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Terrorism Inside Out: Applying the Concept of Legislating for Humanity to Cooperate Against Terrorism

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Terrorism Inside Out: Applying the Concept of Legislating for Humanity to Cooperate Against Terrorism

Dr Myriam Feinberg*

Cooperation is a key tool in the fight against international terrorism and most international measures include the obligation for states to cooperate against terrorism. However, the obligation does not seem to have the same binding status as the obligation to prevent terrorism, which can lead to conflicts between the two in their application by states. This article uses the concept of legislating for humanity in order to study the obligation to cooperate as a responsibility for states to take others into account when they adopt counterterrorism measures. It uses the particular example of revocation of citizenship to examine two specific questions: whether states must take outsiders' interests into account when they adopt domestic measures such as expulsion of terrorists, and, more generally, whether harmonization of counter terrorism measures is the preferable way to fully conduct cooperation, when there are clear differences in capacity and political will.

INTRODUCTION

The rise and increasing impact of the Islamic State in Iraq and Syria (ISIS)[1] has renewed debates both on terrorism and counterterrorism. Issues of attribution, jurisdiction and pre-emptive self-defense are all back on the legal table with experts asking whether ISIS is

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[1] The United states administration and the UN uses the ISIL acronym, but the group is also known as the Islamic State in Iraq and Syria (ISIS), acronym which I use in this article, or Daiish for Al-Dawla Al-Islamiya fi al-Iraq wa al-Sham (also spelled Daesh in Europe).

part of Al-Qaeda or an independent terrorist group,[2] what is the most appropriate legal framework to address the threat, and what is the legal basis for airstrikes against ISIS.[3]

The concept of 'foreign terrorist fighter' (FTF)[4] is now part of the international counterterrorism jargon and has prompted the adoption of a number of new measures, both nationally and internationally. At the pinnacle of these new measures is Resolution 2178, adopted by the UN Security Council in September 2014 to respond to the increasing threat posed by ISIS. Very much like Resolution 1373 adopted by the Security Council days after the attacks of 9/11, Resolution 2178 is a long and complex instrument, which imposes a large number of binding obligations on states in order to fight terrorism: these include the request to adopt or strengthen domestic criminal law, the call to limit terrorism financing, prevent FTFs from travelling, but also a number of preventive measures to counter 'violent extremism'. Some of the obligations contained in 2178 already exist – in fact it seems to collate other existing Security Council obligations on terrorism. However, the resolution also includes – for the first time in its operative paragraphs themselves – the requirement to abide by international human rights,[5] and it includes a number of measures that 'directly address individuals.'[6] Among these things, the resolution requires that states adopt a variety of specific measures to prevent the movement of FTFs, including the removal of citizenship, which I focus on in this article.

The resolution has led to criticism, both on the role of the Security Council in adopting international measures against terrorism, and on the scope and impact of these measures themselves.[7] However, the measures regarding the movement of terrorist

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[2] See for instance Deborah Pearlstein, 'On the Theory That ISIL Is Al Qaeda', *Opinio Juris*, 11 September 2014, http://opiniojuris.org/2014/09/11/theory-isil-al-qaeda/; Jens David Ohlin, 'The 9/11 AUMF Does Not Cover ISIS', *Opinio Juris*, 11 September 2014, http://opiniojuris.org/2014/09/11/911-aumf-cover-isis/.

[3] See Myriam Feinberg, 'The Legality of the International Coalition against ISIS: The Fluidity of International Law', *JUSTICE*, Winter 2015.

[4] Defined in the preamble of Resolution 2178, as 'individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist, training, including in connection with armed conflict', see UN Security Council, Security Council resolution 2178 (2014) [on threats to international peace and security caused by foreign terrorist fighters] , 24 September 2014, S/RES/2178 (2014), available at: http://www.refworld.org/docid/542a8ed74.html (last accessed 01.05.2016).

[5] Resolution 2178, see Operative Paragraphs 5, 11 and 17.

[6] Anne Peters, 'Security Council Resolution 2178 (2014): The "Foreign Terrorist Fighter" as an International Legal Person, Part I', *EJIL Talk*, 20 November 2014, http://www.ejiltalk.org/security-council-resolution-2178-2014-the-foreign-terrorist-fighter-as-an-international-legal-person-part-i/.

[7] Cian C. Murphy, 'Transnational Counter-Terrorism Law: Law, Power and Legitimacy in the "wars on Terror"', *Transnational Legal Theory* 6, no. 1 (2 January 2015): 31–54, doi:10.1080/20414005.2015.1042229; Martin Scheinin, 'A Comment on Security Council Res 2178 (Foreign Terrorist Fighters) as a "Form" of Global Governance', *Just Security*, 6 October 2014, http://justsecurity.org/15989/comment-security-council-res-2178-foreign-fighters-form-global-governance/;

suspects also raise a number of questions about another aspect of international counterterrorism, and that is cooperation. Professor Clive Walker, in debates around the terrorism bill that was eventually adopted in the UK in 2015, stated that the UK's 'unilateral policy to "export" terrorists, by banning their return to the state, might be incompatible with the duty to cooperate with other states to address the threat posed by foreign terrorist fighters under paragraph 8 of 2178.'[8]

This article focuses on the obligation to cooperate against terrorism and examine two related questions: whether it creates an obligation on states to take 'others' into account when adopting measures to prevent terrorism, or at least a negative obligation to refrain from adopting measures that could be harmful for individuals, both citizens and non-citizens; and, in practice, if cooperation should mean harmonization of domestic measures when there are such differences in capacities and political will between states. It is foreseeable that the desire of states to make their own territory safe could clash with their obligation to cooperate with other states against terrorism. Yet, if states do not consider that their obligation to cooperate includes the duty of preventing terrorism for the sake of all individuals, this could increase the risk of a gap between safe and less safe states. Moreover, measures concerning the removal of citizenship for terrorism prevention could lead to differences in the treatment of citizens. In turn, this could create a new 'us versus them' situation where states will focus on improving the safety of their own population, at the expense of the safety of other states or on the protection of a part of the population, at the expense of citizens considered as enemies. On the other hand, harmonization of domestic legislation on counterterrorism seems both impossible at this stage, but also does not reflect sufficiently the differences in capacities and interest that states have regarding the threat of terrorism. I focus in this article on the aspect of counterterrorism cooperation as burden sharing and distribution of risk in order to analyze the nature of the duty to cooperate.

In the first part of this article, I examine the obligation to cooperate against terrorism based on two justifications: the first, that the obligation to cooperate emerged as a necessity of the global nature of terrorism, and is therefore inherently related to the obligation to prevent terrorism. This justification forms the pragmatic basis for the obligation to cooperate, but it has normative, as well as practical limitations, in particular as states might not consider this particular obligation to have the same binding status as other preventative and punishing measures, thereby leading to a hierarchy between

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Martin Scheinin, 'Back to Post-9/11 Panic? Security Council Resolution on Foreign Terrorist Fighters', *Just Security*, 23 September 2014, http://justsecurity.org/15407/post-911-panic-security-council-resolution-foreign-terrorist-fighters-scheinin/.

[8] 'Counterterrorism and Security Bill, 2014-2015, Submission to Joint Committee on Human Rights', Professor Clive Walker, December 5, 2014, §6, available at http://www.parliament.uk/documents/joint-committees/human-rights/Submission_from_Prof_Clive_Walker_091214.pdf (last accessed 04.04.2016).

preventing terrorism in their own territory, and cooperating with other states to improve the general response to global terrorism. The second justification, a more complex one, which can be based on the concept of legislating for humanity,[9] supports and requires a fuller understanding of the concept, as based on responsibility, which states owe to both their citizens and non-citizens. This justification also allows discussions on burden sharing of the risk that international terrorism entails and whether all states should have similar legislation. In turn, this discussion raises the question of conflict between various counterterrorism obligations and the necessity for harmonization of domestic measures.

The second part of the article therefore looks at the particular example of the restrictions of movement that are required by Resolution 2178 and it examines whether states have to or should balance these measures with their obligation to cooperate. I show that measures such as revocation of citizenship and expulsion, while necessary for the prevention of terrorism, need to be balanced with the requirement to cooperate with other states. This is both because of the pragmatic reason for the obligation to cooperate, i.e., an efficiency reason and the fact that states need to address the threat in cooperation with other states – as well as because of the duty of states to take others into account. This balancing exercise is necessary to avoid the creation of gaps in counterterrorism as well as to prevent a 'us versus them' discourse that can shift responsibility to weak or failed states. The second section of the part examines the various responses that can be adopted to encourage this balancing exercise and increase shared responsibility for addressing international terrorism and it asks whether harmonization is the best answer when states possess different interests and capacities towards the terrorist threat.

I. THE DUTY TO COOPERATE AGAINST TERRORISM – PRAGMATIC NECESSITY OR ALTRUISTIC DECISION?

The obligation to fight terrorism finds its basis in moral philosophy and in political science in the general duty of a state to protect its citizens. The social contract justifies the existence of a state in order to translate the desire for security into a regulated norm.[10] According to Max Weber, the state has the monopoly of legitimate violence[11] and this is translated in the state police and the military being tasked with ensuring order and preventing crime. Terrorism is one example of an attack against a population and states will therefore need to prevent and punish terrorism. This is done so usually through

[9] See section I.B of this article for an analysis of the concept.

[10] Jutta Limbach, 'Human Rights in Times of Terror', *Goettingen Journal of International Law* 1 (2009): 21.

