

# Repressing the Foreign Fighters Phenomenon and Terrorism in Western Europe:

## Towards an Effective Response Based on Human Rights

This Research Paper explores how the foreign fighters phenomenon and terrorism more generally is repressed in Western Europe. It looks at a few specific repressive measures announced or adopted by France and the Netherlands, as well as criticism expressed against these proposals and measures. In addition to these two detailed analyses, references will also be made to other developments in Western Europe which appear to be indicative of a more general trend in which human rights increasingly seem to be put on the back seat when countering the phenomenon of foreign fighters and terrorism more generally. In the final section, a number of concluding thoughts and recommendations will be offered which explain why only a response based on human rights will be effective in countering this global problem in the long run.

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# About the Author

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## About ICCT

The International Centre for Counter-Terrorism – The Hague (ICCT) is an independent think and do tank providing multidisciplinary policy advice and practical, solution-oriented implementation support on prevention and the rule of law, two vital pillars of effective counter-terrorism. ICCT's work focuses on themes at the intersection of countering violent extremism and criminal justice sector responses, as well as human rights related aspects of counter-terrorism. The major project areas concern countering violent extremism, rule of law, foreign fighters, country and regional analysis, rehabilitation, civil society engagement and victims' voices. Functioning as a nucleus within the international counter-terrorism network, ICCT connects experts, policymakers, civil society actors and practitioners from different fields by providing a platform for productive collaboration, practical analysis, and exchange of experiences and expertise, with the ultimate aim of identifying innovative and comprehensive approaches to preventing and countering terrorism.

# 1. Introduction

The foreign fighters phenomenon has become mainstream; whereas a few years ago, it was still predominantly the domain of a limited number of people, such as intelligence analysts, police officers and researchers, the security risk of (returning) foreign fighters is now clearly visible to the general public. It is explained and discussed in TV shows and in newspapers around the world, and not only in places which have witnessed actual attacks, such as Ankara, Beirut, Brussels, Istanbul, Paris, Sana'a, Sharm el Sheikh, Sousse and Tunis, to name just a few well-known examples. In addition to those people who have actually been in foreign conflicts, especially the one in Syria/Iraq, there are foreign fighter wannabes: persons who have not joined organisations like the so-called Islamic State (IS) themselves, but who are instructed or at least inspired by their actions and objectives. This risk already became visible with the attacks in Copenhagen, Saint Jean sur Richelieu, Ottawa and San Bernardino, but especially in the first half of 2016, with attacks taking place in Ansbach, Jakarta, Nice, Orlando, Saint-Etienne-du-Rouvray and Würzburg, it became clear that the phenomenon of foreign fighters (wannabes) has become truly mainstream as well as increasingly complex.

After a very brief introduction to the phenomenon itself (Section 2), this paper will turn to responses that have been announced and taken to tackle the problem of foreign fighters and terrorism more generally in Western Europe itself. Subsequently, human rights criticism towards these (proposed) measures will be outlined (Section 3). Two countries will be discussed in detail: France, the 'cradle of human rights',<sup>1</sup> and the Netherlands, home to The Hague, the International City of Peace and Justice. In addition to these two countries, references will also be made to other developments in Western Europe which appear to be indicative of a more general trend in which human rights increasingly seem to be put on the back seat when countering the phenomenon of foreign fighters and terrorism more generally. In the final section (Section 4), a number of concluding thoughts and recommendations will be offered.

## 2. The Foreign Fighters Phenomenon

Foreign fighters can be defined as "individuals, driven mainly by ideology, religion and/or kinship, who leave their country of origin or their country of habitual residence to join a party engaged in an armed conflict".<sup>2</sup> However, often, the foreign fighter issue is looked at from a (limited) counter-terrorism perspective only. In those cases, the object is not foreign fighters as such, but foreign *terrorist* fighters. This term has been defined in several ways. The most authoritative,<sup>3</sup> but still problematic,<sup>4</sup> definition stems

<sup>1</sup> See e.g. "Day to commemorate the abolition of human trafficking and slavery – Speech by Nicolas Sarkozy, President of the Republic (excerpts)", 10 May 2011, <http://www.ambafrance-uk.org/President-Sarkozy-commemorates-the>.

<sup>2</sup> A. de Guttry, F. Capone and C. Paulussen, "Introduction", in A. de Guttry, F. Capone and C. Paulussen, eds., *Foreign Fighters under International Law and Beyond* (The Hague: T.M.C. Asser Press/Springer Verlag, 2016), p. 2.

<sup>3</sup> Another version can be found in the Global Counterterrorism Forum's "The Hague – Marrakech Memorandum on Good Practices for a More Effective Response to the FTF Phenomenon": "[I]ndividuals who travel abroad to a State other than their States of residence or nationality to engage in, undertake, plan, prepare, carry out or otherwise support terrorist activity or to provide or receive training to do so (often labeled as "terrorist training")", [https://www.thegctf.org/documents/10162/140201/14Sept19\\_The+Hague-Marrakech+FTF+Memorandum.pdf](https://www.thegctf.org/documents/10162/140201/14Sept19_The+Hague-Marrakech+FTF+Memorandum.pdf).

<sup>4</sup> See Council of Europe, Parliamentary Assembly, Committee on Political Affairs and Democracy, "Foreign fighters in Syria and Iraq", Doc. 13937, 8 January 2016, paras. 17-22, <http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbmQvbnNvZS5uZXQvWHNsdC9QZGYvWFJlZi1XRC1BVC1P2ZpbGVpZD0yMjMwNCZsYW5nPUVO&xsl=aHR0cDovL3NlbnRlbnR1bWVudGljZGFjZS5uZXQvWHNsdC9QZGYvWFJlZi1XRC1BVC1>

from UN Security Council Resolution 2178, which refers to “individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict”.<sup>5</sup> Although foreign fighters are currently active in conflicts such as those in Ukraine, Libya, Egypt, Somalia, and Yemen, most of today’s foreign fighters have joined the battlefields in Syria/Iraq. Bakker and Singleton, basing themselves on the then latest estimates published in early 2015, arrived at “a total number of more than 30,000 foreign fighters of all sorts for the entire conflict in Syria and Iraq since 2011”.<sup>6</sup> At the same time, it should be noted that probably not all of these are proper fighters. Schmid, in his October 2015 ICCT Policy Brief, correctly pointed to the fact that some of them are women with children.<sup>7</sup> He concluded that “[w]e can be reasonably sure that [...] [t]here are at least 25,000 foreign and perhaps as many as 30,000 insurgent fighters in Syria and Iraq with IS”.<sup>8</sup>

While not downplaying the importance of having a clear idea of the exact scope of this problem, the importance of numbers is relative, for we have already seen that only a few foreign fighters – or copy-cats at home inspired by the jihad abroad – can stage a successful attack. However, with IS suffering losses and territory in the Middle-East and North Africa, the threat of terrorist attacks may even become more serious in the future.<sup>9</sup>

### 3. Proposals, Responses and Criticism

In response to the foreign fighters phenomenon, and especially after specific terrorist attacks, politicians have adopted or announced various new laws and measures. These could be divided into ‘soft’, preventive measures, such as inter-cultural and inter-religious dialogue, engagement with Islamic communities and the use of counter-narratives/messages, and ‘hard’, repressive measures, such as the deprivation of nationality and criminal prosecutions.<sup>10</sup> The current author has argued elsewhere that of those two options, only preventive measures tackle the underlying causes of the problem, and therefore do more than just fighting symptoms. Consequently, the author asserted that it would be advisable if these preventive measures are the focus

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YUWwyJERGLnhzbA==&xsltparams=ZmlsZWlkaWkPTIyMzA0. (The explanatory memorandum (part C of the report) is largely based on the background study prepared by the author of the current ICCT paper, see the explanatory memorandum, para. 5.)

<sup>5</sup> UN Security Council Resolution 2178, S/RES/2178 (2014), 24 September 2014, [http://www.un.org/en/sc/ctc/docs/2015/SCR%202178\\_2014\\_EN.pdf](http://www.un.org/en/sc/ctc/docs/2015/SCR%202178_2014_EN.pdf).

<sup>6</sup> E. Bakker and M. Singleton, “Foreign Fighters in the Syria and Iraq Conflict: Statistics and Characteristics of a Rapidly Growing Phenomenon”, in A. de Guttery, F. Capone and C. Paulussen, eds., *Foreign Fighters under International Law and Beyond* (The Hague: T.M.C. Asser Press/Springer Verlag, 2016), p. 23.

<sup>7</sup> A.P. Schmid, “Foreign (Terrorist) Fighter Estimates: Conceptual and Data Issues”, *The International Centre for Counter-Terrorism – The Hague* 6, no. 4 (2015), <http://icct.nl/wp-content/uploads/2015/10/ICCT-Schmid-Foreign-Terrorist-Fighter-Estimates-Conceptual-and-Data-Issues-October20152.pdf>, p. 5.

<sup>8</sup> *Ibid.*, p. 14.

<sup>9</sup> In the words of J.M. Berger: “Isis has an apocalyptic world view, and such organisations can become even more violent when their prophetic expectations are disappointed [...] [...] Fighting an insurgency requires a lot more people than terrorism does. If the Isis state falls, especially to an outside invasion force, the short- to medium-term result will likely be a massive wave of terrorist attacks”. See E. Graham-Harrison, “Isis loss of ‘caliphate’ could fuel terror attacks abroad”, *The Guardian*, 22 November 2015, <http://www.theguardian.com/world/2015/nov/22/isis-loss-of-caliphate-fuel-terror-attacks-abroad>.

<sup>10</sup> This, of course, does not preclude some repressive measures also having a preventive dimension. In fact, one can see a trend in which criminal law is increasingly used as a preventive tool, with a stronger focus on the prosecution of preparatory acts. This will also be explained later in this paper. However, these kinds of examples are not viewed as ‘proper’ preventive measures seeking to remove the underlying causes of why people may engage in criminal conduct in the first place.

of states' policies.<sup>11</sup> This tallies with the general message defended also in this paper, namely that states should take a long-term perspective to this problem, looking at and trying to resolve the roots of the problem, rather than reacting to its manifestations. However, reality shows that short-term, repressive measures are still dominant.<sup>12</sup> This paper will look at a few specific *repressive* measures announced or adopted by states in Western Europe, namely France (3.1.) and the Netherlands (3.2.), as well as criticism expressed against these proposals and measures. The following pages can only address a small selection of measures, proposed or adopted by again only two countries. As such, the reader will not be provided with a comprehensive overview. However, that is also not the objective. The objective of the following pages is merely to describe in detail the development of a number of proposals and measures which have engendered human rights criticism and to show that even Western European countries with a generally well-established reputation in human rights protection should keep investing in those reputations. Finally, this paper illustrates that these kinds of measures and proposals may be indicative of a broader and thus more worrying trend that needs to be halted (3.3.).

### 3.1 France

France is the most troublesome country in Western Europe, when looking at absolute numbers of foreign fighters.<sup>13</sup> However, estimates differ. In January 2015, Peter Neumann, Director of the International Centre for the Study of Radicalisation and Political Violence (ICSR), wrote that 1,200 foreign fighters from France had joined Sunni militant organisations in the Syria/Iraq conflict,<sup>14</sup> whereas in April 2016, ICCT estimated "that more than 900 individuals had left France for Syria/Iraq by October 2015".<sup>15</sup>

France was also the country which witnessed "[t]he first violent attack that was linked to the recent growth of European jihadist foreign fighters",<sup>16</sup> namely the killing, in March 2012, of seven people in Toulouse and Montauban by Mohammed Merah, "a young Frenchman of Algerian origin who turned to Salafism in prison and who made two journeys to Afghanistan and Pakistan where he was allegedly trained by al Qaeda".<sup>17</sup>

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<sup>11</sup> See Council of Europe, "Foreign fighters in Syria and Iraq" (2016), explanatory memorandum, para. 52.

<sup>12</sup> *Ibid.*, para. 48. See also C. Paulussen and E. Entenmann, "National Responses in Select Western European Countries to the Foreign Fighter Phenomenon", in A. de Guttery, F. Capone and C. Paulussen, eds., *Foreign Fighters under International Law and Beyond* (The Hague: T.M.C. Asser Press/Springer Verlag, 2016), p. 420 and B. van Ginkel, E. Entenmann, B. Boutin, G. Chauzal, J. Dorsey, M. Jegerings, C. Paulussen, J. Pohl, A. Reed and S. Zavagli, "The Foreign Fighters Phenomenon in the European Union. Profiles, Threats & Policies", *The International Centre for Counter-Terrorism – The Hague* 7, no. 2 (2016), p. 65, <http://icct.nl/publication/report-the-foreign-fighters-phenomenon-in-the-eu-profiles-threats-policies/>.

<sup>13</sup> See C. Paulussen and E. Entenmann, "National Responses in Select Western European Countries" (2016), p. 400.

<sup>14</sup> See P.R. Neumann, "Foreign fighter total in Syria/Iraq now exceeds 20,000; surpasses Afghanistan conflict in the 1980s", ICSR, 26 January 2015, <http://icsr.info/2015/01/foreign-fighter-total-syriairaq-now-exceeds-20000-surpasses-afghanistan-conflict-1980s/>.

<sup>15</sup> B. van Ginkel et al., "The Foreign Fighters Phenomenon in the European Union" (2016), p. 31.

<sup>16</sup> E. Bakker and J. de Roy van Zuijdewijn, "Jihadist Foreign Fighter Phenomenon in Western Europe: A Low-Probability, High-Impact Threat", *The International Centre for Counter-Terrorism – The Hague* 6, no. 9 (2015), p.3, <http://icct.nl/wp-content/uploads/2015/11/ICCT-Bakker-DeRoyvanZuijdewijn-Jihadist-Foreign-Fighter-Phenomenon-in-Western-Europe-October2015.pdf>.

