly, for the reasons explained earlier. Unfortunately, as was made clear in the trend analysis, material support and assistance laws are anything but narrow. Andrej Zwitter has correctly characterised the situation as a Catch-22.[77] On the one hand, international terrorism presents a real threat to global security; yet it is the factors frequently underlying terrorism, and that may amount to conditions conducive to the spread of terrorism (underdevelopment, socio-economic marginalization and so forth),[78] that humanitarian aid aims to address.[79]

International humanitarian law

Humanitarian actors already work in dangerous, war-torn corners of the world. Amplifying these difficulties, and despite the 13.5 million civilians in need of aid,[80] the Syrian Government recently asserted that engaging terrorist groups, which control large swathes of territory, to provide humanitarian assistance, violates international law and will not be tolerated.[81] The Assad regime's claim runs directly counter to UNSC Resolutions dating back to 1992, which condemned those impeding the delivery of food and medicine to civilian populations in Somalia.[82] However, in tacit agreement, some Western nations are currently 'evaluating' whether to penalise medics providing support in ISIS-held territory,[83] leaving a sword of Damocles dangling over the heads of international aid workers.

Little is done at the international level to mitigate these issues. UNSC Resolution 2178 simply reaffirms the need to comply with humanitarian obligations[84] and the Draft Directive is silent on the point. The OSCE goes further, emphasising that the term FTF is "without

[76] Phoebe Pope et al., 'Legislating Against Humanitarian Principles: A Case Study on the Humanitarian Implications of Australian Counterterrorism Legislation' (2016) 97(897/898) *International Review of the Red Cross* 235, p. 246.
[77] Andrej Zwitter, 'Humanitarian Action, Development and Terrorism' in Ben Saul (ed.) *Research Handbook on International Law and Terrorism* (Cheltenham: Edward Elgar, 2014), p. 315.
[78] United Nations Global Counter-Terrorism Strategy, adopted under UNGA Resolution 60/288 (20 September 2006), UN Doc A/RES/60/260, Pillar I, premabular paragraph.
[79] Zwitter (2014) op. cit., p. 315.
[80] UN Secretary General, 'Report on the threat posed by ISIL (Da'esh) to international peace and security and the range of United Nations efforts in support of Member States in countering the threat', UN Doc S/2016/92 (2016), [11].
[81] Academy Briefing No. 7, p. 63.
[82] UNSC Res 794 (3 December 1992), UN Doc S/RES/794. See also: UNSC Res 1916 (19 March 2010), UN Doc S/RES/1916; and Jessica Burniske et al., 'Suppressing Foreign Terrorist Fighters and Supporting Principles Humanitarian Action: A Provisional Framework for Analysing State Practice' (Harvard Counterterrorism and Humanitarian Engagement Project, Research Briefing, October 2015), p. 38.
[83] Lewis (2015) op. cit., iii.
[84] UNSC Res 2178 (24 September 2014), UN Doc S/RES/2178, preamble [7] and operative [5].

prejudice to the legal status [of fighters under] in particular [IHL]"[85] and some headway was made recently by the EU Working Party on Substantive Criminal Law, which proposed adding a recital to the Draft Directive stipulating that it does not alter the rights, obligations and responsibilities of States under IHL and does not govern the activities of armed forces which come under that regime.[86] This is similar to the exception under Canadian law and neither constitute a panacea as many entities simultaneously perpetrate acts of terrorism and remain parties to an international or a non-international armed conflict.[87]

This lack of guidance is accentuated by the sometimes paradoxical nature of provisions of the Geneva Conventions,[88] as despite assertions that relief action "*shall* be undertaken" (emphasis added), there are immediate caveats which require the consent of the State(s) concerned.[89] However, the ICRC has said that the correct interpretation of these provisions requires that, in situations where civilians are at risk of starvation, the State will be "obliged to give consent".[90] This is of course contingent on the humanitarian organisation satisfying the principle of impartiality and not making any adverse distinctions in relation to aid distribution.

The fear of prosecution under foreign laws, magnified by the above factors, has been penetrating the ranks of humanitarian organisations since at least 2004 when a number of actors refused to distribute aid to the LTTE controlled shores of Sri Lanka, after the region was devastated by a Tsunami.[91] They were concerned about the breadth of US law and in so refusing the workers were foregoing the exercise of their basic human rights, an issue discussed directly below.[92]

International human rights law

Most obviously at risk of being infringed by broad support and assistance laws is the principle of legality.[93] According to the OSCE, this principle requires that no one be charged

[85] OSCE Ministerial Council, 'Declaration on the OSCE Role in Countering the Phenomenon of Foreign Terrorist Fighters in the Context of the Implementation of UN Security Council Resolutions 2170 (2014) and 2178 (2014)', MC.DOC/5/14, 5 December 2014, footnote to the preamble.

[86] Council of the EU, 'Proposal for a Directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism: Examination of the revised text', 23 February 2016, 2015/0281 (COD), proposed recital 19a.

[87] Kräehenmann (2014), p. 23.

[88] Lewis et al., (2015) op. cit., pp. 12-63.

[89] Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3, Article 70(1)-(3); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609, Article 18; ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' (Geneva, October 2011) Doc. 31/C/11/5.1.2, p. 25; David Marcus, 'Famine Crimes in International Law' (2003) 97(2) *American Journal of International Law* 245, pp. 268-269.

[90] ICRC, 'Customary International Humanitarian Law, Rule 55: Access for Humanitarian Relief to Civilians in Need' <https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule55#Fn_34_23> (accessed 29 March 2016).

[91] Justin A. Fraterman, 'Criminalising Humanitarian Relief: Are U.S. Material Support for Terrorism Laws Compatible with International Humanitarian Law?' (2014) 46 *International Law and Politics* 399, pp. 401-402.

[92] Ibid., p.402.

