

Deprivation of citizenship for terrorism-related activities: An allowed and effective means to an end?

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INTRODUCTION

On Tuesday 22 March 2016 at 7:58 local time, a bomb exploded at the Brussels Airport, Belgium. The toll was devastating. More than 30 people from around the world were killed that day, many more injured. Mothers were separated from their children, brothers from their sisters and husbands from their wives. The bombers were said to be supporters of ISIS, also known as DAESH, or ISIL. They are a brutal and violent terrorist group occupying several key cities in both Iraq and Syria. Their reign in the Middle-East has known innumerable violations of international human rights law, with inter alia, mass rape, genocide against certain ethnic groups, chemical attacks and mass murder. They claim to act upon the Quran's words. To prevent this inhumane treatment from leaving the Middle-East and reaching our shores, States have adopted several counter-terrorism measures. The United States and Russia, for example, have been actively targeting ISIS fighters with airstrikes.¹ Europe has strengthened their outside borders and formed a transnational surveillance system such as Eurosur (European Border Surveillance System) in order to prevent suspected terrorists from entering Member States.² But the peril is not just coming from abroad. The recent London, Brussels, Paris, Nice, Berlin and Istanbul attacks show us another frightening reality about the group. ISIS has the ability to attract domestic supporters to its ranks, who are willing to do anything to achieve their goal.

¹ G. BOTELHO and B. STARR, 'Reasonably certain' drone strikes killed ISIS mouthpiece 'Jihadi John', CNN, 14 November 2015, www.cnn.com/2015/11/13/middleeast/jihadi-john-airstrike-target/; S. GHOSHRAY, "Targeted Killing in International Law: Searching for Rights in the Shadow of 9/11", *Indiana International & Comparative Law Review*, 2014, Volume 24, Issue 2, 355-418; R. J. VOGEL, "Drone Warfare and the Law of Armed Conflict", *Denver Journal of International Law and Policy*, Volume 39, Issue 1, (101) 101-102.

² L. ZEDNER, "Citizenship Deprivation, Security and Human Rights", *European Journal of Migration and Law*, 2016, Volume 18, Issue 2, (222) 224.

These domestic supporters are an incredible threat to a State's national security. Imagine an ISIS supporter having both a European passport and a Syrian, Iraqi or Turkish passport. He is able to join ISIS in Iraq or Syria, where he is trained in weapons and explosives. Afterwards, he could come back to Europe and use that knowledge to strike. The fear for a situation like this has caused many countries to adapt their nationality laws and impose restrictions on basic human rights.³ States claim to have the ability to adopt denationalization programs and strip suspected terrorists from their nationalities, in order to prevent them from returning home.⁴ Citizenship deprivation has been widely used in the past to target those suspected of threatening national security.⁵ The United Kingdom, for example, has adopted the Immigration Act 2014 allowing them to revoke, under certain circumstances, the British nationality of single-nationals who are suspected to be ISIS supporters.⁶ Amnesty International, however, has recently (17 January 2017) expressed its concern that the denationalization programs governments have adopted in the wake of the European and US terrorist attacks are not in compliance with international human rights law because they are disproportionate, discriminatory and disregarding human rights. Moreover, they claim the programs to be an ineffective tool to fight terrorism.⁷ Further investigation is required to determine whether the claims made by Amnesty are legitimate. Following the foregoing, the following question can be asked: In the wake of recent terrorist attacks, what kind of denationalization program, regarding suspected terrorists, would be in accordance with the international human rights law and is this really an effective tool to fight global terrorism? In order to answer this question, this article is divided into three main chapters.

The first chapter elaborates on the following question: Can States implement denationalization programs to combat terrorism in light of international human rights law? All States have absolute sovereignty in their nationality laws. If all States around the world would start adopting different rules on citizenship, this would, logically speaking, lead to conflict. Rules are necessary. The legal framework, provided by international human rights law, imposes several limits to a State's sovereignty in order to protect civilians against the

³ L. ZEDNER, "Citizenship Deprivation, Security and Human Rights", *European Journal of Migration and Law* 2016, Volume 18, Issue 2, (222) 226.

⁴ H. BROWN, *The Hidden Dangers of Ted Cruz's New Anti-ISIS Bill*, Think Progress, 8 September 2014, <http://thinkprogress.org/world/2014/09/08/3564312/the-hidden-dangers-of-ted-cruz-s-new-anti-isis-bill/>; G. MEZZOFIORE, *Norway 'to Make Citizens Fighting for Isis Stateless'*, IB TIMES, 27 August 2014, www.ibtimes.co.uk/norway-make-citizens-fighting-isis-stateless-1462776; X., *Fact check: How does Australia's plan to strip foreign rights of citizenship compare to other nations?*, ABC NEWS, 11 June 2015, www.abc.net.au/news/2015-06-11/foreign-fighters-citizenship-around-the-world/6498920.