<sup>17</sup> E. Bakker, C. Paulussen and E. Entenmann, "Dealing with European Foreign Fighters in Syria: Governance Challenges and Legal Implications", *The International Centre for Counter-Terrorism – The Hague* 4, no. 8 (2013), p. 5, <http://www.icct.nl/download/file/ICCT-Bakker-Paulussen-Entenmann-Dealing-With-European-Foreign-Fighters-in-Syria.pdf>.

In the aftermath of this attack, the French government adopted a new counter-terrorism law,<sup>18</sup> which, among other things,<sup>19</sup> “step[ped] up sanctions against persons who are ‘guilty of justification of or incitement to terrorism on the internet’”.<sup>20</sup> Two years later, on 18 September 2014, the French National Assembly established the offence of terrorists acting alone (‘individual terrorist undertaking’ or *entreprise terroriste individuelle*), which aims “to enable the criminal justice system to intervene at the preparatory stage, even when a person is acting on his own and no criminal association between two or more persons is established”.<sup>21</sup> This offence criminalises the searching, obtaining or making, as part of this ‘individual terrorist undertaking’, of objects or substances to prepare a terrorist act.<sup>22</sup> It can be seen as an addition to the already-existing offence of ‘criminal association in relation to a terrorist undertaking’ (*association de malfaiteurs en relation avec une entreprise terroriste*), which enables the authorities to prosecute foreign terrorist fighters in the early stages of the commission of the crime, including before the threshold of an attempt to commit an act of terrorism has been crossed.<sup>23</sup> The offence of *association de malfaiteurs en relation avec une entreprise terroriste* was already criticised by Human Rights Watch back in 2008, when it noted:

The overly broad formulation of the association de malfaiteurs offense has led, in our view, to convictions based on weak or circumstantial evidence. As long as there is evidence that a number of individuals know each other, are in regular contact, and share religious and political convictions, there is considerable room for classifying a wide range of acts, by even the most peripheral character, as the “material actions” demonstrating participation in a terrorist undertaking.<sup>24</sup>

In 2014, Human Rights Watch was concerned that the addition of *entreprise terroriste individuelle* would lead to similar abuses<sup>25</sup> and in doing so, referred to the views of the French National Consultative Commission on Human Rights (CNCDH), which noted in its Opinion of September 2014<sup>26</sup> that the 2014 bill “would criminalize ‘the preparation of the preparation’ of the offense. The lack of clarity could lead to someone facing criminal charges for conduct the person could not know was unlawful. Such a provision would breach the principle of legality and the presumption of innocence under French and international law”.<sup>27</sup>

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<sup>18</sup> Law No. 2012-1432 of 21 December 2012 on security and action against terrorism, <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000026809719>.

<sup>19</sup> For more information, see C. Paulussen and E. Entenmann, “National Responses in Select Western European Countries” (2016), p. 400.

<sup>20</sup> See “Terrorism, Counter-terrorism in France”, France Diplomatie, <http://www.diplomatie.gouv.fr/en/french-foreign-policy-1/defence-security/terrorism/>.

<sup>21</sup> See UN Security Council, “Letter dated 18 February 2015 from the Chair of the Security Council Committee established pursuant to Resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council”, S/2015/123, 23 February 2015, Annex “Bringing terrorists to justice: challenges in prosecutions related to foreign terrorist fighters”, p. 6. [http://www.un.org/en/sc/ctc/docs/2015/S\\_2015\\_123\\_EN.pdf](http://www.un.org/en/sc/ctc/docs/2015/S_2015_123_EN.pdf).

<sup>22</sup> See Human Rights Watch, “France: Counterterrorism Bill Threatens Rights”, 10 October 2014, <https://www.hrw.org/news/2014/10/09/france-counterterrorism-bill-threatens-rights>.

<sup>23</sup> UN Security Council, “Letter dated 18 February 2015”, 23 February 2015, Annex “Bringing terrorists to justice”, p. 6.

<sup>24</sup> Human Rights Watch, “Preempting Justice. Counterterrorism Laws and Procedures in France”, 1 July 2008, <https://www.hrw.org/report/2008/07/01/preempting-justice/counterterrorism-laws-and-procedures-france>.

<sup>25</sup> Human Rights Watch, “France: Counterterrorism Bill Threatens Rights”, 10 October 2014, <https://www.hrw.org/news/2014/10/09/france-counterterrorism-bill-threatens-rights>.

<sup>26</sup> See Commission Nationale Consultative des Droits de l’Homme, “Avis sur le projet de loi renforçant les dispositions relatives à la lutte contre le terrorisme”, 25 September 2014, <http://www.cncdh.fr/fr/publications/avis-sur-le-projet-de-loi-renforçant-les-dispositions-relatives-la-lutte-contre-le->

<sup>27</sup> Human Rights Watch, “France: Counterterrorism Bill Threatens Rights” (2014).

In addition to this specific provision, Human Rights Watch, again referring to the French CNCDH, voiced various other concerns towards the 2014 bill which also includes a ban on leaving French soil, a ban on entering or staying in France (for non-resident foreigners representing a threat to national security), regulates the blocking of internet sites that incite or express support for terrorism and finally, introduces additional penalties for the offence of expressing support for or inciting terrorism.<sup>28</sup> For instance, it was argued that it “would allow the government to ban French nationals from leaving the country on very broad grounds that could breach their right to free movement under international human rights law”<sup>29</sup> – such as Article 12 of the International Covenant on Civil and Political Rights,<sup>30</sup> and that “in practice the decision to ban someone from leaving France would be based on ‘notes’ from intelligence agencies that may be secret and that the person concerned would not be able to challenge”.<sup>31</sup>

As to glorification and incitement of terrorism, Human Rights Watch stated, among other things, that “[t]hese terms are overly broad and can lead to breaches of the right to freedom of expression, capturing speech that has no direct causal link to a terrorist act”.<sup>32</sup> This would also be applicable to the online environment, where the government could block websites that incite or glorify terrorism without prior, independent judicial authorisation.<sup>33</sup> Human Rights Watch recognised that restrictions are possible under human rights law, but warned at the same time that measures must be necessary and proportionate<sup>34</sup> and that “[t]here is a real risk that this provision would deter free expression through a chilling effect, while being ineffective at addressing recruitment”,<sup>35</sup> a point confirmed<sup>36</sup> by the French Digital Council (*Conseil National du Numérique*), which advises the government on questions relating to the impact of digital technologies in economy and society.<sup>37</sup>

In general, it was concluded by Human Rights Watch that the measures in the bill “raise serious concerns because they significantly expand the government’s counterterrorism powers but are subject to vague and broad standards of evidence and insufficient due process safeguards [...]. The result would be restrictions on fundamental rights to an extent wholly unnecessary and disproportionate to the purported aim of the measures”.<sup>38</sup>

<sup>28</sup> See Embassy of France in London, “Interior Minister explains how France is confronting terrorism”, 19 February 2015, <http://www.ambafrance-uk.org/Interior-Minister-explains-how>.

<sup>29</sup> Human Rights Watch, “France: Counterterrorism Bill Threatens Rights” (2014). In this context, Human Rights Watch referred to Article 1 of the Bill, pursuant to which “the interior minister could bar people from leaving France if there are ‘serious reasons to believe’ they are planning to go abroad with the aim of ‘participating in terrorist activities, war crimes or crimes against humanity’ or if authorities suspect they are traveling to a place where terrorist groups operate and in conditions conducive to their posing a threat to public safety upon their return to France”.

<sup>30</sup> This article states: “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”.

<sup>31</sup> Human Rights Watch, “France: Counterterrorism Bill Threatens Rights” (2014).

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

<sup>34</sup> For more information on the various elements, see B. Van Ginkel, “Incitement to Terrorism: A Matter of Prevention or Repression?”, *The International Centre for Counter-Terrorism – The Hague* 2, no. 6 (2011), <https://www.icct.nl/download/file/ICCT-Van-Ginkel-Incitement-To-Terrorism-August-2011.pdf>.

<sup>35</sup> Human Rights Watch, “France: Counterterrorism Bill Threatens Rights” (2014).

<sup>36</sup> *Ibid.*

<sup>37</sup> The website of the Council is available at: <http://www.cnumerique.fr/en/french-digital-council/>.

<sup>38</sup> Human Rights Watch, “France: Counterterrorism Bill Threatens Rights” (2014).

Notwithstanding this criticism, on 4 November 2014, the French Senate adopted the (slightly amended)<sup>39</sup> bill, termed ‘loi Cazeneuve’, which was promulgated on 13 November 2014.<sup>40</sup>

After the attacks in January 2015,<sup>41</sup> an even tougher stance was taken, with French Prime Minister Valls indicating that France was “at war” with terrorism, jihadism and radical Islamism<sup>42</sup> and announcing new measures.<sup>43</sup> Between January and November 2015, 87 websites were blocked, and about 700 individuals prosecuted for inciting or justifying terrorism.<sup>44</sup> These arrests were severely criticised, with Amnesty International asserting that “in many cases authorities prosecuted individuals for statements that did not constitute incitement to violence and fell within the scope of legitimate exercise of freedom of expression”.<sup>45</sup>

In July 2015, a law was passed that empowers the Prime Minister to authorise the use of surveillance measures on national territory, without independent judicial oversight,<sup>46</sup> and that allows for mass surveillance techniques in the fight against terrorism.<sup>47</sup> In November, a similar law was adopted, this time with respect to electronic communications sent to – or received from – abroad.<sup>48</sup> Here, concerns were raised that these measures “could breach the rights to privacy and to free expression by authorizing surveillance on a mass scale, on overly broad and vague grounds in the absence of adequate oversight”.<sup>49</sup>

Vasiliki Chalkiadaki from the Max Planck Institute for Foreign and International Criminal Law has carried out a detailed analysis of the impact that the January 2015 attacks has had on France’s counter-terrorism legislation. She observed that “in a very short time, France has engaged in a legislative fever, aiming to boost—once more—the capacities

<sup>39</sup> For instance, the new version of the law criminalised the “possessing, searching, obtaining or making” (*détenir, de rechercher, de se procurer ou de fabriquer*) as part of an “individual terrorist undertaking” objects or substances, whereas the old version of the law spoke about “searching, obtaining or making” only.

<sup>40</sup> See C. Paulussen and E. Entenmann, “National Responses in Select Western European Countries” (2016), p. 402. The law (No. 2014-1353) is available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029754374&dateTexte=20160414>.

<sup>41</sup> The following has been largely taken from C. Paulussen and E. Entenmann, “National Responses in Select Western European Countries” (2016), pp. 404-405.

<sup>42</sup> See K. Calamur, “France ‘At War With Jihadism And Radical Islamism,’ Prime Minister Says”, *NPR*, 13 January 2015, <http://www.npr.org/sections/thetwo-way/2015/01/13/377020079/france-at-war-with-jihadism-and-radical-islamism-prime-minister-says>.

<sup>43</sup> Amnesty International, “France: Newly announced ‘anti-terror measures’ put human rights at risk”, 23 January 2015, [http://www.amnesty.eu/content/assets/public\\_statements/France\\_Newly\\_announced\\_anti-terror\\_measures\\_put\\_human\\_rights\\_at\\_risk.pdf](http://www.amnesty.eu/content/assets/public_statements/France_Newly_announced_anti-terror_measures_put_human_rights_at_risk.pdf).

<sup>44</sup> Amnesty International, “Amnesty International Report 2015/16: The State of the World’s Human Rights”, 23 February 2016, p. 159, <https://www.amnesty.org/download/Documents/POL1025522016ENGLISH.PDF>.

<sup>45</sup> *Ibid.* See also D. Carvajal and A. Cowelljan, “French Rein In Speech Backing Acts of Terror”, *The New York Times*, 15 January 2015, <http://www.nytimes.com/2015/01/16/world/europe/french-rein-in-speech-backing-acts-of-terror.html>; I. Leghtas, “Dispatches: France, a Country of Freedom of Expression – For Some”, *Human Rights Watch*, 16 January 2015, <https://www.hrw.org/news/2015/01/16/dispatches-france-country-freedom-expression-some>.

<sup>46</sup> The Prime Minister only has to consult with a new executive advisory body – the National Control Commission on Intelligence Techniques (Commission nationale de contrôle des techniques de renseignement, CNCTR) but is not required to follow its advice. See for more information: Human Rights Watch, “France: Bill Opens Door to Surveillance Society”, 6 April 2015, <https://www.hrw.org/news/2015/04/06/france-bill-opens-door-surveillance-society>: “And even that consultation would be waived for real-time surveillance if there is a “very high risk” that the surveillance could not be conducted later. The bill contains no requirement for judicial review of surveillance measures before they are put into effect, unless a majority of the nine appointed members of this commission disagree with the prime minister’s decision. In those rare cases, the matter would be referred to the State Council, France’s highest court for administrative justice, for review. In contrast, it takes only one commission member to approve a measure, and if the commission is silent during a brief 24-72-hour review period, the measure could go into effect”.

<sup>47</sup> Amnesty International, “Amnesty International Report 2015/16:” (2016), p. 159.

