



# Guidelines for Addressing the Threats and Challenges of “Foreign Terrorist Fighters” within a Human Rights Framework

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Designed by Nona Reuter

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# List of Acronyms and Abbreviations

CCPR	UN Human Rights Committee
CRC	UN Convention on the Rights of the Child
CVE/PVE	Countering violent extremism/preventing violent extremism
EU	European Union
FTF	Foreign terrorist fighter
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)
ECtHR	European Court of Human Rights
IHL	International humanitarian law
ICCPR	International Covenant on Civil and Political Rights
ISIL	“Islamic State in Iraq and the Levant”
ODIHR	OSCE Office for Democratic Institutions and Human Rights
OSCE	Organization for Security and Co-operation in Europe
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCTED	UN Counter-Terrorism Committee Executive Directorate
UNOCT	UN Office of Counter-Terrorism
UNSC	UN Security Council
UNSG	UN Secretary General
<b>UN Special Rapporteur on counter-terrorism</b>	UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism
<b>UN Working Group on mercenaries</b>	UN Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination
VERLT	Violent extremism and radicalization that lead to terrorism

# Foreword

Terrorism poses multi-dimensional challenges and requires multi-dimensional responses. Experience has shown that respecting and protecting human rights and fundamental rule of law principles are not an impediment to, but a vital condition for addressing security threats effectively.

The threats posed by so-called “foreign terrorist fighters” (FTFs) and the responses required to address those threats are no exception. Human rights and the rule of law provide a solid framework for effective action to address the potential threats and challenges posed by individuals who travel for terrorism-related purposes.

United Nations Security Council (UNSC) Resolutions 2170 (2014) and 2178 (2014), adopted under Chapter VII of the UN Charter, determined that the flow of FTFs constitutes an “international threat to peace and security”. As a result, the resolutions oblige states to take wide-reaching measures to prevent and suppress this flow.<sup>1</sup> Recalling the UNSC resolutions, the 2014 OSCE Ministerial Council in Basel noted that the threat of FTFs may affect all regions and states, even those far from the conflict zones to which FTFs are travelling.<sup>2</sup> Since then, the challenges have changed in several ways due to new trends in the return and relocation of FTFs from conflict zones in Iraq and Syria. UNSC Resolution 2396 (2017), sought to address those new challenges.<sup>3</sup>

What has not changed is the need for human rights and rule of law-based approaches with respect to all aspects of the flow of FTFs in countries of departure, transit, destination and relocation. A flurry of legislation, policies and practices has unfolded around the globe in an effort to address the issue. But the breadth of the term FTF and the wide-reaching responses taken by states raise multiple questions concerning their compliance with, and the implications for, the rule of law and the international human rights framework in countering terrorism.

States have committed themselves to combatting the potential threats and challenges posed by FTFs within the framework of international law, in accordance with their obligations under international human rights law and international humanitarian law. The UNSC resolutions, the OSCE Ministerial Declaration on FTFs and other regional initiatives, all consistently reflect and confirm this commitment.

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1 See: Preamble of UNSC Resolution 2178 (2014), adopted on 24 September 2014, UN Doc. S/RES/2178 (2014), (hereafter, UNSC Resolution 2178 (2014)). The resolution was preceded by UNSC Resolution 2170 (2014), which called upon states to suppress the flow of FTFs to the Islamic State in Iraq and the Levant (ISIL) and Al Nusrah Front (ANF) and all other entities associated with Al-Qaida, and to bring the FTFs of those groups to justice. See: UNSC Resolution 2170 (2014), adopted on 15 August 2014, UN Doc. S/RES/2170 (2014), para 8.

2 Preamble of the “Declaration on the OSCE Role in Countering the Phenomenon of Foreign Terrorist Fighters in the Context of the Implementation of UN Security Council Resolutions 2170 (2014) and 2178 (2014)”, adopted by the OSCE Ministerial Council in Basel on 5 December 2014, MC.DOC/5/14 (hereafter, OSCE Ministerial Declaration on FTFs).

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

ODIHR has been specifically mandated to assist OSCE participating States in ensuring the compliance of their counter-terrorism initiatives with OSCE human dimension commitments and international human rights standards. The 2018 OSCE-wide Counter-Terrorism Conference on “The Reverse Flow of Foreign Terrorist Fighters (FTFs): Challenges for the OSCE Area and Beyond”, convened by the Italian OSCE Chairmanship in Rome on 10-11 May 2018, recommended that OSCE executive structures continue to effectively mainstream the protection of human rights and fundamental freedoms, as well as gender considerations, as an integral part of all OSCE activities related to FTFs.<sup>4</sup>

It is against this backdrop, and on the basis of its mandate, that ODIHR aims to provide support and guidance, from a human rights perspective, to OSCE participating States on how they can respond to FTF-related threats and challenges. We hope that this publication will facilitate dialogue between the broad range of state and non-governmental actors involved in counter-terrorism efforts,<sup>5</sup> and lead to further exchanges of experiences and good practices between states. This process should help to promote comprehensive, coherent<sup>6</sup> and human rights compliant responses to this multi-dimensional issue.

*Ingibjörg Sólrún Gísladóttir*  
*Director, OSCE Office for Democratic Institutions and Human Rights*

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4 See: “Chairmanship’s Perception Paper: Recommendations from the 2018 OSCE-wide Counter-Terrorism Conference on ‘The Reverse Flow of Foreign Terrorist Fighters (FTFs): Challenges for the OSCE Area and Beyond’, Rome, 10-11 May 2018”, Italian OSCE Chairmanship, CIO.GAL/90/18, 20 July 2018, p. 5, (hereafter, Chairmanship’s Perception Paper on the 2018 OSCE-wide Counter-Terrorism Conference).

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

6 OSCE Ministerial Declaration on FTFs, *op. cit.*, note 2, para. 8.

# 1. Introduction

While the definition and scope of the term “foreign terrorist fighter”(FTF) is controversial, in recent years it has been commonly used to refer to individuals who have travelled from their home states to other states to participate in or support terrorist acts, including in the context of armed conflict, especially in Iraq and Syria.<sup>7</sup>

Although FTF travel and return is not new, the dynamics of contemporary waves of travel and the extent and the nature of the responses on the national and international levels are. Normative, practical and political developments have unfolded internationally, regionally and nationally. The recognition of FTF flows as a threat to international peace and security, enshrined most notably in UN Security Council (UNSC) Resolution 2178 (2014) and under binding Chapter VII powers, put in place wide-reaching obligations on states to take all necessary and feasible measures to combat them. Subsequent international initiatives such as UNSC Resolution 2396 (2017), reiterated the characterization of FTFs, and in particular their return, as a grave threat to peace and security, and broadened states’ obligations to respond to its manifestations.

UNSC Resolution 2178 (2014) requires states to prevent, disrupt, prosecute, rehabilitate and reintegrate FTFs and recognized the importance of “comprehensively addressing underlying factors, including by preventing radicalization to terrorism, stemming recruitment, inhibiting foreign terrorist fighter travel, disrupting financial support to foreign terrorist fighters, countering violent extremism, which can be conducive to terrorism, countering incitement to terrorist acts motivated by extremism or intolerance, promoting political and religious tolerance, economic development and social cohesion and inclusiveness, ending and resolving armed conflicts, and facilitating reintegration and rehabilitation...”<sup>8</sup> UNSC Resolution 2396 (2017) calls for additional action to be taken in the areas of border security and information sharing; judicial measures and co-operation; and prosecution, rehabilitation and reintegration strategies.

In some areas, actions the UNSC has called for since 2014 have been applied selectively in practice, for example in relation to rehabilitation and reintegration of FTFs. On

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7 For the controversies relating to the term, and associated human rights issues, see section 3.1 below. UNSC Resolution 2178 (2014), *op. cit.*, note 1, describes FTFs as “individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict”. Subsequent UNSC resolutions and legislative measures broadly adopted this language, whereas a broad range of research on the topic continues to refer to “foreign fighters” only rather than “foreign terrorist fighters”. Although, as noted below, the FTF term is problematic for its breadth and vagueness and the ensuing rights implications, it is the term most commonly used in the international arena and the one therefore used in this paper.

8 Preamble to UNSC Resolution 2178 (2014), para. 4, calls on states “to cooperate in efforts to address the threat posed by foreign terrorist fighters, including by preventing the radicalization to terrorism and recruitment of foreign terrorist fighters, including children, preventing foreign terrorist fighters from crossing their borders, disrupting and preventing financial support to foreign terrorist fighters, and developing and implementing prosecution, rehabilitation and reintegration strategies for returning foreign terrorist fighters”, *op. cit.*, note 1.



the other hand, increasingly expansive approaches to criminal law and administrative measures have been among the features of states' responses to the challenges posed by FTFs, with potentially far-reaching impacts on a broad range of human rights, including the right to liberty, the right to a fair trial, freedom of movement, freedom of expression and others.

Like other responses to terrorism, Resolutions 2178 (2014) and 2396 (2017) have been criticized for creating obligations for states to take broad-reaching measures, without clearly defining the target.<sup>9</sup> The fact that far-reaching measures are directed at a broadly or ill-defined issue – and the significant impact they may have on those targeted or indirectly affected – contributes to serious concerns about the compliance of those measures and other counter-terrorism efforts, with fundamental human rights and rule of law principles.

While states have an obligation to prevent and counter terrorism, including terrorism-related acts committed by FTFs, measures should be carefully designed to ensure that they are human rights-compliant and do not undermine the global human rights and rule of law framework while countering terrorism. Doing so would jeopardize not only the legitimacy but also the effectiveness of national and international counter-terrorism efforts.

### ***Scope and Purpose of the Document***

This document seeks to provide states with policy recommendations, and supporting analysis, on some of the key human rights issues that they must grapple with as they seek to respond to the threats posed by FTFs in a manner that is consistent with human rights and the rule of law. Following a brief overview of background facts, international and national responses, this document offers a series of recommendations for a human rights-compliant approach to addressing the flow and return of FTFs. It does not purport to provide an exhaustive analysis of its manifestations, states' responses or the many human rights challenges arising in OSCE participating States from the challenge of FTFs. Nor does it purport to present straightforward solutions to a complex and multi-faceted problem. Instead, it seeks, through recommendations and supporting analysis, to suggest human rights approaches, consistent with states' obligations and commitments, in light of concerns that have arisen in practice. In a rapidly evolving environment, we hope that this document will serve as a springboard for the further exchange of ideas, and sharing of good practices within and outside of the OSCE on addressing the challenges posed by FTFs in a manner responsive to security needs and compliant with human rights standards. This publication complements guidance documents developed by other international actors.<sup>10</sup>

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<sup>9</sup> In particular, UNSC Resolution 1373 (2001), adopted on 28 September 2001 in the aftermath of the 9/11 terror attack in the United States. For a more detailed discussion of these definitional ambiguities, see sections 2 and 3.1 below.

<sup>10</sup> See, for example, "Guidance to States on human rights-compliant responses to the threat posed by foreign fighters", UN Counter-Terrorism Implementation Task Force (CTITF), Working Group on Promoting and Protecting Human Rights and the Rule of Law while Countering Terrorism, (hereafter UN CTITF Guidance 2018), 28 June 2018, <[www.ohchr.org/EN/newyork/Documents/Human-Rights-Responses-to-Foreign-Fighters-web%20final.pdf](http://www.ohchr.org/EN/newyork/Documents/Human-Rights-Responses-to-Foreign-Fighters-web%20final.pdf)>.

The recommendations and analysis draw on ODIHR research and on advice and input obtained from a broad range of individuals – from the OSCE, other international organizations, non-governmental organizations and academia – with recognized expertise in human rights and counter-terrorism issues. Input was gathered, in particular, at an Expert Meeting on “The implementation of legislation and policies to counter the phenomenon of foreign terrorist fighters: a human rights perspective”, held in Warsaw on 25 and 26 April 2017, and a subsequent distance peer-review with meeting participants and other key stakeholders in March and April 2018.<sup>11</sup> The paper also builds on previous research and activities carried out by ODIHR, including an Expert Workshop on “*The phenomenon of foreign terrorist fighters: a human rights perspective*”, held in March 2015, and a background paper on the subject prepared for the 2015 OSCE-wide Counter-Terrorism Conference.<sup>12</sup> The May 2018 OSCE-wide Counter-Terrorism Conference in Rome, which was dedicated to the new challenges connected to the reverse flow of FTFs, and a side event ODIHR organized at the margins of the Conference, also provided valuable input for the finalization of this document.<sup>13</sup>

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<sup>11</sup> “Human rights-based approach key to effectively countering phenomenon of foreign terrorist fighters, experts underline at ODIHR meeting”, OSCE/ODIHR, 26 April 2017, <[www.osce.org/odihr/313906](http://www.osce.org/odihr/313906)>.

<sup>12</sup> “Background Paper: Countering the Incitement and Recruitment of Foreign Terrorist Fighters: The Human Dimension”, OSCE/ODIHR, 25 June 2015, <[www.osce.org/odihr/166646](http://www.osce.org/odihr/166646)>, (hereafter, “Background Paper: Countering the Incitement and Recruitment of Foreign Terrorist Fighters: The Human Dimension”, OSCE/ODIHR).

<sup>13</sup> See: Chairmanship’s Perception Paper on the 2018 OSCE-wide Counter-Terrorism Conference, *op. cit.*, note 4.

## 2. Background: Overview of FTF Dynamics, Challenges and Responses

The starting point for many analyses of what is often referred to as the “FTF-phenomenon” is to note that it is, in many respects, not new. Foreign fighters have been a staple feature of many if not most armed conflicts, international and non-international, for many decades.<sup>14</sup> However, it is only in recent years, with the influx of FTFs to Syria and Iraq, and increasingly their return to states of origin, previous residence, or onward travel to third states, that the issue has become a matter of intense international concern.

Understanding the nature of the FTF problem – the motivation of those engaged in FTF-related travel and return, and the threat it represents – is a necessary pre-requisite to formulating effective strategies of prevention and response. While an in-depth exploration of its manifestations goes beyond the scope of this document, a few background facts from a growing body of research and literature are worth highlighting. These should inform discussions on effective and targeted legal and policy responses.

### ***Foreign Fighters Today***

Available information suggests that FTFs who travelled to and actively engaged with the so-called “Islamic State” in Iraq and the Levant (ISIL), Al-Qaida and associated groups in Iraq, Syria and other countries – such as Afghanistan, Yemen, Libya, Pakistan and Somalia – came from an estimated 110 states around the globe. While estimates are by their very nature unreliable, linked in part to definitional problems, it has been suggested that more than 40,000 foreign terrorist fighters had travelled to just Iraq and Syria alone as of late 2017.<sup>15</sup> Those who travelled from European states to the conflict

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14 Reference is often made to the large number of foreign fighters who fled to the Spanish civil war, to oppose Soviet occupation of Afghanistan, or to participate in the conflict in the former Yugoslavia, though a growing body of analysis makes clear that the practice goes far beyond these renowned examples. See, for example: M. Flores, “Foreign Fighters Involvement in National and International Wars: A Historical Survey”, in Andrea de Guttery, Francesca Capone and Christophe Paulussen (eds.), *Foreign Fighters under International Law and Beyond* (The Hague: T.M.C. Asser Press, 2016), pp. 27-48 (hereafter FFILB). See also: D. Malet, “The European Experience with Foreign Fighters and Returnees”, in T. Renard and R. Coolsaet (eds.), “Returnees: who are they, why are they (not) coming back and how should we deal with them? Assessing policies on returning foreign terrorist fighters in Belgium, Germany and the Netherlands”, Egmont Institute, Brussels, February 2018, pp. 7-9, <[www.egmontinstitute.be/content/uploads/2018/02/egmont.papers.101\\_online\\_v1-3.pdf?type=pdf](http://www.egmontinstitute.be/content/uploads/2018/02/egmont.papers.101_online_v1-3.pdf?type=pdf)>, (hereafter, T. Renard and R. Coolsaet (eds), “Returnees: who are they, why are they (not) coming back and how should we deal with them?”, Egmont Institute).

15 See: “Greater Cooperation Needed to Tackle Danger Posed by Returning Foreign Fighters, Head of Counter-Terrorism Office Tells Security Council”, United Nations, 29 November 2017, <[www.un.org/press/en/2017/sc13097.doc.htm](http://www.un.org/press/en/2017/sc13097.doc.htm)>.

areas in Syria and Iraq attracted particular attention and voluminous analysis, though they represent a smaller percentage of the total number of FTFs.<sup>16</sup>

As regards the return or “reverse flow” of FTFs, which has taken place in waves, reliable statistics are, again, elusive. One report tracked 5,600 fighters who had returned to their home countries globally by 2015.<sup>17</sup> Another report, focused on the FTF issue in the European Union (EU), suggested that some 30 per cent of FTFs had returned or moved to other states by 2016.<sup>18</sup> The “shrinking territories” in Syria and collapse of the so-called “Islamic State” caliphate in Iraq in October 2017 contributed to the latest wave of returnees.<sup>19</sup> By early 2018, evidence pointed to both a sharp decrease in the number of those travelling to Iraq and Syria and to growing concern regarding the impact of FTFs returning to their home states or moving on to other – sometimes unknown – locations.<sup>20</sup> In light of these dynamics, concerns that ISIL is turning its sights elsewhere, potentially using returning FTFs, has been a defining feature of the political discourse and related developments in law and policy.

The widely reported involvement of several former FTFs in attacks in Brussels, Paris, Istanbul and London between 2015 and 2017 appeared to confirm this fear. Concern has also arisen from research suggesting that FTF-related attacks, while infrequent, have been particularly brutal and lethal.<sup>21</sup> At the same time, others have called for some perspective on the relatively very small number of FTFs who have engaged in any acts

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16 “Terror Situation and Trend’ report (TE-SAT 2016)”, Europol, 2016, p. 26, <[www.europol.europa.eu/sites/default/files/documents/europol\\_tesat\\_2016.pdf](http://www.europol.europa.eu/sites/default/files/documents/europol_tesat_2016.pdf)>. Europol writes that “More than 5,000 Europeans are believed to have travelled to conflict areas in Syria and Iraq”. The International Centre for Counter-Terrorism (ICCT) cited the number of between 3,922 and 4,294, hence on average 4,108. See: B. van Ginkel and E. Entenmann (eds.), “The Foreign Fighters Phenomenon in the European Union: Profiles, Threats & Policies”, International Centre for Counter-Terrorism, April 2016, p. 4, <[www.icct.nl/wp-content/uploads/2016/03/ICCT-Report\\_Foreign-Fighters-Phenomenon-in-the-EU\\_1-April-2016\\_including-AnnexesLinks.pdf](http://www.icct.nl/wp-content/uploads/2016/03/ICCT-Report_Foreign-Fighters-Phenomenon-in-the-EU_1-April-2016_including-AnnexesLinks.pdf)> (hereafter, B. van Ginkel and E. Entenmann (eds.), “The Foreign Fighters Phenomenon in the European Union”). Tunisia is believed to be the largest source state, with 6,000 persons estimated to have travelled to the conflict in Syria from that state alone. See: “Foreign Fighters: An Updated Assessment of the Flow of Foreign Fighters into Syria and Iraq”, the Soufan Group, December 2015, p. 15, <[soufangroup.com/wp-content/uploads/2015/12/TSG\\_ForeignFightersUpdate3.pdf](http://soufangroup.com/wp-content/uploads/2015/12/TSG_ForeignFightersUpdate3.pdf)>.

17 “Foreign Fighters: An Updated Assessment of the Flow of Foreign Fighters into Syria and Iraq”, the Soufan Group, *op. cit.*, note 16. Although still cited in 2017, news reports and other sources (e.g., UNSC meeting records of 28 November 2017, SC/13097), the number can now be expected to be significantly higher.

18 B. van Ginkel and E. Entenmann (eds.), “The Foreign Fighters Phenomenon in the European Union”, *op. cit.*, note 16.

19 “The Challenge of Returning and Relocating Foreign Terrorist Fighters: Research Perspectives”, UN Counter-Terrorism Committee Executive Directorate (UNCTED), March 2018 (hereafter, UNCTED Trends Report 2018), <[www.un.org/sc/ctc/wp-content/uploads/2018/04/CTED-Trends-Report-March-2018.pdf](http://www.un.org/sc/ctc/wp-content/uploads/2018/04/CTED-Trends-Report-March-2018.pdf)>. The current wave of returning FTFs is described as being larger and more diverse than previous ones.

20 Many FTFs remain unaccounted for, having either died overseas or moved to unknown locations. See, for example, UNCTED Trends Report 2018, *op. cit.*, note 19. See also: “Risk Analysis 2017”, Frontex, 20 February 2018, pp. 30–31, <[frontex.europa.eu/assets/Publications/Risk\\_Analysis/Annual\\_Risk\\_Analysis\\_2017.pdf](http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2017.pdf)>, (hereafter, “Risk Analysis 2017”, Frontex); “Now that the Islamic State has fallen in Iraq and Syria, where are all its fighters going”, the Washington Post, 22 February 2018, <[www.washingtonpost.com/graphics/2018/world/isis-returning-fighters/](http://www.washingtonpost.com/graphics/2018/world/isis-returning-fighters/)>; D.L. Byman, “Frustrated Foreign Fighters”, the Brookings Institution, 13 July 2017, <[www.brookings.edu/blog/order-from-chaos/2017/07/13/frustrated-foreign-fighters/](http://www.brookings.edu/blog/order-from-chaos/2017/07/13/frustrated-foreign-fighters/)>.

21 See: UNCTED Trends Report 2018, *op. cit.*, note 19; Hegghammer, “Should I stay or Should I Go? Explaining Variation in Western Jihadists’ Choice between Domestic and Foreign Fighting”, *American Political Science Review*, Vol. 107, No. 1, (February 2013), p. 11.

of terrorism upon their return.<sup>22</sup> Experience has shown that threats and attacks also emerge frequently without any “foreign” engagement.<sup>23</sup> The threat that returnees pose in countries of return or relocation is inherently difficult to quantify and requires ongoing analysis.

The UN Security Council has noted that a key element of the risk arising from FTFs relates not only to their return but to their impact in the conflict zones themselves. UNSC resolutions on FTFs, and others focused on particular terrorist groups,<sup>24</sup> explain the significance of the issue by referring to the impact of FTFs on “the intensity, duration and intractability of conflicts,” as well as the “serious threat to their States of origin, the States they transit and the States to which they travel, as well as States neighbouring zones of armed conflict in which foreign terrorist fighters are active and that are affected by serious security burdens”.<sup>25</sup> Commentators also refer to the impact of FTFs on the sustainability and operations of organizations such as ISIL, which rely on a constant flow of recruits to sustain their ranks, not least due to very high casualty rates. Legal and policy responses directed at alleviating one area of risk (e.g., in states of origin) should be mindful of the potential to contribute to other risks (e.g., in conflict zones), as well as to the need to evaluate risk in the short and longer term. A broader risk analysis would also take into account threats associated with the increasing polarization of society to which FTFs, and state responses to them, may contribute.<sup>26</sup>

Crucial questions are who is going and coming back, where to and from and, in both cases, why? These are key questions that must inform policies. While studies thus far are limited in scope, a number of reports by civil society, academic and inter-state institutions, including the UN Office of Counter-Terrorism (UNOCT), contribute to our understanding of FTF motivations and contributing factors, including by giving voice to disengaged FTFs.<sup>27</sup>

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22 See, for example; C. Lister, “Returning Foreign Fighters: Criminalization or Reintegration?”, the Brookings Institution, August 2015, p. 2, <[www.brookings.edu/wp-content/uploads/2016/06/En-Fighters-Web.pdf](http://www.brookings.edu/wp-content/uploads/2016/06/En-Fighters-Web.pdf)>, which notes: “While genuine, the potential threat posed by returning FFs should not be overly exaggerated. Statistical analyses based on historical data – such as one by Hegghammer – have suggested that no more than 11 percent of FFs will pose a terrorist threat upon their return home”.

23 For example, see the statement by the EU Counter-Terrorism Coordinator in 2016 noting that it would be erroneous to focus on foreign threats when many attacks are from homegrown terrorism, in A. Reed, J. Pohl and M. Jegerings, “The Four Dimensions of the Foreign Fighter Threat: Making Sense of an Evolving Phenomenon”, International Centre for Counter-Terrorism, June 2017, p. 7, <[www.icct.nl/publication/the-four-dimensions-of-the-foreign-fighter-threat-making-sense-of-an-evolving-phenomenon](http://www.icct.nl/publication/the-four-dimensions-of-the-foreign-fighter-threat-making-sense-of-an-evolving-phenomenon)>.

24 Related UNSC resolutions have specifically targeted groups such as ISIL, Al Nusrah Front, and entities associated with Al-Qaida, and referred to FTF obligations in this context. See, for example: UNSC Resolution 2249 (2015).

25 UNSC Resolution 2178 (2014), *op. cit.*, note 1.

26 For one assessment of the “shifting threats” posed by foreign fighters see: A. Reed, J. Pohl and M. Jegerings, “The Four Dimensions of the Foreign Fighter Threat”, *op. cit.*, note 23. The four main threats related to travel, return to their countries of residence, the threat posed by lone actors and sympathisers, and finally, the increasing polarization of society.

