

“Foreign Terrorist Fighters”: A Human Rights Approach?

Helen Duffy

Director of ‘Human Rights in Practice’; Professor of International Human Rights and Humanitarian Law, University of Leiden

h.duffy@law.leidenuniv.nl

Abstract

This article reflects on the proliferation of responses to the so-called phenomenon of “foreign terrorist fighters,” and the profound human rights challenges they give rise to. It considers national, regional and international developments, many spurred by an activist Security Council, through which expanded powers have been assumed and rights restricted by reference to the need to respond to FTF threats. A series of uncomfortable relationships emerge from this analysis. They include for example tensions: between the evolving and still relatively superficial understanding of the nature and source of uncertain threats and contributing factors on the one hand, and the onerous and far-reaching nature of responses directed against them on the other; between the expansive use of coercive measures including criminal law, and basic constraining principles of criminal law upon which its legitimacy and power depends, such as individual culpability, harm principle and remoteness; or between the original purposes of most FTF measures and their impact in practice, on the operation of humanitarian law, on humanitarian workers and human rights defenders, and on the rule of law. Exceptional FTF measures continue to spread their reach and creep into other areas of security and organised crime. The article highlights the need to consider the short and long term impact, on the full range of rights of many, of the array of administrative, criminal and other measures being passed into law and implemented in practice across the globe in the name of responding to the ill-defined phenomenon of “FTFs”.

Keywords

foreign terrorist fighters – human rights – humanitarian law – Security Council – administrative measures – criminal law – legality – freedom of expression – gender – childrens rights – international cooperation

1 Introduction

It is often noted that the phenomenon of travel to support foreign fighting is not new,¹ but the extent and nature of responses on the national and international levels in recent years certainly are. In the past five years, the influx of what have (controversially) come to be referred to as “foreign terrorist fighters”² (FTFs) to Iraq, Syria and other states, and in particular their return home or movement on to third states, has been the subject of intense international attention, spurring prolific developments in law, policy and practice across the globe.

A defining contributor to this process has been the United Nations Security Council (UNSC). Successive resolutions, several adopted under Chapter VII of the UN Charter, determined that the flow of FTFs constituted an “international threat to peace and security.”³ Resolution 2178 of 2014 obliged states to take wide-reaching measures to prevent, disrupt, prosecute and suppress the travel

-
- 1 See, eg. M. Flores, “Foreign Fighters Involvement in National and International Wars: A Historical Survey”, in Andrea de Guttry, Francesca Capone and Christophe Paulussen (eds.), *Foreign Fighters under International Law and Beyond* (The Hague: T.M.C. Asser Press, 2016), pp. 27–48 (hereafter FFILB). See also: D. Malet, “The European Experience with Foreign Fighters and Returnees”, in T. Renard and R. Coolsaet (eds.), “Returnees: who are they, why are they (not) coming back and how should we deal with them? Assessing policies on returning foreign terrorist fighters in Belgium, Germany and the Netherlands”, Egmont Institute, Brussels, February 2018, pp. 7–9.
 - 2 For the controversies relating to the term, and associated human rights issues, see section 3. UNSC Resolution 2178, 24 September 2014 (UN Doc. S/RES/2178 (2014)), describes FTFs as “individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict”. Although, as noted below, the FTF term is problematic for its breadth and vagueness and the ensuing rights implications, it is the term most commonly used in the international arena and the one therefore used in this paper. Some research on the topic continues to refer to “foreign fighters”.
 - 3 See UNSC Resolution 2178 (2014), preceded by UNSC Resolution 2170 (UN Doc. S/RES/2170 (2014)), of 15 August 2014 para 8, which called upon states to suppress the flow of FTFs to the Islamic State in Iraq and the Levant (ISIL) Al Nusrah Front (ANF) and all other entities associated with Al-Qaida, and to bring FTFs to justice.

and return of FTFs, targeting inter alia recruitment, organization, transportation, training, financing, and various other forms of facilitation or support for FTFs.⁴ It also called on states to promote tolerance, rehabilitation and the prevention of “radicalization to terrorism [and] violent extremism.” Subsequent UNSC Resolution 2396 (2017) broadened out further the obligations in relation to criminal justice, border security, and cooperation, including the creation of “watch lists or databases” of suspect persons and information sharing between states.⁵ In 2019, further resolutions sought to enhance the prosecution of “direct and indirect” forms of support or services to terrorist groups, and to “intensify and accelerate” access to – and inter-state sharing of – intelligence, including from the private sector.⁶ This Security Council activity has unleashed a normative flood that continues to pour downwards and spill outwards, manifesting itself in new regional and national developments against an ever-broadening range of targets.⁷

States around the globe have changed legislation, developed policy and introduced practices with wide-reaching human rights implications. Among these practices are an array of ‘administrative’ measures, such as citizenship stripping, deportation, travel bans, blocking entry into or transit through territories, removal of travel documents, house arrest, control orders and freezing of assets among others. Also prevalent is the expanded criminalization of travel-related activity or its “facilitation” or “justification”. Both are supported by an increase in the use of surveillance, special investigative techniques, watch lists and databases, and the monitoring and blocking of websites that for example support FTF laws and policies.⁸

4 Preamble to UNSC Resolution 2178 (2014), para. 4, calls on states “to cooperate in efforts to address the threat posed by foreign terrorist fighters, including by preventing the radicalization to terrorism and recruitment of foreign terrorist fighters, including children, preventing foreign terrorist fighters from crossing their borders, disrupting and preventing financial support to foreign terrorist fighters, and developing and implementing prosecution, rehabilitation and reintegration strategies for returning foreign terrorist fighters.”

5 UNSC Resolution 2396 (2017), adopted on 21 December 2017, UN Doc. S/RES/2396.

6 UNSC Resolution 2482 (2019) and 2462 (2019); the latter provides for states to ensure “that their domestic laws and regulations establish serious criminal offenses ... the wilful provision or collection of funds, financial assets or economic resources or financial or other related services, directly or indirectly, with the intention that the funds should be used, or in the knowledge that they are to be used for the benefit of terrorist organizations or individual terrorists for any purpose, including but not limited to recruitment, training, or travel, even in the absence of a link to a specific terrorist act;”

7 see eg EU Directive 2017/541 on Combatting Terrorism, 15 March 2017.

8 For an overview of measures applied in selected countries, see eg: “Returning foreign terrorist fighters in Europe: A comparative analysis”, October 2017, <<http://mastereurope.eu/wp-content/uploads/2017/10/Returning-foreign-terrorist-fighters-in-Europe-.pdf>>; “The return

As the SC resolutions that prompted much of this activity themselves explicitly acknowledge, states are obliged to adopt counter-terrorism measures consistently with their obligations under international human rights law (IHRL), international humanitarian law (IHL) and refugee law.⁹ Recognition of the interconnectedness and co-dependency of protecting human rights and security is now commonplace, not only in Security Council resolutions but across the board of international instruments, UNGA resolutions and regional commitments.¹⁰ Likewise, that an effective counter-terrorism policy needs to address the “conditions conducive to the spread of terrorism” including rights violations, injustice and inequality, is amply reflected across international counter-terrorism initiatives in the last decade, with the UN Global Counter-Terrorism Strategy as the centrepiece.¹¹

What emerges, however, is a substantial gap between theory and unfolding practice. Even the language of the Security Council resolutions, not to mention their implementation by states, raise profound and wide-reaching human rights and rule of law concerns. This has led to unusually strident criticism of the Security Council for paying mere ‘lip service’ to human rights.¹² It has also prompted questions as to how can and should states meet the genuine security challenges that arise from the movement of so-called FTFs, while making real on the commitment to human rights and rule of law? What does a human rights approach look like, and how can we ensure that FTF measures make a genuine contribution to addressing, not fuelling, the problem?

of foreign fighters to EU soil: Ex-post evaluation”, European Parliamentary Research Service 15 May 2018, <[www.europarl.europa.eu/RegData/etudes/STUD/2018/621811/EPRS_STU\(2018\)621811_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/621811/EPRS_STU(2018)621811_EN.pdf)>, (hereafter, “The return of foreign fighters to EU soil. Ex-post evaluation”, European Parliamentary Research Service); B. van Ginkel and E. Entenmann (eds.), “The Foreign Fighters Phenomenon in the European Union”.

- 9 Unlike eg SCRes 1373 post 9/11, it must be recognized that the FTF resolutions are explicit in this respect.
- 10 Eg EU Directive on Combatting Terrorism, recital 35. See: “Chairmanship’s Perception Paper: Recommendations from the 2018 OSCE-wide Counter-Terrorism Conference on ‘The Reverse Flow of Foreign Terrorist Fighters (FTFs): Challenges for the OSCE Area and Beyond’, Rome, 10–11 May 2018”, Italian OSCE Chairmanship, CIO.GAL/90/18, 20 July 2018, p. 5, (hereafter, Chairmanship’s Perception Paper on the 2018 OSCE-wide Counter-Terrorism Conference).
- 11 The OSCE Ministerial Declaration on human rights concerns fomenting the spread of violent extremism.
- 12 Eg. F. Ní Aoláin, (current UN Special Rapporteur on counter-terrorism), “The UN Security Council, Global Watch Lists, Biometrics and the threat to the rule of law”, *Just Security*, 17 January 2018, <www.justsecurity.org/51075/security-council-global-watch-lists-biometrics/>, (hereafter, F. Ní Aoláin, “The UN Security Council, Global Watch Lists, Biometrics and the threat to the rule of law”).

In the past few years various initiatives have emerged in an effort to consider these questions, address the human rights implications of developments thus far, and offer recommendations on a more human rights compliant approach. One of these was a report drafted by this author under the auspices of the OSCE (ODIHR), which sought to provide support and guidance, from a human rights perspective, to OSCE participating States on responding to FTF-related threats and challenges in a manner consistent with their international obligations.¹³ Neither that report, still less this summary of issues arising from that project, purport to be definitive guides to human rights compliance in this complex field. They are, however, part of a growing conversation¹⁴ between state and non-governmental actors on how to develop comprehensive, coherent and human rights compliant responses in practice.¹⁵ What follows are a few reflections, on what, in the author's view, a human rights approach to the issue involves and some of the key challenges.

2 A Human Rights Approach?

2.1 *Understanding Threats to Effectively Address Evolving Problems*

Any effective strategy to address a problem must be predicated on a clear understanding of it. Moreover, legal requirements such as the necessity and proportionality of restrictions on rights highlighted in the next section, are dependent on an understanding of the problem or threat, and the anticipated effectiveness of particular measures of response. Understanding the true threat FTF-related travel represents and why, the motivation of those engaged in it, the role of various forms of support, are therefore essential and among the necessary pre-requisites to a tailored, effective rule of law approach. Our collective understanding of FTF-activity, its drivers, causes and contributors, is however very much in flux. The evidence emerging from a growing (but still

13 Guidelines for Addressing the Threats and Challenges of "Foreign Terrorist Fighters" within a Human Rights Framework, ODIHR (2018) at <https://www.osce.org/odihr/393503?download=true>.

14 It forms part of an increased amount of attention from important sources, within the UNCTED, the Special Rapporteur on terrorism and human rights, NGOs and others, which reveals the profound human rights and rule of law implications of current trends and the urgency of changing course.

15 "Ministerial Statement on Supporting the United Nations Global Counter-Terrorism Strategy", OSCE, MC.DOC/3/07, 3 December 2007, para. 22, (hereafter, OSCE Ministerial Statement on Supporting the United Nations Global Counter-Terrorism Strategy).

limited) body of research and literature is however instructive and not always reflected in international and national responses.

2.1.1 Evolving Global Flow, and Uncertain Threats

The FTF phenomenon, like terrorism itself, is a long-standing and a global phenomenon. Specifically, the tens of thousands of people who travelled to Iraq, Syria and other countries in the past few years¹⁶ came from a geographic spread of around 110 states.¹⁷ The travelers from and back to European states generated the vast majority of international attention but represent a relatively small piece of the picture.¹⁸ The nature of the flow is also constantly evolving and uncertain. It is clear that for a range of reasons,¹⁹ travel to those states that prompted the initial FTF resolutions has diminished in the past couple of years, while return or “reverse flow” of FTFs and their families has taken place in waves. Reliable statistics are, again, elusive, but in the European Union (EU) it has been suggested that some 30 per cent had returned or moved to other

16 These other states include Afghanistan, Yemen, Libya, Pakistan and Somalia.

17 While estimates are by their very nature unreliable, linked in part to definitional problems, it has been suggested that more than 40,000 foreign terrorist fighters had travelled to just Iraq and Syria alone as of late 2017. See: “Greater Cooperation Needed to Tackle Danger Posed by Returning Foreign Fighters, Head of Counter-Terrorism Office Tells Security Council”, United Nations, 29 November 2017, <www.un.org/press/en/2017/sc13097.doc.htm>.

18 <www.europol.europa.eu/sites/default/files/documents/europol_tesat_2016.pdf>. Europol writes that “More than 5,000 Europeans are believed to have travelled to conflict areas in Syria and Iraq”. The International Centre for Counter-Terrorism (ICCT) cited the number of between 3,922 and 4,294, hence on average 4,108. See: B. van Ginkel and E. Entenmann (eds.), “The Foreign Fighters Phenomenon in the European Union: Profiles, Threats & Policies”, International Centre for Counter-Terrorism, April 2016, p. 4. <www.icct.nl/wp-content/uploads/2016/03/ICCT-Report-Foreign-Fighters-Phenomenon-in-the-EU_1-April-2016_including-AnnexesLinks.pdf> (hereafter, B. van Ginkel and E. Entenmann (eds.), “The Foreign Fighters Phenomenon in the European Union”). Tunisia is believed to be the largest source state, with 6,000 persons estimated to have travelled to the conflict in Syria from that state alone. See: “Foreign Fighters: An Updated Assessment of the Flow of Foreign Fighters into Syria and Iraq”, the Soufan Group, December 2015, p. 15, <soufangroup.com/wp-content/uploads/2015/12/TSG_ForeignFightersUpdate3.pdf>.

19 These may include attacks on ISIS and widely reported shrinking space, among several others: “The Challenge of Returning and Relocating Foreign Terrorist Fighters: Research Perspectives”, UN Counter-Terrorism Committee Executive Directorate (UNCTED), March 2018 (hereafter, UNCTED Trends Report 2018), <www.un.org/sc/ctc/wp-content/uploads/2018/04/CTED-Trends-Report-March-2018.pdf>. The current wave of returning FTFs up to 2018 is described as larger and more diverse than previous ones.

states by 2016, most of whom had spent relatively short periods of time abroad,²⁰ while a larger and more diverse wave developed of returnees occurred during 2017–18 corresponding with the “shrinking territories” in Syria and collapse of the so-called “Islamic State” caliphate in Iraq. Many others remain unaccounted for, while an uncertain number of thousands of people including children are held indefinitely in camps described as breeding grounds for violent extremism.²¹

Within this landscape, concerns that ISIL is intent on using *returning* FTFs has been a defining feature of the political discourse and related developments in law and policy. The threat this poses is also inherently difficult to quantify. The widely reported involvement of several former FTFs in some European attacks appeared to confirm fears.²² On the other hand, some commentators have called for some perspective on the relatively very small number of FTFs who have engaged in terrorism upon their return.²³ Experience has shown that threats and attacks much more commonly emerge without any “foreign” engagement.²⁴

-
- 20 Reliable statistics are elusive, but in the European Union (EU) it has been suggested that some 30 per cent had already returned or moved to other states by 2016. B. van Ginkel and E. Entenmann (eds.), “The Foreign Fighters Phenomenon in the European Union”.
- 21 See, for example, UNCTED Trends Report 2018, “Risk Analysis 2017”, Frontex, 20 February 2018, pp. 30–31, <frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2017.pdf>, (hereafter, “Risk Analysis 2017”, Frontex); “Now that the Islamic State has fallen in Iraq and Syria, where are all its fighters going”, the Washington Post, 22 February 2018, <www.washingtonpost.com/graphics/2018/world/isis-returning-fighters>; D.L. Byman, “Frustrated Foreign Fighters”, the Brookings Institution, 13 July 2017, <www.brookings.edu/blog/order-from-chaos/2017/07/13/frustrated-foreign-fighters/>.
- 22 See: UNCTED Trends Report 2018; Hegghammer, “Should I stay or Should I Go? Explaining Variation in Western Jihadists’ Choice between Domestic and Foreign Fighting”, *American Political Science Review*, Vol. 107, No. 1, (February 2013), p. 11.
- 23 See, for example, C. Lister, “Returning Foreign Fighters: Criminalization or Reintegration?”, the Brookings Institution, August 2015, p. 2, <www.brookings.edu/wp-content/uploads/2016/06/En-Fighters-Web.pdf>, which notes: “While genuine, the potential threat posed by returning FFs should not be overly exaggerated. Statistical analyses based on historical data ... have suggested that no more than 11 percent of FFs will pose a terrorist threat upon their return home”.
- 24 For example, see the statement by the EU Counter-Terrorism Coordinator in 2016 noting that it would be erroneous to focus on foreign threats when many attacks are from homegrown terrorism, in A. Reed, J. Pohl and M. Jegerings, “The Four Dimensions of the Foreign Fighter Threat: Making Sense of an Evolving Phenomenon”, International Centre for Counter-Terrorism, June 2017, p. 7, <www.icct.nl/publication/the

The UN Security Council has famously (and controversially)²⁵ referred to the phenomenon as ‘one of the most serious threats to international peace and security’. Back in 2014, it is noteworthy though that the risk it originally identified related to the impact in the conflict zones themselves (contributing to “the intensity, duration and intractability of conflicts”) not solely, or principally, upon return.²⁶ Consistent with this, legal and policy responses directed at alleviating risk in states of origin should be mindful of the potential to contribute to other risks for example in conflict zones or through the longer term impact of the situation in the Syrian or Iraqi camps. Short and longer term threat assessment should include a broader risk analysis which takes into account the shifting and multi-dimensional nature of threats.²⁷ This includes threats arising from *responses* to FTF and CT.