⁵ L. ZEDNER, "Citizenship Deprivation, Security and Human Rights", *European Journal of Migration and Law* 2016, Volume 18, Issue 2, (222) 229; S. LAVI, 'Punishment and the Revocation of Citizenship in the United Kingdom, United States, and Israel', *New Criminal Law Review: An International and Interdisciplinary Journal*, 2010, Vol. 13, No. 2, (404) 427.

⁶ S. MANTU, *Citizenship in times of terror: citizenship deprivation in the UK*, Nijmegen, Centre for Migration Law 2015, 14.

⁷ X., *EU: Orwellian counter-terrorism laws stripping rights under guise of defending them*, Amnesty International, 17 January 2017, www.amnesty.org/en/latest/news/2017/01/eu-orwellian-counter-terrorism-laws-stripping-rights-under-guise-of-defending-them/; For the full report, *Amnesty International Report 2016/2017: The state of the world's human rights*.

arbitrary deprivation of their citizenship and statelessness, both in a procedural and substantive way. Our focus will be with the deprivation of citizenship of a single national, which would leave him/her stateless and particularly in the situation of an individual suspected of terrorism.

The second chapter elaborates on the following question: Should States implement denationalization programs to combat terrorism? This question will be answered by referring to the results obtained from the first chapter. A first impression would be that denationalization is indeed effective. This is a view shared among several populist politicians around the world. Several authors, however, believe that there are certain policy considerations which reason against the implementation of these programs. Whether these and other arguments are valid is important, for they might tackle the entire idea behind denationalization programs in the context of terrorism.

The third chapter will elaborate, by way of example, on how the international law has (wrongfully?) been implemented nationally. The UK nationality laws will be examined. The reason why the UK system is examined, is because it has been deemed to be arbitrary and disregarding international human rights law. A clear example of a defective denationalization program, of which Amnesty International speaks.

1. INTERNATIONAL LEGAL FRAMEWORK FOR DEPRIVATION OF CITIZENSHIP

1.1 FROM ABSOLUTE TO LIMITED STATE SOVEREIGNTY

1. Citizenship in general, and not specifically the ‘right to citizenship’, is a legal relationship between an individual and a State. US Supreme Court Chief Justice Earl Warren, in the decision on the 1958 case of *Trop v. Dulles*, called it “the right to have rights”.⁸ The judge called it this way because citizenship is an essential prerequisite for the effective enjoyment and protection of all other human rights. In the words of article 29 of the Vienna Convention on the Law of Treaties: “a treaty is binding upon each party in respect of its entire territory.”⁹ This means that a State is bound by international law to protect all rights of their civilians within their jurisdiction. To be stripped of this citizenship of a State, where the State is the key distributor of social resources, is to be stripped of the basis of other rights.¹⁰ It is clear that denationalization programs might have a great impact on those with only a single nationality.

⁸ US Supreme Court, 1958, 356 US 86, *Trop v. Dulles, Secretary of State et. al*; US Supreme Court, 1958, 356 US 54, *Perez v. Brownell*; L. VAN WAAS, “Nationality Matters: Statelessness under international law”, *School of Human Rights Research Series*, 2008, Volume 29, 217.

⁹ Adopted 23 May 1969, entered into force 27 Jan. 1980 1155 UNTS 331.

¹⁰ M. ADJAMI and J. HARRINGTON, “The Scope and Content of Article 15 of the Universal Declaration of Human Rights”, *Refugee Survey Quarterly*, 2008, Volume 27, Issue 3, (93) 109; K. FAULKES, *Citizenship*, Routledge, London, 2003, chapter 1, 8; U.N. High Commissioner for Refugees, *Expert Meeting - Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting*

2. Citizenship is the bedrock for the protection of all other rights and the State provides that protection through their courts and tribunals. Since the State offers that protection, does that not mean that they get to decide independently who to grant protection through citizenship and whom they no longer wish to protect? History has shown that one of the most important properties of the sovereignty of States is their right to determine the rules governing the grant or withdrawal of a citizen's citizenship in accordance with the States' interests.¹¹ The initial approach to citizenship under international law was not to meddle with the power of States to regulate its attribution. The principle was State sovereignty. Until the late 19th and early 20th century, this right was considered to be absolute. This often led to conflicts between the domestic nationality laws of States, which was the case in the Tunis and Morocco Nationality Decrees case.¹² In this case, the Permanent Court of International Justice advised in 1923, that State sovereignty to regulate citizenship was not absolute but subject to developments in international law.¹³ This principle was later affirmed in Article 1 of the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws: "It is for each State to determine under its own laws who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality."¹⁴ This convention, ratified by 40 countries, formed the basis for article 15 UDHR, which is discussed in §2, section B. So the principle is State sovereignty, but limitations on that sovereignty are being imposed by any subsequent international treaties.

from *Loss and Deprivation of Nationality* ("Tunis Conclusions"), 2014, www.refworld.org/docid/533a754b4.html.