[11] Max Weber, 'Politics as Vocation', 1919.

criminal law (although different approaches have been used, in particular after September 11, 2001).[12]

In addition to this criminal law and law enforcement context, the rights of a population, which are recognized by domestic and international law, such as the right to life and security, require protection against violations and attacks: according to the Vienna Declaration and Programme of Action of June 1993, 'all acts of terrorism aim at the destruction of human rights and democracy.'[13] The state therefore needs to prevent attacks against its population and the violation of these rights. A number of human rights instruments impose such an obligation on states to address terrorism in their jurisdiction in order to protect the right to life. The Council of Europe Guidelines on human rights and the fight against terrorism state the following:

> States are under the obligation to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially the right to life. This positive obligation fully justifies states' fight against terrorism in accordance with the present Guidelines.[14]

Because of the nature of terrorism, which has become a global threat, and which therefore requests a global response, the duty to fight terrorism has led to the adoption of many international instruments and it has given rise to an international obligation to cooperate against terrorism. This section examines the obligation to cooperate against terrorism under two justifications: the first is the more obvious one, where the obligation to cooperate stems, pragmatically, from the need of states to act together to address an international threat. Here, the obligation to cooperate is the natural evolution of the obligation to prevent terrorism, and is linked to the various other counterterrorism obligations included in international measures. In this context, the obligation to cooperate is considered as a necessity, which might therefore depend on the actual nature of the threat and is further contingent on the will of states to improve their response to terrorism. The second section refers to the frame of the legislating for humanity concept in order to develop a deeper justification behind the obligation to cooperate. As a result, the obligation to cooperate is considered as a responsibility that requires that states also

[12] It is beyond the scope of this article to list all national measures against terrorism but the majority of domestic regimes against terrorism are under criminal law, with an increase in the use of force. See Robert Cryer et al., *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2007), 284.

[13] Vienna Declaration and Programme of Action of June, 25 June 1993, §17.

[14] Council of Europe: Committee of Ministers, Guidelines on human rights and the fight against terrorism, 11 July 2002.

take non-citizens into account when adopting counterterrorism measures. Yet, political will and differences in capacity mean that not all states will be able – or ready – to do so. Therefore, this duty raises questions of burden sharing and distribution of competences, which the second part of this article examines in practice.

A. Pragmatic Necessity and Legal Obligation – A Limited Impact

International counterterrorism was born out of the necessity for states to cooperate in order to address the increasingly global nature of the threat. The pragmatic need for an international regime in counterterrorism has eventually evolved into an international obligation for states to address terrorism.

A number of bilateral agreements have long existed, usually between neighboring states, wishing to increase the reach of their prevention and avoid the escape of terrorists or criminals.[15] Within the context of the UN, states further developed principles such as 'aut dedere aut judicare'[16] to address the threat of international terrorism. The principle, adapted from Grotius' principle of 'aut dedere aut punire'[17] is a paramount principle of cooperation and prevention, which aims to avoid safe havens for criminals and jurisdictional gaps by requiring that states prosecute a suspect if they do not wish to, or cannot extradite them. The principle was given practical application through various UN treaties imposing the obligation of prosecuting or extraditing the authors of specifically designated acts such as hijacking,[18] hostage taking,[19] attacks against the safety of sea vessels,[20] or the proliferation of nuclear weapons.[21] There are now eighteen different conventions and protocols dealing with terrorism, which address specific accidents of

[15] For instance, the most advanced cooperation in Europe has been taking place in the past twenty years between France and Spain in order to tackle the problems raised by ETA, the armed separatist organization. See 'Other types of cooperation', France Diplomatie, available at http://www.diplomatie.gouv.fr/en/country-files/spain/spain-and-france/other-types-of-cooperation-6347/ (last accessed 04.04.2016) for more information.

[16] Meaning the obligation to prosecute a criminal, or extradite them if the state refuses or is unable to prosecute.

[17] Hugo Grotius, De Iure Belli ac Pacis, Book II, chap. XXI, paras. III and IV; English translation, The Law of War and Peace (Classics of International Law, F.W. Kelsey transl.) 1925, pp. 526-529.

[18] Convention on Offences and Certain Other Acts Committed on Board Aircraft 1963; Convention for the Suppression of Unlawful Seizure of Aircraft 1970; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971 and its Protocol 1988.

[19] International Convention against the Taking of Hostages 1979.

[20] Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988 and its Protocol 2005.

[21] Convention on the Physical Protection of Nuclear Material 1980, as amended 2005; International Convention for the Suppression of Acts of Nuclear Terrorism 2005.

terrorism.[22] The General Assembly also adopted Resolution 60/288 in 2006, which created the 'Global Counterterrorism Strategy'[23] a framework for counterterrorism action.

Other international actors have adopted measures to assist states in their global fight against terrorism. For instance, the North Atlantic Treaty Organization is involved in counter-terrorism,[24] although it raises issue of military responses to terrorism and of collective self-defense, which are too broad to include in the scope of this article. The Organization of American states adopted the Inter-American Convention against Terrorism.[25] By doing so, it 'became one of the first group of nations to adopt an anti-terrorism treaty in the wake of September 11.'[26] The Council of Europe adopted, in May 2005, the Convention on the Prevention of Terrorism[27] and its Additional Protocol in 2015.[28] The European Union's very advanced regime on counterterrorism includes – among others things – two Framework Decisions adopted in 2002 by the Council of Ministers,[29] which include a definition of terrorism, as well as a series of Regulations imposing financial sanctions on Member states.[30]

Many of these international measures were adopted out of the necessity to offer a global response to a global threat. Yet, these instruments now also point to the existence of a legal obligation on states to act against terrorism in order to protect their citizens. The International Commission of Jurists supports this status as follows:

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[22] A list of treaties adopted by the UN can be found at https://treaties.un.org/Pages/DB.aspx?path=DB/studies/page2_en.xml (last accessed 04.04.2016).

[23] UN General Assembly Resolution, The United Nations Global Counter-Terrorism Strategy, 13 October 2010, A/RES/64/297.

[24] For information on NATO's activities against terrorism, see http://www.nato.int/cps/en/natohq/topics_77646.htm (last accessed 04.04.2016).

[25] OAS Convention against Terrorism, AG/RES 1840 (XXXII.0/02) signed by thirty Member states at the General Assembly in Bridgetown, Barbados on June 3, 2002 and entered into force in July 2003.

[26] Enrique Lagos and Timothy D. Rudy, 'Latin Americas: Views on Contemporary Issues in the Region Preventing, Punishing and Eliminating Terrorism in the Western Hemisphere: A Post 9/11 Inter-American Treaty' (2003) 26 *Fordham International Law Journal*, 402.

[27] Council of Europe, Council of Europe Convention on the Prevention of Terrorism, 16 May 2005, ETS No. 196

[28] 125th Session of the Committee of Ministers (Brussels, 19 May 2015), Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (Adopted by the Committee of Ministers at its 125th Session on 19 May 2015).

[29] According to Art. 34 (2) (b) of the TEU, Framework Decisions serve the purpose of approximating of the laws and regulations of the Member states. They shall be binding upon the Member states as to the result to be achieved but shall leave the choice of form and methods to the national authorities. With the Lisbon Treaty, Framework Decisions disappear, but existing decisions are not abandoned.

[30] For a summary of the sanctions regimes adopted by the EU, see Myriam Feinberg, 'International Counterterrorism – National Security and Human Rights: Conflicts of Norms or Checks and Balances?', *The International Journal of Human Rights* 19, no. 4 (May 2015): 393, doi:10.1080/13642987.2015.1027053.

> The duty of states to protect all within their jurisdiction against such threats is beyond dispute. International law requires that states take all measures appropriate to guarantee the right to life, and other essential freedoms, to all within their jurisdiction. In face of the real threats that exist, states are legally bound to take appropriate counter-terrorist measures.[31]

Indeed, through the treaties mentioned above, but also, significantly, through binding UN Security Council resolutions, these obligations have become legally binding on states. There have been more than 35 Security Council resolutions on terrorism since 9/11, including resolutions 1373 and 2178, which impose immediately binding obligations on states to address terrorism, including a duty to legislate on terrorism, to criminalize terrorism, to prevent financing, to share intelligence, an obligation to cooperate, etc.[32] The nature of the measures adopted by the Security Council means that – in theory – states could face enforcement actions for failure to implement the measures.[33]

The obligation to act against acts of terrorism is, in this way, 'codified in each international convention' and resolutions and therefore 'states have obligations to refrain from engaging in and to prevent acts of international terrorism.'[34] It is even considered that the obligation to fight terrorism could be part of customary international law and that UN Resolutions 'may serve as evidence of a common opinio juris.'[35] Former EU Counter-Terrorism Coordinator Gijs de Vries stressed that 'the fight against terrorism …

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[31] International Commission of Jurists (ICJ), Addressing Damage, Urging Action. Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights, February 2009, Executive summary, page 1.

[32] UN Security Council, Security Council resolution 1373 (2001) [on threats to international peace and security caused by terrorist acts], 28 September 2001, S/RES/1373 (2001) and UN Security Council, Security Council resolution 2178 (2014) [on threats to international peace and security caused by foreign terrorist fighters] , 24 September 2014, S/RES/2178 (2014).

[33] The Executive Director of the Counterterrorism Executive Committee of the UN Counterterrorism Committee noted that, despite the possibility to impose sanctions against Member States that do not abide by their Security Council obligations, non-compliance has not happened in the context of Resolutions 1373 and 1267: 'Strategies for Countering Violent Extremism', interview of Jean-Paul Laborde by Joanne J. Myers, the Carnegie Council for Ethics in International Affairs, November 24, 2014, transcript and video available at http://www.carnegiecouncil.org/studio/multimedia/20141124/index.html (last accessed 04.04.2016).

[34] Kimberley Trapp, 'Terrorism and the International Law of State Responsibility' in *Research Handbook on International Law and Terrorism* (Edward Elgar Publishing Limited 2014) 40.