2.1.2 Understanding FTF ‘push and pull’ Factors, and ‘conditions conducive’ to the Problem

Understanding who is going, who is coming back, who is not – and, in all cases, why – are key questions upon which targeted and effective measures of prevention and response depend.²⁸ What emerges clearly from research to date is a complex multi-faceted environment, within which there is no single FTF profile.²⁹ A greater range of possible “push and pull” factors emerge than

-four-dimensions-of-the-foreign-fighter-threat-making-sense-of-an-evolving-phenomenon>.

25 M. Scheinin, Back to post 9/11 Panic; SC resolution 2178, *Just Security* (2014): <https://www.justsecurity.org/15407/post-911-panic-security-council-resolution-foreign-terrorist-fighters-scheinin/>.

26 UNSC Resolution 2178 (2014), refers to a “serious threat to their States of origin, the States they transit and the States to which they travel, as well as States neighbouring zones of armed conflict in which foreign terrorist fighters are active and that are affected by serious security burdens.”

27 For one assessment of the “shifting threats” see: A. Reed, J. Pohl and M. Jegerings, “The Four Dimensions of the Foreign Fighter Threat” – four main threats related to travel, return to their countries of residence, the threat posed by lone actors and sympathisers, and finally, the increasing polarization of society.

28 UNSG Plan of Action on PVE, and UN Global Counter-Terrorism Strategy, *op. cit.*, note.

29 Reports by civil society, academic and inter-state institutions, including the UN Office of Counter-Terrorism (UNOCT), contribute to our understanding of FTF motivations and contributing factors, including by giving voice to disengaged FTFS. See eg “Enhancing the Understanding of the Foreign Terrorist Fighters Phenomenon in Syria”, UNOCT, July 2017, p. 52 (hereafter, UNOCT Report July 2017), <www.un.org/en/counterterrorism/assets/img/Report_Final_20170727.pdf>. also J.M. Berger “Making CVE Work: A Focused Approach Based on Process Disruption”, International Centre for Counter-Terrorism (hereafter, J.M.

were apparent when the issue first gained international attention,³⁰ varying dramatically between individuals and contexts.³¹ Although samples analysed in research and literature remain limited and we should be cautious to avoid simplistic conclusions, certain personal and ideological factors and motivations have arisen recurrently.

These include the contribution to the decision to travel of socio-economic realities, including high unemployment, lack of opportunities, “isolation from mainstream social, economic and political activity,” as well as dysfunctional personal and family circumstances.³² Religion is part of this landscape, though given how central it is often assumed to be, it is noteworthy that the role of so-called religious “fundamentalism” as the key driving factor has been disputed. For example, a 2016 study by a group of mostly United States military researchers at West Point found that religion was “not the strongest driving force”, emphasizing instead “cultural and political identities” and “a narrative that is focused on the ongoing deprivation of Muslims, both in specific Western polities, as well as in the international arena.”³³ Similar findings percolate out of reports by the UN Special Rapporteur on terrorism and human rights and the UNOCT; the latter distinguishes religion as such from a “sense of identity with – and

Berger “Making CVE Work: A Focused Approach Based on Process Disruption”), May 2016, which notes “push and pull factors intertwine in different ways according to the individual and the internal and external environment each one faces,” and concludes: “There are obvious risks in arguing for single-issue causation in settings where multiple variables are at play.”

30 R. Frenett and T. Silverman, “Foreign Fighters: Motivations for Travel to Foreign Conflicts”, in FFILB, pp. 63–76; Phil Gurski, *Western Foreign Fighters: The Threat to Homeland and International Security* (Lanham: Rowman & Littlefield, 2017), p. 70. Note that many analyses focus on “foreign fighters” not “FTFs”.

31 UNOCT Report July 2017, p. 5.

32 See J.M. Berger, *Ibid.*, “Making CVE Work:”, p. 5; UNOCT Report July 2017, p. 5.

33 “From Cradle to Grave: The Lifecycle of Foreign Fighters in Iraq and Syria”, Combating Terrorism Center at West Point, November 2016, <<https://ctc.usma.edu/app/uploads/2016/11/Cradle-to-Grave2.pdf>>; see also: “Tariq Ramadan: As Muslims Condemn Spain Attack, Americans Must Denounce U.S. Killings in Syria, Iraq”, Democracy Now, 24 August 2017, <www.democracynow.org/2017/8/24/tariq_ramadan_as_muslims_condemn_spain>. See UN Special Rapporteur on counter-terrorism, *Report to the UN Human Rights Council*, UN Doc. A/HRC/31/65, 22 February 2016, para. 15: “Commentators have noted that there can be too much focus on religious ideology as the driver of terrorism and extremism, while factors related to identity, or misguided altruism, are overlooked”.

a desire to help – co-religionists who are perceived as victimized and mistreated by other groups.”³⁴

Profiles of those *returning* from conflict zones and their experiences abroad points to similar diversity, precluding generalized assumptions as to experience abroad or motivation for return.³⁵ Among the many factors noted in research are: disillusionment, particularly for those driven by “idealism”, the draw of family, dangers and conditions of life abroad. For this reason it has been suggested that: “[i]n dealing with returnees, it may be important to differentiate between them based on what they actually did in Syria, their initial intention before going and their reasons for return.”³⁶ Gender assumptions regarding experience abroad and motivation – including that women and girls were necessarily victims not agents – have unsurprisingly also proved erroneous and dangerous.³⁷

The need for greater research and engagement to understand and address the myriad conditions conducive and contributing to unlawful violence is clear. As is the fact that simplistic attempts at classifying the problem, or identifying solutions, are bound for failure. This underlines the need for crafting and channeling policies of prevention and response that reflect a realistic and holistic assessment of threats, and are targeted to particular cases and contexts.

2.2 *Understanding and Addressing the Human Rights Implications of FTF Responses*

A human rights approach plainly requires us to understand and assess the full array of human rights – and vast range of human beings – affected by FTF

34 UNOCT Report July 2017, p. 3, *noting* empathy with the Sunni communities believed to be under attack as one of the most common reasons for travelling to Syria. Empathy for Muslim victims of violence and the perceived complicity of “Western” powers are cited as driving factors for women who choose to join ISIL in Van Leuven, Mazurana and Gordon, “Analysing the Recruitment and Use of Foreign Men and Women in ISIL through a Gender Perspective” in FFILB, pp. 97–121.

35 The UNOCT Report July 2017, p. 5, notes that “not all FTFs go to Syria with the objective of becoming fighters there, even less of committing atrocities.” It notes that “few of those who go to Syria do so with the intention of training to become a domestic terrorist upon their return.”

36 See UNOCT Report July 2017.

37 See Gender, below. In early practice in the Netherlands and Belgium, very few females were prosecuted, but since 2016 “no distinction” has been made. The distinction has reportedly narrowed in Germany. See, eg. T. Renard and R. Coolsaet (eds), “Returnees: who are they, why are they (not) coming back and how should we deal with them?”, Egmont Institute.

legislation, policy and practice. Understanding the impact on human rights, democracy and rule of law is an important aspect of the threats landscape that needs to be assessed.

The rights affected are not limited to the freedom of movement, liberty or fair trial rights most obviously implicated,³⁸ but include the much fuller spectrum of civil, political, economic, social and cultural rights. Contrary to the impression from the “foreign terrorist fighter” title, even those *targeted* by broadly or ill-defined laws include people far removed in conduct or intent from acts of violence of any type. Those *affected* extends much further still. A human rights perspective requires consideration of more than the direct and immediate impact on the particular rights of targeted individuals to the broader impact on the rights of others, from family members, to social, political or religious associates and groups, and in some cases on the population at large. It requires longer term consideration of the implications for the erosion of legal standards of the indeterminacy of the law, enhanced powers or reduced oversight. Given the growing and deeply troubling trend towards targeting of human rights defenders (HRDs), humanitarian workers and opposition groups, it requires careful attention to the insidious impact of counter-terrorism and FTF laws on the ability to defend human rights and provide humanitarian assistance and on the quality of democracy.

In this context, measures permitting states to restrict movement for example may have much further reaching consequences. At first glance they most obviously impact on freedom of movement and the right to return to one's own country of the targeted individual, which may be restricted in certain circumstances. They may however also have implications for economic and social rights, such as right to work or education of targeted individuals or their family members. If excluded, this can and has given rise to non-refoulement concerns, exposure to real risks of torture and other ill-treatment, or other serious violations, of targeted persons, families and children trapped in atrocious and violent circumstances overseas.³⁹ Despite the profound impact of exclusion, it is often effectively impossible to challenge, raising a fair trial or due

38 The EU counter-terrorism directive of 15 March 2017 refers specifically to a range of civil and political rights – “Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA”, European Union, <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32017L0541>>.

39 As regards economic and social rights, for example, freezing of assets and suspension of social allowances may have a direct impact, while other measures that limit movement and impose residency and reporting obligations may in effect interfere with work or education.

process deficit.⁴⁰ The decisions regarding exclusion are in turn fed by increased surveillance, and sharing and retention of information, affecting the right to privacy of many, including potentially the population as a whole so far as mass surveillance increases and is normalized by reference to exceptional circumstances.⁴¹ The banning, criminalization and prosecution of dangerous, ‘extremist’ views that may be identified through this surveillance in turn have a serious impact on freedom of expression, or on freedom of thought, conscience, religion or belief, of large sways of the population. The increased sharing this information between states may involve facilitating the full range of violations elsewhere, from torture to right to life to the right to protest or political participation, particularly in light of concerns that information-sharing is being “used by states to nefariously target those who disagree with them”.⁴² What begins as a debate on permissible restrictions on freedom of movement to prevent ‘foreign terrorist fighting’ quickly escalates into a serious and complex human rights storm undermining the full range of rights of many across the globe.

2.3 *Applying the Law: The Flexible Human Rights Framework*

A primary requirement of a human rights approach is of course that FTF responses be governed by law. National law must provide in clear and specific terms for measures that will, in various ways, restrict rights, and that law must in turn accord with the flexible framework of IHRL. That framework recognises, and adjusts to accommodate, effective action against security threats in various ways.

So far as Chapter VII resolutions oblige states to take all necessary and feasible measures to prevent and respond to threats of violence, this is reflected in human rights law’s positive obligations to take appropriate preventive, protective, investigative and where appropriate punitive measures. Prevention and prosecution are therefore consistent with, and may in certain circumstances be required by, the human rights approach,⁴³ but only so far as the measures are targeted, framed and discharged in a human rights compliant way.

40 See judicial review below; individuals may have limited rights to challenge as a matter of law, or in practice, especially if they are located abroad at the time.

41 Privacy concerns are heightened by UNSC Resolution 2396 (2017) and the legal framework must be strictly applied in its implementation.

42 Resolution 2396 (2017).

43 On positive obligations to prevent acts of terrorism, see, for example, *Tagayeva and Others v. Russia*, ECtHR, 13 April 2017. Media reports of recruits being treated as “slaves” and various forms of ill-treatment and sexual violence by the “Islamic State” points to the

The need to ‘balance security and human rights’ in the CT and FTF framework is a common refrain. The balance is in fact built into the legal framework, which adjusts to security imperatives in particular contexts, for example by providing for derogation from certain human rights obligations in situations of genuine national emergency, by enshrining *permissible restrictions* on certain rights that are necessary and proportionate to national security, and by the co-applicability of human rights standards alongside IHL in (genuine) armed conflicts. However, this inherent flexibility within the law should be carefully distinguished from an abstract ‘balancing’ exercise so often invoked to justify counter-terrorism and FTF measures that go beyond the limits of the law.

Measures that restrict human rights must conform with basic legal requirements, including the following:

- *No circumstances can justify interference with absolute rights or disregard of fundamental rule of law safeguards such as legality and non-arbitrariness.* The requirement that criminal offences were clearly defined in law at the time committed, the presumption of innocence, core aspects of the right to a fair trial and to liberty, the right to religion or belief, the right to equality and non-discrimination and the prohibition of torture and other ill treatment are among the core rights that must be respected at all times.
- *‘Emergency’ measures must be exceptional, time-limited and justified.* States can only rely on ‘emergency’ measures to derogate from other obligations under IHRL where the stringent test laid down in IHRL – of an “emergency threatening the life of the nation”⁴⁴ – is met. In the context of FTF measures, however seriously one assesses the situation at least in states of travel,⁴⁵ it is doubtful whether this is the case. Even if it were, the derogation should be invoked, and the measures adopted strictly limited to what is necessary pursuant to the exigencies of that emergency, and

need to prevent and counter both such “internal” abuse as well as the broader “external” terrorist threat those groups pose.

44 A broad range of factors are relevant to the assessment but it is clear that the threshold is high, affecting “organised life of the community” (*Lawless v. Ireland (No. 3)*, ECtHR, Judgment of 1 July 1961) but not necessarily imperiling the existence of the institutions of states as such (*A and Others v. The United Kingdom*, ECtHR, Judgment of 19 February 2009 (hereafter, *A and Others v. The United Kingdom*, ECtHR)).

45 The impact on destination states eg Syria is distinct from the impact on potential states of return, and would not justify derogation in the latter.

not be discriminatory in their application.⁴⁶ Moreover, while the duration of emergencies may vary, they are, by definition, temporary and exceptional, and must be subject to review. This runs counter to recent practice which points to emergency measures, loosely justified, gradually seeping into ordinary law and practice, effectively introducing permanent derogations from human rights obligations.⁴⁷

- *Permissible restrictions*: For the most part, the rights most obviously affected by FTF provisions (such the right to privacy, freedom of expression and association or the right to manifest one's religion) are qualified rights subject to permissible restrictions, provided certain requirements are met. Limitations to such rights must be provided for in clear law, necessary and proportionate to a legitimate aim such as national security, and minimized wherever possible. The requirement of necessity and proportionality of the particular measure requires a specific risk assessment of the individual case and context, and procedural safeguards including appropriate judicial review.

46 UN Special Rapporteur on counter-terrorism, *Report to the UN Human Rights Council (Report on the human rights challenge of states of emergency in the context of countering terrorism)*, UN Doc. A/HRC/37/52, 27 February 2018 (hereafter 'Special Rapporteur's Report on Emergencies' (2018)). Emergency powers and derogations by the United Kingdom post 9/11 and in France, for example, have been criticized for their allegedly discriminatory and therefore unlawful impact: eg. *Concluding observations: United Kingdom*, UN Committee on the Elimination of Racial Discrimination (CERD), UN Doc. CERD/C/GBR/CO/21-23, 3 October 2016, paras. 15, 18–19; *A and Others v. The United Kingdom*, ECtHR; *Concluding observations: France*, CCPR, UN Doc. CCPR/C/FRA/CO/5, 17 August 2015, paras. 9–10; C. Paulussen, "Repressing the Foreign Fighters Phenomenon and Terrorism in Western Europe: Towards an Effective Response Based on Human Rights", International Centre for Counter Terrorism, November 2016, <icct.nl/wp-content/uploads/2016/11/ICCT-Paulussen-Rule-of-Law-Nov2016-1.pdf>, on discrimination in relation to the French emergency regime.

