

Administrative Measures against Foreign Fighters:

In Search of Limits and Safeguards

This Research Paper analyses the increasing use of administrative measures, such as travel bans and control orders, in the counter-terrorism context. On the basis of a review of the use of these measures in three selected states (the United Kingdom, France, and the Netherlands), the paper provides a critical assessment of the use of administrative measures in counter-terrorism. It identifies in which situations it might be justified to use administrative measures, and assesses the impact of the use of these measures on the protection of human rights. In conclusion, the paper recommends to establish limits and safeguards around the use of administrative measures in counter-terrorism.

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1. Introduction

In order to address the phenomenon of foreign fighters (FFs), that is, individuals travelling or aiming at travelling, for instance to Syria or Iraq, for the purpose of participating in terrorist activities or to join an armed group,¹ states have adopted a multitude of counter-terrorism laws and policies, usually combining repressive, preventive, and other measures. On the repressive side, criminal justice measures have been adopted, notably in implementation of United Nations Security Council Resolution 2178 and other instruments calling for the creation of new terrorist offences.² Many states have thereby criminalised incitement to terrorism, recruitment for terrorist activities, travel or attempt to travel to areas where terrorist groups are active, and providing or receiving terrorist training.³ On the preventive side, policies and programmes aimed at countering violent extremism are being developed.⁴

As the threat posed by FFs remains very high, governments keep developing new legislative policies, and seek new types of measures that could be applied against FFs. This paper addresses such relatively new type of measures, namely the so-called ‘administrative measures’, which some states are increasingly relying upon to counteract FFs.⁵ These measures, which seem to fit somewhere in between prevention and repression,⁶ include travel bans (e.g. through passport revocation), expulsion orders, entry bans, control orders, assigned residence orders, area restrictions, social benefits stripping, and citizenship revocation. The use of administrative measures in counter-terrorism is not completely new, as they have been used for countering the financing of terrorism.⁷ However, their renewed popularity to address a much broader scope of behaviours has raised concerns amongst organisations and scholars criticising their shortcomings in the protection of human rights.⁸

This paper addresses challenges flowing from the increasing use of these administrative measures against FFs. It argues that, in view of the human rights concerns they raise, the use of administrative measures in counter-terrorism should be limited both in its scope and methods, and that safeguards should be implemented

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¹ For a discussion of the definition of foreign fighters, see: Geneva Academy, “Foreign Fighters under International Law”, *Academy Briefing No. 7* (2014), p. 6; A. de Guttry, F. Capone and C. Paulussen, eds., *Foreign Fighters under International Law* (Springer, 2016), p. 2.

² United Nations Security Council, “Resolution 2178”, *UN Doc S/RES/2178* (2014), para. 6; Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, as amended by Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism; “Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism”, Council of Europe Treaty Series – No. 217 (2015).

³ United Nations, “Implementation of Security Council Resolution 2178 (2014) by States Affected by Foreign Terrorist Fighters”, *UN Doc S/2015/338, Annex* (2015); B. van Ginkel and E. Entenmann, eds., “The Foreign Fighters Phenomenon in the European Union”, *The International Centre for Counter-Terrorism – The Hague 7*, no. 2 (2016), pp. 60–61, <http://icct.nl/publication/report-the-foreign-fighters-phenomenon-in-the-eu-profiles-threats-policies/>.

⁴ United Nations. “Plan of Action to Prevent Violent Extremism – Report of the Secretary-General” *UN Doc A/70/674*, (2015). http://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/674. See, inter alia, the work of ICCT on countering violent extremism (CVE) and strategic communications (www.icct.nl).

⁵ T. Ojanen, “Administrative Counter-Terrorism Measures – a Strategy to Circumvent Human Rights in the Fight against Terrorism?”, in D. Cole, F. Fabbrini and A. Vidaschi, eds., *Secrecy, National Security and the Vindication of Constitutional Law*, (Cheltenham: Edward Elgar Publishing, 2013), p. 250; European Parliamentary Research Service, “Briefing: Foreign Fighters – Member State Responses and EU Action”, March 2016, <http://www.europarl.europa.eu/EPRS/EPRS-Briefing-579080-Foreign-fighters-rev-FINAL.pdf>.

⁶ See below Section 4.1.

⁷ F. Galli, “The Freezing of Terrorists’ Assets: Preventive Purposes with a Punitive Effect”, in A. Weyembergh and F. Galli, eds., *Do Labels Still Matter? Blurring Boundaries between Administrative and Criminal Law. The Influence of the EU* (Brussels: Editions de l’Université de Bruxelles, 2014), p. 43.

⁸ See below, Sections 3 and 4.2.

to ensure full compliance with human rights obligations. In Section 2, the paper begins by introducing the notion of ‘administrative measures’ in the context of counter-terrorism, which remains unclearly defined at the international level. In Section 3 the paper looks more closely at the use of administrative measures in three states selected as case studies: The United Kingdom (UK), whose counter-terrorism policies have included such measures since 2001; France, which has more recently enacted administrative measures in response to terrorist attacks; and the Netherlands, which is debating the adoption of new measures. On the basis of this review, the paper provides in Section 4 a critical assessment of the use of administrative measures against FFs. It analyses in which situations the use of administrative measures might or might not be justified, and assesses the impact of the use of administrative measures on the protection of human rights such as the right to freedom of movement and the right to due process. Finally, Section 5 provides conclusions and recommendations to establish limits and safeguards around the use of administrative measures in counter-terrorism.

2. The Notion of Administrative Measures in the Context of Counter-Terrorism

While the term administrative measures is more and more frequently referred to in the counter-terrorism context,⁹ it is rarely explicitly defined, and has no established meaning at the international level. Furthermore, the term as used in this context cannot be equated with domestic concepts of administrative law, the precise contours of which vary in different domestic legal orders.¹⁰ Often, the term is defined negatively, without identifying the particularities and common features of administrative measures against FFs. For instance, some documents refer to non-criminal measures,¹¹ which designates a much broader category of laws and policies. Other documents seem to oppose administrative measures to legislative measures,¹² which is misleading, since there is always a legislative basis for the application of administrative measures. The same goes for references to non-judicial measures:¹³ although the involvement of the judiciary in the application and review of administrative measures is often limited, the terms such as non-judicial measures can wrongly imply that no judge is involved at all. Other terms have also been used to refer to the notion, including the term ‘restrictive measures’,¹⁴

⁹ E.g.: United Nations, “Implementation of Security Council Resolution 2178 (2014) by States Affected by Foreign Terrorist Fighters – Third Report” (2015), para. 6; United Nations, “Bringing Terrorists to Justice: Challenges in Prosecutions Related to Foreign Terrorist Fighters”, *UN Doc S/2015/123, Annex* (2015), http://www.un.org/en/sc/ctc/docs/2015/S_2015_123_EN.pdf, para. 29; European Parliamentary Research Service, “Briefing: ‘Foreign Fighters’ – Member States’ Responses and EU Action in an International Context” (2015), <http://www.europarl.europa.eu/EPRS/EPRS-Briefing-548980-Foreign-fighters-FINAL.pdf>, para. 6.

¹⁰ A. Spapens, M. Peters and D. Van Daele, eds., “Administrative Measures to Prevent and Tackle Crime – Legal Possibilities and Practical Application in EU Member States” (2015), https://pure.uvt.nl/portal/files/6949919/Administrative_measures_to_prevent_and_tackle_crime_pdf_voor_online_1_.pdf, p. 6; C. S. Lobingier, “Administrative Law and Droit Administratif”, *University of Pennsylvania Law Review* 91 (1942), pp. 36–58.

¹¹ E.g.: European Parliamentary Research Service, “Briefing: ‘Foreign Fighters’ – Member States’ Responses and EU Action in an International Context” (2015), p. 6.

¹² E.g.: United Nations, “Implementation of Security Council Resolution 2178 (2014) by States Affected by Foreign Terrorist Fighters – Third Report” (2015), para. 66; United Nations, “Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism”, *UN Doc A/HRC/31/65* (2016), para. 36.

¹³ E.g.: European Parliamentary Research Service, “Briefing: ‘Foreign Fighters’”, 2016, p. 8.

¹⁴ Council Decision (CFSP) 2016/1693 of 20 September 2016 concerning restrictive measures against ISIL (Da’esh) and Al-Qaeda and persons, groups, undertakings and entities associated with them and repealing Common Position 2002/402/CFSP.

which attempts to more functionally define the measures, and the term ‘executive measures’,¹⁵ which adequately pinpoint one of the key aspects, namely that individual measures are decided by organs of the executive. Although, due to the ambiguities described, the author of this paper finds that the terminology could be refined, the term administrative measures, which seems to be becoming accepted, will be used in this paper.

The lack of definition can also be explained by the fact that the measures used in practice are rather heterogeneous, aiming at different purposes, and difficult to categorise. Some measures aim at preventing travel abroad of potential FFs, others at preventing their return, and some others address the threat posed by radicalised individuals in the territory of the state itself. One of the features of administrative measures thus appears to be that they are territorially-focused, aiming at addressing terrorism and FFs within a state’s own territory. Functionally, they are preventive in the sense that they are applied before the commission of a terrorist act, in an attempt to reduce the terrorist threat and to prevent the occurrence of terrorist acts within a territory, but also restrictive to the individuals to whom they are applied. Finally, they follow different procedures depending on the country, with varied degrees of respective involvement of the executive and the judiciary.

This paper proposes the following working definition of administrative measures in the counter-terrorism context:

Restrictive measures aimed at preventing terrorism within the territory of a state, decided upon and ordered by the executive (or with its close involvement), and subject to limited judicial review.

3. Review of the Use of Administrative Measures against FFs in Three Selected States

3.1. The United Kingdom

The UK is one of the first states to have enacted administrative measures in the context of counter-terrorism.¹⁶ As part of the Anti-Terrorism, Crime and Security Act 2001 adopted in reaction to the 9/11 attacks, it had developed a regime of indefinite administrative detention of foreign nationals suspected of being terrorists.¹⁷ The measure was heavily criticised for being “discriminatory, draconian and unlawful”,¹⁸ declared incompatible with human rights obligations by the House of Lords,¹⁹ and eventually repealed.²⁰

¹⁵ K. Roach, “Thematic Conclusions and Future Challenges”, in K. Roach, ed., *Comparative Counter-Terrorism Law* (Cambridge: Cambridge University Press, 2015), p. 746.

¹⁶ In the context of the troubles in Northern Ireland, the UK had enacted controversial Exclusion Orders in the Prevention of Terrorism (Temporary Provisions) Act 1974.

¹⁷ Part 4, Anti-Terrorism, Crime and Security Act 2001, <http://www.legislation.gov.uk/ukpga/2001/24/enacted>.

¹⁸ Amnesty International, “United Kingdom – Human Rights: A Broken Promise”, 23 February 2006, p. 14.