27 The UNOCT report goes to some lengths to explicitly acknowledge its limitations. See: “Enhancing the Understanding of the Foreign Terrorist Fighters Phenomenon in Syria”, UNOCT, July 2017, p. 52 (hereafter, UNOCT Report July 2017), <[www.un.org/en/counterterrorism/assets/img/Report\\_Final\\_20170727.pdf](http://www.un.org/en/counterterrorism/assets/img/Report_Final_20170727.pdf)>.

Research reveals a complex multi-faceted environment and consistently shows that there is no single FTF profile.<sup>28</sup> Available information and experience suggests that assumptions regarding FTF profiles and triggers have often proved erroneous. For example, assumptions along gender lines that women and girls are victims and not agents have proven dangerously ill-founded.<sup>29</sup> Furthermore, the fact that many FTFs are themselves children of a range of ages, with some born to FTFs abroad and educated as fighters, raises particular challenges and concerns regarding child protection (see section 3.8). Significant research, focusing on Europe, also suggests there may be other factors relevant to appropriate responses, such as high levels of mental illness on the part of so-called “suspected jihadi radicals” drawn to foreign fighting, which have not yet been fully explored.<sup>30</sup>

Several studies enquiring into the motivation of FTFs similarly reflect a greater range of possible “push and pull” factors than were apparent when the issue first gained international attention.<sup>31</sup> These factors, and in particular social structural “push” factors, vary dramatically between individuals and contexts. As “push and pull factors intertwine in different ways according to the individual and the internal and external environment each one faces,” simplistic attempts at identifying the source of the problem are bound for failure.<sup>32</sup> This underlines the need for crafting and channeling relevant responses – both the responses that seek to prevent individuals from leaving as well as those that address returnees – in a way that is targeted to particular cases and contexts.

Nonetheless, certain motivations have been shown to recur in available research and are of potential relevance to human rights considerations discussed later in this document. These include personal motivations (such as lack of opportunities, personal circumstances and the search for identity and meaning) as well as ideological ones (including, for example, empathy and outrage for Muslim victims of violence and against “Western”

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28 UNOCT Report July 2017, *op. cit.*, note 27.

29 See section 3.7 on the gender dimension below. In early practice, very few females were prosecuted as a result, but it has been suggested that in the Netherlands and Belgium lessons have been learned and since 2016 “no distinction” has been made between the prosecution of women and men, in sharp contrast to earlier experience. The division has also, reportedly, narrowed in Germany. See, for example, T. Renard and R. Coolsaet (eds), “Returnees: who are they, why are they (not) coming back and how should we deal with them?”, Egmont Institute, *op. cit.*, note 14.

30 See claim by mental health specialists that 60 per cent of suspected jihadi radicals in the Netherlands had a history of mental health problems, in C. Paulussen, J. Nijman, K. Lismont, “Mental Health and the Foreign Fighter Phenomenon: A Case Study from the Netherlands”, International Centre for Counter-Terrorism, March 2017, p. 7, <[www.icct.nl/wp-content/uploads/2017/03/ICCT-Paulussen-Nijman-Lismont-Mental-Health-and-the-Foreign-Fighter-Phenomenon-March-2017.pdf](http://www.icct.nl/wp-content/uploads/2017/03/ICCT-Paulussen-Nijman-Lismont-Mental-Health-and-the-Foreign-Fighter-Phenomenon-March-2017.pdf)>.

31 R. Frenett and T. Silverman, “Foreign Fighters: Motivations for Travel to Foreign Conflicts”, in FFILB, pp. 63-76, *op. cit.*, note 14. Also see: Phil Gurski, *Western Foreign Fighters: The Threat to Homeland and International Security* (Lanham: Rowman & Littlefield, 2017), p. 70. Note again that some of these analyses focus on “foreign fighters” not “FTFs”.

32 UNOCT Report July 2017, p. 5, *op. cit.*, note 27. See also J.M. Berger “Making CVE Work: A Focused Approach Based on Process Disruption”, International Centre for Counter-Terrorism (hereafter, J.M. Berger “Making CVE Work: A Focused Approach Based on Process Disruption”), May 2016, which concludes: “There are obvious risks in arguing for single-issue causation in settings where multiple variables are at play.”

states, which are seen to be complicit).<sup>33</sup> While religion is part of the landscape, assumptions regarding so-called religious “fundamentalism” being the key driving factor are increasingly disputed, as reflected, for example, in the work of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (hereafter UN Special Rapporteur on counter-terrorism).<sup>34</sup> Likewise, a 2016 study by a group of mostly United States military researchers at the Combating Terrorism Center at West Point found that religion was “not the strongest driving force”, emphasizing instead “cultural and political identities” and “a narrative that is focused on the ongoing deprivation of Muslims, both in specific Western polities, as well as in the international arena.”<sup>35</sup> A report by UNOCT also distinguishes religion as such from a “sense of identity with – and a desire to help – co-religionists who are perceived as victimized and mistreated by other groups” as a common theme.<sup>36</sup>

Another commonality in several studies is reference to socio-economic realities, including the correlation between high unemployment and FTF flows. While a 2016 study suggested this was true from within “the Muslim world”,<sup>37</sup> a later analysis suggests that poor education and employment rates were also key push factors for many, but by no means all, FTFs from European contexts.<sup>38</sup> The UNOCT also refers more broadly to individuals “isolated from mainstream social, economic and political activity”.<sup>39</sup> Difficult personal and dysfunctional family circumstances were also identified as common features of the sample of FTFs considered in that study.<sup>40</sup>

As regards returnees, who are increasingly the focus of policymakers’ attention, the July 2017 UNOCT report points to similar diversity. It notes that “few of those who go to Syria

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33 Empathy for Muslim victims of violence and the perceived complicity of “Western” powers in perpetuating conflicts in the Middle East, for example, are cited as driving factors for women who choose to join ISIL. See: Van Leuven, Mazurana and Gordon, “Analysing the Recruitment and Use of Foreign Men and Women in ISIL through a Gender Perspective” in FFILB, pp. 97-121, *op. cit.*, note 14.

34 See UN Special Rapporteur on counter-terrorism, *Report to the UN Human Rights Council*, UN Doc. A/HRC/31/65, 22 February 2016, para. 15: “Commentators have noted that there can be too much focus on religious ideology as the driver of terrorism and extremism, while factors related to identity, or misguided altruism, are overlooked”.

35 “From Cradle to Grave: The Lifecycle of Foreign Fighters in Iraq and Syria”, Combating Terrorism Center at West Point, November 2016, <<https://ctc.usma.edu/app/uploads/2016/11/Cradle-to-Gravez.pdf>>; see also: “Tariq Ramadan: As Muslims Condemn Spain Attack, Americans Must Denounce U.S. Killings in Syria, Iraq”, Democracy Now, 24 August 2017, <[www.democracynow.org/2017/8/24/tariq\\_ramadan\\_as\\_muslims\\_condemn\\_spain](http://www.democracynow.org/2017/8/24/tariq_ramadan_as_muslims_condemn_spain)>.

36 UNOCT Report July 2017, p.3, *op. cit.*, note 27, which notes that one of the most common reasons for traveling to Syria is empathy with the Sunni communities believed to be under attack for their beliefs.

37 See J.M. Berger, “Making CVE Work: A Focused Approach Based on Process Disruption”, p. 5, *op. cit.*, note 32. Cautioning against the risks of arguing for single-issue causations, Berger referred to a large-scale study that found a correlation between high unemployment and high FTF flows from within “the Muslim world” but the opposite correlation for foreign fighters from “non-Muslim countries”.

38 UNOCT Report July 2017, p. 5, *op. cit.*, note 27.

39 “Most FTFs in this sample come from large families in urban communities that are rather isolated from mainstream social, economic and political activity. Some of the families from which these particular FTFs come often show signs of internal dysfunction or stress”, according to the UNOCT Report July 2017, p. 4, *op. cit.*, note 27.

40 *Ibid.*

do so with the intention of training to become a domestic terrorist upon their return.”<sup>41</sup> Among the many factors that motivate return are disillusionment, particularly for those driven by “idealism”, and the draw of family, especially mothers.<sup>42</sup> Undoubtedly, dangers and conditions of life, including the eventual collapse of the ISIL project in Iraq, also contributed as motivating factors.

The diversity of profiles of those returning from conflict zones and their experiences abroad precludes generalized assumptions as to their motivations for return, the roles they have played abroad (e.g., as “fighters” or active supporters of the “Islamic State”) and their intentions upon return.<sup>43</sup> Likewise, in relation to returnees from Syria it has been suggested that: “In dealing with returnees, it may be important to differentiate between them based on what they actually did in Syria, their initial intention before going and their reasons for return.”<sup>44</sup>

Understanding motivation is crucial to addressing causes and consequences. Moreover, it is also essential to recall that motivation, even if based on violent extremist views, must be distinguished from violent action and an assessment of the intent to do harm when it comes to finding appropriate responses to individual cases of FTFs.

### ***Supranational Responses: Obligations to Prevent and Suppress within the Framework of International Law***

This document focuses on policy recommendations to states. Many of the measures adopted by states have responded to or been triggered by UNSC resolutions, in particular Resolutions 2170 (2014), 2178 (2014) and 2396 (2017), which have been adopted under Chapter VII of the UN Charter and, as a result, impose on states binding obligations under international law.

UNSC Resolution 2178 (2014) sets down a far-reaching framework of obligations on states, which provided the impetus for further international, regional and national normative developments from other sources. In particular, the resolution imposed obligations on states to prevent and suppress the recruiting, organizing, transporting or equipping of FTFs<sup>45</sup> and to establish serious criminal offences to prosecute and penalize a range of conduct. This includes: travel or attempts to travel by individuals to states other than their states of residence or nationality for the purpose of the perpetration, planning, preparation or participation in terrorist acts, or to provide or receive terrorist training; the willful provision or collection, by any means, directly or indirectly, of funds to finance such travel; or the willful organization, recruitment or “other facilitation” of

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41 The UNOCT Report July 2017, p. 5, *op. cit.*, note 27, notes that “not all FTFs go to Syria with the objective of becoming fighters there, even less of committing atrocities”.

42 *Ibid.*

43 UNCTED Trends Report 2018, *op. cit.*, note 19.

44 See UNOCT Report July 2017, *op. cit.*, note 27.

45 UNSC Resolution 2178 (2014), para 5, *op. cit.*, note 1.



such travel.<sup>46</sup> It also requires states to prevent entry to their territory or transit of FTFs<sup>47</sup> and calls upon them to co-operate, for example, in preventing radicalization to terrorism, and developing and implementing prosecution, rehabilitation and reintegration strategies for returning FTFs.<sup>48</sup> Furthermore, it calls on states to take a number of additional measures to enhance international co-operation, including in sharing information to identify FTFs and countering violent extremism in order to prevent terrorism.<sup>49</sup> Resolution 2178 (2014) also demands that “all foreign terrorist fighters disarm and cease all terrorist acts and participation in an armed conflict.”<sup>50</sup>

The former UN Special Rapporteur on counter-terrorism observed in strikingly critical terms that UNSC Resolution 2178 (2014) “imposes upon all Member States far-reaching new legal obligations without any effort to define or limit the categories of persons who may be identified as ‘terrorists’ by an individual state,” and that “[t]his approach carries a huge risk of abuse, as various states apply notoriously wide, vague or abusive definitions of terrorism, often with a clear political or oppressive motivation.”<sup>51</sup> The lack of a definition of terrorism in UNSC resolutions or international law more broadly, has been well recognized, while associated concerns are greatly intensified in the context of the added layers of ambiguity around each of the elements of the phrase “foreign terrorist fighters”, as discussed further in section 3.1, below.

UNSC Resolution 2396 (2017) has been described as going significantly further than its predecessor in several respects. It requires states to “strengthen their efforts in border security, information-sharing, and criminal justice in ways that have serious implications for domestic legal regimes”, for human rights and the rule of law.<sup>52</sup> In particular, its call to member states to develop “watch lists or databases” of persons suspected of engagement in or support for FTFs, and to share a broad range of relevant information, including personal biometric data with other states, necessitates careful attention as to whether and how human rights are being protected in co-operating states.<sup>53</sup> Echoing commentary on its predecessor, Resolution 2396 (2017), has been criticized for its

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46 *Ibid.*, para. 6.

47 *Ibid.*, para. 8.

48 *Ibid.*, para. 4.

49 *Ibid.*, paras. 11-14 and 15-19, respectively.

50 *Ibid.*, para. 1.

51 M. Scheinin (former UN Special Rapporteur on counter-terrorism), “Back to post-9/11 panic? Security Council resolution on foreign terrorist fighters”, Just Security, 23 September 2014, <[www.justsecurity.org/15407/post-911-panic-security-council-resolution-foreign-terrorist-fighters-scheinin/](http://www.justsecurity.org/15407/post-911-panic-security-council-resolution-foreign-terrorist-fighters-scheinin/)> (hereafter, M. Scheinin, “Back to post-9/11”). See also: M. Scheinin, “A Comment on Security Council Res 2178 (Foreign Terrorist Fighters) as a ‘Form’ of Global Governance”, Just Security, 6 October 2014, <[www.justsecurity.org/15989/comment-security-council-res-2178-foreign-fighters-form-global-governance](http://www.justsecurity.org/15989/comment-security-council-res-2178-foreign-fighters-form-global-governance/)>.

52 F. Ní Aoláin, (current UN Special Rapporteur on counter-terrorism), “The UN Security Council, Global Watch Lists, Biometrics and the threat to the rule of law”, Just Security, 17 January 2018, <[www.justsecurity.org/51075/security-council-global-watch-lists-biometrics/](http://www.justsecurity.org/51075/security-council-global-watch-lists-biometrics/)>, (hereafter, F. Ní Aoláin, “The UN Security Council, Global Watch Lists, Biometrics and the threat to the rule of law”).

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

breadth and lack of precision, increasing the risk that the “Security Council dictate may be used by states to nefariously target those who disagree with them”.<sup>54</sup>

The challenge for states is to define and approach the problem in a manner that avoids these pitfalls. In this context, it is crucial to underline that UNSC Resolutions 2178 (2014) and 2396 (2017) explicitly note (in several operative paragraphs and the preamble) that the obligations enshrined therein must be applied consistently with human rights, international humanitarian law and refugee law. Echoing the UN’s 2006 Global Counter-Terrorism Strategy, UNSC Resolution 2178 (2014) also stresses the complementarity of effective counter-terrorism measures and the protection of human rights by:

*“Underscoring that respect for human rights, fundamental freedoms and the rule of law are complementary and mutually reinforcing with effective counter-terrorism measures, and are an essential part of a successful counter-terrorism effort” and noting “the importance of respect for the rule of law so as to effectively prevent and combat terrorism”.*<sup>55</sup>

The obligation to respect human rights in countering the threats posed by FTFs has been reiterated in numerous subsequent declarations and conventions, including in the 2015 European Union (EU) Joint Riga Statement following the Charlie Hebdo attack in Paris<sup>56</sup> and the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, which focuses on FTFs.<sup>57</sup>

The OSCE Ministerial Council Declaration on the role of the OSCE in countering the “FTF phenomenon” acknowledged the threats that FTFs may pose and made a host of specific commitments to take “resolute action to counter foreign terrorist fighters”.<sup>58</sup> At the same time, OSCE participating States pledged to do so “in compliance with our OSCE commitments, and with all obligations under international law, including international

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<sup>54</sup> *Ibid.*

<sup>55</sup> Preamble to UNSC Resolution 2178 (2014), *op. cit.*, note 1. The “UN Global Counter-Terrorism Strategy”, consisting of a UN General Assembly resolution and an annexed Plan of Action, comprises four pillars, which include measures to ensure respect for human rights for all and the rule of law as the fundamental basis for the fight against terrorism (fourth pillar); see: UN General Assembly Resolution 60/288 adopted on 8 September 2006, UN Doc. A/RES/60/288.

<sup>56</sup> “Riga Joint Statement”, Council of the European Union, 2 February 2015, <<http://data.consilium.europa.eu/doc/document/ST-5855-2015-INIT/en/pdf>>.

<sup>57</sup> See: “Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism”, Council of Europe, adopted on 22 October 2015. Article 8 of the Additional Protocol provides that each Party shall implement the Protocol, “while respecting human rights obligations, in particular the right to freedom of movement, freedom of expression, freedom of association and freedom of religion, as set forth in, where applicable to that Party, the Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights and other obligations under international law.”

<sup>58</sup> These commitments reflected those enshrined in UNSC Resolution 2178 (2014), *op. cit.*, note 1. They included commitments to: co-operate to find, deny safe haven to and bring to justice FTFs; to devise and adopt effective measures to prevent the financing of terrorism, and the movement of FTFs, through effective controls on borders and documentation, and to address the use of the internet for terrorism purposes, as well as to prepare for and mitigate the threat posed by FTFs upon return.

human rights law, international refugee law and international humanitarian law.”<sup>59</sup> This forms part of a long-standing commitment to the promotion and protection of human rights as part of the strategic focus of OSCE counter-terrorism activities, and it includes addressing not only manifestations of, but also the conditions conducive to the spread of terrorism.<sup>60</sup> In accordance with its comprehensive concept of security, the OSCE approach sees terrorism as a multi-dimensional threat, which requires comprehensive, human rights-compliant and multi-stakeholder responses.<sup>61</sup>

### ***Human Rights Implications of State Responses***

Pursuant to the UNSC resolutions and FTF-related legal instruments that followed, states around the globe have adopted, and continue to adopt, wide-ranging responses to the potential threats and challenges posed by FTFs. These include changes in legislation, policy and practice, as well as the application of general counter-terrorism laws and practices by reference to the obligations of FTF-related UNSC resolutions and legal instruments.<sup>62</sup>

New laws have criminalized recruitment, travel, the provision of funds, the organization or facilitation of travel, the delivery and receiving of broadly defined training (including self-training via the Internet) or various forms of facilitation, support, incitement, “justification” or “apology” for such offences. Increasingly restrictive administrative measures that have been used in the FTF-context include stripping individuals of their citizenship, deporting them, imposing travel bans and blocking their entry into or transit through territories, or the removal of travel documents. Surveillance, special investigative techniques, the collection and sharing of individuals’ personal information, the operation of watch lists and databases, as well as monitoring, blocking and regulating Internet websites are all activities carried out more regularly. Restricting liberty through practices such as house arrests, area restrictions or control orders, alongside the freezing of assets of individuals suspected of being involved in FTF-related acts have also

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59 Preamble to OSCE Ministerial Declaration on FTFs, *op. cit.*, note 2. The Declaration builds on the earlier “OSCE Consolidated Framework for the Fight against Terrorism”, OSCE, 7 December 2012, PC.DEC/1063, <[www.osce.org/pc/98008](http://www.osce.org/pc/98008)> (hereafter, OSCE Consolidated Framework for the Fight Against Terrorism), which in turn built on the “Bucharest Plan of Action for Combating Terrorism”, OSCE, 4 December 2001, MC(9).DEC/1, [www.osce.org/atu/42524](http://www.osce.org/atu/42524).

60 See: OSCE Consolidated Framework for the Fight Against Terrorism, *op. cit.*, note 59. See also, for example, OSCE Ministerial Statement on Supporting the United Nations Global Counter-Terrorism Strategy, para. 4, *op. cit.*, note 5.

61 OSCE Consolidated Framework for the Fight Against Terrorism, para 12, *op. cit.*, note 59.

62 For an analysis of state responses pursuant to UNSC Resolution 2178 (2014) see, for example, “Implementation of Security Council resolution 2178 (2014) by States affected by foreign terrorist fighters: A compilation of three reports (S/2015/338; S/2015/683; S/2015/975)”, United Nations Counter-Terrorism Executive Directorate (UNCTED), 2016, <[www.un.org/sc/ctc/wp-content/uploads/2016/09/FTF-Report-1-3\\_English.pdf](http://www.un.org/sc/ctc/wp-content/uploads/2016/09/FTF-Report-1-3_English.pdf)>, (hereafter, UNCTED 2016, Implementation of Security Council resolution 2178 (2014)).

been applied in several states.<sup>63</sup> The collection of evidence against and prosecution of returning FTFs is currently being given increased attention by states.

Almost all of those responses to the perceived threat of FTFs and returnees entail potentially significant interference with a number of human rights. Any such measures, therefore, must be carefully considered in light of the relevant international legal framework. What are sometimes called “softer” approaches (alternatives to restrictive measures aimed at preventing FTF travel and recruitment), such as policies directed at preventing and countering violent extremism and radicalization that lead to terrorism, can, in certain circumstances, also raise serious concerns regarding the implications for rights such as freedom of thought, conscience, religion or belief, expression, privacy and equality.<sup>64</sup>

The following section explores further the human rights implications of some of those responses and offers recommendations and supporting observations regarding a human rights-compliant approach to the potential threats and challenges posed by FTFs.

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63 For an overview of measures applied in selected countries, see, for example: “Returning foreign terrorist fighters in Europe: A comparative analysis”, October 2017, <<http://mastereurope.eu/wp-content/uploads/2017/10/Returning-foreign-terrorist-fighters-in-Europe-.pdf>>; “The return of foreign fighters to EU soil: Ex-post evaluation”, European Parliamentary Research Service 15 May 2018, <[www.europarl.europa.eu/RegData/etudes/STUD/2018/621811/EPRS\\_STU\(2018\)621811\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/621811/EPRS_STU(2018)621811_EN.pdf)>, (hereafter, “The return of foreign fighters to EU soil. Ex-post evaluation”, European Parliamentary Research Service); B. van Ginkel and E. Entenmann (eds.), “The Foreign Fighters Phenomenon in the European Union”, *op. cit.*, note 16.

64 See also the report of the UN Special Rapporteur on counter-terrorism, UN Doc. A/HRC/31/65, *op. cit.*, note 34.

# 3. Recommendations and Analysis: Addressing the Dynamics and Challenges of FTFs within a Human Rights Framework

## 3.1 Recommendations on the Nature, Scope and Definitions of FTF-related Laws and Policies

### Recommendations

OSCE participating States should:

- Carefully define and limit the scope of activity covered by FTF-related laws and policies and ensure that responses are framed around the conduct of individuals, and clearly identified in law;
- Adopt legislative provisions based on a definition of terrorism that follows the approach of UN Security Council Resolution 1566 (2004) and offences within the scope of international conventions and protocols relating to terrorism;
- Avoid in law, policy and practice the use of vague or imprecise terms that are prone to arbitrary application, such as “extremism”, disconnected from specific violent conduct or incitement to violence, and ensure that terrorist designations meet due process standards;
- Distinguish “foreign terrorist fighting” from participation in armed conflict consistently with international humanitarian law (IHL), and apply and interpret FTF-related measures consistently with, and in a way that does not undermine, the broader legal framework, including IHL; and
- Provide appropriate safeguards for legitimate activity such as human rights and humanitarian work, including by women’s groups and organizations and in particular exempt humanitarian work in conflict zones from restrictions designed to counter FTF-related acts.

## “Foreign”, “Terrorist”, “Fighter”?

The fundamental principle of legality and certainty in the law is put under strain by terms that are vague and uncertain in scope. While particularly stringent requirements arise in relation to *nullum crimen sine lege* (no crime without law) or *nulla poena sine lege* (no punishment without law),<sup>65</sup> considered in section 3.3 on criminal law, all restrictions on rights (such as permissible limitations on freedom of expression, association or private life) must be clearly provided for in law.

Multiple human rights issues arise from the use of the term “foreign terrorist fighters”, leading several initiatives to call for reconsideration of the approach to the definition of “foreign terrorist fighters”, given the dangers inherent in the scope of the label. Each element of the term has given rise to controversy and uncertainty:

- UNSC Resolution 2178 (2014) associates the term “**foreigner**” with individuals who “travel to a State other than their States of residence or nationality”. However, the term still leaves significant margin of ambiguity. In line with basic principles of international law, dual nationals or persons with important personal, social, cultural and family links to states, beyond formal residence or nationality, should not be considered “foreigners” for this purpose when they travel to the state with which they have the relevant links.<sup>66</sup>
- The fact that there is no internationally agreed definition of the term “**terrorist**” or “**terrorism**” leaves significant space for diverse and far-reaching interpretations by national authorities, and increases the potential for abuse when implementing UNSC Resolution 2178.<sup>67</sup> Human rights courts and bodies have frequently criticized broad and ambiguous definitions of terrorism as being in violation of the principle of legality and of other rights.<sup>68</sup> The concerns are compounded in the FTF context by an accumulation of additional ambiguous related concepts.
- Provisions on “foreign terrorist fighters” commonly cover travel to support “terrorist organizations” and entities, but the question of how that qualification is made, and by whom, is not addressed. It does not appear to be limited to travelling to join or support groups specifically designated or listed as “terrorist” by the UN or regional groupings such as the EU. Arguably, confining the term in this way would at least limit the scope for abuse, though it would not eradicate it entirely, as the listings processes

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

66 UNSC Resolution 2178 (2014) refers in para. 6 to prosecuting travel to states other than states of residence or nationality, *op. cit.*, note 1. See fuller discussion of possible ambiguities in S. Krähenmann, ‘The Obligations under International Law of the Foreign Fighter’s State of Nationality or Habitual Residence, State of Transit and State of Destination’ in FFILB (2016), p. 235, *op. cit.*, note 14.

