The Expanding Use of Administrative Measures in a Counter-Terrorism Context

Part 1: In Need of Rule of Law Safeguards

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ICCT International Centre for Counter-Terrorism

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Policy Brief

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* This policy brief is the first in a two-part series. Both policy briefs are a result of a two years project in which the authors have developed the GCTF Glion Recommendations and organized four series of on-line workshops for participants from different regions. The policy briefs are based on consultations and input from a broad range of practitioners, and views and opinions expressed in this policy brief are those of the authors.

ICCT International Centre for Counter-Terrorism

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Contents

Abstract	1
Introduction	2
Definitions	2
Categories of administrative measures	4
Lawfulness of imposing administrative measures	5
Effectiveness of administrative measures	8
Recommendations	9
Endnotes	12
Bibliography	18
About the authors	23

Abstract

In order to address the evolving challenges and threats of terrorism, States have adopted an increasingly broad set of measures to mitigate posed terrorist risks to national security. These measures now extend to the use of administrative measures such as control orders, exclusions zones, curfews, travel bans, and deprivation of nationality. There are, however, several important substantive and procedural criteria that need to be met in order for these administrative measures to be lawful. The increasing level of use and expanding catalogue of these measures, their impact on the exercise of human rights, and their potential to circumvent criminal proceedings means that a close examination of the imposition of administrative measures is warranted.

The question this paper addresses is how and when administrative measures can be applied in accordance with human rights and rule of law safeguards. The paper will explore and define different types of administrative measures, set out the limited number of exceptional cases in which the measures can be a legitimate and useful tool to curb a risk to national security, and assesses the different factors affecting the lawfulness of these measures. In doing so, consideration is given to the legal basis of the measures, the human rights affected, the procedural safeguards in place, and the substantive criteria necessary before recommendations are offered on how administrative measures can be applied in a rule of law and human rights compliant manner in the future.

Keywords: administrative measures, counter-terrorism, citizenship deprivation, control orders, procedural safeguards, lawfulness, human rights.

Introduction

In the past decade states have increasingly resorted to the use of administrative measures in a counter-terrorism context. Administrative measures are generally imposed because there is a perceived threat to national security, particularly of a terrorist nature, often when there is not (yet) enough evidence to bring a criminal charge. In a small number of exceptional cases, and when utilised with full respect for the rule of law (RoL) and human rights (HR), administrative measures can be imperative in mitigating the posed terrorist risk to national security.

The phenomenon of foreign terrorist fighters (FTFs) travelling to Syria and Iraq to join Islamic State (IS) or other terrorist organisations, for example, has been one factor in causing more states to resort to the use of administrative measures. The return of FTFs from conflict zones back to their home or third countries, sometimes accompanied by family members, and the (further) radicalisation to violence of convicted individuals in prisons and upon release, can pose a significant threat to society.

There is similar growing concern regarding the increasing frequency and transnational nature of right-wing extremism. The growing threat posed by right-wing extremist groups particularly in Europe and the United States has had a significant impact on the terrorist landscape. Several countries such as France,[1] Germany,[2] Canada,[3] the US[4] and the UK[5] have begun to designate numerous right-wing groups as terrorist organisations for spreading hatred and extremism, and inciting others to violence. In addition, some right-wing extremists have been banned from entering[6] specific countries or have been (temporarily) denied a visa[7] on the basis of extremist behaviour.

Alongside the emergence of these and other terrorist-related threats, counter-terrorism measures available to states have expanded to include a broad range of administrative measures. Examples include travel bans and managed returns, control orders, deprivation of nationality, expulsion or deportation orders, curfews, reporting obligations to police stations, and listing mechanisms.

The paper will address the definition and different types of administrative measures, and highlight which HR are affected. There are several important criteria that have to be met to consider administrative measures lawful. The subsequent section will examine the effectiveness of administrative measures in curbing a risk to national security. Overall, this paper considers whether administrative measures – once imposed – are useful in mitigating national security risks, and offers recommendations on how administrative measures can be applied in a RoL and HR compliant manner in the future. The increasing level of use and expanding catalogue of these measures, a lack of comprehensive approach on their use, and the inconsistent methods of monitoring and evaluation employed across different countries, means that a close examination of the imposition of administrative measures is warranted.

Definitions

There is no internationally accepted definition of an administrative measure, just like there is no definition of terrorism, violent extremism, or national security. Yet, from a RoL perspective, legal certainty is vital to prevent misuse of administrative measures by governments that might otherwise impose restrictions when there is no clear terrorist threat or risk to national security.

Considering the broad array of contexts from which administrative measures originated, spanning from immigration to domestic violence cases, and the evolution they have now taken into the national security realm, it is perhaps unsurprising that there is no internationally agreed definition,[8] something witnessed during the drafting of the Global Counterterrorism Forum Glion

Recommendations on the Use of Administrative Measures in a Counter Terrorism Context.[9] General examples of administrative measures include travel bans and managed returns, control orders, deprivation of nationality, expulsion or deportation orders, curfews, reporting duty to police stations, and listing mechanisms. Based on the distinguishing elements of administrative measures as employed, the factors that set them apart from other measures, and for the purposes of this policy brief, we define administrative measures as *coercive measures that restrict the exercise of certain human rights, and are imposed by a judicial or executive authority, against a person or entity who is deemed to pose a risk to national security without laying criminal charges.*

In some countries preventive and/or rehabilitative measures are considered administrative measures. For instance, whilst administrative measures as per our definition indeed have preventative purpose, several preventive measures such as those included in the Guidance Note to Universities in UK under the Prevent Programme,[10] or the data retention obligations for internet service providers are nevertheless not imposed on one specific individual and do not always relate to an imminent threat to national security, and thus do not fall within the scope of this paper. Another example can be found in relation to rehabilitation measures that are most effective when the individual engages on a voluntary basis and aims to disengage or deradicalise from violent extremism views.[11] For these reasons both preventive and rehabilitative measures are not considered to fall within of administrative measures as defined in this policy brief.

In the situation that administrative measures are imposed by a judicial authority, they are done so without the need for any criminal charges.[12] In Canada, under section 810.011 (1) of the Canadian Criminal Code,[13] a peace bond can be obtained from the court when an individual appears likely to commit a criminal offence, but there are no reasonable grounds to believe that an offence has actually been committed.[14] The purpose of such a peace bond is to prevent the individual from committing harm to, for example, their partner or children but it is also increasingly used in the context of countering terrorism. This was the case when a peace bond was imposed on a far-right extremist who had been making online threats against HR activists.[15]

From a preventative security perspective, administrative measures therefore exist in the 'pre-criminal space' as a means to prevent terrorist attacks and pre-emptively deal with threats to national security. This fits with the overall shift in states' policies from responding to, to preventing terrorism, which has in turn led to a broader criminalisation beyond the traditional inchoate offences such as conspiracy, attempt, and soliciting, into the pre-criminal space. States have criminalised preparatory and material support acts such as preparing to leave to fight abroad, providing or receiving terrorist training, facilitating someone's travel to a conflict area, or recruiting others to do so. Justification for the criminalisation of these offences rests in the 'precautionary principle'[16] or 'harm principle'. However, moving further into the pre-criminal space is problematic from a RoL perspective, as it increasingly criminalises 'normal' behaviour or acts without establishing a link to terrorist intent.[17]

Despite the developments mentioned above, administrative measures are by no means new; they have been an important tool in fighting terrorism since UN Security Council Resolutions (UNSCRs) 1267 (1999)[18] and 1373 (2001)[19] called for the listing of persons, entities, or organisations that are involved in terrorism-related activities.[20] Additionally, UNSCRs 2178 (2014)[21] and 2396 (2019)[22] have spurred the proliferation of criminal and non-criminal justice responses to the FTF phenomenon.[23] Administrative measures, however, are temporary in nature.[24] The very essence of an administrative measure is that it is imposed for a limited time to deal with an immediate threat and can, in exceptional circumstances, be extended. However, as discussed below, administrative measures are imposed because there is not yet enough evidence to bring a criminal charge and it is intended to allow law enforcement and prosecutors to continue to build their cases while

the administrative measure is in place. Cases concerning terrorist offences can be complex and time-consuming, but administrative measures should not be imposed to circumvent the fair trial guarantees provided for in criminal proceedings.