<sup>48</sup> *Ibid.*

<sup>49</sup> See Human Rights Watch, “Human Rights Watch Concerns and Recommendations on France. Submitted to the UN Human Rights Committee in advance of its Review of France”, June 2015, p. 8, [https://www.hrw.org/sites/default/files/supporting\\_resources/hrw-recommendations-on-france-june2015-en.pdf](https://www.hrw.org/sites/default/files/supporting_resources/hrw-recommendations-on-france-june2015-en.pdf).



of the criminal justice system and the law enforcement agencies in the prevention of terrorist attacks".<sup>50</sup> She concluded that "[i]t remains to be seen whether this scheme of practically turning post-Charlie France into post-9/11 US will be the right approach or not, in terms of ensuring effectivity, fairness, and respect for human dignity in the criminal justice administration".<sup>51</sup>

The attacks of 13 November 2015 brought new challenges to France. Again, the climate hardened, with Alexis Brezet, the Editor-in-Chief of *Le Figaro*, writing an editorial entitled 'Gagner la guerre' ('To win the war'), in which he seemed to suggest pushing away legal guarantees for 'the greater good': "Security, justice, diplomacy, immigration controls: we have to review all of this if we want to meet this threat. Without being further hindered by legal quibbles or preachy affectations".<sup>52</sup> Wise warnings not to overreact were expressed,<sup>53</sup> but as will be shown later, these fell on deaf ears. Moreover, the day after the attacks, a state of emergency was declared,<sup>54</sup> which, as has been noted elsewhere by the current author,<sup>55</sup> is problematic in both its provisions and its practical application. Under this state of emergency, a number of measures were introduced which deviate from the ordinary criminal law regime, such as "house searches without a warrant, forced residency and the power to dissolve associations or groups broadly described as participating in acts that breach public order. Under the law, pre-judicial authorization for these measures was not required".<sup>56</sup> Within the first two weeks after the attacks, the police carried out 2,029 house searches and 296 individuals were the object of forced residency.<sup>57</sup> Although the regime intends to partly derogate from human rights obligations on the ground of public emergency,<sup>58</sup> many of its measures have been severely criticised. According to Amnesty International, for instance,

[s]everal Muslim individuals were targeted for house searches or forced residency on the basis of vague criteria, including religious practices deemed by the authorities to be "radical", and thus constituting a threat to public order or national security. The police also searched mosques and other Muslim prayer spaces, and in some instances shut them down.<sup>59</sup>

This criticism was shared by Human Rights Watch, which concluded that "France has carried out abusive and discriminatory raids and house arrests against Muslims under its sweeping new state of emergency law. The measures have created economic hardship, stigmatized those targeted, and have traumatized children".<sup>60</sup> In December,

<sup>50</sup> V. Chalkiadaki, "The French 'War on Terror' in the post-Charlie Hebdo Era", *The European Criminal Law Associations' Forum (Eucrium)* 1, no. 1 (2015), pp. 26-32, p. 31, [https://eucrium.mpicc.de/archiv/eucrium\\_15-01.pdf](https://eucrium.mpicc.de/archiv/eucrium_15-01.pdf).

<sup>51</sup> *Ibid.*

<sup>52</sup> A. Brezet, "Gagner la guerre", *Le Figaro*, 14 November 2015, <http://www.lefigaro.fr/vox/societe/2015/11/14/31003-20151114ARTFIG00247-gagner-la-guerre.php>. The original French text reads as follows: "Sécurité, justice, diplomatie, contrôle de l'immigration: c'est tout cela qu'il faut revoir si nous voulons répondre à la menace. Sans nous embarrasser davantage d'arguties juridiques ou d'afféteries moralisatrices".

<sup>53</sup> See e.g. J. Shapiro, "How Not to Overreact to ISIS", *Slate*, 16 November 2015, [http://www.slate.com/articles/news\\_and\\_politics/foreigners/2015/11/how\\_not\\_to\\_overreact\\_to\\_isis.html](http://www.slate.com/articles/news_and_politics/foreigners/2015/11/how_not_to_overreact_to_isis.html).

<sup>54</sup> Décret n° 2015-1475 du 14 novembre 2015 portant application de la loi n° 55-385 du 3 avril 1955, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000031473404&categorieLien=cid>.

<sup>55</sup> See 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, July 2016, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2811602](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2811602).

<sup>56</sup> Amnesty International, "Amnesty International Report 2015/16:" (2016), p. 159.

<sup>57</sup> *Ibid.*

<sup>58</sup> See Article 15 of the European Convention on Human Rights ('derogation in time of emergency').

<sup>59</sup> Amnesty International, "Amnesty International Report 2015/16:" (2016), p. 159. For more information, see Amnesty International, "France: Upturned lives: The disproportionate impact of France's state of emergency", 4 February 2016, <https://www.amnesty.org/en/documents/eur21/3364/2016/en/>.

<sup>60</sup> See 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>.

over 100 organisations asked the French government to lift the state of emergency<sup>61</sup> and on 19 January 2016, the UN Special Rapporteurs on 1) freedom of opinion and expression, 2) the rights to freedom of peaceful assembly and of association, 3) the situation of human rights defenders, 4) the protection and promotion of human rights and fundamental freedoms while countering terrorism and 5) the right to privacy concluded that “[t]he current state of emergency in France and the law on surveillance of electronic communications impose excessive and disproportionate restrictions on fundamental freedoms”.<sup>62</sup> What is also concerning is that the emergency regime is allegedly used “on the basis of reasons which lack any connection with the imminent danger that had led to the declaration of the state of emergency”.<sup>63</sup> The fact that ecological activists were put under house arrest during the 2015 UN Climate Change Conference may attest to that.<sup>64</sup>

Nonetheless, the emergency regime was extended, in February 2016, to 26 May 2016.<sup>65</sup>

Another bill, which was supposed to amend the French Constitution, and which would

make it easier for the government to declare a state of emergency, remove the possibility of legal challenges to government actions under a state of emergency, including warrantless searches and preventive detention, and make it possible to strip French-born<sup>66</sup> dual nationals convicted of terrorism-related crimes of their French citizenship<sup>67</sup>

was dropped,<sup>68</sup> after fierce criticism and the resignation of the French Justice Minister Christiane Taubira.<sup>69</sup>

In May, the emergency regime was further extended,<sup>70</sup> again to the displeasure of human rights organisations, with the French Human Rights League saying the government had become “hooked on the state of emergency”.<sup>71</sup> But finally, on the morning of 14 July 2016, French President Hollande announced that the state of

<sup>61</sup> See B. McAllister, “Muslim and human rights groups in France ask government to lift state of emergency”, *Jurist*, 19 December 2015, <http://www.jurist.org/paperchase/2015/12/france-muslim-group-files-suit-alleges-government-abuse-after-paris-attacks.php>.

<sup>62</sup> See UN, “UN rights experts urge France to protect fundamental freedoms while countering terrorism”, 19 February 2016, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16966&LangID=E#sthash.jrPKMzAg.dpuf>. In more detail, the “lack of clarity and precision of several provisions of the state of emergency and surveillance laws” was noted, and “prior judicial controls” were recommended.

<sup>63</sup> Commission Nationale Consultative des Droits de l’Homme, “Statement of Opinion on the State of Emergency”, 18 February 2016, para. 26, [http://www.cncdh.fr/sites/default/files/english\\_avis\\_statement\\_of\\_opinion\\_on\\_the\\_state\\_of\\_emergency.pdf](http://www.cncdh.fr/sites/default/files/english_avis_statement_of_opinion_on_the_state_of_emergency.pdf).

<sup>64</sup> For more information, see B. Boutin and C. Paulussen, “From the Bataclan to Nice” (2016), pp. 2-3.

<sup>65</sup> “French parliament extends state of emergency to May 26”, *France24*, 16 February 2016,

<http://www.france24.com/en/20160216-french-parliament-prolong-state-emergency-may-26>.

<sup>66</sup> Note that naturalised dual-national French citizens can already be stripped of their citizenship, see The Editorial Board, “France’s Diminished Liberties”, *The New York Times*, 4 January 2016, <http://www.nytimes.com/2016/01/04/opinion/frances-diminished-liberties.html>.

<sup>67</sup> *Ibid.*

<sup>68</sup> See T. Gillan, “France president drops plan to strip terrorists of citizenship”, *Jurist*, 30 March 2016, <http://www.jurist.org/paperchase/2016/03/france-president-drops-constitution-reform-plan.php>. Another dubious proposal, which would allow preventive administrative detention of individuals suspected of being radicalised, was also dropped after the French Council of State found it to be incompatible with human rights, see B. Boutin and C. Paulussen, “From the Bataclan to Nice” (2016), p. 3.

<sup>69</sup> See 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-terrorists>.

<sup>70</sup> “France extends state of emergency to end of July”, *The Local*, 10 May 2016, <http://www.thelocal.fr/20160510/france-extends-state-of-emergency-to-end-of-july>.

<sup>71</sup> *Ibid.*

emergency would not be extended after the end of the Tour de France, on 26 July, since “[w]e can’t extend the state of emergency indefinitely, it would make no sense. That would mean we’re no longer a republic with the rule of law applied in all circumstances”.<sup>72</sup> Sadly, that same evening, Mohamed Lahouaiej-Bouhlel began his deadly tour in Nice after the end of the city’s Bastille Day fireworks display, killing 86 people and injuring hundreds more. A few hours later, it was announced that the emergency regime would be extended again for three months,<sup>73</sup> which was approved, but in fact for another six instead of three months, until late January 2017, by both the National Assembly and the Senate one week later.<sup>74</sup>

Interestingly, the French Government has not only received criticism from human rights organisations, but also from the right-wing political spectrum in France, which noted that the left was not doing enough and should do more, and, according to some, disregard the rule of law to be able to. A number of arguably very concerning statements were made in this context by French right-wing politicians.<sup>75</sup> Former President Nicolas Sarkozy, the man responsible for dismantling three useful counter-terrorism tools in the past, including community policing,<sup>76</sup> used Bush-like language, stating that “[w]e are at war, outright war. So I will use strong words: it will be us or them”.<sup>77</sup> In the same vein, he stated after the attack in Saint-Etienne-du-Rouvray, several days later, that “legal quibbles”, “safeguards” and “excuses” are not admissible in refusing to pass measures (that are, according to the French Council of State, in violation of the French Constitution and human rights law, such as administrative detention of suspected radicalised persons) and that since the enemy does not have any limits, we must be ruthless.<sup>78</sup>

Putting this in context, it might not come as a surprise that with the presidential elections coming up in the spring of 2017 and the majority of the French people supporting a strong stance, or at least supporting the extension of the emergency

<sup>72</sup> L. Marlowe, “Bastille Day Attack: 80 people dead after truck drives through crowd in Nice”, *The Irish Times*, 14 July 2016, <http://www.irishtimes.com/news/world/europe/bastille-day-attack-80-people-dead-after-truck-drives-through-crowd-in-nice-1.2722442>.

<sup>73</sup> A. Withnall, “Nice attack: Hollande extends France’s state of emergency after Bastille Day massacre”, *The Independent*, 15 July 2016, <http://www.independent.co.uk/news/world/europe/nice-attack-bastille-day-president-francois-hollande-france-state-of-emergency-extended-a7137991.html>.

<sup>74</sup> B. Love and E. Picy, “French lawmakers extend state of emergency after Nice attack”, *Reuters*, 20 July 2016, <http://www.reuters.com/article/us-europe-attacks-nice-idUSKCN10009V>.

<sup>75</sup> See 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>. This article has compiled some of the post-Nice statements: the left needs to stop hiding systematically behind the holy constitution (“tous les amendements ont été rejetés par une gauche que l’on sent complètement sclérosée, figée dans une posture en se réfugiant systématiquement derrière cette sacro-sainte Constitution. Mais on est là pour changer tout ça. Il faut qu’on aille beaucoup plus loin. Les Français nous le demandent”); the left should stop caring about fundamental freedoms and just change the law (“Votre réponse à vous, c’est laquelle? Convention européenne des droits de l’homme. ‘Attention, nous allons porter atteinte à leurs libertés personnelles. Attention, on ne peut pas prendre de mesures privatives de liberté. Attention, ce n’est pas compatible avec la Constitution’. Mais changez le droit! C’est exactement ce que les Français vous demandent. Changez le droit!”); we must get rid of the rule of law because security is the first freedom (“Il faut faire sauter l’État de droit quand celui-ci étouffe la liberté des Français, et là, la défense de la sécurité est bien la première des libertés”).

<sup>76</sup> P. Briançon, “Sarkozy’s terrorism record now fair game for conservative rivals”, *Politico*, 21 July 2016, <http://www.politico.eu/article/nicolas-sarkozy-terrorism-nice-attacks-alain-juppe/>.

<sup>77</sup> A. Berthelier, “Nicolas Sarkozy après l’attentat de Nice: ‘On est dans une guerre totale. Ce sera eux ou ce sera nous’”, *Le Huffington Post*, 17 July 2016, [http://www.huffingtonpost.fr/2016/07/17/nicolas-sarkozy-nice-politique-guerre-terrorisme-tf1\\_n\\_11043324.html](http://www.huffingtonpost.fr/2016/07/17/nicolas-sarkozy-nice-politique-guerre-terrorisme-tf1_n_11043324.html).

<sup>78</sup> A. Boudet, “Face au terrorisme, Nicolas Sarkozy ne veut plus s’encombrer ‘d’arguties juridiques’”, *Le 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](http://www.huffingtonpost.fr/2016/07/26/terrorisme-nicolas-sarkozy-droite-arguties-juridiques-etat-droit-saint-etienne-du-rouvray_n_11195290.html).

regime, this kind of forceful talk is used.<sup>79</sup> Regardless, all of this testifies to a climate of fear and distrust in which it will be difficult to return to the old, 'pre-emergency' situation (which – as was explained earlier in this paper – was already quite tough in terms of counter-terrorism measures). Although this strict approach may seem the correct route for some – even though the effectiveness of the harsh measures described in this section can be seriously doubted<sup>80</sup> – it should be noted that not even in a police state will it be possible to prevent one determined terrorist from stabbing, shooting or running people over by car. Such actions are partly out of our control and thus, safety can never be guaranteed one hundred percent. Taking that reality into account, one can either stick to international law, human rights and the rule of law principles in general, principles that have been secured after many years of struggle, and accept that sporadically an attack may occur, or run the risk of moving gradually into the direction of a police state, nullify everything that has been built up and that our societies stand for, and *still* be confronted every now and then with an attack. In fact, it is argued that this latter route will do even more harm in the long run, since the harsh measures – as was shown earlier – will predominantly affect the Muslim population, which may lead to more discrimination, distrust, stigmatisation, polarisation, exclusion, alienation, resentment, radicalisation and, in the end, a greater pool of recruits for the organisations the politicians are trying to fight.