[93] Claudia Martin, 'Terrorism as a Crime in International and Domestic Law: Open Issues' in Larissa Van Den Herik and Nico Shrijver, (eds.) *Counter-Terrorism Strategies in a Fragmented International Legal Order*' (Cambridge: Cambridge University Press, 2015), p. 655.

with or tried on the basis of an offence not defined "with clarity and precision",[94] so as to safeguard the right to know which acts can result in criminal liability, thus allowing citizens to regulate their behaviour accordingly.[95] Thomas Bingham described it is as a rule of "simple fairness… which any child would understand".[96] Thus, the UNSC's recent assertion that States must respect the principle when defining crimes and not presume that people travelling abroad are seeking to engage in terrorism is a welcome proclamation.[97] Unfortunately, these sentiments did not expressly find their way into a substantive resolution, and are only implicit through the repeated reference in Resolution 2178 that measures taken to implement the Resolution be compliant with international law, including international human rights law. Having said that, the UN Human Rights Committee and the ECtHR have both decided that States must implement Security Council obligations in a human rights compliant manner.[98] Furthermore, in *Al-Dulimi v. Switzerland* the ECtHR had to consider a Resolution which granted Switzerland no latitude regarding its implementation.[99] This notwithstanding, they found that, unless the enacting organisation offers equivalent protection to the ECHR, States remain responsible for any violations resulting from the implementation of the measure.[100]

Fear of being caught in a web of immense and confusing law[101] contributes to the 'chilling effect' on aid agencies;[102] an effect magnified by the fact that, as noted above, many States require only knowledge or even recklessness as to the terrorist-nature of the group associated with to support a terrorism charge. In this connection, two of the UN's Special Procedures have noted a concerning trend toward singling out organisations on the basis of religion, race or location,[103] a concern potentially borne out by the reliance of many States

[94] OSCE, 'Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE' (Copenhagen, 1990), [5.18]; and ODIHR, 'Legal Digest of International Fair Trial Rights' (ODIHR, 2012), p. 185; see also *inter alia* Human Rights Committee, 'General Comment No. 34: Freedom of Opinion and Expression', UN Doc CCPR/C/CG/34 (2011), [25].

[95] International Commission of Jurists, 'Legal Commentary on the ICJ Berlin Declaration: Counter-Terrorism, Human Rights and the Rule of Law' (Geneva: ICJ, 2008), p. 16; Assessing Damage, Urging Action, p. 127; Human Rights Committee, 'General Comment No. 34: Freedom of Opinion and Expression', UN Doc CCPR/C/CG/34 (2011), [25]; *Sunday Times v. United Kingdom*, application 6538/74, 26 April 1979, [49].

[96] Thomas Bingham, *The Rule of Law* (London: Penguin Books, 2010), p. 74.

[97] UNSC, 'Implementation of Security Council resolution 2178 (2014) by States affected by foreign terrorist fighters: first report', UN Doc S/2015/338 (2015), p. 37; UNSC, 'Implementation of Security Council resolution 2178 (2014) by States affected by foreign terrorist fighters: third report', UN Doc S/2015/975 (2015), p. 154.

[98] *Sayadi v. Belgium*, Human Rights Committee, UN Doc. CCPR/C/94/D/1472/2006 (29 December 2008), [10.6]; *Nada v. Switzerland* [GC] application 10593/08, 12 September 2012, [172].

[99] *Al-Dulimi and Montana Management Inc v Switzerland*, application 5809/08, 26 November 2013, [117]; c*f., Nada v. Switzerland* [175]-[180].

[100] *Al-Dulimi and Montana Management Inc v Switzerland*, [118]-[120]; for comment see, Alex Conte 'An Old Question in a New Context: Do States Have to Comply with Human Rights When Countering the Phenomenon of Foreign Fighters?' (*EJIL Talk!* 19 March 2015) < http://www.ejiltalk.org/an-old-question-in-a-new-context-do-states-have-to-comply-with-human-rights-when-countering-the-phenomenon-of-foreign-fighters/> (accessed 15 April 2016).

[101] Humanitarian Policy Group, 'Aid and the Islamic State' (Crisis Brief, December 2014), p. 3.

[102] Naz K. Modirzadeh et al., 'Humanitarian Engagement Under Counter-Terrorism: A Conflict of Norms and the Emerging Policy Landscape' (2011) 93(833) *International Review of the Red Cross* 623, pp. 642-643.

[103] Report of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc A/70/371 (2015), [43]; Report of the UN Special Rapporteur on

on objective factual circumstances – such as the mere fact of travelling to another country[104] – to secure convictions.

Adding to the above concerns, the Humanitarian Policy Group (HPG) recently noted that while "duty-bound to deliver aid impartially… there is a very real fear that working with IS will inadvertently benefit [them] materially", which could result in prosecution.[105] As such, some evidence suggests that international agencies have sworn themselves to secrecy, working undercover and via local NGOs to distribute aid in ISIS controlled territory.[106] Government officials have taken the view that even those who pay fees at roadblocks in an effort to reach civilians in need will be liable to prosecution.[107] These direct assertions, coupled with the lack of clarity inherent in counter-terrorism laws,[108] have led many agencies to self-censor and avoid areas under the de facto control of armed terrorist groups such as Al-Shabab[109] and Hamas.[110] Indeed, there is strong evidence suggesting that aid to Somalia and Palestine plummeted after Al-Shabab and Hamas were listed as terrorist organisations.[111]

It is suggested that States must at least refrain from violating the rights of those within their jurisdiction, yet evidently the rights to free association, expression and movement[112] cannot be fully enjoyed by aid workers at risk of prosecution for travelling abroad to provide innocuous, even peaceful advice or assistance to FTFs and, of special concern, to the thousands of civilians under their control. Furthermore, the right to food and freedom from hunger[113] of those same civilians hangs in the balance as their primary sources of aid are threatened with the prospect of prosecution by foreign powers.

When agencies inject aid into a conflict the accrual of some benefit to the parties involved is inevitable,[114] be it perceived[115] legitimacy as ISIS takes credit for the distribution of

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the rights to freedom of peaceful assembly and of associations, UN Doc A/HRC/23/39/Add.1 (2013), [83] and [91].

[104] E.g., see Poland's response in the Compilation of Replies, 57.

[105] Humanitarian Policy Group, 'Aid and the Islamic State' (Crisis Brief, December 2014), p. 5.

[106] Ibid., p. 4.

[107] Jeffrey Gettleman, 'U.N. Officials Assail U.S. on Limiting Somali Aid' (*New York Times*, 18 February 2010) <http://query.nytimes.com/gst/fullpage.html?res=9807EED9153FF93BA25751C0A9669D8B63> (accessed 22 March 2016); and Joint Committee on the Draft Protection of Charities Bill, *Report: Draft Protection of Charities Bill* (2015, HL 108, HC 813), p. 54.

[108] Mackintosh and Duplat (2013) op. cit., pp. 99-100.

[109] Report of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc A/70/371 (2015), [36]-[40]; Ibid., pp. 81 and 84.

[110] Mackintosh and Duplat (2013) op. cit., pp. 97-100.

[111] Gettleman (2010) op. cit.; Mackintosh and Duplat (2013) op. cit., pp. 73-102.

[112] The right of association: ECHR, Article 11; ICCPR Article 22; EUCFR, Article 12. Freedom of expression: ECHR, Article 10; ICCPR, Article 19; EUCFR, Article 11. Freedom of movement: ECHR, Article 2 of Protocol 4; ICCPR, Article 12; EUCFR, Article 45.

[113] The right to food, International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976), 993 UNTS 3 (ICESCR), Article 11, Article 11(2) of which specifies the need for international cooperation and programmes of aid.