Whilst states have a right and a duty to protect their citizens, the extensive use of administrative measures in a counter-terrorism context has an impact on the exercise of HR and though not all HR are absolute, derogations from them need to be prescribed by law and in pursuit of a legitimate aim. Further, in order for the application of administrative measures to be lawful and effective it needs to meet the relevant substantive criteria and procedural safeguards, such as the obligation to the targeted individual to be informed of the measures, and given the right to be heard, and the right to appeal.

Categories of administrative measures[25]

Administrative measures in the context of terrorism can include a wide range of measures that limit the exercise of the following types of HR.

Administrative measures restricting freedom of movement

Examples of state practice that restrict the freedom of movement within a country include relocation orders, curfews, assigned residence orders,[26] control orders,[27] peace bonds,[28] area bans, and reporting obligation at fixed times to a police station.[29] Such measures may affect the ability to work, the right to education, or the right to vote. States can also restrict individuals from leaving the country, for example by temporarily seizing, retaining, cancelling, or refusing to issue or renew the passport of one of their own nationals. Finally, some states impose entry bans,[30] deportation orders[31] or revoke residence permits to prevent foreigners who pose a risk to national security from (re)entering the country.[32]

Deprivation of nationality

A number of countries, including Belgium,[33] France,[34] the Netherlands,[35] Germany[36] and United Kingdom[37] have sought to use deprivation of nationality as a counter-terrorism measure. This has the result of a person no longer residing lawfully in the territory and risks being expelled or – if abroad – refused readmission. According to article 15 of the Universal Declaration of Human Rights,[38] everyone has the right to nationality, which is considered a right to all other rights including access to justice, the right to an effective remedy, and the right to private and family life. Unlike other administrative measures, deprivation of nationality is permanent, making this measure more distinct. International law states that arbitrary deprivation of nationality is prohibited[39] and statelessness should be prevented and eliminated.[40] As such, deprivation of nationality measures will typically only be applied to dual nationals and will otherwise likely be violation of international law.[41] The UN High Commissioner for Refugees (UNHCR)[42] and the Institute of Statelessness provide useful guidance on how deprivation of nationality should be "interpreted and applied narrowly" in order to prevent statelessness.[43] The fact that deprivation of nationality may be permitted under international law in very narrow circumstances, does not in itself justify the use of it as an administrative measure. It is regarded as highly symbolic,[44] counter-productive,[45] raises several HR concerns, and does not curb the risk to nationality security but instead makes it a problem for another country.[46] The Parliamentary Assembly of the Council of Europe therefore recommended states to refrain from deprivation of nationality.[47]

Administrative measures restricting right to liberty

Some States have imposed administrative measures that restrict the right to liberty. These practices can take the form of house arrest (in combination with electronic ankle bracelets), or to prevent imminent travel,[48] or any other security ground without a criminal charge, confinement to a restricted area of an airport or other designated area,[49] preventive order to stay at or away from a given area, [50] preventive detention[51], immigration detention pending removal[52] and in some cases continued detention after serving a prison sentence.[53] Detention can be unlawful without being arbitrary, detention can be arbitrary but not unlawful, and detention can be both unlawful and arbitrary.[54] Unlawful detention means it is not in accordance with the law and process, whereas arbitrary detention refers to the inappropriateness or injustice.[55]

Administrative measures limiting freedoms of expression, peaceful assembly, association or thought, conscience and religion

Freedom of expression is considered to be an important foundation of every free and democratic society. Examples of administrative measures states take in practice include restrictions on means of communication and the use of various platforms to spread ideas,[56] the prohibition to speak at a public event, the prohibition of contacting specific individuals,[57] or limiting access to and the use of mobile phones or the internet. These measures should meet the legal thresholds of article 19 International Covenant on Civil and Political Rights (ICCPR) and should not jeopardise the very essence of the right to freedom of expression.[58]

Some states also impose administrative measures that have an impact on the freedom of peaceful assembly, association, conscience, and religion such as cancelling public meetings or events relying on local authorities[59] and closing places of worship.[60] Other measures include mandatory meetings with professionals,[61] maintaining a list of hate preachers,[62] requiring permission, or proscribing civil society organisations including advocacy groups, humanitarian organisations and financial institutions.[63]

Lawfulness of imposing administrative measures

Before considering the use of administrative measures, it is important that the relevant authorities first explore whether criminal investigations can be opened. This means that they would need to consult with the prosecutor or law enforcement authorities to determine whether the behaviour of the individual constitutes or could constitute a criminal offence. In some countries, the need to consult a prosecutor or law enforcement authorities has been laid down in law. In the UK, for instance, the Secretary of State is obliged to consult with the police to see whether there is evidence available that could realistically be used for the purposes of prosecuting the individual for an offence relating to terrorism.[64] This aims to prevent the misuse of administrative measures in situations where criminal prosecutions could be pursued. Determination of whether administrative measures or criminal measures are more appropriate will be context specific. Administrative measures can in some very specific circumstances be more suitable than pursuing a criminal prosecution, for example, when a minor who commits a single offence of sharing violent extremist propaganda, has a good social network, and no previous record criminal or terrorist behaviour.[65] In practice, many of the administrative measures have limited procedural safeguards or judicial review, and apply a lower standard of 'proof'. Furthermore, the right to a fair trial, applicable in criminal proceedings, provides several safeguards such as the presumption of innocence, need for proceedings to take place within an adequate time, the right to prepare defence, or the equality of arms.[66] Several of these fair trial principles but not all, are also applicable in civil proceedings such as the right to a fair and public hearing by a competent, independent and

impartial tribunal established by law.[67] The use of administrative measures should not circumvent the criminal proceedings and safeguards it provides to the accused. In order to ensure that administrative measures are RoL compliant, they must adhere to the following RoL principles:[68]

Legal basis

In accordance with the principle of legality, the law that provides a legal basis to use administrative measures and subsequently restrict the exercise of HR, should be clear, predictable and accessible.[69] Legal certainty is ensured when one can anticipate what is and what is not permissible. Furthermore, the procedure of adopting the laws should be transparent and democratic. A distinction needs to be drawn between providing a legal basis and the powers to promulgate those laws. The more countries rely on emergency powers or on executive powers, the more problematic it becomes from a RoL perspective as it diminishes the role of parliament to check and hold the government accountable. A study conducted on the wide-range of measures introduced to deal with Covid-19 that also restrict the exercise of some HR illustrates that a majority of those measures are adopted on the basis of executive powers challenging the RoL principles of legality and limiting accountability by parliaments.[70]

Legitimate aim

Restrictions to HR are only permitted if they pursue a legitimate aim. The ICCPR lists for each HR a limited number of grounds that could justify a restriction. These include public health, national security, public order or safety or rights of others. It is incumbent on the states to prove that the imposed administrative measures genuinely pursue a legitimate aim. A terrorist threat is generally considered a threat to national security and could meet the criteria of pursuing a legitimate aim. The lack of definitions with respect to terrorism and national security, can, however, easily be exploited by repressive regimes to suppress political opponents, journalists, or HR defenders.[71] It is therefore important that the term *national security* is interpreted[72] by states narrowly, and a clear link is established between the act or behaviour of a person and the identified threat to national security.[73] The standard of proof required to impose administrative measures is often lower than for court proceedings.[74] The Syracusa Principles indicate that a national security limitation "cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order." They also insist that "[n]ational security cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exists adequate safeguards and effective remedies against abuse".[75]