¹⁹ *A (FC) and Others v Secretary of State for the Home Department* [2004] UKHL 56, <http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd041216/a&others.pdf>.

²⁰ D. McGoldrick, “Security Detention – United Kingdom Practice”, *Case Western Reserve Journal of International Law* 40, no. 3 (2009), p. 511.

In order to provide for alternative measures, the UK introduced in the Prevention of Terrorism Act 2005 a regime of control orders, pursuant to which the executive could impose a variety of restrictive measures on individuals suspected to be or to have been involved in terrorism-related activity.²¹ The regime allowed the Secretary of State to impose on either nationals or foreigners a wide range of restrictive measures aimed at “preventing or restricting involvement by that individual in terrorism-related activity”.²² These included, but were not limited to, restrictions regarding residence, travel, movements within the UK, communications, possessions, and work.²³ For instance, control orders could consist of the obligation to wear an electronic monitoring tag, the obligation to relocate to another part of the UK, curfew obligations, a daily telephone reporting requirement, the prohibition to meet any person, and the prohibition to use a mobile phone and to access internet.²⁴ From 2005 to 2011, control orders were used 52 times against individuals suspected of involvement in terrorism, “for periods ranging from a few months to more than four-and-a-half years”.²⁵ The regime of control orders received lots of criticism for allowing the executive to impose restrictions on a broad range of human rights without fair trial guarantees. In practice, the cumulative effect of obligations imposed pursuant to control orders could lead to excessive infringements of fundamental freedoms.²⁶

In view of these critics, the UK enacted new administrative measures to replace control orders, namely the Terrorism Prevention and Investigation Measures (TPIM) Act 2011.²⁷ TPIMs are similar to control orders, as they allow the executive to impose a range of restrictive measures on individuals suspected of involvement in terrorism, including measures regarding residence, travel, electronic communication devices, and association.²⁸ The criteria to impose TPIM orders is that “the Secretary of State is satisfied, on the balance of probabilities, that the individual is, or has been, involved in terrorism-related activity” and that he “reasonably considers that [the measure] is necessary, for purposes connected with protecting members of the public from a risk of terrorism”.²⁹

There are some notable differences between TPIM orders and the previous control orders.³⁰ First, the types of restrictions which can be imposed under TPIM orders are exhaustively listed in the Act,³¹ while for control orders the executive could devise all sorts of restrictions. Additionally, the scope of some of the possible restrictions was

²¹ Section 2(1), Prevention of Terrorism Act 2005, <http://www.legislation.gov.uk/ukpga/2005/2/enacted>.

²² Section 1(3), Prevention of Terrorism Act 2005.

²³ Section 1(4), Prevention of Terrorism Act 2005.

²⁴ Lord Carlile, “First Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005”, 2 February 2006, Annex 2.

²⁵ D. Anderson, “Control Orders in 2011 – Final Report of the Independent Reviewer on the Prevention of Terrorism Act 2005”, March 2012, p. 9,

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228614/9780108511417.pdf.

²⁶ Amnesty International, “United Kingdom – Human Rights: A Broken Promise” (2006).

²⁷ Section 1, Terrorism Prevention and Investigation Measures Act 2011, <http://www.legislation.gov.uk/ukpga/2011/23>.

²⁸ Amnesty International, “United Kingdom – The Terrorism Prevention And Investigation Measures Bill 2011: Control Orders Redux”, 30 June 2011, <https://www.amnesty.org/download/Documents/28000/eur450072011en.pdf>.

²⁹ Section 3(1), Terrorism Prevention and Investigation Measures Act 2011, as amended by Section 20(1), Counter Terrorism and Security Act 2015, <http://www.legislation.gov.uk/ukpga/2015/6/section/20#section-20-1>. The initial criteria was that “the Secretary of State reasonably believes that the individual is, or has been, involved in terrorism-related activity”. By contrast, the criteria for control orders was that the Secretary of State “has reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity” (Section 2(1)(a), Prevention of Terrorism Act 2005).

³⁰ D. Anderson, “Terrorism Prevention and Investigation Measures in 2014 – Third Report of the Independent Reviewer on the Operation of the Terrorism Prevention and Investigation Measures Act 2011”, March 2015, para. 1.4, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/411824/IRTL_TPIMs_2014_final_report_web.pdf.

³¹ Schedule 1, Terrorism Prevention and Investigation Measures Act 2011.

refined. For instance, while control orders could impose a ban on the use of any communications device, under the TPIM Act “[t]he Secretary of State must allow the individual to possess and use (at least) [...] a computer that provides access to the internet by connection to a fixed line [...] [and] a mobile telephone that does not provide access to the internet”, subject to conditions such as monitoring.³² Another important difference is that TPIM orders can be imposed for a maximum period of two years and can only be extended further if new evidence is presented by the Secretary of State,³³ while control orders could be extended year to year for an indefinite period of time.³⁴ In 2015, the Counter Terrorism and Security Act (CTSA) modified some modalities of the TPIM orders and reintroduced the controversial involuntary relocation measure which existed under the 2005 control order regime but was removed from the TPIM Act 2011 due to civil liberties concerns. The new relocation measure however comes with a new safeguard, which is that involuntary relocation cannot take place further than 200 miles (320 km) from the previous residence of the individual.³⁵

One of the main concerns regarding the use of administrative measures such as control orders or TPIM orders is that, due to matters of national security, the evidence on which the allegations of involvement in terrorism are based are kept secret, and to a large extent not disclosed to the individuals subject to TPIM orders.³⁶ In the UK, the issue of the use of secret evidence is dealt with to a certain extent by the use of “special advocates” as part of the “closed material procedure”.³⁷ Under this procedure, the detailed evidence upon which a TPIM order is based is disclosed to a special advocate who has security clearance, while the individual is only provided with the non-sensitive information. The special advocate can only communicate with the controlled individual prior to seeing the secret evidence, and the individual is prevented from being present during the rest of the procedure.³⁸ Due to these modalities, the closed material procedure has been criticised for not providing sufficient opportunities to challenge TPIM orders.³⁹ The European Court of Human Rights had the opportunity to assess the issue, and considered that “the special advocate could perform an important role in counterbalancing the lack of full disclosure”, but that “the special advocate could not perform this function in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate.”⁴⁰ Accordingly, “[t]he extent to which the Special Advocate procedure is consistent with the requirements of a fair trial will depend to a large extent on the degree of disclosure that is made to the controlled person.”⁴¹

³² Section 7(3) of Schedule 1, Terrorism Prevention and Investigation Measures Act 2011.

³³ Section 5, Terrorism Prevention and Investigation Measures Act 2011.

³⁴ Section 2(6), Prevention of Terrorism Act 2005.

³⁵ Section 16(3), Counter Terrorism and Security Act 2015, <http://www.legislation.gov.uk/ukpga/2015/6>. See D.

Anderson, “Terrorism Prevention and Investigation Measures in 2014 – Third Report of the Independent Reviewer on the Operation of the Terrorism Prevention and Investigation Measures Act 2011” (2015), paras. 3.15–3.25.

³⁶ Amnesty International, “Left in the Dark: The Use of Secret Evidence in the United Kingdom” (2012).

³⁷ “Justice and Security Green Paper Presented to Parliament by the Secretary of State for Justice”, Cm 8194 (2011), Appendix C.

³⁸ D. Anderson, “Control Orders in 2011 – Final Report of the Independent Reviewer on the Prevention of Terrorism Act 2005”, March 2012, para. 3.71, <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2013/04/control-orders-2011.pdf>.

³⁹ Amnesty International, “Left in the Dark: The Use of Secret Evidence in the United Kingdom” (2012); *Al-Rawi v Security Service* [2011] UKSC 34, para. 94; M. Chamberlain, “A Barrister Who’s Worked in Secret Courts since 2003 Describes a Twisted System of Justice Worthy of Kafka”, *Daily Mail*, 13 March 2012, <http://www.dailymail.co.uk/debate/article-2114162/Closed-material-procedure-Barrister-describes-twisted-justice-worthy-Franz-Kafka.html>.

⁴⁰ European Court of Human Rights, *A and Others v United Kingdom*, App No 3455/05 (19 February 2009), 2009, para. 220, <http://hudoc.echr.coe.int/eng?i=001-91403>.

⁴¹ D. Anderson, “Control Orders in 2011 – Final Report of the Independent Reviewer on the Prevention of Terrorism Act 2005” (2012), para. 3.72. See, *SSHD v AF* (No. 3) [2009] UKHL 28, [2010] 2 AC 269; *AM v SSHD* [2011] EWCA Civ 710.

Some oversight mechanisms are in place to monitor the application of counter-terrorism measures such as TPIM orders, including through reports and recommendations by the Independent Reviewer on the terrorism legislation, David Anderson QC, and by the Joint Committee on Human Rights of the House of Lords and the House of Commons. Furthermore, TPIM orders are subject to “quasi-automatic”⁴² prior judicial review by the High Court, which gives permission for the imposition of measures unless it considers that the decision to impose a TPIM order is “obviously flawed”.⁴³ Finally, prior to issuing a TPIM order, the Secretary of State must consult with the police and prosecutors to assess whether there is sufficient evidence for a criminal case.⁴⁴ In practice, few TPIM orders have been issued since their adoption, leading the Parliamentary Joint Committee on Human Rights to consider that “TPIMs may be withering on the vine”.⁴⁵ As of October 2016, only six TPIM orders were in place.⁴⁶

Several measures are available in order to prevent the travel abroad of potential FFs located in the UK. First, when imposing a TPIM order, it is possible to impose a travel ban prohibiting an individual from leaving the UK and an obligation to surrender travel documents.⁴⁷ Besides, under the Counter Terrorism and Security Act (CTSA) 2015, administrative officers may seize the passport of individuals suspected of intending to leave the UK to engage in terrorism-related activity.⁴⁸ In addition, the revocation of passports is possible through the use of Royal Prerogative powers, pursuant to which the decision to withdraw or cancel passports is at the discretion of the Home Secretary.⁴⁹ This power has notably been used to invalidate the passport of individuals likely to travel abroad in order to engage in terrorism-related activity. In a case brought by individuals whose passports were cancelled, the continuing use of this discretionary power despite the existence of specific legislation was deemed lawful by the High Court.⁵⁰

In 2015, new measures specifically targeted at returning FFs were introduced as part of the CTSA.⁵¹ In particular, new provisions provide for the imposition of temporary exclusion orders (TEOs), which allow for the exclusion from the territory of individuals situated outside the United Kingdom and suspected of involvement in terrorism activity abroad.⁵² The measure is applicable to nationals and thus has the effect of forbidding British FFs from re-entering the UK. Exclusion orders are issued for periods of two years, and result in the automatic invalidation of “any British passport held by the excluded individual”.⁵³ In order to manage the return of British FFs against whom TEOs have been issued, the CTSA further introduced a procedure of “permits to return”,

⁴² D. Anderson, “Terrorism Prevention and Investigation Measures in 2014 – Third Report of the Independent Reviewer on the Operation of the Terrorism Prevention and Investigation Measures Act 2011” (2015), para. 1.2.