[114] Sara Pantuliano et al., 'Counter-Terrorism and Humanitarian Action: Tensions, impact and ways forward' (Policy Brief 43, October 2011), p. 6.

[115] Not actual legitimacy or recognition, Gerard Mc Hugh and Manuel Bessler 'Guidelines on Humanitarian Negotiations with Armed Groups' (UN, January 2006)

vaccinations, or financial gain when aid-workers are forced to pay gatekeepers to access victims.[116] But as long as those agencies provide relief impartially and without specific intent to engage in criminal activity, prosecution should not follow. These assertions are fleshed out into recommendations below.

Recommendations

Recommendation 1 – specific intention and causation

The case for a requirement of specific intent was well put by the HPG, which noted that "humanitarian action intends to save lives… not support terrorism".[117] Despite this, it has been shown in the trend analysis that the majority of OSCE participating States require only knowledge of or recklessness as to the criminal activities of the group in question. The issue with overly broad 'contribution' crimes is also present in international criminal law where it has been noted that the criminality of a particular group will often be common knowledge.[118] However, to prosecute every individual who provides that group with a service or commodity would be counter-productive as those living under the control of large scale, criminal organisations often have no choice but to engage with them.[119]

Likewise, the criminality of ISIS or Hamas is common knowledge, but humanitarian organisations are often the only lifeline for civilians living under their respective regimes. Further, requiring 'knowledge' alone, particularly when this can be inferred, can lead to ethnic profiling,[120] a concern expressed by two of the UN's Special Procedures, as earlier outlined. In this connection, the principles of legality and fair labelling[121] dictate that one should not have their reputation marred by being labelled a supporter of terrorism unless that was indeed their intention when they acted.[122]

While Germany is the only State featured in the trend analysis which requires intention across the board, the Canadian Supreme Court in *Khawaja* provides an example of a specific intent requirement directly linked to terrorism offences. To re-state the Court's judgment: "the accused [must have] specifically intended to enhance the ability of a terrorist group or facilitate or carry out a terrorist activity", adding that the element is one of subjective intent.[123] Furthermore, causation to crime in the minimal sense that the assistance must

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<http://www.unicef.org/emerg/files/guidelines_negotiations_armed_groups.pdf> (accessed 10 May 2016), p. 1.

[116] See, Max Fisher, 'Even ISIS Supports Getting Kids Vaccinated' (*Vox,* 2 February 2015) <http://www.vox.com/2015/2/2/7966421/vaccination-isis> (accessed 30 March 2016).

[117] Ibid., p. 5.

[118] *The Prosecutor v. Callixte Mbarushimana*, Pre-Trial Chamber, Decision on the Confirmation of Charges, ICC-01/04-01/01, 16 December 2011, p. 277.

[119] Jens D. Ohlin, 'Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise' (2007) 5(1) *Journal of International Criminal Justice* 69, p. 79.

[120] Sandra Krähenmann, 'The Obligations Under International Law of the Foreign Fighter's State of Nationality of Habitual Residence, State of Transit and State of Destination' in Andrea de Guttry et al., (eds.) *Foreign Fighters Under International Law and Beyond* (The Hague: Asser Press, 2016), p. 237.

[121] For a detailed overview of the history of and justifications for the latter principle see, James Chalmers and Fiona Leverick 'Fair Labelling in Criminal Law' (2008) 71(2) *Modern Law Review* 217, especially pp.218-238.

[122] Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Cambridge: Cambridge University Press, 2014), p. 179.

[123] *R v. Khawaja* [2012] 3 R.C.S. 555, 558.

amount to a 'condition' – though not a *sine qua non* – of the crime should be required.[124] This would have the effect of ensuring that nominal contributions and harmless, peaceful advocacy would not be caught in the web of criminality.[125]

It is therefore recommended that, when criminalising 'material support', 'assistance' or 'collaboration' with a terrorist group, States' criminal law provisions require that the person have a specific intention to further or enhance the activities of the terrorist group or to commit offences and engage in activity not permitted by IHL. Their contribution should be a condition of the group's activities in the minimal sense that use must be made of the help offered to perpetrate a crime, so that, for example, peaceful advocacy alone cannot entail a conviction. Furthermore, recklessness or negligence should never suffice for a conviction on the basis of these crimes.

Recommendation 2 – humanitarian exception

Additional to those States which have already implemented such a humanitarian exception provision, some other States have expressed an awareness of the need for such an exception. Sweden, commenting on the Draft Directive, explained the need to avoid affecting "an individual's ability to contribute to humanitarian activities"[126] and Finland added that the "principles of [sic] rule of law, legality and proportionality"[127] were of the upmost importance in the fight against terrorism. As noted in the trend analysis, some consideration was also given to this issue in the UK, first by the Independent Reviewer of Terrorism Legislation and latterly by a Parliamentary Joint Committee.

In a recent study[128] it was remarked that States should be given guidance on how to comply with IHL obligations, while combatting terrorism, based on the approach taken in UNSC Resolution 1916 (2010).[129] There, the UNSC decided that to ensure the timely delivery of aid during a humanitarian crisis in Somalia the restrictions on delivering money and economic or other resources into the State would, for a limited period, not apply. The provision specified that the embargo was only lifted in relation to UN specialised agencies, humanitarian organisations with observer status at the UN or their domestic implementing partners.[130]

Turning to the municipal legislatures examined, the Australian exception was arguably too broad as prosecutors often experience real difficulty in proving the elements of crimes where suspects *claim* that they are travelling abroad for humanitarian reasons[131] – a term

[124] Hart and Honoré (1995) op. cit., p. 385.
[125] *Holder v. Humanitarian Law Project* 561 U.S. 1 (2010) (Breyer, Ginsburg and Sotomayor, dissenting), [11]-[13]; and *The Prosecution v. Callixte Mbarushimana*, Pre-Trial Chamber, Decision on the Confirmation of Charges, ICC-01/04-01/10, 16 December 2011, [277].
[126] Compilation of Replies, p. 71.
[127] Ibid., p. 30.
[128] Burniske et al., (2015) op. cit., pp. 43-44; also Mackintosh and Duplat (2013) op. cit., pp. 117.
[129] UNSC Res 1916 (19 March 2010), UN Doc S/RES/1916.
[130] Ibid., [5].
[131] Christophe Paulussen and Eva Entenmann, 'National Responses in Select Western European Countries to the Foreign Fighter Phenomenon' in Andrea de Guttry et al., (eds.) *Foreign Fighters Under International Law and Beyond* (The Hague: Asser Press, 2016), p. 395. See generally, UNSC, 'Bringing Terrorists to Justice: Challenges in Prosecutions Related to Foreign Terrorist Fighters' UN Doc S/2015/123 (2015).

left undefined.[132] A better approach is that taken by the Swiss Criminal Code. While Switzerland does not have a material support provision, article 260(4) states that their offence of financing terrorism does not apply if the money "is intended to support acts that do not violate the rules of international law on the conduct of armed conflicts". The principal merit of this approach is its link to a requirement of specific intention, which fits alongside recommendation 1.