Non-discrimination principle

The non-discrimination principle is a cornerstone in protecting HR. When applying administrative measures, authorities should respect the obligation that prohibits discrimination, as laid down in article 2 of the ICCPR. Authorities should thus refrain from applying administrative measures in a manner that discriminates against individuals or groups and should ensure equal and effective protection against discrimination on any ground, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[76] Closely linked to the non-discrimination principle is the equality before the law that does not allow certain individuals or groups to have special legal privileges or advantages. Certainly in the application of deprivation of nationality, one can debate whether the fact that this measure can only be used against citizens with dual nationality does not render this an arbitrary measure. After all, in order for deprivation not to be arbitrary, even where a person is not rendered stateless, deprivation of nationality should not be implemented such that it discriminates indirectly or in effect against minorities, if it is applied only to certain categories of nationals (i.e. dual nationals and naturalised citizens). During a visit of the UN Special Rapporteur on Contemporary Forms of Racism, Racial

Discrimination, Xenophobia and Related Intolerance it was indicated that deprivation of nationality disproportionately affects Dutch minorities with dual nationality.[77]

Substantive criteria

In addition to pursuing a legitimate aim and having a legal basis, measures that lawfully infringe HR must meet substantive criteria requirements as well and have adequate procedural safeguards in place.[78] The first criteria, that of necessity, is satisfied if it can be determined that an intervention as serious as an administrative measure is needed to curb the perceived threat to national security.[79] The onus rests with the appropriate authority to justify the necessity and it is therefore down to this authority to assess the behaviour of the individual and question whether these facts contribute to a serious threat to national security. The authority must subsequently assess whether the measures taken are needed to curb that threat. Simply, it is necessary to determine that national security would be seriously at risk if the envisioned measure was not taken. Important to reiterate is the fact that without an internationally accepted definition, states themselves define both the scope of national security, and what constitutes a threat to national security. This lack of a normative definition can lead to an overly broad scope of the concept which in turn is prone to lead to abuse of power.

The next criteria, that of adequacy, relates both to the suitability of the measure to serve the stated purpose, and the assessment of whether it is the least intrusive measure available which serves that purpose.[80] Different administrative measures have varying implications on the enjoyment of HR and states should therefore choose the least restrictive measures possible to serve the legitimate aim given the circumstances.

The final criteria, that of proportionality, relates to the level of restriction the measure places on the individual in relation to the purpose pursued.[81] This involves states considering the deleterious effects on the rights at stake and the salutary effects of the measure in furthering their objective. It is necessary therefore to consider the impact on the targeted individual's life to be a proportional consequence of pursuing the stated aim whilst avoiding excessive or unreasonable burdens for the individual.

These criteria of necessity, adequacy, and proportionality relate directly to the assessment of how effective a measure is. The measure in question needs to target the specific identified problematic behaviour in a way that lowers the perceived risk to national security posed by that behaviour. It also needs to target this behaviour sufficiently without implementing a heavy-handed approach which could be counterproductive by pushing the individual further down the path of radicalisation.

Procedural safeguards

Considering that administrative measures restrict the exercise of HR, it is necessary to ensure that an individual has an opportunity to challenge the administrative measures and request a legal review. Procedural safeguards relate to the process and the authority that imposes an administrative measure in a specific case and the ability of the individual to challenge the decision or request a review of that decision. This could include issues such as determining whether the notice of implementation of the measure was given within a reasonable time, whether prior authorisation was obtained, and whether a right to be heard has been observed. Which of the procedural safeguards should be applied depends on the type of administrative measure imposed. A person needs to be informed of an area ban, whereas prior notification of an order to freeze assets will be counter-productive as it avails the person of the opportunity to move their assets.

In order to challenge the administrative measure, the individual has to be notified of the specific measure that has been imposed, including the reasons why the measure has been taken, to be able to effectively challenge it.[82] This requires that relevant authorities should provide the factual grounds that led to the measure.[83] Regardless of the type of administrative measure, in all circumstances an individual should have the right to challenge the decision before an independent and impartial entity and the right to an effective remedy in case his or her rights are violated and in order to hold governments accountable for potential abuses of power.[84]

States should ensure that individuals have access to the relevant authorities and where appropriate reparations should be made.[85] State legal aid is a vital component of this access to justice, when denied it can affect the ability of an individual to challenge the administrative measure due to the nature and complexity of the process.[86] The withholding of this source of funding, and resulting blocking of representation, can undermine the lawfulness of the administrative measures system itself.[87]

The importance of procedural safeguards becomes very evident in the context of administrative detention, which according to the Human Rights Committee presents severe risks of arbitrary deprivation of liberty.[88] The use of rendition and secret detention are clear examples of not only how the right to liberty and security have been violated but have also led to torture.[89] Deprivation of liberty is considered as a very extreme measure, that should only be applied in narrow circumstances, which include the opportunity to be heard and right to challenge the lawfulness of detention before a court.[90]

Effectiveness of administrative measures

It is necessary to consider personal, familial, and societal circumstances to make an effectiveness assessment of all measures used in every individual case. These assessments are often plagued, however, by the debate on whether effectiveness of counter-terrorism policies generally can be measured at all.[91] The main question is how one measures that a risk to national security has diminished? How does one demonstrate the causal link between implementation of an administrative measure and prevention of a terrorist attack? The issue is simpler in the case of a deliberately foiled attack, and inferences can be drawn from quantitative data[92] on absolute numbers of victims, financial damage, number of arrests and convictions, and number of active networks. But it is difficult to directly demonstrate a linear relationship between the decrease in any of these figures and the implementation of a particular measure.

The discussions of effectiveness are to some extent linked to the broader discourse on counter-terrorism policy. Reactionary implementation of severe measures after a terrorist attack can be interpreted as a display of determination in the population not to be held hostage in fear and a steadfast resolve to show solidarity with the victims. This often results in the further criminalisation of certain acts,[93] and increased means to sufficiently deter perpetrators from committing future crimes by ensuring severe penalties.[94] Justification of the use of particularly intrusive counter-terrorism powers like administrative measures, therefore can rest on the use of securitised language employed by politicians, which frames the problem as an exceptional situation, deserving exceptional powers and responses.

A good example is the increasing use of deprivation of nationality as a counter-terrorism measure in several countries. This measure is highly symbolic and often used to appease the general public that a person – often a foreign fighter – is refrained from entering the country, thus keeping the country safe.[95] This absorption of normally exceptional national security powers and counter-terrorism measures into the ordinary law of states has been raised as an area of concern[96] by the United Nations Special Rapporteur on the promotion and protection of human rights and

fundamental freedoms while countering terrorism, and one which makes the protection of rights increasingly fraught and difficult to provide.

It goes beyond the focus of this policy paper to fully explore the multitude of factors, which influence the effectiveness of both overall counter-terrorism policies and targeted administrative measures, but what should be understood is that there is a difference between the short-, medium-, and long-term effects that they hold. As alluded to above, the direct effect of severe policies which oppressively limit all kinds of societal and HR would inevitably have the short-term effect of decreasing security risks but could in turn introduce new personal grievances and cause an increase in radicalisation to violent extremism[97] as a result of the HR restrictions. This approach can be seen in contrast to prevention policies, which have the long-term aim of increasing resilience in society against the undermining effects of radicalisation. It also comes up against the medium-term challenge of increased frustrations among, for example, the young adult population due to increased lack of economic opportunities.