### 3.2 The Netherlands

The next state to be discussed is the Netherlands, a state which is often (and correctly) lauded for its international law focus. However, also here, criticism was voiced on how to respond to terrorism and foreign fighters.

On 30 April 2015, the Netherlands Institute for Human Rights or, in Dutch, *College voor de Rechten van de Mens* (CvdRM) issued a general press release with the telling heading 'Aanpak terrorisme vooral symptoombestrijding' (Approach against terrorism mainly about fighting symptoms).<sup>81</sup> The press release was issued two days after the CvdRM's latest recommendations on the draft legislative proposal on the 'Temporary administrative (counterterrorism) measures Act' (hereinafter: Proposal 1), but also addresses other legislative proposals, including the draft legislative proposal on the amendment of the Netherlands Nationality Act (hereinafter: Proposal 2). The recommendations on Proposal 2 had already been published on 24 February 2015.

Proposal 1<sup>82</sup> seeks to implement the already mentioned UN Security Council Resolution 2178 on foreign terrorist fighters, as well as the plans announced in the 2014

<sup>79</sup> J. Fourquet, "79% des Français favorables à une prolongation de l'état d'urgence", *Atlantico*, 30 January 2016, <http://www.atlantico.fr/decryptage/79-pourcents-francais-favorables-prolongation-etat-urgence-jerome-fourquet-2568017.html>.

<sup>80</sup> Taking the emergency regime as an example, "[o]f nearly 3,600 house raids carried out under its provisions, only five have led to a terrorism-linked judicial investigation". See "Madness and terror", *The Economist*, 23 July 2016, <http://www.economist.com/news/europe/21702480-when-truck-weapon-mass-murder-madness-and-terror>. It should also be noted that all the harsh measures adopted over the past few years could not prevent the attacks in e.g. Nice and Saint-Etienne-du-Rouvray.

<sup>81</sup> CvdRM, "Aanpak terrorisme vooral symptoombestrijding", 30 April 2015, <https://www.mensenrechten.nl/berichten/aanpak-terrorisme-vooral-symptoombestrijding>.

<sup>82</sup> The proposal "*Tijdelijke regels inzake het opleggen van vrijheidsbeperkende maatregelen aan personen die een gevaar vormen voor de nationale veiligheid of die voornemens zijn zich aan te sluiten bij terroristische strijdgroepen en het weigeren en intrekken van beschikkingen bij ernstig gevaar voor gebruik ervan voor terroristische activiteiten (Tijdelijke wet bestuurlijke maatregelen terrorismebestrijding)*" and its explanatory memorandum "*Memorie van toelichting*" of 10 March 2015 are available at (in Dutch only): <https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/kamerstukken/2015/03/17/wetsvoorstel-tijdelijke-wet-bestuurlijke-maatregelen-terrorismebestrijding/getcontent.pdf>.

'Netherlands comprehensive action programme to combat jihadism'.<sup>83</sup> It enables the Minister of Security and Justice, when needed, to protect national security, to take measures restricting the freedom of movement, such as a notification requirement, an area ban or a restraining order, against a person when that person can be connected to terrorist activities or the support of such activities, based on the behaviour of that person.<sup>84</sup> The proposal also enables the Minister to ban people from leaving the Schengen area if there are reasons to suspect that this person will leave the area to join a designated terrorist organisation,<sup>85</sup> and provides administrative authorities, such as the *college van burgemeester en wethouders* (the executive board of a municipality in the Netherlands, consisting of the mayor and the members of the municipal executive), with the possibility to reject or revoke subsidies, permits and exemptions when the person in question can be connected to terrorist activities or the support of such activities, based on the behaviour of that person, and when there is a serious risk that the subsidies, permits and exemptions will be used (partly) for terrorist activities or the support of such activities.<sup>86</sup>

In its recommendations on this draft legislative proposal,<sup>87</sup> the CvdRM, while understanding the need to protect the Dutch democracy, rule of law and population from terrorist violence, noted first of all that the proposal will affect various human rights, including the right to respect for private and family life and the right to freedom of movement. In principle, infringements on the exercise of such rights are possible, but only

when these infringements are founded on a sufficiently clear and precise basis, when there is a compelling societal need to implement the measures, when the measures are in proportion to the objective they are designed to achieve and when the measures are accompanied by an adequate form of legal protection.<sup>88</sup>

The CvdRM noted, however, that the draft legislative proposal's criterion – when that person can be connected to terrorist activities or the support of such activities, based on the behaviour of that person – “does not form a sufficiently clear and precise legal basis for the justification of the limitation of human rights”.<sup>89</sup> Moreover, the CvdRM “ha[d] doubts about the decision to adopt administrative law measures rather than criminal law provisions”.<sup>90</sup>

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<sup>83</sup> National Coordinator for Security and Counterterrorism, “The Netherlands comprehensive action programme to combat jihadism. Overview of measures and actions”, 29 August 2014, p. 8, [https://english.nctv.nl/images/def-a5-nctvjihadismuk-03-lr\\_tcm92-562673.pdf](https://english.nctv.nl/images/def-a5-nctvjihadismuk-03-lr_tcm92-562673.pdf), under 11(a) and (b): “a. A proposal for a temporary act for administrative powers is being prepared to reduce the risks and to prevent serious crimes from being committed by terrorist fighters who return to the Netherlands. b. This could include temporary measures such as a periodic duty to report, contact bans, cooperation with relocation, et cetera to prevent further radicalisation of the returnee, to prevent him from spreading his radical ideas and to prevent recruitment”.

<sup>84</sup> Article 2 of Proposal 1.

<sup>85</sup> Article 3 of Proposal 1.

<sup>86</sup> Article 6 of Proposal 1.

<sup>87</sup> CvdRM, “Recommendations Temporary administrative (counterterrorism) measures Act – summary”, 28 April 2015, <https://mensenrechten.nl/publicaties/detail/35933>. The full (Dutch) version is available at: <https://mensenrechten.nl/publicaties/detail/35614>.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*

As regards this last point, it is argued by the current author that one should not *a priori* reject any kind of use of administrative law<sup>91</sup> instead of criminal law.<sup>92</sup> However, the specific situations as regards this proposal in which one should be able to apply administrative law where one cannot *also* apply criminal law will be extremely limited and possibly non-existent.<sup>93</sup> What if, according to the information of the intelligence services, a person has gone to Syria and he/she has joined IS? What if that person comes back to the Netherlands but the prosecutorial authorities are not able themselves, for instance because of the chaotic situation in Syria and because the intelligence services for some reason cannot share their information, to prove (yet) that he/she has committed a terrorist crime,<sup>94</sup> or that he/she has participated in an organisation whose object it is to commit terrorist crimes<sup>95</sup> or that he/she has fought alongside IS?<sup>96</sup> And what if other measures, such as pre-trial detention – which provides the prosecutor with more time to investigate and which can last up to two years in the Netherlands in the case of suspicion of terrorism offences –<sup>97</sup> are not (yet) or no longer possible either? But what if all the first-line professionals working with this person at the local level (municipality, police, Public Prosecutor’s Office, mental health providers etc.), in the context of the so-called multidisciplinary case management teams,<sup>98</sup> assess that this person could pose a threat? Perhaps this could constitute one of those very rare instances where one should be able to resort to administrative measures to at least make sure the person in question can for instance be better observed or restricted in his/her movements for a limited time. But again: then it must be demonstrated that the use of administrative law is absolutely necessary – and, given the (increasing number of) possibilities criminal law is offering, this will rarely be the case – and proportionate. (And of course, only when other valid points of concern, such as the vagueness of certain terms, see the earlier discussion about the criterion “when that person can be connected to terrorist activities or the support of such activities, based on the behaviour of that person”, have been remedied.) Moreover, when administrative law is subsequently used, enough safeguards have to be in place. What is not acceptable is that one resorts to administrative law to adopt very strict, human rights-infringing measures *without* enough safeguards, including the opportunity for the person to challenge the evidence against him/her (see the problematic use of often

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<sup>91</sup> Administrative law “prescribes the rules that public authorities must keep to in their decision-making and regulates relations between government and citizens”. See “The Dutch court system”, <https://www.government.nl/topics/administration-of-justice-and-dispute-settlement/contents/the-dutch-court-system>.

<sup>92</sup> For a more in-depth study of administrative measures in the context of foreign fighters, see B. Boutin, “Administrative measures against foreign fighters: in search of limits and safeguards”, ICCT Research Paper, forthcoming.

<sup>93</sup> See also the advice of the Council of State (see below in n. 108, at p. 2) which referred to a report from the *college of procureurs-generaal* (the Board of Procurators General, the highest authority of the Public Prosecution Service), saying that in those cases in which criminal law cannot also be applied, one will rarely or never be able to comply with the requirement “when needed to protect national security”. If that requirement has been complied with, then a criminal offence (almost always: a terrorist offence) is present, and a criminal prosecution deemed necessary.

<sup>94</sup> This is criminalised pursuant to Article 83 of the Dutch Criminal Code.

<sup>95</sup> This is criminalised pursuant to Article 140a of the Dutch Criminal Code.

<sup>96</sup> One could argue that the simple fact of joining an armed group in a non-international armed conflict can already lead to a criminal conviction, since fighters in such non-international armed conflicts do not have combatant status, and thus can be prosecuted for the simple fact of fighting. See also the Dutch Maher H. case in the Netherlands. For more information, see C. Paulussen and E. Entenmann, “National Responses in Select Western European Countries” (2016), p. 414.

<sup>97</sup> See Article 66, para. 3 of the Dutch Code of Criminal Procedure which states that “[i]n the case of suspicion of a terrorist offence, the term of the warrant of arrest or the remand detention order may be extended, after ninety days, by periods that do not exceed ninety days for a maximum period of two years”. (The term of the warrant of arrest (in Dutch *bevel tot gevangenneming*) or the remand detention order (in Dutch *bevel tot gevangenhouding*), as well as the earlier stage of the order remanding the suspect in custody (in Dutch *bevel tot bewaring*) are forms of pre-trial detention (orders) (in Dutch *bevelen tot voorlopige hechtenis*). That *voorlopige hechtenis* could be used was also argued by, for instance, the Dutch Section of the International Commission of Jurists and the Netherlands Bar Association, see the source in n. 107, pp. 10 and 16.

<sup>98</sup> See National Coordinator for Security and Counterterrorism, “The Netherlands comprehensive action programme” (2014), p. 25.

secret information by the intelligence services as explained in the aforementioned example); that one uses administrative law, not because it is necessary, but simply because one can reach the same coercive measures in an easier way. In essence: that one embraces administrative law to *by-pass* the stricter legal safeguards of the criminal law process, including its *a priori* review by the court.

The necessity of Proposal 1 was also challenged by the CvdRM, which stated that the need for and thus added value of the proposal had not been adequately demonstrated in view of the fact that Dutch criminal law already includes a number of provisions designed to prevent terrorism.<sup>99</sup> Finally, the CvdRM warned against the potentially stigmatising effects of the proposal on groups of migrants with Islamic religious beliefs.<sup>100</sup>

Similar and even stronger concerns were voiced against Proposal 2, namely the draft legislative proposal on the amendment of the Netherlands Nationality Act. This proposal would allow the Government to withdraw Dutch citizenship, without a criminal conviction,<sup>101</sup> when the person in question has joined an organisation which is taking part in a national or international armed conflict and which has been placed by the Minister of Security and Justice on a list of organisations that constitute a threat to national security. In the proposal's explanatory memorandum,<sup>102</sup> the Minister focuses in particular on jihadist terrorist organisations, in conformity with the plan as announced in the already mentioned 'Netherlands comprehensive action programme to combat jihadism'.<sup>103</sup> In its recommendations, the CvdRM noted that the necessity of the proposal, which could infringe on rights such as the right to freedom of movement and the active and passive right to vote, had not been sufficiently demonstrated, among other things, because of the existing possibility to withdraw nationality after conviction for terrorist activities. It also raised concerns about the practicability and suitability of the proposal vis-à-vis its objective, about the imprecise and broad criterion of 'affiliation with a Jihad terrorist organisation',<sup>104</sup> about its lack of adequate legal protection (no prior judicial review, even though the human rights implications can be very far-

<sup>99</sup> CvdRM, "Recommendations Temporary administrative (counterterrorism) measures Act" (2015).

<sup>100</sup> *Ibid.*

<sup>101</sup> Note that in contrast to this proposal, which does not need a prior criminal conviction, revocation of Dutch nationality by the Minister of Security and Justice is already possible, pursuant to Article 14, para. 2 (b) of the Dutch Nationality Act, in case of irrevocable conviction for a terrorist offence (Article 83 of the Dutch Criminal Code), for recruitment of persons for foreign armed forces or armed struggle, which includes the armed jihad (Article 205 of the Dutch Criminal Code) and for the offence as outlined in Article 134a Dutch Criminal Code. ("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".) This is basically the criminalisation of (preparing for) training for terrorism (both providing training and participating in training). When the CvdRM issued its recommendations in February 2015, revoking nationality on the basis of a conviction pursuant to this latter provision, Article 134a Dutch Criminal Code, was not yet possible, but it is now, see also W. Zeldin, "Netherlands: Possibilities for Revocation of Citizenship to Be Expanded", *Global Legal Monitor*, 18 March 2016, <http://www.loc.gov/law/foreign-news/article/netherlands-possibilities-for-revocation-of-citizenship-to-be-expanded/>.