[35] Kai Ambos and Anina Timmermann, 'Terrorism and Customary International Law', in Research Handbook on International Law and Terrorism, *Research Handbook in International Law* (Edward Elgar Publishing Limited, 2014), 30.

is both a moral duty and a legal obligation under international law.'[36] The Special Tribunal for Lebanon gave the following reasoning for this:

> There is a settled practice concerning the punishment of acts of terrorism … is evidence of a belief of states that the punishment of terrorism responds to a social necessity (opinio necessitatis) and is hence rendered obligatory by the existence of a rule requiring it (opinio juris). This obligation includes:
>
> the obligation to refrain from engaging in acts of terrorism;
>
> the obligation to prevent and repress terrorism, particularly to prosecute and try alleged perpetrators; and
>
> the right to prosecute and repress the crime of terrorism committed on their territory by nationals and foreigners and the correlative obligation of third states to refrain from objecting to such prosecution and repression against their nationals.'[37]

In fact, for Proulx, 'the existence of [the obligation to prevent terrorism] is so widely recognized that it poses no problems and should not fuel a futile or circuitous debate'.[38] Proulx bases his analyses on several sources of international law, including a number of cases of the International Court of Justice, such as the Corfu Channel case and the Teheran Hostage, as forming the basis for state responsibility when failing to control its territory.[39]

International terrorism started with acts of cooperation between states wishing to pool competences to make their fight against the threat more efficient. Most Security Council resolutions now include cooperation as one of the *means* for the prevention and punishment of terrorism. Yet, in most Security Council resolutions, the verbs used for cooperation seem to lack the same strength as those for other obligations: for instance,

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[36] Introductory Comments, European Parliament Committee on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, Brussels, 20 March 2006, text available at http://www.statewatch.org/cia/documents/extract-de-Vries-speech-20-03-06.pdf (last accessed 04.04.2016).

[37] Special Tribunal for Lebanon, Order on Preliminary Questions Addressed to the Judges of the Appeal Chamber Pursuant to Rule 68, Paragraph (G) of the Rules of Procedure and Evidence, 21 January 2011 (STL-11-01/I/AC/R176bis), §102.

[38] Vincent-Joël Proulx, *Transnational Terrorism and State Accountability: A New Theory of Prevention* (Hart Publishing, 2012), 22.

[39] Ibid 20 and 24.

Resolution 1373 'calls on states' to cooperate in order to improve their counterterrorism regimes, whereas other obligations seem to carry a greater weight as states 'shall' adopt measures to prevent terrorism. An increasing number of forums are created at the international level in order to enhance cooperation between states[40] and these should be welcome. But these forums mainly function on a voluntary basis, which explains their success, but it might hamper full implementation.

This indicates that cooperation is considered as a tool in order to achieve prevention and punishment in one said territory and that states primarily look at it as a means to achieve their goal of preventing terrorism, in their own territory, rather than as an obligation in itself, which commits them, legally, to working with other states.

It is clear that the protection of a territory is, ultimately, the responsibility of each state and cooperation mainly aims to fill responsibility gaps by linking together parallel systems. This corresponds to an international system of sovereign states, which forms the basis of the UN. Yet, at the same time, the safety of one population cannot be considered in isolation to another anymore and international terrorism is only one example of a global 'bad' that needs to be addressed globally.[41] The failure of one state to prevent terrorism does not only have an impact in its own territory, but will potentially have repercussions on neighboring and non-neighboring states:

> security and stability are obviously public goods, because all can enjoy them, without detracting from each other's enjoyment. The provision of such a good raises a collective action problem, because not all who benefit from the good wish to contribute to its production.[42]

The concept of human security, while focusing on 'shift from sovereignty to humanity'[43] and a shift from the power of states to their responsibility towards individuals, also carries with it the principle that security is also a human right, that is recognized for every

[40] For instance, the Inter-American Committee against Terrorism, known as CICTE, created in 1999 within the Organization of American States focuses specifically on cooperation between the Member States in various areas of counterterrorism.

[41] Other examples of global 'bads' can include global warming, which requires concerted action by states and the international community.

[42] Eyal Benvenisti, 'The US and the Use of Force: Double-Edged Hegemony and the Management of Global Emergencies', *European Journal of International Law* 15, no. 4 (2004): 681.

[43] William Burke-White, Opinio Juris, Book Roundtable on Ruti Teitel's Humanity's Law, 26 October 2011, available at http://opiniojuris.org/2011/10/26/book-roundtable-ruti-teitel%E2%80%99s-humanity%E2%80%99s-law/ (last accessed 07.04.2016).

individual under international law. Therefore, the duty to cooperate cannot simply be considered as a necessity for each state to protect its population but rather, as a binding obligation with wider consequences on what measures states can adopt. The next section examines the obligation to cooperate as a legal duty of its own, for the protection of citizens as a global group, and this raises practical questions, which will be examined both in theory, here, and in practice in the second part of the article.

B. A Legal Imperative with A Global Aim

If we follow Proulx's analysis, the obligation to prevent terrorism

> stems from the basic principle of sovereignty, which entails both rights and obligations. The concept of sovereignty also implies a correlative obligation of due diligence, particularly in the field of counterterrorism.[44]

What is interesting here is the development that Proulx makes regarding this obligation of due diligence: he first notes that 'states are expected to diligently suppress or prevent harm emanating from private actors and injuring nationals within their own territory.'[45] But he then continues to develop this obligation of due diligence to the effect that a state's actions would have on *another* state in the context of counterterrorism, and the measures that the first state should, therefore, adopt to prevent this impact. He notes that 'states are expected to forestall terrorist activities emanating from their territory and causing harm. This idea has long been ingrained in international law, albeit in other branches of the discipline such as in environmental law's treatment of transboundary pollution.'[46] Proulx considers that this obligation of prevent in other countries is based in customary law, which 'has long established a duty incumbent upon states to diligently suppress and prevent the use of their territory as a launch pad for activities harmful to other states, a norm also encompassing acts carried out by private individuals.'[47]

It is now generally accepted that the concept of sovereignty includes responsibilities for a State as well as rights.[48] Therefore, the protection of a population

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[44] Proulx (n 38) 23.
[45] Ibid, 25.
[46] Ibid 18.
[47] Ibid 25.
[48] For analyses on the concept of sovereignty as responsibility, see, among others, Myriam Feinberg, *Sovereignty in the Age of Global Terrorism: The Role of International Organisations*, Nijhoff Law Specials

(against terrorism for instance, but also against pollution and other 'threats') is now accepted as rooted in sovereignty. Terrorism challenges the sovereignty of a State because it questions the ability of the State to protect its citizens against violence and its monopoly of legitimate violence.[49] Moreover, international terrorism questions a number of concepts such as state authority within a territory, the principle of boarders, and world order as such.[50] Therefore, to assert its sovereignty, a 'government needs to respond to acts of terrorism, or at the very least be perceived as responding.'[51] In addition, developing sovereignty as a legal concept creating duties, Proulx links it with that of due diligence that extends *beyond* the territorial boarders of the sovereign.

The concept of legislating for humanity – understood as 'the unilateral regulation by states of activities in and also outside the state whose goal is to prevent or remedy global public "bads"'[52] – can assist in examining the scope of protection, which is owed beyond the domestic boarders or beyond citizenship, in particular since terrorism now obviously affects the global citizenry. Terrorism has become a global 'bad' that requires a global answer, and the arrest, convicting and punishment of terrorist suspects will benefit the population of more than one state. Under the principle of legislating for humanity, 'sovereigns are obligated to take other-regarding considerations seriously into account in formulating and implementing policies, even absent specific treaty obligation'.[53] The customary nature of the duty to prevent terrorism, which was established before, supports this requirement but expanding this customary nature to cooperating allows the responsibility of states to act against terrorism beyond their boarders.

The idea that cooperating against terrorism is a legal obligation that states owe to all citizens, and not only for the safety of their own population, raises a number of practical issues with regards to what it consists of exactly. The first, is whether there is a justification for a difference in treatment between nationals and non-nationals, if the aim is to protect humanity as a whole against the threat of terrorism. As a consequence, is it possible for states to remove the citizenship of terrorists and expel them, thereby shifting the risk to other states. The second is whether cooperation should mean an equal and

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89 (Brill/Nijhoff, 2016); Emilie Kuijt, *Humanitarian Assistance and State Sovereignty in International Law*, School of Human Rights Research Series 76 (Intersentia, 2015).

[49] A State is a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory', Max Weber, 1918, Speech Politik als Beruf (Politics as a Vocation).

[50] For an analysis of the relationship between international terrorism and state sovereignty, see Feinberg, *Sovereignty in the Age of Global Terrorism: The Role of International Organisations.*

[51] Elena Pokalova, 'Legislative Responses to Terrorism: What Drives States to Adopt New Counterterrorism Legislation?', *Terrorism and Political Violence* 27, no. 3 (27 May 2015): 480.

[52] Eyal Benvenisti, 'Legislating for Humanity: May States Compel Foreigners to Promote Global Welfare?', Global Trust Working Paper Series 02/2013.

[53] Eyal Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders', *American Journal of International Law* 107 (2013): 300.

shared burden of risk or rather a level of burden adapted to the means and capacities of each state. In practice, should cooperation amount to *harmonization* of legislation.

The first issue is related to the more complex question of whether states have obligations towards non-citizens. In this case, the question is whether the international obligation to fight terrorism is limited to one territory, and only to citizens or residents, and more generally, who should benefit from the adoption of one state's measures on safety. A state has a primary responsibility towards its own citizens and the principle of nation-state creates exclusion, as membership through citizenship is limited to those accepted by the state.[54] Yet, increasingly, international law and human rights law have required states to extend their responsibility both to foreign stakeholders within their borders[55] and extra-territorially.[56] According to David Weissbrodt, 'in general, international human rights law require the equal treatment of citizens and non-citizens.'[57] Discrimination against non-citizens can be justified for some particular rights.[58] But it becomes a particular problem in counterterrorism as security threats often lead to separate treatment of non-nationals, including the violation of fundamental human rights, because they are often seen as the source of the terrorist threat as it always seems easier to grasp that there is threat if we can point to it from the 'outside'.[59] This is particularly poignant at the moment, when the influx of refugees in Europe has increased nationalistic discourses and created the fear of the 'other'.[60] Obviously, refugee conventions allow states to forbid entry into their territory in cases of terrorism threat or conviction[61] and it

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[54] See Benjamin Gregg, *The Human Rights State: Justice Within and Beyond Sovereign Nations* (University of Pennsylvania Press, 2016), 25.