The issue of effectiveness further extends beyond merely the question of whether the measures themselves are effective, their availability has a broader impact on the focus of counter-terrorism responses more generally. The possibility to use administrative measures has been introduced with the intended aim to address the gap between 'mere concern' related to the development of a specific instance of radicalisation and 'apparent criminal behaviour', and to allow authorities to act when a national security threat exists. Nevertheless, the result is that with this ability comes the risk that authorities will utilise the measures broadly, with less guaranteed safeguards, and through vague use of terminology as justification. The existence of administrative measures as an optional counter-terrorism tool therefore, can mean that instead of putting in the extra effort to ensure that the threshold has been crossed to start a criminal investigation or putting together the requisite evidential material to ensure a criminal charge can be brought/upheld, authorities might opt for the easier choice of using administrative measures to immediately control the situation. Similarly, broadly defining what constitutes a threat to national security, or leaving this determination to the discretion of a member of the executive, allows authorities to use administrative measures at their will rather than when they are absolutely necessary. Both of these situations should be avoided, as they undermine RoL as well as the legitimacy, and ultimately the effectiveness of administrative measures.

Recommendations

When administrative measures are applied in accordance with the RoL safeguards, they can – in a limited number of exceptional cases, in which prosecution is not possible – be a useful tool to curb a risk to national security. In this policy paper, we argue that it is nonetheless imperative that consultations take place with law enforcement authorities to investigate the possibility of a criminal prosecution, as such procedures offer the best assurance that fair trial principles are guaranteed. Furthermore, we argue that the possibility to apply administrative measures should be neither used to circumvent the criminal justice approach, nor should they have a punitive effect. Administrative measures should be used with the utmost restraint and in full compliance with the RoL and HR. Moreover, we argue that authorities act prudently and in full accordance with the procedural safeguards and substantive criteria when utilising administrative measures. The latter is related to the key issue of this paper, namely the question whether the measures applied and the methods in which they are implemented are lawful and effective in addressing the assessed threat to national security.

Accompanying the following recommendations, and as a guide on how to properly implement them in practice, the International Centre for Counter-Terrorism (ICCT) has developed a Training Manual for the GCTF Glion Recommendations on a Rule of Law-Based Use of Administrative

Measures in a Counter-Terrorism Context. Its purpose is to assist practitioners in understanding the provisions contained in the GCTF Glion Recommendations. It can also serve as an educational tool to be used in the training of legal practitioners in the fight against terrorism.

Before considering the use of administrative measures, the relevant authorities are recommended to **first consult with the law enforcement authorities and/or prosecutor to** see whether criminal investigations have been or will be initiated. The use of administrative measures should not circumvent the protections that are available for individuals in criminal proceedings which should be the preferred action where appropriate. The following questions should be addressed:

- Can, or should, a criminal investigation be started?
- Are administrative measures necessary to impose if criminal prosecution has already started?
- Are additional measures such as social, preventive, or rehabilitative measures available and more suitable? Can they be combined with administrative measures?

Considering the impact administrative measures have on HR, **the scope of administrative measures should be limited and clearly defined in law through a democratic process.** Fully respecting the checks and balances of a democratic society, would meet the requirements of legality and legal certainty. The law should be carefully drafted and not adopted under emergency powers, but through parliament. States should also ensure that HR institutions and research institutions, including representatives of minority groups, are consulted in the drafting of the law. Furthermore, including sunset clauses in the legislation that allows for the use of administrative measures could be useful.[98] The following issues should be addressed:

- Has the scope of the law that allows the use of administrative measures clearly been defined, and has it been clearly defined when the use of administrative measures is merited and for what purposes?
- Has the law been adopted by parliament, including consultations with, for instance, civil society and experts?

Administrative measures that restrict human rights are only lawful if they pursue a legitimate aim. To ensure that administrative measures are not prone to arbitrary application it is important to clearly establish what constitutes a threat to national security. States are recommended to ensure that those who apply administrative measures are properly trained in how to define a risk to national security, apply a sufficient standard of proof, and to a use a consistent set of indicators and/or risk assessment tool. The following questions should be addressed:

- Has the risk to national security been clearly defined?
- Are there clear instructions that prevent use against legitimate and peaceful demonstrations? Are there clear guarantees that protect journalists and media to make use of the freedom of press? And are there clear guarantees that protect political opponents to voice their opinion in a peaceful manner?
- Is there a clear link between the behaviour of the individual and risk to national security?
- What standard of proof and indicators are used to establish whether someone poses a risk to national security?

When applying administrative measures, **the relevant authorities should ensure that the measures respect the non-discriminatory principle** and do not stigmatise certain individuals or groups in society. Administrative measures that discriminate are not only unlawful, but may also lead to polarisation and stigmatisation. Discriminatory misuse of administrative measures could be counter-productive and conducive to the spread of violent extremism. States are recommended to consult civil society groups representing minorities or religious organisations

to assess whether the measures are discriminatory. Carefully monitoring and evaluating the impact of measures, as discussed in Part 2, will also be important to ensure that administrative measures are non-discriminatory.

In each individual case, the relevant authorities should ensure that the administrative measures **adhere to the substantive criteria necessity, proportionality and adequacy**. The outcome of applying these criteria could be different owing to the individual circumstances. It is therefore necessary that authorities carefully consider the alternatives available to deal with a certain situation. Authorities are recommended to set up multidisciplinary consultation mechanisms to discuss the various policy option. Furthermore, authorities should conduct proper impact assessments (elaborated on further in Part 2 of this policy brief). This also means recognising that an administrative measure such as a relocation order may have an impact on more than one HR and potentially not only restrict the freedom of movement, but also the right to privacy and family life.

The purpose of judicial oversight and review are important tools to hold relevant government authorities accountable. States should ensure that the individual has the possibility to **challenge the administrative measure in a meaningful manner.** States are recommended to inform the individual in a language he or she understands regarding where and how the administrative measure can be challenged. The following questions should thus be addressed:

- Has the individual been informed where and how to challenge the administrative measure?
- Has the individual been provided with sufficient information on the grounds for imposing the administrative measure?
- Is legal aid available for the individual to challenge the administrative measure?
- Is the review conducted by a competent, independent, and impartial body?
- Is the review meaningful, and can both facts and merits that have led to the decision to impose administrative measure be challenged?

Furthermore, states should **ensure access to effective remedies** and, where appropriate, adequate reparation for those individuals whose rights have been violated. States should therefore make it easy for individuals whose rights have been violated to pursue an effective remedy. The following questions should be addressed:

- Does the individual have access to competent authorities to vindicate his or her rights?
- What kind of reparations are available?
- How are the remedies enforced?

Even when deprivation of nationality is being considered in the most exceptional cases and with the most stringent safeguards, states should refrain from using this measure. Deprivation of nationality is distinct from other measures, as it is permanent, the impact on the individual concerned is particularly severe, especially when it leads to statelessness, which makes it particularly difficult to justify as a proportionate measure, and is counter-productive as it does not effectively address the threat to national security.

With a trend towards democratic decline and increasing autocratisation, the use of administrative measures in a counter-terrorism context, could easily be misused and erode the RoL principles. Strict adherence to the RoL as a benchmark for the use of administrative measures to address a risk to national security can help to improve the legitimacy and effectiveness of such measures in a well-functioning society.

Endnotes

[1] France has banned far-right group Génération Identitaire which is known to be hostile to migrants,'Génération identitaire dissous en conseil des ministres', Le Monde, 3 March 2021, available at https://www.lemonde.fr/politique/article/2021/03/03/le-groupe-d-extreme-droite-generation-identitaire-dissous-en-conseil-des-ministres_6071823_823448.html.

[2] Germany has banned Nordadler, which is the third right-wing extremist group. 'Germany Bans Pro-Nazi Group That 'wants to Re-Establish Dictatorship'', Associated Press in Berlin,, The Guardian, 1 December 2020, sec. World news, available at http://www.theguardian.com/world/2020/dec/01/germany-bans-pro-nazi-group-that-wants-to-re-establish-dictatorship-wolfbrigade-44.

[3] Canada has banned three right-wing extremist entities the Three Percenters, Aryan Strikeforce and James Mason, after designating Proud Boys earlier this year. As of 6 September 2021 a total of 9 right wing extremist groups have been designated by Canada. David Ljunggren, 'Canada Puts U.S. Three Percenters Militia on Terror List, Cites Risk of Violent Extremism', Reuters, 25 June 2021, sec. Americas, available at https://www.reuters.com/world/americas/canada-puts-us-right-wing-three-percenters-militia-group-terror-list-2021-06-25/.