67 See criticism by M. Scheinin, “Back to post-9/11”, *op. cit.*, note 51.

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

have themselves been criticized for their politicization and arbitrariness.<sup>69</sup> When individuals are labelled FTFs according to national lists of terrorist organizations, similar concerns apply depending on how such designations are made and what human rights safeguards are in place to prevent abuse. A report of the UN Counter-Terrorism Committee Executive Directorate (UNCTED) on FTFs drew attention to this problem by calling for the “adoption of procedures to make national terrorist designations in compliance with human rights principles”.<sup>70</sup>

- Absent an international definition of terrorism, it is crucial that definitions by national authorities are clear and confined to conduct that might, in the words of the UN Special Rapporteur on counter-terrorism, be of a “genuinely terrorist nature”.<sup>71</sup> While there is no universally accepted definition in international law, UNSC Resolution 1566, adopted in 2004, provides some parameters that states should be guided by in elaborating clear definitions in national laws and regulations.<sup>72</sup> On the basis of those parameters the UN Special Rapporteur has recommended that terrorist offences should be confined to:

- (1) Acts committed with the intention of causing death or serious bodily injury, or the taking of hostages;
- (2) For the purpose of provoking a state of terror, intimidating a population, or compelling a government or international organization to do or abstain from a specific act; and that
- (3) Constitute offences under the international conventions and protocols related to terrorism.<sup>73</sup> The FTF label should be limited to acts that meet those core elements of “terrorism” too.

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69 For concerns about international listing see: e.g., the following cases considered by the European Court of Human Rights (ECtHR) and the UN Human Rights Committee (CCPR): *Nada v. Switzerland*, ECtHR Judgment of 12 September 2012; *Al-Dulimi and Montana Management Inc. v. Switzerland*, ECtHR, Judgment of 21 June 2016; and *Sayadi & Vinck v. Belgium*, CCPR, Views adopted on 22 October 2008, UN Doc. CCPR/C/94/D/1472/2006.

70 See: UNCTED 2016, Implementation of Security Council resolution 2178 (2014), para. 158(b), *op. cit.*, note 62. This comment was made in the context of seeking to strengthen the use of asset-freezing mechanisms, in accordance with UNSC resolutions 1267 (1999) and 1373 (2001) to disrupt terrorist activity, but it also applies in this context.

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

72 UNSC Resolution 1566 para. 3 “Recalls that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, and all other acts which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and calls upon all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature.”

73 UN Special Rapporteur on counter-terrorism, UN Doc. E/CN.4/2006/98, para. 42, *op. cit.*, note 71. For a proposed model definition of terrorism based on those criteria see UN Special Rapporteur on counter-terrorism, *Report to the UN Human Rights Council* (“Ten areas of best practices in countering terrorism”), UN Doc. A/HRC/16/51, 22 December 2010, para. 28. On the definition of terrorism see: *Preventing Terrorism and Countering Violent Extremism and Radicalization that Lead to Terrorism: A Community Policing Approach*, (Vienna: OSCE, 2014), pp. 27-30, <<https://www.osce.org/atu/111438>> (hereafter, *Preventing Terrorism and Countering Violent Extremism and Radicalization that Lead to Terrorism*, OSCE).

- Furthermore, the designation of individuals as FTFs should be based on what individuals have done, and intended to do, not on the deemed nature, or designation, of a group or a cause which they are deemed to support. Many measures to date have focused on preventing and responding to prohibited travel to particular states, or to support named groups,<sup>74</sup> though this designation runs the risk of selectivity and manipulation. The problem of politicization, selectivity and lack of transparency around the process of “terrorist” designation is longstanding. The vast number of prohibited “terrorist” organizations and entities, so deemed by states around the world or identified on terrorist lists nationally and internationally, means the scope and impact of the measures adopted in the few years since the adoption of UNSC Resolution 2178 (2014) could greatly increase in the years to come.
- Although FTF-related provisions refer to “fighters”, the scope of those covered by the provisions goes far beyond those engaging in combat.<sup>75</sup> It reaches travelers who engage in an array of roles abroad and in relation to quite different types of groups, as well as a much broader web of individuals deemed to be supporting, facilitating or encouraging such travel. In light of available facts, which indicate that very many of those covered by FTF laws and policies were in fact not engaged in fighting in any way, the use of the term is misleading. It also conveys the intention to address participation in armed conflict, while covering civilians who do not engage in “direct participation in hostilities” and therefore enjoy general protection under humanitarian law.<sup>76</sup>

### ***Implications for the Application of International Humanitarian Law***

In accordance with the introductory paragraphs of UNSC Resolution 2178 (2014) and most other resolutions, states must interpret their FTF obligations consistently with international humanitarian law (IHL) and they should not undermine the operation or effectiveness of IHL. The conflation of “terrorism” and “armed conflict” in the Resolution raises significant international rule of law issues, which states should seek to address through implementation.

There is a long history of opponents in an armed conflict, especially a non-international armed conflict, being labeled “terrorists”. However, acts of terrorism that may arise in armed conflict must be distinguished from mere participation in a conflict. The International Committee of the Red Cross (ICRC) and others have underscored the importance of clarifying the distinction between the two to preserve the proper functioning of IHL. While participation in a non-international armed conflict may, in practice, lead

<sup>74</sup> UNSC Resolutions since 2015 have named specific groups.

<sup>75</sup> See: UN Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination (hereafter, UN Working Group on mercenaries), *Report to the UN General Assembly*, UN Doc. A/70/330, 19 August 2015.

<sup>76</sup> For further information on what constitutes “direct participation in hostilities” see e.g., Nils Melzer, “Interpretative guidance on the notion of direct participation in hostilities under international humanitarian law”, International Committee of the Red Cross (ICRC), <[www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf](http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf)>. The issue has given rise to particular concern in relation to responses to women whose support or roles have often (though, as noted in section 3.7 below, not always) fallen far short of standards concerning direct participation in hostilities.



to prosecution under some (but not all) domestic laws,<sup>77</sup> IHL encourages amnesty at the end of the conflict for participation in conflict that has not violated IHL, to facilitate the termination of conflict and incentivize compliance with IHL.<sup>78</sup> The obligation to prosecute FTFs should be read consistently with these principles. If an individual is designated a “foreign terrorist fighter” in the context of a conflict, this must be based on engagement in acts of terrorism that may constitute war crimes under IHL.<sup>79</sup>

The uncertainty about the definition and scope of the term “foreign terrorist fighter” covered by the UNSC resolutions, and related measures, mean that states have difficult policy decisions to make. Despite common perceptions to the contrary, FTF-related laws and policies are not limited to the groups referred to in UNSC resolutions (so-called “Islamic State”, the Al Nusrah Front and groups associated with Al-Qaida)<sup>80</sup> or even, as noted above, to other designated terrorist groups. Instead, they often cover both travel to support a terrorist cause and travel to support armed groups that may resist a terrorist cause, and respect IHL. Where individuals who have fought against repressive regimes or against terrorist organizations such as the so-called “Islamic State” (in other words in line with the position and engagement of some prosecuting states), it has provoked serious controversy and policy debate concerning the public interest and the interests of justice in pursuing such prosecutions.<sup>81</sup> While practice is far from established, there are implications for legal certainty and foreseeability, as well as respect for IHL, of the failure to distinguish “terrorist fighting” from participation in armed conflict, while abiding by IHL.

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77 S. Krähenmann, “The Obligations under International Law of the Foreign Fighter’s State of Nationality or Habitual Residence, State of Transit and State of Destination” in FFILB, pp. 229-258, *op. cit.*, note 14.

78 *Customary International Humanitarian Law: Volume I: Rules*, (Cambridge: Cambridge University Press & ICRC, 2009), <[www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf](http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf)>. See: Rule 159: “At the end of hostilities, the authorities in power must endeavour to grant the broadest possible amnesty to persons who have participated in a non-international armed conflict, or those deprived of their liberty for reasons related to the armed conflict, with the exception of persons suspected of, accused of or sentenced for war crimes.”

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

80 For example, UNSC Resolution 2249 (2015).

81 Questions have arisen regarding the legitimacy and appropriateness of prosecutions in various contexts, including in Belgium, the Netherlands and Denmark of returnees who had fought against ISIL. In 2017, Belgian courts ruled that individuals could not be prosecuted for “terrorism” in respect of acts that involved engagement in a “conflict”, though a higher court has paved the way for some prosecutions to proceed. For other cases see: L. Whyte, “Danish woman who fought against Isis faces jail sentence”, the Guardian, 19 December 2016, <[www.theguardian.com/world/2016/dec/19/danish-woman-who-fought-against-isis-faces-jail-sentence](http://www.theguardian.com/world/2016/dec/19/danish-woman-who-fought-against-isis-faces-jail-sentence)>; “Netherlands drops case against man suspected of killing Isis fighters”, the Guardian, 21 June 2016, <[www.theguardian.com/world/2016/jun/21/netherlands-drops-case-against-man-suspected-of-killing-isis-fighters](http://www.theguardian.com/world/2016/jun/21/netherlands-drops-case-against-man-suspected-of-killing-isis-fighters)>; L. Dearden, “Danish woman faces jail after violating travel ban for fighting against Isis with Kurdish groups in Syria and Iraq”, the Independent, 13 December 2016, <[www.independent.co.uk/news/world/europe/joanna-palani-danish-kurdish-woman-ypg-peshmerga-iraq-syria-fighting-isis-faces-jail-passport-police-a7471266.html](http://www.independent.co.uk/news/world/europe/joanna-palani-danish-kurdish-woman-ypg-peshmerga-iraq-syria-fighting-isis-faces-jail-passport-police-a7471266.html)>.

As such, on the international level, the UN Working Group on mercenaries has noted the importance of distinguishing FTFs from participation in armed conflict, in accordance with IHL.<sup>82</sup> This is reflected in the decision by some OSCE participating States to provide that exceptions for conduct that is permissible under IHL should be enshrined in FTF-related laws, or adopted in practice.<sup>83</sup>

### ***Ensuring Safeguards for Legitimate Activity and Adequate Humanitarian Exceptions***

It follows from the breadth and scope of what has been described as the “FTF phenomenon” that far-reaching responses to it have thwarted or punished a range of legitimate activity. This problem is not limited to FTFs alone. Counter-terrorism laws on, for example, financing or providing “material support” to terrorist organizations,<sup>84</sup> or the “indirect incitement” of terrorism,<sup>85</sup> have increasingly been used against human rights defenders and humanitarian organizations in recent years. But due to the expanded prohibitions, restrictions and crimes that have emerged as a result of UNSC Resolution 2178 (2014), this problem has been exacerbated significantly.<sup>86</sup>

There are a range of related impacts, in particular on humanitarian actors, that arise from FTF measures, including: impeding their ability to engage with certain groups, and thereby to gain access to civilian populations in some areas; subjecting humanitarian personnel to new or heightened restrictions on travel that make their work practically impossible; or increasing intelligence-gathering activities in affected regions, which can undermine humanitarian actors’ relationships with local communities and partner organizations. For some governments, “the line between talking to proscribed groups for purposes of recruitment and talking to them for purposes of humanitarian negotiations

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82 UN Working Group on mercenaries, UN Doc. A/70/330, *op. cit.*, note 75.

83 At least two of the 57 OSCE participating States (Switzerland and Canada) appear to have such exclusions in certain laws. The Canadian Criminal Code defines “terrorist activity” under section 83.01(1) as expressly “not includ[ing] an act or omission that is committed during an armed conflict [and which is] in accordance with... international law applicable to the conflict”. Article 260(4) of the Swiss Criminal Code provides that financing terrorism does not apply if “it is intended to support acts that do not violate the rules of international law on the conduct of armed conflicts”. There is no such exception for Swiss federal law proscribing participation in the activities of the “Islamic State” and Al-Qaida, however, as the law (unlike UNSC Resolution 2178) only applies to these groups. Reportedly, a number of legislative amendments are under consideration, creating new offences that do not appear to include humanitarian exceptions.

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

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

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

may just be too fine of a distinction for counterterrorism laws to capture, particularly at a time when national security concerns are running so high.”<sup>87</sup>

Particular concern has been expressed about the need to exclude humanitarian workers, including medical personnel, treating “fighters” who have been wounded on the battlefield. The role and protection of such personnel has been “a cornerstone of IHL since [...] its codification over 150 years ago”.<sup>88</sup> The provision of forms of humanitarian assistance such as medical aid is a protected activity under IHL that must not be jeopardized.

Greater legal and regulatory scrutiny concerning FTF threats may also affect the willingness of donors to provide funds and of private actors, such as banks and other financial institutions, to provide financial services and facilitate financial transactions in situations of armed conflict. For example, they may be reluctant to provide funds or financial services to humanitarian projects engaging with armed groups or entities that may ultimately be deemed by certain states as “terrorist”, or to organizations merely because they operate in particular territories (such as parts of Iraq and Syria) that are, or were, controlled by groups engaged in FTF recruitment. While not specific to FTF-related laws and policies, greater legal and regulatory scrutiny under provisions to counter-terrorism financing may also have a differential impact on humanitarian assistance by women’s rights organizations and on gender equality, due to the profile and operating environments of those organizations.<sup>89</sup>

A limited number of states have sought to carve out exceptions for humanitarian operations. The exceptions for conduct permissible under IHL, noted above, are relevant and may protect some legitimate activity recognized in IHL.<sup>90</sup> Untargeted measures to counter FTFs risk undermining humanitarian assistance, as well as public appreciation

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<sup>87</sup> *Ibid.*

<sup>88</sup> S. Ojeda, “Out of balance: Global counter-terrorism & the laws of war”, Humanitarian Law & Policy blog, 15 September 2017, <[blogs.icrc.org/law-and-policy/2017/09/15/out-of-balance-global-counter-terrorism-the-laws-of-war/](https://blogs.icrc.org/law-and-policy/2017/09/15/out-of-balance-global-counter-terrorism-the-laws-of-war/)>.

<sup>89</sup> “Tightening the Purse Strings: What Countering Terrorism Financing Costs Gender Equality and Security”, Duke Law International Human Rights Clinic and Women Peacemakers Program, March 2017, <[law.duke.edu/sites/default/files/humanrights/tighteningpursestrings.pdf](http://law.duke.edu/sites/default/files/humanrights/tighteningpursestrings.pdf)>, (hereafter, “Tightening the Purse Strings: What Countering Terrorism Financing Costs Gender Equality and Security”, Duke Law International Human Rights Clinic and Women Peacemakers Program). Based on a survey of women’s organizations around the globe, the report found, for example, that there was a growing donor preference for larger, well-known international organizations with greater absorption capacity and compliance resources and towards making fewer grants to the detriment of women’s rights organization that are often smaller and operating at the grassroots level. Furthermore, concern regarding the potential diversions of funds to terrorism appeared to have reduced funding for women’s peacebuilding and humanitarian assistance in areas where violent groups are active or exercise control, see p. 9.

<sup>90</sup> Other good practices from outside of the OSCE area include Australian law, which exempts those who only provide “aid of a humanitarian nature” from the offence of association with terrorist organizations, while New Zealand explicitly allows for the provision of food, clothing and medicine, even to designated terrorist entities as far as is necessary to satisfy essential needs. See: Australian Criminal Code, division 102.8(4)(c); and New Zealand Terrorism Suppression Act 2002, sections 9(1) and (2). Although the United States material support statute once also contained a “humanitarian assistance” exception, this has been abolished and US courts have found any form of material assistance to terrorist organizations, even provision of training to promote respect for IHL that plainly serves ends of counter-terrorism, to constitute “material support”. See: *Holder v. Humanitarian Law Project*, (2010), United States Supreme Court, 561 U.S. 1, 130 S.Ct. 2705, (hereafter, *Holder v. Humanitarian Law Project*).

for humanitarian action and humanitarian needs. This underscores the importance of greater clarity in FTF-related legislation and practice with regards to humanitarian assistance. Failure to provide such clarity could have negative consequences on human rights protection and, ultimately, on counter-terrorism efforts. States should therefore ensure that careful, narrowly constructed but effective exceptions are carved out to ensure that those engaged in genuine human rights and humanitarian work are not unduly restricted in that work, but are protected in accordance with the obligations of states under international human rights and humanitarian law.

### **3.2 General Recommendations on the Application of the Human Rights Framework**

#### **Recommendations**

OSCE participating States should ensure that national laws, policies and practices aimed at countering FTF threats are implemented in full compliance with international law, including international human rights and humanitarian law standards.

In particular, they should:

- Enhance their understanding of the manifestations of FTF-activity, its drivers, causes and contributors, including the specific factors conducive to participation of women and girls; and develop targeted, effective and evidence-based responses in line with their obligation to prevent and counter potential threats posed by FTFs;
- Adopt and implement a comprehensive and holistic approach to prevention, prosecution, rehabilitation and reintegration; and recalibrate the balance between suppressive approaches, less coercive alternatives and preventive ones, favouring the latter when possible;
- Recognize and protect the full range of human rights – including civil, political, economic, social and cultural rights – that may be affected by FTF responses, with attention to direct and indirect impact;
- Apply FTF-related laws and policies in accordance with fundamental human rights principles and safeguards, including the principles of legality, necessity, proportionality, and equality and non-discrimination;
- Take into account context, case specificity and the nature of the rights at stake to ensure that FTF-related measures and policies are applied in an individualized and targeted way and do not result in blanket limitations that unduly restrict human rights;
- Ensure that FTF measures do not, in any circumstances, lead to infringements on absolute rights, and that fundamental rule of law safeguards are respected; and
- Guarantee access to effective remedies and, where appropriate, adequate reparation for those whose rights may be affected by FTF-related laws and policies.

The obligation on states to take all necessary and feasible measures to combat FTF threats effectively, as set down in binding Chapter VII UNSC resolutions referred to above, are reflected in human rights law itself. The positive obligation on states to protect individuals within their jurisdiction from terrorist attacks, or from falling victim in various ways to organizations such as ISIL, requires that states take all feasible measures to prevent and to respond to terrorist acts.<sup>91</sup> However, in doing so they must operate within the rule of law framework, which requires adherence to, inter alia, international human rights law, international humanitarian law and international refugee law. The need for an approach compliant with international human rights and humanitarian law is made explicit in the UNSC resolutions, the UN's Global Counter-Terrorism Strategy, OSCE commitments and other regional initiatives, as noted above.

The importance of a comprehensive approach to meeting the obligations to prevent and suppress terrorism, including FTF-related acts, is increasingly recognized at the national and international levels. As the 2015 Annual Report of the UN Working Group on mercenaries put it, the approach must be “global, holistic, multidimensional and strategic”.<sup>92</sup> Prevention, prosecution, rehabilitation and reintegration have been identified as the critical elements of such an approach, as reflected in UNSC Resolution 2178 (2014) and OSCE commitments. Rehabilitation has been described as “an important element of a pragmatic and reasonable response to the foreign fighter phenomenon [as] the basis for a long-term security approach”, particularly in light of the challenges and limitations of coercive approaches, which are highlighted below.<sup>93</sup>

However, notwithstanding the terms of resolutions and declarations, in practice far greater emphasis still appears to be placed on repressive and punitive approaches than on preventive or rehabilitative ones. The reports by the UN Working Group on mercenaries are among a number that call for states to respond to the threats and challenges posed by FTFs in a way that balances punitive measures and preventive ones, while

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91 Media reports of recruits being treated as “slaves” and various forms of ill-treatment and sexual violence by the “Islamic State” towards some of their own recruits also point to the need to take action to prevent and counter both such “internal” abuse as well as the broader “external” terrorist threat those groups pose. As regards positive obligations to prevent acts of terrorism, see, for example, *Tagayeva and Others v. Russia*, ECtHR, 13 April 2017.

92 UN Working Group on mercenaries, UN Doc. A/70/330, *op. cit.*, note 75. The Working Group also addressed the FTF issue in its country visits to Tunisia from 1 to 8 July 2015 (UN Doc. A/HRC/33/43/Add.1), Belgium from 12 to 16 October 2015 (UN Doc. A/HRC/33/43/Add.2), Ukraine from 14 to 18 March 2016 (UN Doc. A/HRC/33/43/Add.3) and the European Union from 25 to 28 April 2016 (UN Doc. A/HRC/33/43/Add.4); in expert panels and meetings and in its Annual Report to the 71st session of the UN General Assembly (UN Doc. A/71/318).

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

ensuring rehabilitation opportunities for returnees. In this context, the Working Group also cites emerging good practices in respect of rehabilitation and reintegration.<sup>94</sup>

The feasibility of the rehabilitation and reintegration of many FTFs is confirmed by available research outlined in section 2, above. Against this background, the development of strategies of effective prevention, rehabilitation and reintegration deserves more careful consideration and emphasis in responses to FTF-related threats and challenges.<sup>95</sup>

### **Which Human Rights are Affected?**

While emphasis is often placed on the civil and political rights most obviously affected by responses to the threats and challenges posed by FTFs,<sup>96</sup> states should recognize and seek to address the broad range of civil, political, economic, social and cultural rights implicated by FTF-related strategies. They should pay due attention to the direct and indirect impact on the rights of those immediately targeted, and on others who may be affected, such as family members, social groups and the population at large. The lasting impact on individuals, on social, family and community life, and on the enjoyment of human rights in other contexts, should be carefully considered.

The wide-ranging rights implications flow from the breadth of the measures states have been called on to take, by the UNSC, for example, in response to the challenges posed by the flow of FTFs. Measures to prevent travel or return, for example, have an obvious impact on the enjoyment of freedom of movement and the right to return to one's own country, both by those against whom such measures are directed and by others who

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94 The report of the UN Working Group on mercenaries on the visit to Belgium (UN Doc. A/HRC/33/43/Add.2) cites initiatives such as the Danish Aarhus and the German Hayat programmes, para. 116. For the importance of reintegration programmes and experiences and lessons learnt from other contexts, see also: G. Holmer and A. Shtuni, "Returning Foreign Fighters and the Reintegration Imperative", United States Institute of Peace, March 2017, <[www.usip.org/sites/default/files/2017-03/sr402-returning-foreign-fighters-and-the-reintegration-imperative.pdf](http://www.usip.org/sites/default/files/2017-03/sr402-returning-foreign-fighters-and-the-reintegration-imperative.pdf)>, (hereafter, G. Holmer and A. Shtuni, "Returning Foreign Fighters and the Reintegration Imperative").

95 See: G. Kerchove, C. Höhn, "The Regional Answers and Governance Structure for Dealing with Foreign Fighters: The Case of the EU", p. 318, in FFILB, pp. 299-332, *op. cit.*, note 14. T. Mehra, "Foreign Terrorist Fighters: Trends, Dynamics and Policy Responses", International Centre for Counter-Terrorism, December 2016, pp. 16-17, <[icct.nl/wp-content/uploads/2016/12/ICCT-Mehra-FTF-Dec2016-2.pdf](http://icct.nl/wp-content/uploads/2016/12/ICCT-Mehra-FTF-Dec2016-2.pdf)>, (hereafter, Foreign Terrorist Fighters: Trends, Dynamics and Policy Responses", International Centre for Counter-Terrorism). Also see: "Rome Memorandum on Good Practices for Rehabilitation and Reintegration of Violent Extremist Offenders", the Global Counterterrorism Forum (GCTF), <<https://www.thegctf.org/Portals/1/Documents/Framework%20Documents/A/GCTF-Rome-Memorandum-ENG.pdf>> and its accompanying "Addendum", which offers additional guidance on reintegrating returning FTFs into society <<https://www.thegctf.org/Portals/1/Documents/Toolkit-documents/English-Addendum-to-the-Rome-Memorandum-on-Legal-Frameworks.pdf>>.

96 The EU counter-terrorism directive of 15 March 2017 refers specifically to "the right to liberty and security, freedom of expression and information, freedom of association, freedom of thought, conscience and religion, the general prohibition of discrimination, in particular on grounds of race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, the right to respect for private and family life and the right to protection of personal data, the principles of legality and proportionality of criminal offences and penalties, covering also the requirement of precision, clarity and foreseeability in criminal law, the presumption of innocence as well as freedom of movement..." See: "Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA", European Union, <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32017L0541>>.

may be associated with them, such as family members. However, they may also affect the right to privacy, with implications beyond the FTF context, as a result of enhanced surveillance, sharing and retention of information.<sup>97</sup> Fair trial standards are affected as adjustments are made to prosecute FTF-related offences, while expulsion or refusal of entry to a country may have implications for a range of human rights, including in terms of non-refoulement and exposure to real risks of torture and other ill-treatment and other serious human rights violations in other states. Efforts to suppress recruitment of FTFs and influence the environment in which recruiters operate, for example through overly broad and imprecisely framed incitement or “extremism” laws (see sections 3.3 and 3.5), can have a serious impact on freedom of expression, or on freedom of thought, conscience, religion or belief, and thereby also erode the quality of democracy itself. The impact of such measures on a range of economic and social rights, including ability to work or pursue education, may arise directly and indirectly from FTF-related measures, with potentially serious effects for individuals and extended families.<sup>98</sup> The impact of counter-terrorism measures, both more general and directly FTF-related ones, on the right to equality and non-discrimination is also pervasive and often neglected (see section 3.6).