In making a second recommendation, an amalgamation of the two approaches detailed above is proposed. Currently, aid agencies must choose between obeying humanitarian principles or counter-terrorism laws.[133] Humanitarian principles are what separate agencies like the ICRC from other NGOs and any exception should be contingent on them. It is therefore proposed that an evidential burden be placed on the organisation in question to show that it abides by the four principles of humanity, impartiality, independence and neutrality in its work.[134] This would separate cases such as *U.S. v. Sabir*, where a doctor was found guilty of material support after he pledged allegiance to provide care only to al-Qaeda fighters,[135] from cases where organisations adhere to humanitarian principles, but make payments to or associate with terrorist organisations out of necessity.

It must be stressed that an evidential burden is not a reverse burden. Once an organisation shows that it adhered to principled humanitarian action, the provision should require that the suspect specifically intended to support criminal acts that are prohibited under IHL and contributed in some way to the crime.

Administrative measures against foreign terrorist fighters: denationalisation

When implementing the obligation to prevent and suppress the movement of FTFs pursuant to the relevant instruments, some States have opted to deprive such individuals of their nationality. Although traditionally a sovereign issue, matters of nationality are subject to international legal restraints. The compliance of administrative denationalisation of FTFs with international law is explored in this part of the memorandum. Legal and theoretical compliance is first analysed generally, then contextualised by examining the domestic denationalisation law and policy of the United Kingdom (UK) when implementing its obligations pursuant to the instruments mentioned.

The right to nationality

The right to a nationality is enshrined in Article 15 of the Universal Declaration on Human Rights (UDHR), providing that "Everyone has the right to a nationality" and that "No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality".[136] This has been reinforced internationally in the Convention on the Reduction of Statelessness (CRS) and the Convention Relating to the Status of Stateless Persons, as well as by regional treaties including the European Convention on Nationality (ECN) and the

[132] Pope (2016) op. cit., p. 246.
[133] Zwitter (2014) op. cit., p. 331.
[134] Lewis et al., (2015), pp. 12-13.
[135] *US v. Shah* 474 F.Supp.2d 492 (2007).
[136] Universal Declaration of Human Rights, adopted under UNGA Res 217 A(III) (1948) (UDHR), Article 15.

American Convention on Human Rights.[137] Although the right to a nationality is not mentioned in the European Convention on Human Rights, it has been addressed in the case law of the European Court of Human Rights. In the 2011 case *Genovese v. Malta*, nationality was interpreted by the Court to be a part of individuals' social identity under their Article 8 right to a private life.[138] In the EU context, the right to a nationality has similarly been addressed in the European Court of Justice's jurisprudence, where nationality has been interpreted as key to bringing individuals under the ambit of EU law.[139]

The Secretary-General of the United Nations published a report in 2011 exploring the intrinsic links between the right to a nationality and other human rights. He concluded that, *inter alia*, the right to a nationality aids the enjoyment of the right to vote and be elected, the right to freedom of movement, to liberty, to an effective remedy, to family life and private life, to work, social security, health and adequate housing.[140] Nationality facilitates many other human rights, and is therefore considered to be a fundamental right by the Office of the High Commissioner for Human Rights, the Human Rights Council (HRC), the UN Secretary-General and the Council of Europe, not to mention civil society and NGOs.[141]

The facilitation of the right to freedom of movement is particularly relevant. Preventing and suppressing the travel of FTFs by way of denationalisation serves as a double-edged sword, not only severing the connection of the individual to the State, but also limiting the physical access of the individual to a State's territory. This simultaneously limits the ability to exercise human rights.[142]

Nationality is the bridge between the individual and the international community. It holds the keys to international legal protection, to holding States accountable for their actions and to recognition by a system centred on Statehood. To deprive someone of their nationality, therefore, is not a measure to be taken lightly. The rights listed above are inherently affected, amounting to a severe curtailing of human rights enjoyment and protection. Notwithstanding, international law does not absolutely prohibit deprivation of nationality. However, in accordance with various aforementioned legal texts, it sets out strict conditions for States to follow in order to avoid arbitrarily denationalising individuals.

[137] Convention Relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117; Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UTS 175; European Convention on Nationality (adopted 6 November 1997, entered into force 1 March 2000) ETS 166; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) OASTS 36.

[138] *Genovese v. Malta*, ECtHR Application 53124/09, 11 October 2011.

[139] *Janko Rottman v. Freistaat Bayern*, ECJ Case C-135/08, 2 March 2010.

[140] Report of the Secretary-General, 'Human Rights and Arbitrary Deprivation of Nationality', UN Doc A/HRC/13/43 (2011).

[141] Ibid; UN Human Rights Council Resolution 10/13 (2009), UN Doc A/HRC/10/13; Council of Europe 'The Right to a Nationality' (2009) <http://www.coe.int/t/dghl/standardsetting/nationality/nationality_enA3.pdf> (accessed 14 March 2016); European Network on Statelessness 'Statelessness: 2015 Brochure' (2015) <http://www.statelessness.eu/sites/www.statelessness.eu/files/ENS_brochure_2015.pdf> (accessed 9 January 2016).

[142] UN Human Rights Committee, 'General Comment No. 27', UN Doc CCPR/C/21/Rev.1/Add.9 (1999).

The prohibition of arbitrary deprivation of nationality

The idea of arbitrary deprivation of nationality has been discussed internationally since its first mention in the UDHR. This discussion intensified in the 1990s during the dissolution of the Former Soviet Union, focusing on nationality in the context of State succession. This formed the basis for the ECN, and was added to by the adoption of resolutions by the former UN Commission on Human Rights on the denationalisation of vulnerable groups and minorities during this period.[143] The theme of vulnerable groups and denationalisation continued in the twentieth century, with similar resolutions by both the former Commission and the nascent Human Rights Council (HRC) addressing deprivation of women and children's citizenship.[144] The General Assembly has also adopted several resolutions concerning the issue of nationality, statelessness and arbitrary deprivation of nationality.[145] The Convention on Eliminating All Forms of Racial Discrimination further prohibits racial discrimination for deprivation of nationality, and its overseeing Committee has also passed comment on the issue.[146] Arbitrary deprivation of nationality has been dealt with extensively in a variety of instruments and mechanisms, and is therefore not simply a capricious construct.