[4] The United States have designated the Russian Imperial Movement (RIM) and three of its leaders as Specially Designated Global Terrorists (SDGTs), but not as a Foreign Terrorist Organisations (FTOs), which would open a broader range of measures. 'United States Designates Russian Imperial Movement and Leaders as Global Terrorists', United States Department of State (blog), available at https://2017-2021.state.gov/united-states-designates-russian-imperial-movement-and-leaders-as-global-terrorists/.

[5] The United Kingdom (UK) banned The Base in July 2021, making it the fifth right-wing extremist group that has been proscribed in the country. Daniel De Simone, 'UK Bans Fifth Neo-Nazi Group under Terror Laws', BBC News, 12 July 2021, sec. UK, available at https://www.bbc.com/news/uk-57806800.

[6] Austrian activist Martin Sellner was permanently banned from entering the UK: Ben Quinn and Jason Wilson, 'Anti-Islamic Extremist Permanently Excluded from Entering UK', The Guardian, 26 June 2019, available at http://www.theguardian.com/world/2019/jun/26/anti-muslim-extremist-martin-sellner-permanently-excluded-from-entering-uk.

[7] Canadian activist Lauren Southern was banned from entering the UK and was initially denied but then granted a visa to enter Australia: Pallavi Singhal, '"It's OK to Be White": Far Right YouTuber Lauren Southern Lands in Australia', The Sydney Morning Herald, 14 July 2018, available at https://www.smh.com.au/national/it-s-ok-to-be-white-far-right-youtuber-lauren-southern-lands-in-australia-20180714-p4zrgq.html.

[8] Berenice Boutin, for example, gives a definition which does not include administrative measures that are being imposed by courts and is therefore too narrow. Bérénice Boutin, 'Administrative Measures against Foreign Fighters: In Search of Limits and Safeguards', December 2016, International Centre for Counter-Terrorism, available at https://icct.nl/app/uploads/2016/12/ICCT-Boutin-Administrative-Measures-December2016-1.pdf. A report from Amnesty International also gives a definition which disregards the possibility of administrative measures being used in conjunction with criminal justice measures during the investigative phase of proceedings. Amnesty International, 'Dangerously Disproportionate The Ever-Expanding National Security State in Europe' (London, 2017), https://www.politico.eu/wp-content/uploads/2017/01/CounterTerrorReport.pdf.

[9] Global Counterterrorism Forum, 'GCTF Glion Recommendations on the Use of Administrative Measures in Counter Terrorism Context' (hereafter 'Glion Reommendations') (Global Counterterrorism Forum, 2019), available at https://www.thegctf.org/LinkClick.aspx?fileticket=Hbz41Fu2cKY=&portalid=1.

[10] HM Government, "Statutory guidance: Prevent duty guidance: for higher education institutions in England and Wales" Home Office, April 1, 2021, available at https://www.gov.uk/government/publications/prevent-duty-guidance/prevent-duty-guidance-for-higher-education-institutions-in-england-and-wales

[11] Radicalisation Awareness Network, "Rehabilitation Manual: Rehabilitation of radicalised and terrorist offenders for first-line practitioners", June 2020, available at https://ec.europa.eu/home-affairs/system/files/2020-06/ran_rehab_manual_en.pdf

[12] Administrative measures that are not imposed by a criminal court, but by a civil or administrative court without criminal charges, and are more likely to provide high(er) RoL safeguards than administrative measures imposed by an executive body. Administrative measures imposed by a court can also be seen as judicial measures.

[13] Legislative Services Branch, 'Consolidated Federal Laws of Canada, Criminal Code' (2021), available at https://laws-lois.justice.gc.ca/eng/acts/c-46/page-210.html.

[14] These bonds can consist of electronic monitoring devices, curfews and house arrests, exclusion zones, an obligation to surrender their passport, and a duty to participate in treatment programmes. Department of Justice Government of Cvanada, 'Victims Right's in Canada – Peace Bonds Fact Sheet', 20 July 2015, available at https://www.justice.gc.ca/eng/cj-jp/victims-victimes/factsheets-fiches/peace-paix.html.

[15] In this case, Kevin Goudreau was ordered not to make any violent threat online or otherwise and was no longer allowed to possess weapons. Rachel Browne, 'Ontario Court Imposes Peace Bond against Far-Right Figure over Online Threats', Global News, 12 August 2019, available at https://globalnews.ca/news/5755173/ontario-court-peace-bond-far-right-figure/.

[16] The precautionary principle is mainly applied in international environmental law and public health but is also increasingly being applied in counter-terrorism contexts. See: Charles Vlek, 'A precautionary-principled approach towards uncertain risks: review and decision-theoretic elaboration', Erasmus Law Review 2, no. 2 (2009): 129–70, available at http://www.erasmuslawreview.nl/tijdschrift/ELR/2009/2/ELR_2210-2671_2009_002_002_003.

[17] Particularly regarding restrictions imposed on the freedom of expression and thought, as noted by the Special Rapporteur on Countering Terrorism while Protecting Human Rights. This includes the criminalisation of pre-criminal offences as the use of administrative measures. United Nations General Assembly, 'Human rights impact of policies and practices aimed at preventing and countering violent extremism: Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism,' (21 February 2020), available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/045/67/PDF/G2004567.pdf?OpenElement
[18] United Nations Security Council, Resolution 1267 (1999), S/RES/1267 (1999), available at http://unscr.com/en/resolutions/doc/1267.
[19] United Nations Security Council, Resolution 1373 (2001), S/RES/1373 (2001), available at http://unscr.com/en/resolutions/doc/1373.
[20] In 2015, UNSCR 2252 (2015) expanded the al-Qaeda Sanctions List to include ISIL/Da'esh. United Nations Security Council, Resolution 2252 (2015), S/RES/2252 (2015), available at http://unscr.com/en/resolutions/doc/2252.
[21] United Nations Security Council, Resolution 2178 (2014), S/RES/2178 (2014), available at http://unscr.com/en/resolutions/doc/2178.
[22] United Nations Security Council, Resolution 2396 (2014), S/RES/2396 (2017), available at http://unscr.com/en/resolutions/doc/2396.
[23] UNSCR 2178 para. 6 obliges states to criminalise a broad range of offences, and many have now criminalised travel, attempt to travel, funding travel (directly or indirectly), as well as providing or receiving terrorist training. See United Nations Security Council, Resolution 2178 (2014), S/RES/2178 (2014), available at http://unscr.com/en/resolutions/doc/2178. See also DIRECTIVE (EU) 2017/541 of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, has criminalised a range of terrorist-related activities such as directing or participating in a terrorist group or public provocation to commit a terrorist offence.
[24] A number of countries have sought to use deprivation of nationality as a counter-terrorism measure, which has the unique distinction of being a permanent administrative measure.
[25] UNSC 2396 mandates that states use watchlists and no-fly lists, as well as the collection of biometrics. This has a severe impact on the right to personal privacy, however discussion on this topic is beyond the scope of this paper.
[26] For example, in France several of these administrative measures, such as assigned residence orders and house searches, were carried out under the Law of 30 October 2017 Strengthening Internal Security and the Fight Against Terrorism (LOI n° 2017-1510 du 30 octobre 2017 renforçant la sécurité intérieure et la lutte contre le terrorisme), last accessed 9 September 2021, available at https://www.legifrance.gouv.fr/loda/id/JORFTEXT000035932811/.
[27] For example in Australia, the Australian Federal Police can apply to the court to issue a control order.
Division 104 Criminal Code 1995, last accessed 9 September 2021, available at https://www.ag.gov.au/national-security/australias-counter-terrorism-laws/control-orders.
[28] See footnote 11.
[29] For example in the Netherlands, the Minister of Justice and Security can impose reporting duty at the police station at fixed times. Article 2 Temporary Law on Counterterrorism Administrative Measures (Tijdelijke wet bestuurlijke maatregelen terrorismebestrijding), last accessed 9 September 2021, available at https://wetten.overheid.nl/BWBR0039210/2017-03-01.
[30] For example in Switzerland, the Federal Police can impose several travel restrictions. Article 23m and 23n Anti-Terrorism Police Measures Law (Bundesgesetz über polizeiliche Massnahmen zur Bekämpfung von Terrorismus), last accessed 9 September 2021, available at https://swissvotes.ch/attachments/7fefef2eeb9252da86b8bdbb203a6ac0554ba2404be41d96a011cd3068ee106c.
[31] For example in Germany and France, Section 53 and Section 58a of the Federal Residence Act, last accessed 9 September 2021, available at https://www.gesetze-im-internet.de/englisch_aufenthg/englisch_aufenthg.html, and Articles L630-1 Code of Entry and Residence of Foreigners and the Right to Asylum (Code de l'entrée et du séjour des étrangers et du droit d'asile), last accessed 9 September 2021, available at https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006070158/LEGISCTA000042772918/#LEGISCTA000042775409 respectively.
[32] According to article 12(4) of UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, available at: https://www.refworld.org/docid/3ae6b3aa0.html, no one shall be arbitrarily deprived of the right to enter their own country. The scope of 'one's own country' is broader than the concept of 'country of one's nationality' and according to the Human Rights Committee's General Comment No. 27 "it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered a mere alien" and specifically refers to nationals of a country who have been stripped of their nationality in violation of international law, and other categories of long-term residents, including but not limited to stateless persons arbitrarily deprived of their right to acquire the nationality of the country of such residence. The right to enter one's own country or the country the person has special ties to is therefore also relevant in the context of expulsion and deportation orders, especially in combination with the stripping of nationality. If an individual is deprived of nationality in violation of international law, the country of former nationality remains the persons "own country" for the purposes of the right to enter one's own country. In practice, some states impose entry bans, revoking residence permits to prevent foreigners who pose a risk to national security from (re)entering the country. See Human Rights Committee, General Comment 27, U.N. Doc CCPR/C/21/Rev.1/Add.9 (1999), para. 20, available at https://www.refworld.org/docid/45139c394.html.
[33] Deprivation of nationality is permitted only for citizens who have not obtained nationality through birth or parents as long as it does not lead to statelessness. Article 23 § 1 Code of the Belgian Nationality, last accessed 13 September 2021, available at http://www.ejustice.just.fgov.be/eli/loi/1984/06/28/1984900065/justel.