⁴³ Section 6, Terrorism Prevention and Investigation Measures Act 2011.

⁴⁴ Section 10, Terrorism Prevention and Investigation Measures Act 2011.

⁴⁵ House of Lords and House of Commons Joint Committee on Human Rights, “Post-Legislative Scrutiny: Terrorism Prevention and Investigation Measures Act 2011 – Tenth Report of Session 2013–14”, *HL Paper 113 HC 1014*, 2014, para. 80.

⁴⁶ Memorandum to the Home Affairs Committee, “Post-Legislative Scrutiny of the Terrorism Prevention and Investigation Measures Act 2011”, Cm 9348 (October 2016), p 14.

⁴⁷ Section 2 of Schedule 1, Terrorism Prevention and Investigation Measures Act 2011.

⁴⁸ Section 1 of Schedule 1, Counter Terrorism and Security Act 2015, <http://www.legislation.gov.uk/ukpga/2015/6>.

⁴⁹ UK Home Office, “Written ministerial statement – The issuing, withdrawal or refusal of passports”, 25 April 2013, <https://www.gov.uk/government/speeches/the-issuing-withdrawal-or-refusal-of-passports>.

⁵⁰ *XH and Another v Secretary of State for the Home Department* [2016] EWHC 1898

⁵¹ D. Anderson, “Terrorism Prevention and Investigation Measures in 2014 – Third Report of the Independent Reviewer on the Operation of the Terrorism Prevention and Investigation Measures Act 2011” (2015), para. 3.13: “TEOs are a reaction to the spate of British citizens travelling to fight in Syria and Iraq, and were designed for the specific purpose of managing their return”.

⁵² Section 2, Counter Terrorism and Security Act 2015.

⁵³ Section 4, Counter Terrorism and Security Act 2015.

under which individuals subject to TEOs may be given permission to return to the UK subject to a number of conditions.⁵⁴ Individuals wishing to return must submit an application to the Secretary of State, and have to accept conditions that can be attached to the permit to return, such as obligations to report to the police and to notify their place of residence.⁵⁵ In addition, the permit states the time during which, manner in which, and place where, the individual is permitted to return.⁵⁶ Both the TEO and the permit to return are reviewable before a court to ensure that the conditions for their imposition were met and continue to be met.⁵⁷ At the time of writing of this paper, no TEO had yet been issued.⁵⁸

Finally, citizenship revocation has been used by the UK as part of its counter-terrorism policies. Exact numbers have not been disclosed by the government, but it appears that citizenship revocation has been used in about 30 instances since 2010.⁵⁹ In two controversial instances, it was used against citizens who were subsequently killed by drone strikes.⁶⁰ Citizenship revocation is provided for by the British Nationality Act 1981, which has been amended several times to extend the scope of the measure.⁶¹ Under this Act, the citizenship of dual nationals, including since 2002 of British-born citizens, can be revoked by order of the Secretary of State if he is “satisfied that deprivation is conducive to the public good”.⁶²

Furthermore, an amendment adopted in 2014 re-introduced a controversial power allowing to revoke the citizenship of naturalised British citizens who have no other nationality, provided that there are “reasonable grounds for believing that the person is able [...] to become a national of such a country or territory”. The Secretary of State must there be satisfied that the individual “has conducted him or herself in a manner which is seriously prejudicial to the vital interests of the United Kingdom”.⁶³ The measure has been criticised for its capacity to lead to statelessness.⁶⁴ The risk of statelessness is supposed to be reduced by the condition that the individual could potentially acquire another nationality, however, “[w]ould another country seriously consider giving nationality, even to someone who might have the ability to apply for nationality of that country, if it knew that British citizenship had been removed on the

⁵⁴ Section 5, Counter Terrorism and Security Act 2015.

⁵⁵ Sections 6 and 9, Counter Terrorism and Security Act 2015.

⁵⁶ Section 5(4), Counter Terrorism and Security Act 2015.

⁵⁷ Section 11, Counter Terrorism and Security Act 2015.

⁵⁸ C. Walker, “Foreign Terrorist Fighters and UK Counter Terrorism Laws Professor Emeritus”, p. 121 (Annex 2 – Guest Chapter, D. Anderson, “The Terrorism Acts in 2015 – Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006”, 1 December 2016, <https://www.gov.uk/government/publications/the-terrorism-acts-in-2015>).

⁵⁹ V. Parsons, “Citizenship stripping: new figures reveal Theresa May has deprived 33 individuals of British citizenship”, *The Bureau of Investigative Journalism*, 21 June 2016, <https://www.thebureauinvestigates.com/2016/06/21/citizenship-stripping-new-figures-reveal-theresa-may-deprived-33-individuals-british-citizenship/>.

⁶⁰ C. Woods, A. K. Ross and O. Wright, “British Terror Suspects Quietly Stripped of Citizenship... Then Killed by Drones”, *The Independent*, 27 February 2013, <http://www.independent.co.uk/news/uk/crime/british-terror-suspects-quietly-stripped-of-citizenship-then-killed-by-drones-8513858.html>.

⁶¹ Nationality Immigration and Asylum Act 2002, Immigration, Asylum and Nationality Act 2006, Immigration Act 2014.

⁶² Section 40(2) and (4), British Nationality Act 1981, as amended,

<http://www.legislation.gov.uk/ukpga/1981/61/section/40>.

⁶³ Section 40(4A), British Nationality Act 1981, as amended; introduced by Section 66, Immigration Act 2014,

<http://www.legislation.gov.uk/ukpga/2014/22/section/66>.

⁶⁴ 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”, April 2016, paras. 3.9–3.14, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/518120/David_Anderson_OC_-_CITIZENSHIP_REMOVAL_web.pdf.

grounds that the person was believed to be in some way linked to, or to condone, international terrorism?”⁶⁵

This controversial measure was adopted in reaction to the impossibility of lawfully depriving the British nationality of Mr Al-Jedda,⁶⁶ an individual who had acquired British citizenship in 2000, as a result of which his original Iraqi citizenship automatically lapsed. Mr Al-Jedda lived in the UK since 1992 but travelled to Iraq in 2004, where he was arrested and detained by British forces in Iraq from 2004 to 2007 on grounds of suspected membership of a terrorist group.⁶⁷ Upon his release, the UK attempted to revoke his citizenship, however the Supreme Court invalidated the measure on the ground that revoking the citizenship of an individual who could hypothetically acquire another nationality was not in line with international obligation on the reduction of statelessness.⁶⁸ Following the 2014 amendment to the British Nationality Act 1981 Mr Al-Jedda’s citizenship was revoked for a second time.

3.2. France

France has turned to administrative measures in the counter-terrorism context a bit more recently than the UK. As in other countries, some measures that can be applied to FFs have been in place for a long time, but not as part of counter-terrorism policies. In particular, immigration law provisions allow administrative authorities to deny entry⁶⁹ to foreigners who constitute a threat to public order, or to issue expulsion orders against foreigners who constitute a serious threat to public order.⁷⁰

More recently, administrative measures specifically targeted at FFs have been adopted. In reaction to the very high threat to which it has been subject in the past years, France has enacted several counter-terrorism laws, in what some have qualified as “legislative fever”.⁷¹ It notably brought amendments to its Criminal Code aiming at strengthening criminal justice tools against FFs,⁷² but also adopted administrative measures.

⁶⁵ H. Kennedy, “Britain Expands Power to Strip Citizenship From Terrorism Suspects”, *New York Times*, 14 May 2014, <http://www.nytimes.com/2014/05/15/world/europe/britain-broadens-power-to-strip-terrorism-suspects-of-citizenship.html>.

⁶⁶ 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” (2016), para. 2.17.

⁶⁷ The detention was ruled to be in violation of human rights obligations by the European Court of Human Rights in *Al-Jedda v The United Kingdom*, App No 27021/08, 7 July 2011.

⁶⁸ *Secretary of State for the Home Department (Appellant) v Al-Jedda (Respondent)*, Supreme Court, 9 October 2013 [2013] UKSC 62.

⁶⁹ Articles L213-1 to L213-9, 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*), https://www.legifrance.gouv.fr/affichCode.do?jsessionid=401A8DCD56F988831EDA478E2B133379.tpdila21v_1?idSectionTA=LEGISCTA000006147750&cidTexte=LEGITEXT000006070158&dateTexte=20160825.

⁷⁰ Articles L521-1 to L521-5, 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*), <https://www.legifrance.gouv.fr/affichCode.do?idArticle=LEGIARTI000006335207&idSectionTA=LEGISCTA000006147776&cidTexte=LEGITEXT000006070158&dateTexte=20160825>.

⁷¹ V. Chalkiadaki, “The French ‘War on Terror’ in the Post-Charlie Hebdo Era”, *Eucri* (2015), p. 31; B. Boutin and C. Paulussen, “From the Bataclan to Nice: A Critique of France’s State of Emergency Regime”, *ASSER Policy Brief No. 2016-01* (2016), <http://ssrn.com/abstract=2811602>, p. 3.

⁷² C. Paulussen, “Repressing the Foreign Fighters Phenomenon and Terrorism in Western Europe: Towards an Effective Response Based on Human Rights”, *The International Centre for Counter-Terrorism – The Hague* 7, no. 10 (2016), <https://icct.nl/publication/repressing-the-foreign-fighters-phenomenon-and-terrorism-in-western-europe-towards-an-effective-response-based-on-human-rights>.

In November 2014, in the same law that created the criminal offence of travelling to an area where terrorist groups are operating,⁷³ the possibility to issue travel and entry bans against potential and suspected FFs was enacted. Travel bans, referred to as “administrative interdiction to leave the territory” are applicable to French nationals, where there are serious reasons to believe that an individual is planning to travel abroad in order to engage in terrorist activities. Travel bans are issued by a written and motivated decision of the Minister of the Interior, for a duration of maximum six months, renewable for a total duration of maximum two years. Individuals subject to the measure are notified, have the opportunity to present observations, and can appeal the measure within two months before an administrative tribunal. Travel bans result in the automatic invalidation of travel documents, which must be handed over.⁷⁴ Furthermore, they are registered with national databases, the Schengen Information System (SIS2) and INTERPOL’s Stolen/Lost Travel Document database (SLTD).⁷⁵ The Parliamentary Commission on the means used to fight terrorism reported that, between November 2014 and April 2016, 308 travel bans had been ordered, and 56 individuals had brought complaints before an administrative tribunal, out of which four travel bans had been invalidated.⁷⁶ The efficiency of such measures has however been called into question when it was revealed that one of the terrorists of the Bataclan attacks had been able to travel to Syria in 2013 while being subject to a travel ban – not as a result of an administrative measure, but as part of a judicial enquiry – simply by pretending that he had lost his passport.⁷⁷ This illustrates the dire need for increased information sharing amongst national agencies and between states in order to operationalise legislative policies.