¹¹ R. DONNER, *The Regulation of Nationality in International Law*, New York, Transnational Publishers, 1994, 121.

¹² Permanent Court of International Justice, 1923, *Advisory Opinion on the Nationality Decrees issued in Tunis and Morocco*, www.icj-cij.org/pcij/serie_B/B_04/Decrets_de_nationalite_promulgues_en_Tunisie_et_au_Maroc_Avis_consultatif_1.pdf.

¹³ M. ADJAMI and J. HARRINGTON, "The Scope and Content of Article 15 of the Universal Declaration of Human Rights", *Refugee Survey Quarterly*, 2008, Volume 27, Issue 3, (93) 109; Open Society Justice Initiative, *Citizenship and Equality in Practice: Guaranteeing Non-Discriminatory Access to Nationality, Protecting the Right to be Free from Arbitrary Deprivation of Nationality and Combating Statelessness*, 2005, 3 www.opensocietyfoundations.org/sites/default/files/citizenship_20051101.pdf; L. VAN WAAS, "Nationality Matters: Statelessness under international law", *School of Human Rights Research Series*, 2008, Volume 29, 26; P. WEIS, *Nationality and Statelessness in International Law*, Dordrecht, Kluwer Academic Publishers Group, 1979, 66; X., "Nationality Decrees in Tunis and Morocco: Advisory opinion of 2 August 1922" in UNITED NATIONS, *Summaries of Judgments, Advisory Opinions and Orders of the Permanent Court of International Justice*, New York, United Nations, 2012, (7) 7, http://legal.un.org/PCIJsummaries/documents/english/PCIJ_FinalText.pdf.

¹⁴ Article 1 *Convention on Certain Questions relating to the Conflict of Nationality Laws*, 13 April 1930, League of Nations, Treaty Series, Vol. 179, 89, www.refworld.org/docid/3ae6b3b00.html; M. ADJAMI and J. HARRINGTON, "The Scope and Content of Article 15 of the Universal Declaration of Human Rights", *Refugee Survey Quarterly*, 2008, Volume 27, Issue 3, (93) 109.

1.2 LIMITATIONS BY INTERNATIONAL HUMAN RIGHTS LAW

1.2.1. General

3. Because the effect of losing the bedrock for all other human rights is immense and conflict might arise out of absolute sovereignty, States do not have complete independence in depriving their citizens from their citizenship. International treaties, which they have signed and ratified, impose certain limitations on the freedom for States to deprive their citizens of their nationality. The most important treaties are the Universal Declaration of Human Rights and the 1961 Convention on the Reduction of Statelessness.

1.2.2. The Universal Declaration of Human Rights

a. Article 15 (1) UDHR: Right to citizenship

4. In §1, it became clear that citizenship is the foundation for all other human rights and that these are protected in the courts and tribunals of the State. In order to guarantee this protection, the most important limitation on the State's sovereignty is an individual's 'right to citizenship'. This right is recognized in several international treaties of which the Universal Declaration of Human Rights (hereafter called, "UDHR") is the most important one. Article 15 (1) UDHR explicitly states that everyone has a right to nationality. Even though the preamble makes clear that these provisions are not legally binding, they are often invoked as customary international human rights law.¹⁵ An important issue is that article 15 only proposes a vague, general principle. It omits to clearly specify to which nationality one is entitled, and under what circumstances this right might arise.¹⁶

5. Similar treaties with similar provisions have been adopted through the years by several countries.¹⁷ The United States of America, Argentina, Chile, Ecuador and most other countries in the Americas have ratified article 20 of the 1969 American Convention on Human Rights.¹⁸ Several members of the Council of Europe have ratified article 4 of the European Convention on

¹⁵ A. ALENIKOFF and D. KLUSMEYER, *Citizenship Today: Global Perspectives and Practices*, Washington, Carnegie Endowment for International Peace, 2001, 65; E. CLOOTS, "The Legal Limits of Citizenship Deprivation as a Counterterror Strategy", *European Public Law* 2017, Volume 23, Issue 1, (57) 67; A. MACKLIN, "Citizenship Revocation, the Privilege To Have Rights and The Production of the Alien", *Queens Law Journal*, 2014, Volume 40, (1) 10.

¹⁶ J. BLACKMAN, "State Successions and Statelessness: The Emerging Right to an Effective Nationality under International Law", *Michigan Journal of International Law* 1998, Volume 19, Issue 4, (1141) 1172, http://heinonline.org/HOL/Page?handle=hein.journals/mjil19&div=37&g_sent=1&collection=journals.

¹⁷ A. HARVEY, "Deprivation of nationality: Implications for the fight against statelessness", *Questions of International Law* 2016, (21) 27.

¹⁸ *American Convention on Human Rights*, 22 November 1969, Inter-American Commission on Human Rights, www.cidh.org/Basicos/English/Basic3.American%20Convention.htm; List of countries who adopted the Convention available at: www.cidh.oas.org/Basicos/English/Basic4.Amer.Conv.Ratif.htm.