The relationship between human rights and measures to counter the threats and challenges posed by FTFs also has another dimension. The interconnectedness of human rights and security, and the critical need to address violations, injustice, inequality and other “conditions conducive to the spread of terrorism” have been amply reflected in international initiatives in the last decade, including the UN Global Counter-Terrorism Strategy and within the OSCE.<sup>99</sup> Yet the emphasis on the comprehensive approach noted above, and the need to address the “conditions conducive” to the spread of terrorism and FTFs specifically for an effective, long term approach, is not always supported in practice, or evident from policies. States should adopt an approach that recognizes and addresses human rights concerns, including socio-economic discrimination, as drivers of FTF engagement, ensuring that responses to the FTF matter do not fuel the problem.

### ***Application of the Human Rights Framework***

It is well known that the human rights framework accommodates effective action against security threats, such as those represented by FTFs, in various ways: through derogation from certain human rights obligations in situations of emergency, permissible restrictions to non-absolute rights, and co-applicability of human rights standards alongside international humanitarian law in armed conflict. However, caution is needed with respect to approaches that purport to broadly balance security and human rights, as many counter-terrorism and FTF policies claim to do. While a balance is, indeed,

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

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

99 The OSCE Ministerial Declaration on FTFs recognizes that human rights concerns may contribute to or foment the spread of violent extremism, *op. cit.*, note 2.

reflected in the legal framework, measures that affect human rights must be justified by reference to permissible grounds, as set out in relevant human rights standards, and they must conform with the strict requirements provided for in international law, including the following:

- *No circumstances can justify interference with absolute rights.* Measures that impinge on absolute rights are not permissible under any circumstances. Such rights include that no-one shall be held guilty for a criminal offence on account of an act or omission not constituting a criminal offence at the time when it was committed (no punishment without law), the presumption of innocence and other core aspects of the right to a fair trial, as well as core aspects of the right to liberty, the right to have or adopt a religion or belief and the right to hold opinions without interference, the right to equality and non-discrimination and the prohibition of torture and other ill treatment.
- *Emergency measures must be exceptional, time-limited in their operation and effect, and justified by the stringent test laid down in international human rights law.* States can only derogate from their obligations under international human rights standards where there is an “emergency threatening the life of the nation”.<sup>100</sup> The impact of FTFs in Syria, for example, is to be distinguished from their impact on European states, where the high threshold for a situation to be classified as an “emergency threatening the life of the nation” is unlikely to be met. The measures adopted pursuant to an emergency must be strictly limited to what is necessary pursuant to the exigencies of the particular situation, and can never be discriminatory in their application.<sup>101</sup> Moreover, while the duration of emergencies may vary, they are, by definition, temporary and exceptional. The exceptional measures invoked pursuant to them must also be temporary and subject to review. Therefore, they should not be used as a premise to

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<sup>100</sup> A broad range of factors are relevant to the assessment but it is clear that the threshold is high, affecting “organised life of the community” (*Lawless v. Ireland (No. 3)*, ECtHR, Judgment of 1 July 1961) but not necessarily imperiling the existence of the institutions of states as such (*A and Others v. The United Kingdom*, ECtHR, Judgment of 19 February 2009 (hereafter, *A and Others v. The United Kingdom*, ECtHR)). See also: UN Special Rapporteur on counter-terrorism, *Report to the UN Human Rights Council (Report on the human rights challenge of states of emergency in the context of countering terrorism)*, UN Doc. A/HRC/37/52, 27 February 2018; and the UN special procedures statement on the state of emergency in Turkey: “UN human rights experts urge Turkey not to extend state of emergency”, 17 January 2018, <[www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22592&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22592&LangID=E)>.

<sup>101</sup> Emergency powers and derogations by the United Kingdom post 9/11 and in France, for example, have been criticized for their allegedly discriminatory and therefore unlawful impact. See, for example, *Concluding observations: United Kingdom*, UN Committee on the Elimination of Racial Discrimination (CERD), UN Doc. CERD/C/GBR/CO/21-23, 3 October 2016, paras. 15, 18-19; *A and Others v. The United Kingdom*, ECtHR, *op. cit.*, note 100; *Concluding observations: France*, CCPR, UN Doc. CCPR/C/FRA/CO/5, 17 August 2015, paras. 9-10. See also: C. Paulussen, “Repressing the Foreign Fighters Phenomenon and Terrorism in Western Europe: Towards an Effective Response Based on Human Rights”, International Centre for Counter Terrorism, November 2016, <[icct.nl/wp-content/uploads/2016/11/ICCT-Paulussen-Rule-of-Law-Nov2016-1.pdf](http://icct.nl/wp-content/uploads/2016/11/ICCT-Paulussen-Rule-of-Law-Nov2016-1.pdf)>, on discrimination in relation to the French emergency regime. For questions related to fair trial rights and the independence of the judiciary see: “Fair Trial Rights during States of Conflict and Emergency”, OSCE/ODIHR, May 2017, <[www.osce.org/odihr/317766](http://www.osce.org/odihr/317766)>.



introduce changes in ordinary law that may constitute permanent derogations from human rights obligations.<sup>102</sup>

- *Restrictions of those rights that allow for limitations must be prescribed in law, be necessary and proportionate as well as non-discriminatory.* For the most part, the rights most obviously affected by FTF provisions (such the right to privacy, freedom of expression and association or the right to manifest one’s religion) are qualified rights subject to restrictions, provided those restrictions meet strict requirements and are applied accordingly. They must be provided for by law, must not exceed necessary limitations, and must be minimized wherever possible and be proportionate to a legitimate aim. Particular care is needed to avoid rights being balanced against security threats in abstract terms. Limitations to rights must be justified by the necessity and proportionality of the particular measure, based on a specific risk assessment of the individual case and context.
- *Targeted case-by-case approach:* The human rights law framework requires a targeted approach, and rejects “one size fits all” solutions. Blanket application of laws and policies may not only be less effective and efficient, but it also falls short of requirements in human rights law for approaches to risk assessment to be individualized and for there to be an analysis of the necessity and proportionality of the particular measure in question. In order to give effect to these obligations, the need for enhanced understanding of the “phenomenon”, its causes and contributors, and careful analysis of case and context specificity, has been broadly recognized and alluded to above.<sup>103</sup> As noted above, this is underscored by analyses on the diverse profiles of FTFs and the range of relevant “push” and “pull” factors. The personal, social, ideological, religious and gender dimensions, and the role of mental health factors, all recall the need for responses to be informed by, and tailored to, a more nuanced understanding of each and every case and its context.
- *Violations must be met with suitable remedies and accountability:* Satisfying the right of victims to a remedy, and holding to account those responsible for violations, is an important element of any rule of law approach to countering FTF-related threats. Legal remedies for those alleging violations, as well as full and effective reparation for those whose rights have been violated, make an essential contribution to learning from mistakes and shaping lawful responses for the future (see also section 3.9).

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102 UN Special Rapporteur on counter-terrorism, UN Doc. A/HRC/37/52, *op. cit.*, note 100, has emphasized that emergencies, as exceptional measures, should be temporary and short-lived. See also: *General Comment No. 29 (Article 4: Derogations during a State of Emergency)*, CCPR, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 2. As a September 2017 statement of the Special Rapporteur on counter-terrorism notes, expressing concern at developments in France: “The duration of the state of emergency must be time-bound, revised regularly, and meet the criteria of necessity and proportionality”, <[www.un.org/apps/news/story.asp?NewsID=57759#.Wc66brpuKUK](http://www.un.org/apps/news/story.asp?NewsID=57759#.Wc66brpuKUK)>.

103 B. van Ginkel and E. Entenmann (eds.), “The Foreign Fighters Phenomenon in the European Union”, p. 6, *op. cit.*, note 16; “Report on the implementation of the EU Counter Terrorism Strategy”, EU Counter-Terrorism Coordinator, 24 November 2014, p.6, <<http://data.consilium.europa.eu/doc/document/ST-15799-2014-INIT/en/pdf>>; C. Lister, “Returning Foreign Fighters: Criminalization or Reintegration?”, p. 12, *op. cit.*, note 22.

### 3.3 Criminal Law Responses: Scope of Criminality, Principles, Procedures and Penalties

#### Recommendations

OSCE participating States should:

- Recognize the crucial role of criminal law, in conformity with fundamental rule of law principles, in countering terrorism and FTF-related threats, and that overreaching approaches that operate outside of a rule of law-based criminal justice framework, with its established legal procedures and safeguards, are counter-productive;
- Define the scope of criminality concerning FTF-related offences consistently with the basic principle of legality (no punishment without law), requiring certainty, clarity and specificity of legal provisions;
- Ensure that criminal responsibility is not based solely on association with terrorist groups, or expression of opinions about their activities, but on intentional contributions to, instigating or inciting terrorist acts, as defined in accordance with international human rights law;
- Ensure that criminal law is applied as a matter of last resort, in line with the principle of restraint in the use of criminal law and the interests of justice and with a view to prosecuting genuine terrorist conduct while curtailing over-reach;
- Strictly respect the fairness of criminal proceedings and the presumption of innocence in accordance with international fair trial standards;
- Enhance inter-state co-operation in respect of prosecution of terrorist acts, while complying with international human rights standards. In doing so, exchange information and evidence directed at the fair prosecution of criminal conduct, while:
  - \* guaranteeing that information that may have been obtained in other countries by unlawful means, especially torture and other ill-treatment, is not used in domestic legal proceedings or otherwise, and
  - \* taking appropriate measures to ensure that information shared with other countries is not used in contravention of international human rights standards in those countries; and
- Punish FTF-related offences in a manner commensurate with the crime and according to individual culpability, based on conduct and criminal intent. Also, guarantee humane and dignified treatment of detainees suspected or convicted of FTF-related offences at all times, with due regard to the specific risks and needs of female FTFs in detention.

Criminal law plays a crucial role in addressing conduct that intentionally contributes in various ways to acts of terrorism. In principle, it can provide a solid rule of law starting point for responses to FTF-related crimes. As far as FTFs have committed crimes abroad, criminal law can be used to secure accountability. In principle, criminal procedure also

provides a fairer vehicle for suspected FTFs to know and respond to allegations against them, compared to the application of administrative or executive measures that can have just as serious rights consequences and punitive effects (see section 3.4). But the fairness, legitimacy and effectiveness of criminal law responses depends on the existence of a rule of law framework that is consistent with fundamental principles of criminal law and international human rights law, which are often in jeopardy in this context.

In their counter-terrorism efforts, states have increasingly sought to use criminal law preventively – by criminalizing conduct arising before a terrorist crime is committed (i.e., preparatory acts, and acts deemed to support or contribute to terrorism, such as financing, providing material support or inciting terrorism directly or indirectly). The development of specific legislation on FTFs and prosecutions in practice take this trend a step further. Much legislation now criminalizes travelling or the attempt to travel as preparatory acts, as well as facilitating or supporting the travel of another individual. The result is that a broad array of preparatory acts, as well as forms of facilitation or support for such acts and funding or association with or expression of support for individuals associated with them, are now criminalized in legislation across the OSCE area and beyond.

The preventive role of criminal law is not itself new or inherently problematic. It is well established, for example, that inchoate acts such as attempts to commit a crime, direct and public incitement, some preparatory acts, or conspiracy or association with criminal intent, may justify the early intervention of criminal law before any terrorist act has taken place. But there are also limits to the preventive application of criminal law, which are enshrined in basic principles of criminal and human rights law and set out below. The expansion of criminal law – alongside shifts in principles, procedures and penalties – raises questions regarding broader implications for the protection of human rights and its effectiveness in terms of terrorism prevention.

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

The requirement of legality and certainty in criminal law (*nullum crimen sine lege* or *nulla poena sine lege*) is enshrined in Article 15 of the International Covenant on Civil and Political Rights (ICCPR) and other human rights instruments.<sup>104</sup> Non-retroactivity, certainty, precision and foreseeability are all aspects of the right, and are essential rule of law constraints.<sup>105</sup> The principle of *lex certa* requires that criminal law must be sufficiently clear to allow those within a state's jurisdiction to understand the law's limits and modify their behaviour. Human rights treaties explicitly proscribe derogation from the

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104 Article 15(1) ICCPR provides: "No one shall be held guilty of any criminal offence on account of any act or omission, which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby." See also Article 11(2) UDHR; Article 7(1) ECHR; Article 9 of the American Convention on Human Rights (ACHR); see also Articles 22 (*Nullum crimen sine lege*) and 23 (*Nulla poena sine lege*) of the Rome Statute of the International Criminal Court (ICC).

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

right that no-one shall be held guilty of a criminal offence that did not constitute a crime at the time it was committed (no punishment without law).<sup>106</sup> Furthermore, the right must be interpreted “in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment.”<sup>107</sup> As an offshoot of this principle, criminal law should be strictly applied and restrictively interpreted; it should not be interpreted by analogy, and any ambiguity should be resolved in favour of the accused.<sup>108</sup>

Legislation criminalizing FTF-related conduct, and its interpretation and application in practice, clashes with these fundamental principles. Crimes, inchoate offences and modes of liability that target not only travel for some ill-defined purpose, but also other forms of support, such as funding or facilitating travel; “indirectly inciting”, “expressing appreciation of”, “justifying”, “provoking” or “apologizing for” terrorism or “disseminating messages” in relation to FTF activities are extremely expansive in their potential scope of application, and are ridden with ambiguity. In addition, broad interpretations of existing laws regarding what constitutes “incitement” raise serious questions concerning the strict interpretation of criminal law.

The imposition of obligations on states in UNSC Resolution 2178 (2014) to establish criminal offences for a broad range of conduct in relation to FTFs, without clearly identifying the basic mental and material elements (or the criminal intent and conduct), has been much criticized.<sup>109</sup> Problems associated with the lack of a clear definition of terrorism are compounded by the inherent breadth and ambiguity of terms used to describe FTF-related conduct.

However, while Resolution 2178 (2014) provides the framework of obligations, it falls to states to give them effect in criminal law in a manner that respects the principle of legality and clarifies the scope of criminality. The burden, therefore, falls on individual states to ensure that their national legislation clearly and specifically defines the material and mental elements of FTF-related crimes.

### ***Criminal Responsibility and Individual Culpability***

It is an essential principle of criminal law, reflected in international law, that responsibility must be individual, not collective.<sup>110</sup> The most basic principle of criminal law is that

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106 Article 4 ICCPR, Article 15 ECHR and Article 27 ACHR all expressly proscribe derogation from this right.

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

108 See e.g., “European Parliament resolution of 22 May 2012 on an EU approach to criminal law (2010/2310(INI))”, European Parliament, P7\_TA(2012)0208, <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52012lPo208>> (hereafter, European Parliament, EU Approach to Criminal Law).

109 M. Scheinin, “Back to post-9/11” *op. cit.*, note 51.

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

individuals are held responsible for their conduct and any associated intent.<sup>111</sup> Conduct with intent – *actus reus* and *mens rea*, or the material and mental elements – provide the objective and subjective conditions for punishability and form the essential nexus between the individual and the criminal wrong.<sup>112</sup>

The intervention of criminal law is generally justified where an individual has caused or contributed to harm to a protected value (the “harm principle”).<sup>113</sup> As an exception, criminal law also penalizes inchoate crimes, before the harm has arisen or the crime has taken place, on the basis that the conduct in question, committed with criminal intent, poses a significant danger that harm occurs.<sup>114</sup> Preparatory acts, which may include planning or conspiracy with a view to committing or contributing to a terrorist offence, may also be prosecuted if the relevant elements are met.

The law cannot, however, prosecute an abstract danger that an individual is seen to represent. It cannot prosecute what one might do, but what one has done or intended to do, albeit before impact is felt. It cannot punish thoughts, however dangerous society perceives an individual’s ideas to be, but can only intervene when they are converted into concrete acts.<sup>115</sup> While harm may ultimately be caused by another person, there must be sufficient normative involvement of an individual in the wrongful act, or at the very least in the deliberate creation of risk of such a wrongful act taking place, to justify criminal intervention.<sup>116</sup> Conversely, remoteness is a constraining principle of criminal law, such that individuals cannot be prosecuted absent a meaningful proximate link between

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111 See e.g., European Parliament, *EU Approach to Criminal Law*, *op. cit.*, note 108.

112 A. Ashworth and L. Zedner, *Preventive Justice*, *op. cit.*, note 105; and fuller discussion in H. Duffy and K. Pitcher, “Inciting Terrorism? Crimes of Expression and the Limits of the Law”, *op. cit.*, note 85.

113 For a discussion of the “harm principle” see: A. Ashworth and L. Zedner, *Preventive Justice*, *op. cit.*, note 105.

114 Examples would include direct and public incitement to genocide in international criminal law, where the conduct (the expression) in question creates a significant danger that this serious crime will be committed, and the accused intends this to happen, which can be punished even if the crime does not ultimately occur.

115 In accordance with the Roman law principle *cogitationis poenam nemo patitur* (“nobody endures punishment for thought.”, Justinian’s *Digest* (48.19.18)), punishment cannot encroach into the private sphere of the individual, until such time as the thoughts have been brought, through conduct, into the external world. See also: A. Ashworth and L. Zedner, *Preventive Justice*, *op. cit.*, note 105, p. 110. A provision in French counter-terrorism legislation, which was declared unconstitutional by the French Constitutional Council in 2017, has been described as a “crime of thought”. The provision sought to criminalize consultation of terrorist websites “when accompanied by the desire to adhere to an ideology expressed by these services” but otherwise fell short of requiring terrorist intent. See B. Boutin, “Excesses of Counter-Terrorism and Constitutional Review in France: The Example of the Criminalisation of the Consultation of Websites”, *Verfassungsblog*, 10 May 2018, <<https://verfassungsblog.de/where-visiting-a-website-is-now-a-crime-excesses-of-counter-terrorism-and-constitutional-review-in-france/>>.

116 For crimes, such as terrorist attacks, to be imputed to another who, for example, possesses material or makes statements that may be deemed by some to “glorify” such acts, the original actor must have had “some form of normative involvement [in the other person’s] subsequent choice” to commit a crime and “the intent to cause the final crime itself”. See: A. Ashworth and L. Zedner, *Preventive Justice*, *op. cit.*, note 105, p. 112, quoting Simester and von Hirsch. Note that the breadth and ambiguity of the offences, and the need for broad contextual analysis of facts, means that wide-reaching and potentially prejudicial evidence that may not normally be relevant and admitted is placed before the jury in common law systems. This risks making thought, if not the basis of the crime charged, at least strongly influential in determination of guilt.

their behaviour and the ultimate wrong.<sup>117</sup> Finally, for all forms of responsibility and modes of liability, the individual must have demonstrated criminal intent. The individual must intend to act, and to cause the harm, or at least to create a serious risk of foreseeable harm.<sup>118</sup> Intent and recklessness provide the basis for the moral culpability and legal responsibility of the individual.

States should carefully consider whether these basic principles are reflected in FTF-related laws and practice. First, in many incarnations of FTF-related laws, legislation detaches criminalized conduct from any appreciable harm or consequence in the external world. Many offences of travel, or “glorification” of terrorism, have a debatable or tangential link to future terrorist attacks, and are prosecuted on the basis that they may create a risk of such eventual attacks.<sup>119</sup> Second, the critical dimension of intent is sometimes absent or limited in scope (directed not at the intent to commit terrorist acts but merely at the intent to travel to a conflict zone, to facilitate travel to a conflict zone for someone who intends to join a terrorist group or to receive terrorism training, or to provide funding in the knowledge that it could be used for terrorist ends).<sup>120</sup> The link between an individual’s behavior and the criminal wrong becomes extremely tenuous when no specific conduct or contribution towards any act of terrorism, nor any intent to make such a contribution, is required for criminal charges to be levelled against the individual.<sup>121</sup>

In prosecuting FTF-related acts, states must ensure that the basic principle of individual responsibility is met, and that individuals are charged and punished based on their own conduct and culpability. Preventive prosecution (e.g., prior to travel) should, at a minimum, require proof of intent to carry out – or make a criminal contribution to – terrorist acts. In line with UNSC Resolution 1566 (2004), which contains guidance on the

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117 A. Ashworth and L. Zedner, *Preventive Justice*, *op. cit.*, note 105, p. 109.

118 For how this is reflected in international criminal law principles, see e.g., A. Eser, “Individual Criminal Responsibility”, in A. Cassese, P. Gaeta and J. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), vol. 1, p. 797.

119 For example, in the United Kingdom crimes of “encouragement to terrorism” explicitly note that impact is irrelevant. Convictions include the cases against Tareena Shakil who tweeted support for ISIL and posted ISIL iconography; and Mohammed Moshin Ameen in which the accused was described by the court as risking “the emulation of terrorist actions” through opinions which inter alia “establish[ed] religious and social grounds for terrorist action”. In other cases the oath of allegiance, sharing of ideas and possession of information have been prosecuted. In some cases, judges have insisted on some direct connection to an act of terrorism. In cases from other participating States the ideas have not even been communicated: these include cases where leaflets were never distributed but still deemed “propagandizing” in Turkey; see: H. Duffy and K. Pitcher, “Inciting Terrorism? Crimes of Expression and the Limits of the Law”, *op. cit.*, note 85.

120 According to UNSC Resolution 2178 (2014) acts of support, organization or facilitation have to be “wilful” but (unlike for individuals who travel) do not have to have the purpose of participation in or support for terrorism, *op. cit.*, note 1.

121 The risk of prosecution on charges of “material support” for providing training to promote respect for IHL or prosecution of individuals sending money abroad to their children for basic needs illustrates the decreasing regard for terrorist intent in the application of counter-terrorism legislation, see: *Holder v. Humanitarian Law Project*, *op. cit.*, note 90; and cases involving family member prosecutions for terrorism financing in: B. Boutin, “Has Countering the Financing of Terrorism Gone Wrong? Prosecuting the Parents of Foreign Terrorist Fighters”, International Centre for Counter-Terrorism, 2 October 2017, <[icct.nl/publication/countering-the-financing-of-terrorism-gone-wrong-prosecuting-the-parents-of-foreign-terrorist-fighters/](http://icct.nl/publication/countering-the-financing-of-terrorism-gone-wrong-prosecuting-the-parents-of-foreign-terrorist-fighters/)>.

definition of terrorism, this would require individuals to intend to contribute to the use of violence or cause death or serious harm to civilians for the purpose of intimidating a population or compelling a government to do or abstain from any act.

The vast number of preventive offences that have emerged in the counter-terrorism context in recent years have been described as “ad hoc extensions of the criminal law”.<sup>122</sup> They reflect the understandable desire to intervene early to prevent terrorism as states have an obligation to prevent terrorist acts. But in doing so they must ensure that criminal law measures to that end uphold the principles on which their legitimacy depends.

### ***Disproportionate and Otherwise Arbitrary Applications of Criminal Law***

Criminal law should be employed only as a last resort. The principle of *ultima ratio* (criminal law as a last resort) is recognized in criminal law theory and reflected in, for example, the EU approach to Criminal Law:

*“Whereas in view of its being able by its very nature to restrict certain human rights and fundamental freedoms of suspected, accused or convicted persons, in addition to the possible stigmatising effect of criminal investigations, and taking into account that excessive use of criminal legislation leads to a decline in efficiency, criminal law must be applied as a measure of last resort (ultima ratio) addressing clearly defined and delimited conduct, which cannot be addressed effectively by less severe measures and which causes significant damage to society or individuals...”*<sup>123</sup>

The principle of liberal criminal law often corresponds to what has been described as the “culture of executive restraint” in prosecution.<sup>124</sup> However, recent international developments in countering terrorism, including the threats and challenges posed by FTFs, related legislative changes and prosecution practice, even for relatively minor offences, suggest that states across the OSCE area are exercising less restraint in their use of criminal law.<sup>125</sup> The effect of treating large groups of people as suspected criminals has been questioned recurrently, as it may contribute to the sense of injustice (real or perceived) that can attract individuals to becoming FTFs.

Such developments also add to trends of criminalization and prosecution of a range of legitimate activities – from journalism, participation in non-governmental organizations,

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122 A. Ashworth and L. Zedner, *Preventive Justice*, *op. cit.*, note 105, pp. 3, 98. Referring to “offences aimed at purely preparatory conduct” that “may be criminalized without the need for proof of an intent to cause harm” Ashworth and Zedner state: “These offences are specific to terrorism, and are ad hoc extensions of the criminal law aimed at exerting a preventive effect, largely by authorizing police action at a relatively early stage”.

123 European Parliament, EU Approach to Criminal Law, *op. cit.*, note 108.

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

125 Controversial examples already referred to earlier include the convictions of mothers and other family members for sending basic funds to their children overseas under broad terrorist financing provisions, on the basis for example that they “knew the recipient was radicalised” so there was a risk the money could have been used for terrorist purpose. See B. Boutin, “Has Countering the Financing of Terrorism Gone Wrong? Prosecuting the Parents of Foreign Terrorist Fighters”, *op. cit.*, note 121.

academia, legal representation and others – under broadly framed counter-terrorism criminal laws in several OSCE participating States.<sup>126</sup> In their efforts to counter FTF threats, states must be cautious not to reinforce existing trends in some countries of counter-terrorism legislation being applied in an abusive manner.