47 See also: 'Special Rapporteur's Report on Emergencies' (2018); and the UN special procedures statement on the state of emergency in Turkey: "UN human rights experts urge Turkey not to extend state of emergency", 17 January 2018, <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22592&LangID=E>.

General Comment No. 29 (Article 4: Derogations during a State of Emergency), CCPR, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 2. September 2017 statement of the Special Rapporteur on counter-terrorism notes, expressing concern at developments in France: "The duration of the state of emergency must be time-bound, revised regularly, and meet the criteria of necessity and proportionality", <www.un.org/apps/news/story.asp?NewsID=57759#.Wc66brpuKuk>.

- *Targeted case-by-case approach*: A human rights law approach is a targeted one, which rejects “one size fits all” solutions. Blanket application of laws and policies may not only be less effective, it may fall short of requirements of individualized risk assessment implicit in the analysis of the necessity and proportionality of the particular measure in question.
- *Remedies and accountability*: Finally, a core requirement of the legal framework, and of non-arbitrariness, is the right of victims of violations to a remedy, and where appropriate accountability of those responsible. Legal remedies and full and effective reparation for those whose rights have been violated, make an essential contribution to learning from mistakes and shaping lawful responses for the future.

3 The Underlying Legality Challenge: Indeterminacy and Scope

3.1 “Foreign”, “Terrorist”, “Fighter”?

Multiple human rights issues arose from the use of the term “foreign terrorist fighters” by the UN Security Council in 2014, which has become common parlance since then. Key concerns include the fundamental principle of legality and certainty in the law which is put under severe strain by terms that are vague and uncertain in scope.⁴⁸ Particularly stringent requirements arise in relation to *nullum crimen sine lege* (no crime without law) but, as noted above, all restrictions on rights must be provided for in clear, accessible law. By contrast, each element of the FTF term is vague, controversial and problematic.

- The scope of the term “terrorism” in domestic laws, linked to internationally agreed definition of the term, is an old problem, but one that never ceases to wreak havoc.⁴⁹ The wording of UNSC Resolution 2178, and interpretations of it, have resulted in laws of amorphous scope and reach.⁵⁰ Attempts to limit definitions by national authorities to conduct that, in the words of a former UN Special Rapporteur on counter-terrorism, are of a “genuinely terrorist nature,” have not prevailed.⁵¹ Even the UNSC’s own

48 Article 15 of the International Covenant on Civil and Political Rights (ICCPR); Article 7 of the European Convention on Human Rights (ECHR).

49 For examples see H. Duffy, *War on Terror and framework of international law*, second edition 2015, Chapter 7B.

50 See criticism by M. Scheinin, “Back to post-9/11”.

51 UN Special Rapporteur on counter-terrorism, *Report to the UN Commission on Human Rights*, UN Doc. E/CN.4/2006/98, 28 December 2005, para. 42.

Resolution 1566, adopted back in 2004 to provide parameters to guide states in elaborating clear definitions in national laws and regulations, has not been referred to by the Council in this context.⁵² Broad and ambiguous definitions of terrorism, long criticised, have been compounded by the spread of the ill-defined (or undefined) concepts of ‘extremism,’ and in turn in the FTF context, by an accumulation of additional ambiguous-related concepts as noted below.

- Many FTF-related provisions address travel to support “**terrorist organizations**” and entities, but do not make clear how such organisations will be identified. These entities are not limited e.g. to groups specifically designated or listed as “terrorist” by the UN or regional groupings. The problem of politicization, selectivity and lack of transparency around the process of “terrorist” designation on the international – and particularly national – levels are notorious and longstanding.⁵³ The vast number and range of prohibited “terrorist” organizations and entities, unilaterally so declared by states around the world, means the scope and impact of FTF measures increases exponentially. The designation of individuals as FTFs should be based on what individuals have done and intended to do, not on the deemed nature, or designation, of a group or a cause which they are deemed to support.
- UNSC Resolution 2178 (2014) associates the term “**foreigner**” with individuals who “travel to a State other than their States of residence or nationality”. However, the term still leaves significant margin of ambiguity. In line with basic principles of international law, dual nationals or persons with important personal, social, cultural and family links to states, beyond formal residence or nationality, should not be considered “foreigners” for this purpose when they travel to the state with which they have the relevant links.⁵⁴
- Finally, although FTF-related provisions refer to “**fighters**”, the scope of those covered by the provisions goes far beyond those engaging in

52 UNSC Resolution 1566 para. 3.

53 One Canadian judge described the terrorist listing regime as Kafaesque; Duffy 2015 Ch. 7B. For concerns about listing see: e.g., the following cases considered by the European Court of Human Rights (ECtHR) and the UN Human Rights Committee (CCPR): *Nada v. Switzerland*, ECtHR Judgment of 12 September 2012; *Al-Dulimi and Montana Management Inc. v. Switzerland*, ECtHR, Judgment of 21 June 2016; and *Sayadi & Vinck v. Belgium*, CCPR, Views adopted on 22 October 2008, UN Doc. CCPR/C/94/D/1472/2006. On national lists and processes see UNCTED 2016, Implementation of Security Council resolution 2178 (2014), para. 158(b).

54 UNSC Resolution 2178 (2014) para. 6 ; see S. Krähenmann, ‘The Obligations under International Law of the Foreign Fighter’s State of Nationality or Habitual Residence, State of Transit and State of Destination’ in *FFILB* (2016), p. 235.

combat.⁵⁵ It reaches travelers with diverse roles abroad, in relation to quite different types of groups, as well as a much broader web of individuals deemed to be supporting, facilitating, financing, servicing or encouraging such travel. The fact that the various forms of facilitation, support or services are themselves undefined contributes further indeterminacy. In light of available facts, which indicate that very many of those covered by FTF laws and policies were in fact not engaged in fighting in any way, the use of the label is certainly misleading.

3.2 *Implications for International Humanitarian Law*

The FTF description also raises concerns that are not new to counter-terrorism, but are particularly pronounced in the FTF context, regarding the conflation and confusion of “terrorism” and armed conflict.

In accordance with the introductory paragraphs of UNSC Resolution 2178 (2014) and most other UNSC resolutions in the field in recent years, states should interpret their FTF obligations consistently with international humanitarian law (IHL). They must not therefore undermine its operation or effectiveness. However, the failure to distinguish travel to “terrorism” and to engagement in an “armed conflict” in the Resolutions risks doing just that.

Unlawful acts of terrorism must be distinguished from participation in a conflict by persons abiding by the terms of IHL. The International Committee of the Red Cross (ICRC) and others have underscored the importance of clarifying this distinction to preserve the proper functioning of IHL. While participation in a non-international armed conflict may, in practice, lead to prosecution under some (but not all) domestic laws,⁵⁶ IHL encourages amnesty at the end of the conflict for participation in conflict (as opposed to war crimes which are excluded). This is important to incentivize compliance with IHL, but also to facilitate the termination of conflict.⁵⁷ A great deal is at stake then in

55 See: UN Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination (hereafter, UN Working Group on mercenaries), *Report to the UN General Assembly*, UN Doc. A/70/330, 19 August 2015.

56 S. Krähenmann, “The Obligations under International Law of the Foreign Fighter’s State of Nationality or Habitual Residence, State of Transit and State of Destination” in *FILB*, pp. 229–258.

57 *Customary International Humanitarian Law: Volume 1: Rules*, (Cambridge: Cambridge University Press & ICRC, 2009), <www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>. See: Rule 159: “At the end of hostilities, the authorities in power must endeavour to grant the broadest possible amnesty to persons who have participated in a non-international armed conflict, or those deprived of

ensuring that the obligation to prosecute ‘FTFs’ is read consistently with these principles. If an individual is designated a “foreign terrorist fighter” in the context of a conflict, this should be based on engagement in acts of terrorism so defined by IHL, which may constitute war crimes.⁵⁸

Difficult policy and legal questions flow from this uncertainty as to the scope of the FTF term and its relationship with participation in armed conflict. Despite perceptions to the contrary, FTF-related laws and policies are not limited to the groups referred to in UNSC resolutions (so-called “Islamic State”, the Al Nusrah Front and groups associated with Al-Qaida),⁵⁹ around whom much of the debate revolves, or even, as noted above, to other designated terrorist groups. They may include much broader-reaching travel to or support for *causes* perceived to have ‘terrorist’ anti-state goals, as defined or indicated by affected states. They may also embrace travel to support armed groups that resist or fight *against* terrorist groups, while respecting IHL. Questions have arisen in several European states regarding the legitimacy and appropriateness of prosecutions of individuals who support organizations fighting against the so-called “Islamic State”. Other questions were evident before Belgian courts, where judges found individuals could not be prosecuted for “terrorism” in respect of acts that involved engagement in a “conflict.” The result is on-going controversy and policy debate concerning the public interest and the interests of justice in pursuing such prosecutions, as well as the need to locate terrorism within the relevant international legal framework.⁶⁰

their liberty for reasons related to the armed conflict, with the exception of persons suspected of, accused of or sentenced for war crimes.”

58 Both Additional Protocols to the Geneva Conventions prohibit e.g. “[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population”. See Article 51 (2), “Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)”, 8 June 1977; and Article 13 (2), “Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)”, 8 June 1977.

59 For example, UNSC Resolution 2249 (2015).

60 Questions have arisen regarding the legitimacy and appropriateness of prosecutions in various contexts, including in Belgium, the Netherlands and Denmark of returnees who had fought against ISIL. In 2017, Belgian courts ruled that individuals could not be prosecuted for “terrorism” in respect of acts that involved engagement in a “conflict”, though a higher court has paved the way for some prosecutions to proceed. For other cases see: L. Whyte, “Danish woman who fought against Isis faces jail sentence”, the Guardian, 19 December 2016, <www.theguardian.com/world/2016/dec/19/danish-woman-who-fought-against-isis-faces-jail-sentence>; “Netherlands drops case against man suspected of killing Isis fighters”, the Guardian, 21 June 2016, <www.theguardian.com/world/2016/jun/21/>

The FTF label may also give the impression that it intends to embrace participation in armed conflict, yet its scope goes far beyond those who engage in “direct participation in hostilities” under humanitarian law, to include civilians who would enjoy the general protection of that body of law.⁶¹

One element of a rule of law approach would therefore be for states to distinguish, as recommended by the UN Working Group on mercenaries, between participation in armed conflict, in accordance with IHL, and terrorist fighting.⁶² One way to do so, as reflected in the practice of some States, would be to enshrine in law and reflect in practice, exceptions for conduct permissible under IHL.⁶³

3.3 *Jeopardising Legitimate Activity: Ensuring Humanitarian/Human Rights Exceptions*

Parallel questions arise regarding the need to exclude humanitarian workers and the legitimate activities of human rights defenders (HRDs) from the scope of ‘FTF’ provisions. The provision of forms of humanitarian assistance such as medical aid is an activity that has long been protected under IHL.⁶⁴ The positive obligations of states to create an ‘enabling environment’ for HRDs is reflected across IHRL.⁶⁵

netherlands-drops-case-against-man-suspected-of-killing-isis-fighters>; L. Dearden, “Danish woman faces jail after violating travel ban for fighting against Isis with Kurdish groups in Syria and Iraq”, the Independent, 13 December 2016, <www.independent.co.uk/news/world/europe/joanna-palani-danish-kurdish-woman-ypg-peshmerga-iraq-syria-fighting-isis-faces-jail-passport-police-a7471266.html>.

61 For further information on what constitutes “direct participation in hostilities” see e.g., Nils Melzer, “Interpretative guidance on the notion of direct participation in hostilities under international humanitarian law”, International Committee of the Red Cross (ICRC), <www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>.

62 UN Working Group on mercenaries, UN Doc. A/70/330.

63 E.g. section 83.01(1) of the Canadian Criminal Code defines “terrorist activity” as “not includ[ing] an act or omission that is committed during an armed conflict [and which is] in accordance with...international law applicable to the conflict”. Article 260(4) of the Swiss Criminal Code provides that 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”.

64 S. Ojeda, “Out of balance: Global counter-terrorism & the laws of war”, Humanitarian Law & Policy blog, 15 September 2017, <blogs.icrc.org/law-and-policy/2017/09/15/out-of-balance-global-counter-terrorism-the-laws-of-war/> describing it as “a cornerstone of IHL since [...] its codification over 150 years ago”.

65 Eg. UN Declaration on HRDs; OSCE, Guidelines on the Protection of Human Rights Defenders, 2014.

However, it follows from the breadth and scope of what has been described as the “FTF phenomenon” that far-reaching responses to it have thwarted and/or punished both groups of actors. This forms part of a broader problem with the widespread use of counter-terrorism laws on, for example, financing, “material support”⁶⁶ or “indirect incitement” of terrorism,⁶⁷ being used against HRDs and humanitarian organizations in recent years. The expanded prohibitions, crimes and restrictions and increased legal and regulatory scrutiny surrounding FTFs exacerbate the problem significantly.⁶⁸

The implications for human rights and humanitarian protection are profound and wide-reaching. FTF provisions jeopardise the ability of medical personnel to treat “fighters” wounded on the battlefield, of humanitarian workers and HRDs’ to engage with groups perceived as “terrorist” for example to gain access and provide relief to civilian populations, and the willingness of donors and financial institutions to provide essential funds and services, particularly in situations of armed conflict where they may be most needed.⁶⁹ Real concerns have emerged that responses apparently directed to FTFs, under cover of Security Council resolutions, may render essential humanitarian work practically impossible and undermine human rights defence, by stigmatizing persons or causes disfavoured by the state.

States should therefore ensure that careful, narrowly constructed but effective exceptions are carved out to ensure that those engaged in genuine human rights and humanitarian work are not unduly restricted in that work, but are protected in accordance with the obligations of states under international

66 J.A. Fraterman, “Criminalising Humanitarian Relief: Are U.S. Material Support for Terrorism Laws Compatible with International Humanitarian Law?”, *International Law and Politics*, 2014, pp. 401–402; K. Mackintosh and P. Duplat, “Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action”, UN Office for the Coordination of Humanitarian Affairs (OCHA) and the Norwegian Refugee Council (NRC), July 2013, pp. 20, 39–44.

67 For more detailed discussion and examples of issues arising from crimes of expression: H. Duffy and K. Pitcher, “Inciting Terrorism? Crimes of Expression and the Limits of the Law”, Grotius Centre for International Legal Studies, Leiden University, 4 April 2018, <<https://ssrn.com/abstract=3156210>> (hereafter, H. Duffy and K. Pitcher, “Inciting Terrorism? Crimes of Expression and the Limits of the Law”).

68 J. Burniske, D.A. Lewis, and N.K. Modirzadeh, “Suppressing Foreign Terrorist Fighters and Supporting Principled Humanitarian Action: A Provisional Framework for Analyzing State Practice”, October 2015, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2673502>.

69 “Tightening the Purse Strings: What Countering Terrorism Financing Costs Gender Equality and Security”, Duke Law International Human Rights Clinic and Women Peacemakers Program, March 2017, <law.duke.edu/sites/default/files/humanrights/tighteningpursestrings.pdf> *Ibid.*

human rights and humanitarian law. A limited number of states have sought to carve out exceptions for humanitarian operations and it is to be hoped that more follow suit.⁷⁰

4 Criminal Law Responses: Principles, Procedures and Penalties

In principle, so far as FTFs have committed or contributed to serious crimes abroad, criminal law has an important role to play. It can secure accountability, while providing robust guarantees of fairness including ensuring that suspects know and can respond to allegations against them. As such, a criminal law approach may fare favourably when compared to the application of administrative or executive measures, that can have just as serious rights consequences and punitive effects, absent the safeguards. But the fairness, legitimacy and effectiveness of criminal law responses depends on consistency with fundamental principles of criminal law and IHRL, which are often compromised in this context.