<sup>102</sup> The proposal "Wijziging van de rijkswet op het Nederlandschap in verband met het intrekken van het Nederlandschap in het belang van de nationale veiligheid" and its explanatory memorandum "Memorie van toelichting" of 18 December 2014 are available (in Dutch only) at: <https://www.internetconsultatie.nl/rwn/document/1435>.

<sup>103</sup> See National Coordinator for Security and Counterterrorism, "The Netherlands comprehensive action programme" (2014), p. 6, under 4(b): "In addition, the [Netherlands Nationality] Act will be further amended to allow Dutch nationality to be stripped without prior criminal conviction when Dutch nationals voluntarily enlist in the armed forces of a terrorist militia".

<sup>104</sup> It should be explained though that these exact words will not be found in the draft legislative proposal, but the CvdRM bases itself on the proposal as well as its explanatory memorandum, which, as said (see ns. 102 and 103 and accompanying text) indeed focus on joining/being affiliated with terrorist *jihadist* organisations. This is because the latter aim to disrupt Western societies and can thus constitute a threat to the national security of the Netherlands which may be different from the object of other terrorist organisations, such as the FARC, the PKK and the Tamil Tigers, see Proposal "Wijziging van de rijkswet op het Nederlandschap" (2014), pp. 5 and 7.

reaching, and no effective participation of the person in the administrative law procedure) and because of its discriminatory effect, as it will result “in a distinction between Dutch citizens who have or do not have dual nationality [this is because nationality can only be revoked in case of dual nationality, as revoking nationality of a person with one passport will lead to statelessness, which is to be avoided<sup>105</sup>], with risks for the stigmatisation of groups of the population with an immigrant background, without providing sufficiently weighty reasons for making that distinction”.<sup>106</sup>

There was also criticism of the two legislative proposals from other (human rights) organisations and experts,<sup>107</sup> as well as by the Council of State.

In its advice of 28 October 2015 (published 9 December 2015, the day after the proposal was sent to the House of Representatives), the Council of State noted with respect to Proposal 1 that it doubted its utility and necessity, now that there are already several administrative law and criminal law measures available with which the objectives of the proposal can be met.<sup>108</sup> The Council of State felt as well that the formulation of important provisions and concepts was not accurate, leading to the conclusion that the measures did not comply with the requirement of foreseeability, and that attention should be paid to the fact that the duration of an individual measure or travel ban is quite long (six months) and that that these measures can be extended, without a maximum duration.<sup>109</sup>

The Minister of Security and Justice responded saying, among other things, that the objective of these measures is the protection of national security, which should be distinguished from the objective of using criminal law and thus that the measures were not meant to apply instead of criminal law.<sup>110</sup> Interestingly, he also provided the example mentioned above of a person who would come back from a terrorist battlefield and who can constitute a threat to national security, even if a conviction for

<sup>105</sup> For more information, see L. Van Waas, “Foreign Fighters and the Deprivation of Nationality: National Practices and International Law Implications”, in A. de Guttry, F. Capone and C. Paulussen, eds., *Foreign Fighters under International Law and Beyond* (The Hague: T.M.C. Asser Press/Springer Verlag, 2016), pp. 469-488.

<sup>106</sup> See CvdRM, ‘Recommendations Draft legislative proposal on the amendment of the Netherlands Nationality Act – summary’, 24 February 2015,

<http://zoekservice.mensenrechten.nl/StippWebDLL/Resources/Handlers/DownloadBestand.ashx?id=3084>. The full (Dutch) version is available at: <https://mensenrechten.nl/publicaties/detail/35355>.

<sup>107</sup> See e.g. the comments made by the Dutch Section of the International Commission of Jurists, the National Bar Association, the Council for the Judiciary and the Advisory Committee on Migration Affairs on Proposal 2, (in Dutch only): <https://zoek.officielebekendmakingen.nl/blg-635950.pdf>, criticising/pointing at, among other things, fair trial implications, the scope of judicial review, the use of administrative law versus criminal law, possible discriminatory effects (the Dutch Section of the International Commission of Jurists), the legal protection regime, including fair trial principles, international obligations, equal treatment, discrimination, added value and necessity of the proposal, also in view of the fact that a comparable proposal had been withdrawn in 2011 (National Bar Association), usefulness, legal protection and lack of clarity about criteria and procedures (Council for the Judiciary), human rights concerns, in particular Article 47 of the EU Charter of Fundamental Rights (“Right to an effective remedy and to a fair trial”), efficiency in practice, vague and broad terms, legal protection (Advisory Committee on Migration Affairs). Of interest is also the contribution by Professor Gerard-René De Groot and Dr. Olivier Vonk, who noted that using the law of nationality as a weapon against jihadists is unwise and that the proposal erodes the rule of law. See G.-R. De Groot and O. Vonk, “De ontkenning van het Nederlanderschap wegens jihadistische Activiteiten”, 3 February 2015, (in Dutch only) <https://www.internetconsultatie.nl/rwn/reactie/32176/bestand>, p. 1. See e.g. on Proposal 1 the Council of the Judiciary, “Advisering over het concept Wetvoorstel Tijdelijke wet bestuurlijke maatregelen terrorismebestrijding”, 29 April 2015, (in Dutch only) <https://www.rechtspraak.nl/SiteCollectionDocuments/2015-15-Advisering-over-het-concept-Wetvoorstel-Tijdelijke-wet-bestuurlijke-maatregelen-terrorisbestrijding.pdf>, criticising the added value of the proposal, the interaction between using administrative law and criminal law, the vague criteria, the scope of the proposal and the legal protection regime (possibility of no hearing even in case of far-reaching measures).

<sup>108</sup> Raad van State, “Samenvatting advies wetsvoorstel bestuurlijke maatregelen terrorismebestrijding”, 28 October 2015 (published 9 December 2015), (in Dutch only) <https://www.raadvanstate.nl/adviezen/samenvattingen/tekst-samenvatting.html?id=358>. The full advice is available at (in Dutch only): <https://www.raadvanstate.nl/adviezen/zoeken-in-adviezen/tekst-advies.html?id=11957>.

<sup>109</sup> *Ibid.*

<sup>110</sup> See the full advice as mentioned in n. 108, p. 7.



crimes committed in that area cannot (yet) be secured. In addition, the Minister referred in this context to the possibility that pre-trial detention may not be possible yet.<sup>111</sup> As explained before, although this situation cannot be ruled out altogether – and thus that any kind of use of administrative law should not be resolutely rejected from the start – it will remain difficult to prove that in a situation where there is a threat to national security, the use of these measures under administrative law is absolutely necessary as the various options under criminal law will most probably already have kicked in. The other advice of the Council of State – to be more precise when formulating important provisions and concepts – was not adopted, as the Minister felt the European Convention on Human Rights provides enough discretionary power to the Executive to make that assessment. Nevertheless, he did clarify the explanatory memorandum on this point. The same goes for the concerns about the temporal dimension of the measures (see above); it was not changed, although more clarification was provided about how the duration of the measure can affect the proportionality test.

In its advice of 17 November 2015 (published 7 December 2015, the day the proposal was sent to the House of Representatives), the Council of State noted with respect to Proposal 2 that it doubted its added value in view of the existing possibilities under criminal law.<sup>112</sup> It remarked in this context that nationality can only be revoked in case someone has joined a terrorist organisation. According to the Council, the government did not explain that in the situations where one can meet this high threshold, it is not already possible to use criminal law, including the use of pre-trial detention.<sup>113</sup> In addition, it noted, referring to the explanatory memorandum, that it assumes that the Netherlands, in principle, will no longer initiate prosecution in such cases, which will imply a loss of criminal law powers, intelligence and the possibility to apply de-radicalisation measures – after all, a person may still be able to return to the Netherlands.<sup>114</sup> Moreover, revoking nationality could also prevent the return of someone who actually wants to leave the terrorist organisation and who does not, or no longer, constitute a threat. The impossibility of returning could also backfire and lead to further radicalisation – also as regards that person's friends in the Netherlands.<sup>115</sup> Finally, the Council was not convinced about the proportionality of the measure, due to a lack of legal protection for the person in question (who, in principle, cannot attend the hearing in the Netherlands).<sup>116</sup> In a reaction, the Minister of Security and Justice responded saying, among other things, that the measure complements criminal law and hence that it is not about whether criminal law options are available in general, but whether these are efficient enough – in the specific situation of a person residing in an area controlled by a terrorist organisation – to protect national security.<sup>117</sup> Although that would indeed point to the necessity of the measure, the inefficiency of the criminal law measures was not further explained. As to the second point, the Minister noted that the assumption of loss of criminal law powers was incorrect and based on a misunderstanding (which led to a clarification in the explanatory memorandum); even when nationality is revoked, the Netherlands would

<sup>111</sup> *Ibid.*, pp. 7-8.

<sup>112</sup> Raad van State, 'Samenvatting advies over intrekken van het Nederlanderschap in het belang van de nationale veiligheid', 17 November 2015 (published 7 December 2015), (in Dutch only): [https://www.raadvanstate.nl/adviezen/samenvattingen/tekst-samenvatting.html?id=355&summary\\_only](https://www.raadvanstate.nl/adviezen/samenvattingen/tekst-samenvatting.html?id=355&summary_only). The full advice is available at (in Dutch only): <https://www.raadvanstate.nl/adviezen/zoeken-in-adviezen/tekst-advies.html?id=11950>.

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.*

<sup>115</sup> Full advice, see n. 112, p. 3.

<sup>116</sup> *Ibid.*, p. 4.

<sup>117</sup> *Ibid.*, p. 7.

still keep its criminal law powers if a person manages to come back to the Netherlands, based on the principle of universal jurisdiction.<sup>118</sup> As to the impossibility of return for people who may want to leave the organisation, the Minister noted that it is about a personalised and targeted approach and that if a person is disillusioned, it would probably indeed not be obvious to revoke nationality but better to focus on return and criminal prosecution. Moreover, he noted that radicalisation of friends can also be countered through the use of other preventive measures.<sup>119</sup> Again the explanatory memorandum was amended to clarify the issue of potential side-effects. This was also the case with regard to the issue of proportionality.<sup>120</sup> The text of the proposal itself was changed as concerns the balancing of interests, and was clarified on what it means to join a terrorist organisation. This must become clear from the person's conduct.<sup>121</sup>

On 17 May 2016, the House of Representatives adopted Proposal 1 and sent it to the Senate for further deliberation. One week later, the second proposal was also passed by the House of Representatives and sent to the Senate.<sup>122</sup>

On 28 June 2016, the Senate's Committee for Security and Justice issued a provisional report, in which a number of concerns were raised with respect to both proposals.<sup>123</sup> To start with Proposal 1, it was questioned whether the criterion "national security" is useful,<sup>124</sup> whether the fight against terrorism should not focus on a better/more effective use of existing powers instead of adopting new powers,<sup>125</sup> why the government did not incorporate the advice of the Council of State to further specify important concepts,<sup>126</sup> where the exact utility and necessity of the administrative measures lie, also in view of the points raised by the Council of State and the Board of Procurators General on the possibilities under criminal law,<sup>127</sup> whether the government shares the views of the CvdRM that the measures can have a stigmatising effect and can lead to further polarisation and increasing distrust – something which, in turn, can lead to further radicalisation<sup>128</sup> – and what the exact scope of judicial review is.<sup>129</sup> As regards Proposal 2, it was noted, among other things, how the person's conduct (as a basis of determining that a person has joined an organisation) can be assessed (for instance, whether marrying a jihadist or sharing messages via social media of the organisation in question also falls under 'joining'),<sup>130</sup> what the added value, efficiency and negative side effects are, also in terms of further radicalisation and the obstruction of collecting intelligence and prosecution,<sup>131</sup> whether the proposal is not in violation of the constitution's non-discrimination provision,<sup>132</sup> whether the government can prove that criminal law until now has not been efficient enough and thus that resorting to

<sup>118</sup> *Ibid.*, p. 8.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*, p. 9.

<sup>121</sup> *Ibid.*

<sup>122</sup> See W. Zeldin, "Netherlands: Two New Sets of Administrative Sanctions Proposed to Fight Terrorism", *Global Legal Monitor*, <http://www.loc.gov/law/foreign-news/article/netherlands-two-new-sets-of-administrative-sanctions-proposed-to-fight-terrorism/>.

<sup>123</sup> Eerste Kamer, vergaderjaar 2015-2016, 34 356 (R2064), B, "Voorlopig verslag van de vaste commissie voor Veiligheid en Justitie", 28 June 2016, (in Dutch only)

<https://www.eerstekamer.nl/9370000/1/j9vvhwtbnzpbzcc/vk5eqyu1n8xg/f=y.pdf>.

<sup>124</sup> *Ibid.*, p. 13.

<sup>125</sup> *Ibid.*, p. 14.

<sup>126</sup> *Ibid.*, p. 15.

<sup>127</sup> *Ibid.*, pp. 15-18. For the point of the Board of Procurators General, see n. 93.

<sup>128</sup> *Ibid.*, p. 16.

<sup>129</sup> *Ibid.*, pp. 13 and 18.

<sup>130</sup> *Ibid.*, pp. 4-5 and 8.