The responsibility to ensure compliance with rule of law principles falls first and foremost on legislatures. In the context of Resolutions 2178 (2014) and 2396 (2017), the UN Security Council has been criticized for “directing criminal legislative practice in expanded ways”.<sup>127</sup> The broad terms of such resolutions make it all the more important that national legislatures engage in a rigorous and inclusive process in which they consider the “value, efficiency and rule of law compliance” of criminal law measures in this field.<sup>128</sup> Those drafting and adopting legislation must ensure that criminal law meets the strict requirements of legality upon which its legitimacy depends.

Prosecuting authorities, within the limits provided by the legal system in the country concerned, also play a crucial role in exercising discretion in the selection of cases and application of the law. Even where criminal law could be used, independent and professional prosecutors should take into account all the circumstances of a suspect’s case, the interests of justice and countervailing criminal policy considerations, including the broader social or human rights impact of a prosecution. Governments must respect the independence and professionalism of prosecuting agencies.

While important, discretion of prosecutors within the limits of the legal system should not be considered an alternative to clarity in the law itself. As British judge Lord Bingham has noted, “the rule of law is not well served if a crime is defined in terms wide enough to cover conduct which is not regarded as criminal and it is then left to the prosecuting authorities ... not to prosecute to avoid injustice”.<sup>129</sup>

Participating States must, therefore, ensure complementary legislative, prosecutorial and judicial roles in line with fundamental rule of law and human rights principles, with a view to effectively prosecuting genuine terrorist activity while curtailing over-reach.

### ***Ensuring Fairness and Respecting the Presumption of Innocence***

States must ensure that the fairness of criminal proceedings, as enshrined in international human rights law, is strictly respected. In practice, the expanding scope of criminal law and imposition of grave penalties for FTF-related acts, including less serious ones, may be rendered more problematic by criminal law procedures that undermine standards of justice and fair trial rights.

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<sup>126</sup> Concerns about the unwarranted application of offences related to “terrorism” or so-called “extremism” are well documented. See for example, “The Responsibility of States’: Protection of Human Rights Defenders in the OSCE Region (2014–2016)”, OSCE/ODIHR, 14 September 2017, <<https://www.osce.org/odihr/341366>>.

<sup>127</sup> F. Ní Aoláin, “The UN Security Council, Global Watch Lists, Biometrics and the threat to the rule of law”, *op. cit.*, note 52.

<sup>128</sup> *Ibid.*

<sup>129</sup> Cited in: D. Anderson, “Shielding the Compass: How to Fight Terrorism without Defeating the Law”, *op. cit.*, note 124.



The right to be tried by an independent and impartial tribunal is imperiled by resort to “special courts and administrative boards” that undermine international due-process standards, and have reportedly been used to prosecute FTF crimes in a range of states around the world.<sup>130</sup> The 2018 UN Counter-Terrorism Implementation Task Force (CTITF) guidance to states stresses that the use of military courts to try civilians will only be legitimate if regular civilian courts are unavailable and recourse to military courts is unavoidable.<sup>131</sup> Particular challenges also arise from trials in absentia, which have long been controversial as a matter of human rights law. Article 14 of the ICCPR entitles anyone accused of a criminal offence to be present during their trial. Both the UN Human Rights Committee (CCPR) and the European Court of Human Rights (ECtHR) have found that trials in absentia can be permitted only under very limited conditions. If individuals are tried and convicted when they are overseas, they should be granted the right to a retrial when they can be present.<sup>132</sup>

Non-disclosure of information and evidence is also invoked frequently in terrorism cases, including FTF-related ones. In any fair trial, the accused must have access to the evidence presented against them and a meaningful opportunity to refute it. It is impermissible under international human rights standards to withhold information that is exculpatory for the accused. Access to information must include all materials the prosecution plans to present in court against the accused.<sup>133</sup> Only in exceptional circumstances may it be legitimate to withhold certain information, for example, to protect the rights of witnesses or sources, or to safeguard an important public interest, such as national security. However, the use of secret evidence is inconsistent with the right to a fair trial if not accompanied by appropriate safeguards. Withholding information is only

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

131 UN CTITF Guidance 2018, *op. cit.*, note 10, p. 42. In this context reference should also be made to the US military commissions, which have been established to try Guantánamo detainees for law of war violations and for “other offenses”, including material support for terrorism. Due to concerns over the jurisdiction and the proceedings of the military commissions, which contravened fundamental fair trial rights, ODIHR called on the US authorities to disestablish the commissions and to ensure that Guantánamo detainees suspected of a criminal offence are prosecuted before ordinary civilian courts. See “Report on the Human Rights Situation of Detainees at Guantánamo”, OSCE/ODIHR, November 2015, <<https://www.osce.org/odihr/198721>>.

132 Other conditions include that the accused has notice of the proceedings and charges and is legally represented with effective assistance of counsel. See: *General Comment No. 32 (Article 14: Right to equality before courts and tribunals and to a fair trial)*, CCPR, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 36, (hereafter, *General Comment No. 32*, CCPR); and *Sejdovic v. Italy*, ECtHR, Judgment of 1 March 2006. In absentia trials of FTFs have reportedly been held in, e.g., Belgium, Denmark, France and the Netherlands. See: “The return of foreign fighters to EU soil. Ex-post evaluation”, European Parliamentary Research Service, pp. 50 and 86-87, *op. cit.*, note 63. See also: “Foreign Terrorist Fighters: Eurojust’s Views on the Phenomenon and the Criminal Justice Response, Fourth Eurojust Report”, Eurojust, November 2016, p.15 (hereafter, Eurojust Report 2016).

133 See: *Human Rights in Counter-Terrorism Investigations: A Practical Manual for Law Enforcement Officers*, (Warsaw: OSCE/ODIHR, November 2013), p. 48, <[www.osce.org/odihr/108930](http://www.osce.org/odihr/108930)>, (hereafter, *Human Rights in Counter-Terrorism Investigations*, OSCE/ODIHR); and *General Comment No. 32*, CCPR, para. 33, *op. cit.*, note 132.

permissible if strictly necessary and sufficiently counter-balanced by adequate procedural guarantees to ensure an overall fair trial.<sup>134</sup>

Furthermore, states must exercise caution to ensure that the presumption of innocence is not jeopardized in the context of FTF offences. This requires that the burden of proof remains firmly on the prosecution to prove the guilt of the accused. The risk of inverting the burden of proof may arise, for example, if courts shift emphasis onto what the accused did not do to demonstrate opposition to terrorism.<sup>135</sup> The risk may arise more directly in the context of laws that criminalize travel to certain areas unless the accused can prove a legitimate purpose.<sup>136</sup>

### ***Gathering and Sharing Information and Evidence Within and Across Borders***

States face serious challenges in prosecuting FTFs and terrorist acts committed abroad due to the location of crimes, suspects and witnesses. In particular, it poses difficulties in accessing evidence, and there may be restrictions on the use of information received from foreign intelligence agencies. Therefore, states should dedicate serious attention to considering and sharing best practices on how to meet practical, evidentiary and jurisdictional challenges in a way that respects international human rights standards, including in relation to fair trial rights.

UNSC Resolution 2396 (2017) places particular emphasis on gathering and sharing of information, intelligence and evidence, including from conflict zones, and on judicial measures and international co-operation to ensure that anyone who participates in the planning, preparation or perpetration of terrorist acts is brought to justice. In doing so, states should use all lawful means, consistent with human rights, to gather evidence of criminal conduct.

Surveillance of individuals reasonably suspected of having committed FTF-related offences and the gathering, retention and sharing of information and personal data – including communication and digital data, and information about one’s movements – must not be done in a manner that erodes fundamental human rights protections.

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<sup>134</sup> *Human Rights in Counter-Terrorism Investigations*, OSCE/ODIHR, p. 48, *op. cit.*, note 133; and *Rowe and Davis v. The United Kingdom*, ECtHR, Judgment of 16 February 2000.

<sup>135</sup> An example of the difficult balance sometimes struck by courts in this context can be found in the case of *Anjem Choudary and Mohammed Rahman in the United Kingdom*. The two defendants were convicted in 2016 of inviting support for a terrorist organization by signing an oath of allegiance and broadcasting a series of lectures in which they claimed the “Islamic State” was a legitimate caliphate. The sentencing remarks noted that the defendants did nothing to condemn in the lectures any aspect of what the “Islamic State” was doing at the time and in that way indirectly encouraged violent terrorist activity. The judge accepted that there was no direct encouragement of any particular violent action and no evidence that anyone committed such acts as a result of the lectures, which constituted an important factor in limiting the sentences. See: *R v Anjem Choudary and Mohammed Rahman*, Central Criminal Court, Great Britain, Sentencing Remarks, 6 September 2016, International Crimes Database, <<http://www.internationalcrimesdatabase.org/Case/3273>>.

<sup>136</sup> Australia’s Foreign Fighters Law of 2014 criminalized travel to a “declared area where terrorist organizations engage in hostile activity”, subject to the individual proving that presence there was for “a sole legitimate purpose”; see: “Foreign Terrorist Fighter’ Laws, Human Rights Rollbacks Under UN Security Council Resolution 2178”, Human Rights Watch, p. 14, *op. cit.*, note 130.

Safeguards surrounding the right to privacy, including judicial oversight of the necessity and proportionality of any interference, need to be respected.<sup>137</sup>

Furthermore, it is important to recall that it is absolutely prohibited under international law to use evidence obtained by torture and other ill-treatment in judicial proceedings. Its admission as evidence in court violates due process and fair trial rights.<sup>138</sup> This also applies when the evidence is received from other countries. Even if it is not intended to be used in court proceedings, but for other purposes, the collection, storing, sharing and receiving of torture tainted information should be banned.<sup>139</sup> This is because the reliability of torture-tainted information is always doubtful and because it makes the receiving agency complicit in internationally wrongful acts.<sup>140</sup>

When receiving information from authorities of other states, including from conflict zones, measures should be taken to ensure that the information or evidence has not been obtained by unlawful means. Similarly, sharing of information should be based on national legislation that outlines clearly the parameters for information exchange and the safeguards that apply to ensure that information is not used for unlawful purposes. Before entering into an information and intelligence sharing agreement, or doing so on an ad hoc basis, an assessment should be made of the counterpart's record on human rights and data protection, as well as the legal safeguards and institutional controls that govern the counterpart.<sup>141</sup> States should ensure that they do not co-operate with other states in the sharing of information and evidence where those states do not meet fundamental human rights standards in practice.

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137 See e.g., *Shimolovs v. Russia*, ECtHR, Judgment of 21 June 2011. For a fuller discussion of information exchange, data collection and analysis for the detection of FTFs and border control in pursuance of UNSC Resolution 2396 (2017), see UN CTITF Guidance 2018, p. 30-34, *op. cit.*, note 10.

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

139 *Ibid.*, para. 73.

140 *OSCE Guidebook Intelligence-Led Policing*, (Vienna: OSCE, 2017), p. 29, <<https://www.osce.org/chairmanship/327476>>; *Human Rights in Counter-Terrorism Investigations*, OSCE/ODIHR, p. 28-29, *op. cit.*, note 133. See also: *Report to the UN Human Rights Council*, UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/HRC/25/60, *op. cit.*, note 138; and UN Special Rapporteur on counter-terrorism, *Report to the UN Human Rights Council*, UN Doc. A/HRC/10/3, 4 February 2009, paras. 55-57.

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

## ***Fair, Proportionate and Effective Penalties***

There are heightened penalties attached to terror-related crimes in many states (including mandatory penalties in some) due to the gravity of terrorism offences.<sup>142</sup> General presumptions as to the gravity of FTF-related offences may not, however, be appropriate in light of the expanded reach of such offences and the fact that they sometimes also embrace minor forms of contribution without clear criminal intent. Furthermore, if the conduct in question is unconnected or very remote from eventual or planned terrorist acts, heightened sentences may not be proportionate to the gravity of the offence. States must ensure that punishment is commensurate not only with the crime, but also with the individual's role in the crime.<sup>143</sup>

Courts must take into account all of the circumstances in assessing appropriate and proportionate penalties.<sup>144</sup> The diverse profiles of FTFs, and examples of vulnerability on account of age, mental health or intellectual ability, speak to the importance of careful consideration of not only whether to prosecute at all, but if so, how to punish. The use of individual risk assessments of FTFs, which are usually provided to courts by probation services to assist judges when sentencing, has been identified as a good practice by Eurojust – the EU's judicial co-operation agency – in shaping appropriate penalties.<sup>145</sup> Punishment must not be inhumane,<sup>146</sup> conditions and treatment in detention of individuals accused or convicted of FTF-related offences must be humane and respect the inherent dignity of the human person,<sup>147</sup> and interference with private and family life, for example, must meet the necessity and proportionality test.<sup>148</sup> Legitimate efforts should be made to ensure prisons are not environments in which violent extremism spreads, but this must not lead to unnecessary separation from other prisoners, solitary confinement or other excessively restrictive detention regimes.<sup>149</sup> Conditions of detention for women accused or convicted of FTF-related offences must take into account the heightened

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142 Some examples of penalties include 17-18 years of imprisonment for contributing to recruitment (“Albania Jails Nine Jihadi Recruiters”, *BalkanInsight*, 4 May 2016, <[www.balkaninsight.com/en/article/heavy-sentences-spelled-for-albania-jihadi-recruiters-05-04-2016](http://www.balkaninsight.com/en/article/heavy-sentences-spelled-for-albania-jihadi-recruiters-05-04-2016)>). Laws in the United Kingdom provide for up to seven years of imprisonment for “encouragement to terrorism” (*Terrorism Act* (2006), Section 1 (7)). See also “‘Foreign Terrorist Fighter’ Laws, Human Rights Rollbacks Under UN Security Council Resolution 2178”, *Human Rights Watch*, *op. cit.*, note 130).

143 In accordance with the principle of individual guilt (*nulla poena sine culpa*); see: European Parliament, *EU Approach to Criminal Law*, *op. cit.*, note 108; and Article 25 (individual criminal responsibility) of the Rome Statute of the International Criminal Court (ICC).

144 International human rights law requires a balanced assessment of appropriate punishment not automatic penalties. For examples of court approaches see, for example, Eurojust Report 2016, p. 13, *op. cit.*, note 132.

145 “Foreign Terrorist Fighters: Eurojust’s Views on the Phenomenon and the Criminal Justice Response, Fourth Eurojust Report, Summary of Main Findings”, Eurojust, 19 April 2017, p. 5.

146 Article 7 ICCPR.

147 Article 10 ICCPR. This also applies when special security measures are imposed in detention.

148 Article 17 ICCPR. This also applies in detention, for example, when individuals accused or convicted of FTF-related offences are moved further from their social group or subjected to restrictions to receive family visits on security grounds.

149 For a more comprehensive analysis of those and other related issues see the forthcoming ODHR and Penal Reform International (PRI) guide for detention monitors on the protection of human rights in preventing and countering violent extremism and radicalization that leads to terrorism (VERLT) in the prison context.

risks of sexual abuse and other violence to which female detainees are exposed, and must accommodate gender-specific protection and other needs.<sup>150</sup>

Alternatives to custodial sentences have also been adopted in a number of participating States, indicating positive practice.<sup>151</sup> While it appears that rehabilitation has, for a long time, largely been neglected in states' counter-terrorism efforts, it is now recognized as an increasingly significant aspect within the context of the criminal law framework.<sup>152</sup> Eurojust provides examples of judicial alternatives to imprisonment, including the attachment of "specific conditions" directed at the "rehabilitation, disengagement and/or de-radicalisation of FTFs".<sup>153</sup> For reintegration and rehabilitation within the broader context of the prevention of VERLT see section 3.5.

Finally, punishment should not extend beyond the sentence imposed by the criminal court. If an individual is acquitted, or once his or her sentence is served, ongoing punishment is impermissible. Yet, experience indicates that onerous requirements sometimes continue far beyond acquittal or the sentence period for some individuals. The practice of listing "perpetrators", including persons charged but not convicted, and creating ensuing obligations for the individual concerned (such as regularly reporting to the police), is one example.<sup>154</sup> The fact that individuals were charged in a criminal process should not lead to consequences other than the sentence imposed by a court of law following proof of guilt beyond reasonable doubt. Any other measures that may be imposed outside of the criminal framework on individuals who were charged or convicted of terrorism-related offences, such as regular reporting requirements, other restrictions or "administrative measures", must be strictly justified by reference to the relevant legal framework and respect due process standards.

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<sup>150</sup> See for example, "UN Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders" (Bangkok Rules), adopted by UN General Assembly Resolution 65/229 on 21 December 2010, UN Doc. A/RES/65/229.

<sup>151</sup> Eurojust Report 2016, *op. cit.*, note 132.

<sup>152</sup> See for example, "Declaration on strengthening OSCE efforts to prevent and counter terrorism" adopted by the OSCE Ministerial Council in Hamburg on 9 December 2016, MC.DOC/1/16, (hereafter, OSCE Declaration on strengthening OSCE efforts to prevent and counter terrorism); and "Ministerial Declaration on preventing and countering violent extremism and radicalization that lead to terrorism", adopted by the OSCE Ministerial Council in Belgrade on 4 December 2015, MC.DOC/4/15 (hereafter, OSCE Ministerial Declaration on VERLT). See also UNOCT Report July 2017, *op. cit.*, note 27; "Rome Memorandum on Good Practices for Rehabilitation and Reintegration of Violent Extremist Offenders", Global Counterterrorism Forum (GCTF), *op. cit.*, note 95. See also: E. Entenmann, L. van der Heide, D. Weggemans, J. Dorsey, "Rehabilitation for Foreign Fighters? Relevance, Challenges and Opportunities for the Criminal Justice Sector", *op. cit.*, note 93.

<sup>153</sup> Eurojust Report 2016, *op. cit.*, note 132.

<sup>154</sup> For example Eurojust notes that in France, an automated database of perpetrators of terrorist offences was established, and "after sentencing or charging" a "perpetrator" may be listed for 20 years (underage individuals for ten years). The listing creates a series of obligations for the individual, see: Eurojust Report 2016, *op. cit.*, note 132. Concerns have also been expressed about Australian laws, which among other things appear to have been introduced due to perceived threats of returning FTFs, allowing for unlimited extension of prison terms of persons convicted of terrorist offences, after their sentences are completed. See Michelle Innis, "Counterterrorism law to let Australia detain convicts after their sentences", the New York Times, 1 December 2016, <[www.nytimes.com/2016/12/01/world/australia/counterterrorism-law-senate-prison.html?ref=world](http://www.nytimes.com/2016/12/01/world/australia/counterterrorism-law-senate-prison.html?ref=world)>.

### 3.4 Exercising Restraint when Resorting to “Administrative Measures”

#### Recommendations

OSCE participating States should:

- Ensure that administrative measures, which lead to human rights restrictions and may have a punitive effect, are not used to circumvent the protections of criminal law;
- Ensure that restrictions on rights resulting from administrative measures are prescribed by law, strictly necessary, proportionate, non-discriminatory and otherwise in accordance with international human rights standards;
- Refrain from resorting to deprivation of citizenship as a generally applied policy to prevent and counter terrorism, including FTF-related offences; ensure, that if stripping of citizenship is used, it is in the most exceptional circumstances, is not applied arbitrarily and does not lead to statelessness; and that any subsequent measures that lead to restrictions on rights (such as denial of entry or deportation) are still strictly justified as necessary and proportionate; and
- Ensure that restrictions on the right to liberty and to freedom of movement comply with fundamental human rights principles – including the principle of legality, necessity, proportionality and non-discrimination – and are accompanied by stringent safeguards, including judicial approval and review. Furthermore, those subjected to such measures must be provided with sufficient information on the grounds for the imposition of that particular measure, and be given the right to challenge the lawfulness of the measures and other due process guarantees.

There is a trend across the OSCE area towards increasing use of administrative measures in countering terrorism. Although not defined, the term “administrative measures” is generally used to refer to restrictive measures, of a non-criminal nature, that are imposed by the executive in the name of terrorism prevention.<sup>155</sup> Although increasingly onerous and wide-reaching in their impact on human rights, they are characteristically accompanied by limited judicial review.<sup>156</sup> Those subject to such measures often receive little or no access to information concerning the basis for those measures or have limited opportunities to challenge such measures in line with fundamental due process standards and the right to a remedy (see also section 3.9).

<sup>155</sup> See, for example, B. Boutin, “Administrative Measures against Foreign Fighters: In Search of Limits and Safeguards”, International Centre for Counter-Terrorism, 16 December 2016, <<https://icct.nl/publication/administrative-measures-against-foreign-fighters-in-search-of-limits-and-safeguards/>>, (hereafter, B. Boutin, “Administrative Measures against Foreign Fighters: In Search of Limits and Safeguards”).

<sup>156</sup> *Ibid*, p. 5.

## ***Administrative Measures and Circumvention of the Protection of Criminal Law***

Criminal law is not always the appropriate instrument when seeking to prevent and counter terrorism and FTF-related acts, and there is a complementary role for a range of different types of preventive and responsive measures. However, administrative measures that have a punitive effect should not be used as alternatives to criminal law responses to bypass the higher procedural guarantees of criminal law and procedure. These include standards of proof and the nature of evidence that can be used, as well as the availability of opportunities for appeal or meaningful challenge.

The UNCTED has recommended that administrative measures only be used where “it would not be appropriate to bring terrorism related charges.”<sup>157</sup> Moreover, it has been recognized that where measures such as preventive detention or restrictive control orders are used as an alternative to criminal process, but with comparable impact on the individual affected, the more stringent standards, processes and safeguards of criminal law should be applied.<sup>158</sup> In practice, states need to address and take seriously the concern that the upsurge in administrative measures in the counter-terrorism context, including FTF-related acts, is “a repressive tool which problematically circumvents the procedures and guarantees of criminal prosecution.”<sup>159</sup>

Specific issues arising in relation to two groups of administrative measures – citizenship stripping and restrictions on liberty – are addressed below.

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

A growing practice, adopted in a number of states, and proposed in others, involves stripping individuals who have engaged in FTF-related acts or are considered to pose a terrorist threat of their citizenship.<sup>160</sup> In response, limits on the permissibility of some of these measures have been clarified by courts that have developed legal standards through case-law. In some cases, practices have been modified as a result of such case-law, or the government has retreated from its stated plans.<sup>161</sup>

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157 UNCTED 2016, Implementation of Security Council resolution 2178 (2014), para. 155, *op. cit.*, note 62.

158 The principle that criminal due process standards should apply in certain circumstances to civil and administrative measures depending on their nature and impact, is established in *Engel and Others v. The Netherlands*, ECtHR, Judgment of 8 June 1976, para. 82, and has been accepted in cases on, for example, control orders in the counter-terrorism context.

159 B. Boutin, “Administrative Measures against Foreign Fighters: In Search of Limits and Safeguards”, p. 19, *op. cit.*, note 155.

160 The practice emerged, for example, in the United Kingdom, Bosnia and Herzegovina, the Netherlands and France. See B. van Ginkel and E. Entenmann (eds.), “The Foreign Fighters Phenomenon in the European Union”, *op. cit.*, note 16. It included cases of deprivation of citizenship both as a consequence of the conviction of terrorist offences (such as the case of *Ghoomid v France*, which is pending before the ECtHR at the time of writing) and on the ground of the individuals being considered to constitute a threat to national security (such as cases in the United Kingdom).

161 In the United Kingdom, for example, practices have been modified, whereas, in Canada, in June 2017, the government repealed amendments (to the Citizenship Act and other statutes) that had revoked citizenship for joining an armed group in a conflict abroad.

The right to a nationality is set out in the Universal Declaration of Human Rights (UDHR) and other international instruments.<sup>162</sup> International law does not confer a right to any particular nationality, and it provides for discretion to states to grant and revoke nationality, subject to certain limits. States may also deprive individuals of nationality when they have conducted themselves in a manner “seriously prejudicial to the vital interests of the state”, though this should be interpreted narrowly.<sup>163</sup> The power to strip persons of citizenship has also long been enshrined in domestic laws in the OSCE region. However, deprivation of nationality is clearly an extreme measure that interferes, directly and indirectly, with the enjoyment of a much broader range of rights, and which to a significant extent hampers an individual’s ability to claim and secure her/his human rights in general. It is therefore subject to strict limits.

First, where deprivation of nationality would result in **statelessness**, it can violate the state’s obligations in respect of the reduction of statelessness under international law.<sup>164</sup> Courts have held that it is insufficient that the individual “could be eligible for another nationality”, if stripping nationality renders the person stateless. Without such protection it would be unlawful as a matter of fact.<sup>165</sup> Given the severe impact of statelessness,

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

163 UN Convention on the Reduction of Statelessness, 30 August 1961, Article 8 (3). The UN Secretary General noted that this should be interpreted narrowly as an exception to the general rule; see UN Secretary General, *Report to the Human Rights Council* (“Human rights and arbitrary deprivation of nationality”), UN Doc. A/HRC/25/28, 19 December 2013, para. 12.