[34] Deprivation of nationality is permitted only against naturalised citizens after conviction of terrorist-related offences as long as it does not lead to statelessness. Art. 25 Code Civil, last accessed 13 September 2021, available (in French) at https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006070721/LEGISCTA000006150513/#LEGISCTA000006150513.
[35] Deprivation of nationality is permitted with or without a criminal conviction, as long as it does not lead to statelessness. Article 14 Rijkswet op het Nederlanderschap, available (in Dutch) at https://wetten.overheid.nl/BWBR0003738/2018-08-01#Hoofdstuk5_Artikel14.
[36] Deprivation of nationality is permitted if an individual participated in combat operations of a terrorist organisation abroad as long as it does not lead to statelessness. Article 28a Staatsangehörigkeitsgesetz, last accessed 13 September 2021, available at https://www.gesetze-im-internet.de/stag/__28.html.
[37] Deprivation of nationality is permitted if it is assessed to be in the interest of public good. The Home Secretary has very broad discretionary powers in this assessment. Article 40(A) and (B) British Nationality Act 1981, last accessed 13 September, available at http://www.legislation.gov.uk/ukpga/1981/61.
[38] United Nations, Universal Declaration of Human Rights, 10 December 1948, available at https://www.un.org/sites/un2.un.org/files/udhr.pdf.
[39] The General Assembly, in Resolution 50/152 of 9 February 1996, recognised the fundamental nature of the prohibition of arbitrary deprivation of nationality. See UN General Assembly, Office of the United Nations High Commissioner for Refugees, Resolution 50/152, 9 February 1996, A/RES/50/152, available at https://www.refworld.org/docid/3b00f31d24.html. See also para. 21, UN Human Rights Council, Human rights and arbitrary deprivation of nationality: report of the Secretary-General, 14 December 2009, A/HRC/13/34, available at: https://www.refworld.org/docid/4b83a9cb2.html, Article 29 League of Arab States, Arab Charter on Human Rights, 15 September 1994, available at https://digitallibrary.un.org/record/551368/files/%5BST_HR_%5DCHR_NONE_2004_40_Rev.1-EN.pdf,
Article 4, Council of Europe, European Convention on Nationality, 6 November 1997, ETS 166, available at https://rm.coe.int/168007f2c8, and Article 20, Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969, available at https://www.refworld.org/docid/3ae6b36510.html.
[40] See articles 5-9 of UN General Assembly, Convention on the Reduction of Statelessness, 30 August 1961, United Nations, Treaty Series, vol. 989, available at https://www.refworld.org/docid/3ae6b39620.html.
[41] There have been instances, however, of these measures being used against individuals whose second nationality is not officially held, but rather a theoretical entitlement which is later denied thus leading to statelessness. See, for example Bangladesh Ministry of Foreign Affairs, 'Bangladesh's position on the report of revoking Ms Shamima Begum's citizenship by the British Government in connection with her involvement in ISIS in Syria' 20 February 2019, available at https://mofa.gov.bd/site/press_release/a5530623-ad80-4996-b0b4-f60f39927005.
[42] UN High Commissioner for Refugees (UNHCR), Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness, May 2020, HCR/GS/20/05, last accessed 13 September 2021, available at https://www.refworld.org/docid/5ec5640c4.html.
[43] See Institute on Statelessness and Inclusion, Principles on Deprivation of Nationality as a National Security Measure, Institute on Statelessness and Inclusion, February 2020, principle 4, available at https://files.institutesi.org/PRINCIPLES.pdf. These non-binding principles reflect and restate international law. These standards state that deprivation should not leave a person stateless, be discriminatory or arbitrary. Deprivation of nationality should meet the standards of the right to a fair trial, remedy and reparation and other obligations and standards set forth in international human rights law, international humanitarian law and international refugee law.
[44] Christophe Paulussen, 'Countering Terrorism Through the Stripping of Citizenship: Ineffective and Counterproductive', 17 October 2018, International Centre for Counter-Terrorism, available at https://icct.nl/publication/countering-terrorism-through-the-stripping-of-citizenship-ineffective-and-counterproductive/.
[45] Institute on Statelessness and Inclusion, The World's Stateless: Deprivation of Nationality, Institute on Statelessness and Inclusion, March 2020, Pp. 227-238, available at https://files.institutesi.org/WORLD%27s_STATELESS_2020.pdf.
[46] Stripping of nationality is often combined with an expulsion order or a no-entry ban, once the person is deported to another country or refrained from entering their own country, this person becomes the problem from another country. Furthermore, under binding UNSCRs such as 2178 (2014) and 2396 (2019), states have an obligation to counter terrorism and bringing alleged terrorist to justice. By stripping nationality, it is difficult to maintain that a state has met its obligation to bring terrorists to justice. Furthermore, deprivation of nationality also limits the possibilities to prosecute the alleged person for terrorist offences they might commit after the revocation of citizenship on the basis of active personality principle. Finally, by stripping nationality, a person may be deported to a country where they may not receive a fair trial or risk a death penalty. Tanya Mehra, 'The long and winding road to bringing the ISIS 'Beatles' to justice', 27 August 2020, International Centre for Countering Terrorism, available at https://icct.nl/publication/the-long-and-winding-road-to-bringing-the-isis-beatles-to-justice/.
[47] Withdrawing nationality as a measure to combat terrorism: a human-rights compatible approach?, Resolution 2263 (2019), available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=25430&lang=en.
[48] For example, in the UK, the Home Secretary can issue a ban on travel outside of a specified area in the UK. Terrorism Prevention and Investigation Measures Act 2011, last accessed 13 September 2021, available at http://www.legislation.gov.uk/ukpga/2011/23/pdfs/ukpga_20110023_en.pdf.