Conversely, entry bans allow for the barring of foreigners, who are not residing and not located in France and who constitute a threat to public order and security, from entering the territory. A distinction is made between non-EU citizens, for which a serious threat is required, and EU citizens, for which the threat must be not only serious but also genuine and sufficient. Entry bans are pronounced by decision of the Minister of the Interior, and are justified unless issues of state security are involved.⁷⁸ Available statistics show that 98 entry bans were issued between February 2015 and April 2016, 32 of which concerned EU nationals.⁷⁹

Compared to other administrative measures, travel and entry bans have not caused extensive controversy. They raise some human rights concerns,⁸⁰ but can be seen as potentially effective (subject to effective data sharing and cooperation) and not

⁷³ Law n° 2014-1353 of 13 November 2014 strengthening provisions on the fight against terrorism (*Loi renforçant les dispositions relatives à la lutte contre le terrorisme*),

<http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029754374&categorieLien=id>.

⁷⁴ Article L224-1, Code of Interior Security (*Code de la sécurité intérieure*),

https://www.legifrance.gouv.fr/affichCode.do?sessionId=401A8DCD56F988831EDA478E2B133379.tpdila21v_1?idSectionTA=LEGISCTA000029755319&cidTexte=LEGITEXT000025503132&dateTexte=20160829.

⁷⁵ Assemblée Nationale, “Rapport fait au nom de la commission d’enquête relative aux moyens mis en œuvre par l’état pour lutter contre le terrorisme depuis le 7 janvier 2015”, 5 July 2016, p. 256, <http://www.assemblee-nationale.fr/14/pdf/rap-enq/r3922-t1.pdf>.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*, p. 148.

⁷⁸ Articles L214-1 to L214-7, 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*),

https://www.legifrance.gouv.fr/affichCode.do?sessionId=401A8DCD56F988831EDA478E2B133379.tpdila21v_1?idSectionTA=LEGISCTA000029755341&cidTexte=LEGITEXT000006070158&dateTexte=20160725.

⁷⁹ Assemblée Nationale, “Rapport fait au nom de la commission d’enquête relative aux moyens mis en œuvre par l’état pour lutter contre le terrorisme depuis le 7 janvier 2015”, 5 July 2016, p. 257.

⁸⁰ Human Rights Watch, “UN: End Overbroad Foreign Terrorist Fighter Laws – Panel Says ‘Misapplication’ of Resolution Imperils Rights”, 2 November 2015, <https://www.hrw.org/news/2015/11/02/un-end-overbroad-foreign-terrorist-fighter-laws>.

excessively restrictive means to prevent the travel of FFs. Yet, in view of their impact on the right to freedom of movement, notably within the Schengen area, it is important to ensure that sufficient safeguards are in place.⁸¹

A number of administrative measures available in France at the time of writing of this paper result from the state of emergency in force since November 2015, and have, by contrast, received ample criticism.⁸² The state of emergency regime stems from a 1955 law⁸³ which provides that, in case of imminent danger resulting from serious breaches of public order, the Government may declare a state of emergency, which can then be extended by the Parliament. Administrative measures available under the state of emergency are particular in that they result from an exceptional and, in principle, temporary regime called for by an equally exceptional situation. Measures under this regime can explicitly and validly derogate from some human rights obligations, in accordance with Article 15 of the European Convention of Human Rights⁸⁴ and the declaration made thereof by France on 24 November 2015.⁸⁵ They are, again in principle, not conceived as regular means of addressing terrorism, and in that sense are not fully comparable to other administrative measures enacted as part of long-term counter-terrorism strategies. However, since its proclamation after the November 2015 attacks, the state of emergency has been repeatedly extended, and was – at the time of writing of this paper – set to be further extended until the upcoming elections of spring 2017.⁸⁶ Apart from the measures themselves, this prolonged application of a supposedly exceptional regime has been criticised.⁸⁷

Under the state of emergency law, organs from the executive have the authority to order a number of administrative measures. Key provisions include the possibility for the Minister of the Interior and/or Departments' Prefects to order the placement under house arrest of any individual in respect of whom there are serious reasons to believe that his behaviour constitutes a threat to security and public order,⁸⁸ to order the conduct at day or night of warrantless searches at any place suspected to be

⁸¹ See below Section 4.2.

⁸² CNCDH, "Statement of Opinion on the State of Emergency", 18 February 2016, http://www.cncdh.fr/sites/default/files/english_avis_statement_of_opinion_on_the_state_of_emergency.pdf; Amnesty International, "Upturned Lives: The Disproportionate Impact of France's State of Emergency" (2016); B. Boutin and C. Paulussen, "From the Bataclan to Nice: A Critique of France's State of Emergency Regime" (2016); N. Muiznieks, "Lutons contre le terrorisme dans le respect du droit", *Le Monde*, 3 February 2016, http://www.lemonde.fr/idees/article/2016/02/03/lutons-contre-le-terrorisme-dans-le-respect-du-droit_4858281_3232.html; Human Rights Watch, "France: Abuses Under State of Emergency", 3 February 2016, <https://www.hrw.org/news/2016/02/03/france-abuses-under-state-emergency>; Défenseur des droits, "Avis 16-03: Suivi de l'état d'urgence" (2016), <http://www.defenseurdesdroits.fr/fr/publications/avis-au-parlement/16-03>; OHCHR, "UN rights experts urge France to protect fundamental freedoms while countering terrorism", 19 January 2016, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16966&LangID=E#sthash.5fETSUFF.dpuf>.

⁸³ Law n° 55-385 of 3 April 1955 regarding the state of emergency, as amended, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000695350>.

⁸⁴ Article 15 ECHR provides the possibility of derogating from obligations under the Convention in case of public emergency. This must be done "to the extent strictly required by the exigencies of the situation", and no derogation to Articles 2 (Right to life), 3 (Prohibition of torture), 4 (Prohibition of slavery and forced labour) and 7 (No punishment without law) are allowed.

⁸⁵ "Declaration contained in a Note verbale from the Permanent Representation of France, dated 24 November 2015, registered at the Secretariat General on 24 November 2015", <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations>. See A. Mokhtar, "Human Rights Obligations v. Derogations: Article 15 of the European Convention on Human Rights", *The International Journal of Human Rights* 8 (2004), pp. 65–87.

⁸⁶ "Prolongation de l'Etat d'urgence: vote des députés le 21 décembre", *TV5 Monde*, 30 November 2016, <http://information.tv5monde.com/en-continu/prolongation-de-l-etat-d-urgence-vote-des-deputes-le-21-decembre-141716>.

⁸⁷ J.-B. Jacquin, "Prolonger l'état d'urgence, un 'risque' pour la démocratie", *Le Monde*, 30 November 2016, http://www.lemonde.fr/societe/article/2016/11/30/prolonger-l-etat-d-urgence-un-risque-pour-la-democratie_5040770_3224.html.

⁸⁸ Article 6, Law n° 55-385 of 3 April 1955 regarding the state of emergency.

frequented by an individual posing a threat to public order and security,⁸⁹ to impose specific area bans on anyone seeking in any way to hinder the action of public authorities,⁹⁰ to order the temporary closure of public venues, and to prohibit certain meetings.⁹¹ Measures under the state of emergency have been used quite frequently in practice, with close to 4000 searches conducted, and more than 500 house arrests ordered.⁹²

As mentioned, the application of the state of emergency regime received plenty of criticism by organisations considering it has led to abuses, and to excessive restrictions of fundamental freedoms. Criticism first arose out of the formal criteria for the provisions – serious reasons that someone constitutes a threat to security and public order – which has been denounced as too vague and too broad, and thus leaving wide room for abuse.⁹³ The vague criteria notably allowed the government to impose administrative measures for purposes unrelated to the prevention of terrorism, such as to prevent environmental or labour law activists to demonstrate.⁹⁴

More generally, the broadness of the provisions resulted in practice in a disproportionate and excessive application of the state of emergency regime. For instance, it was reported that administrative searches had often involved excessive physical and psychological violence (e.g. failure to take into account the presence of children, pregnant women, elderly, and disabled people), and unnecessary damage to property (e.g. breaking entry doors without prior notice, degradation of religious symbols).⁹⁵

Regarding house arrests, one of the main concerns pertained to the impact on the right to private and family life of the strict modalities, applied in ways lacking consideration for the specific situations of individuals.⁹⁶ House arrest orders usually not only impose an obligation to stay at home up to 12 hours per day, but also an obligation to permanently remain within a designated area (eg. a city), and an obligation to report to a police station up to three times per day.⁹⁷ Such measures can have a significant impact on carrying out work or studies, caring for children, or otherwise enjoying the right to private life. The *Conseil d'État* (Council of State) recognised the need for the individualisation of house arrest measures in a case involving a single mother of three children who had to report to a police station every day including weekends at 9:00, 14:00, and 19:00, and as a result could not properly care for her children. While not invalidating the measure, the *Conseil d'État* considered that in view of the right to family

⁸⁹ Article 11, Law n° 55-385 of 3 April 1955 regarding the state of emergency.

⁹⁰ Article 5, Law n° 55-385 of 3 April 1955 regarding the state of emergency.

⁹¹ Article 8, Law n° 55-385 of 3 April 1955 regarding the state of emergency.

⁹² Assemblée Nationale, "Mesures administratives prises en application de la Loi n° 55-385 du 3 Avril 1955, du 14 Novembre 2015 au 18 Juillet 2016" (2016), <http://www2.assemblee-nationale.fr/14/commissions-permanentes/commission-des-lois/controle-parlementaire-de-l-etat-d-urgence/controle-parlementaire-de-l-etat-d-urgence>.

⁹³ OHCHR, "Déclaration publique sur la loi relative à l'état d'urgence et sur la loi relative à la surveillance des communications électroniques internationales", 19 January 2016, <http://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=16961&LangID=F>.

⁹⁴ A. Neslen, "Paris climate activists put under house arrest using emergency laws", *The Guardian*, 27 November 2015, <http://www.theguardian.com/environment/2015/nov/27/paris-climate-activists-put-under-house-arrest-using-emergency-laws>; "Loi travail: plusieurs opposants interdits de manifester", *Le Monde*, 16 May 2016, http://www.lemonde.fr/police-justice/article/2016/05/16/loi-travail-plusieurs-opposants-interdits-de-manifester_4920064_1653578.html.

⁹⁵ CNCDH, "Statement of Opinion on the State of Emergency" (2016), paras. 7–10.

⁹⁶ *Ibid.*, paras. 12–13.