Nationality of 1997.¹⁹ The member states of the Association of South-East Asian Nations have ratified article 18 of the ASEAN Human Rights Declaration 2012.²⁰ The members of the Commonwealth of Independent States have ratified article 24 of the CIS Convention on Human Rights and Fundamental Freedoms of 1995.²¹ The focus will be, however, on the articles of the Universal Declaration of Human Rights and their interpretation by the United Nations Committee for Human Rights.

b. Article 15 (2) UDHR: Prohibition of arbitrary deprivation

6. The second section of article 15 UDHR protects people from being arbitrarily deprived of their citizenship. Although this section was inspired by the international community's disapproval of discretionary and random denationalizations of Russians, Jews, and other racial and ethnic minorities in Europe in the 1920s, 1930s, and 1940s, it will prove very useful when studying the deprivation for terrorism-related activities.²² The Universal Declaration of Human Rights has been vaguely drafted and therefore does not explain what is meant by arbitrary deprivation of nationality. Various human rights norms and treaties, however, have been developed to give content to the right to be free from arbitrary deprivation.²³ This prohibition against arbitrariness encompasses both procedural and substantive prohibitions.

7. First of all, the prohibition against arbitrariness requires procedural fairness. It prevents States from unilaterally denationalizing individuals without "due process".²⁴ On one hand, there has to be a firm prescription by national law of

¹⁹ *European Convention on Nationality*, 6 November 1997, European Treaty Series, No. 166, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007f2c8>.

²⁰ *ASEAN Human Rights Declaration*, 18 November 2012, ASEAN Intergovernmental Commission on Human Rights, <http://aichr.org/documents>.

²¹ *Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms*, 26 May 1995, Regional Treaties, Agreements, Declaration and Related, www.refworld.org/docid/49997ac32c.html.

²² G. JOHNSON and J. SYMONIDES, *The Universal Declaration of Human Rights : A history of its creation and implementation 1948—1998*, Paris, Unesco Publishing, 1998, <http://unesdoc.unesco.org/images/0011/001144/114488E.pdf>; Open Society Justice Initiative, *Citizenship and Equality in Practice: Guaranteeing Non-Discriminatory Access to Nationality, Protecting the Right to be Free from Arbitrary Deprivation of Nationality and Combating Statelessness*, 2005, 7, www.opensocietyfoundations.org/sites/default/files/citizenship_20051101.pdf.

²³ E. CLOOTS, "The Legal Limits of Citizenship Deprivation as a Counterterrorism Strategy", *European Public Law* 2017, Volume 23, Issue 1, (57) 65; A. MACKLIN, "Citizenship Revocation, the Privilege To Have Rights and The Production of the Alien", *Queens Law Journal*, 2014, Volume 40, (1) 10.

²⁴ Human Rights and arbitrary deprivation of nationality (19 December 2012), *UN Human Rights Council*, A/HRC/19/43, 14, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/174/43/PDF/G1117443.pdf?OpenElement>; M. ADJAMI and J. HARRINGTON, "The Scope and Content of Article 15 of the Universal Declaration of Human Rights", *Refugee Survey Quarterly*, 2008, Volume 27, Issue 3, (93) 109; S. JAYARAMAN, "International Terrorism and Statelessness: Revoking the Citizenship of ISIL Foreign Fighters", *Chicago Journal of International Law* 2016, volume 17, Issue 1, (180) 192; Open Society Justice Initiative, *Citizenship and Equality in Practice: Guaranteeing Non-Discriminatory Access to Nationality, Protecting the Right to be Free from Arbitrary Deprivation of Nationality and Combating Statelessness*, 2005, 8, www.opensocietyfoundations.org/sites/default/files/citizenship_20051101.pdf; L. VAN

an objective standard that provides the State with the possibility to deprive. This means that every decision has to be taken in accordance with the law, both domestic and international.²⁵ On the other hand, the individual must have the meaningful possibility to contest any decision before a tribunal, which is independent of the authority that made the decision. This will protect the individual against unlawful, unreasonable or discriminatory decisions. This due process requirement is also clear under the 1961 Convention on the Reduction of Statelessness, which will be discussed hereafter. Article 8(4) 1961 Convention clearly states: “A contracting State shall not exercise a power of deprivation . . . except in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body.”²⁶

8. Secondly, the notion of arbitrariness requires more than just procedural fairness. It is the term ‘arbitrarily’ itself that might confer substantive rights to individuals as well. What does it mean? Outside this particular context, the U.N. Human Rights Committee (UNHRC) has interpreted the meaning of arbitrary action in relation with the International Covenant on Civil and Political Rights (ICCPR). The UNHRC stated that “the introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the [ICCPR] and should be, in any event, reasonable in the particular circumstances.”²⁷ Even though this has been said in the context of the ICCPR, this interpretation is just as meaningful in the context of the UDHR.²⁸ It means that an interference provided for by law can still be arbitrary if it is not in accordance with the international law. But, the international jurisprudence agrees that the notion of arbitrariness does not just mean ‘against the law’. In reaching a decision, the standards of necessity/adequacy, proportionality and reasonableness should also be taken into account. This means that the deprivation must be capable of achieving the purpose for which it was taken, otherwise it would not be necessary, nor reasonable. Whether deprivation is effective to fight terrorism will be determined in the second chapter. This also means that a State has to show that the deprivation is proportionate to the interests it seeks to protect

WAAS, “Nationality Matters: Statelessness under international law”, *School of Human Rights Research Series*, 2008, Volume 29.