In their counter-terrorism efforts, states have increasingly sought to use criminal law preventively – by criminalizing conduct arising before a terrorist crime is committed (i.e., preparatory acts, and acts deemed to support or contribute to terrorism, such as financing, providing material support or inciting terrorism directly or indirectly). The development of specific legislation on FTFs, and prosecutions in practice, take this trend a step further. Much legislation now criminalizes travelling or the attempt to travel as preparatory acts, as well as conduct deemed to facilitate or support the travel of another individual.

The preventive role of criminal law is not inherently problematic, but it has significant limits.⁷¹ The expansion of criminal law in this context raises questions regarding consistency with basic principles of criminal and human rights

70 Eg. See: Australian Criminal Code, division 102.8(4)(c); and New Zealand Terrorism Suppression Act 2002, sections 9(1) and (2). Although the United States material support statute once also contained a “humanitarian assistance” exception, this has been abolished and US courts have found any form of material assistance to terrorist organizations, even provision of training to promote respect for IHL that plainly serves ends of counter-terrorism, to constitute “material support”. See: *Holder v. Humanitarian Law Project*, (2010), United States Supreme Court, 561 U.S. 1, 130 S.Ct. 2705, (hereafter, *Holder v. Humanitarian Law Project*).

71 Eg inchoate acts such as attempts, direct and public incitement, some preparatory acts, or conspiracy may justify the early intervention of criminal law before any terrorist act has taken place.

law, with broader implications for the effectiveness of criminal law and terrorism prevention.

4.1 *The Principle of Legality: Clear and Precise Definitions of Offences*

The non-derogable principle of legality (*nullum crimen sine lege*) reflected in, for example, Article 15 of the International Covenant on Civil and Political Rights (ICCPR)⁷² requires that the scope of crimes must be clearly defined in law at the time of the alleged offence. The principle of *lex certa* requires that criminal law must be sufficiently clear, precise and foreseeable to allow those within a state's jurisdiction to understand the law's limits and modify their behaviour.⁷³ Crimes, inchoate offences and modes of liability that criminalise ill-defined support for ill-defined 'terrorist fighting', "justifying", "provoking" or "apology" for terrorism, or "disseminating messages" in relation to FTF activities, are extremely expansive in their potential scope and ridden with ambiguity.

The obligations on states in UNSC Resolution 2178 (2014) to establish criminal offences for a broad range of conduct, without defining the terms or identifying the basic mental and material elements (or the criminal intent and conduct), has been much criticized.⁷⁴ However, it falls to states to give the framework of obligations effect in a manner that respects the principle of legality, clarifies the scope of criminality and specifically defines the material and mental elements of FTF-related crimes.

Furthermore, the law must be interpreted "in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment."⁷⁵ As an offshoot of this principle, criminal law should be strictly applied and restrictively interpreted; it should not be interpreted by analogy, and any

72 Article 15(1) ICCPR, Article 11(2) UDHR; Article 7(1) ECHR; Article 9 of the American Convention on Human Rights (ACHR); see also Articles 22 (*Nullum crimen sine lege*) and 23 (*Nulla poena sine lege*) of the Rome Statute of the International Criminal Court (ICC).

73 A. Ashworth and L. Zedner, *Preventive Justice*, (Oxford: Oxford University Press, 2014), pp. 113–114, (hereafter, A. Ashworth and L. Zedner, *Preventive Justice*).

74 M. Scheinin, "Back to post-9/11" *op. cit.*

75 See: *S.W. v. United Kingdom* and *C.R. v. United Kingdom*, ECtHR, Judgments of 22 November 1995, cited in *Streletz, Kessler and Krenz v. Germany*, Judgment of 22 March 2001, para. 50. The passage continues: "It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment."

ambiguity should be resolved in favour of the accused.⁷⁶ National laws and some prosecutorial practice may, however, suggest the contrary.⁷⁷

4.2 *Criminal Responsibility and Individual Culpability*

The most basic principle of criminal law is that individuals are held responsible for their own conduct and any associated intent.⁷⁸ Responsibility must be individual, not collective.⁷⁹ It cannot be based solely on association with others, or expression of opinions about their activities, absent an intentional contribution to criminal acts. Conduct with intent – *actus reus* and *mens rea*, or the material and mental elements – provide the objective and subjective conditions for punishability and form the essential nexus between the individual and the criminal wrong.⁸⁰

The intervention of criminal law is generally justified where an individual has caused or contributed to harm to a protected value (the “harm principle”).⁸¹ As an exception, criminal law also penalizes inchoate crimes, before the harm has arisen, where conduct committed with criminal intent poses a significant danger of serious harm.⁸² Criminal law cannot, however, proscribe abstract danger. It cannot prosecute what one might do, but what one has done and intended to do. It cannot punish thoughts, however dangerous society perceives

76 See e.g., “European Parliament resolution of 22 May 2012 on an EU approach to criminal law (2010/2310(INI))”, European Parliament, P7_TA(2012)0208, <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52012IP0208>> (hereafter, European Parliament, EU Approach to Criminal Law).

77 Examples appear below, or in the OSCE report, and in Duffy and Pitcher, *Crimes of Expression*.

78 See e.g., European Parliament, EU Approach to Criminal Law.

79 ICTY, *Prosecutor v. Tadic*, (Case No. IT-94-1-A), Judgment (Appeals Chamber), 15 July 1999, para. 186: “nobody may be held criminally responsible for acts in which he has not personally engaged or in some way participated”. On the prohibition on collective punishments in IHL (as well as IHRL), see Article 33 of the 1949 Geneva Convention (IV) on Civilians; Article 75 of Additional Protocol I, Article 6(2) Additional Protocol II.

80 A. Ashworth and L. Zedner, *Preventive Justice*; and fuller discussion in H. Duffy and K. Pitcher, “Inciting Terrorism? Crimes of Expression and the Limits of the Law”.

81 For a discussion of the “harm principle” see: A. Ashworth and L. Zedner, *Preventive Justice*.

82 Examples would include direct and public incitement to genocide in international criminal law, where the conduct (the expression) in question creates a significant danger that this serious crime will be committed, and the accused intends this to happen; this can be punished even if the crime does not ultimately occur. Preparatory acts, which may include planning or conspiracy with a view to committing or contributing to a terrorist offence, may also be prosecuted if the relevant elements are met.

them to be, but can only intervene when they are converted into concrete acts.⁸³ In some circumstances, the intervention may be before the impact of the action and intent is felt, or indeed the harm may ultimately be caused by another person; there must however be sufficient ‘normative involvement’ of an individual in the wrongful act, or at the very least in the deliberate creation of risk of such an act.⁸⁴ Conversely, remoteness is a constraining principle of criminal law, such that individuals cannot be prosecuted absent a meaningful proximate link between them and the wrong towards which the coercive power of the criminal law is directed.⁸⁵

By contrast, many FTF-related provisions detach criminal conduct from any appreciable harm or consequence in the external world. Many offences of travel, support, financing or “glorification” of it, have extremely tangential links, if any, to future terrorist attacks, but are prosecuted on the basis that they *may* create a *risk* of such eventual attacks.⁸⁶ There need be no contribution towards any act of terrorism, nor any intent to make such a contribution,⁸⁷ as intent to

83 In accordance with the Roman law principle *cogitationis poenam nemo patitur* (“nobody endures punishment for thought.”, Justinian’s *Digest* (48.19.18)); A. Ashworth and L. Zedner, *Preventive Justice*, *op. cit.*, p. 110. A provision in French counter-terrorism legislation, which was declared unconstitutional by the French Constitutional Council in 2017, sought to criminalize consultation of terrorist websites, without requiring terrorist intent; see B. Boutin, “Excesses of Counter-Terrorism and Constitutional Review in France: The Example of the Criminalisation of the Consultation of Websites”, *Verfassungsblog*, 10 May 2018, <<https://verfassungsblog.de/where-visiting-a-website-is-now-a-crime-excesses-of-counter-terrorism-and-constitutional-review-in-france/>>.

84 For crimes, such as terrorist attacks, to be imputed to another who, for example, possesses material or makes statements that may be deemed by some to “glorify” such acts, the original actor must have had “some form of normative involvement [in the other person’s] subsequent choice” to commit a crime and “the intent to cause the final crime itself”. See: A. Ashworth and L. Zedner, *Preventive Justice*, *op. cit.*, p. 112.

85 A. Ashworth and L. Zedner, *Preventive Justice*, p. 109.

86 Eg. in the United Kingdom crimes of “encouragement to terrorism” explicitly note that impact is irrelevant. Convictions include the cases against Tareena Shakil who tweeted support for ISIL and posted ISIL iconography; and Mohammed Moshin Ameen in which the accused was described by the court as risking “the emulation of terrorist actions” through opinions which inter alia “establish[ed] religious and social grounds for terrorist action”. A brother sending money to his sister to return home, which could have been for terrorist purposes, though that was indisputably not his intention. In some cases, judges have insisted on some direct connection to an act of terrorism. See eg H. Duffy and K. Pitcher, “Inciting Terrorism? Crimes of Expression and the Limits of the Law”.

87 The risk of prosecution on charges of “material support” for providing training to promote respect for IHL or prosecution of individuals sending money abroad to their children for basic needs illustrates the decreasing regard for terrorist intent in the application of

travel to a conflict zone, to facilitate such travel, or to provide funding in the knowledge that it *could* be used for terrorist ends may suffice.⁸⁸ Arguably the link between the individual and the crime becomes extremely strained and unduly remote.⁸⁹ While an expansive approach to criminal law may reflect an understandable desire to ‘defend further up the field’, intervening early to prevent terrorism, in doing so it risks upending the principles on which the legitimacy of criminal law depends.⁹⁰

4.3 *The Principle of Restraint in Criminal law*

Concern surrounding individual culpability are linked to the principle that criminal law is an exceptional framework, a last resort or *ultima ratio*. This is linked to a general “culture of executive restraint”⁹¹ in resort to criminal law. The ‘EU approach to Criminal Law’ by the European Parliament explains the principle of restraint in these terms:

... in view of its being able by its very nature to restrict certain human rights and fundamental freedoms of suspected, accused or convicted persons, in addition to the possible stigmatising effect of criminal investigations, and taking into account that excessive use of criminal legislation leads to a decline in efficiency, criminal law must be applied as a measure of last resort (*ultima ratio*) addressing clearly defined and delimited conduct, which cannot be addressed effectively by less severe measures and which causes significant damage to society or individuals...⁹²

counter-terrorism legislation, see: *Holder v. Humanitarian Law Project*; and cases involving family member prosecutions for terrorism financing in: B. Boutin, “Has Countering the Financing of Terrorism Gone Wrong? Prosecuting the Parents of Foreign Terrorist Fighters”, International Centre for Counter-Terrorism, 2 October 2017, <icct.nl/publication/countering-the-financing-of-terrorism-gone-wrong-prosecuting-the-parents-of-foreign-terrorist-fighters/>.

88 According to UNSC Resolution 2178 (2014) acts of support, organization or facilitation have to be “wilful” but (unlike for individuals who travel) do not have to have the purpose of participation in or support for terrorism.

89 On remoteness see Duffy and Pitcher, REF.

90 D. Anderson, “Shielding the Compass: How to Fight Terrorism without Defeating the Law”, UK Independent Reviewer of Terrorism Legislation, 15 June 2013, <terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2013/04/SHIELDING-THE-COMPASS1.pdf>, p. 6, (hereafter, D. Anderson, “Shielding the Compass: How to Fight Terrorism without Defeating the Law”).

91 Anderson, *Ibid.*

92 European Parliament, EU Approach to Criminal Law.

Recent international practice, particularly in the areas of counter-terrorism raise serious doubts as to whether this principle governs in practice. Controversial examples include the convictions of mothers and other family members for sending basic funds to their children overseas under broad terrorist financing provisions, on the basis that they “knew the recipient was radicalised” so there was a risk the money could have been used for terrorist purpose.⁹³ Additional concerns arise from the fact that expansive criminalization has provided a legal pretext for the prosecution of journalists, NGO leaders, academics, lawyers and others under broadly framed counter-terrorism criminal laws, as referred to above.⁹⁴ There is a need for urgent efforts to reverse the trend in many countries of counter-terrorism legislation being applied in an abusive manner.⁹⁵

Prosecuting authorities also play a crucial role in exercising discretion in the selection of cases and strict application of the law. However, this is no alternative to clarity in the law itself. As British judge Lord Bingham has noted, “the rule of law is not well served if a crime is defined in terms wide enough to cover conduct which is not regarded as criminal and it is then left to the prosecuting authorities ... not to prosecute to avoid injustice”.⁹⁶ The broad (and arguably dangerous⁹⁷) terms of Resolutions 2178 (2014) and 2396 (2017), make it all the more important that national legislatures engage in a rigorous and inclusive process in which they consider the “value, efficiency and rule of law compliance” of criminal law measures in this field.⁹⁸

93 See B. Boutin, “Has Countering the Financing of Terrorism Gone Wrong? Prosecuting the Parents of Foreign Terrorist Fighters”. A UK example from 2019 is reported at <https://www.bbc.com/news/uk-england-hampshire-46874831>.

94 Concerns about the unwarranted application of offences related to “terrorism” or so-called “extremism” are well documented. See for example, “The Responsibility of States’: Protection of Human Rights Defenders in the OSCE Region (2014–2016)”, OSCE/ODIHR, 14 September 2017, <<https://www.osce.org/odihr/341366>>.

95 Successive European Commissioners express such concerns in the context of Turkey since the 2015 coup attempt.

96 D. Anderson, “Shielding the Compass: How to Fight Terrorism without Defeating the Law”.

97 F. Ní Aoláin, “The UN Security Council, Global Watch Lists, Biometrics and the threat to the rule of law” criticized the UN Security Council for “directing criminal legislative practice in expanded ways,” with problematic effects.

98 *Ibid.*

4.4 *Process and Penalties*

Concerns regarding the ever-expanding scope of criminal law are compounded by procedures that undermine fair trial rights, and by the onerous penalties for FTF-related acts.

Resort to “special courts and administrative boards” to prosecute FTF crimes in a range of states around the world undermine international due-process standards.⁹⁹ A 2018 UN Counter-Terrorism Implementation Task Force (CTITF) guidance to states stresses that the use of military courts to try civilians will only be legitimate if regular civilian courts are unavailable and recourse to military courts is unavoidable.¹⁰⁰ Likewise, the reality of FTF phenomenon has meant that trials in absentia have increased, despite having long been controversial as a matter of human rights law.¹⁰¹ Non-disclosure of information and evidence is a recurrent problem, jeopardizing the right of the accused to know evidence against them and have a meaningful opportunity to refute it.¹⁰² In exceptional circumstances it may be legitimate to withhold certain information, for example where necessary to protect national security, the rights of witnesses or sources, but provided this is sufficiently counter-balanced by adequate procedural guarantees to ensure an overall fair trial.¹⁰³ In turn, caution

99 The right to be tried by an independent and impartial tribunal is part of the non derogable core of fair trial rights. See “Foreign Terrorist Fighter’ Laws, Human Rights Rollbacks Under UN Security Council Resolution 2178”, Human Rights Watch, December 2016, p. 16.

100 UN CTITF Guidance 2018, p. 42. The US military commissions established to try Guantánamo detainees for law of war violations and for “other offenses”, including material support for terrorism, are a case in point.

101 Article 14 of the ICCPR entitles anyone accused of a criminal offence to be present during their trial. Both the UN Human Rights Committee (CCPR) and the European Court of Human Rights (ECtHR) have found that trials in absentia can be permitted if individuals tried and convicted when they are overseas are granted the right to a retrial when they can be present, the accused has notice of the proceedings and is legally represented. See: *General Comment No. 32* UN Doc. CCPR/C/GC/32, 23 August 2007, para. 36. In absentia trials of FTFS have reportedly been held in, e.g., Belgium, Denmark, France and the Netherlands. See: “The return of foreign fighters to EU soil. Ex-post evaluation”, European Parliamentary Research Service, pp. 50 and 86–87. See also: “Foreign Terrorist Fighters: Eurojust’s Views on the Phenomenon and the Criminal Justice Response, Fourth Eurojust Report”, Eurojust, November 2016, p. 15 (hereafter, Eurojust Report 2016).