[55] See the Legislating for humanity concept, examined above.

[56] For a general approach to the concept of extraterritoriality of human rights, see, among others Michal Gondek, 'Extraterritorial Application of The European Convention on Human Rights: Territorial Focus in the Age of Globalization?', *Netherlands International Law Review* 52, no. 3 (December 2005): 349–387, doi:10.1017/S0165070X05003499; Hugh King, 'The Extraterritorial Human Rights Obligations of States', *Human Rights Law Review* 9, no. 4 (1 January 2009): 521–56, doi:10.1093/hrlr/ngp028; Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP Oxford, 2011).

[57] David S. Weissbrodt, *The Human Rights of Non-Citizens* (Oxford University Press, 2008), 5.

[58] For instance voting rights, or employment rights.

[59] A number of works have been published on the topic. See for instance, Alice Edwards and Carla Ferstman, *Human Security and Non-Citizens: Law, Policy and International Affairs* (Cambridge University Press, 2010); Daniel Moeckli, *Human Rights and Non-Discrimination in the 'War on Terror'*, Oxford Monographs in International Law (Oxford University Press, 2008).

[60] See the next section for an analysis of this idea.

[61] For instance, article 1F of the 1951 Refugee Convention states that its provisions "shall not apply to any person with respect to whom there are serious reasons for considering that: a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

is reasonable to expect states to do so in order to decrease the risk of terrorism. However, it can also be abused by states for political reasons. Therefore, can states justify the possibly negative consequences of their counterterrorism measures with their obligation to keep their citizens safe? Considering the obligation to cooperate as an obligation to prevent a global bad and/or achieve a global good requires states to take non-nationals into accounts, including those who do not reside in the state, as well as take into account the effects of their domestic measures abroad. I will show in the next section that doing so can also be in their own interest.

In practice, taking others into account immediately raises the question of burden sharing of the risk and of the format of the obligation, because, while the terrorist threat is affecting the world, some states might be targeted more than others. Should they therefore bear the main responsibility for trying to prevent this threat? On the other hand, some states clearly have better financial, logistical and political capacities to deal with terrorism. Should they be the ones to bear the main responsibility? The principle of sovereign equality traditionally distributed competences and authority within boarders of states. Yet, this is obviously not the case anymore, and for Benvenisti,

> there is no unanimity as to the utility of the principle of territorial sovereignty as a useful tool for allocating global risks and responsibilities. Some sovereigns will not be able, or simply refuse, to live up to Huber's vision of the collective effort to guarantee minimum protection for all.[62]

What kind of global answer is therefore requested, in practice, for a global bad? Can complete harmonization of domestic legislation be the answer, if it is clear that some states are better equipped, or willing, to take on the challenge? The next part of the article takes a practical example of counterterrorism measures to attempt to answer these questions and examine what the obligation to cooperate against terrorism should mean in order to be both efficient and fair.

II. LEGISLATING FOR HUMANITY IN PRACTICE –EXPULSION AND HARMONIZATION IN QUESTION

This section first examines the case of travel measures that resolution 2178 imposes on states in order to examine the issues raised by the previous section on burden of risk. I analyze in practice how the revocation of citizenship can raise questions on the efficiency of counterterrorism, as well as the responsibility of states towards other states. I conclude

[62] Benvenisti (n 42) 692.

that the obligation to cooperate imposes on states to address terrorism beyond their territory and that it imposes restrictions on what measures they can adopt. The second part in turn examines, more generally possible responses to create a shared responsibility to address terrorism and in particular looks at the question of whether harmonization is the best cooperation application, when the practice shows considerable discrepancies between states in capacities and interest.

A. Expulsion of Foreign Terrorist Fighters – Exporting The Risk and Denying Responsibility

Among other things, Resolution 2178 requires that states adopt measures to prevent the movement of terrorist, which can be translated into measures to remove the passports, or revoke the citizenship of those accused of terrorism or to prevent entry of terrorist suspects into their territory. Further to the adoption of the resolution, many states have adopted, or updated their legislation to this effect, although some states already had this kind of measure in place.[63] These measures are considered necessary to deal with the new threat of terrorist suspects travelling to other countries and returning, planning to carry out attacks. The resolution should be welcomed for its attempt to respond to a new challenge and for creating the legal basis for states to prevent and punish foreign terrorist fighters.

Yet, some of these measures – in particular the revocation of citizenship – also have the potential to drive terrorist suspects to other states, making it likely more dangerous for these states – and by extension, for all states. This section focuses on this issue and on whether the obligation to cooperate imposes limits on what states can adopt to counter terrorism. Clive Walker raises the question as follows:

> Is it appropriate or even lawful to 'export' terrorism risks to other countries, especially as they probably have less information and capability to deal with the

[63] In November 2014, France adopted a new piece of legislation on counterterrorism that includes – among other provisions – a travel ban for French citizens suspected of terrorism. The UK adopted the Counter-Terrorism and Security Act 2015, which provides for the seizure and retention of a passport of a person suspected of leaving the UK for the terrorism activities, as well as the temporary exclusion of individuals if they are suspected of terrorism activities outside of the UK. New Zealand approved, on 9th December 2014, a new law on counterterrorism, which allows for the cancellation of passports for up to three years for those suspected of involvement in terrorism. Australia itself has adopted the Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014.

risk than the UK? Aside from liability to act under international convention and under UNSCR 2178, one might question the sense of the policy.[64]

As a result, I examine the particular case where the measures adopted domestically might have consequences on other domestic regimes and this raises a number of legal issues, both on the efficiency of criminal and administrative measures but also more deeply, on sovereignty and responsibility.

Let us first consider this statement by the German Justice Minister who said, regarding the adoption of their new counterterrorism law: 'we will have one of the harshest criminal anti-terrorism laws in all of Europe. That will make Germany safer.'[65] If the goal is to keep Germans safe – which is a legitimate and expected responsibility of a state – does it mean that anything goes? Such strictness might increase the safety of one country,[66] but it might engage the state's responsibility towards other states with less strict policies, as it might dissuade terrorists from operating in the jurisdiction to the point where they might choose to operate in another jurisdiction. Such issue questions not only the efficiency of such measures on one given territory, but also, the *legality* of such measures that might impact on other states. Indeed, the development examined previously regarding the due diligence of one state could also be made here if a state's policy will drive terrorists to another state.

The main example of measure I use here is the complete revocation of citizenship of a person convicted of terrorism: in the EU, fifteen states allow for revocation of citizenship.[67] This measure usually only applies to people who have *obtained* the

[64] 'Counterterrorism and Security Bill, 2014-2015, Submission to Joint Committee on Human Rights', Professor Clive Walker, December 5, 2014, §6, available at http://www.parliament.uk/documents/joint-committees/human-rights/Submission_from_Prof_Clive_Walker_091214.pdf (last accessed 04.04.2016).

[65] 'Germany set to pass 'one of the harshest' anti-terror laws in Europe' EurActive, 5 February 2015, available at http://www.euractiv.com/sections/justice-home-affairs/germany-set-pass-one-harshest-anti-terror-laws-europe-311851 (last accessed 04.04.2016).

[66] Although this is debatable to start with: the concept of marginal deterrence examines whether stricter penalties actually deter criminals, or only encourage them as they have 'nothing to lose'. For a summary of criminal law theories on the topic, see Steven Shavell, 'A note on marginal deterrence' (1992) *International Review of Law and Economics*, 12, 345-355.

[67] See 'Comparing Citizenship Laws: Loss of Citizenship', European Union Democracy Observatory on Citizenship, data available at http://eudo-citizenship.eu/databases/modes-of-loss?p=&application=globalModesLoss&search=1&modeby=idmode&idmode=L07&countrySel[]=Austria&countrySel[]=Belgium&countrySel[]=Bulgaria&countrySel[]=Croatia&countrySel[]=Cyprus&countrySel[]=Czech+Republic&countrySel[]=Denmark&countrySel[]=Estonia&countrySel[]=Finland&countrySel[]=France&countrySel[]=Germany&countrySel[]=Greece&countrySel[]=Hungary&countrySel[]=Ireland&countrySel[]=Italy&countrySel[]=Latvia&countrySel[]=Lithuania&countrySel[]=Luxembourg&countrySel[]=Malta&countrySel[]=Netherlands&countrySel[]=Poland&countrySel[]=Portugal&countrySel[]=Romania&

citizenship of the state and in general, is only possible for dual citizens, as international law prohibits statelessness.[68] One notable exception is the new Immigration Act 2014, which allows the UK government to remove citizenship from British nationals in some cases even where the result would be statelessness.[69] After the November 2015 terrorist attacks in Paris, France aimed to amend its existing law on citizenship, although the project was later abandoned.[70] The current legislation allows for revocation of citizenship for dual nationals who have obtained French citizenship in the last 15 years and are convicted of terrorism.[71] In practice, in September 2015, France expelled a Moroccan citizen, who had obtained French citizenship in 2003, after he had been found guilty of organizing a jihadist recruitment ring and was condemned to 7 years in prison in 2013.[72] Denmark and Canada have also recently revoked citizenship of dual-citizens condemned for links to terrorism.[73]

If we look at the obligation to cooperate under the two bases I presented in the first section, we have to ask here whether this kind of measure is efficient, useful, but also whether it might not conflict with other obligations, potentially making them illegal and raising responsibility issues. A recent report on the subject qualifies citizenship

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countrySel[]=Slovakia&countrySel[]=Slovenia&countrySel[]=Spain&countrySel[]=Sweden&countrySel[]=United+Kingdom (last accessed 23.03.2016).

[68] Universal Declaration of Human Rights (Article 15), the 1961 New York Convention on the Reduction of Statelessness and the 1997 Council of Europe Convention on Nationality all prohibit statelessness. Further, the 4th Protocol to Europe Convention on Human Rights stipulates that states are not allowed to expel their nationals, so they have to remove citizenship first, which means that, in practice, only dual nationals should be expelled, Article 3, Council of Europe, Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto, 16 September 1963, ETS 46.