<sup>131</sup> *Ibid.*

<sup>132</sup> *Ibid.*, pp. 5 and 9.

administrative law is necessary,<sup>133</sup> whether the government is not inflicting a risk on other societies<sup>134</sup> and whether the use of universal jurisdiction is usually sufficient.<sup>135</sup>

On 26 August 2016, the Minister of Security and Justice reacted, providing an elaborate, 33-page long response to the concerns pertaining to both proposals, addressing, among other things, issues such as added value and effectiveness, alleged discrimination, legal protection, definitions, stigmatisation, transparency, judicial review and procedural matters.<sup>136</sup> Despite the elaborate answers, many Senators remained critical; in its follow-up report of 17 October 2016, the Senate's Committee for Security and Justice again raised several concerns – many of which have already been discussed above – and requested the Minister to respond within four weeks.<sup>137</sup> It is not clear whether the government will withdraw the proposal (as happened in 2011 with a similar proposal) or whether it will modify the proposals to such an extent that the Senators will provide their stamp of approval.

In the author's view, a very important point to stress as regards Proposal 1 is that criminal law may be complex and cumbersome, but that this does not justify the adoption of far-reaching measures outside of the criminal law paradigm. These measures should only be applied when, among other things, they are absolutely necessary, not because they are easier to apply than criminal law measures. There is considerable energy being put into suggesting new measures, however, fewer efforts are being made in the pursuit of a solid assessment of whether or not the existing structures are really insufficient.

As regards Proposal 2, this author fully agrees with the point of several organisations that revoking nationality of dual nationals leads to a dodging by the Netherlands Government of its (international criminal law) responsibility vis-à-vis the international community, something which is not fitting for the state which is home to The Hague, the International City of Peace and Justice.<sup>138</sup> It reflects a 'pass the buck mentality' which is detrimental to the fight against terrorism and, in fact, to any international cooperative effort. Indeed, this is about 'risk exportation', potentially making matters even worse. Why push someone away from our own society and allow that person to stay in an "international army of jihadists", where that person can continue to commit crimes, if criminal law also provides various options?<sup>139</sup> That criminal law does *not* provide these options has arguably not been clearly established, again showing the lack of proper assessment of whether or not the existing structures are really insufficient. It is true

<sup>133</sup> *Ibid.*, pp. 6-7 and 10.

<sup>134</sup> *Ibid.*, p. 7.

<sup>135</sup> *Ibid.*, p. 11.

<sup>136</sup> Eerste Kamer, vergaderjaar 2015–2016, 34 356 (R2064), C, "Memorie van antwoord", 26 August 2016, (in Dutch only) [https://www.eerstekamer.nl/behandeling/20160826/memorie\\_van\\_antwoord](https://www.eerstekamer.nl/behandeling/20160826/memorie_van_antwoord).

<sup>137</sup> Eerste Kamer, vergaderjaar 2016–2017, 34 356 (R2064), D, "Nader voorlopig verslag van de vaste commissie voor Veiligheid en Justitie", 17 October 2016, (in Dutch only) [https://www.eerstekamer.nl/behandeling/20161017/nader\\_voorlopig\\_verslag/document3/f=/vk8hcm6e5fw9.pdf](https://www.eerstekamer.nl/behandeling/20161017/nader_voorlopig_verslag/document3/f=/vk8hcm6e5fw9.pdf).

<sup>138</sup> See e.g. the Dutch Section of the International Commission of Jurists: Eerste Kamer, vergaderjaar 2015-2016, 34 356 (R2064), B, 28 June 2016, p. 2, (in Dutch only),

<https://www.eerstekamer.nl/9370000/1/j9vvhwtbnzpbzcc/vk5eqyu1n8xg/f=y.pdf>.

<sup>139</sup> See G.-R. De Groot and O. Vonk, "De ontneming van het Nederlanderschap wegens jihadistische Activiteiten", 3 February 2015, pp. 9-10, (in Dutch only): <https://www.internetconsultatie.nl/rwn/reactie/32176/bestand>, referring to professor Rainer Bauböck, who stated: "The question is whether Western democracies can shed responsibility for their homegrown citizen terrorists and shoulder it upon other states. This is what the new denationalization policies are about. [...] [T]he crucial point is that citizenship is by its very nature a domestic relation between an individual and a state. By cutting the bond, states deny their responsibility, including that towards the rest of the world upon whom they inflict the terrorist threat". R. Bauböck, "Whose bad guys are terrorists?", in A. Macklin and R. Bauböck, eds., *The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?*, EUI Working Paper RSCAS 2015/14, p. 29, [http://cadmus.eui.eu/bitstream/handle/1814/34617/RSCAS\\_2015\\_14.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/34617/RSCAS_2015_14.pdf?sequence=1).

that the Dutch proposal merely speaks about the possibility of revoking nationality and that the potential interest of prosecution will be taken into account in the Minister's deliberation, but the impression remains that the drafters of the proposal seem more interested in flexing their muscles, taking the stance that fighting with a terrorist organisation like IS means you are out of society. Although perhaps understandable from a political point of view, it is a fact that such a stance will make that person the problem of other (and possibly legally less-developed) countries, and does not take into account the benefits of keeping the connection, in terms of intelligence gathering and prosecution, which is arguably a much stronger response and which has already led to interesting insights about the organisations we are fighting.<sup>140</sup>

### 3.3 General Trend

Even though the situation in the two above-mentioned countries is very different, with the situation in France arguably being of a more disturbing nature,<sup>141</sup> the discussion from the previous subsections shows that human rights protection should not be taken for granted and that constant investment is needed. That human rights are having a difficult time these days, in the context of responding to the foreign fighters phenomenon and terrorism more generally, is arguably part of a broader international trend.<sup>142</sup>

A well-known Western European example, going much further than the (planned) situation in France and the Netherlands, is the United Kingdom (UK), where the Home Secretary can deprive a person of UK citizenship without judicial approval, even if that leads to statelessness, namely if,

(a) the citizenship status results from the person's naturalisation, (b) the Secretary of State is satisfied that the deprivation is conducive to the public good because the person, while having that citizenship status, has conducted him or herself in a manner which is seriously prejudicial to the vital interests of the United Kingdom, any of the Islands, or any British overseas territory, and (c) *the Secretary of State has reasonable grounds for believing that the person is able, under the law of a country or territory outside the United Kingdom, to become a national of such a country or territory* [emphasis added].<sup>143</sup>

With regard to this last point, Laura Van Waas has correctly pointed out that

[t]his approach leaves the door to Statelessness open, given that the theoretical possibility of acquiring a foreign nationality cannot be equated

<sup>140</sup> See e.g. R. Callimachi, "How a Secretive Branch of ISIS Built a Global Network of Killers", *The New York Times*, 3 August 2016, <http://www.nytimes.com/2016/08/04/world/middleeast/isis-german-recruit-interview.html>.

<sup>141</sup> Of course, one should take into account here that the Netherlands has not suffered as much from terrorism as France recently, which obviously also has an impact on the political climate.

<sup>142</sup> See also Amnesty International, "Amnesty International Report 2015/16." (2016), pp. 46-48 and Human Rights Watch, "World Report 2016", 2016, p. 248, [https://www.hrw.org/sites/default/files/world\\_report\\_download/wr2016\\_web.pdf](https://www.hrw.org/sites/default/files/world_report_download/wr2016_web.pdf). Moreover, on 2 November 2015, the UN Working Group on Mercenaries issued a report on foreign fighters and stated that "States have adopted measures that disproportionately restrict freedom of movement and the rights to nationality, due process and presumption of innocence, and unnecessarily expand powers for emergency surveillance, arrest, detention, search, and seizure". Statement by Ms. Elzbieta Karska, Chair-Rapporteur of the Working Group on the Use of Mercenaries, 70<sup>th</sup> session of the General Assembly, Third Committee, Item 71, 2 November 2015, New York, p. 5 <https://papersmart.unmeetings.org/media2/7654359/elzbieta-karska.pdf>. See also Human Rights Watch, "UN: End Overbroad Foreign Terrorist Fighter Laws", 2 November 2015, <https://www.hrw.org/news/2015/11/02/un-end-overbroad-foreign-terrorist-fighter-laws>.

<sup>143</sup> Section 40 (4A) of the British Nationality Act 1981, <http://www.legislation.gov.uk/ukpga/1981/61/section/40>.

with the actual acquisition of that nationality—and with the profile of the person who would be subject to such deprivation (i.e. someone who has engaged in conduct ‘seriously prejudicial to the vital interests’ of the United Kingdom), one can wonder what country would be willing, in reality, to extend its citizenship.<sup>144</sup>

As argued before,<sup>145</sup> this measure appears to be of a purely symbolic nature and its efficiency has not been proven. In addition, and as also stressed in the context of the Dutch Proposal 2, it ensures that the problem is not dealt with, but left to other states. This leads to a fragmentation of the responses to a global problem that demands a global response, characterised by international solidarity, trust and cooperation.

Another example from the UK is the concern voiced by the human rights organisation Liberty that the new Counter-Terrorism and Security Act 2015 contains provisions which seem to breathe new life into the “widely-discredited” Terrorism Prevention and Investigation Measures (TPIMs),<sup>146</sup> which “allow for indefinite house arrest, and other sweeping restrictions on individual freedoms, on the basis of largely secret intelligence and suspicion”.<sup>147</sup> Although the number of persons subject to TPIMs is very limited, there is a currently a revival discernible in their use.<sup>148</sup>

A second and lesser-known example from Western Europe stems not from the national level, but in fact from the EU level. In December 2015, the European Commission issued a proposal for a new Directive on combating terrorism,<sup>149</sup> replacing the Council Framework Decision of 13 June 2002 on combating terrorism<sup>150</sup> (and the Council Framework Decision of 28 November 2008 amending the one of 2002).<sup>151</sup> This proposal, which is currently being negotiated, aims to strengthen the Framework Decisions by, among other things, criminalising new offences that seek to address the foreign terrorist fighters phenomenon, namely receiving of terrorist training, travelling and attempting to travel abroad for terrorism, and funding or facilitating such travel. The proposed directive, which, in the end, needs to be implemented into national law, has received serious criticism from the side of Amnesty International, the International Commission of Jurists, the Open Society Justice Initiative and the Open Society European Policy Institute, among others.<sup>152</sup> Their February 2016 joint submission, aimed at influencing the text of the Directive before it is adopted,<sup>153</sup> seeks to address,

<sup>144</sup> L. Van Waas, “Foreign Fighters and the Deprivation of Nationality” (2016), p. 480.

<sup>145</sup> See C. Paulussen and L. Van Waas, “UK Measures Rendering Terror Suspects Stateless: A Punishment More Primitive Than Torture”, The International Centre for Counter-Terrorism – The Hague (2014), <http://www.icct.nl/publications/icct-commentaries/uk-measures-rendering-terror-suspects-stateless-a-punishment-more-primitive-than-torture>.

<sup>146</sup> Liberty, “Countering terrorism”, <https://www.liberty-human-rights.org.uk/human-rights/countering-terrorism>.

<sup>147</sup> *Ibid.*

<sup>148</sup> A. Travis, “Six people are subject to Tpims, Home Office reveals”, *The Guardian*, 26 October 2016, <https://www.theguardian.com/uk-news/2016/oct/26/six-people-are-subject-to-tpims-home-office-reveals>.

<sup>149</sup> European Commission, “Proposal for a Directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism”, 2 December 2015, COM(2015) 625 final, 2015/0281 (COD), [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-security/legislative-documents/docs/20151202\\_directive\\_on\\_combatting\\_terrorism\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-security/legislative-documents/docs/20151202_directive_on_combatting_terrorism_en.pdf).

<sup>150</sup> Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA), <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32002F0475&from=EN>.

<sup>151</sup> Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32008F0919&from=en>.

<sup>152</sup> For more criticism, see the concerns raised by the organisations mentioned in: European Parliament, “Combating Terrorism”, EU Legislation in Progress Briefing, July 2016, [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/586628/EPRS\\_BRI\(2016\)586628\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/586628/EPRS_BRI(2016)586628_EN.pdf).

<sup>153</sup> “European Commission’s proposal for a Directive of the European Parliament and of the Council on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA on Combating Terrorism. Joint submission by Amnesty International, the International Commission of Jurists, the Open Society Justice Initiative and the Open Society

among other things, “[t]he failure to provide sufficient guarantees of human rights protection in the implementation of the Directive by Member States”, “[t]he overbroad scope and vague delineation of many of the offences to be established under the Directive, with consequences for the principle of legality and the prohibitions on arbitrary, disproportionate and discriminatory interference with human rights” and “[t]he designation of ancillary and inchoate offences with a low degree of proximity to the principal offence of commission of a terrorism-related act”.<sup>154</sup> It is clear that one must be careful that measures are not adopted simply because there is a feeling of an urgent security threat that needs to be tackled without too much reflection prior to adoption. In that sense, it is quite telling that the explanatory memorandum accompanying the Directive states that “[g]iven the urgent need to improve the EU framework to increase security in the light of recent terrorist attacks, including by incorporating international obligations and standards, this proposal is exceptionally presented without an impact assessment”.<sup>155</sup> One cannot but agree with the human rights organisations mentioned before that

[g]iven the impact that this Directive may have on a wide array of human rights, in addition to the resources of Member States, it is crucial that this Directive undergoes proper scrutiny and debate, including through an impact assessment, and through proper consultation with civil society as to the potential impact of the Directive in practice.<sup>156</sup>

On 12 July 2016, the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE) issued its report,<sup>157</sup> in which a number of changes to the text were suggested, including the addition that not only the Directive, but in fact the Directive *and its implementation* respects fundamental rights and freedoms,<sup>158</sup> the addition that the Directive “should not have the effect of requiring Member States to take measures which would result in any form of discrimination”,<sup>159</sup> or the addition that “[n]othing in this Directive should be interpreted as being intended to reduce or restrict the Union *acquis* with regard to the procedural rights of suspects or accused persons in criminal proceedings”.<sup>160</sup> While these are positive steps forward, the human rights organisations mentioned earlier also pointed out, among other things, that the text “contrary to the principle of legality, retains vague and imprecise language”,<sup>161</sup> for instance on “what constitutes a ‘terrorist group’ or what amounts to ‘receiving training’ or ‘travelling’ for terrorism purposes”.<sup>162</sup> Moreover, they referred to the statement of the Committee’s Rapporteur, Monika Hohlmeier, after the adoption of the Committee’s text, who noted that “[w]e have managed to strike a fair balance between ensuring security and

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European Policy Institute”, February 2016, <https://www.opensocietyfoundations.org/sites/default/files/submission-ec-terrorism-directive-20160219.PDF>.