102 See: *Human Rights in Counter-Terrorism Investigations: A Practical Manual for Law Enforcement Officers*, (Warsaw: OSCE/ODIHR, November 2013), p. 48, <www.osce.org/odihr/108930>, (hereafter, *Human Rights in Counter-Terrorism Investigations*, OSCE/ODIHR); and *General Comment No. 32*, CCPR, para. 33.

103 *Human Rights in Counter-Terrorism Investigations*, OSCE/ODIHR, p. 48; and *Rowe and Davis v. The United Kingdom*, ECtHR, Judgment of 16 February 2000.

is due to ensure that the presumption of innocence is not jeopardized, for example by criminalizing travel to certain areas unless the accused can prove a legitimate purpose arguably shifting the burden of proof.¹⁰⁴

The heightened penalties attached to terror-related and FTF crimes in many states (including mandatory penalties in some) raise questions of proportionality of punishment.¹⁰⁵ Sentences must be commensurate with the crime, and with the individual's role in that crime.¹⁰⁶ Assumptions as to the gravity of FTF-related offences may not stand up in light of their expanded scope, embracing minor forms of potential contribution without clear criminal intent.

Courts must be able to take into account all of the circumstances in assessing appropriate and proportionate penalties.¹⁰⁷ The diverse profiles of FTFs, examples of vulnerability on account of age, mental health or intellectual ability, and a sometimes complex intermingling of perpetration and victimhood, speak to the importance of careful consideration of whether to prosecute at all, and if so, how to punish. Myriad human rights issues arise in relation to detention practices,¹⁰⁸ including concerns that prisons are environments in

104 Australia's Foreign Fighters Law of 2014 criminalized travel to a "declared area where terrorist organizations engage in hostile activity", subject to the individual proving that presence there was for "a sole legitimate purpose"; see: "Foreign Terrorist Fighter' Laws, Human Rights Rollbacks Under UN Security Council Resolution 2178", Human Rights Watch, p. 14. See also eg. Sentencing decision in *R v Anjem Choudary and Mohammed Rahman*, Central Criminal Court, Great Britain, Sentencing Remarks, 6 September 2016, International Crimes Database, <<http://www.internationalcrimesdatabase.org/Case/3273>>; convicted for signing an oath of allegiance and broadcasting lectures, sentencing remarks noted that the defendants did nothing to condemn "Islamic State".

105 Some examples of penalties include 17–18 years of imprisonment for contributing to recruitment ("Albania Jails Nine Jihadi Recruiters", *BalkanInsight*, 4 May 2016, <www.balkaninsight.com/en/article/heavy-sentences-spelled-for-albania-jihadi-recruiters-05-04-2016>). Laws in the UK provide for up to seven years of imprisonment for "encouragement to terrorism" (*Terrorism Act (2006)*, Section 1 (7)). See also "Foreign Terrorist Fighter' Laws, Human Rights Rollbacks Under UN Security Council Resolution 2178", (Human Rights Watch).

106 In accordance with the principle of individual guilt (*nulla poena sine culpa*); see: European Parliament, *EU Approach to Criminal Law*, *op. cit* and Article 25 of the Rome Statute of the International Criminal Court (ICC).

107 IHRL requires a balanced assessment of appropriate punishment not automatic penalties. For examples of court approaches see, for example, Eurojust Report 2016, p. 13, *op. cit*.

108 Eg Articles 7, 10, 17 ICCPR. Eg. "UN Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders" (Bangkok Rules), GARes. 65/229 on 21 December 2010, UN Doc. A/RES/65/229; Foreign Terrorist Fighters: Eurojust's Views on the Phenomenon and the Criminal Justice Response, 4th report, 19 April 2017, p. 5.

which violent extremism spreads.¹⁰⁹ However, despite this there may still be insufficient attention paid to alternatives to custodial sentences, reflected in practice in a number of States,¹¹⁰ and to grappling with meaningful efforts at rehabilitation in the criminal context.¹¹¹

5 “Administrative Measures”

The trend towards increasing use of administrative measures in countering terrorism is particularly visible in the FTF context. The term “administrative measures” is generally used to refer to restrictive measures, of a non-criminal nature, that are imposed by the executive in the name of terrorism prevention.¹¹² Although increasingly onerous and wide-reaching in their impact, they are characteristically accompanied by limited judicial review or opportunities to challenge¹¹³ and little or no access to information concerning the basis for the measures. States need to address and take seriously the concern that the upsurge in administrative measures in the counter-terrorism context, including

109 ODIHR and Penal Reform International (PRI) guide for detention monitors on the protection of human rights in preventing and countering violent extremism and radicalization that leads to terrorism (VERLT) in prison (2019).

110 Eurojust Report 2016, examples of judicial alternatives to imprisonment, including the attachment of “specific conditions” directed at the “rehabilitation, disengagement and/or de-radicalisation of FTFs”.

111 On rehabilitation more broadly, see eg. “Declaration on strengthening OSCE efforts to prevent and counter terrorism” adopted by the OSCE Ministerial Council in Hamburg on 9 December 2016, MC.DOC/1/16, (hereafter, OSCE Declaration on strengthening OSCE efforts to prevent and counter terrorism); and “Ministerial Declaration on preventing and countering violent extremism and radicalization that lead to terrorism”, adopted by the OSCE Ministerial Council in Belgrade on 4 December 2015, MC.DOC/4/15 (hereafter, OSCE Ministerial Declaration on VERLT). See also UNOCT Report July 2017, *op. cit.*; “Rome Memorandum on Good Practices for Rehabilitation and Reintegration of Violent Extremist Offenders”, Global Counterterrorism Forum (GCTF). See also: E. Entenmann, L. van der Heide, D. Weggemans, J. Dorsey, “Rehabilitation for Foreign Fighters? Relevance, Challenges and Opportunities for the Criminal Justice Sector”.

112 See, for example, B. Boutin, “Administrative Measures against Foreign Fighters: In Search of Limits and Safeguards”, International Centre for Counter-Terrorism, 16 December 2016, <<https://icct.nl/publication/administrative-measures-against-foreign-fighters-in-search-of-limits-and-safeguards/>>, (hereafter, B. Boutin, “Administrative Measures against Foreign Fighters: In Search of Limits and Safeguards”).

113 *Ibid.*, p. 5.

FTF-related acts, is “a repressive tool which problematically circumvents the procedures and guarantees of criminal prosecution.”¹¹⁴

5.1 *Limits on Permissible Deprivation of Nationality (and Exclusion)*

Particular concerns arise in relation to the growing practice, adopted in a number of states, and proposed in others, of citizenship-stripping of individuals who have engaged in FTF-related acts or are considered to pose a terrorist threat.¹¹⁵ In some cases, judicial findings of violations have led to policy reversal, but the trend in the adoption of such laws and policies continues.¹¹⁶

The right to a nationality is set out in the Universal Declaration of Human Rights (UDHR) and other international instruments.¹¹⁷ International law does not confer a right to any particular nationality, and it provides for discretion to states to grant and revoke nationality, including when individuals have conducted themselves in a manner “seriously prejudicial to the vital interests of the state”.¹¹⁸ However, deprivation of nationality is an extreme measure for individuals targeted and those around them, which interferes, directly and indirectly, with the enjoyment of a much broader range of rights, and to a significant extent hampers an individual’s ability to claim and secure her/his rights at all. It is accordingly subject to strict limits.

If stripping of citizenship is used at all, it should be the most exceptional circumstances. Moreover, deprivation of nationality must not result in statelessness, in law or in fact.¹¹⁹ Courts have held that it is insufficient that the

114 B. Boutin, “Administrative Measures against Foreign Fighters: In Search of Limits and Safeguards”, p. 19.

115 Such laws and practice emerged, for example, in the United Kingdom, Belgium, Bosnia and Herzegovina, the Netherlands and France. See B. van Ginkel and E. Entenmann (eds.), “The Foreign Fighters Phenomenon in the European Union”.

116 In the UK, eg., practices have been modified following litigation, whereas in Canada in June 2017 the government repealed amendments to legislation that had revoked citizenship for joining an armed group in a conflict abroad. The Global Database on Modes of Loss of Citizenship notes more than 130 countries around the world have such legislation on the books, including 19 EU Member States.

117 Article 15 of the UDHR provides that everyone has a right to a nationality and that no one shall be arbitrarily deprived of his or her nationality nor denied the right to change nationality. According to Article 24 (3) of the ICCPR and Article 7 (1) of the Convention on the Rights of the Child (CRC), every child has the right to acquire a nationality.

118 UN Convention on the Reduction of Statelessness, 30 August 1961, Article 8 (3). see UN Secretary General, *Report to the Human Rights Council* (“Human rights and arbitrary deprivation of nationality”), UN Doc. A/HRC/25/28, 19 December 2013, para. 12.

119 According to Article 8 (1) of the UN Convention on the Reduction of Statelessness and Article 7 (3) of the European Convention on Nationality of the Council of Europe, state

individual “could be eligible for another nationality”, if stripping nationality renders the person stateless.¹²⁰ The deprivation of nationality must not be arbitrary,¹²¹ prescribed by law, necessary and proportionate to the intended aim and not discriminatory. Laws that allow for nationality to be deprived in cases where it is deemed “conducive to the public good”,¹²² set a much lower threshold than necessity and proportionality, as required by international human rights law.¹²³ Where someone joining a banned or “extremist” organization is automatically deprived of citizenship, states end up skipping the careful case-by-case consideration of legal tests required by human rights law. A practical and effective right to challenge deprivation of their nationality before a court of law is also essential; in practice, however, even where there is an appeal in theory, when individuals are abroad at the relevant time they often have no meaningful right in practice.¹²⁴ Finally, questions also arise as to whether deprivation of nationality is discriminatory, in law or more often in

parties to those treaties should not deprive anyone of their nationality if that would render them stateless. Both treaties only allow for exceptions to this rule in strictly limited circumstances. For general recognition of the need to avoid statelessness, UN General Assembly Resolution 50/152, UN Doc. A/RES/50/152, 21 December 1995, para. 16; UN Secretary General, *Report to the Human Rights Council* UN Doc. A/HRC/10/34, 26 January 2009, para. 51.

120 UN Secretary General, UN Doc. A/HRC/25/28, para. 4 see also UN Secretary General, *Report to the Human Rights Council* (“Human rights and arbitrary deprivation of nationality”), UN Doc. A/HRC/13/34, 14 December 2009, para. 59.

121 This is explicit in, for example, Article 15 UDHR; Article 20 ACHR.

122 This standard is employed eg in the UK under the Immigration Act 2014. See D. Anderson, “Citizenship Removal Resulting in Statelessness, first report of the independent reviewer on the operation of the power to remove citizenship obtained by naturalisation from persons who have no other citizenship”, UK Independent Reviewer of Terrorism Legislation, April 2016, <<https://www.gov.uk/government/publications/citizenship-removal-resulting-in-statelessness>>.

123 Eg. a bill signed into law in Kazakhstan in July 2017 providing for revocation of citizenship of individuals convicted of terrorist crimes and other offences causing grave harm to the country’s vitally important interests has been criticized for its vagueness and potential impact; see eg. “Nations in Transit 2018, Kazakhstan, Country Profile”, Freedom House, <https://freedomhouse.org/report/nations-transit/2018/kazakhstan>.

124 See, for example, “Foreign Fighters under International Law”, Geneva Academy of International Humanitarian Law and Human Rights, Academy Briefing No. 7, pp. 57–58, <www.geneva-academy.ch/joomlatools-files/docman-files/Publications/Academy%20Briefings/Foreign%20Fighters_2015_WEB.pdf>.

practice; for example, provisions that distinguish naturalized persons from others have been criticized for creating a group of “second-class citizens”.¹²⁵

In practice, stripping of nationality often precedes or is linked to other steps that implicate human rights, such as denial of entry to a state, deportation or even in extreme cases targeted killing. In some cases, as in targeted killings, it has no bearing whatever on the lawfulness under IHRL of that action. It should be noted that it does not necessarily entitle the state to lawfully exclude an individual from its territory either, as the right to enter or leave one’s own country¹²⁶ is not limited to “nationals” under human rights law, but to those with a relevant and substantial link to the state.¹²⁷ Nor, as a matter of law, does deprivation of nationality affect the right not to be expelled, returned or extradited to another state where there are real risks of serious human rights violations such as torture and other ill-treatment if used (as is often the case) as a precursor to deportation.

As ever, due consideration should also be given to the question of the effectiveness of deprivation of nationality, and associated measures¹²⁸ “Risk exportation”, whereby measures are taken that seek to protect a particular state by pushing the perceived threat beyond its borders, may not contribute to sustainable long-term security,¹²⁹ and may even be counter-productive if the exclusion forces individuals to remain in or revert to conflict zones, or in contexts in which terrorism and violent extremism thrive. This would appear to be

125 The report deals also with dual nationals; see also the debate of such provisions in the Netherlands in B. Boutin, “Administrative Measures against Foreign Fighters: In Search of Limits and Safeguards”. For similar concerns relating to practices and previously contemplated proposals about citizenship deprivation in other countries, including Belgium, France and the United Kingdom, see also “Europe: Dangerously disproportionate: The ever-expanding national security state in Europe”, Amnesty International, 17 January 2017, pp. 58–63, <www.amnesty.org/en/documents/euro1/5342/2017/en/>.

126 *General Comment No. 27 (Article 12: Freedom of movement)*, CCPR, UN Doc. CCPR/C/21/Rev.1/Add.9, 2 November 1999, paras. 19–21.

127 *Ibid.*, (CCPR). The International Law Commission (ILC) has noted that deprivation of citizenship for the sole purpose of expulsion would be “abusive, indeed arbitrary within the meaning of article 15, paragraph 2, of the Universal Declaration of Human Rights”. See Commentary to article 8 of the Draft Articles on the Expulsion of Aliens, in *Report to the UN General Assembly*, International Law Commission, UN Doc. A/69/10, 2014, p. 32.

128 See eg M. Benton and N. Banulescu-Bogdan, *Foreign Fighters: Will Revoking Citizenship Mitigate the Threat?* Migration Policy Institute, 3 April 2019.

129 See report of the UK Independent Reviewer of Terrorism Legislation, D. Anderson, “Shielding the Compass: How to Fight Terrorism without Defeating the Law”; see also R. Bauböck and V. Paskalev, “Citizenship Deprivation A Normative Analysis”, March 2015, <www.ceps.eu/publications/citizenship-deprivation-normative-analysis>.

incompatible with the obligations under UNSC Resolution 2178 (2014), which requires states to co-operate with each other to address the effectively threats of FTFs.¹³⁰

5.2 *Deprivation of Liberty and Restrictions on Freedom of Movement*

Travel bans and revocation of passports are two of the prime methods of choice employed by states in respect to FTFs.¹³¹ International law grants everyone the right to leave any country (eg. Article 12 of the ICCPR), including their own, subject to *permissible restrictions*, and the principles of legality, necessity and proportionality.¹³² Naturally, travel can be restricted to prevent acts of terrorist violence, for example, but the nature of some travel restrictions has been criticized for being so broad as to be arbitrary and disproportionate.¹³³

Even greater concern attends so-called preventive or administrative detention (on security grounds without criminal charges) of persons perceived to constitute a threat. While this has long been held to violate the basic right to liberty, and potentially equality, in the ‘war on terror’ context, it has made a troubling reappearance in some states in the FTF context.¹³⁴ Detaining an individual on the basis of a perceived risk of travel and of potentially contributing in some way to ill-defined FTF threats falls foul of the requirement that

130 See the argument developed in G. Goodwin Gil, “‘Temporary Exclusion Orders’ and their Implications for the United Kingdom’s International Legal Obligations, Part II”, 9 December 2014, <www.ejiltalk.org/temporary-exclusion-orders-and-their-implications-for-the-united-kingdoms-international-legal-obligations-part-ii/>.

131 “‘Foreign Terrorist Fighter’ Laws, Human Rights Rollbacks Under UN Security Council Resolution 2178”, Human Rights Watch, cites Austria, Azerbaijan, Belgium, Denmark, France, Italy, the Netherlands, Tajikistan, the United Kingdom and others as having enacted travel bans.