[69] Helena Wray, 'The New Powers of Deprivation of Citizenship in the UK', European Union Democracy Observatory on Citizenship, 28 June 2014, http://eudo-citizenship.eu/news/citizenship-news/1160-the-new-powers-of-deprivation-of-citizenship-in-the-uk. I will examine this measure in more details further.

[70] See 'Déchéance: Hollande abandonne la réforme constitutionelle', Le Figaro, 30th March 2016, available (in French), at http://www.lefigaro.fr/politique/le-scan/2016/03/30/25001-20160330ARTFIG00162-decheance-hollande-abandonne-la-revision-constitutionnelle.php (last accessed 04.04.2016).

[71] Article 23 to 25, Civil Code.

[72] See (in French), http://www.le360.ma/fr/politique/terrorisme-expulsion-dun-marocain-du-territoire-francais-52181 and http://www.francetvinfo.fr/faits-divers/terrorisme/video-le-conseil-constitutionnel-valide-la-decheance-de-nationalite-d-un-jihadiste-franco-marocain_805667.html (both last accessed 01.04.2016).

[73] See (in French) http://www.postedeveille.ca/2015/07/une-premiere-au-danemark-un-terroriste-prive-de-sa-citoyennete.html; http://www.postedeveille.ca/2015/07/ottawa-demande-la-revocation-de-la-citoyennete-dun-terroriste.html and
http://news.nationalpost.com/news/canada/canada-revokes-citizenship-of-toronto-18-ringleader (both last accessed 04.04.2016)

removal as 'ineffective and counter-productive'.[74] As we saw, a number of experts also consider that they might be illegal under international law. I examine here these two questions in practice.

First of all, the dual citizenship condition inherently limits the scope of this measure as the threat might come from citizens of a country, with no link to another country. For instance, most of the terrorists responsible for the Paris attacks were born French and/or did not have a second citizenship.[75] In these cases, the revocation of citizenship is not possible, making the relevance of the measure questionable. While a limited number of countries also allow citizenship removal even in cases where it might lead to statelessness, they still do so under a number of conditions, which again, might limit the scope of their application. In particular, the UK's recent amendment to the British Nationality Act 1981, mentioned above and which allows the Secretary of State to deprive an individual of citizenship, even if it would result in statelessness can only apply under the next three conditions: if the person obtained UK citizenship by naturalization; if the Secretary of State is satisfied that the deprivation is conducive to the public good; and if 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.[76]

In addition to the international prohibition of statelessness that limits the revocation of citizenship, for a number of states, there are also cases from the European Court of Human Rights preventing expulsion to states that are considered to expose people to inhuman treatment or torture.[77] This means that a terrorist suspect (or convicted terrorist), who has been stripped of one of his citizenships by one of the 44 states of the Council of Europe, might not actually be expelled to his or her other country of citizenship, and might in effect, have to stay in the first state. The Abu Qatada case showed the difficulty of the UK to argue for the expulsion of the Jordanian national, who

[74] First report of the Independent Reviewer on the operation of the power to remove citizenship obtained by naturalisation from people with no other citizenship, Independent Reviewer of Terrorism Legislation, page 12, available at https://www.gov.uk/government/publications/citizenship-removal-resulting-in-statelessness, last accessed 26.04.2016.

[75] A summary of the citizenship of the terrorists, as well as their accomplices, is available (in French) at https://fr.wikipedia.org/wiki/Attentats_du_13_novembre_2015_en_France#Identification_des_terroristes_et_complices_pr.C3.A9sum.C3.A9s (last accessed 01.04.2016).

[76] Section 40, British Nationality Act 1981, section available at http://www.legislation.gov.uk/ukpga/1981/61/section/40 (last accessed 26.04.2016).

[77] Among others, *Soering v. The United Kingdom*, 1/1989/161/217 , Council of Europe: European Court of Human Rights, 7 July 1989, *Saadi v. Italy*, Appl. No. 37201/06, Council of Europe: European Court of Human Rights, 28 February 2008, and *Othman (Abu Qatada) v. The United Kingdom*, Application no. 8139/09, Council of Europe: European Court of Human Rights, 17 January 2012.

did not even have UK citizenship.[78] For UK Counterterrorism Legislation Reviewer David Anderson therefore, the conflict between these human rights obligations and the domestic measures on citizenship removal might lead to 'complex and costly legal battles.'[79]

Finally, being expelled from one state does not prevent a terrorist from operating, either because they can plan attacks from another location, or because they can still train other people who might be able to operate in the country they were expelled from. In these scenarios, the source of the threat is simply moved geographically, without actually being stopped. A person intending to conduct terrorism attacks might not be discouraged by a revocation of citizenship. Moreover, the domestic intelligence, law enforcement and judiciary of the country of expulsion do not have control over the actions of the individuals once they have left the country, which can increase the risk caused by the terrorist, who might enjoy protection – or mere laissez-faire – in another country. One feature of global terrorism is the lack of specific link to a country, which the UN has recognized by developing sanctions against specific individuals, rather than against states.[80] With the increasing adoption of revocation of citizenship measures, states return to a geographical attempt to remove the threat and it increases the 'dangerous delusion that terrorism is (or can be made into) a foreign threat and problem", diminishing the incentive to deal with it domestically.'[81] Such measures can obviously disrupt or limit terrorist activities but they do not entirely remove them. In fact, for Ben Saul, the revocation of citizenship of terrorists 'makes the world more dangerous'.[82]

The question then, if this kind of measure is not relevant or efficient, is why governments will resort to them so often. An answer is that these measures are highly symbolic: terrorism aims to disturb everyday life and usually contains a certain amount of theatricality. Responses to terrorism will therefore aim to reassure a population, show that

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[78] See 'Abu Qatada case is no victory for London', Human Rights Watch, available at https://www.hrw.org/news/2014/10/27/abu-qatada-case-no-victory-london (last accessed 02.05.2016).

[79] First report of the Independent Reviewer on the operation of the power to remove citizenship obtained by naturalisation from people with no other citizenship, Independent Reviewer of Terrorism Legislation, page 12.

[80] International counterterrorism post-9/11 is characterized by targeted sanctions, which will target groups and individuals suspected of terrorist activities. See for instance the 1267 Sanctions regimes, and the sanctions regimes created by Resolution 1373 (2001).

[81] First report of the Independent Reviewer on the operation of the power to remove citizenship obtained by naturalisation from people with no other citizenship, Independent Reviewer of Terrorism Legislation, page 12.

[82] See Ben Saul, 'Stripping dual national terrorists of citizenship will make the world more dangerous', The Sydney Morning Herald, 26 November 2015, available at http://www.smh.com.au/comment/stripping-dual-national-terrorists-of-citizenship-will-make-the-world-more-dangerous-20151126-gl8hsa.html (last accessed 04.04.2016).

the government is acting on a threat, and not only arrest and prosecute the suspects. For Ben Saul,

> Treating terrorism as a separate category of unlawful activity expresses a deliberate desire by the international community to morally condemn and stigmatise terrorism as an especially egregious crime, beyond its ordinary criminal characteristics.[83]

This kind of response however, means that states might be inclined to adopt a response for the sake of appearing to react, when often, there are existing measures that are sufficiently relevant to address the threat. This will in turn lead to an inflation of terrorism legislation, and a tendency to adopt emergency measures to send a message both to terrorism and to the civilian population. Gross and Ni Aolain suggest that

> Post-September 11 additions to the criminal law reflect an augmentation of a ‘‘narrative” and ‘‘memorial” style to the criminal law based on the perceived impact of the harm suffered and not on an assessment of the capacity of existing law to respond. We suggest that the use of emergency powers has become a conduit for this narrative style of response to terrorism by states.[84]

There are a number of issues with adopting emergency measures, especially as they can easily become permanent and change the legal landscape, thereby regularly raising the threshold of what is acceptable in counterterrorism. This kind of slippery slope might itself create a climate of fear and resentment towards those suspected of terrorism. In the specific case of revocation of citizenship, Spiro critically notes that

> The expatriation measures are empty gestures, a kind of counter-terror bravado to make up for the deficiency of more important material responses. Government officials must be seen to be doing something, and so they may (for appearances sake) throw expatriation into the counter-terror toolbox. But
>
> expatriation won’t advance the counter-terror agenda in any real way.[85]

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[83] Ben Saul, ‘Three Reasons to Define Terrorism’ available at http://www.esil-sedi.eu/sites/default/files/Saul_0.PDF (last accessed 01.04.2016).

[84] Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press, 2006), 379.

[85] Peter J. Spiro , “Terrorist expatriation: All show, no byte, no future ”, in The Return of Banishment: Do

The counterterrorism measures being currently discussed or already in place in some jurisdictions answer a need for adaptable responses to evolving threats. However, they also encourage discrimination and foster a climate of fear. More deeply, they can also raise issues of responsibility and legality, both at the domestic level and at the international level, which refers to the second basis of the obligation to cooperate I examined, as an obligation owed to 'humanity'.

The first level is domestic, where the condition of dual citizenship in effect creates two types of citizens, which can raise the issue of discrimination. Most countries reserve some rights to citizens only, such voting rights or eligibility to positions of authority.[86] However, for most other rights, article 5(2) of the European Convention on Nationality states that 'each State Party shall be guided by the principle of non-discrimination between its nationals, whether they are nationals by birth or have acquired its nationality subsequently.'[87] The current French law, which only applies to dual citizens who have obtained French citizenship in the last 15 years, has been criticized as creating inequality between French citizens born in France, and those who *became* French. The debate on extending the revocation to dual citizens born in France, eventually abandoned in March 2016, was also criticized for creating a discrimination, this time between French people and French people who also have a second citizenship. The only solution against differences between citizens would be to completely abandon this kind of measures, or – as suggested by Paul Lagarde, to transform them into a sentence of national or civil demotion, which would focus on civil rights, some of which could be denied to any citizen accused of terrorism, without leading to revocation of citizenship.[88] We can also note that the revocation of citizenship – often an administrative measure – usually comes in addition to criminal sentencing.[89] It may therefore question 'whether the additional penalty of deprivation, which may not be inflicted to those terrorists who only have one nationality (…), still bears a reasonable relationship of proportionality with the aim pursued by the legislator'[90] as a penalty already exist.[91]

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the New Denationalisation Policies Weaken Citizenship? EUI Working Paper, RSCAS 2015/14, 2015, p. 7

[86] For instance, a number of EU countries do not give right to vote to non-EU foreigners (including France, Germany and Italy); and US citizens who were not born in the United States territory are not eligible to be candidate to presidential elections.