<sup>154</sup> *Ibid.*, p. 1.

<sup>155</sup> European Commission, “Proposal for a Directive of the European Parliament and of the Council on combating terrorism” (2015).

<sup>156</sup> “Joint submission” (2016), p. 5.

<sup>157</sup> See European Parliament, “Report on the proposal for a directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism (COM(2015)0625 – C8-0386/2015 – 2015/0281(COD))”, Committee on Civil Liberties, Justice and Home Affairs, Rapporteur: Monika Hohlmeier, A8-0228/2016, 12 July 2016, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2016-0228+0+DOC+PDF+V0//EN>.

<sup>158</sup> *Ibid.*, p. 27.

<sup>159</sup> *Ibid.*, p. 29.

<sup>160</sup> *Ibid.*

<sup>161</sup> Amnesty International, International Commission of Jurists, Open Society European Policy Institute and Open Society Justice Initiative, “After a Fast-Track Process the European Parliament Takes a Troubling Position on Counter-Terrorism in Europe”, 13 July 2016, [http://www.amnesty.eu/content/assets/Joint\\_Statement\\_on\\_Counter-Terrorism\\_Directive\\_after\\_LIBE\\_vote\\_July\\_2016.pdf](http://www.amnesty.eu/content/assets/Joint_Statement_on_Counter-Terrorism_Directive_after_LIBE_vote_July_2016.pdf)

<sup>162</sup> *Ibid.*

respecting basic human rights”.<sup>163</sup> However, the current author agrees with the human rights organisations that there can be no such thing as balancing security and human rights, for “human rights are an integral part of security”.<sup>164</sup> This will be further explained in the next and final section of this paper.

## 4. Concluding Thoughts and Recommendations

### *Pause, reflect and assess existing measures before adopting new ones*

The various (proposed) measures described and analysed above show that far-reaching measures, which directly or indirectly infringe on human rights, are proposed or adopted basically because there is an urgent feeling that something needs to be done about the increased security threat, caused, in particular, by foreign fighters (wannabes). Increasingly, these measures are of an administrative nature.<sup>165</sup> Sometimes, the necessity of these measures seems to be fully justified by the occurrence of terrorist incidents as such. For example, the first sentence of the explanatory statement to the LIBE’s Report states that “[r]ecent terrorist attacks on European soil and beyond, and most significantly the terrorist attacks in Paris on 13 November 2015, with more than 130 dead victims, have underscored the need to substantially boost our efforts to prevent and fight terrorism”.<sup>166</sup> But is that really so? Does one need to substantially boost efforts because these horrible attacks happened? Or does one need to substantially boost efforts because the current measures have proven to be clearly inefficient? One gets the impression that various measures have been engendered as an almost automatic and emotional reaction to attacks, fuelled by the demand, from both the public and especially the right-wing political spectrum, for harder measures, without first conducting a proper assessment and evaluation of whether the old measures were really that inefficient, and if so, why. As argued before,<sup>167</sup> there is a clear and constant need for an effective monitoring and evaluation framework to analyse the impact and effectiveness of existing and future policies and practices. The arguments from the human rights organisations in the context of the new proposed EU Directive to the various organisations and organs reacting to the two proposals by the Dutch Government presented in this paper confirm this need.

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<sup>163</sup> European Parliament, “Planning terrorist attacks must be made a crime, say civil liberties MEPs”, Press Release, 5 July 2016, <http://www.europarl.europa.eu/news/en/news-room/20160620IPR32963/planning-terrorist-attacks-must-be-made-a-crime-say-civil-liberties-meps>.

<sup>164</sup> Amnesty International et al., “Joint Statement” (2016).

<sup>165</sup> See also B. van Ginkel et al., “The Foreign Fighters Phenomenon in the European Union” (2016), pp. 6, 59 and 65.

<sup>166</sup> European Parliament, “Report on the proposal” (2016), p. 55.

<sup>167</sup> C. Paulussen, “Responding to Foreign Fighters: A Quick Overview for People with Little Time”, The International Centre for Counter-Terrorism – The Hague (2015), <https://icct.nl/publication/responding-to-foreign-fighters-a-quick-overview-for-people-with-little-time/>.

*Realise that terrorism can never be fully prevented and therefore that the least damaging responses should be embraced*

Terrorism has been with us in the past and will be with us in the future. Whereas specific terrorist groups have come to an end in this past,<sup>168</sup> terrorism as such will not disappear. Indeed, “terrorism is a permanent problem that can only be managed, not solved—more akin to fighting crime than waging war”.<sup>169</sup> As explained before, even a police state, with all the human rights-restricting measures combined, cannot prevent a determined terrorist from committing an attack. Terrorism is something we will never be able to completely control, which means that absolute security is an unattainable goal.<sup>170</sup> Therefore, either one continues to adopt measures that will slowly but surely erode the rule of law principles and *still* be confronted with attacks, or one accepts from the start that attacks will be inevitable, that this is partly outside our control, but that we can at least focus on what is *within* our control, namely to adopt the best strategies, policies and measures. It should be noted that non-repressive measures, such as countering discrimination, developing counter-narratives or investing in community engagement, will not lead to the end of terrorism as such either, but at least they target the underlying causes, rather than fight the symptoms, and do not make the problem *worse*. And that is arguably different for those repressive measures infringing on human rights. As the French emergency regime has shown, and as the CvDRM has warned, such measures target a specific (Muslim) community, which can lead to further stigmatisation, exclusion, distrust, radicalisation, and a propaganda tool for, and an increase of the pool of recruits of, the organisations governments are trying to fight. Even UN Security Council Resolution 2178, which is now used by governments to justify certain far-reaching measures, explicitly states:

*Reaffirming* that Member States must ensure that any measures taken to counter terrorism comply with all their obligations under international law, in particular international human rights law, international refugee law, and international humanitarian law, *underscoring* 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 and notes the importance of respect for the rule of law so as to effectively prevent and combat terrorism, and *noting* that failure to comply with these and other international obligations, including under the Charter of the United Nations, is one of the factors contributing to increased radicalization and fosters a sense of impunity [...].<sup>171</sup>

<sup>168</sup> See e.g. S.G. Jones and M.C. Libicki, “How Terrorist Groups End. Lessons for Countering al Qa’ida”, RAND Corporation, 2008, [http://www.rand.org/content/dam/rand/pubs/monographs/2008/RAND\\_MG741-1.pdf](http://www.rand.org/content/dam/rand/pubs/monographs/2008/RAND_MG741-1.pdf) and A. Perlinger and L. Weinberg, “How Terrorist Groups End”, *CTC Sentinel* 3, no. 2, February 2010, <https://www.ctc.usma.edu/v2/wp-content/uploads/2010/08/CTCSentinel-Vol3Iss2-art6.pdf>.

<sup>169</sup> J. Shapiro, “How Not to Overreact to ISIS”, 16 November 2015.

<sup>170</sup> See *ibid.*: “[T]o say that the problem must be managed is to accept that even the best counterterrorism system will sometimes fail to stop attacks”.

<sup>171</sup> UN Security Resolution 2178 of 24 September 2014 (S/RES/2178 (2014)), [http://www.un.org/en/sc/ctc/docs/2015/SCR%202178\\_2014\\_EN.pdf](http://www.un.org/en/sc/ctc/docs/2015/SCR%202178_2014_EN.pdf). See also the UN Global Counter-Terrorism Strategy’s Plan of Action, UN General Assembly Resolution 60/288 of 20 September 2006, Annex, <http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/RES/60/288&Lang=E&Area=UNDOC>, which states that: “We resolve to undertake the following measures aimed at addressing the conditions conducive to the spread of terrorism, including but not limited to prolonged unresolved conflicts, dehumanization of victims of terrorism in all its forms and manifestations, *lack of the rule of law and violations of human rights*, ethnic, national and religious discrimination, political exclusion, socio-economic marginalization and lack of good governance, while recognizing that none of these conditions can excuse or justify acts of terrorism [emphasis added]”.



## *Realise that terrorism can only be fought while respecting international law including human rights*

Hence, and following up on the previous point, fighting terrorism while respecting international law and human rights, even if the adversary is not doing the same, is not only mandated by law, including the above-mentioned Security Council Resolution binding on all UN Member States,<sup>172</sup> it is also the best thing to do from a strategic perspective, as measures not respecting international law will make the problem even worse. Moreover, it is the only way we do not undermine everything our societies and democracies stand for.<sup>173</sup> In the words of UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein:

I come to you at what may prove to be a turning-point in our young and troubled century. There is real danger that in their reaction to extremist violence, opinion-leaders and decision-makers will lose their grasp of the deeper principles that underpin the system for global security which States built 70 years ago to ward off the horror of war. The fight against terror is a struggle to *uphold* the values of democracy and human rights – not undermine them. My Office strongly supports efforts by States around the world to prevent and combat terrorism, and to ensure that the perpetrators of terrorism, as well as their financiers and suppliers of arms, are brought to justice. But counter-terrorist operations that are non-specific, disproportionate, brutal and inadequately supervised violate the very norms that we seek to defend. They also risk handing the terrorists a propaganda tool – thus making our societies neither free nor safe [emphasis in original].<sup>174</sup>

Indeed, as explained, whereas we cannot completely control what potential terrorists will do, we *can* fully control our own actions – and hence also which kinds of measures we adopt. The realisation must kick in that there is truly only one avenue to follow here: the human rights-respecting one, and that the other avenue is not only illegal and in the long run strategically the worst decision, but also an undermining of everything our societies stand for and that the terrorists seek to destroy. To again refer to Al Hussein: “Terrorist attacks cannot destroy the values on which our societies are grounded – but laws and policies can”.<sup>175</sup>

## *Realise that security and human rights cannot be weighed against each other*

Providing human rights and security are often seen as two different aims which can be weighed. However, and as can also be seen from UN Security Council Resolution 2178

<sup>172</sup> But of course, there are more examples, see A. Conte, “States’ Prevention and Responses to the Phenomenon of Foreign Fighters against the Backdrop of International Human Rights Law Obligations”, in A. de Guttry, F. Capone and C. Paulussen, eds., *Foreign Fighters under International Law and Beyond* (The Hague: T.M.C. Asser Press/Springer Verlag, 2016), pp. 290-291.

<sup>173</sup> See also C. Paulussen and L. Van Waas, “UK Measures Rendering Terror Suspects Stateless” (2014).

<sup>174</sup> UN Human Rights Office of the High Commissioner, “Opening Statement, Item 2, High Commissioner’s Annual Report”, 5 March 2015, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15642&LangID=E>. See also UN Human Rights Office of the High Commissioner, “States must uphold human rights principles in struggle against violent extremism – Zeid”, 5 March 2015,

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15646&LangID=E>.

<sup>175</sup> *Ibid.*

as well as the UN Global Counter-Terrorism Strategy,<sup>176</sup> these values are in fact integral, complementary and mutually reinforcing<sup>177</sup> and thus cannot be weighed against each other. In other words: one cannot have security without human rights, in the same way as one cannot enjoy human rights without basic security. It is of course true that states need to provide security to their citizens, including their human right to life.<sup>178</sup> Hence, everything should be done, *within the limits of the law, including international law*, to make that happen. That is even the case in emergency situations, when human rights law allows for some level of flexibility when the life of the nation is threatened.<sup>179</sup> However, what should be resolutely rejected is that governments adopt human rights-infringing measures under the guise of security. The idea that human rights need to be sacrificed on the altar of security is misleading and dangerous, as it implies that total security can be achieved, which is not the case. Again, as history has shown, and as the Security Council and the UN Global Counter-Terrorism Strategy correctly warn against, adopting measures which infringe human rights will not lead to more security, but to less security in the long run.

### *Realise the fight is going to last long and thus that we should be careful in our responses*

The European Council and the Council of the EU have indicated that “[t]he threat posed by Europeans being radicalised, many of who are also travelling abroad to fight, is likely to persist in the coming years. An effective response to these issues requires a comprehensive approach and long term commitment”.<sup>180</sup> The current author fully agrees with this assessment and with the simple but powerful lesson from Richard English, who noted that “the truth is that terrorism is something that we will all have to learn to live with”.<sup>181</sup> Therefore, it is of the utmost importance that we do not rush into adopting measures, the effects of which may not be clear to us yet. Powers given to governments are rarely given back and thus it should be clearly established that the responses are truly necessary and proportionate.

### *Realise the risk of precedent in case of non-compliance*

Moreover, Western Europe has to realise that it is often seen as an example to follow. If ‘the example’ gets away with human rights-violating measures, other countries may follow suit, thus enlarging the number of worrisome measures as well as the possible pool of recruits for organisations such as IS. In the words of Kat Craig, the Legal Director of Reprieve, commenting on the plans of (then Home Secretary) Theresa May on the

<sup>176</sup> See A. Conte, “States’ Prevention and Responses” (2016), pp. 288-289.