132 For further considerations concerning freedom of movement see UN CTITF Guidance 2018, pp. 15–20.

133 *Ibid.*

134 This is clear from other contexts such as security detention of non-nationals in the United Kingdom post 9/11, see: *A and Others v. The United Kingdom*, ECtHR, or the French *Conseil d’État* issued an advisory opinion against preventive administrative detention on security grounds proposed in the aftermath of the terrorist attacks in Paris in November 2015, see: “Avis sur la constitutionnalité et la compatibilité avec les engagements internationaux de la France de certaines mesures de prévention du risque de terrorisme”, Conseil d’État, Assemblée générale, Section de l’intérieur, 17 December 2015, <www.conseil-etat.fr/Decisions-Avis-Publications/Avis/Selection-des-avis-faisant-l-objet-d-une-communication-particuliere/Mesures-de-prevention-du-risque-de-terrorisme>.

deprivation of liberty must have a lawful basis and cannot be “arbitrary”.¹³⁵ Procedural safeguards, including a meaningful and effective opportunity to challenge the lawfulness of one’s detention promptly before a judge, have also been compromised.¹³⁶

Certain practices that have emerged in some states, such as short-term detention for questioning or to prevent imminent travel, house arrest or assigned residence, control orders or limitations on movement to and within certain areas, may not be presented as deprivation of liberty, but this is a question of fact;¹³⁷ they must be carefully assessed to determine whether the degree of control is such that they amount to deprivation of liberty. They must also be subject to all legal safeguards against arbitrary deprivation of liberty required under IHRL.

5.3 *Inter-state Cooperation: Gathering and Sharing Information and Evidence*

It follows from the foregoing that the focus of FTF measures should, so far as possible, be on the conduct of individuals. In particular, where established crimes, such as war crimes or crimes against humanity were committed, states should cooperate to ensure accountability. This involves cooperating to overcome the many practical, evidentiary and jurisdictional challenges to investigation and prosecution that arise for an array of reasons, including the location of suspects, witnesses and other evidence, restrictions on evidence from foreign partners and others. Serious attention is due to considering and sharing

135 While the Article 9 ICCPR prohibits arbitrary detention, Article 5 ECHR (Article 5) provides an exhaustive list of grounds of detention (e.g., pursuant to criminal charge or pending deportation) which do not include security detention., The UN Human Rights Committee makes clear that such detention will be arbitrary save in the most exceptional circumstances – *General Comment No. 35 (Article 9: Liberty and security of person)*, CCPR, UN Doc. CCPR/C/GC/35, 16 December 2014, para. 15 (hereafter *General Comment No. 35*, CCPR).

136 Eg “UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment”, adopted by UN General Assembly Resolution 43/173, 9 December 1988, UN Doc. A/RES/43/173, See eg. principles 4, 11–14 (right to be heard and to information), 17–18 (on legal counsel) and 32 (right to challenge the lawfulness of detention).

137 For an overview of case-law on this issue see “Guide on Article 5 of the Convention, Right to Liberty and Security”, ECtHR, April 2014, <https://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf>, pp. 4–5. On different forms of restrictions amounting to deprivation of liberty in the jurisprudence of the UN Human Rights Committee see also *General Comment No. 35*, CCPR, para. 5.

best practices on how to meet these difficulties, while respecting international human rights standards, including in relation to privacy and fair trial rights.

States must ensure that they do not co-operate with other states in the transfer of persons, or the collection, sharing or receipt of information and evidence, in a way that violates their own obligations or aids and assists wrongs by other states.¹³⁸ UNSC Resolution 2396 (2017) raises particular concerns given the emphasis on gathering and sharing of information, intelligence and evidence, including personal biometric data with other states.¹³⁹ UNSC Resolutions 2462 and 2482 (2019) go a little further, call on states to ‘intensify and accelerate’ the exchange of relevant ‘operational information or financial intelligence’ regarding FTFs, including ‘information obtained from the private sector.’¹⁴⁰ The same resolution specifically calls on states to periodically assess which non-profit organisations may be “vulnerable to terrorist financing” which, in this context, may increase the risk that such laws have been shown to pose to civil society.¹⁴¹

Cooperation arrangements should be based on national legislation that outlines clear parameters and safeguards for the collection and receipt of information consistently with IHRL standards and seeks to ensure that information provided to other states is not used for unlawful purposes.¹⁴² Before entering into an information and intelligence sharing agreement, an assessment should be made of the counterpart’s record on human rights and data protection, as well as the legal safeguards and institutional controls.¹⁴³

138 Art 16 ILC Articles.

139 *Ibid.*, Ní Aoláin notes that “the principle of sharing assumes that all states value privacy equally; do not misuse information to target individuals outside of the rule of law; and that information practices including integrity, anonymity, destruction as appropriate are rule of law based.... [which is] not the case in practice.”

140 S/Res 2462 (2019); see also UN Doc S/Res/2484 (2019).

141 *Ibid.* see also The Massive Perils of the Latest UN SC resolution on Terrorism, F. NiAolain, Just Security, 8 July 2019, at <https://www.justsecurity.org/64840/the-massive-perils-of-the-latest-u-n-resolution-on-terrorism/>.

142 The reliance on torture evidence has been considered to amount to a “flagrant denial of justice” by the ECtHR; see, for example: *Husayn (Abu Zubaydah) v. Poland*, ECtHR, Judgment of 24 July 2014. See also UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/HRC/25/60, 10 April 2014, para. 21.

143 See: UN Special Rapporteur on counter-terrorism, *Report to the UN Human Rights Council* (“Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight”), UN Doc. A/HRC/14/46, 17 May 2010, Practices 31–32. See also: “Democratic and effective oversight of national security services”, Council of Europe Commissioner for Human Rights, May 2015, in particular recommendation 5.

6 Preventing and Countering Violent Extremism that Leads to Terrorism

There can be no doubt that States are obliged to take effective measures to protect individuals within their jurisdiction from violence. This includes prevention of terrorism, and countering recruitment to organizations that threaten human rights. The relevance of this is clear in the context of a growing body of reports showing the extent of violations by organizations such as Islamic state, as well as the energy and resources expended on its online messaging and virtual image to lure vulnerable recruits.¹⁴⁴

In practice, the response by many states has been the development of strategies or policies often referred to as countering or preventing violent extremism (CVE or PVE). This shadows UNSC Resolution 2178 (2014) which “[u]nder-scores that countering violent extremism, which can be conducive to terrorism, include[s] preventing radicalization, recruitment, and mobilization of individuals into terrorist groups and becoming foreign terrorist fighters ... and calls upon Member States to enhance efforts to counter this kind of violent extremism.”¹⁴⁵ States need to carefully consider the rights issues arising from these programmes, and their effectiveness, in light of mixed practice to date, much of which has been criticised as dubious and counter-productive.¹⁴⁶

6.1 *Preventing Terrorist Violence versus Countering “Radicalization” or “Extremism”*

First, human rights and rule of law controversies arise regarding the objectives, framing and/or focus of policies that counter so-called “radicalization” or “extremism”. The legality concerns discussed above are particularly pronounced in relation to “counter-extremism” measures given the undefined, vague and inherently problematic nature of the term.¹⁴⁷ The fact that so many political and human rights movements in diverse contexts have been considered radical

144 See, for example, G. Weimann, “The Emerging role of Social Media in the Recruitment of Foreign Fighters”, in FFILB, pp. 77–96.

145 See: OSCE Ministerial Declaration on VERLT, para. 4; OSCE Ministerial Declaration on FTFS.

146 Eg. multiple reports on Prevent in the UK raise myriad issues. Practice to date shows many pitfalls with direct and indirect implications for rights such as freedom of thought, conscience, religion or belief, expression, privacy and equality, as noted further below. See more broadly C. Thiessen, Preventing Violent Extremis awhile Promoting Human Rights; Toward a Clarified UN Approach’ in International Peace Institute July 2019, pp. 1–8.

147 UN Special Rapporteur on Counter-terrorism, Report to the UN Commission on Human Rights, UN Doc. A/HRC/40/52, 01 March 2019 para 19 describing extremism as “a poorly

and extreme in their time should sound a cautionary note. Yet contemporary practice points to overbroad and vague definitions in “anti – terrorism” and “anti-extremism” legislation being susceptible to abuse, and used in practice to targeted the activities of peaceful opposition groups, civil society and HRDs.¹⁴⁸ As a UN Special Rapporteur recently noted, the lack of a specific definition of extremism “allows States to adopt highly intrusive, disproportionate and discriminatory measures, notably to limit freedom of expression.”¹⁴⁹

A sharp distinction should be drawn between loose notions of extremism and ‘violent extremism,’ where there is a proximate relationship between prohibited conduct and unlawful acts, such as incitement to discrimination, hostility or violence, as defined in accordance with international human rights standards.¹⁵⁰

Moreover, it cannot be ignored that, despite repeated reassertions by the UN Security Council, and others that terrorism is not associated with any one religion,¹⁵¹ the widespread focus on countering “radicalization” or “extremism” often have a discriminatory focus or effect.¹⁵² In some contexts, detecting “early signs of radicalization” and suspicious behavior has, in practice, become interlinked with identifying more devout religious practice, raising obvious human rights issues concerning equality and the right to religious freedom.¹⁵³

defined concept that has already been used to target civil society and human rights defenders.”

148 C. Thiessen, *Ibid.* See, eg. “Civil Society Recommendations to the Participants of the OSCE Ministerial Council Meeting in Vienna”, Civic Solidarity Platform, December 2017. <www.civicsolidarity.org/sites/default/files/recomendations_vienna_2017_3.12.pdf>; F. Ní Aoláin, “The UN Security Council, Global Watch Lists, Biometrics and the threat to the rule of law”.

149 *Ibid.*

150 *Preventing Terrorism and Countering Violent Extremism and Radicalization that Lead to Terrorism*, OSCE, pp. 42–43.

151 see eg 2016 OSCE Declaration on strengthening OSCE efforts to prevent and counter terrorism, and the “OSCE Charter on Preventing and Combating Terrorism”, adopted 7 December 2002, MC(10).JOUR/2.

152 The UN Special Rapporteur on counter-terrorism noted that strategies to counter violent extremism, even if generic on paper, tend to target specific groups considered to be most “at risk”; he stressed that such strategies should not be based on “pre- or misconceptions about the groups that are most susceptible to radicalization or violent extremism”. See UN Special Rapporteur on counter-terrorism, UN Doc. A/HRC/31/65, para. 43.

153 see eg *Preventing Terrorism and Countering Violent Extremism and Radicalization that Lead to Terrorism*, OSCE, pp. 48–60: “Background Paper: Countering the Incitement and Recruitment of Foreign Terrorist Fighters: The Human Dimension”, OSCE/ODIHR, UN Special Rapporteur on counter-terrorism, UN Doc. A/HRC/31/65.

The inviolability of the right to freedom of thought is likewise jeopardized when states focus their counter-terrorism policies on ‘extremist’ beliefs and ideologies rather than conduct. It has been noted, moreover, that preventive measures with a stigmatizing and discriminatory effect may be counter-productive, as they can be used by “violent extremist groups as propaganda to undermine these efforts”.¹⁵⁴

6.2 *Countering Violent Extremism While Protecting Freedom of Expression*

The clampdown on freedom of expression globally, to which FTF measures have contributed, deserves urgent attention. Freedom of expression embraces the freedom to express ideas and opinions that “offend, shock or disturb,”¹⁵⁵ the significance of which is captured in the oft-cited judgment of the ECtHR which notes that “such are the demands of [...] pluralism, tolerance and broad-mindedness without which there is no ‘democratic society’”.¹⁵⁶ Although not absolute, restrictions on the right must be prescribed by law, pursue one of the legitimate aims listed in relevant international standards (namely the protection of the rights or reputations of others or the protection of national security, public order, health or morals), and be necessary and proportionate to fulfilment of those aims.¹⁵⁷

In certain circumstances, states are not only entitled to, but may be obliged to intervene to limit free speech, notably where it amounts to incitement to violence or hate speech.¹⁵⁸ However, blocking “extremist” views *per se* is likely to fall foul of legal requirements.¹⁵⁹ Human rights courts have also noted the need to clearly distinguish between incitement to violence and “hostile”,

154 “The Hague-Marrakech Memorandum on Good Practices for a more Effective Response to the FTF Phenomenon”, Global Counterterrorism Forum (GCTF).

155 *Handyside v. The United Kingdom*, ECtHR, Judgment of 7 December 1976, para. 49.

156 *Ibid.*

157 See Article 19 ICCPR, Article 19 UDHR, Article 10 ECHR, Article 13 ACHR. For example Article 19(3) ICCPR *General Comment No. 34 (Article 19: Freedoms of opinion and expression)*, CCPR, 12 September 2011, UN Doc. CCPR/C/GC/34, e.g., paras. 22 and 34, (hereafter, *General Comment No. 34*, CCPR, UN Doc. CCPR/C/GC/34).

158 See: Article 20 ICCPR; and Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Or E.g. *Belek and Velioglu v. Turkey*, ECtHR, Judgment of 6 October 2015, paras. 24–27.

159 “Rabat Plan of Action” Appendix in UN High Commissioner for Human Rights, *Report to the Human Rights Council* (“Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred”), UN Doc. A/HRC/22/17/Add.4, 11 January 2013, see also A. Callamard,

“negative” or “acerbic” comments and criticism,¹⁶⁰ or expressions of support for a leader of a “terrorist organization”, struggle or liberation.¹⁶¹ Moreover, if restrictions are to be justified as necessary and proportionate to national security threats, those threats must involve at least a reasonable risk of serious disturbance, not an abstract, hypothetical or remote danger down the line.

6.3 *Dialogue, Debate and Credible Alternative Narratives*

In recent years there has been recognition, in several contexts including the UN Secretary General’s Plan of Action on Preventing Violent Extremism, of the importance of fostering and creating platforms for dialogue and discussion: “to promote tolerance and understanding between communities, and voice their rejection of violent doctrines by emphasizing the peaceful and humanitarian values inherent in their theologies”.¹⁶² The Plan also makes clear that it is important to “promote, in partnership with civil society and communities, a discourse that addresses the drivers of violent extremism, including ongoing human rights violations.”¹⁶³

However, tensions and disconnects emerge from recent practice between the focus on fostering debate and engaging in discourse, on the one hand, and the undue suppression of freedom of expression in the name of countering terrorism, on the other.

Moreover, while states have increasingly engaged in measures directed at fostering “alternative narratives” to the ideology advanced by groups such as ISIL, these may lack credibility. The effectiveness of such initiatives is likely to depend on who they are delivered by and whether they reflect genuinely open

“Religion, Terrorism, and Speech in a ‘Post-Charlie Hebdo’ World”, *Religion and Human Rights*, Vol. 10, No. 3, 2015, pp. 207–228.

160 *Surek and Ozdemir v. Turkey*, ECtHR, Judgment of 8 July 1999, para. 61; *Erdogdu v. Turkey*, ECtHR, Judgment of 15 June 2000 *Falakaoglu v. Turkey*, ECtHR, Judgment of 26 April 2005 (French), para. 35. *Incal v. Turkey*, ECtHR, Judgment of 9 June 1998; *Otegi Mondragon v. Spain*, ECtHR, Judgment of 15 March 2011, para. 54 on negative and hostile criticism.

161 *Yalçinkaya and Others v. Turkey*, ECtHR, Judgment of 24 June 2014 (French), para. 34. The UN Human Rights Committee, in its General Comment on Article 19, stressed that UK and Russian offences such as “encouragement of terrorism” and “extremist activity” as well as offences of “praising”, “glorifying”, or “justifying” need to be based on clearly defined law to ensure that they do not lead to unnecessary or disproportionate.

162 “Plan of Action to Prevent Violent Extremism: Report of the Secretary-General”, UN Secretary General, UN Doc. A/70/674, 24 December 2015, para. 49 (e), <www.un.org/en/ga/search/view_doc.asp?symbol=A/70/674>, (hereafter, UNSG Plan of Action on PVE).

163 *Ibid.*, para. 51 (g) Rec 3(7). The paragraph goes on to recommend that states “Address any existing human rights violations, as a matter of both legal obligation and credibility”.

debate or just seek to impose “acceptable” narratives by the state. Disaffected returning FTFs could be potentially effective dissuasive voices, yet the dominance of coercive approaches may preclude or limit this. As the Hague-Marrakech Memorandum of the Global Counterterrorism Forum (GCTF) emphasizes, trust is critical¹⁶⁴ yet often in short supply, exacerbated by repressive initiatives that may target would-be interlocutors.