²⁵ U.N. High Commissioner for Refugees, *Expert Meeting - Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality (“Tunis Conclusions”)*, 2014, www.refworld.org/docid/533a754b4.html.

²⁶ Open Society Justice Initiative, *Citizenship and Equality in Practice: Guaranteeing Non-Discriminatory Access to Nationality, Protecting the Right to be Free from Arbitrary Deprivation of Nationality and Combating Statelessness*, 2005, 8, www.opensocietyfoundations.org/sites/default/files/citizenship_20051101.pdf.

²⁷ U.N. Human Rights Committee, *CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 1994, www.refworld.org/docid/453883f922.html; S. JAYARAMAN, “International Terrorism and Statelessness: Revoking the Citizenship of ISIL Foreign Fighters”, *Chicago Journal of International Law* 2016, volume 17, Issue 1, (180) 192, <http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1705&context=cjil>.

²⁸ S. JAYARAMAN, “International Terrorism and Statelessness: Revoking the Citizenship of ISIL Foreign Fighters”, *Chicago Journal of International Law* 2016, volume 17, Issue 1, (180) 192.

(legitimate purpose) and that it is not unreasonable to deprive. The Courts have to engage into a balancing exercise between the impact of the deprivation on the rights of the individual on one hand, and the purpose for which the citizen is being deprived on the other hand.²⁹

9. Suppose now, for example, that a State wishes to deprive an individual or a group of individuals of his/their nationality because of their race or ethnicity. This might be relevant here. States might use the argument that the individuals they deprive of their citizenship are related to terrorist activities (which they are, in this case, clearly not), where in fact, this argument is used to deprive individuals for racial or ethnic reasons. Even if these reasons are in accordance with a State's domestic nationality laws and even if the State offered due process in reaching the decision, the substantive aspect of article 15 (2) UDHR would still protect the individual against this unreasonable decision. Deprivation cannot be based on discrimination on any ground prohibited in international human rights law, either in law or in practice, for this will be arbitrary.³⁰ Deprivation for racial and ethnic purposes is not only arbitrary, it is also discriminatory which is also prohibited under article 2 UDHR, and every other major international human rights treaty.³¹ Article 9 of the 1961 Convention on the Reduction of Statelessness goes even further: "A Contracting State may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds." The UN Commission on Human Rights added 'gender grounds' to that list in resolution 2005/45.³²

10. How does this theory apply to the deprivation of the citizenship of suspected terrorists? Like every other human being, even an individual who is suspected of terrorism-related activities is protected by article 15 (1) UDHR and has the right to a nationality. This implies automatically the application of article 15 (2) and the right not to be arbitrarily deprived of that nationality. First of all, a suspected terrorist is owed due process, which means that the State in question must have adopted a law that prohibits that certain terrorism-related activity and he must have the possibility to fight the decision before an independent judge. Secondly, the decision needs to have a legitimate purpose, which is often to reduce the threat to national security and the deprivation must be proportionate with that purpose. Where an individual only has one nationality, however, the decision to deprive will lead to statelessness. According to the UNHCR, such a decision is never proportionate and will always be deemed arbitrary, because the impact of statelessness on the

²⁹ U.N. Human Rights Committee, 30 April 1993, *A. v. Australia*, *Communication No. 560/1993: UN Doc. CCPR/C/59/D/560/1993*, 9.2 - 9.4; U.N. High Commissioner for Refugees, *Expert Meeting - Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality ("Tunis Conclusions")*, 2014, n° 19-20, www.refworld.org/docid/533a754b4.html.

³⁰ *Ibid.*, n° 30.

³¹ The prohibition on racial and ethnic discrimination can also be found in: Articles 2 and 7 UDHR, articles 2 and 26 ICCPR, article 2(2) ICESCR; Article 14 ECHR; Article 2 African Charter on Human and Peoples' Rights; articles 1 and 24 American Convention on Human Rights.

³² Resolution 2005/45 on Human Rights and Arbitrary Deprivation of Nationality (19 April 2005), *UN Commission on Human Rights, E/CN.4/RES/2005/45*, 16, www.refworld.org/docid/429c3b694.html.

individual will always outweigh the interests the State seeks to protect.³³ However, in certain circumstances, exceptions are provided by international law. Whether a threat to national security because of terrorist activities is one of those exceptions and outweighs the impact of statelessness will be the subject of the next section. Deprivation in case of dual nationals suspected of terrorism will be treated thereafter.