The conditions for non-arbitrary deprivation of nationality are outlined by the Secretary-General in his 2009 report on the topic. He notes that the conditions listed draw heavily on the Human Rights Committee's interpretation of what constitutes 'arbitrary interference' in the context of Article 17 of the ICCPR, again emphasising the engagement with broader international law and not simply imposing his own limitations on what is essentially a sovereign matter.[147] Deprivation of nationality must be prescribed by domestic law, be in pursuit of a legitimate aim, be proportionate to that aim and provide procedural safeguards to allow individuals to challenge their denationalisation.[148] These conditions are in keeping with international standards for limiting rights non-arbitrarily. Crucially, the report states that these conditions are to be followed for 'legislative, administrative and judicial' denationalisation.[149]

It is against these conditions that the deprivation of nationality to prevent and suppress the travel of foreign terrorist must be assessed. National security, despite its baggage as a catch-all term, certainly constitutes a legitimate aim for depriving individuals of citizenship. For

[143] UN Commission on Human Rights resolution, 'Human Rights and Arbitrary Deprivation of Nationality', UN Doc E/CN.4/Res/1997/36; UN Commission on Human Rights resolution, 'Human Rights and Arbitrary Deprivation of Nationality', UN Doc E/CN.4/Res/1999/28.

[144] UN Commission on Human Rights resolution, 'Human Rights and Arbitrary Deprivation of Nationality', UN Doc E/CN.4/Res/2005/45; UN Human Rights Council, 'Resolution 7/10: Human Rights and Arbitrary Deprivation of Nationality', UN Doc A/HRC/Res/7/10; UN Human Rights Council, 'Resolution 13/2: Human Rights and Arbitrary Deprivation of Nationality', UN Doc A/HRC/Res/13/2.

[145] UN General Assembly, 'United Nations General Assembly Resolutions of Particular Relevance to Statelessness and Nationality' (16 May 2014) <http://www.refworld.org/docid/4c49a02c2.html> (accessed 21/03/2016).

[146] Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195; Committee on the Elimination of All Forms of Racial Discrimination 'General Recommendations No. 30', UN Doc. CERD/C/64/Misc.11/rev.3 (2004).

[147] Report of the Secretary-General, 'Human Rights and Arbitrary Deprivation of Nationality', UN Doc. A/HRC/13/34 (2009), [24].

[148] Ibid, [24-25].

[149] Ibid, [24].

the purposes of this memorandum, it is assumed that denationalisation is provided for in domestic law. This is particularly salient given that the UK's denationalisation policy is prescribed in national legislation. It is important to bear in mind, however, that this is not true for all similar State policies. The conditions that prove particularly problematic for denationalisation of FTFs are its proportionality and their provision of due process and procedural safeguards.

Proportionality

The Secretary-General states that denationalisation "must be the least intrusive measure to achieve the desired result, and must be proportional to the interest that is being protected… The notion of arbitrariness could be interpreted to include not only acts that are against the law but, more broadly, elements of inappropriateness, injustice and lack of predictability also."[150]

According to this condition, deprivation of FTFs' nationality can only be legitimate if it is proportionate to their threat to national security. It is important to note that those that travel abroad to conflict zones are statistically far more likely to either remain in the conflict zone or, once the conflict has ended, move on to another conflict.[151] This is not to denigrate the threat that even one returning foreign terrorist fighter poses to his State of return. It is well-documented that terrorist attacks by returning FTFs are more effective and therefore more dangerous.[152] The Paris attacks in 2015 and the recent Brussels attacks in March 2016 validate this. It is nonetheless important when assessing proportionality to bear in mind that the overwhelming majority of foreign fighters do not return.[153]

Deprivation of citizenship as a method of preventing and suppressing the travel of FTFs is considered an administrative measure because its purpose is prevention rather than punishment. However, in practice, the distinction between the administrative versus criminal nature of denationalisation is not so clear. In 2007, the then-Special Rapporteur on the promotion and protection of human rights while countering terrorism questioned this distinction in the context of financial asset-freezing under the Al-Qaeda sanctions regime.[154] He noted that the threshold for criminal measures is a combination of severity and time-frame.[155] His argument was that without temporal constraints, the freezing of assets could in theory become a permanent confiscation of funds, which constitutes a serious criminal sanction. He asserted that any open-ended sanction, "no matter how they are qualified, may fall within the scope of criminal sanctions for the purposes of international human rights law".[156] Serious administrative action when applied open-endedly may therefore cross the threshold to become a criminal measure.

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[150] Ibid, [25].

[151] T Hegghammer, 'Should I Stay or Should I Go? Explaining Variation in Western Jihadists' Choice between Domestic and Foreign Fighting' (2013) *American Political Science Review* 107(1) 1-15 pp. 6-7.

[152] Academy Briefing No. 7, op. cit., pp. 3-4.

[153] Ibid., p. 6.

[154] UNSC Res 1267 (15 October 1999), UN Doc S/Res/1267.

[155] Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism, UN Doc A/61/267 (2006), [34-35].

[156] Ibid, [35].

As detailed above, denationalisation is certainly a severe measure. The concomitant effects of deprivation of citizenship qualify it, at the very least, as a serious administrative action. One of the most problematic aspects of the relevant instruments cited is their lack of temporal scope. Without this, the detrimental effects of denationalisation are hypothetically indefinite. The instruments do not oblige States to impose measures preventing and suppressing travel strictly temporarily. Deprivation of citizenship in this way crosses the threshold of criminal measures given its severity and its open-endedness. This has implications for procedural safeguards and due process, which will be discussed at greater length below.

This is problematic in terms of proportionality. How can criminal punishment be proportional to grounds of administrative prevention? Pre-emptive denationalisation of FTFs relies on the fact that such strong action is inhibiting a threat to national security. To impose criminal sanctions on individuals before they have committed any offence amounts to punishment without conviction.[157]

The proportionality of preventive denationalisation on an open-ended basis is cast further into doubt by examining its effectiveness. It is important to revisit the specific wording of the Secretary-General's report here, that, in order to avoid arbitrariness, deprivation of citizenship "must be the least intrusive measure to achieve the desired result". Underpinning this condition is the assumption that such measures do indeed "achieve the desired result". Denationalisation, it is implied, achieves the desired result of preventing the return of FTFs and consequently averting a threat to national security. This is an assumption that must be challenged.

Deprivation of citizenship may not effectively prevent individuals from claiming their return. Article 12 of the ICCPR, the right to freedom of movement, includes the right to return to one's own country. This serves as a protection against exile, which is enshrined in Article 9 of the UDHR but does not explicitly appear in the ICCPR or the ECHR. The right to return to one's own country therefore renders exile impossible in practice[158], and it has been suggested by several commentators and organisations, including the Human Rights Committee and the Secretary-General, that denationalisation with the sole intent of exiling individuals should automatically be considered arbitrary.[159]

The Human Rights Committee, in its General Comment No. 27, clarified that the right to enter one's own country is a broader construct than 'country of nationality'.[160] The Committee went on to state that this applied "at the very least to individuals who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. This would be the case, for example, of nationals of a country who have

[157] L van Waas 'Foreign Fighters and Deprivation of Nationality', op. cit., p. 477

[158] J Niemi-Kiesiläinen 'Article 9' in GA Alfredsson and A Eide (eds.), *The Universal Declaration on Human Rights: A Common Standard* (The Hague: Martinus Nijhoff, 1999), pp. 215-216.