[49] For example in France, the Minister of Interior can issue an Assigned Residence Order which prohibits a person's movement outside of a geographically determined perimeter. Articles L228-1 à 7 of the Code on internal security created by the article 2 of the Law n° 2017-1510 of October 30th, last accessed 13 September 2021, available at https://www.legifrance.gouv.fr/eli/loi/2017/10/30/INTX1716370L/jo/article_3

[50] For example in the Netherlands, the Minister of Justice and Security can impose a ban on an individual being located in the vicinity of certain specific objects or in a certain part or parts of the Netherlands, article 2 Temporary Law on Counterterrorism Administrative Measures (Tijdelijke wet bestuurlijke maatregelen terrorismebestrijding), last accessed 9 September 2021, available at https://wetten.overheid.nl/BWBR0039210/2017-03-01.

[51] For example in Australia, the Federal Police can make a Preventative Detention Order up to 48 hours in order to prevent a terrorist act or preserve vital evidence relating to a terrorist act. Division 105, Australian Government, 'Criminal Code Act 1995', C2021C00183 § (1995), last accessed 13 September 2021, available at http://www.legislation.gov.au/Details/C2021C00183.

[52] For example in the US, the Department of Homeland Security is authorised, and in terror cases, required, to detain non-US nationals considered removable on terrorist-related grounds after release from criminal incarceration pending an administrative determination as to whether the individual should be removed from the US. Immigration and Nationality Act 1952, 8 U.S.C. § 1226 & 1226a, last accessed 12/10/2021, available at https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1226&num=0&edition=prelim

[53] For example in Australia, the Supreme Court of State or Territory can impose an continued detention order if the terrorist offender poses a great risk to national security once he or she is released. This form preventative detention is problematic as a person could be punished twice and thus violating finality of judgement and the ne bis in idem principle. Division 105A Australian Government, 'Criminal Code Act 1995', C2021C00183 § (1995), last accessed 13 September 2021, available at http://www.legislation.gov.au/Details/C2021C00183.

[54] Detention is unlawful where it is not justified by the law or is not carried out in the proper manner, however, detention (even lawful detention) can be arbitrary if it violates human rights standards, for example if the detention is unreasonable, unforeseeable, lacking in proportionality, or discriminatory. United Nations Office of the High Commissioner for Human Rights, and International Bar Association, 'Chapter 5: Human Rights and Arrest, Pre-Trial Detention and Administrative Detention', Human Rights In The Administration Of Justice: A Manual On Human Rights For Judges, Prosecutors And Lawyers. No. 9. New York and Geneva: United Nations, 2003.

[55] The right to be free from arbitrary detention has been qualified by the UN Human Rights Committee as binding and non-derogable under international law. Arbitrariness relates to inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality and the person must be notified of the reasons of his or her detention. See para 12, United Nations Centre for Civil and Political Rights, 'General Comment No.35 Article 9 (Liberty and Security of Person)' (United Nations, 16 December 2014), available at https://undocs.org/en/CCPR/C/GC/35.

[56] For example in the United Kingdom, HM Government, 'Terrorism Prevention and Investigation Measures Act 2011', Schedule 1, § 7, available at https://www.legislation.gov.uk/ukpga/2011/23/schedule/1.

[57] For example in Switzerland, article 23l Anti-Terrorism Police Measures Law (Bundesgesetz über polizeiliche Massnahmen zur Bekämpfung von Terrorismus), available at https://swissvotes.ch/attachments/7fefef2eeb9252da86b8bdbb203a6ac0554ba2404be41d96a011cd3068ee106c.

[58] Any restriction on peaceful assembly or association must be consistent with Articles 21 and 22 of the ICCPR, which articulate the narrow circumstances in which these rights may be limited. Further, any restriction on freedom of religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. Extreme care must be taken by states when limiting the human rights or fundamental freedoms, including when these restrictions apply to journalists, researchers, political activists, or human rights defenders.

[59] For example in Belgium, Articles 134 and 135 New Municipalities law (Gecoördineerde wetten Nieuwe Gemeentewet), available at https://codex.vlaanderen.be/Portals/Codex/documenten/1009730.html.

[60] For example in France, five places of worship have been closed since the adoption of the Strengthening Internal Security and the Fight Against Terrorism law on 1 November 2017 to October 2018. Amnesty International, 'Punished without trial - the use of administrative control measures in the context of counter- terrorism in France' Amnesty International, 2018, available at https://www.amnesty.nl/content/uploads/2018/12/Punished-without-trial-The-use-of-administrative-control-measures-in-the-context-of-counter-terrorism-in-France.pdf?x53918.

[61] For example in Switzerland, Article 23k Anti-Terrorism Police Measures Law (Bundesgesetz über polizeiliche Massnahmen zur Bekämpfung von Terrorismus), available at https://swissvotes.ch/attachments/7fefef2eeb9252da86b8bdbb203a6ac0554ba2404be41d96a011cd3068ee106c.

[62] The Danish Immigration Service, 'Religious Preachers with Entry Ban', New to Denmark, accessed 13 September 2021, available at https://nyidanmark.dk/en-GB/Words and Concepts Front Page/US/Religious workers/Religious publishers with a ban on entry.

[63] In addition to being proscribed as a terrorist groups, strict rules relating to registration of CSOs and limiting foreign funding to CSOs under Recommendation 8 of the FATF to combat financing of terrorism have led to shrinking the civic space and undermining the work of CSOs in preventing terrorism. See para 25 and 26, Maina Kiai, "Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association", United Nations General Assembly, Aril 24 2013, available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.39_EN.pdf.