1.2.3. *The 1961 UN Convention on the Reduction of Statelessness*

11. As stated before, the right to citizenship is the bedrock of all human rights and the loss of it will have a great impact on the protection of these rights. The international community recognised this problem for the first time in 1921 when they crafted the Nansen passport which allowed stateless people a legal existence and travel possibilities.³⁴ This was the first from all kinds of initiatives to prevent or remedy statelessness.³⁵ The 1961 Convention on the Reduction of Statelessness was also one of them. In relation to deprivation, the Convention works as a further concretisation for single nationals of the broad principles of Article 15 UDHR, for the UDHR was not designed to be legally binding and left a lot of questions unanswered. Only sixty-four countries have ratified the 1961 Convention, but the fact that it broadly codifies principles of customary law gives it more legal authority.³⁶

12. In the previous Section, it became clear that in order to prevent a deprivation from being arbitrary, the legitimate purpose of the deprivation has to be proportionate with the loss of nationality itself. The consequence of the loss of a single nationality outweighs any interest that a State can seek to protect. This is why deprivation that leads to statelessness is not proportionate and therefore arbitrary.³⁷ This general principle of article 15 (2) UDHR³⁸ is codified in article 8 (1) 1961 Convention.³⁹ It states: “A contracting State shall not deprive a person of his nationality if such deprivation would render him stateless.” This article only protects single nationals. In some circumstances, however, the balancing exercise tips over to the State’s side. In these cases, the State’s interests are recognised to be far more important than a single national

³³ U.N. High Commissioner for Refugees, *Expert Meeting - Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality (“Tunis Conclusions”)*, 2014, n° 24, www.refworld.org/docid/533a754b4.html.

³⁴ J. MILBRANDT, “Statelessness”, *Cardozo Journal on International and Comparative Law* 2011, (75) 87-89, https://works.bepress.com/jay_milbrandt/1/.

³⁵ Other initiatives: Universal Declaration of Human Rights; creation of the Office of the United Nations High Commissioner for Refugees; 1954 Status Convention; 1961 UN Convention on the Reduction of Statelessness.

³⁶ List of signatories available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-4&chapter=5&clang=_en; S. JAYARAMAN, “International Terrorism and Statelessness: Revoking the Citizenship of ISIL Foreign Fighters”, *Chicago Journal of International Law* 2016, volume 17, Issue 1, (180) 194.

³⁷ U.N. High Commissioner for Refugees, *Expert Meeting - Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality (“Tunis Conclusions”)*, 2014, n° 19, www.refworld.org/docid/533a754b4.html.

³⁸ Similar to article 4(c) European Convention on Nationality 1997.

³⁹ Similar to article 7 European Convention on Nationality 1997.

losing his only nationality. Paragraphs (2) and (3) of article 8 of the 1961 Convention set out an exhaustive list of exceptions to the basic rule of paragraph (1), in which the deprivation will not be deemed arbitrary. In these situations, the purpose of the deprivation is proportionate with the consequences of deprivation itself. It is very important to understand that the UNHRC requires these exceptions to be narrowly construed.⁴⁰ States are allowed to deprive individuals of their nationality outside these exceptions, just not if it leads to statelessness.⁴¹ To us, article 8 (3)(a)(ii) is most important. This article states that deprivation is allowed, even when it renders the individual stateless, when he has conducted himself in a manner “seriously prejudicial to the vital interests of the State”. The Office of the U.N. High Commissioner for Refugees has issued a report, where the terms “prejudicial” and “vital interests” are interpreted. The report states that these terms are very high thresholds to meet and are to be interpreted narrowly. Therefore, deprivation is only possible when the conduct of the individual threatens the foundations and organization of the State. This exception does not cover criminal offences of a general nature, rather acts of treason, espionage and even terrorist acts.⁴² More importantly, the report states that acts of terrorism fall under the exception “depending on their interpretation in domestic law”. This means that a domestic court can determine whether an individual’s actions are indeed “terrorist acts”. This interpretation allows a State to adopt a broad definition of what terrorism-related activities are and with it enlarge the scope of the exception. It would be possible to regard an act of terrorism committed abroad as prejudicial to the vital interests of the State, even though the terrorist activities are not, in fact, committed on the State’s territory.⁴³ More importantly, it would allow States to have suspected terrorist acts fall under this exception as well. But the UNHRC also says that you have to look at these factors case by case and that you have to look at the person’s actual responsibility for the alleged terrorist acts and the circumstances under which they were committed.⁴⁴

⁴⁰ Resolution 2005/45 on Human Rights and Arbitrary Deprivation of Nationality (19 April 2005), *UN Commission on Human Rights, E/CN.4/RES/2005/45*, 16, www.refworld.org/docid/429c3b694.html.