[159] International Law Commission, 'Expulsion of Aliens: Draft Articles 1-32', UN Doc. A/CN.4/L.797 (2012), Draft Article 9; Academy Briefing No. 7, op. cit., p. 57; J Brandvoll 'Deprivation of Nationality: Limitations on Rendering Persons Stateless under International Law' 194-216 in *Nationality and Statelessness under International Law* (Cambridge: Cambridge University Press, 2014) p. 214; Report of the Secretary-General, 'Human Rights and Arbitrary Deprivation of Nationality', UN Doc. A/HRC/25/28 (2013), [26].

[160] Human Rights Committee, 'General Comment No. 27: Freedom of Movement', UN Doc CCPR/C/21/Rev.1/Add.9 (1999), [14].

been stripped of their nationality in violation of international law." [161] Thus, if an individual is stripped of their nationality without abiding by the principle of proportionality, the individual would retain the right to enter their own country. Denationalisation, therefore, would not prevent and suppress the return of FTFs to their own country. It has been suggested in this context that denationalisation is an outdated procedure that should have been obviated by the development of domestic criminal justice systems.[162]

The Human Rights Committee has also noted that "there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable".[163] Criminally punitive denationalisation, regardless of their purported 'administrative' grounds, would certainly not represent one of these rare circumstances. When assessing the proportionality of denationalisation, one must therefore balance the curtailment of several fundamental human rights against a national security threat which may not even be prevented. If the purpose of citizenship deprivation is to thwart the threat of returning FTFs, the right to return to one's own country would suggest that deprivation is ineffective. Ironically, it would appear that the right to return is the only right that denationalisation does not seriously inhibit. Denationalisation does not in practice make the global community more secure[164], and individuals can still return to their own country, as clarified by the Human Rights Committee. The underlying assumption in the proportionality assessment of limiting the right to a nationality is that it 'achieves the desired result'. This assumption is false, and therefore depriving FTFs of their citizenship casts further aspersions on proportionality.

Procedural safeguards

In order for denationalisation of FTFs to be legitimate, States are expected to establish and observe procedural standards to protect individuals from abuse of the law. The International Law Commission outlined that decisions relating to nationality should be issued in writing and be open to an effective judicial review. This applies not just to the procedure but the substantive issues relevant to denationalisation. These, according to the International Law Commission, "represent minimum requirements in this respect".[165]

These standards of due process and access to effective remedy for matters of nationality are echoed in each of the Secretary-General's reports on arbitrary denationalisation, the Convention on the Rights of the Child, several resolutions of the HRC and the Executive Committee of the High Commissioner for Refugees.[166] Regionally, the importance of

[161] Ibid, [20].
[162] A Macklin 'Kick-Off Contribution', in A Macklin and Rainer Baubock (eds.), *The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?* <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2563555> (accessed 3 February 2016), p. 5.
[163] Ibid, [20].
[164] A Macklin, 'Kick-Off Contribution', p. 6.
[165] *Yearbook of the International Law Commission* Vol. 2(2) (1999) pp. 31 and 38.
[166] Report of the Secretary-General 'Human Rights and Arbitrary Deprivation of Nationality' (2009) [43-46]; Report of the Secretary-General 'Human Rights and Arbitrary Deprivation of Nationality' (2011) [17-20]; Report of the Secretary-General 'Human Rights and Arbitrary Deprivation of Nationality' (2013) [31-34]; Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 Article 8(2); Human Rights Council Resolution 10/13 (2009) [9]; Human Rights Council Resolution 7/10 (2008)

procedural safeguards in deprivation of citizenship are enshrined in Articles 11 and 12 of the ECN.[167] The plethora of textual evidence for the necessity of procedural safeguards for nationality issues are complemented by the more broadly pertinent right of individuals to an effective remedy and to fair trial standards both regionally and internationally, applicable to both criminal and administrative measures, and especially rigorous in the context of criminal proceedings.[168]

Denationalisation of FTFs is laden with obstacles to both an effective remedy and procedural safeguards. National security grounds may be invoked to withhold information from the individual whose nationality has been deprived.[169] This negatively impacts the ability of the individual to challenge the decision to strip them of their citizenship, allowing the executive branch of the State to lean on classified intelligence to justify the measure.[170] Without access to the substantive reasons behind citizenship deprivation, it is impossible for those denationalised to contest the case against them, and frustrates their right to an effective remedy and to a fair hearing.[171]

The practical access of individuals to an effective remedy is blocked in certain denationalisation circumstances. Some States deprive individuals of nationality while they are abroad, which is of course highly likely in the case of FTFs given their role in conflicts outside the territory of their State. This is the policy of the UK, for example, which will be discussed at greater length below. Where denationalisation occurs abroad, individuals may find it impossible to access domestic review mechanisms. If the decision has immediate effect, the individual will not be able to appeal from within their State of nationality.[172] While in theory judicial review is possible, in practice meeting deadlines and simple communications with the independent reviewing body are made extremely difficult if individuals are abroad when their citizenship is stripped.[173] If they are outside the jurisdiction of their State of nationality, their access to a review procedure is severely limited. The Secretary-General has also asserted that the increased vulnerability of denationalised individuals renders them less likely to assert their rights and seek an effective remedy.[174]

Most problematic of all for denationalisation is its crossing the threshold from an administrative prevention measure to a criminal punishment without conviction, discussed above. While the overarching fair trial standards in Article 14(1) of the ICCPR are applicable

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[7]; Executive Committee of the High Commissioner for Refugees, 'General Conclusion No 102: International Protection' (7 October 2005) <http://www.unhcr.org/43575ce3e.html> (accessed 29 March 2016).

[167] European Convention on Nationality, Articles 11 and 12.

[168] See: ICCPR, Articles 2(3)(a) and 14(1); and ECHR, Articles 6(1) and 13.

[169] L van Waas, 'Foreign Fighters and Deprivation of Nationality', op. cit., p. 477.

[170] Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism, UN Doc A/65/258 (2010), [53].

[171] C Joppke, 'Terrorists Repudiate their own Citizenship' in A Macklin and Rainer Baubock (eds.) *The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?* <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2563555> (accessed 3 February 2016), p. 12.

[172] Academy Briefing No. 7, op. cit., p. 57.

[173] Immigration Law Practitioner's Association, 'Arbitrary Deprivation of Nationality Submission of the Immigration Law Practitioners' Association to the UN Office of the High Commissioner for Human Rights' (13 February 2013) <www.ilpa.org.uk/data/.../13.02.15-Arbitrary-deprivation-for-OHCHR.pdf> (accessed 12 March 2016).