[64] HM Government, 'Terrorism Prevention and Investigation Measures Act 2011', § 10, accessed 9 September 2021, available at https://www.legislation.gov.uk/ukpga/2011/23/section/10.
[65] Other examples could include low level funding by relatives of family members detained in camps or in cases of diminished responsibility.
[66] See article 14 United Nations Human Rights Office of the High Commissioner, 'OHCHR | International Covenant on Civil and Political Rights', 23 March 1976, available at https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx. For further information see United Nations Counter-Terrorism Implementation Task Force, 'Basic Human Rights Reference Guide: Right to a Fair Trial and Due Process in the Context of Countering Terrorism' (United Nations Office of the High Commissioner for Human Rights, October 2014), available at https://www.ohchr.org/EN/newyork/Documents/FairTrial.pdf.
[67] This could be relevant when administrative measures are being imposed by a civil court or subsequently being reviewed by a civil court. See article 14(1) of ICCPR.
[68] The focus of this policy brief is on lawfully restricting the exercise of human rights and not address the derogation from derogable rights under exceptional circumstances. According to Article 4 United Nations Human Rights Office of the High Commissioner, 'OHCHR | International Covenant on Civil and Political Rights' and Article 15 European Court of Human Rights, 'European Convention on Human Rights' (Council of Europe, 1950), available at https://www.echr.coe.int/documents/convention_eng.pdf. States could go beyond simply limiting rights, provided it is lawful to do so, to derogating from them or suspending them in times of emergency that threaten the life of the nation.
[69] See article 10 of the Glion Recommendations, Global Counterterrorism Forum, 2019.
[70] To mitigate the adoption of Covid-19 legislation under emergency powers, several countries such as Ireland, Germany and Singapore have included sunset clauses in the legislation. Franklin De Vrieze, Sean Molloy, 'Can sunset clause live up to their promise', available at https://www.wfd.org/2020/10/27/can-sunset-clauses-live-up-to-their-promise/. See also, Joelle Grogan, 'Power, Law and the COVID-19 Pandemic – Part I: The Year of Pandemic', Verfassungsblog (blog), available at https://verfassungsblog.de/power-law-and-the-covid-19-pandemic-part-i-the-year-of-pandemic/.
[71] Frank La Rue, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (United Nations General Assembly, 17 April 2013), availabe at https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/23/40.
[72] Council of Europe, National security and European case-law, (Council of Europe, 2013), available at https://rm.coe.int/168067d214. The UN Human Rights Council requires a State invoking national security to restrict freedom of expression "demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat." The "interests of national security" may serve as a ground for restrictions if such restrictions are necessary to preserve the State's capacity to protect the existence of the nation, its territorial integrity or political independence against a credible threat or use of force.
[73] See principle 2 of the Johannes Principles: Article 19, 'The Johannesburg Principles on National Security, Freedom of Expression and Access to Information' (Article 19, November 1996), available at https://www.article19.org/wp-content/uploads/2018/02/joburg-principles.pdf.
[74] When an individual can be subjected to an administrative measure on mere suspicion, without link to proof of terrorist intent, this can have an impact on the presumption of innocence. See, Directorate General for Internal Policies "EU and Member States' policies and laws on persons suspected of terrorism-related crimes", European Union, December 2017, available at https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596832/IPOL_STU(2017)596832_EN.pdf
[75] American Association for the International Commission of Jurists, 'Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights' (American Association for the International Commission of Jurists, April 1985), available at https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf.
[76] See article 2 para and article 26 of UN General Assembly, "International Covenant on Civil and Political Rights", 16 December 1966, United Nations, Treaty Series, vol. 999, available at https://www.refworld.org/docid/3ae6b3aa0.html. The non-discrimination principle is considered vital, part of jus cogens, and is non-derogable. It requires the equal treatment of an individual or group irrespective of their particular characteristics.
[77] 'OHCHR | End of Mission Statement of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance at the Conclusion of Her Mission to the Kingdom of the Netherlands, The Hague (7 October 2019)', para 32, accessed 9 September 2021, available at https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25100&LangID=E#_ftnref25.
[78] The majority of human rights as enumerated in the ICCPR are limited or qualified to some degree. This means that limiting the use of certain human rights is possible if conditions are met. Each article in the ICCPR reflects a specific right that is at stake when adopting an administrative measure and lists the specific derogation criteria that need to be met. These criteria include the principles of necessity (necessary in a democratic society), proportionality and adequacy. These principles have been further interpreted in the case of the European Court on Human Rights, Handyside v. the United Kingdom, no. 5493/72, 7 December 1976, paras. 48 and 49. See furthermore Human Rights Committee, General Comment No. 27, 1999, CCPR/C/21/Rev.1/Add.9, paras. 11 – 16; UN Human Rights Committee, General Comment no. 34 on freedoms of opinion and expression (Article 19 ICCPR), CCPR/C/GC/34, 12 September 2011, para. 34.

[79] The interference needs to be justified by a pressing social need relating to one of the legitimate aims, in accordance with the interpretation given in for instance, European Court of Human Rights, Judgment in Observer and Guardian v. U.K, NO. 13585/88, 26 November 1991, A 217, par. 71.
[80] The Inter-American Court of Human Rights when considering the adequacy of the measure questions whether the measure would be capable of contributing to the realization of the objective invoked for limiting the right at issue. See Inter-American Court of Human Rights, Case of Fontevecchia y D`Amico v. Argentina, Merits, Reparations and Costs. Judgment of November 29, 2011. Series C No. 238, para 53.
[81] When assessing the proportionality, it is important to balance the legitimate aim (protecting national security) versus the rights of the individual. In other words it is a costs and benefits assessment. See for an extensive explanation of the principle Juan Cianciardo, 'The Principle of Proportionality: the Challenge of Human Rights', in: Journal of Civil Law Studies, Vol 3, 2010, pp. 177-186.
[82] See Recommendation 13 of the Glion Recommendations, GCTF, 2019.
[83] In many cases administrative measures are taken based on intelligence or information which may not be disclosed to individual in the interest of national security. Although in some countries procedures have been developed – for example Closed Materials Procedures – the overreliance on intelligence impact the right of the individual to be informed of the reasons why the administrative measure is being imposed and the possibility to effectively challenge this measure.
[84] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, available at https://www.refworld.org/docid/3ae6b3aa0.html.
[85] United Nations Centre for Civil and Political Rights, 'General Comment No. 31 [80], CCPR/C/GC/35, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (paras. 15-17), (United Nations, 26 May 2004), available at https://www.refworld.org/docid/478b26ae2.html.
[86] The availability of legal aid often determines whether or not a person has access to justice or participate in them in a meaningful way.
[87] Jonathan Hall, Continuation of TPIM Act 2011: statutory consultation - Response by the Independent Reviewer of Terrorism Legislation, (Independent Reviewer of Terrorism Legislation, 9 August 2021), available at https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2021/08/IRTL-re-TPIM-Act-2011.pdf
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[89] European Court of Human Rights, "Secret Detention Sites", March 2019, available at https://www.echr.coe.int/documents/fs_secret_detention_eng.pdf
[90] See article 9(4) ICCPR.
[91] Peter S. Probst, 'Measuring Success in Countering Terrorism: Problems and Pitfalls', in Intelligence and Security Informatics, ed. Paul Kantor et al., Lecture Notes in Computer Science (Berlin, Heidelberg: Springer, 2005), 316–21, available at https://doi.org/10.1007/11427995_26.(last visited on 15 September 2021); Raphael Perl, 'Combating Terrorism: The Challenge of Measuring Effectiveness' (Congressional Research Service, 23 November 2005), available at https://www.researchgate.net/publication/235162144_Combating_Terrorism_The_Challenge_of_Measuring_Effectiveness (last visited on 15 September 2021).
[92] EUROPOL, 'European Union Terrorism Situation and Trend Report (TE-SAT) 2020' (European Union Agency for Law Enforcement Cooperation, 23 June 2020), available at https://www.europol.europa.eu/activities-services/main-reports/european-union-terrorism-situation-and-trend-report-te-sat-2020 (last visited on 15 September 2021).
[93] Beatrix Immenkamp et al., 'The Fight against Terrorism' (European Parliamentary Research Service, June 2019), available at https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/635561/EPRS_BRI(2019)635561_EN.pdf, (last visited 15 September 2021).
[94] Ibid.
[95] Maarten P. Bolhuis and Joris van Wijk, 'Citizenship Deprivation as a Counterterrorism Measure in Europe; Possible Follow-Up Scenarios, Human Rights Infringements and the Effect on Counterterrorism', European Journal of Migration and Law 22, no. 3 (7 October 2020): 338–65, available at https://doi.org/10.1163/15718166-12340079 (last visited 15 September 2021).
[96] UN General Assembly, Promotion and protection of human rights and fundamental freedoms while countering terrorism: Note by the Secretary-General, 27 September 2017, A/72/495, available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/301/19/PDF/N1730119.pdf?OpenElement (last visited 15 September 2021).
[97] United Nations Development Programme, 'Journey to Extremism in Africa' (United Nations, 2017), available at https://journey-to-extremism.undp.org/content/downloads/UNDP-JourneyToExtremism-report-2017-english.pdf (last visited 15 September 2021).
[98] The use of sunset clauses in the terrorism legislation is not uncommon and has been applied with respect to the Anti-Terrorism Act of 2001 in Canada and the Anti -Terrorism, Crimes and Security Act of 2001 in the UK. Sunset clauses provide for an expiry date and require a review of the legislation. Such a review should ideally be conducted by an independent body and include consulting civil society organisations and minority groups. The review should not only consider technical aspects but also the impact of the legislation. For more on this discussion, see Part 2 of this Policy Brief series.

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