⁴¹ E. CLOOTS, “The Legal Limits of Citizenship Deprivation as a Counterterrorism Strategy”, *European Public Law* 2017, Volume 23, Issue 1, (57) 65; A. HARVEY, “Deprivation of nationality: Implications for the fight against statelessness”, *Questions of International Law* 2016, (21) 24-25; A. HARVEY, “Recent developments on deprivation of nationality on grounds of national security and terrorism resulting in statelessness”, *Journal of Immigration, Asylum and Nationality Law* 2014, Volume 28, Issue 4, (336) 337; Open Society Justice Initiative, *Citizenship and Equality in Practice: Guaranteeing Non-Discriminatory Access to Nationality, Protecting the Right to be Free from Arbitrary Deprivation of Nationality and Combating Statelessness*, 2005, 6-7, https://www.opensocietyfoundations.org/sites/default/files/citizenship_20051101.pdf.

⁴² U.N. High Commissioner for Refugees, *Expert Meeting - Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality (“Tunis Conclusions”)*, 2014, n° 53-68, www.refworld.org/docid/533a754b4.html.

⁴³ S. JAYARAMAN, “International Terrorism and Statelessness: Revoking the Citizenship of ISIL Foreign Fighters”, *Chicago Journal of International Law* 2016, volume 17, Issue 1, (180) 199; U.N. High Commissioner for Refugees, *Expert Meeting - Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality (“Tunis Conclusions”)*, 2014, n° 68, www.refworld.org/docid/533a754b4.html.

⁴⁴ *Ibid*, n° 54,

1.2.4. *Limitations on deprivation of dual nationals?*

13. It is, however, important to make a distinction between single and dual nationals. Dual nationals are much more likely to be deprived of their citizenship than those with a single nationality.⁴⁵ Article 15 (1) UDHR says nothing about an individual having a right to all of his nationalities, nor does it elaborate on the status of dual nationals under international law.⁴⁶ Moreover, in case of dual nationals, the deprivation of one of their nationalities does not render them stateless. They will still be provided with a State's protection. Since article 8 (1) of the 1961 Convention only protects individuals who are at risk of becoming stateless, the Convention and its safeguards are not applicable either. The only limitation in international law would be article 15 (2) UDHR, which requires the deprivation to be reasonable and proportionate with the legitimate purpose. It seems very clear that in a balancing exercise, the legitimate purpose of the State to reduce the threat to national security in depriving a dual national will outweigh the impact of that deprivation on the dual national. Suppose that an individual has both a Belgian and a Turkish nationality, and the Belgian government wishes to deprive him from his citizenship because of terrorism. The fact that he will still have the Turkish nationality and his other human rights will still be protected by that State, the Belgian government's interests outweigh the impact of the loss of one of the nationalities. This makes the deprivation proportionate and therefore, not arbitrary. As long as they also comply with the procedural condition of article 15 (2) UDHR.⁴⁷ States who are party to the European Convention on Nationality 1997 ("ECN"), however, are only able to deprive their dual nationals in accordance with article 7. Given the few limitations international law provides, this area will mainly be subject to domestic law. The reason why our focus lies with single nationals is because the deprivation of single nationals poses a bigger threat to global terrorism.

1.2.5. *Example of a regional human rights system: The 1997 European Convention on Nationality.*

14. In 1997, the Council of Europe drafted the ECN with the same purpose as the conventions mentioned before: to avoid "cases of statelessness".⁴⁸ Some of the parties to the convention, who signed and ratified, are Austria, Denmark, Germany, Netherlands, Hungary,... The articles of the ECN are based upon the UDHR and the 1961 Convention on the reduction of Statelessness. The consequence is that their general principles, limitations and exceptions are

⁴⁵ A. MACKLIN, "Citizenship Revocation, the Privilege To Have Rights and The Production of the Alien", *Queens Law Journal*, 2014, Volume 40, (1) 4.

⁴⁶ Resolution 2005/45 on Human Rights and Arbitrary Deprivation of Nationality (19 April 2005), *UN Commission on Human Rights*, E/CN.4/RES/2005/45, 5, www.refworld.org/docid/429c3b694.html; S. JAYARAMAN, "International Terrorism and Statelessness: Revoking the Citizenship of ISIL Foreign Fighters", *Chicago Journal of International Law* 2016, volume 17, Issue 1, (180) 200.

⁴⁷ S. JAYARAMAN, "International Terrorism and Statelessness: Revoking the Citizenship of ISIL Foreign Fighters", *Chicago Journal of International Law* 2016, volume 17, Issue 1, (180) 199.