[174] Report of the Secretary-General, 'Human Rights and Arbitrary Deprivation of Nationality' (2011), [18].

to both criminal and administrative proceedings, criminal prosecution triggers further minimum safeguards.[175] This outlines in specific detail the procedural and due process standards to be afforded to those being prosecuted. If denationalisation crosses the criminally punitive threshold, it is imperative for States to afford individuals the concomitant procedural standards of criminal prosecution. Failure to do so would represent a disparity between the punishment and the procedure.

To prevent such a disparity, States would normally be advised to pursue criminal investigation and prosecution so as to transform temporary administrative measures into conclusive criminal punishment.[176] This avoids individuals being caught in limbo between administrative and criminal proceedings, thus averting open-ended temporary measures. However, the instruments cited oblige States to take administrative action against ancillary offences, namely attempting to travel for the purposes of planning, perpetrating or participating in terrorism. Transforming administrative and preventive measures into criminal sanctions here is unlikely given that no offence has yet been committed. This leaves States no choice but to afford individuals the minimum safeguards of a criminal measure when denationalising in order to avoid violating the procedural standards of deprivation of citizenship. Without doing so, States would risk arbitrary denationalisation and consequently be in violation of several aspects of international human rights law.

The above issues with procedural safeguards, due process standards and the plausibility of an effective remedy for deprivation of citizenship amount to a problematic total. Administrative denationalisation of FTFs is troubling both theoretically and practically. Even if States do decide to implement the full procedural standards of a criminal prosecution for such administrative measures, which is unlikely given that they are under no obligation to do so, individuals may still find it impossible to assert their right to an effective remedy if information is withheld on national security grounds or if they are stranded on the battlefield post-deprivation. The combination of these problems cast serious aspersions over the likelihood of procedural and due process standards for legitimate denationalisation to be met. Deprivation of nationality is not only incapable of meeting the principle of proportionality, it also faces considerable struggle to satisfy procedural and due process standards.

Statelessness

States are further constrained in matters of nationality by the international principle that deprivation of citizenship should generally not result in statelessness. This principle is enshrined in the CRS and the ECN. The former permits rendering individuals Stateless via denationalisation only in cases where the individual "has conducted himself in a manner seriously prejudicial to the vital interests of the State"[177], with the Secretary-General clarifying that this is the exception to the rule.[178] The latter twice states that statelessness is to be avoided, and strictly limits legitimate denationalisation resulting in statelessness to

[175] Human Rights Committee, 'General Comment No. 32: Right to Equality before Courts and Tribunals and to a Fair Trial' UN Doc. CCPR/C/GC/32 (2007) [31-57]

[176] Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism, (16 August 2006), [37].

[177] Convention on the Reduction of Statelessness, Article 8(3)(a)(i).

[178] Report of the Secretary-General, 'Human Rights and Arbitrary Deprivation of Nationality' (2013), [4].

individuals with fraudulent documents or false information.[179] The eradication of statelessness has recently been made a firm goal of the international community, spearheaded by the High Commissioner for Refugees '#I BELONG'[180] campaign with the hope of ending statelessness by 2024.[181]

To belong to a State is the key to international legal protection. It places the responsibility on one's State of nationality to promote and protect one's rights. To be rendered stateless has thus been likened to political death[182], and described as "the worst possible thing to happen to a human being. It means you are a non-entity, you don't exist."[183] Statelessness therefore significantly amplifies the effects of denationalisation, leaving the impact on the individual particularly severe.[184] The international legal constraints on denationalisation naturally apply when the procedure renders individuals Stateless, arguably more strictly so given that the adverse implications are greater.[185]

It logically follows that if deprivation of nationality in the abstract is impossible to justify in terms of proportionality, then its most extreme form naturally fails to satisfy this criteria. The Secretary-General acknowledged this fact, noting that: "Given the severity of the consequences where statelessness results, it may be difficult to justify loss or deprivation resulting in statelessness in terms of proportionality".[186] When coupled with the fact that statelessness is imposed upon individuals as a criminal punishment, purportedly on administrative grounds, it is clear that States cannot render FTFs stateless without it being arbitrary on grounds of disproportionality. To strip the single nationality of FTFs on national security grounds is consequently in violation of international human rights law.

Denationalisation may be impossible to conduct non-arbitrarily when implementing the legal obligations provided for by Resolution 2178 and accompanying instruments. To truly illustrate this it is pertinent to examine how these largely theoretical problems manifest themselves in practice by examining the UK's domestic policy.

Case study: the United Kingdom

The UK's denationalisation policy is provided for under section 40(2) of the British Nationality Act 1981 (BNA). This evidently satisfies the criteria that deprivation must be prescribed by law. After an amendment in 2006, the Act permits deprivation of citizenship "if the Secretary of State is satisfied that deprivation is conducive to the public good".[187] Deprivation is not subject to prior judicial approval, although the decision can be appealed to the Immigrations and Asylum Tribunal. The BNA has been used to denationalise FTFs

[179] European Convention on Nationality (adopted 6 November 1997, entered into force 1 March 2000) ETS 166, Articles 4(b), 7(1)(b) and 7(3).
[180] L van Waas, 'Foreign Fighters and Deprivation of Nationality', op. cit., p. 480; UN High Commissioner for Refugees, '#IBELONG' <http://www.unhcr.org/ibelong/> (accessed 31 March 2016).
[181] UN High Commissioner for Refugees, 'Global Action Plan to End Statelessness: 2014-2024' (November 2014) <http://www.unhcr.org/54621bf49.html> (accessed 15 February 2016).
[182] A Macklin, 'Kick-Off Contribution', op. cit., p. 3.
[183] UN High Commissioner for Human Rights, 'Media Backgrounder: Millions are Stateless, Living in Legal Limbo' (30 August 2011) <http://www.unhcr.org/4e54ec469.pdf> , accessed 16 February 2016
[184] Report of the Secretary-General, 'Human Rights and Arbitrary Deprivation of Nationality' (2013), [4].
[185] Academy Briefing No. 7, op. cit., p. 57.
[186] Report of the Secretary-General, 'Human Rights and Arbitrary Deprivation of Nationality' (2013), [4].
[187] British Nationality Act 1981, section 40(2).

since the 2006 amendment, even when the immediate result of such action rendered individuals Stateless. In the 2013 Supreme Court case *Secretary of State for the Home Department vs. al-Jedda*, the Court found that to deprive al-Jedda of his nationality was unlawful because it rendered him stateless.[188] *Al-Jedda* yielded another amendment to the BNA in the form of the 2014 Immigration Act,[189] allowing deprivation of citizenship even when it results in statelessness so long as the Home Secretary deems that there are "reasonable grounds to believe that they could acquire another nationality".[190] The UK is a State party to the CRS, but importantly is not a State party to the ECN.