Policies that single out, and impede support or funding to, religious or belief communities and other community groups, are problematic and risk counter-productivity. Community participation in state initiatives is increasingly broadly recognized, but it must be voluntary and guard against pitfalls.¹⁶⁵ Genuine empowerment of those best placed to affect change is distinct from the instrumentalization sometimes evident in PVE and CVE measures.¹⁶⁶ Caution is due not to securitize community engagement for political or intelligence-gathering purposes for example, and to guard against the potentially harmful gendered effect of some of those policies.¹⁶⁷ Positive programmes such as the OSCE’s projects “Leaders against Intolerance and Violent Extremism (LIVE)” initiative, seek to build the capacity of leaders in civil society – especially youth, women, and community leaders – to mobilize others against violent extremism that may lead to terrorism.¹⁶⁸

The emphasis on broader “multi-stakeholder” and “public-private partnerships” – with leaders of religious or belief communities, schools, academia, the media, the business community, and industry (the “whole of society” approach) – has been championed by many for its potentially positive long term effect. It is again important to guard against risks, for example that “that humanitarian organizations associated with CVE/PVE programmes be seen by some states and non-state actors as politically motivated and therefore

164 The Hague – Marrakech Memorandum, Good Practice #1.

165 See: Gilles de Kerchove, “Foreword”, in FFILB.

166 The Hague-Marrakech Memorandum, Good Practice #5.

167 See: *Preventing Terrorism and Countering Violent Extremism and Radicalization that Lead to Terrorism*, OSCE, *op. cit.*, note 73; “Women and Terrorist Radicalization: Final Report, OSCE Secretariat – OSCE ODIHR Expert Roundtables”, OSCE, February 2013, <www.osce.org/atu/99919>.

168 The project has been developed and is being implemented by the Action Against Terrorism Unit of the Transnational Threats Department in the OSCE Secretariat in Vienna, <<https://www.osce.org/secretariat/terrorism>>. see also UNSC Resolution 2178 (2014), para. 16, *op. cit.*, note 1. The UNSG Plan of Action on PVE likewise reflects the importance of empowerment of communities, of youth and of women; as does the OSCE Ministerial Declaration on VERLT. See UNSG Plan of Action on PVE, paras. 51–53, *op. cit.*, note 206; and OSCE Ministerial Declaration on VERLT, paras. 13, 14, 19 (c) and (h).

incapable to carry out a neutral, independent and impartial humanitarian action.”¹⁶⁹ While experience also points to the importance of educators, social service professionals and others, tensions arise through increased imposition of ‘reporting’ requirements that limit trust and preclude providing young people with the guidance and support associated with effective prevention.¹⁷⁰

6.4 *Addressing the Conditions Conducive to FTF-related Activity*

The importance of understanding and addressing “the conditions conducive to the spread of terrorism” has been widely acknowledged in recent years, as noted in the introduction.¹⁷¹ The mutually reinforcing relationship between effective long-term prevention of terrorism and respect for human rights, development and rule of law, was reflected in the UN Global Counter-Terrorism Strategy and in many other contexts since, including the UN Secretary General’s Plan of Action on PVE and OSCE commitments.¹⁷²

Understanding and addressing “conditions conducive”¹⁷³ needs to be based on greater evidence of the various “push” and “pull” factors that drive individuals towards FTF recruitment, as discussed in section 2. This includes addressing underlying human rights problems, social disadvantage, poor educational and employment opportunities, and (real or perceived) injustice.¹⁷⁴ Acknowledgement of grievances, widespread disillusionment and meaningful engagement with affected individuals and groups, including gender-specific conditions, have been identified as important aspects of comprehensive strategies to effectively prevent FTF-related travel and recourse to violence.¹⁷⁵ One of the

169 C. Beerli, “Terrorism, counter-terrorism and international humanitarian law. Statement of Christine Beerli, ICRC Vice-President at the 17th edition Bruges Colloquium”, ICRC, 20–21 October 2016, <www.icrc.org/en/document/terrorism-counter-terrorism-and-international-humanitarian-law>.

170 For concerns in this context see eg “Eroding Trust: The UK’s Prevent Counter-Extremism Strategy in Health and Education”, Open Society Justice Initiative, October 2016, (hereafter, “Eroding Trust: The UK’s Prevent Counter-Extremism Strategy in Health and Education”, Open Society Justice Initiative). The UN CTITF Guidance 2018, p. 56.

171 UNSG Plan of Action on PVE, and UN Global Counter-Terrorism Strategy.

172 “Ministerial Declaration on Reinforcing OSCE Efforts to Counter Terrorism in the Wake of Recent Terrorist Attacks”, adopted by the OSCE Ministerial Council in Belgrade on 4 December 2015, MC.DOC/3/15.

173 UNSG Plan of Action on PVE, and UN Global Counter-Terrorism Strategy.

174 UNOCT Report July 2017.

175 F. Ní Aoláin and J. Huckerby, “Gendering Counter-terrorism: How to, and How not to; Just Security,” 3 May 2018, <www.justsecurity.org/55670/gendering-counterterrorism-to-part-ii/>.

key challenges ahead appears to be the closing of the gap between rhetoric and practice on addressing ‘conditions conducive to terrorism’.

6.5 *Disengagement, Rehabilitation and Reintegration*

There is broad recognition of the need for a “global, holistic, multidimensional and strategic”¹⁷⁶ approach to the FTF issue. This commonly involves rehabilitation and reintegration as central elements – at least on paper.¹⁷⁷ In practice, however, the neglect of the rehabilitation and reintegration dimensions of states’ obligations in favour of repressive and punitive approaches has prompted calls (by e.g. the UN Working Group on mercenaries,¹⁷⁸ or the UN Special Rapporteur on Terrorism and Human Rights¹⁷⁹) for states to recalibrate the balance of punitive measures and rehabilitation opportunities for returnees. Rehabilitation should be an important goal of the criminal justice framework, but prison based rehabilitation programmes need to be complemented by non-custodial reintegration, and embedded within broader strategies to address structural social conditions conducive to terrorism.¹⁸⁰ They must reflect the gender-specific needs and challenges of “reintegrating women, as well as men, back into highly-contested societal contexts”.¹⁸¹

Reintegration and rehabilitation efforts should focus explicitly on “disengagement” from terrorism or violence, rather than more amorphous notions of

176 UN SC Res 2178; UN Working Group on mercenaries, UN Doc. A/70/330, *op. cit.*, and the Annual Report to the 71st session of the UN General Assembly (UN Doc. A/71/318).

177 UN SC Res 2178; 2016 OSCE Declaration and OSCE Ministerial Council Declaration on VERLT, The need for programmes of disengagement, rehabilitation and counselling is recognized, for example, in the UNSG PVE Action Plan.

178 In this context, the Working Group also cites emerging good practices in respect of rehabilitation and reintegration: see eg report of the UN Working Group on mercenaries on the visit to Belgium (UN Doc. A/HRC/33/43/Add.2) on the Danish Aarhus and the German Hayat programmes, para. 116. For other contexts, see also: G. Holmer and A. Shtuni, “Returning Foreign Fighters and the Reintegration Imperative”, United States Institute of Peace, March 2017, www.usip.org/sites/default/files/2017-03/sr402-returning-foreign-fighters-and-the-reintegration-imperative.pdf.

179 F. Ní Aoláin, “The UN Security Council, Global Watch Lists, Biometrics and the threat to the rule of law”.

180 G. Holmer and A. Shtuni, “Returning Foreign Fighters and the Reintegration Imperative”, p. 12. See also: Chairmanship’s Perception Paper on the 2018 OSCE-wide Counter-Terrorism Conference, pp. 7–9.

181 F. Ní Aoláin and J. Huckerby, “Gendering Counter-terrorism: How to, and How not to – Part II”.

“de-radicalization” that aim to change ideologies or beliefs.¹⁸² Enabling individuals to disengage and redirect their futures may serve both to reduce any threat they pose, and in some cases, to convince others to follow suit. It has been suggested that there is a risk that the coercive measures that currently dominate will pushing people further into violent extremism as states “tend to treat all returnees as high risk, thereby radicalizing those who are low threat through unwarranted persecution.”¹⁸³ As such meeting the challenges of investing in targeted rehabilitation may be “an important element of a pragmatic and reasonable response to the foreign fighter phenomenon [as] the basis for a long-term security approach”.¹⁸⁴

7 Equality

7.1 *Acknowledging Direct and Indirect Discrimination*

A human rights based approach is one that recognizes the centrality of the right to equality and non-discrimination, and its vulnerability, in responses to FTF-related threats and challenges. While it is commonly reflected in international commitments that terrorism must not be identified with any ethnicity, nationality, religion or belief, many challenges remain to convert these words into reality.

The full range of measures – criminal and administrative ones as well as preventive – have a disproportionate impact on religious or belief communities, in particular Muslims and particular ethnic groups. In some cases

182 On the discussion about de-radicalization vs disengagement in custodial settings, see, for example, “Radicalization in detention – the ICRC’s perspective”, ICRC, 11 July 2016, <www.icrc.org/en/document/responding-radicalization-detention-icrc-perspective>; *Handbook on the Management of Violent Extremist Prisoners and the Prevention of Radicalization to Violence in Prisons*, (Vienna: United Nations Office on Drugs and Crime (UNODC), 2016), p. 71. See also: J.M. Berger, “Making CVE Work: A Focused Approach Based on Process Disruption”.

183 UNOCT Report July 2017, p. 5.

184 E. Entenmann, L. van der Heide, D. Weggemans, J. Dorsey, “Rehabilitation for Foreign Fighters? Relevance, Challenges and Opportunities for the Criminal Justice Sector”, International Centre for Counter-Terrorism, January 2016, <<https://icct.nl/publication/rehabilitation-for-foreign-fighters-relevance-challenges-and-opportunities-for-the-criminal-justice-sector/>>, (hereafter, E. Entenmann, L. van der Heide, D. Weggemans, J. Dorsey, “Rehabilitation for Foreign Fighters? Relevance, Challenges and Opportunities for the Criminal Justice Sector”).

inequality is explicitly enshrined in law,¹⁸⁵ though more commonly it arises from the way laws are applied in practice, for example, through profiling, and distinctions not “objectively justified” but based on stereotypical assumptions about religion, age, nationality, gender, ethnic or other background. As noted above, policies and programmes to prevent ‘radicalization’ or ‘extremism’ clearly have a disproportionate impact on specific religious and ethnic groups.¹⁸⁶ The common identification of Muslim belief or practice as a risk factor in “radicalization” of youth is a clear example, which reinforces the stigmatization of entire religious groups.¹⁸⁷

A targeted approach focused on what individuals do, not on characteristics or pre-determined assumptions based on ethnicity, religion or gender, is the human rights compliant approach. The positive obligation of the state to protect individuals from discrimination by third parties should be recognized in this context.¹⁸⁸ Addressing discrimination is essential for an effective, long-term response to terrorism and potential FTF-related threats that abides by the rule of law.

7.2 *Addressing the Gender Dimensions of FTF Dynamics and Challenges*

It is increasingly common to note that FTF policies should ensure that responses to the threats and challenges posed by FTFs are not based on gender stereotypes, but on evidence reflecting the varying roles of women and men, boys and girls and young adults. The ISIL recruitment strategy of targeting

185 Concerns have been expressed, e.g., about Tajikistan's 2015 decree reportedly banning nationals under 35 from traveling to the Islamic holy sites of Mecca and Medina to perform the annual Hajj pilgrimage. See “‘Foreign Terrorist Fighter’ Laws, Human Rights Rollbacks Under UN Security Council Resolution 2178”, Human Rights Watch, p. 14.

186 See, for example, “Eroding Trust: The UK’s Prevent Counter-Extremism Strategy in Health and Education”, Open Society Justice Initiative; UN Special Rapporteur on counter-terrorism, UN Doc. A/HRC/31/65.

187 “Radicalization” conceptions, such as the conveyor belt or slippery slope arguments, suggesting that there is such a linear path or progression from the adoption of certain religious beliefs to the acceptance of, or indeed willingness to use, terrorist violence are disputed and not supported by empirical evidence. For risks of pre- or misconceptions about the groups that are most susceptible to “radicalization” or violent extremism, see also: UN Special Rapporteur on counter-terrorism, UN Doc. A/HRC/31/65.

188 The UN Human Rights Committee has addressed the positive obligations of states to counter discrimination by eg “an educational campaign through the media to protect persons of foreign extraction, in particular Arabs and Muslims, from stereotypes associating them with terrorism, extremism and fanaticism”; see: *Concluding Observations: Sweden*, CCPR/CO/74/SWE, 24 April 2002.

women and girls, has been well documented.¹⁸⁹ Despite often erroneous gendered assumptions about women as passive actors and victims, rather than as agents and potential perpetrators, a significant number of women are engaged in FTF-related activity in a range of capacities and with diverse motivations.¹⁹⁰

Where women commit or make a criminal contribution to violent crimes, they must be prosecuted in the criminal justice system in a fair, appropriate and non-discriminatory manner.¹⁹¹ Punishment exclusively on the basis of relationships or associations, in particular marital or familial ones, as has emerged in practice in some contexts, is controversial in light of the right to marry and found a family and freedom of association in IHRL.¹⁹² The prosecution of mothers for sending small amounts of money to children abroad is an example of the over-reach of the criminal law with a gendered dimension.¹⁹³

The diverse roles that women and girls have played as perpetrators of terrorist acts should not detract from the fact that many have been subject to egregious human rights abuses, including sexual violence, trafficking and forced marriage.¹⁹⁴ States should, moreover, be mindful that individuals can be

189 See for example L. Tarras-Wahlberg, "Promises of Paradise? – A Study on Official ISIS-Propaganda Targeting Women", Swedish Defence University, May 2016, <<http://fhs.diva-portal.org/smash/get/diva2:942997/FULLTEXT01.pdf>>.

190 The range of roles that they have played includes as recruiters, facilitators, supporters, and in some (more limited) contexts as fighters. For an analysis of the range of reasons see: E.M. Saltman and M. Smith, "Till Martyrdom Do Us Part'. Gender and the ISIS Phenomenon", Institute for Strategic Dialogue, 2015, <www.isdglobal.org/wp-content/uploads/2016/02/Till_Martyrdom_Do_Us_Part_Gender_and_the_ISIS_Phenomenon.pdf>, (hereafter, E.M. Saltman and M. Smith, "Till Martyrdom Do Us Part").

191 As referred to earlier in footnote 29, one recent report noted the shift in Dutch, Belgian and to some extent German prosecutorial policy towards returnees, which now make little or no difference in approaches to prosecution.

192 There have been reports about marriage having been criminalized as "material support" to terrorism, for example where the sole evidence was the fact of marriage. See for example, "Iraq court sentences 16 Turkish women to death for joining Isis", the Guardian, 23 February 2018, <www.theguardian.com/world/2018/feb/25/iraq-court-sentences-16-turkish-women-to-death-for-joining-isis>.

193 Article 16 UDHR, Article 23 ICCPR.

194 "Technical guide to the implementation of Security Council resolution 1373 (2001) and other relevant resolutions", UNCTED, 2017, <<https://www.un.org/sc/ctc/wp-content/uploads/2017/08/CTED-Technical-Guide-2017.pdf>>. The Report notes: "Women and girls are often directly targeted by terrorist groups and subjected to gender-based violence in the form of rape, forced prostitution, forced marriage, forced pregnancy, and human trafficking", see: p. 49. As noted in a report of the UN Secretary-General, sexual and gender-based

considered perpetrators and victims at the same time. The victimisation and trauma experienced at the hand of groups such as ISIL, or as a consequence of being identified with them, risks being diminished by the shift towards security-centric responses. All necessary measures should be taken to hold to account those responsible for sexual violence and related crimes and to provide victims with necessary support. This may include relocation out of conflict zones or neighboring countries where they may continue to face abuse, and subsequent medical and psychological treatment and rehabilitation. Gender-sensitive training or educational programmes should be provided for judges and prosecutors, for border control, law enforcement, prison and probation service personnel, as well as for social services personnel and others dealing with returning FTFs.¹⁹⁵

The importance of empowering women, and their role in solutions to effectively address the FTF problem, has increasingly been recognized.¹⁹⁶ Conversely, the ongoing nature of violations against women with perceived links to ISIL in Iraq, for example, has been described in recent reports as sowing the “seeds ... of the next round of inter-communal violence”.¹⁹⁷ The relationship between equality and security are reflected in the UN Secretary-General’s 2015 Plan of Action on PVE which notes that it is “no coincidence that societies for which gender equality indicators are higher are less vulnerable to violent extremism.”¹⁹⁸ At the same time, states should ensure that women are not unfairly instrumentalized by states that see gender equality and the women,

violence has become a standard tool for controlling territory, dehumanizing victims and recruiting new supporters. See: UN Secretary General, *Report to the Security Council* (“Conflict-related sexual violence”), UN Doc. S/2015/203, 23 March 2015.