164 According to Article 8 (1) of the UN Convention on the Reduction of Statelessness and Article 7 (3) of the European Convention on Nationality of the Council of Europe, state parties to those treaties should not deprive anyone of their nationality if that would render them stateless. Both treaties only allow for exceptions to this rule in strictly limited circumstances. As of June 2018, 71 states worldwide, including 32 OSCE participating States, are parties to the UN Convention and 21 states are parties to the European Convention. The general recognition of the need to avoid statelessness, broadly shared among states, is for example set out in UN General Assembly Resolution 50/152, which calls on states to adopt nationality legislation with a view to reducing statelessness, see UN Doc. A/RES/50/152, 21 December 1995, para. 16. Underlining that the avoidance of statelessness is a general principle of international law, the Office of the UN High Commissioner for Refugees (UNHCR) stressed that deprivation of nationality resulting in statelessness will generally be arbitrary unless it serves a legitimate purpose and complies with the principle of proportionality; see summary of information provided by UNHCR in: UN Secretary General, *Report to the Human Rights Council* (“Arbitrary deprivation of nationality: report of the Secretary-General”), UN Doc. A/HRC/10/34, 26 January 2009, para. 51.

165 In 2014, the power to strip nationality in the United Kingdom was extended from covering just dual nationals to those who there was reasonable ground to believe would have been eligible to obtain another nationality, and the UK Supreme Court found that deprivation would be unlawful if it rendered the person stateless. See *Pham (Appellant) v Secretary of State for the Home Department (Respondent)*, 25 March, 2015, <[www.supremecourt.uk/cases/docs/uksc-2013-0150-press-summary.pdf](http://www.supremecourt.uk/cases/docs/uksc-2013-0150-press-summary.pdf)>. The 2014 change of legislation followed an earlier decision of the UK Supreme Court on that matter in the case of *Al-Jedda* in October 2013. In that decision the Court had dismissed the contention of the Secretary of State that justified the citizenship deprivation of the respondent on the grounds that he could have applied to the Iraqi authorities for restoration of his other nationality. See *Secretary of State for the Home Department (Appellant) v Al-Jedda (Respondent)*, 9 October 2013, <[www.supremecourt.uk/cases/uksc-2012-0129.html](http://www.supremecourt.uk/cases/uksc-2012-0129.html)>.



it would be difficult to justify deprivation of liberty that leads to statelessness as a proportional measure.<sup>166</sup>

Second, deprivation of nationality must not be **arbitrary**<sup>167</sup> and should meet the following basic requirements:

- As far as the deprivation results in restrictions on human rights, it must meet the legal standards to justify restrictions, namely that the limitation is prescribed by law, is necessary for the achievement of a legitimate purpose and proportionate to the intended aim, and is not discriminatory. Laws that allow for nationality to be deprived in cases where it is deemed “conducive to the public good”,<sup>168</sup> set a much lower threshold than the one provided by the principles of necessity and proportionality, as required by international human rights law.<sup>169</sup> Where someone joining a banned or “extremist” organization is automatically deprived of citizenship, states end up skipping the careful case-by-case consideration of legal tests required by human rights law for taking this action.
- It is essential that individuals have a practical and effective right to challenge deprivation of their nationality before a court of law, given the extreme impact such measures may have on human rights. Particular issues arise when, as has happened in practice, individuals do have the right to appeal in theory but are abroad at the relevant time and cannot give meaningful effect to the right in practice.<sup>170</sup>
- Deprivation of nationality must not be discriminatory. For example, provisions that apply only to naturalized persons have been criticized for creating a group of “second-class citizens”. The “dual nationality rule” (which allows deprivation of citizenship only for dual nationals) has been criticized for the same reason, although it may be seen as a valid consideration to prevent statelessness, because it can be perceived

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166 UN Secretary General, UN Doc. A/HRC/25/28, para. 4, *op. cit.*, note 163; see also UN Secretary General, *Report to the Human Rights Council* (“Human rights and arbitrary deprivation of nationality”), UN Doc. A/HRC/13/34, 14 December 2009, para. 59.

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

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

169 Similarly, a bill signed into law in Kazakhstan in July 2017 providing for revocation of citizenship of individuals convicted of terrorist crimes and other offences causing grave harm to the country’s vitally important interests has been criticized for its vagueness and potentially broad interpretation, which could contravene those basic requirements, see for example “Nations in Transit 2018, Kazakhstan, Country Profile”, Freedom House, <<https://freedomhouse.org/report/nations-transit/2018/kazakhstan>>; “Kazakhstan Adopts Law On Deprivation Of Citizenship”, Radio Free Europe/Radio Liberty, 11 July 2017, <[www.rferl.org/a/kazakhstan-citizenship-law-nazarbaev/28610008.html](http://www.rferl.org/a/kazakhstan-citizenship-law-nazarbaev/28610008.html)>; C. Putz, “Kazakhstan Considers Revoking Terrorists’ Citizenship”, *The Diplomat*, 24 May 2017, <<https://thediplomat.com/2017/05/kazakhstan-considers-revoking-terrorists-citizenship/>>.

170 See, for example, “Foreign Fighters under International Law”, Geneva Academy of International Humanitarian Law and Human Rights, Academy Briefing No. 7, pp. 57-58, <[www.geneva-academy.ch/joomla-tools-files/docman-files/Publications/Academy%20Briefings/Foreign%20Fighters\\_2015\\_WEB.pdf](http://www.geneva-academy.ch/joomla-tools-files/docman-files/Publications/Academy%20Briefings/Foreign%20Fighters_2015_WEB.pdf)>.

as a discriminatory tool targeting specific communities whose members frequently hold a second citizenship.<sup>171</sup>

While human rights courts and bodies recognize that citizenship rules may impinge on other rights,<sup>172</sup> it is important to note that the applicability of human rights does not depend on nationality. Under human rights treaties, obligations are owed by states to all individuals within their jurisdiction. Even where nationality stripping may be considered justified, it should not be assumed that the state can then set aside other human rights obligations in respect of the individuals in question. In this sense, the right not to be arbitrarily deprived of nationality is not coterminous with – and should not be confused with – the other rights at stake.

In practice, stripping of nationality often precedes or is linked to other steps that implicate human rights, whether they include denial of entry to a state, deportation or other steps. In particular, the power of states to deprive individuals of their nationality does not necessarily entitle the state to lawfully exclude an individual from its territory, as the right to enter or leave one’s own country<sup>173</sup> is not limited to “nationals” under human rights law, but to those with a relevant and substantial link to the state.<sup>174</sup> Nor, as a matter of law, does deprivation of nationality affect the right not to be expelled, returned or extradited to another state where there are real risks of serious human rights violations such as torture and other ill-treatment if used (as is often the case) as a precursor to deportation.

Due consideration should also be given to the overarching effectiveness of deprivation of nationality, and associated measures such as exclusion or deportation, to meet preventive goals. As already noted, stripping nationality does not automatically entitle the state to take other measures such as excluding or deporting individuals.

More broadly, “risk exportation”, whereby measures are taken that seek to protect a particular state by pushing the perceived threat beyond its borders, may not contribute

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171 Such concerns have for example been expressed about the debate of such provisions in the Netherlands, see B. Boutin, “Administrative Measures against Foreign Fighters: In Search of Limits and Safeguards”, *op. cit.*, note 155. For similar concerns relating to practices and previously contemplated proposals about citizenship deprivation in other countries, including Belgium, France and the United Kingdom, see also “Europe: Dangerously disproportionate: The ever-expanding national security state in Europe”, Amnesty International, 17 January 2017, pp. 58-63, <[www.amnesty.org/en/documents/euro1/5342/2017/en/](http://www.amnesty.org/en/documents/euro1/5342/2017/en/)>.

172 For example, *Genovese v. Malta*, ECtHR, Judgment of 11 October 2011. In an admissibility decision in a terrorism case, the ECtHR recognized that in principle deprivation of citizenship can negatively affect the right to family and private life; see: *K2 v. The United Kingdom*, ECtHR, Judgment of 9 March 2017.

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

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

to sustainable long-term security.<sup>175</sup> It may even be counter-productive if the exclusion forces individuals to remain in or revert to conflict zones, or in contexts in which terrorism and violent extremism can thrive. In this case, “risk exportation” by exclusion would appear to be incompatible with the obligations under UNSC Resolution 2178 (2014), which requires states to co-operate with each other to address the threats of FTFs.<sup>176</sup>

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

Travel bans and revocation of passports are two of the methods of choice employed by states in respect to FTFs.<sup>177</sup> While travel can be restricted to prevent acts of terrorism, for example, the nature of some travel restrictions has been criticized for being so broad as to be arbitrary and disproportionate.<sup>178</sup>

International law grants everyone the right to leave any country, including their own. According to Article 12 of the ICCPR, this right shall not be subject to any restrictions other than those that are provided by law and are necessary to achieve one of the legitimate aims specifically referred to in this provision, such as the protection of national security.<sup>179</sup> Therefore, restrictions on the right to leave a country must also comply with the principles of legality, necessity and proportionality.<sup>180</sup>

Detaining an individual where there is a perceived risk of the individual travelling for a terrorist purpose, or upon return if not connected to the prosecution of a criminal offence, also raises serious human rights issues. Any deprivation of liberty must have a lawful basis. This is reflected in the ICCPR’s prohibition of “arbitrary detention”.<sup>181</sup> Procedural safeguards must be provided immediately upon detention, including the right to challenge the lawfulness of one’s detention promptly before a judge.

So-called preventive or administrative detention (detention on security grounds without criminal charges) of persons perceived to constitute a terrorist threat has been held to

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175 See report of the UK Independent Reviewer of Terrorism Legislation, D. Anderson, “Shielding the Compass: How to Fight Terrorism without Defeating the Law”, *op. cit.*, note 124; see also R. Bauböck and V. Paskalev, “Citizenship Deprivation A Normative Analysis”, March 2015, <[www.ceps.eu/publications/citizenship-deprivation-normative-analysis](http://www.ceps.eu/publications/citizenship-deprivation-normative-analysis)>.

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

177 “‘Foreign Terrorist Fighter’ Laws, Human Rights Rollbacks Under UN Security Council Resolution 2178”, Human Rights Watch, *op. cit.*, note 130 cites countries that have enacted travel bans as including Austria, Azerbaijan, Belgium, Denmark, France, Italy, the Netherlands, Tajikistan, the United Kingdom and a number of countries from outside of the OSCE area.

178 *Ibid.*

179 See also Article 2 of Protocol 4 to the ECHR.

180 For further considerations concerning freedom of movement see UN CTITF Guidance 2018, *op. cit.*, note 10, pp. 15-20.

181 While the Article 9 ICCPR prohibits arbitrary detention, Article 5 ECHR (Article 5) provides an exhaustive list of grounds of detention (e.g., pursuant to criminal charge or pending deportation) which do not include security detention.

violate the basic right to liberty, and potentially, equality.<sup>182</sup> Only in exceptional circumstances could short term detention, with attendant safeguards, be justified.<sup>183</sup> Despite judicial decisions clarifying that deprivation of liberty on security grounds raises serious human rights concerns, policies, practice and debate in relation to FTFs reveal that it remains a live issue.

Certain practices that have emerged in some states, such as short-term detention for questioning or to prevent imminent travel, house arrest or assigned residence, control orders or limitations on movement to and within certain areas, must be carefully assessed to determine whether they amount to deprivation of liberty. Whether or not such measures constitute deprivation of liberty depends on the degree of control and limitations to which the person is subjected to rather than their formal status as detainees or not, as is set out in legal standards.<sup>184</sup> If the measures amount to deprivation of liberty, they must also be subject to all legal safeguards against arbitrary deprivation of liberty required under international human rights law.

The right to be brought promptly before a judicial or other competent, impartial and independent authority applies immediately upon detention. Likewise, anyone whose liberty is restricted must have access to sufficient information concerning the grounds on which the measure has been imposed and enjoy due process guarantees to safeguard their rights.<sup>185</sup> Such safeguards must be meaningful and sufficient in law and practice. While some states have taken the positive step of introducing prior judicial approval, if this amounts only to “automatic” judicial endorsement it would not necessarily provide meaningful oversight.<sup>186</sup>

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182 This is clear from other contexts such as security detention of non-nationals in the United Kingdom post 9/11, see: *A and Others v. The United Kingdom*, ECtHR, *op. cit.*, note 100. The French *Conseil d'État* issued an advisory opinion against preventive administrative detention on security grounds proposed in the aftermath of the terrorist attacks in Paris in November 2015, see: “Avis sur la constitutionnalité et la compatibilité avec les engagements internationaux de la France de certaines mesures de prévention du risque de terrorisme”, *Conseil d'État, Assemblée générale, Section de l'intérieur*, 17 December 2015, <[www.conseil-etat.fr/Decisions-Avis-Publications/Avis/Selection-des-avis-faisant-l-objet-d-une-communication-particuliere/Mesures-de-prevention-du-risque-de-terrorisme](http://www.conseil-etat.fr/Decisions-Avis-Publications/Avis/Selection-des-avis-faisant-l-objet-d-une-communication-particuliere/Mesures-de-prevention-du-risque-de-terrorisme)>.

183 The ECHR precludes this possibility under Article 5, which sets out an exhaustive list of grounds of detention, while the UN Human Rights Committee makes clear that such detention will be arbitrary save in the most exceptional circumstances, where the burden of proof to demonstrate the necessity rests on states, see: *General Comment No. 35 (Article 9: Liberty and security of person)*, CCPR, UN Doc. CCPR/C/GC/35, 16 December 2014, para. 15 (hereafter *General Comment No. 35*, CCPR).

184 For an overview of case-law on this issue see “Guide on Article 5 of the Convention, Right to Liberty and Security”, ECtHR, April 2014, <[https://www.echr.coe.int/Documents/Guide\\_Art\\_5\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf)>, pp. 4-5. On different forms of restrictions amounting to deprivation of liberty in the jurisprudence of the UN Human Rights Committee see also *General Comment No. 35*, CCPR, para. 5, *op. cit.*, note 183.

185 See: “UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment”, adopted by UN General Assembly Resolution 43/173, 9 December 1988, UN Doc. A/RES/43/173, See in particular principles 11-14 (right to be heard and provided with information), 17-18 (on legal counsel) and 32 (right to take proceedings to challenge the lawfulness of detention).

186 *Ibid.* Principle 4 requires that any form of detention and all measures affecting the human rights of a person under any form of detention shall be ordered by, or be subject to the effective control of, a judicial or other authority.

### 3.5 Preventing and Countering Violent Extremism and Radicalization that Leads to Terrorism

#### Recommendations

OSCE participating States should:

- Avoid overly broad and vague terms such as “extremism” or “radicalization” without any clear connection to terrorism, violence or other unlawful acts, as defined in accordance with international human rights law;
- Fully protect freedom of expression while preventing recruitment and mobilization of FTFs, subject to prohibition of genuine incitement to terrorist violence in accordance with international law;
- Avoid overly broad offences in criminal law – such as apology, glorification or condoning of terrorism – that frequently fall short of the threshold of incitement to discrimination, hostility or violence and lead to impermissible limitations of freedom of expression;
- Support voices offering alternative narratives as an antidote to violent extremism; empower communities and develop effective partnerships for the prevention of VERLT, including to address the varied push and pull factors and conditions conducive to recruitment and mobilization of FTFs; and
- Develop and implement tailored human rights-compliant and gender-sensitive reintegration and rehabilitation programmes for returning FTFs and others involved in FTF-activity, which:
  - \* Are based on individualized risk and needs assessments that take into account, among other things, personal motivations, the nature and level of their involvement in violent acts and potential victimization they may have experienced themselves; and
  - \* Are firmly embedded in broader VERLT prevention measures that effectively address the grievances and structural social conditions conducive to terrorist radicalization.

States are obliged to protect individuals under their jurisdiction from violence. Preventing and countering recruitment to and the engagement of individuals with organizations that threaten human rights are dimensions of the positive human rights obligation of states.

A growing body of reporting shows how ISIL expends considerable energy and resources on its online messaging and its virtual image to lure and recruit individuals.<sup>187</sup> UNSC Resolution 2178 (2014) “[u]nderscores that countering violent extremism, which can be conducive to terrorism, include[s] preventing radicalization, recruitment, and mobilization of individuals into terrorist groups and becoming foreign terrorist fighters ... and

<sup>187</sup> See, for example, G. Weimann, “The Emerging role of Social Media in the Recruitment of Foreign Fighters”, in FFILB, pp. 77-96, *op. cit.*, note 14.

calls upon Member States to enhance efforts to counter this kind of violent extremism.” Likewise, OSCE commitments call for enhanced co-operation to prevent and counter violent extremism and radicalization that lead to terrorism (VERLT), including recruitment and mobilization of individuals as terrorists and FTFs.<sup>188</sup>

Increasingly, states across the region are developing and pursuing a broad range of policies to prevent and counter VERLT – often also referred to as countering or preventing violent extremism (CVE or PVE) strategies. Where such policies involve identifying “early signs of radicalization”, detecting and countering attitudes, beliefs and to some extent behavior that are considered precursors to terrorism or engaging as FTFs, they raise a number of human rights issues.<sup>189</sup>

### ***Preventing Terrorist Violence Versus Countering “Radicalization” or “Extremism”***

First, difficult questions arise regarding the objectives, framing and focus of policies that counter so-called “radicalization” or “extremism”. Many political and human rights movements have been considered radical and extreme in their inception and the scope for abuse in countering views and behaviour that is considered to be undesirable is clear. Overbroad and vague definitions in counter-terrorism and “anti-extremism” legislation raise serious concerns about non-violent acts being targeted by such legislation, including the activities of peaceful opposition groups, civil society and human rights defenders across the OSCE area.<sup>190</sup>

Moreover, in practice, the widespread focus on countering “radicalization” or “extremism” is often connected to a focus on Muslim belief and practice,<sup>191</sup> despite repeated reassertions by the UN Security Council, OSCE participating States and others that

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188 See: OSCE Ministerial Declaration on VERLT, para. 4, *op. cit.*, note 152. See also: OSCE Ministerial Declaration on FTFs, *op. cit.*, note 2.

189 For an overview of potential human rights implications of measures to prevent and counter VERLT see: *Preventing Terrorism and Countering Violent Extremism and Radicalization that Lead to Terrorism*, OSCE, pp. 48-60, *op. cit.*, note 73. See also: “Background Paper: Countering the Incitement and Recruitment of Foreign Terrorist Fighters: The Human Dimension”, OSCE/ODIHR, *op. cit.*, note 12. See also: UN Special Rapporteur on counter-terrorism, UN Doc. A/HRC/31/65, *op. cit.*, note 34.

190 See, for example, “Civil Society Recommendations to the Participants of the OSCE Ministerial Council Meeting in Vienna”, Civic Solidarity Platform, December 2017, <[www.civicsolidarity.org/sites/default/files/recommendations\\_vienna\\_2017\\_3.12.pdf](http://www.civicsolidarity.org/sites/default/files/recommendations_vienna_2017_3.12.pdf)>; F. Ní Aoláin, “The UN Security Council, Global Watch Lists, Biometrics and the threat to the rule of law”, *op. cit.*, note 52. See also considerations in section 3.3 above.

191 The UN Special Rapporteur on counter-terrorism noted that strategies to counter violent extremism, even if generic on paper, tend to target specific groups considered to be most “at risk” of turning to violent extremism in practice. In order to avoid the stigmatization of entire communities and ethnic or religious groups, he stressed that such strategies should not be based on “pre- or misconceptions about the groups that are most susceptible to radicalization or violent extremism”. See UN Special Rapporteur on counter-terrorism, UN Doc. A/HRC/31/65, para. 43, *op. cit.*, note 34.

terrorism is not associated with any one religion.<sup>192</sup> In some contexts, detecting radicalized and suspicious behavior has, in practice, become interlinked with identifying more devout religious expression. Such practice raise concerns about the potential for discrimination on the grounds of religion or belief and arbitrary interference with the freedom to hold or manifest one's religion or belief itself. The inviolability of the right to freedom of thought is likewise jeopardized when states focus their counter-terrorism policies on beliefs and ideologies rather than actual criminal conduct.

Counter-terrorism measures should, therefore, be carefully focused on conduct with a proximate relationship to violence or with another unlawful act, such as incitement to discrimination, hostility or violence, as defined in accordance with international human rights standards.<sup>193</sup> Preventive measures with a stigmatizing and discriminatory effect are counter-productive because they can be used by “violent extremist groups as propaganda to undermine these efforts”.<sup>194</sup>

### ***Countering Violent Extremism while Protecting Freedom of Expression***

Concerns also arise regarding the impact on freedom of expression of steps to prevent VERLT and counter the recruitment and mobilization of FTFs. It is essential that states counter the use of social media and the Internet by groups like ISIL to recruit FTFs and promote violence. They can and must do so in full compliance with the right to freedom of expression. Over-reaching approaches to curbing free expression are also counter-productive and run counter to objectives of preventing VERLT.

Freedom of expression, often described as one of the essential foundations of democracy, embraces the freedom to express ideas and opinions that “offend, shock or disturb”.<sup>195</sup> Its significance is captured in the oft-cited judgment of the ECtHR which notes that “such are the demands of [...] pluralism, tolerance and broadmindedness without which there is no ‘democratic society’”.<sup>196</sup> The right to free expression is not absolute and can be restricted in line with strict criteria. However, restrictions must be prescribed by law, pursue one of the legitimate aims listed in relevant international standards (namely the protection of the rights or reputations of others or the protection of

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<sup>192</sup> This is consistently reflected throughout the OSCE's terrorism-related commitments, such as the 2016 OSCE Declaration on strengthening OSCE efforts to prevent and counter terrorism, *op. cit.*, note 152; the 2015 OSCE Ministerial Declaration on VERLT, *op. cit.*, note 152; the 2014 OSCE Ministerial Declaration on FTFs, *op. cit.*, note 2; the 2012 OSCE Consolidated Framework for the Fight against Terrorism, *op. cit.*, note 59; and the “OSCE Charter on Preventing and Combating Terrorism”, adopted by the OSCE Ministerial Council in Porto on 7 December 2002, MC(10).JOUR/2.

<sup>193</sup> See: *Preventing Terrorism and Countering Violent Extremism and Radicalization that Lead to Terrorism*, OSCE, p. 42-43, *op. cit.*, note 73.

<sup>194</sup> “The Hague-Marrakech Memorandum on Good Practices for a more Effective Response to the FTF Phenomenon”, Global Counterterrorism Forum (GCTF), <[www.thegctf.org/documents/10162/140201/14Sept19\\_The+Hague-Marrakech+FTF+Memorandum.pdf](http://www.thegctf.org/documents/10162/140201/14Sept19_The+Hague-Marrakech+FTF+Memorandum.pdf)>, (hereafter, The Hague-Marrakech Memorandum). The GCTF is an informal multilateral counterterrorism platform, which was founded by 29 states – from within and outside of the OSCE area – and by the European Union. The GCTF “Foreign Terrorist Fighters” (FTF) Initiative drew together global policy makers who prepared the Memorandum in 2014.

<sup>195</sup> *Handyside v. The United Kingdom*, ECtHR, Judgment of 7 December 1976, para. 49.

<sup>196</sup> *Ibid.*

national security, public order, health or morals), and be necessary and proportionate to fulfilment of those aims.<sup>197</sup>

According to some international human rights treaties, in certain circumstances state parties are not only entitled to, but obliged to intervene to limit free speech, notably where it amounts to incitement to discrimination, hostility or violence.<sup>198</sup> Numerous cases at the ECtHR have considered whether the words used, understood in context, were a “call for the use of violence, armed resistance or uprising”.<sup>199</sup> Blocking “extremist” views may actually fall foul of requirements of legal precision, and may go far beyond legitimate actions to counter incitement to violence or hate speech.<sup>200</sup>

Human rights courts have also noted the need to clearly distinguish between incitement to violence and “hostile”, “negative” or “acerbic” comments and criticism,<sup>201</sup> as “the line between virulent or even offensive criticism and incitement must not [...] be confused”.<sup>202</sup> The ECtHR has also noted that “a message of intransigence as to the objectives of a proscribed organisation cannot be confused with incitement to violence or hatred”.<sup>203</sup> Positive references to “resistance”, “struggle” or “liberation”,<sup>204</sup> expressions

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197 See Article 19 ICCPR, Article 19 UDHR, Article 10 ECHR, Article 13 ACHR. For example Article 19(3) ICCPR makes clear that the exercise of the right to freedom of expression “may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: [...] (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.” The jurisprudence of the UN Human Rights Committee stressed that this also entails the principle that restrictions must be proportionate, see: *General Comment No. 34 (Article 19: Freedoms of opinion and expression)*, CCPR, 12 September 2011, UN Doc. CCPR/C/GC/34, e.g., paras. 22 and 34, (hereafter, *General Comment No. 34*, CCPR, UN Doc. CCPR/C/GC/34).

198 See: Article 20 ICCPR; and Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

199 *Belek and Velioglu v. Turkey*, ECtHR, Judgment of 6 October 2015, paras. 24-27.