[87] Council of Europe, European Convention on Nationality, 6 November 1997, ETS 166.

[88] See (in French), 'Le débat sur la déchéance de nationalité – Essai de clarification', Paul Labarde, La Semaine Juridique, Edition générale, no. 5, 1st February 2016, available at http://www.lexisnexis.fr/pdf/2016/LP-Paul-Lagarde-JCPG01022016.pdf (last accessed 04.04.2016).

[89] Although there are some exceptions, including the UK case.

[90] Patrick R. Wautelet, Deprivation of Citizenship for 'Jihadists' Analysis of Belgian and French Practice and Policy in Light of the Principle of Equal Treatment (January 11, 2016), 20, available at Available at

Finally, in the UK and in Australia for instance, legislation on revocation of citizenship was condemned by experts for the method in which these measures can be adopted. In the case of the UK, the removal of citizenship is not actually based on conviction of the person, but rather only on the deprivation being 'conducive to the public good' because the person, 'has conducted him or herself in a manner which is seriously prejudicial to the vital interests of the United Kingdom'[92] which is a rather broad definition. In addition, in the specific case of the UK, there is no judicial approval required for the removal. This is also the case in Australia, where Professor George Williams described the creation of new Citizenship Loss Board as an 'Orwellian development'[93] as the board is not included in any legislation and therefore act of its own rules and discretion and no information is readily available regarding its mandate.

For Daniel Moeckli, post September 11, 2001 counterterrorism measures mean the emergence of a shadow of justice that applies to some only, with increased discrimination between nationals and non-nationals.[94] Therefore, for him, the result of new anti-terrorism laws is not a new balance but rather a distribution of liberty among different categories of people. The doctrine of criminal enemy law, developed first in Germany by Günther Jakobs about thirty years ago is described by Dominique Linhardt as being used in the counterterrorism policies of both the US and Europe nowadays.[95] For Linhardt, the use of the doctrine for counterterrorism facilitates the use of alternative means to combat terrorists, including military tools. But more generally, at the basis of this doctrine, is the idea that some citizens have relinquished their right to certain aspects of citizenship by engaging in acts of terrorism.[96] For David Anderson, these kind of measures 'tap into the feeling, which may well be widespread in the population, that a person who has betrayed the interests of his or her state of citizenship should no longer be

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SSRN: http://ssrn.com/abstract=2713742 or http://dx.doi.org/10.2139/ssrn.2713742 (last accessed 04.04.2016).

[91] On the other hand, Shai Lavi considers that citizenship revocation should constitute a punishment and not an administrative measure, and that it is a 'political punishment to a political crime' which can therefore be added to the criminal conviction. See Shai Lavi, 'Revocation of Citizenship as Punishment: On the Modern Bond of Citizenship and its Criminal Breach', (2011) 61 *University of Toronto Law Journal* 4, 806.

[92] British Nationality Act 1981, s40(4A).

[93] 'Stripping of citizenship a loss in more ways than one', George Williams, The Sydney Morning Herald, April 17, 2016, available at http://www.smh.com.au/comment/stripping-of-citizenship-a-loss-in-more-ways-than-one-20160417-go87as.html, last accessed 26.04.2016.

[94] Moeckli, *Human Rights and Non-Discrimination in the 'War on Terror'*, 170.

[95] See Dominique Linhardt, Cédric Moreau de Bellaing, "Le droit pénal de l'ennemi : une approche sociologique", (2015) *Jurisprudence - revue critique* 4, 35-50.

[96] See also Shai Lavi's analysis (n 91).

entitled to benefit from that citizenship.'[97] George Williams talking about the new Australian anti-terrorism law, stated, before it adoption, that it would 'entrench two classes of citizenship, breaching the notion that every Australian should be treated equally under the law.'[98] The possibility for a state to revoke citizenship allows it to make a citizen into an alien, making it a 'them' instead of an 'us'.[99] It also prompts them to expel these individuals to other states, thereby raising responsibility abroad.

Second, in terms of responsibility outside of the state and relationship between states more generally: dual citizens, stripped of one of their citizenship, might get expulsed.[100] The first state will therefore relinquish its responsibility to deal with terrorists and transfer it to another state. The latter state might be less-equipped or less willing to deal with the terrorist. We could therefore imagine a case where the latter state will claim that the first state is responsible for an increase of terrorism in its territory because of its policy of exporting terrorists. Professor Guy Goodwin-Gill summarizes this as follows, in the specific case of the UK:

> The United Kingdom has no right and no power to require any other State to accept its outcasts and, as a matter of international law, it will be obliged to readmit them if no other State is prepared to allow them to remain.[101]

This statement stresses the links between states that need to exist in counterterrorism: their counterterrorism regime cannot exist in abstraction of each other's and the limit to their powers in this context, lie with the powers of other states, raising the need for each

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[97] First report of the Independent Reviewer on the operation of the power to remove citizenship obtained by naturalisation from people with no other citizenship, Independent Reviewer of Terrorism Legislation, page 11.

[98] 'Citizenship rights a casualty of terrorism', George Williams, The Sydney Morning Herald, November 16, 2015, available at http://www.smh.com.au/comment/george-williams-citizenship-rights-a-casualty-of-terrorism-20151114-gkz9gv.html (last accessed 31.03.16).

[99] This paradigm is reminding of the 'you're either with us or with the terrorists' uttered by Former US President George W Bush, see Voice of America, October 27, 2009, available at http://www.voanews.com/content/a-13-a-2001-09-21-14-bush-66411197/549664.html, last accessed 03.05.2016. The statement gave rise to an extensive and controversial counterterrorism policy.

[100] Again, this might not be automatic, depending on the country of second citizenship. The convicted terrorist might remain in the first state, serving time in prison, and then possibly residing in the country without citizenship. One must question the implications of such situation.

[101] Professor Guy Goodwin-Gill, "Mr. Al-Jedda, Deprivation of Citizenship, and International Law", February 2014, paper submitted to the Joint Committee on Human Rights, p.16, available at http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/legislative-scrutiny-2013-14/immigration-bill/, last accessed 26.04.2016.

state to 'do their part'. But in practice, instead of cooperation between states, we see a denial of responsibility. As examined in the first part of this article, Proulx wrote about the responsibility of states for their failure to prevent transboarder attacks.[102] It is possible to see parallels here. For instance, Turkey has been criticized by the EU for not preventing passage of FTFs to Syria,[103] thereby undermining the efforts of other states to prevent their citizens from joining ISIS and other terrorist groups and potentially leading to responsibility for failing to contribute to counterterrorism. On the other hand, after the terrorist attacks in Brussels in March 2016, Turkey argued that some of the suspects had previously been detained in Turkey; that it had warned the Belgian authorities of their suspicions but that Belgian had not arrested the suspects. More generally, Turkey is blaming the EU for failing to secure its borders, thereby creating an increase terrorist risk for other countries.[104]

However, in the case of revocation of citizenship and expulsion of terrorists, these measures could also constitute direct responsibility, as states could be considered as actively exporting terrorism into other states. Tal Becker's work on states' responsibility for terrorism developed the concept of direct responsibility of states for private acts of terrorism.[105] In our example, states might be responsible for increasing the *risk* of terrorism acts in other countries, by spatially removing the threat from their own territory and instead putting the burden of this risk onto another country. In this respect, they might be violating their obligation to prevent terrorism, which, if we couple it with the obligation to cooperate, would also apply extra-territorially. There is no explicit limit to the obligation to prevent terrorism. While it can be understood primarily as a territorial obligation, it should also apply extraterritorially considering that it is protecting the right to life, as noted in the first section. The recognition of such responsibility could lead to disputes between states before international court. The recognition of an obligation to cooperate as the basis for this responsibility could further prompt non-compliance action by the Security Council for failure to abide by such obligation.

In practice, it is unclear whether either would happen[106] especially considering that the obligation to cooperate is not considered to be so far reaching. Moreover, often

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[102] Vincent-Joël Proulx, 'Babysitting Terrorists: Should States Be Strictly Liable for Failing to Prevent Transborder Attacks?', *Berkeley Journal of International Law* 23, no. 3 (2005): 615.

[103] See the document released by the EU: http://www.statewatch.org/news/2015/jun/eu-council-migratory-pressure-turkey-9491-15.pdf (last accessed 04.04.2016).

[104] See 'Turkish officials: Europe wanted to export extremists to Syria,' The Guardian, 25th March 2016, available at http://www.theguardian.com/world/2016/mar/25/turkish-officials-europe-wanted-to-export-extremists-to-syria (last accessed 05.04.2016).

[105] Tal Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility*, vol. 1, Hart Monographs in Transnational and International Laq (Hart Publishing, 2006).

[106] See note 33.

states will express their disagreement with other states' actions that have impacts beyond borders, but will fall short of legal challenge. The next section examines the practical application of what an extended obligation to cooperate should look like in practice.