⁹⁷ Article 6, Law n° 55-385 of 3 April 1955 regarding the state of emergency.

life and of the principle of the best interest of the child, the measure had to be modified to an obligation to report only twice a day excluding weekends and to a closer station.⁹⁸ A number of monitoring and control mechanisms have been put in place with regards to the use of state of emergency powers. Primarily, parliamentary oversight is provided for in the state of emergency law, under which the National Assembly and the Senate must be kept informed of the measures taken by administrative authorities.⁹⁹ In addition, independent institutions, such as the CNCDH (*Commission Nationale Consultative des Droits de l'Homme*, National Consultative Commission on Human Rights), and the *Défenseur des droits* (Rights Defender), have been monitoring and reporting on the state of emergency. Furthermore, individuals subject to measures have the possibility to bring claims before administrative tribunals, either to contest and request the invalidation of measures such as house arrest, or to claim reparation for damage resulting from measures such as house searches.¹⁰⁰

However, judicial review and other forms of monitoring are constrained by one significant hurdle, which lies in the recurrent use of secret intelligence to justify the imposition of particular measures. In France, administrative measures in the counter-terrorism context are often decided on the basis of so-called “white notes”, which are very succinct, unsigned, and undated documents drafted by French intelligence services, attesting – without fully disclosing why – that an individual poses a threat to public order and security.¹⁰¹ In these circumstances, targeted individuals have ample difficulty in challenging allegations that are not clearly exposed to them, while judges cannot properly assess the conclusive value of evidence presented to them in white notes.¹⁰²

While the state of emergency is meant to end at some point – possibly by January 2017 –, ¹⁰³ some new administrative measures have been enacted as part of regular legislation in June 2016.¹⁰⁴ This law enacts into regular legislation some measures that can be seen as inspired by the state of emergency.¹⁰⁵ Remarkably, it provides for the administrative control of returning FTFs. Under the new provisions, individuals who left the country presumably to join terrorist groups and who are likely to endanger public

⁹⁸ Conseil d'État, Juge des référés, *Mme C...* (6 January 2016),

<https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000031861482>: “les modalités de l'assignation à résidence telles qu'elles étaient déterminées par l'arrêté du 22 novembre 2015 portent une atteinte grave et manifestement illégale au droit de Mme C... au respect de sa vie familiale ainsi qu'à l'intérêt supérieur de ses enfants”.

⁹⁹ Article 5, Law n° 55-385 of 3 April 1955 regarding the state of emergency. See, Assemblée Nationale, “Contrôle parlementaire de l'état d'urgence”, <http://www2.assemblee-nationale.fr/14/commissions-permanentes/commission-des-lois/controle-parlementaire-de-l-etat-d-urgence/controle-parlementaire-de-l-etat-d-urgence>.

¹⁰⁰ F. Nicoud, “Le terrorisme au filtre de la jurisprudence administrative”, *Riseo* (2015), <http://www.riseo.fr/IMG/pdf/2-2015/11-Nicoud-Le-terrorisme-devant-le-juge-administratif.pdf>; B. Stirn, “Lutte contre le terrorisme, état d'urgence et État de droit”, *Intervention lors de la conférence de rentrée de l'Institut d'Études Politiques d'Aix-en-Provence*, 21 Septembre 2016.

¹⁰¹ P. Alonso, “Notes blanches: les corbeaux de la Place Beauvau”, *Libération*, 15 February 2016, http://www.liberation.fr/france/2016/02/15/notes-blanches-les-corbeaux-de-la-place-beauvau_1433587; E. Daoud, “Etat d'urgence et contrôle du juge administratif: la grande illusion”, *Rue89 – L'Obs*, 3 February 2016, <http://rue89.nouvelobs.com/blog/oh-my-code/2016/02/03/etat-durgence-et-contrôle-du-juge-administratif-la-grande-illusion-235213>.

¹⁰² CNCDH, “Statement of Opinion on the State of Emergency” (2016), para. 25.

¹⁰³ At the time of writing of this paper, the state of emergency was extended for six months on 26 July 2016, and could, depending on the circumstances, either end in January 2017, or be lifted earlier, or be further extended – for instance if a terrorist attack occurs.

¹⁰⁴ Law n° 2016-731 of 3 June 2016 strengthening the fight against organised crime, terrorism and their financing (*Loi renforçant la lutte contre le crime organisé, le terrorisme et leur financement, et améliorant l'efficacité et les garanties de la procédure pénale*), <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000032627231>.

¹⁰⁵ CNCDH, “Avis sur le projet de loi renforçant la lutte contre le crime organisé, le terrorisme et leur financement, et améliorant l'efficacité et les garanties de la procédure pénale” (2016), para. 4, <http://www.cncdh.fr/fr/publications/avis-sur-le-projet-de-loi-de-lutte-contre-le-crime-organise-et-le-terrorisme>.

safety upon return can, upon decision of the Minister of the Interior, be subject to a certain number of controlling measures, including house arrest orders comparable to the one applicable under the state of emergency (assigned residence, obligation to remain within an area, and reporting requirements).¹⁰⁶ While it is too early to evaluate practice regarding these measures, it can already be questioned whether administrative measures subject to limited judicial review should be used against returning FFs.¹⁰⁷

In the months which followed the attacks of November 2015, and then again in the aftermath of the July 2016 attack, a number of politicians have pushed for the adoption of increasingly tough counter-terrorism measures while showing limited consideration for human rights protection.¹⁰⁸ Two proposals, regarding deprivation of citizenship and preventive administrative detention, were eventually dropped, but deserve to be briefly discussed so as to better assess the trend towards the use of administrative measures.

Deprivation of nationality in relation to terrorism has been possible with respect to naturalised citizens since 1996.¹⁰⁹ Under Article 25 Civil Code, “[a]n individual who acquired the French nationality may be declared by decree adopted after conforming assent of the Conseil d’État to have forfeited his French nationality, unless forfeiture would have the effect of making him stateless [...] [w]hen he is sentenced [...] for a crime or offense that constitutes an act of terrorism”.¹¹⁰ The new measure proposed by the government aimed at extending the deprivation of nationality to French-born dual citizens, and involved an amendment of the Constitution allowing for such measure.¹¹¹ In view of the political backlash resulting notably in the resignation of the Minister of Justice, the project was abandoned.¹¹² In practice, the deprivation of nationality does not appear to have been applied often,¹¹³ revealing the rather symbolic function of the measure.

The second project, which, quite worrisomely, involved the placement in administrative detention of individuals suspected of being radicalised, did not even reach the stage of a legislative proposal, yet has remained omnipresent in political discourses notably from the opposition, in particular in the wake of terrorist attacks. The government requested the opinion of the *Conseil d’État* on the possibility of enacting such measures,

¹⁰⁶ Articles L225-1 to L225-8 Code of Interior Security,
https://www.legifrance.gouv.fr/affichCode.do?sessionId=6FD327914B7256123E1600A64331EE32.tpdila19v_3?idSectionTA=LEGISCTA000032634633&cidTexte=LEGITEXT000025503132&dateTexte=20160831.

¹⁰⁷ See below, Section 4.1.

¹⁰⁸ M. de Boni, “État d’urgence: des élus LR veulent revoir l’état de droit et la ‘sacro-sainte Constitution’”, *Le Figaro*, 20 July 2016, <http://www.lefigaro.fr/politique/le-scan/citations/2016/07/20/25002-20160720ARTFIG00148-etat-d-urgence-des-elus-lr-veulent-revoir-l-etat-de-droit-et-la-sacro-sainte-constitution.php>; A. Boudet, “Face au terrorisme, Nicolas Sarkozy ne veut plus s’encombrer d’arguties juridiques”, *Huffington Post*, 26 July 2016, http://www.huffingtonpost.fr/2016/07/26/terrorisme-nicolas-sarkozy-droite-arguties-juridiques-etat-droit-saint-etienne-du-rouvray_n_11195290.html.

¹⁰⁹ Law n° 96-647 of 22 July 1996 aiming at strengthening the repression of terrorism (*Loi tendant à renforcer la répression du terrorisme et des atteintes aux personnes dépositaires de l’autorité publique ou chargées d’une mission de service public et comportant des dispositions relatives à la police judiciaire*), Article 12,
<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT00000367689&categorieLien=id>.

¹¹⁰ Article 25, Civil Code (*Code civil*),
https://www.legifrance.gouv.fr/affichCode.do?sessionId=401A8DCD56F988831EDA478E2B133379.tpdila21v_1?idSectionTA=LEGISCTA000006150513&cidTexte=LEGITEXT000006070721&dateTexte=20160829; English version:
https://www.legifrance.gouv.fr/content/download/7754/105592/version/4/file/Code_civil_20130701_EN.pdf.

¹¹¹ Draft Constitutional Law for the Protection of the Nation (*Projet de loi constitutionnelle de protection de la Nation*),
<http://www.assemblee-nationale.fr/14/projets/pl3381.asp>.

¹¹² K. Willsher, “Hollande drops plan to revoke citizenship of dual-national terrorists”, *The Guardian*, 30 March 2016,
<http://www.theguardian.com/world/2016/mar/30/francois-hollande-drops-plan-to-revoke-citizenship-of-dual-national-terrorist>.

¹¹³ C. Venaille, “Qui sont les derniers déchus de la nationalité française?”, *Rue89 – L’Obs*, 2 August 2010,
<http://rue89.nouvelobs.com/2010/08/02/qui-sont-les-derniers-dechus-de-la-nationalite-francaise-160799>.

and unsurprisingly was advised that it would constitute a flagrant violation of fundamental rights guaranteed by the Constitution and by international human rights law.¹¹⁴ Nonetheless, the idea persisted in political debates, with a number of politicians declaring in the weeks following the July 2016 attack in Nice that preventive administrative detention should be used, while expressly discarding rule of law principles.¹¹⁵ Such discourse, reminiscent of post-9/11, should be firmly rejected,¹¹⁶ and it should be insisted that “States must ensure that any measures taken to counter terrorism comply with all their obligations under international law” and that “respect for human rights, fundamental freedoms and the rule of law are complementary and mutually reinforcing with effective counter-terrorism measures, and are an essential part of a successful counter-terrorism effort”.¹¹⁷

3.3. The Netherlands

The Netherlands has also more recently engaged in the adoption of administrative measures against FFs. In August 2014, it adopted a Comprehensive Action Programme to Combat Jihadism, as part of which a number of administrative measures aimed at reducing the threat posed by FFs and terrorism have been strengthened or introduced.¹¹⁸

Regarding restrictions to travel, the Minister of the Interior has the authority to revoke or refuse the passport of an individual where there are sufficient grounds to believe that the person intends to commit acts abroad that will pose a threat to the Netherlands.¹¹⁹ Between December 2013 and April 2015, approximately 65 passports have been revoked, mostly of Dutch individuals suspected of intending to travel, and in three cases of FFs located abroad.¹²⁰ In situations where a Dutch national is subject to a passport revocation while abroad, the law provides that a temporary travel document, allowing only direct return to the Netherlands, can be issued.¹²¹ Furthermore, the Minister of Security and Justice can issue entry bans against non-EU foreigners constituting a threat to public order or national security and declare them as “undesirable foreign nationals”.¹²² Since March 2013, these measures were used against 15 individuals.¹²³ Finally, the Minister can declare EU foreigners constituting a

¹¹⁴ Conseil d’État, “Avis sur la constitutionnalité et la compatibilité avec les engagements internationaux de la France de certaines mesures de prévention du risque de terrorisme” (2015), No 390867.