200 The so-called “Rabat Plan of Action” can provide useful guidance on what constitutes incitement, even though it is not an internationally binding standard that has been adopted by UN member states. It identifies six factors that need to be considered to distinguish forms of expression that should be defined as incitement to hatred and thus prohibited in accordance with Article 20 ICCPR: the context, position of the speaker, intent, content and form, extent of the speech act, and the likelihood, including imminence, of harm that may occur as a result of the speech. See: “Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”; Appendix in UN High Commissioner for Human Rights, *Report to the Human Rights Council* (“Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred”), UN Doc. A/HRC/22/17/Add.4, 11 January 2013. On legal practices moving towards criminalization of speech without a clear link to violence or other unlawful acts (e.g., discrimination) that appear to reflect an “increasing political and social focus on the perceived (non-violent) ideological and religious roots of ‘terrorism’”, see: A. Callamard, “Religion, Terrorism, and Speech in a ‘Post-Charlie Hebdo’ World”, *Religion and Human Rights*, Vol. 10, No. 3, 2015, pp. 207-228.

201 *Falakaoglu v. Turkey*, ECtHR, Judgment of 26 April 2005 (French), para. 35.

202 *Incal v. Turkey*, ECtHR, Judgment of 9 June 1998; *Otegi Mondragon v. Spain*, ECtHR, Judgment of 15 March 2011, para. 54 on negative and hostile criticism.

203 *Surek and Ozdemir v. Turkey*, ECtHR, Judgment of 8 July 1999, para. 61; *Erdogdu v. Turkey*, ECtHR, Judgment of 15 June 2000.

204 *Ceylan v. Turkey*, ECtHR, Judgment of 8 July 1999, para. 34.



of support for a leader of a “terrorist organization”, per se, have not justified interference in past cases.<sup>205</sup>

Moreover, if restrictions are to be justified based on threats to national security, the threat cannot be abstract or hypothetical, but must involve at least a reasonable risk of serious disturbance. Restrictions on freedom of expression must be exceptional, strictly justified as necessary and proportionate by reference to all the circumstances of the individual case. Restrictions cannot be justified on the basis that the ideas and opinions are not popular, are disfavoured or considered to represent an abstract danger.

### ***Alternative Narratives by Credible Messengers***

The UN Secretary General’s Plan of Action on Preventing Violent Extremism emphasizes the importance of fostering and creating platforms for dialogue and discussion. It notes that it is important “to promote tolerance and understanding between communities, and voice their rejection of violent doctrines by emphasizing the peaceful and humanitarian values inherent in their theologies”.<sup>206</sup> It also makes clear that it is important to “promote, in partnership with civil society and communities, a discourse that addresses the drivers of violent extremism, including ongoing human rights violations.”<sup>207</sup>

Initiatives that focus on fostering debate and engaging in discourse are undermined in contexts in which freedom of expression is unduly suppressed in the name of countering terrorism. If the debate is to be taken seriously, it must enable the expression of a range of opinions, including offensive and even anti-democratic speech, and embrace not only the expression of views that the state or the majority of society endorse but also those that they do not. A holistic, long-term and human rights-compliant approach to prevention would safeguard freedom of expression, subject to the acceptable limits provided by international law, including concerning the prohibition of incitement to terrorist violence.

States have increasingly engaged in measures directed at fostering “alternative narratives” to the ideology advanced by groups such as ISIL. The credibility and effect of such initiatives depends on who they are delivered by and whether initiatives genuinely open the debate, rather than gearing it only towards “acceptable” narratives. Emerging research suggests that when the primary motivation for returning FTFs is disaffection with the groups they joined abroad, they may constitute effective advocates to dissuade prospective recruits. Successful reintegration and rehabilitation, as set out below, may

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205 *Yalçinkaya and Others v. Turkey*, ECtHR, Judgment of 24 June 2014 (French), para. 34. The UN Human Rights Committee, in its General Comment on Article 19, stressed with reference to concerns expressed in concluding observations on the United Kingdom and Russia that offences such as “encouragement of terrorism” and “extremist activity” as well as offences of “praising”, “glorifying”, or “justifying” need to be based on clearly defined law to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression. See: *General Comment No. 34*, CCPR, para. 46, *op. cit.*, note 197.

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

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

therefore have significant knock-on effects on the availability of credible voices to counter the flow of FTFs.

### ***Community Engagement, Empowerment and Partnerships***

The impact of strategies to prevent and counter VERLT – how they are perceived, their effectiveness and the human rights concerns they may give rise to – depend on their focus, *modus operandi* and who they are developed and implemented by.

The Hague-Marrakech Memorandum of the Global Counterterrorism Forum (GCTF) emphasizes the importance of developing trusted relationships with communities “susceptible” to recruitment.<sup>208</sup> But trust is often in short supply, and this trust deficit is exacerbated by the imposition of broad-based repressive initiatives that can even target would-be interlocutors. Policies that single out and prevent support for, or limit funding to religious or belief communities and other community groups, for example, may in some circumstances run counter to the stated goal of preventing terrorism, FTF recruitment and mobilization. It could also lead to further alienation.<sup>209</sup>

Another noteworthy element of The Hague-Marrakech Memorandum is the reference to the empowerment of those best placed to affect change.<sup>210</sup> This is also reflected in the UNSC Resolution 2178 (2014), which uses similar language when it:

*“Encourages Member States to engage relevant local communities and non-governmental actors in developing strategies to counter the violent extremist narrative that can incite terrorist acts, address the conditions conducive to the spread of violent extremism, which can be conducive to terrorism, including by empowering youth, families, women, religious, cultural and education leaders, and all other concerned groups of civil society and adopt tailored approaches to countering recruitment to this kind of violent extremism and promoting social inclusion and cohesion”.*<sup>211</sup>

Recognizing the importance of work by and with communities is an important step towards an inclusive, participative, human rights sensitive approach to counter-terrorism, including FTF recruitment and mobilization. One of the OSCE’s flag-ship projects, the “Leaders against Intolerance and Violent Extremism (LIVE)” initiative, builds the capacity of leaders in civil society – especially youth, women, and community leaders – to speak out and mobilize others against violent extremism that leads to terrorism.<sup>212</sup>

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208 The Hague – Marrakech Memorandum, Good Practice #1, *op. cit.*, note 194.

209 See: Gilles de Kerchove, “Foreword”, in FFILB, *op. cit.*, note 14.

210 The Hague-Marrakech Memorandum, Good Practice #5, *op. cit.*, note 194.

211 UNSC Resolution 2178 (2014), para. 16, *op. cit.*, note 1. The UNSG Plan of Action on PVE likewise reflects the importance of empowerment of communities, of youth and of women; as does the OSCE Ministerial Declaration on VERLT. See UNSG Plan of Action on PVE, paras. 51-53, *op. cit.*, note 206; and OSCE Ministerial Declaration on VERLT, paras. 13, 14, 19 (c) and (h), *op. cit.*, note 152.

212 The project has been developed and is being implemented by the Action Against Terrorism Unit of the Transnational Threats Department in the OSCE Secretariat in Vienna, <<https://www.osce.org/secretariat/terrorism>>.

The importance of community-led initiatives and effective interlocutors stands alongside the need for broader partnerships. An approach that encompasses the “whole of society” has been championed by the UN and other inter-governmental and non-governmental organizations. Such an approach requires engagement of civil society across the board, including women and youth groups. The OSCE emphasizes the importance of fostering “multi-stakeholder partnerships” involving community-based initiatives that engage civil society and local leaders. “Public-private partnerships” also have a role to play to strengthen co-operation with leaders of religious or belief communities, schools, academia, the media, the business community, and industry.

Care must be taken, however, to ensure that community participation in state initiatives is genuinely voluntary and effective. This is particularly important in the case of religious or belief communities, given the stigma that may be attached to their engagement on FTF-related issues. States should also carefully identify the appropriate state agencies to engage in outreach and partnerships and ensure adequate training in sensitive, informed approaches to community engagement and human rights compliant approaches to combatting FTF threats.

It is important to guard against the “risk that humanitarian organizations associated with CVE/PVE programmes be seen by some states and non-state actors as politically motivated and therefore incapable to carry out a neutral, independent and impartial humanitarian action.”<sup>213</sup> The same applies in other fields than the humanitarian sector. It is critical to avoid unduly securitizing and instrumentalizing engagement with community actors and organizations for political or intelligence-gathering purposes, and the potentially harmful gendered effect some of those policies may have.<sup>214</sup> Experience also points to the need to safeguard the role of educators, social service professionals and others. Imposing broad reporting requirements on interlocutors may be counter-productive to providing young people with the guidance and support associated with effective prevention.<sup>215</sup>

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

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

215 For concerns that have been expressed in this context see for example “Eroding Trust: The UK’s Prevent Counter-Extremism Strategy in Health and Education”, Open Society Justice Initiative, October 2016, (hereafter, “Eroding Trust: The UK’s Prevent Counter-Extremism Strategy in Health and Education”, Open Society Justice Initiative). The UN CTITF Guidance recommends: ‘When a statutory obligation exists for civil servants engaged in education, social and health services to share information about those with whom they interact with law enforcement officers, this should be made clear to beneficiaries from the outset’. See: UN CTITF Guidance 2018, p. 56, *op. cit.*, note 10.

## ***Addressing the Conditions Conducive to FTF-related Activity and Perceived Injustice***

The importance of understanding and addressing “the conditions conducive to the spread of terrorism” has been widely acknowledged.<sup>216</sup> The mutually reinforcing relationship between effective long-term prevention of terrorism and respect for human rights, development and rule of law, was reflected in the UN Global Counter-Terrorism Strategy and in many other contexts since, including the UN Secretary General’s Plan of Action on PVE and OSCE commitments.<sup>217</sup>

The emphasis on the need to create economic, educational and employment opportunities, and to address underlying human rights problems, is supported by findings on the motivating factors driving FTF flows outlined above. The various “push” and “pull” factors that drive individuals towards FTF recruitment include social disadvantage, poor educational and employment opportunities, and perceived injustice and a sense of shared identity with groups affected by perceived injustice.<sup>218</sup> Acknowledgement of grievances, widespread disillusionment and meaningful engagement with affected individuals and groups have been identified as important aspects of comprehensive strategies to effectively prevent FTF-related travel and recourse to violence. Attention should also be given to grievances and gender-specific conditions that are conducive to women and girls joining terrorist and violent extremist groups.<sup>219</sup>

Acknowledgement and engagement with affected individuals and groups on such issues may also prove critical to the effectiveness of more coercive responses, such as prosecutions, where appropriate. Genuine engagement with groups and affected individuals can help law enforcement agencies to obtain evidence and facilitate access to suspects and witnesses, thereby overcoming some of the obstacles that arise in the investigation of terror-related crimes.

## ***Disengagement, Rehabilitation and Reintegration***

The focus on prevention is closely linked to the rehabilitation and reintegration of those who have become involved in some way in FTF-related acts. Many individuals who travelled to conflict zones now seek to return to their home or other countries. As such, there need to be effective screening and risk assessment processes in place for returnees, in light of the risk that some may pose a terrorist threat when they return to their home countries. But the trend of people seeking to return also creates an opportunity for effective programmes of reintegration.

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216 UNSG Plan of Action on PVE, *op. cit.*, note 206, and UN Global Counter-Terrorism Strategy, *op. cit.*, note 55.

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

218 UNOCT Report July 2017, *op. cit.*, note 27.

219 F. Ni Aoláin and J. Huckerby, “Gendering Counter-terrorism: How to, and How not to – Part II”, Just Security, 3 May 2018, <[www.justsecurity.org/55670/gendering-counterterrorism-to-part-ii/](http://www.justsecurity.org/55670/gendering-counterterrorism-to-part-ii/)>, (hereafter, F. Ni Aoláin and J. Huckerby, “Gendering Counter-terrorism: How to, and How not to – Part II”). The article was published in two parts. The first part is available at: <[www.justsecurity.org/55522/gendering-counterterrorism-to/](http://www.justsecurity.org/55522/gendering-counterterrorism-to/)>.

Although it is reflected in UNSC Resolution 2178 (2014) and recalled in OSCE commitments,<sup>220</sup> it appears that the rehabilitation and reintegration dimensions of states' obligations have been largely neglected. Reintegration and rehabilitation efforts should focus explicitly on "disengagement" from terrorism or violence, rather than more amorphous notions of "de-radicalization" that aim to change ideologies or beliefs.<sup>221</sup> Rehabilitation and reintegration programmes should seek to ensure that individuals disengage and redirect their futures, which may serve both to reduce any threat they pose, and in some cases, help to convince others to disengage, thereby stemming the flow of recruits.

Such initiatives have been launched in a number of states, but often in the context of the criminal justice process. As noted by the UN Special Rapporteur on counter-terrorism, punitive, coercive approaches should not assume primacy when dealing with the potential threats and challenges posed by returnees.<sup>222</sup> In stark contrast to the need to support returning FTFs and others involved in FTF-related acts to re-establish themselves in society, approaches such as arbitrary exclusions (prevention from entering the territory of the state) and over-reaching prosecutions run counter to effective rehabilitation and reintegration. The risk of pushing people further into violent extremism has been recognized, but not fully taken into account in practice. As the UNOCT report notes, there is a danger that states "tend to treat all returnees as high risk, thereby radicalizing those who are low threat through unwarranted persecution."<sup>223</sup>

Therefore, prison based rehabilitation programmes need to be complemented by non-custodial reintegration. For them to be successful, both need to be firmly embedded within broader strategies outside of the criminal justice field that prevent terrorist radicalization by effectively addressing the grievances and structural conditions in society that are conducive to terrorism.<sup>224</sup> Prison-based rehabilitation and non-custodial reintegration must be comprehensive, voluntary, cautious not to reinforce stigmatization and attentive to potential direct or indirect discrimination. They must reflect the gender-specific needs and challenges of "reintegrating women, as well as men, back

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220 See, for example, the 2016 OSCE Declaration on strengthening OSCE efforts to prevent and counter terrorism, para. 8, *op. cit.*, note 152, which states: "We call on States to co-operate in efforts to address the threat posed by terrorists, including foreign terrorist fighters and returnees, by inter alia developing and implementing, after prosecution, rehabilitation and re-integration strategies." See also: OSCE Ministerial Council Declaration on VERLT, preamble and para. 19, *op. cit.*, note 152. The need for programmes of disengagement, rehabilitation and counselling is recognized, for example, in the UNSG PVE Action Plan, *op. cit.*, note 206.

221 On the discussion about de-radicalization vs disengagement in custodial settings, see, for example, "Radicalization in detention – the ICRC's perspective", ICRC, 11 July 2016, <[www.icrc.org/en/document/responding-radicalization-detention-icrc-perspective](http://www.icrc.org/en/document/responding-radicalization-detention-icrc-perspective)>; *Handbook on the Management of Violent Extremist Prisoners and the Prevention of Radicalization to Violence in Prisons*, (Vienna: United Nations Office on Drugs and Crime (UNODC), 2016), p. 71. See also: J.M. Berger, "Making CVE Work: A Focused Approach Based on Process Disruption", *op. cit.*, note 32.

222 F. Ní Aoláin, "The UN Security Council, Global Watch Lists, Biometrics and the threat to the rule of law", *op. cit.*, note 52.

223 UNOCT Report July 2017, p. 5, *op. cit.*, note 27.

224 G. Holmer and A. Shtuni, "Returning Foreign Fighters and the Reintegration Imperative", p. 12, *op. cit.*, note 94, p. 12. See also: Chairmanship's Perception Paper on the 2018 OSCE-wide Counter-Terrorism Conference, pp. 7-9 *op. cit.*, note 4.

into highly-contested societal contexts”.<sup>225</sup> Community engagement and trusted partnerships are pre-conditions for successful reintegration and rehabilitation of FTFs, as well as broader VERLT prevention.

### 3.6 Acknowledging and Addressing Direct and Indirect Discrimination

#### Recommendations

OSCE participating States should:

- Recognize that enhanced focus on promoting equality and non-discrimination must be a central element of all measures to counter FTF-related threats and challenges in line with their human rights obligations, given that persistent discrimination, as well as real or perceived stigmatization and marginalization, fuel FTF recruitment and mobilization;
- Ensure that FTF-related laws, policies and practices, are designed and implemented in a way that does not lead to discrimination on any grounds, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status; and
- Regularly assess all such laws, policies and practices for potential direct or indirect discriminatory impact, and swiftly amend them where they are found to have such an impact.

It is imperative that states recognize the centrality of the right to equality and non-discrimination in their responses to FTF-related threats and challenges. There are concerns about the disproportionate impact that the full range of measures – criminal and administrative ones as well as prevention of VERLT, FTF recruitment and mobilization – have on different religious or belief communities, in particular Muslims and specific ethnic groups. Addressing discrimination is essential for an effective, long-term response to terrorism and potential FTF-related threats that abides by the rule of law.

Inequality most commonly arises from the way laws are applied in practice, but it may also be explicitly enshrined in law.<sup>226</sup> States must ensure that they avoid arbitrary interference with human rights in their FTF-related laws and policies, for example as a result of unlawful profiling or other discriminatory counter-terrorism practices. Any distinctions must be objectively justifiable and must not target individuals solely on the grounds of their ethnicity, nationality, religion or belief, or other grounds.

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<sup>225</sup> F. Ní Aoláin and J. Huckerby, “Gendering Counter-terrorism: How to, and How not to – Part II”, *op. cit.*, note 219.

<sup>226</sup> Concerns have been expressed, for example, about Tajikistan’s 2015 decree reportedly banning nationals under 35 from traveling to the Islamic holy sites of Mecca and Medina to perform the annual Hajj pilgrimage. See “‘Foreign Terrorist Fighter’ Laws, Human Rights Rollbacks Under UN Security Council Resolution 2178”, Human Rights Watch, p. 14, *op. cit.*, note 130.

While it is commonly reflected in international commitments, including OSCE commitments, that terrorism must not be identified with any ethnicity, nationality, religion or belief, many challenges remain to convert words to action. In practice, many counter-terrorism policies and programmes to prevent VERLT, FTF recruitment and mobilization have been criticized for exclusively focusing, or having a disproportionate impact, on Muslims and specific ethnic groups.<sup>227</sup> The positive obligation of the state to protect individuals against discrimination based on stereotypes, intolerance and racism against Muslims should be recognized in this context.<sup>228</sup> Moreover, initiatives to prevent and counter VERLT should be based on sensitive methods and objective criteria, while excluding the direct and indirect discrimination and stigmatization that contributes to FTF recruitment and mobilization.

In particular, states should guard against a range of discriminatory assumptions that may underpin VERLT prevention initiatives and other responses to threats and challenges posed by FTFs. The common identification of Muslim belief or practice as a risk factor in “radicalization” of youth, for example, reinforces the stigmatization of entire religious groups, and is not, in any event, supported by the evidence. There is no linear path from the adoption of certain religious beliefs to the acceptance of, or willingness to use, terrorist violence.<sup>229</sup>

Attempts to detect FTFs based on profiling techniques that use stereotypical assumptions about religion, age, nationality, ethnic or other background are not only at risk of being discriminatory, but are also likely to be ineffective, given that there is no single FTF profile. In countering terrorism, preventing VERLT and effectively addressing FTF threats, a targeted approach focused on what individuals do, not on characteristics or pre-determined assumptions based on ethnicity, religion or gender, is the only human rights compliant approach to avoid errors of approach that have befallen practice to date.

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227 See, for example, “Eroding Trust: The UK’s Prevent Counter-Extremism Strategy in Health and Education”, Open Society Justice Initiative, *op. cit.*, note 215; UN Special Rapporteur on counter-terrorism, UN Doc. A/HRC/31/65, *op. cit.*, note 34.

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

229 “Radicalization” conceptions, such as the conveyor belt or slippery slope arguments, suggesting that there is such a linear path or progression from the adoption of certain religious beliefs to the acceptance of, or indeed willingness to use, terrorist violence are disputed and not supported by empirical evidence. For risks of pre- or misconceptions about the groups that are most susceptible to “radicalization” or violent extremism, see also: UN Special Rapporteur on counter-terrorism, UN Doc. A/HRC/31/65, *op. cit.*, note 34.

## 3.7 Addressing the Gender Dimensions of FTF Dynamics and Challenges

### Recommendations

OSCE participating States should design and implement FTF-related laws, policies and practices in a gender- and age-sensitive way. In addition to gender-specific aspects included in recommendations in previous sections, states should:

- Ensure that responses to the threats and challenges posed by FTFs are not based on gender stereotypes, but based on evidence reflecting the varying roles of women and men, boys and girls and young adults;
- Reflect specific needs, concerns and vulnerabilities of both men and women and regularly review and evaluate the application of FTF measures and address any differential gendered impact they may have;
- Acknowledge and address the roles of women and men as both agents/perpetrators of FTF related acts and as victims/survivors with related rights, including the right to receive tailored support and treatment;
- Ensure accountability for sexual and gender-based violence, and ensure that victims receive necessary protection, support, assistance and treatment;
- Provide appropriate gender training for relevant professional groups, including judges, prosecutors, and border control, law enforcement, prison and probation services, as well as social services and others dealing with FTFs; and
- Appropriately engage and empower women, including women's groups and organizations, to address FTF-related challenges and dynamics without unduly instrumentalizing and securitizing their engagement.

FTF policies increasingly reflect the fact that a significant number of women are engaged in FTF-related activity in a range of capacities.<sup>230</sup> The ISIL recruitment strategy of targeting women and girls, with apparent success, has been well documented.<sup>231</sup> As noted in section 2, state responses – in particular at an early stage – often reveal erroneous gendered assumptions about women as passive actors and victims, rather than as agents and potential perpetrators of terrorist acts. A contributing factor is extensive coverage of the complex problem of girls and women traveling as so-called “ISIL brides”, and the edicts of ISIL on forced marriage and sexual slavery in Iraq. Over time, a fuller picture

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230 For example, in the European context, it has been estimated that 550 FTFs in Syria, and some 30 per cent of Dutch FTFs, were women. See: T. Mehra, “Foreign Terrorist Fighters: Trends, Dynamics and Policy Responses”, International Centre for Counter-Terrorism, *op. cit.*, note 95. See also: E. Bakker and S. de Leede, “European Female Jihadists in Syria: Exploring an Under-Researched Topic”, International Centre for Counter-Terrorism, April 2015, <[www.icct.nl/download/file/ICCT-Bakker-de-Leede-European-Female-Jihadists-In-Syria-Exploring-An-Under-Researched-Topic-April2015\(1\).pdf](http://www.icct.nl/download/file/ICCT-Bakker-de-Leede-European-Female-Jihadists-In-Syria-Exploring-An-Under-Researched-Topic-April2015(1).pdf)>. Bakker and de Leede note: “According to The Soufan Group, the estimated number of women from EU member states joining the jihad is 18 percent of the total number of European foreign fighters....”, *Ibid.*, p. 1. See also reference to increases and trends in this respect in “Risk Analysis 2017”, Frontex, *op. cit.*, note 20.

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



has emerged of the range of motivating factors influencing women and girls<sup>232</sup> and the range of roles that they have played as supporters, recruiters, facilitators and in some (limited) contexts as fighters,<sup>233</sup> as well as being victims and survivors of egregious violations.

Where women commit violent crimes, they must be prosecuted in the criminal justice system in a fair, appropriate and non-discriminatory manner. Several states have shifted prosecutorial policy to focus on female roles, dropping automatic distinctions on gender grounds (previously, men were routinely detained and prosecuted whereas women were not).<sup>234</sup> Careful analysis of the particular role that individuals have played – including their material contribution to crime and their intent, understood in context – is necessary in order to effectively respond to FTFs. Women who have been coerced into performing acts in support of terrorist groups should not be prosecuted for those acts. In particular, as section 3.3 states, individuals should not be punished exclusively on the basis of relationships or associations, in particular marital or familial relationships, but rather on the link between individual and criminal acts. Serious concerns arise, for example, when the fact of marrying an FTF is criminalized.<sup>235</sup> Punishing marriage is inconsistent with the right to marry and found a family, which is enshrined in international human rights law.<sup>236</sup>

The diverse roles that women and girls have played as perpetrators of terrorist acts should not detract from the fact that many have been subject to egregious human rights abuses, including sexual violence, trafficking and forced marriage.<sup>237</sup> The traumas experienced at the hands of groups such as ISIL, or as a consequence of being identified with

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232 For an analysis of the range of reasons why women may choose to travel, see: E.M. Saltman and M. Smith, “‘Till Martyrdom Do Us Part’. Gender and the ISIS Phenomenon”, Institute for Strategic Dialogue, 2015, <[www.isdglobal.org/wp-content/uploads/2016/02/Till\\_Martyrdom\\_Do\\_Us\\_Part\\_Gender\\_and\\_the\\_ISIS\\_Phenomenon.pdf](http://www.isdglobal.org/wp-content/uploads/2016/02/Till_Martyrdom_Do_Us_Part_Gender_and_the_ISIS_Phenomenon.pdf)>, (hereafter, E.M. Saltman and M. Smith, “Till Martyrdom Do Us Part”).

233 Some reports suggest that the FTF characterization is particularly problematic in these cases as women have often not been “fighters” as such. See, for example, E.M. Saltman and M. Smith, “Till Martyrdom Do Us Part”, *op. cit.*, note 232, who “refer to the Western females traveling to join ISIS as ‘migrants’ rather than other common terms such as ‘foreign terrorist fighter’, ‘female foreign fighter’ or ‘jihadi bride’. This is because these women, once in ISIS territory, are not being used in combat and are currently prohibited from combative activities by the strict interpretations of Shariah Law”, p. 7.