B. Is Harmonization the Answer for Cooperating against Terrorism?

In response to the previous section, we can ask whether states seeking to outdo other states in adopting anti-terrorism measures so that the terrorists go elsewhere and bother other states, are ever justified in their action because of the protection they owe their citizens? I noted before that there are bases for difference of treatment of national and non-nationals, some of which are justifiable and legal. But this hierarchy should be put aside for counterterrorism if the end aim is to protect the right to life of *people*. The responsibility to protect a population against terrorism should be extended to mean the general population, especially if – at the end of the day – moving the threat of terrorism to other countries for the sake of protecting one territory offers only a temporary relief, as terrorists might thrive in another jurisdiction and increase the risk of global attacks. Yet, in practice, how can states with different political cultures, financial stability and values, agree on similar responses to the terrorist threat? Does legislating for humanity means that the response should be uniform?

The international community has already aimed to create a global framework against terrorism, which heavily relies on dialogue and cooperation between member states. The General Assembly's Global Counterterrorism Strategy[107] aims to coordinate state's policies on counterterrorism and provides the only global forum to discuss the issues. However, this framework is not binding. The Security Council resolutions, which create a number of binding obligations on states, do not legislate on counterterrorism *per se*, but rather requires that states do.[108] States remain in charge of the practical enforcement of these obligations, which inevitably creates differences in domestic legislation. The Security Council created the Counterterrorism Committee (CTC), which serves as a platform for states to cooperate in counterterrorism, exchange tools and experience. This system allows for states with different capacities to regulate terrorism at the speed they can afford to and with the tools they have. It also reflects the fact that local experience and challenges need to be taken into account to address terrorism. The work of the CTC is completed by the Counter-Terrorism Committee Executive Directorate (CTED), which carries out state visits and provides technical assistance to member states. The leeway that is left to states therefore reflects the difficulty in framing terrorism as a

[107] UN General Assembly Resolution, The United Nations Global Counter-Terrorism Strategy, 13 October 2010, A/RES/64/297.

[108] More than 35 bindings resolutions have been adopted to deal with terrorism since 9/11.

single concept yet it also allows domestic measures to be adapted to the threat and to the capabilities for an answer. It encourages cooperation based on trust and best practice. On the other hand, this flexibility can easily lead to abuse in the definition of terrorism, as well as in the broadness of the measures adopted.

The need to cooperate also explains the rise of regional counterterrorism within organizations wishing to make an area safer by raising standards regionally. The EU is a specific example of attempt at coordinating the legislation in counterterrorism: it has a European definition of terrorism,[109] and it created a European arrest warrant.[110] The Schengen Agreement has also removed passport controls between EU states and the prosecution and judicial services are working together.[111] After a decade of controversy, the EU also adopted an agreement to share personal names records (PNR).[112] Highly criticized because of its possible impact on privacy, critics also state that the European states are simply not sharing the information they already have, and it is not an issue of legal barriers, but rather, of political will and of operational implementation once the intelligence is received. Yet, Resolution 2178 calls on states to share this kind of information in order to increase cooperation between states. The EU is therefore developing an extensive shared framework to address the threat, where states agree to function on the basis of extended cooperation.

The European system, which is the most advanced cooperative one, aims to prevent terrorist suspects from using lax legislation in one country in order to operate there more easily. Yet, even the European model does not amount to a full harmonization of legislation and the member states still each have their own regimes to deal with terrorism, with their own legal regimes and prosecuting regimes. The recent attacks in

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[109] Council Framework Decision of 13 June 2002 on combating terrorism, article 1 defines terrorism as follows: 'Each Member State shall take the necessary measures to ensure that the intentional acts referred to below in points (a) to (i), as defined as offences under national law, which, given their nature or context, may seriously damage a State or an international organisation where committed with the aim of:
- seriously intimidating a population, or
- unduly compelling a Government or international organisation to perform or abstain from performing any act, or
- seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a State or an international organisation

[110] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

[111] Through EUROPOL, the European Police Office, and EUROJUST, the EU's Judicial Cooperation Unit.

[112] Council adopts EU Passenger Name Record (PNR) directive, available at http://www.consilium.europa.eu/en/press/press-releases/2016/04/21-council-adopts-eu-pnr-directive/, last accessed 26.04.2016.

Paris and Brussels are a stark reminder of the gaps in intelligence and operational coordination.[113]

At the international level, it is even harder to imagine harmonization of counterterrorism regimes without an international definition of terrorism and with the differences in criminal and administrative cultures: clearly some states have more financial and logistical capacities than others, without even mentioning political will or ideological agendas. Here we can obviously draw links again with the discussions over migration quotas in Europe and whether some states should bear a heavier burden in accepting migrants.[114] Beyond the ideological approach to terrorism, which varies from country to country, the practical issue here rests with the different capacities that states have to deal with terrorism, as well as their different definitions. Should strong states be encouraged to step up in order to balance the lack of action of weaker states? In practice, this is already the case, as a number of states take the lead in counterterrorism, either because they have had to develop strong counterterrorism measures due to their security situation,[115] or because they have the financial capacities to do so.[116] Should the latter help states that are targeted by terrorism but do not have the capacities to respond to it? And should strong states 'assist' other states if the latter do not wish to receive this help? For instance, Benvenisti asks whether 'the US, when acting to provide a public good, [should] be granted privileges no other states enjoy?'[117] One can mention here in parallel the role of the US in anti-corruption, which led the Guardian writer Jonathan Freedland to call the US a 'global policeman'.[118] He summarizes the role of the US as follows:

> In each case, it was the long arm of American law that brought justice. People are right to complain of the long history of US aggression and intervention in the lives of other sovereign nations. But the long reach of US anti-corruption laws, its

[113] François Heisbourg published a short book entitled 'how to lose the war on terrorism', noting the mistakes and issues with the current French counterterrorism, where he also examines the European response and the challenges it faces, see François Heisbourg, *Comment perdre la guerre contre le terrorism*, Stock, 2016.

[114] UN Security Resolution 2165 (2014) concerning the situation in Syria includes the call on all Member States to support those states that host the Syrian refugees to enable them to cope with the growing humanitarian needs, "based on burden-sharing principles"

[115] Israel for instance has an extensive counterterrorism regime and devotes a large part of its budget to security issues.

[116] Some states will not be able to develop sophisticated counterterrorism measures because they have to deal with other crisis, see note 119.

[117] Benvenisti (n 42) 694.

[118] Be thankful the US is willing to be our global policeman, Jonathan Freedland, The Guardian, 20 April 2016, available at http://www.theguardian.com/commentisfree/2016/apr/20/thanksful-us-willing-global-policeman-panama-papers, last accessed 26.04.2016.

> willingness to act and its ability to do so, are a global asset not to be dismissed lightly.
>
> When it comes to taking on corruption, often it seems the US is the only nation strong enough to do the job. If it's willing to be the global policeman against tax evaders, drug lords and the corrupt, then I for one am grateful.[119]

While Freedland is talking about the US role in anti-corruption, one can see the advantages of the power of the US as a nation concerned by terrorism and the results it can bring when it addresses this global concern, all the while creating other issues, such as whether limits should be imposed on its power.[120]

Finally, what about states that do not consider the threat of terrorism to be relevant to them, or more generally, not as urgent as other pressing problems. For instance,

> ⇨African⇨ states do not see counter-terrorism as a sufficient priority, resist the manner in which the agenda is presented, face internal political struggles to bring legal measures forward, or (for mainly historical reasons) entertain reservations about the discourse of counter-terrorism.[121]

Should these states be held to the same standards as other states? On the other hand, should states that are considered 'failed states' – and the concept of failed states is itself problematic – not be involved in counterterrorism and only be considered as creating or increasing the threat? The recent EU-Turkey deal, signed in March 2016 for handling the refugee influx, under which irregular migrants who arrive in Greece will be returned to Turkey, and the EU will take an equal number of Syrians who are currently staying in refugee camps in Turkey,[122] is based on the assumption that Turkey is a 'safe' country for

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[119] Ibid.

[120] The legal issues raised by US counterterrorism policies after 9/11 are too broad to mention here but they are obviously not considered as insignificant by the author.

[121] Jolyon Ford, *African Counter-Terrorism Legal Frameworks a Decade after 2001* (Institute for Security Studies, 2011), vi.

[122] For details of the deal, see European Commission Fact Sheet, Implementing the EU-Turkey Agreement – Questions and Answers, Brussels, 4 April 2016, available at http://europa.eu/rapid/press-release_MEMO-16-1221_en.htm (last accessed 03.05.2016).

relocation of refugees. However, this has been strongly criticized.[123] Some states' counterterrorism measures focus on 'enemy states',[124] or on geographical areas which travels to will lead to a criminal conviction.[125] This kind of measures might not only lead to discrimination between various states and to questioning sovereign equality, but also to confusion in practice, as Syria for instance is both the source of refugee flow and terrorists. In addition, the notion of 'places of conflict' also run the risk of confusing criminal law aimed at terrorism and laws of war.[126] Finally, it means that some states will automatically disqualify these countries as possible cooperators against terrorism, which might, in turn, encourage them, or their citizens, to promote terrorism.

The prevention of movement of terrorist suspects is necessary for states to address the threat of terrorism. But the efficiency, as well as the legality of these measures needs to be assessed more strongly by states. More generally, states have to develop their understanding of the obligation to cooperate. Rather than being considered as only a tool to enhance the primary obligations to prevent and prosecute terrorism, the duty to cooperate needs to be developed independently: it should be taken by states to have the same strength as the obligation to prevent. Perhaps, it should include certain prohibitions on what states are allowed to adopt domestically instead of being a general obligation. One specific question in this context is whether it should require states to share intelligence regarding terrorist suspects or convicted terrorists, even though they are understandably reluctant to do so for reasons of sovereignty and power. It was noted that

[123] See 'Uncertain Future: Weaknesses Emerge in EU-Turkey Refugee Deal' Giorgos Christides, Katrin Kuntz and Maximilian Popp, Der Spiegel, April 8 2016, available at http://www.spiegel.de/international/europe/first-week-underscores-problems-of-eu-turkey-refugee-deal-a-1086244.html, last accessed 03.05.2016 and a complaint by the Spanish Refugee Aid Commission (CEAR), see '300 organisations and 11,000 individuals denounce the EU-Turkey agreement', available at http://www.statewatch.org/news/2016/may/cear-eu-turkey-complaints.htm (last accessed 08.05.2016).