¹¹⁵ A. Boudet, “Est-il vraiment impossible de placer les fichés S en centre de rétention?”, *Huffington Post*, 20 July 2016, http://www.huffingtonpost.fr/2016/07/20/fiche-s-centre-de-retention-pourquoi-impossible_n_11081222.html; “Nicolas Sarkozy veut un référendum sur le regroupement familial et l’internement des fichés S”, *LCI*, 7 October 2016, <http://www.lci.fr/politique/sur-france-2-nicolas-sarkozy-propose-des-referendums-sur-le-regroupement-familial-et-l-internement-des-fiches-s-2006652.html>.

¹¹⁶ M. Scheinin and M. Vermeulen, “Unilateral Exceptions to International Law: Systematic Legal Analysis and Critique of Doctrines That Seek to Deny or Reduce the Applicability of Human Rights Norms in the Fight against Terrorism”, *EUJ Working Papers LAW 2010/08*, 2010.

¹¹⁷ United Nations Security Council, “Resolution 2178”, *UN Doc S/RES/2178* (2014), Preamble.

¹¹⁸ The Netherlands Comprehensive Action Programme to Combat Jihadism: Overview of Measures and Actions (2014), https://english.nctv.nl/binaries/def-a5-nctvjihadismuk-03-lr_tcm32-83910.pdf.

¹¹⁹ Section 23, Passport Act (*Paspoortwet*), <http://wetten.overheid.nl/BWBR0005212/2014-03-09>.

¹²⁰ Letter of 7 April 2015 from the Minister of Security and Justice and the Minister of Social Affairs and Employment to the House of Representatives on the Progress of the Actionplan ‘The Netherlands Comprehensive Action Programme to Combat Jihadism’, *AVT15/JU115114A*, 2015, p. 2.

¹²¹ Section 46(2), Passport Act (*Paspoortwet*), <http://wetten.overheid.nl/BWBR0005212/2014-03-09>.

¹²² Articles 66a and 67, Aliens Act (*Vreemdelingenwet 2000*), <http://wetten.overheid.nl/BWBR0011823/2015-07-20>.

¹²³ Zevende voortgangsrapportage integrale aanpak jihadisme (2016), Bijlage 1, p. 4, point 5, <https://www.rijksoverheid.nl/documenten/rapporten/2016/11/14/bijlage-1-zevende-voortgangsrapportage-integrale-aanpak-jihadisme>.

threat as “undesirable foreign nationals” (resulting in expulsion),¹²⁴ and refuse or revoke the residence permit of non-EU citizens constituting a threat (resulting in expulsion).¹²⁵ Additional legislation on travel prevention is being debated, which would allow the Minister of Security and Justice to impose travel bans on individuals suspected of intending to travel for terrorism-related activity, with the particularity that the travel ban would apply only beyond the Schengen area.¹²⁶

Amongst other measures, the Netherlands is one of the country which uses termination of social welfare benefits as a measure against FFs. Under this measure, Dutch FFs located abroad are removed from municipal registries and as a result cannot receive any social benefits or allowances.¹²⁷ Between December 2013 and September 2016, this measure was used 98 times, against Dutch residents who allegedly travelled with “jihadists intentions” to Syria/Iraq.¹²⁸

The introduction of further restrictive administrative measures has been under discussion, with a draft legislative proposal of Temporary Law on Counterterrorism Administrative Measures proposed by the government in December 2015 and approved by the *Tweede Kamer* (House of Representatives) in May 2016,¹²⁹ but still under debate before the *Eerste Kamer* (Senate) at the time of writing of this paper. The new measures would allow the Minister of Security and Justice to impose measures restraining freedom of movement, such as a notification requirement, an area ban, or a restraining order, to any individual who “can be connected to terrorist activities or the support of such activities, based on the behaviour of that person”.¹³⁰ This draft law has been strongly criticised by human rights organisations as well as by the *Raad van State* (Council of State), for being based on too broad and unclear criteria which might not comply with the requirement of foreseeability, while imposing significant restriction on fundamental freedoms.¹³¹ Further criticisms of the proposal were brought by the Commissioner for Human Rights of the Council of Europe. He considered that the legislative proposal raised “major issues”, as it allows the imposition of serious restrictions to freedom of movement, based on provisions which are not sufficiently precise and “open to a very expansive interpretation”, and without prior judicial approval.¹³²

¹²⁴ Article 67, Aliens Act (*Vreemdelingenwet 2000*), <http://wetten.overheid.nl/BWBR0011823/2015-07-20>; Besluit van de Minister voor Immigratie, Integratie en Asiel van 27 januari 2012, WBV 2012/1, houdende wijziging van de Vreemdelingen-circulaire 2000, <https://zoek.officielebekendmakingen.nl/stcrt-2012-2570.html>.

¹²⁵ Articles 16–22, Aliens Act (*Vreemdelingenwet 2000*), <http://wetten.overheid.nl/BWBR0011823/2015-07-20>.

¹²⁶ Article 3, Proposal of Temporary Law on Counterterrorism Administrative Measures (*Tijdelijke wet bestuurlijke maatregelen terrorismebestrijding*),

<https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/kamerstukken/2015/03/17/wetsvoorstel-tijdelijke-wet-bestuurlijke-maatregelen-terrorisbestrijding/getcontent.pdf>.

¹²⁷ “The Netherlands Comprehensive Action Programme to Combat Jihadism: Overview of Measures and Actions” (2014), p. 7. Other countries using this type of measure include Belgium and Australia.

¹²⁸ Zevende voortgangsrapportage integrale aanpak jihadisme (2016), Bijlage 1, p. 6, point 9,

<https://www.rijksoverheid.nl/documenten/rapporten/2016/11/14/bijlage-1-zevende-voortgangsrapportage-integrale-aanpak-jihadisme>.

¹²⁹ Government of The Netherlands, “Dutch House of Representatives Approves Administrative Counterterrorist Measures” (2016), <https://www.government.nl/latest/news/2016/05/17/dutch-house-of-representatives-approves-administrative-counterterrorist-measures>.

¹³⁰ Article 2, Proposal of Temporary Law on Counterterrorism Administrative Measures (*Tijdelijke wet bestuurlijke maatregelen terrorismebestrijding*),

<https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/kamerstukken/2015/03/17/wetsvoorstel-tijdelijke-wet-bestuurlijke-maatregelen-terrorisbestrijding/getcontent.pdf>.

¹³¹ College voor de Rechten van de Mens, “Recommendations Temporary Administrative (Counterterrorism) Measures Act – Summary” (2015), <https://mensenrechten.nl/publicaties/detail/35933>; Raad van State, “Samenvatting advies wetsvoorstel bestuurlijke maatregelen terrorismebestrijding”, 28 October 2015, <https://www.raadvanstate.nl/adviezen/samenvattingen/tekst-samenvatting.html?id=358>.

¹³² Letter from the Council of Europe Commissioner for Human Rights, Nils Muižnieks, to Ronald Plasterk, Minister of the Interior and Kingdom Relations of the Netherlands, and Ard Van Der Steur, Minister of Security and Justice of the

Furthermore, as in other countries, one of the most problematic aspects of the use of administrative measures is that they are decided on the basis of intelligence materials treated as confidential and therefore not communicated to the person involved.¹³³ The government has put forward that,¹³⁴ under Dutch administrative law, the use of confidential evidence must be approved by a judge, and is subject to the consent of the individual seeking the review of a measure.¹³⁵ However, in practice, an individual who opposes the use of secret evidence will be considered to have denied the judge the opportunity to fully review the measure and to have to bear the consequences of his refusal.¹³⁶

Finally, the Netherlands uses citizenship as a counter-terrorism tool. Under current law, citizenship revocation is possible for dual citizens convicted of certain terrorism offences, including since March 2016 when convicted for the commission of preparatory acts in relation to terrorist activities under Article 134a of the Criminal Code.¹³⁷ In December 2015, the Government introduced a legislative proposal aiming at further expanding citizenship deprivation to citizens located abroad and having allegedly joined one of the terrorist organisations placed on a list established by the Minister of Security and Justice, without any requirement for the individual to have been subject to a criminal conviction or investigation.¹³⁸ The draft law has been the source of debates that are still ongoing at the time of writing of this paper. Part of the debate has revolved around the possible discriminatory effect of the provisions, under which dual nationals are made “second-class citizens” subject to stricter measures than individuals with a single nationality.¹³⁹ In addition, considering that half of the Dutch nationals who have a second citizenship hold a Moroccan or a Turkish nationality,¹⁴⁰ citizenship revocation could be perceived as a discriminatory tool targeting a specific

Netherlands concerning three bills on counter-terrorism measures, 2 November 2016, CommDH(2016)40, pp. 1–2, [https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CommDH\(2016\)40](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CommDH(2016)40).

¹³³ Nederlands Juristen Comité voor de Mensenrechten (NJCM), “Terrorism, Counter-Terrorism Measures and Human Rights in the Netherlands Background Briefing on the Occasion of the ICJ Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights Brussels, 2-4 July 2007” (2007), p. 11.

¹³⁴ Explanatory Memorandum, Proposal of Temporary Law on Counterterrorism Administrative Measures (*Memorie van toelichting, Tijdelijke wet bestuurlijke maatregelen terrorismebestrijding*), p. 30,

https://www.eerstekamer.nl/behandeling/20151207/memorie_van_toelichting_3/info; Reply by the Dutch authorities to the letter of the Council of Europe Commissioner for Human Rights, Nils Muižnieks, concerning three bills on counter-terrorism measures, 25 November 2016, CommDH/GovRep(2016)25, p. 3, [https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CommDH/GovRep\(2016\)25](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CommDH/GovRep(2016)25).

¹³⁵ Article 8:29(5), General Administrative Act (*Algemene wet bestuursrecht*), <http://wetten.overheid.nl/BWBR0005537/2016-11-03>.

¹³⁶ Raad van State, 28 May 2008, ECLI:NL:RVS:2008:BD2648, para 2.4, <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RVS:2008:BD2648>.

¹³⁷ Article 14(2)(b), Netherlands Nationality Act (*Rijkswet op het Nederlanderschap*)

<http://wetten.overheid.nl/BWBR0003738/2016-03-31>. Article 134a Criminal Code provides: “Any person who intentionally obtains or attempts to obtain for himself or another person means or information for the commission of a terrorist offence or a serious offence for the preparation or facilitation of a terrorist offence, or gains knowledge or skills for that purpose or imparts this knowledge or these skills to another person, shall be liable to a term of imprisonment not exceeding eight years or a fine of the fifth category.” (non-official translation, http://www.ejtn.eu/PageFiles/6533/2014%20seminars/Omsenie/WetboekvanStrafrecht_ENG_PV.pdf).