Importantly, the BNA sits outside the UK's penal code and is therefore, at least technically, an administrative measure. However, it crosses the threshold for criminal punishment given its severity and its lack of temporal scope. This infers that the UK's law and policy is disproportionate, and when used to deal with ancillary acts represents severe punishment without conviction. The UK's deprivation policy is plunged into further disproportionality given that it permits rendering individuals stateless, which amplifies the detrimental effects of denationalisation and, in the words of the Secretary-General, may be difficult to justify.

The UK's condition for denationalisation, even when resulting in statelessness, is that the Secretary of State finds the measure to be conducive to the public good. This is clearly far broader than the condition found in the CRS, in which deprivation is legitimate provided the individual has acted in a manner seriously prejudicial to the State's vital interests. The UK's legislation vests subjective power in the Secretary of State, and therefore affords the State far too much discretion. This is augmented by the fact that if the UK was to denationalise and render individuals stateless, it would be imposing an incredibly severe criminal punishment on an administrative, preventive basis. This cannot be proportionate, especially because the right to return to return to one's own country may nullify the measure's purpose of preventing and suppressing the FTFs travel.

While the UK's deprivation policy offers individuals the chance to appeal their decision to the Immigrations and Asylum Tribunal, this is far easier in theory than in practice. The UK reserves the right to denationalise individuals while they are abroad, as was the case in *al-Jedda*. This seriously limits the ability to pursue an effective remedy. National security grounds are invoked so as to conceal information from those deprived of citizenship, again frustrating not only an effective remedy but also the right to a fair trial. The UK thereby imposes measures that cross the threshold for criminal punishment without affording the procedural safeguards that must accompany such action. The UK here falls well short of the minimum due process and procedural standards required of non-arbitrary deprivation of citizenship. This, combined with its inherent disproportionality, leaves its denationalisation policy unquestionably arbitrary and consequently in violation of international human rights law.

The UK's policy is not only legally but morally arbitrary and counter to global counter-terrorism efforts. The principle that underpins resolutions like 2178 and international counter-terrorism efforts more broadly is that of collective security. The international community has a shared interest in the prevention and suppression of the travel of FTFs,

[188] *Secretary of State for the Home Department vs. al-Jedda* (2013) UKSC 62.
[189] Immigration Act 2014, section 66(2).
[190] British Nationality Act 1981, section 40(4A)(a).

reflected in 2178 and the domestic implementation of its envisioned obligations. The UK, however, has displayed a disregard for collective security through its willingness to render potentially dangerous individuals stateless while abroad. This represents an unjust abdication of responsibility, a refusal to play its part in a broader international effort to thwart terrorism.[191] To leave stateless its own volatile citizens is to shun commitments to fellow States in each of its regional and international institutions.

In a similar vein, the moral arbitrariness of the 2014 Immigration Act must be condemned. When the Supreme Court found rendering individuals stateless to be unlawful in 2013, the 2014 Act allowed the State to continue its statelessness-via-deprivation policy if it was deemed plausible that the individual could acquire another nationality. It disregarded the reality that other States would be extremely reluctant to offer citizenship to individuals guilty or suspected of international terrorism. The amendment perpetuated the power of the Home Department to judge whether or not denationalisation was conducive to the public good if it saw acquisition of another nationality possible. Authority rests with the same body. The amendment also demonstrated the UK's pragmatism, willing to change its policy in a manner simultaneously clever and cynical. The goal of the UK's denationalisation policy thus appears not to be the prevention and suppression of FTF travel, but to retain the authority to leave individuals stateless through deprivation of nationality.

Conclusions

In this memorandum the human rights and international humanitarian law implications of the 'war on terror' have been analysed through the lens of both criminal and administrative measures implemented by States at domestic level, as a result of UNSC Resolution 2178 obligations and corresponding instruments. It is clear that overly broad laws not only risk violating the individual rights of suspected FTFs, but can also inflict damage on civilians under the control of FTFs, or damage the legitimacy of the State as administrative measures fail to accomplish their goal and alienate large groups of people in the process. It must be recalled that human rights violations, alienation and strained relationships between individuals and the State are recognised as conditions conductive to the spread of terrorism. The rule of law and the protection of human rights are not at odds with effective counter-terrorism. They are complementary and mutually reinforcing goals, and strengthening both human rights and the principle of legality ultimately strengthens counter-terrorism policy.[192]

Material support laws serve an important international policy in preventing and punishing terrorism. However, these laws must, according to Professor Rona, "be imposed with a scalpel rather than a sledge hammer",[193] or they risk failing the former objective by perpetuating the conditions conducive to conflict and the spread of terrorism. Although not

[191] M Gibney, 'Why Stripping Citizenship from Home-Grown Terrorists Won't Work' (February 24 2015) <http://www.smh.com.au/comment/why-stripping-citizenship-from-homegrown-terrorists-wont-work-20150223-13n1zq> (accessed 3 April 2016); and L van Waas, 'Foreign Fighters and Deprivation of Nationality', op. cit.,p. 481.

[192] Report of the Secretary-General, 'Uniting against Terrorism: Recommendations for a Global Counter-Terrorism Strategy', UN Doc. A/60/825 (2006) [118]

[193] Gabor Rona, 'IHL and Terrorism, Part III – HRF's Gabor Rona Endorses, Broadens ICRC Position' (*Intercrossblog*, 24 April 2013) <http://intercrossblog.icrc.org/blog/ihl-and-terrorism-part-iii-hrfs-gabor-rona-endorses-broadens-icrc-positon> (accessed 30 March 2016).

a panacea, the recommendations made above concerning material support laws, if implemented, would bring municipal law back in line with the principles of legality and fair labelling. They are also intended to ensure that the human rights of humanitarian workers, and the effectiveness of their action, as well as the rights of those to whom they provide assistance, are not arbitrarily interfered with.

It has further been concluded that denationalisation of FTFs is arbitrary. It imposes severe criminal punishment, on a purportedly administrative basis, and therefore inherently fails to satisfy the criteria of proportionality. This is compounded by denationalisation's ineffectiveness due to the right to return to one's own country, the possibility of rendering individuals stateless, the likely frustration of the right to a fair trial and the disparity between punishment and due process standards. The UK's denationalisation policy features every one of these problems, ultimately rendering it arbitrary in practice and consequently in violation of international law. Denationalisation pursuant to the instruments cited does not prevent or suppress the travel of those planning to participate in or perpetrate acts of terrorism. The sum of these two issues would appear to indicate that deprivation of citizenship in countering terrorism is an inappropriate measure both in terms of legality and effectiveness, and may even prove counter-intuitive by creating or entrenching the conditions in which terrorism is spread.