[124] For instance, Israel prohibits travel to 'enemy countries', in its Prevention of Infiltration Law of 1954, available (in Hebrew) at http://www.nevo.co.il/law_html/Law01/247_001.htm and (in English for an unofficial translation) at http://www.refworld.org/docid/55116dca4.html (both last accessed 03.05.2016). It is a crime to travel to Lebanon, Syria, Egypt, Jordan, Saudi Arabia, Iraq, Yemen, and Iran.

[125] For instance, Denmark wants to adopt a law, which would prohibit travel to an area where a terror organization is involved in an armed conflict. See 'Danish govt seeks Syria travel ban after arrests,' Mail Online, 8 April 2016, available at http://www.dailymail.co.uk/wires/afp/article-3530533/Danish-govt-seeks-Syria-travel-ban-arrests.html (last accessed 02.05.2016).

[126] International counterterrorism is not a clear legal category, but rather, it borrows from criminal law and laws of war. While this is to be welcome for the flexibility it allows in the face of ever-changing threats, this confusion is problematic because a lack of legal clarity can lead to both jurisdiction gaps or to abuse of legal norms.

> after the Paris bombing, senior US officials publicly promised to provide the French with the same level of information that the US has been providing to the British for years. Such expressions of support raise a question: Why was the US not providing that level of information to the French before the Paris attacks?[127]

For Mowatt-Larsen, this requirement to share information is based on the requirement to cooperate, but also on the idea that doing so will benefit all parties involved, including the US, as terrorist attacks that targeted the US were prepared in Europe.[128] The exact nature and practice of intelligence sharing requires adjustments and many states will prefer to share intelligence on a bilateral basis than multilateral basis.[129] Yet, this is one of the questions that the obligation to cooperate raises.

Among other things, Resolution 2178 aims to prevent the movement of terrorism, but some domestic measures might in effect lead to *increased* movement by convicted terrorists, if they are expelled from one country to another. It is obviously easier for states to try to export terrorists than to examine methods to prevent or stop terrorism, such as de-radicalization, education, and improving the general welfare of the state, which are all costlier, more time consuming and with less immediate, obvious or crowd-pleasing results. Yet, these measures are all necessary to address the threat of terrorism in the long run. The development of measures to counter violent extremism, required by Resolution 2178, is one example of the trend to address the root causes of terrorism, as opposed to providing fast and cheaper, but temporary responses to one-off attacks.[130] Moreover, this kind of measures allow to take into account the background of each state's challenges and strength in the face of terrorism, whereas uniform and specific legislation from the top, while easier to adopt, might not yield the same results.

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[127] Rolf Mowatt-Larssen, 'The Long War: The Real Threat of Militant Islamic Extremism', *Just Security*, 11 April 2016, https://www.justsecurity.org/30543/long-war-real-threat-militant-islamic-extremism/.

[128] Ibid.

[129] See 'How to cooperate against terrorism?', Olivier Guitta, Al Jazeera, 16 April 2016, available at http://www.aljazeera.com/indepth/opinion/2016/04/cooperate-terrorism-160414115104156.html, last accessed 26.04.2016.

[130] French Prime Minister Manuel Valls has announced the creation of re-insertion centers in France and more generally, that a 40 millions euro budget would be dedicated to deradicalisation. See in French, http://www.lemonde.fr/societe/article/2016/05/09/manuel-valls-doit-annoncer-ses-mesures-contre-la-radicalisation-djihadiste_4915701_3224.html (last accessed 10.05.2016).

III. CONCLUSIONS

Cooperating against terrorism has the potential to improve the safety of citizens and to protect people on a grander scale. States have recognized this, from the moment terrorism crossed borders. There is no lack of international and bi-lateral instruments aimed at increasing actions between states to prevent terrorism. However, it should not only be considered as a necessity of the international response to the phenomenon, which states can therefore use to their needs, or liking. Intelligence failures, but also the increasing impact of domestic measures on other states and individuals make the obligation to cooperate, a more complex concept, which goes beyond the 'means to and end' approach it has received until now. Instead, it should also be considered to form an inherent part of the existing obligation to prevent and punish terrorism, which has now become a recognized obligation under international law. Alternatively, its relation to other obligations should be clarified and given more weight as we see the emergence of conflicts between the various obligations to fight terrorism. In particular, measures to prevent the movement of terrorists raise questions of burden sharing and distribution of responsibility. It therefore merits a more comprehensive approach, as well as the development of further mechanisms to increase cooperation between states.

The global nature of terrorism requires a global response. That this global response relies on domestic measures and experience is understandable. The Counterterrorism Committee of the UN has recognized this and provides good practice data for all states on counterterrorism measures. It provides assistance to those states that need and require it. However, a global response also requires that states consider they are legislating for the sake of all individuals, not just for their own citizens. In practice, this means obviously that each state has to prevent terrorism to the best of its capacity, which represents positive obligations on states. However, the obligation to cooperate also give rise to obligations on states to avoid negative impact on other states and with the desire to harmonize all legislation.

We can make the obvious parallel here to the fact that counterterrorism measures have the potential to clash with human rights obligations of states as they might require that individuals' freedoms be curtailed. While there were originally strong currents of opinion that hold that the human rights perspective should not 'unduly burden the ⇨Security⇨ Council's agenda,'[131] it is now accepted that counterterrorism measures

[131] E. J. Flynn, 'The Security Council's Counter-Terrorism Committee and Human Rights', *Human Rights Law Review* 7, no. 2 (2007): 371. Resolution 1373 was an example of this trend, as it did not even mention human rights. Moreover, there has always been an argument that in cases of emergency, the curtailment of human rights might become a necessity and the events of September 11, 2001 certainly gave rise to the sense that human rights were second the international security.

need to be balanced with human rights obligations.[132] For the **United Nations Special Rapporteur on Human Rights and Counterterrorism Ben Emmerson, human rights are not only an important part of international law that cannot be set aside, but more importantly, 'by actively promoting and protecting human rights, States contribute to preventing terrorism'.**[133] **In some jurisdictions therefore, there must be a human rights assessment prior to adopting counterterrorism legislation.** For instance, in Australia, the Parliamentary Joint Committee on Human Rights has been established to examine the compatibility of legislative instruments with human rights when they come before parliament.[134] The UK has a Joint Parliamentary Committee on Human Rights, which also examines human rights compatibility of UK bills.[135] **The protection of human rights has become a *tool* for counterterrorism as well as a responsibility for states.**

International counterterrorism cannot function in isolation of human rights protection but neither can it function as the isolated juxtaposition of domestic regimes. Domestic measures against terrorism have the potential to impact, not only the population of one state, but also the population of other states. Therefore, the link between environmental wrongs and terrorism made by Proulx could be extended in order to introduce an impact assessment for counterterrorism measures. In practice, states could be obligated, under Security Council resolutions, to conduct impact assessment of their proposed legislation, not only for the impact that new measures would have in the territory, but also on for the impact that it would have on other states. Like environmental impact assessment, states could be prevented from adopting new counterterrorism

[132] The General Assembly included human rights directly in its Global Counterterrorism Strategy mandate in 2006: Article I.8 of the United Nations General Assembly Adopts Global Counterterrorism Strategy: 'To consider putting in place, on a voluntary basis, national systems of assistance that would promote the needs of victims of terrorism and their families and facilitate the normalization of their lives. In this regard, we encourage States to request the relevant United Nations entities to help them to develop such national systems. We will also strive to promote international solidarity in support of victims and foster the involvement of civil society in a global campaign against terrorism and for its condemnation. This could include exploring at the General Assembly the possibility of developing practical mechanisms assistance to victims.' Very importantly for the legitimacy of international counterterrorism, Resolution 2178 stresses the necessity for Member States to 'comply with', 'respect' and 'conform with' their human rights obligations. Significantly, this is the case, not only in the preamble but also in operative paragraphs 5, 11 and 17.

[133] Press Release, 'Human rights must always be protected, even when countering terrorism – UN experts', document available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15846&LangID=E

[134] See http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights, last accessed 04.05.2016, for details of the committee's mandate.

[135] See http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/role/, last accessed 04.05.2016, for details of the committee's mandate.

measures if they do not fulfil specific requirements. The no-harm principle of international environmental law finds here a parallel in the no-harm obligation that states have to prevent terrorism act by their agents in other countries or by their legislation. Of course, impact assessments can create a time constraint where counterterrorism legislation often needs to be adopted quickly and is sometimes adopted immediately after attacks without lengthy processes. However, this could also prevent the negative effects of emergency measures and legislation inflation, which plagues counterterrorism.

The development of specific obligations on states to cooperate could be a significant way to improve the global response to terrorism. Impact assessment requirement, the spelling, at the international level, of specific behaviors which states should avoid, or wording cooperation as a binding obligation, which states would be responsible for, might ensure the impact of counterterrorism measures is limited in order to avoid abuses, both internally and externally. The principle of legislating for humanity could be incorporated into counterterrorism policies in order to ensure states take into account the needs *and* strengths of other states and their citizens, in their attempt to address the threat that global terrorism is. It does not require a completely harmonized counterterrorism regime, which is not only impossible to foresee in the future, but also would not take into account domestic diversity. However, it requires that states do not act in a way, which might harm other states and/or other citizens. Improvement has been called for – and in some respect – has happened with regards to the impact on counterterrorism measures on human rights[136] but they focus primarily on the human rights of individuals (obviously a worthy and necessary concern). Reframing the obligation to cooperate as an obligation also owed by states towards other states for the sake of all individuals would further improve the efficiency and the fairness of the international counterterrorism framework.

[136] See for instance, the improvements brought to international counterterrorism by the 2008 Kadi decision of the European Court of Justice, Joined Cases C-402/05 P and C-415/05 P Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities [2008] ECR I-6351. For an analysis of the impact of the decision, see Feinberg, *Sovereignty in the Age of Global Terrorism: The Role of International Organisations.*