<sup>177</sup> See *ibid.*, p. 288: “The assumed juxtaposition between global security and human rights asserts that the two motivations are incompatible with one another, whereas it is now clearly recognised that security and human rights are complementary and mutually reinforcing”. See also E. Hirsch Ballin, “Countering violent extremism: understanding the shifting landscape in national and international approaches”, Keynote speech at the closing session of the 110th ASIL annual conference, 2 April 2016, p. 4, <http://www.asser.nl/about-the-institute/news/speech-by-prof-hirsch-ballin-at-asil-annual-conference/>: “Pitting the two [security and human rights] against each other will never create a balance, but a slippery slope. In the end, the more violent extremist movements manifest themselves, the more our fundamental freedoms will be sacrificed”.

<sup>178</sup> See e.g. Article 6 of the International Covenant on Civil and Political Rights or Article 2 of the European Convention on Human Rights.

<sup>179</sup> See A. Conte, “States’ Prevention and Responses” (2016), pp. 291-292.

<sup>180</sup> See the European Council and the Council of the EU, “Response to foreign terrorist fighters and recent terrorist attacks in Europe”, <http://www.consilium.europa.eu/en/policies/fight-against-terrorism/foreign-fighters/>.

<sup>181</sup> R. English, “21st-Century Terrorism: How Should We Respond?”, *Political Insight* 1, no. 3 (2010), p. 78. See also “Learning to live with it”, *The Economist*, 3 September 2016, <http://www.economist.com/news/international/21706250-people-are-surprisingly-good-coping-repeated-terrorist-attacks-america-and?fsrc=scn/tw/te/pe/ed/learningtolivewithit>.

deprivation of nationality for terror suspects: “[N]ot only are Theresa May’s plans for the arbitrary exile of Britons dangerously extreme, they are also setting a terrible example around the world”.<sup>182</sup>

### *Realise that terrorism is not the main issue, but rather how states respond to terrorism*

While realising that the threat of terrorism and the issue of foreign fighters is very serious and real, and while underscoring that everything must be done within the limits of (international) law to fight this, the greater danger lies in the approaches states take to respond to these threats. Former Dutch Minister of Justice and President of the Asser Institute, Ernst Hirsch Ballin, has formulated this as follows:

Political panicking and the predictable success of those politicians who surpass others in their apparent boldness in fighting terrorism and extremism might create a situation in which the rule of law – internationally and domestically – is under attack from two sides: the terrorists and violent extremists themselves, and those people in our midst, in many respects closer to us than the extremists and often sincerely convinced that they are doing the right thing, who recommend to sacrifice the obedience to human rights and legal principles in the fight against terrorism.<sup>183</sup>

Also Jeremy Shapiro, currently Research Director of the European Council on Foreign Relations, warned eloquently after the November 2015 attacks in Paris that responses after attacks are usually borne out of anger and emotion rather than wisdom, and that this is very understandable and even natural,

[b]ut even in this moment of pain, we should understand that such a reaction is the intent of the attack. The purpose of terrorism, a weapon of the weak, is to goad the strong to lash out. The perpetrators want a response that inspires more violence and creates more fear and division. As the dramatic outpourings of solidarity demonstrate, a handful of thugs with automatic weapons can never truly threaten a great nation like France. Only the wrong response can do that. Measured responses to terrorist outrages are alas rare. In times of national trauma, politicians will not even dare utter words of restraint lest they be swept up in the righteous anger gripping the populace.<sup>184</sup>

That is why we need courageous politicians who can withstand the current hysteria – often strengthened by the media which seems more interested in viewing rates than in providing information<sup>185</sup> – and popular calls for even stronger measures. We need politicians who have a truly long-term vision. At the same time, and as argued before,<sup>186</sup> that also means the general public needs to realise that a world without attacks has never been and will never be a reality, and thus that criticism on this point should be

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<sup>182</sup> A. Travis, “Theresa May to seek support for plan to deprive terror suspects of citizenship”, *The Guardian*, 6 May 2014, <http://www.theguardian.com/politics/2014/may/06/theresa-may-support-plan-deprive-terror-suspects-british-citizenship>.

<sup>183</sup> E. Hirsch Ballin, “Countering violent extremism” (2016), p. 3.

<sup>184</sup> J. Shapiro, “How Not to Overreact to ISIS”, 16 November 2015.

<sup>185</sup> See also L. Bigot, “Attentats: repenser notre rapport au monde”, *Le Monde*, 16 July 2016,

[http://www.lemonde.fr/afrique/article/2016/07/16/attentats-repenser-notre-rapport-au-monde\\_4970702\\_3212.html](http://www.lemonde.fr/afrique/article/2016/07/16/attentats-repenser-notre-rapport-au-monde_4970702_3212.html).

<sup>186</sup> C. Paulussen, “Responding to Foreign Fighters” (2015).

voiced moderately, in the same way as responses should be adopted moderately. If we can overcome our fear and panic, keep calm and carry on, apply the law in a sober and human rights-respecting way, we do everything what we should do, even if that means we will not be without terrorist attacks.

### *Invest in trust*

What all parties seem to lack – and what we should therefore invest in – is trust: extremists may not or no longer have trust in the authorities of the countries they live in because their human rights may have been violated.<sup>187</sup> Many politicians and a large part of the general public seem to have less trust in their fellow citizens and more trust in ‘security’, instead of human rights law, even though the latter is flexible enough to deal with emergency situations and even if the human-rights compliant approach – as argued above – is in all aspects the best way forward. Trust is also often lacking in the counter-terrorism responses, both at the national level (e.g. between different governmental institutions or between the government and civil society organisations), and at the international level, where (intelligence) cooperation is still hampered because of a lack of trust of what will happen with the provided (sensitive) information.<sup>188</sup> Therefore, we should invest in, among other things, very concrete cooperation projects at the international level, involvement of civil society organisations in the design of counter-measures as early as possible,<sup>189</sup> trainings of governmental authorities on, for example, ethnic profiling<sup>190</sup> and a clear and consistent

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<sup>187</sup> E. Hirsch Ballin, “Countering violent extremism” (2016), p. 4: “Only when the citizens are equally protected by the law, including human rights, and have equal access to the courts, can they, with mutual trust, embark on new avenues of economic, cultural and political life.” See also L. Pauwels et al., *Explaining and understanding the role of exposure to new social media on violent extremism. An integrative quantitative and qualitative approach* (Summary), 2014, p. 30: “[A]ctions should be taken to restore the trust in the authorities. [...] We believe that the most effective way to rebuilt trust is by sensibilising public servants and especially the police. Therefore, we recommend that they are made aware of the existence of perception of distrust and injustice, how their actions contribute to these perceptions and how best to react in certain situations. Research has already shown that it is not so much the outcome of interactions with the police that determines whether or not they are trusted and seen as legitimate. On the contrary, it has repeatedly been proven that the perception of being treated fairly and respectfully by neutral police during encounters more strongly contributes to the perception of the police as being legitimate, even in case of a negative personal outcome. With this in mind, it is also important that police are trained in how to interact with different populations and learn to recognise possible sensitive situations and how best to handle these. It is important for police to stay neutral in their daily encounters with populations at risk and not to let their actions be guided by political sentiments. We expect this to be equally true for other public servants [original references removed]”. See also Human Rights Watch, “Preempting Justice” (2008): “Excesses in the name of preventing terrorism, even if the overall strategy is based on use of the criminal justice system, are likely to be counterproductive insofar as they alienate entire communities. Injustice feeds resentment and erodes public trust in law enforcement and security forces among the very communities whose cooperation is critical in the fight against terrorism. Over the long term, these abuses may actually feed into the grievances exploited by extremists”. See moreover European Union Agency for Fundamental Rights, “Embedding fundamental rights in the security agenda”, *FRA Focus*, 01/2015, p. 4, [http://fra.europa.eu/sites/default/files/fra-2015-focus-01-2015-internal-security-1\\_en.pdf](http://fra.europa.eu/sites/default/files/fra-2015-focus-01-2015-internal-security-1_en.pdf): “[A] number of minorities in the EU may be disproportionately affected by law enforcement measures such as discriminatory ethnic profiling or discriminatory misconduct by law enforcement officials. [...] The Council of Europe therefore called on its Member States to ‘clearly define racial profiling, ensure its prohibition and provide specific training on identity checks to all police officers’. Lack of trust and a sense of insufficient protection have potentially far-reaching implications both as a factor in radicalisation and as a further obstacle to effective communication between the authorities and particular communities. Poorly designed security policies that are perceived as targeting an entire community rather than individual suspects can further exacerbate the problem, as heavyhanded tactics may serve to enhance recruitment to terrorist organisations if the people concerned are or feel they are treated in a discriminatory or negative way [original footnote omitted]”. See also *ibid.*, p. 5: “FRA research shows that a lack of trust in the authorities is already reality among certain minorities. Countering radicalisation therefore has to begin by ensuring that authorities do not apply their powers in a discriminatory manner but on the contrary in a way that engenders trust”.

<sup>188</sup> See J. Van Buuren, “EU Member States step up information exchange – Again”, *Leiden Safety and Security Blog*, 23 November 2015, <http://leidensafetyandsecurityblog.nl/articles/eu-member-states-step-up-information-exchange-again>, referring to a report from Europol stating: “There is still an urgent need to facilitate awareness and access, as well as engender greater trust in the counter terrorism environment for sharing intelligence at EU level”.

<sup>189</sup> See also B. Boutin and C. Paulussen, “From the Bataclan to Nice” (2016), p. 4.

<sup>190</sup> See again the sources mentioned in n. 187.

public promotion of the fact that the human rights-approach is the only way forward. All of this can assist in decreasing this lack of trust which is plaguing our counter-terrorism efforts.<sup>191</sup> In the words of the Council of the EU: “Respecting fundamental rights in planning and implementing internal security policies and action has to be seen as a means of ensuring proportionality, and as a tool for gaining citizens’ trust and participation”.<sup>192</sup> Also the EU Agency for Fundamental Rights noted in early 2015 that “[t]he European Agenda for Security will have to respond to the call for additional law enforcement and counterradicalisation measures in a manner that neither jeopardises social cohesion nor undermines mutual trust among communities or their trust towards the authorities”.<sup>193</sup>

### *Final thought*

The UN High Commissioner for Human Rights has stated that this “may prove to be a turning-point in our young and troubled century”. Unfortunately, the forecasts are not promising. With a possibility of even more attacks, a shift to the political right<sup>194</sup> and increased calls for security to the detriment of human rights, there is a true risk that more and more governments fall into the trap set by the terrorists, comparable to the situation post 9/11, and overreact in their responses. Luckily, this report has also demonstrated that there is hope: quite often, new, far-reaching proposals were followed by criticism from (human rights) groups such as Amnesty International, Human Rights Watch, Reprieve, Liberty, Open Society, the International Commission of Jurists, the Netherlands National Bar Association and Council of the Judiciary as well as the French Human Rights League. These organisations, as well as more reflective political organs such as the Dutch Senate and governmental advisory committees such as the French CNCDH, the French Digital Council, the CvdRM, the Netherlands Council of State and the Advisory Committee on Migration Affairs, should not be seen by governments as bothersome actors who only delay the process of creating more ‘security’. In contrast to many politicians in power, these actors often have a much clearer long-term vision and realise and/or have documented what the impact of certain measures can be – and how these can make our societies less safe. These actors should be seen as the backbone of our democracies and should have our full support. This implies they should be involved in the design of counter-terrorism measures as early as possible so that they can influence policy makers at both the national and international level to ensure that our societies respond to the foreign fighters phenomenon and terrorism more generally in the most effective manner based on human rights.

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<sup>191</sup> European Union Agency for Fundamental Rights, “Embedding fundamental rights” (2015), p. 1: “[I]t is precisely now that Member States and EU institutions need to work together to seek balanced and legitimate responses that foster trust and cohesion within our societies”.

<sup>192</sup> Council of the EU, ‘Development of a renewed European Union Internal Security Strategy’, Justice and Home Affairs Council Meeting, Brussels, 4 December 2014, p. 7, [https://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/jha/146042.pdf](https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/146042.pdf).

<sup>193</sup> European Union Agency for Fundamental Rights, “Embedding fundamental rights” (2015), p. 5.

<sup>194</sup> See G. Aisch, A. Pearce and B. Rousseau, “How Far Is Europe Swinging to the Right?”, *The New York Times*, 5 July 2016, <http://www.nytimes.com/interactive/2016/05/22/world/europe/europe-right-wing-austria-hungary.html>.

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# Repressing the Foreign Fighters Phenomenon and Terrorism in Western Europe: Towards an Effective Response Based on Human Rights

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## About ICCT

The International Centre for Counter-Terrorism – The Hague (ICCT) is an independent think and do tank providing multidisciplinary policy advice and practical, solution-oriented implementation support on prevention and the rule of law, two vital pillars of effective counter-terrorism.

ICCT's work focuses on themes at the intersection of countering violent extremism and criminal justice sector responses, as well as human rights related aspects of counter-terrorism. The major project areas concern countering violent extremism, rule of law, foreign fighters, country and regional analysis, rehabilitation, civil society engagement and victims' voices.

Functioning as a nucleus within the international counter-terrorism network, ICCT connects experts, policymakers, civil society actors and practitioners from different fields by providing a platform for productive collaboration, practical analysis, and exchange of experiences and expertise, with the ultimate aim of identifying innovative and comprehensive approaches to preventing and countering terrorism.

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