¹³⁸ Proposal of Amendment to the Netherlands Nationality Act (*Wijziging van de Rijkswet op het Nederlanderschap in verband met het intrekken van het Nederlanderschap in het belang van de nationale veiligheid*),

https://www.eerstekamer.nl/behandeling/20160524/gewijzigd_voorstel_van_rijkswet; M. Zwanenburg, “Foreign Terrorist Fighters in Syria: Challenges of the ‘Sending’ State”, *International Law Studies* 92 (2016), p. 228, <http://stockton.usnwc.edu/ils/vol92/iss1/6>.

¹³⁹ B. de Hart and A.B. Terlouw, “Born here. Revocation and the automatic loss of Dutch nationality in case of terrorist activities”, in M. van den Brink, S. Burri, and J. Goldschmidt, eds., *Equality and human rights: nothing but trouble. Liber amicorum Titia Loenen* (SIM, 2015), p. 313; J. d’Oliveira, “Regering maakt Nederlander met dubbel paspoort tot tweederangsburger”, 9 April 2016, <http://www.volkskrant.nl/opinie/regering-maakt-nederlander-met-dubbel-paspoort-tot-tweederangsburger~a4278275/>.

¹⁴⁰ Centraal Bureau voor de Statistiek, “1.3 million people in the Netherlands hold dual citizenship” (2015), <https://www.cbs.nl/en-gb/news/2015/32/1-3-million-people-in-the-netherlands-hold-dual-citizenship>.

part of the population.¹⁴¹ Furthermore, the very broad scope of the measure has been criticised by the *Raad van State*, which considered that such a measure would be very drastic, and that it would have limited added value for the prevention of terrorism.¹⁴² In view of the experiences of the UK and France with the use of increasingly restrictive measures described above, it would be advisable for the Netherlands to very carefully consider the consequences of adopting the envisaged measures.

4. Critical Assessment of the Use of Administrative Measures against FFs

4.1. Between Prevention and Repression: Justifications for the Use of Administrative Measures against FFs

There are various reasons why administrative measures are increasingly relied on as part of counter-terrorism policies. On the one hand, administrative measures have been used as protective measures imposing limited restrictions in order to prevent the commission of terrorist offences and to reduce the terrorist threat within a country, but on the other hand, administrative measures in the counter-terrorism context are becoming more and more restrictive and seem to be used as a repressive tool which problematically circumvents the procedures and guarantees of criminal prosecution.¹⁴³

Traditionally, administrative measures have a rather preventive function, aiming at the protection of the public. In the counter-terrorism context, the reliance on administrative measures as preventive tools allows intervention at an earlier stage so as to preclude the occurrence of terrorist offences notably by disrupting terrorist activity. This can be seen as part of a general shift towards preemptive approaches to counter-terrorism¹⁴⁴ aimed at “predicting and preventing future risks (in order, at least, to minimise their consequences) rather than prosecuting past offences”¹⁴⁵ after the damage is caused.

For instance, a number of states rely on travel bans to prevent the travel abroad of potential FFs because they are seen as a better policy option than the criminal prosecution of individuals for attempting to travel to Syria. Indeed, travel bans can arguably be more effective in preventing travel than criminal measures, and can also leave more room for the concurrent application of effective deradicalisation strategies.¹⁴⁶ As noted in a UN Report, “the imposition of a travel ban [is] potentially

¹⁴¹ Letter from the Council of Europe Commissioner for Human Rights, Nils Muižnieks, to Ronald Plasterk, Minister of the Interior and Kingdom Relations of the Netherlands, and Ard Van Der Steur, Minister of Security and Justice of the Netherlands concerning three bills on counter-terrorism measures, 2 November 2016, CommDH(2016)40, p. 2, [https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CommDH\(2016\)40](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CommDH(2016)40).

¹⁴² Raad van State, “Samenvatting advies over intrekken van het Nederlandschap in het belang van de nationale veiligheid”, 17 November 2015, <https://www.raadvanstate.nl/adviezen/samenvattingen/tekst-samenvatting.html?id=355>.

¹⁴³ T. Ojanen, “Administrative Counter-Terrorism Measures – a Strategy to Circumvent Human Rights in the Fight against Terrorism?” (2013), pp. 251–52.

¹⁴⁴ M. De Goede, “The Politics of Preemption and the War on Terror in Europe”, *European Journal of International Relations* 14 (2008), pp.161–85, <http://ejt.sagepub.com/cgi/doi/10.1177/1354066107087764>.

¹⁴⁵ F. Galli, “The Freezing of Terrorists’ Assets: Preventive Purposes with a Punitive Effect” (2014), p. 43.

¹⁴⁶ S. Pietrasanta, “La Déradicalisation, Outil de Lutte Contre Le Terrorisme” (2015), <http://www.ladocumentationfrancaise.fr/rapports-publics/154000455/index.shtml>; C. Walker, “Foreign Terrorist Fighters and UK Counter Terrorism Laws Professor Emeritus”, p. 123 (Annex 2 – Guest Chapter, D. Anderson, “The Terrorism Acts in 2015 – Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006” (2016), <https://www.gov.uk/government/publications/the-terrorism-acts-in-2015>).

one of the most effective and simplest measures to combat the phenomenon of foreign terrorist fighters".¹⁴⁷ Echoing this trend towards the prevention rather than repression of FFs travel, the Council of the European Union issued in September 2016 a decision on "restrictive measures against ISIL", under which EU "Member States shall take the necessary measures to prevent the entry into, or transit through, their territories of persons [...] travelling or seeking to travel outside of the Union for the purpose of [...] the perpetration, planning, or preparation of, or participation in, terrorist acts [...] [or] seeking to travel into the Union for the same purpose."¹⁴⁸

Other measures, however, are more restrictive, if not outright repressive, and are often relied on as an alternative to prosecution allowing for the bypassing of constraints of criminal procedure. They are usually justified on the ground of the need to prevent terrorist acts, but impose significant restrictions to liberties which normally belong to the realm of criminal law. In this regard, the UN Counter-Terrorism Committee recommended that states "[u]tilize administrative measures [...] as preventive alternatives to prosecution [only] in cases in which it would not be appropriate to bring terrorism-related charges, while ensuring that such measures are employed in a manner compliant with applicable international human rights law and national legislation and are subject to effective review."¹⁴⁹

Yet, in practice, coercive measures such as control orders, TPIM orders, and house arrests are imposed on individuals without the procedural guarantees associated with criminal prosecution, including prior judicial review and a high standard of proof. Reliance on these measures is often linked to the possibility of applying measures on the ground of secret intelligence, which would not constitute sufficient evidence at a criminal trial.¹⁵⁰ Administrative measures are thus becoming an increasingly repressive tool used when it is suspected that an individual is involved in terrorist activities but there is not enough evidence to bring criminal charges.¹⁵¹

Furthermore, some administrative measures having an arguably limited effect on the prevention of terrorism appear to have been used as sanctions. For instance, the revocation of social benefits of departed FFs can with difficulty be seen as a measure of protection against terrorism, and in practice can result in a sanction affecting the relatives of targeted individuals.¹⁵² More strikingly, the use of deprivation of citizenship as a counter-terrorism tool appears difficult to justify. When used against FFs abroad, it is said to be a way to prevent further terrorist acts. However, the revocation of nationality is also clearly a sanction, and a particularly tough one. When used against citizens located in the country, it is implicitly the first step before the expulsion of the

¹⁴⁷ United Nations, "Bringing Terrorists to Justice: Challenges in Prosecutions Related to Foreign Terrorist Fighters" (2015), para. 29.

¹⁴⁸ Council Decision (CFSP) 2016/1693 of 20 September 2016 concerning restrictive measures against ISIL (Da'esh) and Al-Qaeda and persons, groups, undertakings and entities associated with them and repealing Common Position 2002/402/CFSP, Article 2(2).

¹⁴⁹ United Nations, "Implementation of Security Council Resolution 2178 (2014) by States Affected by Foreign Terrorist Fighters – Third Report", para. 155.

¹⁵⁰ T. Ojanen, "Administrative Counter-Terrorism Measures – a Strategy to Circumvent Human Rights in the Fight against Terrorism?" (2013).

¹⁵¹ D. Anderson, "Control Orders in 2011 – Final Report of the Independent Reviewer on the Prevention of Terrorism Act 2005" (2012), para. 2.19.

¹⁵² M. Daou, "Belgian Jihadists in Syria Stripped of Welfare Benefits", *France24*, 10 August 2013, <http://www.france24.com/en/20130819-belgian-jihadists-syria-stripped-welfare-payments-assad-antwerp>: "The action taken by the Flemish cities has also resulted, for example, in the suspension of 1,000-euro monthly welfare payments to the wife of one of the men, even though she still lives in Antwerp."

former citizen to another country with which he might have no real link.¹⁵³ As others have pointed out, the use of citizenship revocation as a counter-terrorism tool is problematic, as it leads to unequal treatment between the citizens of a country, which in turn can lead to perceived discrimination.¹⁵⁴ The author of this paper is quite critical of policies relying on deprivation of nationality, and adopts the view that this symbolic measure does not constitute an efficient tool against terrorism, and exemplifies a lack of global vision and answers to FFs, leading to “risk exportation”.¹⁵⁵ Indeed, the relinquishment and exclusion of individuals genuinely bound to a state on the ground of their involvement in terrorism is tantamount to buck-passing. States which use citizenship deprivation are in effect refusing to directly address the problem posed by these individuals, and attempt to shift responsibility for it to another state. In this regard, the decision of Canada to back track and repeal its 2014 legislation on citizenship revocation of convicted terrorists is laudable.¹⁵⁶

In conclusion, there is a need, when crafting administrative measures as part of counter-terrorism policies, to balance the protective and restrictive aspects of the measures, and to limit the use of administrative measures to situations where they are both effectively protective and not excessively restrictive. As formulated by David Anderson, “there is something unsettling about any system which allows the executive to impose intrusive measures on the individual, challengeable only by way of a closed material procedure and after significant delay. Accordingly, while some compromise of fairness may be justifiable in the interests of national security, it is essential that the use of this and similar powers should be kept to an absolute minimum.”¹⁵⁷

4.2. The Impact of the Use of Administrative Measures on the Protection of Human Rights

While some administrative measures might be justified as a matter of policy, they can nonetheless impose disproportionate restrictions on liberties and thereby result in human rights violations. It is important for policy-makers to bear in mind that, when using administrative measures, “[t]he balancing framework of international human rights is critical; interference with a person’s rights must be legitimate, necessary and proportionate. The failure of states to respect those rights and to apply the rule of law [...] is one of the factors contributing to increased radicalization.”¹⁵⁸

The protection of a number of human rights is at risk when administrative measures are applied. First, some administrative measures can lead to violations of substantive rights, including the right to freedom of movement, the right to liberty, and the right to private and family life. Furthermore, pursuant to the principle of non-refoulement, the application of measures involving the expulsion of individuals can result in indirect

¹⁵³ A. Macklin, “Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien”, *Queen’s Law Journal* 40 (2014), p. 7.