195 Training is critical to understand the gender-specific risks and challenges women involved in or associated with FTF-activities may face, and to victims of sexual and gender-based violence and their needs. For further recommendations on gender-related aspects see also UN CTITF Guidance 2018, pp. 24–26.

196 For example, “Radicalisation and violent extremism – focus on women: How women become radicalised, and how to empower them to prevent radicalisation”, European Parliament, Study for the Committee on Women’s Rights & Gender Equality, December 2017, <[www.europarl.europa.eu/RegData/etudes/STUD/2017/596838/IPOL_STU\(2017\)596838_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596838/IPOL_STU(2017)596838_EN.pdf)>.

197 “The condemned: Woman and children isolated, trapped and exploited in Iraq”, Amnesty International, 17 April 2018, p. 45, <www.amnesty.org/en/documents/mde14/8196/2018/en/>.

198 UNSG Plan of Action on PVE, para. 53.

peace and security agenda merely as tools for national security ends, rather than ends in themselves.¹⁹⁹

Despite growing recognition on paper, understanding and analysis of the complex role of gender in counter-terrorism and FTF policies remains limited.²⁰⁰ States should seek to better understand the gendered dimensions of FTF engagement, including the underexplored role of masculinity in FTF mobilization, and its impact on women and men.²⁰¹

8 Children's Rights: Immediate Crisis and the Longer Term

A human rights crisis faces thousands of children who have travelled with their families, been born to FTFs abroad or themselves engaged with violent groups as a result of FTF travel.²⁰² Many now reportedly find themselves orphaned, in situations of detention or extreme vulnerability and subject to egregious violations including rape, violence and disappearances, as a result of their perceived association with ISIL.²⁰³ Boys and girls associated with or affected by FTF travel and return present a host of protection concerns for the international community in the immediate and longer term. For those who have not travelled, the full range of children's rights may yet be affected, directly and indirectly, by

199 F. Ní Aoláin and J. Huckerby, "Gendering Counter-terrorism: How to, and How not to – Part II".

200 For more detailed recommendations on the complex relationship between gender equality and countering terrorism see UN Special Rapporteur on counter-terrorism, *Report to the UN General Assembly*, UN Doc. A/64/211, 3 August 2009. F. Ní Aoláin and J. Huckerby, "Gendering Counter-terrorism: How to, and How not to"; "Tightening the Purse Strings: What Countering Terrorism Financing Costs Gender Equality and Security", Duke Law International Human Rights Clinic and Women Peacemakers Program.

201 See F. Ní Aoláin, "Masculinity, Jihad and Mobilisation", *Just Security*, 18 October 2016, <https://www.justsecurity.org/33624/masculinity-jihad-mobilization/>.

202 Some reports suggest that FTFs got younger over time; see for example: L. van der Heide and J. Geenen, "Children of the Caliphate: Young IS Returnees and the Reintegration Challenge", International Centre for Counter-Terrorism, August 2017, <<https://icct.nl/publication/children-of-the-caliphate-young-is-returnees-and-the-reintegration-challenge/>>.

203 B. Wille, "ISIS's Other Victims: The world needs a plan to deal with the wives and children of the Islamic State's defeated jihadis", *Foreign Policy*, 9 October 2017, <foreignpolicy.com/2017/10/09/isiss-other-victims>; "Nigeria: Women and the Boko Haram Insurgency", International Crisis Group, 5 December 2016, <www.crisisgroup.org/africa/west-africa/nigeria/nigeria-women-and-boko-haram-insurgency>. See eg Guns, Filth and ISIS: Syrian Camp Is 'Disaster in the Making' *NY Times*, 3 Sept. 2009.

the criminal, administrative, investigative and other measures discussed in this document.²⁰⁴

The UN Convention on the Rights of the Child (CRC) is the most widely ratified human rights convention, with almost universal ratification by 196 states parties.²⁰⁵ The cardinal principle reflected in the CRC, and across international and regional standards, is that the primary focus should be on acting in the “best interest of the child”.²⁰⁶

8.1 *Children, Citizenship and Return*

It follows that states should not deprive children of citizenship given the profound impact this could have on their future and the protection of their rights.²⁰⁷ The range and gravity of threats that children associated with FTFs are facing abroad underscores the importance of ensuring that those seeking to return should be allowed to do so.²⁰⁸ Some States have indicated that young

204 They may also directly or indirectly affect children's rights to freedom of expression and religion or belief, family life, social security, education, equality and non-discrimination and can have wide-reaching, long-term implications for the full range of children's civil, political, economic, social and cultural rights.

205 The CRC explicitly guarantees all of the above mentioned rights to children and other human rights instruments, which contain those rights, equally apply to children. OSCE participating States have decided to accord particular attention to the recognition of the rights of the child, including the civil rights and individual freedoms and the economic, social and cultural rights of the child; see “Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE”, adopted by the representatives of the participating States of the Conference on Security and Co-operation in Europe (CSCE/OSCE) on 29 June 1990, para 13. With reference to the CRC, OSCE participating States have also committed “to actively promote children's rights and interests, especially in conflict and post-conflict situations”; see “Istanbul Summit Declaration”, adopted by the Sixth OSCE Summit of Heads of State or Government on 19 November 1999, para. 28.

206 Article 3(1) CRC. According to Article 1 CRC children are defined as persons under 18 years of age unless under the law applicable to the child, majority is attained earlier.

207 Article 8 CRC provides that parties have to preserve children's identity, including nationality.

208 The rape, enslavement, trafficking, sexual and other abuse of children and young women by ISIL has been recognized in, for example, UNSC Resolution 2331 (2016). However, since the project of the “Islamic State” collapsed in Iraq, current reports also suggest that children are trapped, left orphaned and/or unprotected, in abysmal conditions in IDP camps, that children are subjected to flagrantly unfair prosecutions leading to, inter alia, the death penalty, and scores of children of all ages are being held in detention in Iraq; see for example: “At least 100 European ISIS fighters to be prosecuted in Iraq; most facing the death penalty”, the Independent, October 2017, <www.independent.co.uk/news/world/middle-east/isis-foreign-fighters-iraq-prosecuted-death-penalty-families-mosul-a7987831.html>, reporting 1,400 family members being held in Mosul in late 2017.

children, at least, could return, is a good practice that should be built on.²⁰⁹ Likewise, practical obstacles that impede the ability of children to return, such as lack of valid birth certificates or registration or proof of paternity should be overcome.²¹⁰ States should endeavor to ensure that children exposed to extreme vulnerability, such as those who remain abroad in active conflict zones, camps for internally displaced people, or detention situations²¹¹ receive the protection they need.

Upon return, the emphasis should be placed on providing returning children with adequate support – medical, psychosocial and educational – to assist their recovery and reintegration, in accordance with the CRC.²¹²

8.2 *Children, Victimisation and Crime*

In counter-terrorism practice, as noted by the United Nations Interregional Crime and Justice Research Institute (UNICRI), the focus appears to have shifted towards seeing children as potential threats, in a way that neglects the “best interest of the child” approach.²¹³ The emphasis on potential threats posed by

See also: “The condemned: Woman and children isolated, trapped and exploited in Iraq”, Amnesty International.

- 209 Belgium and France have repatriated some children. Eg. the Belgian government reportedly decided at the end of 2017 that children under the age of 10 years with proven ties to Belgium would automatically be allowed to return, whereas the situation of children between 10 and 18 years would be decided on a case by case basis. Practical challenges in the repatriation of young children remained however: see T. Renard and R. Coolsaet (eds), “Returnees: who are they, why are they (not) coming back and how should we deal with them?”, Egmont Institute, p. 38 and 74.
- 210 N. Houry, “Children of the Caliphate: What to Do About Kids Born Under ISIS”, Human Rights Watch, 23 November 2016, <www.hrw.org/news/2016/11/23/children-caliphate>.
- 211 See Article 20 CRC on special obligations of protection where the child is denied the family structure of support. Reports such as *Guns, Filth and ISIS: Syrian Camp Is ‘Disaster in the Making’*, N. xx, add to the concern.
- 212 **Article 39 CRC requires that** “States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.”
- 213 “Children and counter terrorism”, United Nations Interregional Crime and Justice Research Institute (UNICRI), 2016, p. 77, <www.unicri.it/in_focus/files/Children_counter_terrorism.pdf>.

child returnees (i.e., child FTFs and children associated with FTFs) in discussions about the reverse flow of FTFs appears to confirm this shift.²¹⁴

Without denying children's agency, or the serious impact their crimes may have on their victims, the complex relationship between victimization and perpetration must be acknowledged and responses tailored accordingly. The UN Special Representative of the Secretary-General for Children and Armed Conflict has recommended that states treat children associated with armed groups primarily as victims.²¹⁵ Especially for children, criminal justice responses should not therefore be the norm, but strictly a last resort,²¹⁶ with a pedagogical orientation for the purpose of rehabilitating children.²¹⁷ If minors are subject to criminal justice, international standards of juvenile justice, which apply to individuals under 18 years of age, must be respected.²¹⁸ Detention should be exceptional, as short as possible and with attendant safeguards.²¹⁹

214 UNSC Resolution 2396 (2017) for its part emphasises the diverse roles that children can play, and notes they may be victims and require assistance, but also emphasises the security concerns.

215 UN Special Representative of the Secretary-General for Children and Armed Conflict, *Annual report to the UN Human Rights Council*, UN Doc. A/HRC/31/19, 29 December 2015, para. 65.

216 The Committee recommends as a minimum standard that children under the age of twelve should not be considered criminally responsible, while 14 or 16 years is commendable. See: *General Comment No. 10 (Children's rights in juvenile justice)*, UN Committee on the Rights of the Child, UN Doc. CRC/C/GC/10, 25 April 2007, paras. 30ff, (hereafter, *General Comment No. 10*, UN Committee on the Rights of the Child).

217 Article 40 (1) CRC; *General Comment No. 10*, UN Committee on the Rights of the Child.

218 see the *UN Minimum Standards and Norms of Juvenile Justice*: the "United Nations Guidelines for the Prevention of Juvenile Delinquency" (Riyadh Guidelines), the "United Nations Standard Minimum Rules for the Administration of Juvenile Justice" (Beijing Rules), the "United Nations Rules for the Protection of Juveniles Deprived of their Liberty" (Havana Rules); and the "Guidelines for Action on Children in the Criminal Justice System" (Vienna Guidelines). There are various recommendations and general comments of the Committee on the Rights of the Child and others on juvenile justice; see also *Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups: The Role of the Justice System* (Vienna: UNODC, 2018), <www.unodc.org/documents/justice-and-prison-reform/Child-Victims/Handbook_on_Children_Recruited_and_Exploited_by_Terrorist_and_Violent_Extremist_Groups_the_Role_of_the_Justice_System.E.pdf>. There are also regional standards of relevance. To discuss these here in detail would go beyond the scope of this document.

219 Article 37 (b)–(d) CRC. See also: "Chapter 5: Violence against children in care and justice institutions" in *World Report on Violence against Children*, Independent Expert for the United Nations Secretary-General's Study on Violence against Children, October 2006, available at <www.unicef.org/violencestudy/reports.html>. p. 218.

Penalties should be tailored to age and personal circumstances, and life imprisonment without the possibility of release and the death penalty being prohibited absolutely for persons under the age of 18.²²⁰ Even beyond that age, when appropriate, the young age of perpetrators should be a factor in determining appropriate penalties.²²¹

Relatedly, while recognizing the need for the social support of children, such as post-trauma counselling and other assistance, UN Security Council Resolution 2396(2017) specifically calls upon states to assess and investigate suspected FTFS and their accompanying family members, including children. Collection of information for the purpose of carrying out risk assessments, surveillance or to place individuals on watch lists and exchange information between states are likely to result in invasive interferences with children's privacy and other rights, with detrimental effects on their lives.

While the challenges are considerable, states should take all possible measures to give meaningful effect to children's rights. Protecting the rights of the child is an important human rights obligation, and converges with broader, longer-term security goals.

9 Conclusions

It has long been recognized that states should adopt a human rights and rule of law-based approach in all measures aimed at countering the threats and challenges posed by FTFS. This reflects recognition of the fact that security cannot be achieved at the expense of human rights. The cost of dispensing with the rule of law is epitomized by the worst excesses of the 'war on terror.'²²² The international community responded by committing itself to a different, holistic, comprehensive counter-terrorism strategy over a decade ago.

Yet few of the human rights problems and challenges that have arisen in the FTF context, and been highlighted in this report, are new. They are the latest (but most likely not the last) manifestation of the broader, fundamental problem of the erosion of the rule of law in the name of counter-terrorism. Definitional deficits, the expanding scope of measures against ill-defined targets under cover of Security Council resolutions, the erosion of judicial oversight

²²⁰ Article 37 (a) CRC and Article 6 (5) ICCPR.

²²¹ See: *General Comment No. 10*, UN Committee on the Rights of the Child, paras. 37–38.

²²² The counter-productivity is recognized prior to the UN Global Strategy, and reflected in the apparent shift to a holistic, long term approach, and consistent reference on paper to respecting human rights and IHL.

and due process safeguards, the creeping reach of criminal law to embrace legitimate activity including political opposition and human rights defence, resort to arbitrary detention, or the ‘dark side of international cooperation’ are all too familiar in counter-terrorism practice in a post 9/11 world.²²³ However, as is clear from the issues explored in this paper, the OSCE report upon which it is based and many other reports, far from grappling with those problems they have been replicated and exacerbated in the context of “foreign terrorist fighters”. The FTF responses therefore raise core concerns as to the willingness to learn the lessons of the past.

Beyond the particular human rights issues from each of the measures highlighted above, there is a cross-cutting, recurring procedural concern. The process of adoption of such measures in national systems, and before the Security Council, has been criticised as rushed and untransparent, failing to engage relevant actors and to subject to scrutiny and debate proposals that will have wide-reaching effect.²²⁴ Responding effectively to the threats posed by terrorism, including FTFs, requires calm reflection which can be in short supply in the face of (national and international) political and public pressure for ever “tougher” laws and actions – especially in the wake of terrorist attacks. Democratic checks and balances have been compromised, and respect for human rights and the rule of law marginalized, in the sometimes hasty legislative frenzy to deal with problems or be seen to do so.

At the other end of the spectrum, human rights and rule of law-based approach to address potential threats and challenges of FTFs should also include independent review of the impact, implementation and effectiveness of laws and policies. The success of counter-terrorism efforts is inevitably difficult to demonstrate, but ongoing analysis and regular review is essential to understand and address negative effects on human rights, and to convincingly demonstrate the necessity and proportionality of measures that restrict rights. Periodic reviews, and sunset clauses, which require the renewal of the provisions after a specific time, have been recommended to ensure that exceptional powers do not remain in force when no longer necessary and seep into normalcy.²²⁵

²²³ Duffy, *War on Terror* (2015) Chapters 7 (human rights) and 12 (conclusions on and characteristics of the war on terror).

²²⁴ See Ni Aolain on the rushed Security Council process, especially for the adoption of 2396 in December 2017.

²²⁵ UN CTITF Guidance 2018, pp. 44–45, and recommendation by the UN Special Rapporteur on counter-terrorism, UN. Doc A/HRC/16/51 (“Ten areas of best practice in countering terrorism”), Practice 4 (1), paras. 17–20.

Likewise, independent review, oversight, investigations into potential misconduct, appropriate accountability, and remedies for violations, are all aspects of a human rights and rule of law approach. Acknowledging and addressing past shortcomings are important for the credibility and legitimacy of FTF-related measures. They also represent opportunities for overdue learning, for states to identify shortcomings and make adjustments, contributing to policies that are not only more human rights compliant but also more effective in the long-term.