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

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

236 Article 16 UDHR, Article 23 ICCPR.

237 “Technical guide to the implementation of Security Council resolution 1373 (2001) and other relevant resolutions”, UNCTED, 2017, <<https://www.un.org/sc/ctc/wp-content/uploads/2017/08/CTED-Technical-Guide-2017.pdf>>. The Report notes: “Women and girls are often directly targeted by terrorist groups and subjected to gender-based violence in the form of rape, forced prostitution, forced marriage, forced pregnancy, and human trafficking”, see: p. 49. As noted in a report of the UN Secretary-General, sexual and gender-based violence has become a standard tool for controlling territory, dehumanizing victims and recruiting new supporters. See: UN Secretary General, *Report to the Security Council* (“Conflict-related sexual violence”), UN Doc. S/2015/203, 23 March 2015.

those groups, risks being diminished by the shift towards security-centric responses to FTFs. Women who have been trafficked or otherwise forced into exploitation by terrorist groups must not be re-victimized by being prosecuted and punished for offences resulting from the fact that they have been trafficked or forced into exploitation. Consistent with international human rights obligations to end impunity and provide reparation to victims of sexual and gender-based violence, states must take all necessary measures to hold to account those responsible for such abuses and to provide all women who have been subject to trauma and victimization with the support they may need.

This also applies to women who may have played an active part in, or wilfully contributed to, terrorist acts or other FTF-related offences, for which they may face prosecution. States should, therefore, be mindful that women can be considered perpetrators and victims at the same time. Assistance rendered to women who have faced trauma and victimization should include support for relocation out of conflict zones or neighboring countries where they may continue to face abuse, as well as subsequent medical and psychological treatment and rehabilitation. The ongoing nature of violations against women with perceived links to ISIL in Iraq, for example, has been highlighted in recent reports, where it has been described as sowing the “seeds ... of the next round of inter-communal violence”.<sup>238</sup>

Growing attention has rightly been paid to the link between inequality and violent extremism. The UN Secretary-General’s 2015 Plan of Action on PVE notes that it is “no coincidence that societies for which gender equality indicators are higher are less vulnerable to violent extremism.”<sup>239</sup> In addition, the importance of empowering women, and the role of women in finding and implementing solutions to effectively address the FTF problem, has been recognized and encouraged.<sup>240</sup> At the same time, states should ensure that women are not unfairly instrumentalized by measures to prevent and counter FTF threats, and that those measures recognize individual and social realities women are facing. While the prosecution of mothers for sending small amounts of money for basic needs to children abroad can be seen as an example of over-reaching impact of the criminal law, as set out earlier, VERLT prevention measures that engage women as messengers for counter-narratives should be conscious of the potential consequences for the women within their family or community. Likewise, women’s groups should not be pressured to reorient their activities towards national security objectives as a result of an instrumentalist approach by states that see gender equality and the women, peace and security agenda merely as tools for national security, rather than ends in and of themselves.<sup>241</sup>

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

239 UNSG Plan of Action on PVE, para. 53, *op. cit.*, note 206.

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

241 F. Ní Aoláin and J. Huckerby, “Gendering Counter-terrorism: How to, and How not to – Part II”, *op. cit.*, note 219.

States are obliged to ensure that the full range of measures for responding to FTFs are not directly or indirectly discriminatory through disproportionate impact on the rights of women.<sup>242</sup> Despite recognition on paper, analysis of the role of gender in counter-terrorism policies, and FTF responses in particular, remains limited.<sup>243</sup> States should seek to better understand the gendered dimensions of FTF engagement, including the under-explored role of masculinity in FTF mobilization<sup>244</sup> and the impact of it on women. They should also carefully monitor, assess and address the different impact of laws and policies on women and men. Furthermore, gender-sensitive training or educational programmes should be provided for judges and prosecutors, for border control, law enforcement, prison and probation service personnel, as well as for social services personnel and others dealing with returning FTFs. This is critical to ensure that relevant professional groups understand the gender-specific risks and challenges women involved in or associated with FTF-activities may face. Training is also important to enable relevant officials to identify victims of sexual and gender-based violence, address their special needs and also give real effect to FTF-related gender policies.<sup>245</sup> The integration of a gender dimension into efforts to address FTF threats and challenges is consistent with successive UN Security Council resolutions and is required by OSCE commitments<sup>246</sup> and equality obligations under international human rights law.

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<sup>242</sup> For more detailed recommendations on the complex relationship between gender equality and countering terrorism see UN Special Rapporteur on counter-terrorism, *Report to the UN General Assembly*, UN Doc. A/64/211, 3 August 2009. See also: F. Ní Aoláin and J. Huckerby, “Gendering Counter-terrorism: How to, and How not to”, *op. cit.*, note 219; “Tightening the Purse Strings: What Countering Terrorism Financing Costs Gender Equality and Security”, Duke Law International Human Rights Clinic and Women Peacemakers Program, *op. cit.*, note 89.

<sup>243</sup> See, for example, UN Special Rapporteur on counter-terrorism, *Report to the UN General Assembly*, UN Doc. A/72/495, 27 September 2017, in which the current mandate holder, Fionnuala Ní Aoláin, identified gender mainstreaming in counter-terrorism as a key focus area of her term.

<sup>244</sup> See F. Ní Aoláin, “Masculinity, Jihad and Mobilisation”, *Just Security*, 18 October 2016, <https://www.justsecurity.org/33624/masculinity-jihad-mobilization/>; and in more detail F. Ní Aoláin, “The Complexity and Challenges of Addressing the Conditions Conducive to Terrorism in Human Rights and Counter-Terrorism” in M. Nowak and A. Charbord (eds.), *Using Human Rights to Counter Terrorism* (Cheltenham, United Kingdom and Northampton, USA: Edard Elgar Publishing, 2018), pp. 166-194.

<sup>245</sup> For further recommendations on gender-related aspects see also the previous sections of the present document. See also: UN CTITF Guidance 2018, *op. cit.*, note 10, pp. 24-26.

<sup>246</sup> See for example UN Security Council Resolutions 2122 (2013), 2242 (2015) and 2354 (2017). See OSCE Ministerial Declaration on VERLT, *op. cit.*, note 152, which calls on participating States among other things to take into account a gender perspective in their efforts to counter terrorism and prevent and counter VERLT (para. 13).

### 3.8 Children's Rights

#### Recommendations

OSCE participating States should recognize and address the specific impact, direct and indirect, of FTF measures on the full range of civil, political, economic, social and cultural rights of the child, in light of states' obligations under the UN Convention on the Rights of the Child (CRC), broader international human rights and international humanitarian law, and OSCE commitments.

In doing so, states should:

- Apply all FTF-related policies and practices in a way that is consistent with the best interest of the child, when children are involved, or directly or indirectly affected;
- Pay due regard to the potential impact on children of imposing restrictions on their parents, other family members or guardians, and mitigate the effect on children where such restrictions are unavoidable;
- Develop tailored age- and gender-sensitive strategies on how to address the situation of boys and girls associated with FTFs and how to respond to FTF-related acts by children, while placing the primary emphasis on the specific vulnerabilities of children rather than characterizing them as security threats;
- Treat children who have engaged in FTF-related acts in conflict zones, consistent with approaches towards child soldiers (primarily as victims), and provide them with necessary support for physical and mental recovery and social reintegration;
- Meet international standards that constrain repressive measures against children, and meet related standards of juvenile justice, where criminal law responses are appropriate;
- Under no circumstances apply criminal justice responses to young children, and follow good practice in setting a high minimum age of criminal responsibility and in applying juvenile justice rules and regulations to young adults beyond the age of 18 years; and
- Ensure that children with meaningful links to the state are able to return and receive protection and support for reintegration, recovery and education consistent with their needs, taking all feasible measures to ensure that no child is rendered stateless.

Thousands of children have travelled with their families to areas of terrorist activity or were born to FTFs abroad, and many now reportedly find themselves orphaned, in situations of detention or extreme vulnerability and subject to egregious violations including rape, violence and disappearances, as a result of their perceived association with ISIL.<sup>247</sup>

<sup>247</sup> B. Wille, "ISIS's Other Victims: The world needs a plan to deal with the wives and children of the Islamic State's defeated jihadis", *Foreign Policy*, 9 October 2017, <[foreignpolicy.com/2017/10/09/isis-other-victims](http://foreignpolicy.com/2017/10/09/isis-other-victims)>; "Nigeria: Women and the Boko Haram Insurgency", International Crisis Group, 5 December 2016, <[www.crisis-group.org/africa/west-africa/nigeria/nigeria-women-and-boko-haram-insurgency](http://www.crisis-group.org/africa/west-africa/nigeria/nigeria-women-and-boko-haram-insurgency)>.

As such, boys and girls associated with or affected by FTF travel and return present a host of protection concerns for the international community.

Children and young adults are also affected by the criminal, administrative and other measures discussed in this document. They can be affected both indirectly, when their parents or other family members are targeted, and directly, as the same measures are also applied to children and young adults suspected or convicted of FTF activity at home or abroad.<sup>248</sup> While recognizing the need for the social support of children, such as post-trauma counselling, and other assistance, UN Security Council Resolution 2396 (2017) specifically calls upon states to assess and investigate suspected FTFs and their accompanying family members, including children. Collection of information for the purpose of carrying out risk assessments, surveillance or to place individuals on watch lists and exchange information between states are likely to result in invasive interferences with children's privacy and other rights. Whether directed against themselves or their parents and other family members, those and other measures to counter FTF-related threats and challenges may also directly or indirectly affect children's rights to freedom of expression and religion or belief, family life, social security, education, equality and non-discrimination and can have wide-reaching, long-term implications for the full range of children's civil, political, economic, social and cultural rights.

The UN Convention on the Rights of the Child (CRC) is the most widely ratified human rights convention, with almost universal ratification by 196 states parties.<sup>249</sup> The cardinal principle reflected in the CRC, and across international and regional standards, is that the primary focus should be on acting in the "best interest of the child".<sup>250</sup> However, in practice, as noted by the United Nations Interregional Crime and Justice Research Institute (UNICRI), in counter-terrorism the focus appears to have shifted towards children being potential threats. This approach risks neglecting the "best interest of the child".<sup>251</sup> The emphasis on potential threats posed by child returnees (i.e., child FTFs and children associated with FTFs) in discussions about the reverse flow of FTFs appears to confirm

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

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

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

251 "Children and counter terrorism", United Nations Interregional Crime and Justice Research Institute (UNICRI), 2016, p. 77, <[www.unicri.it/in\\_focus/files/Children\\_counter\\_terrorism.pdf](http://www.unicri.it/in_focus/files/Children_counter_terrorism.pdf)>.

this shift.<sup>252</sup> While the agency of children should not be denied, and the range of roles they play should be recognized and addressed, responses must be informed by an understanding of the rights and interests of the child, taking into account the context and implemented in a manner that is consistent with human rights and humanitarian law.

### ***Citizenship and Return***

States should not deprive children of citizenship given the profound impact this would have on the protection of their rights (as noted in section 3.4), and should take all feasible measures to ensure that children are not rendered stateless.<sup>253</sup> Children seeking to return to states with which they have substantial links should be enabled to do so.<sup>254</sup> The range and gravity of threats that children associated with FTFs are facing abroad underscores the importance of ensuring that those seeking to return should be allowed to do so.<sup>255</sup> The announcement by some OSCE participating States that young children, at least, could return, is a good practice that should be built on and implemented.<sup>256</sup>

There are considerable practical obstacles that may impede the ability of children to return. For example, reports indicate that children born abroad in territory that was controlled by ISIL often lack any valid birth certificate or registration.<sup>257</sup> It is often difficult to establish paternity, particularly where parents have died or are in detention. Many children and those accompanying them also lack travel documents, making it difficult for them to leave and seek support. States should be conscious of and pragmatically address practical impediments, such as the lack of documentation, which may impede access to protection or the assertion of citizenship by children. Decisions on the

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<sup>252</sup> UNSC Resolution 2396 (2017) for its part emphasises the diverse roles that children can play, and notes they may be victims and require assistance, but also emphasises the security concerns.

<sup>253</sup> Article 8 CRC provides that state parties have to respect the right of children to preserve their identity, including nationality.

<sup>254</sup> Whether those children come within the jurisdiction of the state under the CRC is a relevant consideration, which should be interpreted flexibly, in favour of the child, given the extreme stakes for the children in question.

<sup>255</sup> The rape, enslavement, trafficking, sexual and other abuse of children and young women by ISIL has been recognized in, for example, UNSC Resolution 2331 (2016). However, since the project of the “Islamic State” collapsed in Iraq, current reports also suggest that children are trapped, left orphaned and/or unprotected, in abysmal conditions in IDP camps, that children are subjected to flagrantly unfair prosecutions leading to, inter alia, the death penalty, and scores of children of all ages are being held in detention in Iraq; see for example: “At least 100 European ISIS fighters to be prosecuted in Iraq; most facing the death penalty”, the Independent, October 2017, <[www.independent.co.uk/news/world/middle-east/isis-foreign-fighters-iraq-prosecuted-death-penalty-families-mosul-a7987831.html](http://www.independent.co.uk/news/world/middle-east/isis-foreign-fighters-iraq-prosecuted-death-penalty-families-mosul-a7987831.html)>, reporting 1,400 family members being held in Mosul in late 2017. See also: “The condemned: Woman and children isolated, trapped and exploited in Iraq”, Amnesty International, *op. cit.*, note 238.

<sup>256</sup> For example the Belgian government reportedly decided at the end of 2017 that children under the age of 10 years with proven ties to Belgium would automatically be allowed to return, whereas the situation of children between 10 and 18 years would be decided on a case by case basis. Practical challenges in the repatriation of young children reportedly remained however, namely the requirement for families in Belgium to pick them up in IDP camps and bring them to the nearest Belgian embassy or consulate. See: T. Renard and R. Coolsaet (eds), “Returnees: who are they, why are they (not) coming back and how should we deal with them?”, Egmont Institute, *op. cit.*, note 14, p. 38 and 74.

<sup>257</sup> N. Houry, “Children of the Caliphate: What to Do About Kids Born Under ISIS”, Human Rights Watch, 23 November 2016, <[www.hrw.org/news/2016/11/23/children-caliphate](http://www.hrw.org/news/2016/11/23/children-caliphate)>.

revocation of parents' citizenship, or their right to return, should also take into account the impact on the children involved.

Particular protection concerns arise in respect of children who remain abroad in active conflict zones, in camps for internally displaced people, or detention situations that fail to meet basic standards – especially if their parents have died or are in detention.<sup>258</sup> States should endeavor to ensure that children exposed to extreme vulnerability receive the protection they need, including by taking necessary steps to co-operate with foreign states to ensure that their rights are respected. For those currently left without protection and support, states should consider when repatriation (and subsequent recovery and reintegration) is required on the basis of acting in the best interests of the child.<sup>259</sup> While the best interest of the child is the primary consideration, states should also take into account the rights of parents and family members and the general presumption that children and parents should not be separated.<sup>260</sup>

Upon return, the emphasis should be placed on providing returning children with adequate support to assist their recovery and reintegration, in accordance with the CRC.<sup>261</sup> This should include necessary care and medical, psychosocial and educational support. States should implement tailored reintegration programmes for returning children, including by assigning mentors and a range of support to enable them to return to their former lives without stigmatization or alienation.

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

### ***Child FTFs: Victims and Criminals***

Without denying that children commit crimes, and that those crimes have a serious impact on their victims, the complex relationship between victimization and perpetration must be acknowledged and responses tailored accordingly. The UN Special

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<sup>258</sup> See Article 20 CRC on special obligations of protection where the child is denied the family structure of support.

<sup>259</sup> *Ibid.*

<sup>260</sup> On the involuntary separation of children and families see for example Article 9 CRC. Article 9(1) provides that "States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child...." Article 9(2) specifies that "all interested parties shall be given an opportunity to participate in the proceedings and make their views known." Article 9(3) notes the importance of maintaining personal relations and direct contact with parents and Article 9(4) the importance of information being provided to parents, the child or, if appropriate, another member of the family.

<sup>261</sup> Article 39 CRC requires that "States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child."

Representative of the Secretary-General for Children and Armed Conflict has recommended that states treat children associated with armed groups primarily as victims.<sup>262</sup>

Especially for children, criminal justice responses should not be the norm, but used as a matter of last resort and with a pedagogical orientation, with the purpose of rehabilitating children. Particular caution must be exercised in the prosecution of the increasingly broad crimes of association or support. These offences are of particular relevance to the roles children often assume in FTF-related contexts and where concerns regarding individual criminal culpability are heightened. According to the recommendations of the UN Committee on the Rights of the Child regarding the minimum age of criminal responsibility, criminal justice responses for FTF-related acts are not appropriate for young children.<sup>263</sup>

For minors subject to criminal justice, international standards of juvenile justice, which apply to individuals under 18 years of age, must be respected.<sup>264</sup> In accordance with the CRC, the juvenile justice system should be directed towards the rehabilitation and reintegration of child offenders.<sup>265</sup> Detention should be exceptional, as short as possible and with attendant safeguards.<sup>266</sup> Penalties should be tailored to age and personal circumstances, and life imprisonment without the possibility of release and the death penalty are prohibited absolutely under international law for persons under the age of 18.<sup>267</sup> Even

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<sup>262</sup> UN Special Representative of the Secretary-General for Children and Armed Conflict, *Annual report to the UN Human Rights Council*, UN Doc. A/HRC/31/19, 29 December 2015, para. 65.

<sup>263</sup> The Committee recommends as a minimum standard that children under the age of twelve should not be considered criminally responsible. It considers a minimum age of criminal responsibility below the age of 12 years not to be internationally acceptable and has described a high age level of 14 or 16 years as commendable. See: *General Comment No. 10 (Children's rights in juvenile justice)*, UN Committee on the Rights of the Child, UN Doc. CRC/C/GC/10, 25 April 2007, paras. 30ff, (hereafter, *General Comment No. 10*, UN Committee on the Rights of the Child).

<sup>264</sup> Some of these standards are reflected in the CRC and the ICCPR, as supplemented by four juvenile justice instruments, which have been adopted by the UN General Assembly and the UN Economic and Social Council and are sometimes referred to collectively as the *UN Minimum Standards and Norms of Juvenile Justice*: the "United Nations Guidelines for the Prevention of Juvenile Delinquency" (Riyadh Guidelines), the "United Nations Standard Minimum Rules for the Administration of Juvenile Justice" (Beijing Rules), the "United Nations Rules for the Protection of Juveniles Deprived of their Liberty" (Havana Rules); and the "Guidelines for Action on Children in the Criminal Justice System" (Vienna Guidelines). There are various recommendations and general comments of the Committee on the Rights of the Child and other regional counterparts on juvenile justice; see also *Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups: The Role of the Justice System* (Vienna: UNODC, 2018), <[www.unodc.org/documents/justice-and-prison-reform/Child-Victims/Handbook\\_on\\_Children\\_Recruited\\_and\\_Exploited\\_by\\_Terrorist\\_and\\_Violent\\_Extremist\\_Groups\\_the\\_Role\\_of\\_the\\_Justice\\_System.E.pdf](http://www.unodc.org/documents/justice-and-prison-reform/Child-Victims/Handbook_on_Children_Recruited_and_Exploited_by_Terrorist_and_Violent_Extremist_Groups_the_Role_of_the_Justice_System.E.pdf)>. There are also regional standards of relevance. To discuss these here in detail would go beyond the scope of this document.

<sup>265</sup> Article 40 (1) CRC; *General Comment No. 10*, UN Committee on the Rights of the Child, *op. cit.*, note 263.

<sup>266</sup> Article 37 (b)-(d) CRC. See also: "Chapter 5: Violence against children in care and justice institutions" in *World Report on Violence against Children*, Independent Expert for the United Nations Secretary-General's Study on Violence against Children, October 2006, available at <[www.unicef.org/violencestudy/reports.html](http://www.unicef.org/violencestudy/reports.html)>. The report urges governments "to ensure that detention is only used for child offenders who are assessed as posing a real danger to others, and then only as a last resort, for the shortest necessary time, and following judicial hearing, with greater resources invested in alternative family-and community-based rehabilitation and reintegration programmes", p. 218.

<sup>267</sup> Article 37 (a) CRC and Article 6 (5) ICCPR.



beyond that age, when appropriate, the young age of perpetrators should be a factor in determining appropriate penalties.<sup>268</sup>

### 3.9 Human Rights and Rule of Law Imperatives for Effective Responses to Potential Threats and Challenges of FTFs

#### Recommendations

OSCE participating States should:

- Adopt a human rights and rule of law-based approach in all measures aimed at countering the threats and challenges posed by FTFs, in recognition of the fact that security cannot be achieved at the expense of human rights and the rule of law;
- Regularly review and carefully assess the implementation of FTF-related laws, policies and practices, including for their human rights impact, to ensure that all those measures are justified, necessary and proportionate, evidence-based and targeted; and
- Acknowledge past shortcomings and provide for effective remedies and, where necessary, reparation to individuals whose rights have been infringed upon, in order to ensure the credibility and legitimacy on which the effectiveness of FTF-related measures depends.

If efforts to counter the potential threats posed by FTFs, including related measures to prevent and counter VERLT, are to be effective and not based on flawed assumptions, it is essential that states continue to develop their understanding of the manifestations of FTF-activity. Otherwise, efforts could be based on flawed assumptions. This is particularly important in light of constantly changing facts, trends and challenges in relation to FTFs. While the success of counter-terrorism efforts, and of VERLT-prevention programmes, is inevitably difficult to demonstrate, ongoing analysis and regular review is essential to evaluate effectiveness, address potential negative effects on human rights, and to convincingly demonstrate the necessity and proportionality of those measures. In addition to periodic reviews, the UN CTITF Guidance to states recommends that legal provisions establishing special powers to address particular terrorist threats should be subject to sunset clauses, which require the renewal of the provisions after a specific time. These would help to ensure that such powers do not remain in force when no longer necessary.<sup>269</sup>

<sup>268</sup> While the UN Committee on the Rights of the Child stressed that, in accordance with Article 40 CRC, every child under 18 years must be treated in accordance with the rules of juvenile justice, it noted with appreciation good practice in some States that apply the rules and regulations of juvenile justice to persons aged 18 and older, usually until the age of 21. See: *General Comment No. 10*, UN Committee on the Rights of the Child, paras. 37-38, *op. cit.*, note 263.

<sup>269</sup> UN CTITF Guidance 2018, *op. cit.*, note 10, p. 44-45. The recommendation was made by the UN Special Rapporteur on counter-terrorism, UN. Doc A/HRC/16/51 (“Ten areas of best practice in countering terrorism”), Practice 4 (1), paras. 17-20 *op. cit.*, note 73.

Responding effectively to the threats posed by terrorism, including FTFs, requires calm reflection and targeted action, particularly when political and public pressure may call for hasty adoption of new and “tougher” laws and actions – especially in the wake of terrorist attacks. The democratic process provides inherent safeguards – including open debate, transparency and genuine participation of groups that may be affected – that are particularly important for the development, adoption and implementation of new laws, policies and practices in security matters. Governments must make every effort to ensure that human rights and the rule of law are real and visible parts of the democratic process and political debate when designing and implementing responses to threats of terrorism, including from FTFs.

What is often portrayed as a “security first” approach typically marginalizes the respect for human rights and the rule of law that are crucial elements of security. However, counter-terrorism, human rights and the rule of law have been frequently recognized as mutually reinforcing, including in the FTF-context. Where human rights are violated and fundamental rule of law principles set aside, counter-terrorism efforts contribute to distrust and risk fueling the narratives around injustice that can encourage individuals to support terrorism at home or abroad. On the other hand, adherence to human rights and the rule of law strengthens the legitimacy and credibility of FTF-related measures. In its last biennial review of the UN Global Counter-Terrorism Strategy, the UN General Assembly stressed once again that when counter-terrorism efforts neglect the rule of law and human rights “they not only betray the values they seek to uphold, but they may also further fuel violent extremism that can be conducive to terrorism”.<sup>270</sup> This understanding is also enshrined in the terrorism-related commitments of the OSCE and, indeed, is the very essence of the OSCE’s comprehensive concept of security.<sup>271</sup>

A human rights and rule of law-based approach to address potential threats and challenges of FTFs must reflect several elements that have been discussed throughout this document. Of particular importance are independent reviews of how FTF-related laws, policies and practices are implemented, alongside oversight of the government and intelligence agencies involved in their implementation. Independent review and oversight, investigations into potential misconduct and appropriate accountability, and remedies and reparation for violations are all crucial for the protection of human rights. They also represent opportunities for learning, and for states to identify shortcomings and make adjustments accordingly, contributing to policies that are not only more human rights compliant but also more effective in the long-term.

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270 UN General Assembly Resolution 72/284 (“The United Nations Global Counter-Terrorism Strategy Review”), adopted on 26 June 2018, UN Doc. A/RES/72/284, para. 10.

271 See, in particular, OSCE Consolidated Framework for the Fight against Terrorism, *op. cit.*, note 59.