¹⁵⁴ B. de Hart and A.B. Terlouw, “Born here. Revocation and the automatic loss of Dutch nationality in case of terrorist activities”, in M. van den Brink, S. Burri, and J. Goldschmidt, eds., *Equality and human rights: nothing but trouble. Liber amicorum Titia Loenen* (SIM, 2015), pp. 305–332.

¹⁵⁵ 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” (2016), para. 3.6.

¹⁵⁶ T. Parry, “Liberals move to overhaul rules on revoking, granting citizenship”, *CBC News*, 25 February 2016, <http://www.cbc.ca/news/politics/john-mccallum-citizenship-act-repeal-bill-1.3463471>.

¹⁵⁷ D. Anderson, “Control Orders in 2011 – Final Report of the Independent Reviewer on the Prevention of Terrorism Act 2005” (2012), 7.

¹⁵⁸ United Nations, “Bringing Terrorists to Justice: Challenges in Prosecutions Related to Foreign Terrorist Fighters” (2015), para. 30.

violations of the right to life and the prohibition of torture. More generally, it can be questioned whether the procedures surrounding the application and review of most administrative measures are in line with the requirements of due process and fair trial.

Certain administrative measures, including travel bans and area restrictions, impose restrictions on the right to freedom of movement. While freedom of movement is guaranteed under Article 12 of the International Covenant on Civil and Political Rights¹⁵⁹ and Article 2 of the 4th Additional Protocol to the European Convention on Human Rights,¹⁶⁰ it is far from an absolute right. Yet, restrictions must be proportionate and “justified by reliable and credible information and anchored in law. Otherwise they may unreasonably infringe upon a person’s right to freedom of movement.”¹⁶¹

Depending on their intensity and modalities, other measures such as assigned residence can amount not only to restrictions on the freedom of movement but also to an actual deprivation of liberty in a de facto prison without bars. Indeed, when such measures are imposed with strict conditions involving prolonged curfews and regular reporting, it “may transform house arrest, which is a restrictive measure on the freedom to come and go from the home, into a loss of liberty”.¹⁶² In accordance with the fundamental human rights and rule of law principle under which no one shall be subjected to arbitrary detention, such measures restricting the right to liberty should only be applied to individuals against whom criminal charges have been brought.¹⁶³

The right to private and family life is affected by virtually every administrative measure described in this paper, which application often results in “upturned lives”.¹⁶⁴ Here again, whether human rights are adequately protected will depend on whether the modalities of a particular measure are necessary and proportionate. Some of the measures which can have a potentially very significant impact on private life include involuntary relocation under the UK’s TPIMs, and strict house arrest in France where work and family life cannot be pursued. Deprivation of citizenship can also disproportionality affect the right to private and family life when applied to individuals having very precarious links to the state of their other nationality.¹⁶⁵

Moreover, administrative measures involving expulsion from the territory of foreigners or former citizens can lead to indirect violations of human rights obligations when an individual is at risk of being mistreated in the country to which he is sent. Under the principle of non-refoulement, states are prohibited from deporting an individual to a

¹⁵⁹ 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence; 2. Everyone shall be free to leave any country, including his own; 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant; 4. No one shall be arbitrarily deprived of the right to enter his own country.

¹⁶⁰ 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.; 2. Everyone shall be free to leave any country, including his own.; 3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.; 4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

¹⁶¹ United Nations, “Bringing Terrorists to Justice: Challenges in Prosecutions Related to Foreign Terrorist Fighters” (2015), para. 30.

¹⁶² CNCDH, “Statement of Opinion on the State of Emergency” (2016), para. 11.

¹⁶³ Article 9, International Covenant on Civil and Political Rights; Article 5, European Convention on Human Rights.

¹⁶⁴ Amnesty International, “Upturned Lives: The Disproportionate Impact of France’s State of Emergency” (2016).

¹⁶⁵ House of Lords and House of Commons Joint Committee on Human Rights, “Legislative Scrutiny: Immigration Bill, Second Report” (2014), para. 40.

country where his human rights are at risks.¹⁶⁶ As a result, convicted or suspected terrorists stripped of their nationality are often left in a limbo where they cannot be deported but cannot either claim lawful residency in the country which revoked their nationality.

Apart from risks of violation of substantive rights, some of the most recurrent criticisms against the use of administrative measures in counter-terrorism revolve around the limited procedural guarantees available, which are not always commensurate to the degree of restriction imposed by a measure and can result in violations of the right to a fair trial.¹⁶⁷ Most administrative measures can be reviewed by a court, however the standards are much lower than in criminal procedures. In general, administrative measures are only reviewed after they have been imposed, only upon request of the affected individual, and evidence is reviewed with a certain degree of discretion, according to a flexible standard such as the balance of probabilities.¹⁶⁸ Administrative procedures are not based on principles such as the presumption of innocence, and are intrinsically asymmetrical.¹⁶⁹ Further issues of due process arise when, as done in the UK and in the Netherlands, measures against return are imposed in absentia to FFs located abroad who cannot challenge the measures.¹⁷⁰

Moreover, due to the lower standards of review, administrative measures can usually be imposed on the basis of secret evidence collected by intelligence services and not disclosed to the affected individual, making it practically impossible to effectively challenge the measures.¹⁷¹ The Special Advocate procedure developed in the UK attempts to address this challenge, but in practice the procedure does not seem to provide effective fairness guarantees.¹⁷² It is understandable that individual rights have to be balanced with requirements of national security, however the use of administrative measures and procedures becomes problematic when states make use of lower standards to impose highly restrictive measures while circumventing the guarantees of criminal procedure. When the measure is disproportionately restrictive, this can lead to violations of the right to a fair trial.

This overview of the numerous risks of direct or indirect violation of substantive and procedural human rights when applying administrative measures against FFs

¹⁶⁶ F. de Londras, "Saadi v Italy: European Court of Human Rights Reasserts the Absolute Prohibition on Refoulement in Terrorism Extradition Cases", *ASIL Insights* 12, no. 9 (2008), <https://www.asil.org/insights/volume/12/issue/9/saadi-v-italy-european-court-human-rights-reasserts-absolute-prohibition>; C. Michaelsen, "The Renaissance of Non-Refoulement? The Othman (Abu Qatada) Decision of the European Court of Human Rights", *International and Comparative Law Quarterly* 61, no. 3 (2012), pp. 750–65; V. M. Padmanabhan, "To Transfer or Not to Transfer: Identifying and Protecting Relevant Human Rights Interests in Non-Refoulement", *Fordham Law Review* 80 (2012).

¹⁶⁷ Nederlands Juristen Comité voor de Mensenrechten (NJCM), "Terrorism, Counter-Terrorism Measures and Human Rights in the Netherlands" (2007), p. 11; D. Anderson, "Control Orders in 2011 – Final Report of the Independent Reviewer on the Prevention of Terrorism Act 2005" (2012), para. 3.75.

¹⁶⁸ T. Ojanen, "Administrative Counter-Terrorism Measures – a Strategy to Circumvent Human Rights in the Fight against Terrorism?" (2013); Nederlands Juristen Comité voor de Mensenrechten (NJCM), "Terrorism, Counter-Terrorism Measures and Human Rights in the Netherlands" (2007); P. Garant, "La preuve devant les tribunaux administratifs et quasi judiciaires", *Les Cahiers de Droit* 21 (1980), p. 825; W. H. Kuehnle, "Standards of Evidence in Administrative Proceedings", *New York Law School Law Review* 49 (2005), p. 831.

¹⁶⁹ T. Ojanen, "Administrative Counter-Terrorism Measures – a Strategy to Circumvent Human Rights in the Fight against Terrorism?" (2013), p. 253.

¹⁷⁰ House of Lords and House of Commons Joint Committee on Human Rights, "Legislative Scrutiny: Immigration Bill (Second Report)", para. 17.

¹⁷¹ T. Ojanen, "Administrative Counter-Terrorism Measures – a Strategy to Circumvent Human Rights in the Fight against Terrorism?" (2013); United Nations, "Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism" (2016).

¹⁷² "Justice and Security Green Paper, Response to Consultation from Special Advocates" (2011), <https://adam1cor.files.wordpress.com/2012/01/js-green-paper-sas-response-16-12-11-copy.pdf>, para. 15.

demonstrates that there is a need for safeguards to ensure protection for human rights.

5. Conclusions and Recommendations: The Need for Limits and Safeguards

Administrative measures are not inherently undesirable, and searching for new tools to effectively address the threat posed by FFs as part of broader coherent counter-terrorism strategies is legitimate. However, this paper demonstrated that their use raises serious concerns for human rights and the rule of law, and highlighted the crucial need for limits and safeguards in using administrative measures in the counter-terrorism context.

First, limits need to be put on the use of administrative measures in counter-terrorism. Limits involve the types of situations in which administrative measures are used, as well as the types of methods used. Regarding the types of situations, administrative measures should be used only when they are both effective in protecting from terrorism and not excessively restrictive. They should not be used as a tool to bypass the constraints of criminal law. In terms of methods, administrative measures should be limited to measures which respect fundamental freedoms. In this regard, measures amounting to deprivation of liberty are unacceptable.

Second, when administrative measures are used, safeguards must be put in place to ensure that human rights are adequately protected. Monitoring mechanisms are useful, but only if the executive takes full account of the concerns raised. Besides, judicial safeguards must be able to effectively review the measures and address possible human rights violations.

In order to provide limits to and safeguards in the use of administrative measures, the author of this paper suggests the following concrete recommendations:

1. Ensure the compatibility with human rights obligations of any legislative project addressing FFs, so as to preempt future human rights issues. If the review of the conformity of new legislation with constitutional or international obligations is not automatic, request a review.
2. Limit the use of administrative measures to situations where they are both effectively protective and not excessively restrictive. Do not use administrative measures as a way to circumvent the guarantees of criminal procedure. Do not use administrative measures when seeking to impose highly restrictive measures.
3. Set up monitoring and oversight mechanisms to control the use of administrative measures in practice. Take full account of their reports as well as those of human rights organisations.
4. Apply measures in a proportionate and individualised manner, so as to safeguard the right to private and family life

5. Provide procedures to address the handling of secret evidence and allow affected individuals to effectively challenge measures.
6. Set up evaluation mechanisms to assess the efficacy and downfalls of current and envisaged measures
7. Reflect on more global approaches to the fight against FFs and terrorism. Refrain from adopting measures based solely on national considerations.

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Administrative Measures against Foreign Fighters: In Search of Limits and Safeguards

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