⁴⁸ Preamble of the European Convention on Nationality 1997.

conferred (again) upon the signatory parties.⁴⁹ Article 4 (a), (b) & (c) ECN also confer a right to a nationality, a right not to be arbitrarily deprived of that nationality and an avoidance of statelessness upon citizens. In articles 10 to 13 ECN, procedural safeguards were adopted. The reason why we refer to the ECN is because article 7 ECN provides, for the first time in an international legal document, an exhaustive list of acceptable grounds for deprivation of dual nationals.⁵⁰ In case of single nationals, however, to the contrary of the 1961 Convention, a State may never provide in its internal law for the deprivation of a nationality if that deprivation was to lead to statelessness, unless in case of fraud, not even when the individual has acted in a manner which is seriously prejudicial to the vital interests of the State. This means that the Convention allows less (to no) discretion to signatory parties in relation to deprivation that would lead to statelessness. The consequence is that a lot of countries did not want to sign or only signed, but never ratified the convention. This would take away their ability to deprive their citizens for actions which were prejudicial to the vital interests of the state, in this case terrorism, if it would leave the individual stateless.⁵¹ Examples of members of the Council of Europe who never signed are the United Kingdom, Belgium, Spain, Switzerland. Examples of members of the Council of Europe who signed, but never ratified are France, Italy, Greece, Croatia, Russia, Poland, ...⁵² The fact that some of the major European countries did not agree with this convention shows how States until today prefer to maintain sovereignty regarding citizenship.

1.2.6. UN International Law Commission's Draft Articles on the Expulsion of Aliens 2014

15. An extra, and more recent, instrument to fight deprivation of citizenship that will lead to Statelessness are the 2014 United Nations International Law Commission's Draft Articles on the Expulsion of Aliens. These articles provide citizens with an extra protection against arbitrary deprivation. Sometimes, the sole purpose of denationalization is often to remove and punish a citizen, who is deemed to be dangerous, from the State's territory or prevent one from returning. Article 8 tries to prevent that by stating that: "[a] State shall not make its national an alien, by deprivation of nationality, for the sole purpose of expelling him or her."⁵³ This will become important in the second Chapter.

⁴⁹ S. JAYARAMAN, "International Terrorism and Statelessness: Revoking the Citizenship of ISIL Foreign Fighters", *Chicago Journal of International Law* 2016, volume 17, Issue 1, (180) 197.

⁵⁰ G. R. DE GROOT and M. PETER VINK, "A Comparative Analysis of Regulations on Involuntary Loss of Nationality in the European Union", *Liberty and Security in Europe* 2014, 2.

⁵¹ G. R. DE GROOT and M. PETER VINK, "A Comparative Analysis of Regulations on Involuntary Loss of Nationality in the European Union", *Liberty and Security in Europe* 2014, 27.

⁵² Full list of parties to the 1997 Convention on Nationality: www.coe.int/en/web/conventions/full-list/-/conventions/treaty/166/signatures.

⁵³ Draft Articles on the Expulsion of Aliens, with commentaries, International Law Commission, (6 June 2014), 32, <http://legal.un.org/docs/?path=../ilc/reports/2014/english/chp4.pdf&lang=EFsrac>.

2. DEPRIVATION: AN EFFECTIVE MEANS TO AN END?

16. The previous chapter has shown that domestic terrorist denationalization programs have a good chance of surviving legal scrutiny as long as the decisions are not arbitrary. But even when the terrorist denationalization programs survive the legal scrutiny, there are still other problems regarding these programs.⁵⁴ A lot of States want to preserve the community bond that exists in their country and therefore get rid of the threat that the individual suspected of terrorism might pose for that bond. With a deprivation of citizenship, the State believes to have removed the disturbance of that political community bond that existed within that State.⁵⁵ By shifting the burden to another part of the world, the State seems to only have solved their own, temporal problem. The questions that come up are whether these deprivations are really effective in building a safer community, and also in building a safer world in practise? Is deprivation really an effective remedy to fight global terror or is it better to carry out sanctions of imprisonment without revoking the citizenship?

17. The reason why we look into the effectiveness of the deprivation is because, in order for a deprivation not to be arbitrary the decision has to be necessary/adequate, reasonable and proportionate. If we were to conclude that deprivation is not an effective measure to fight terrorism, how can it still be necessary/reasonable/proportionate? How can the impact of the loss of a single nationality still be proportionate with the legitimate purpose the State wishes to achieve, if the deprivation will never achieve that purpose? How can the deprivation still be deemed to be necessary to achieve that purpose?⁵⁶ On top of that, it is not reasonable to make a decision for a specific goal, where you know that this decision will have no impact on reaching that goal. The ineffectiveness of the deprivation of citizenship for terrorism, might tackle the entire idea behind the system. But first, we will have to decide whether the system is effective or not. Arguments which argue in favour of deprivation and who argue against to fight terrorism will be discussed.

⁵⁴ E. CLOOTS, "The Legal Limits of Citizenship Deprivation as a Counterterror Strategy", *European Public Law* 2017, Volume, 23, Issue 1, (57) 87.

⁵⁵ M. A. DONOSO, "Douglas Husak, Over criminalization. The Limits of the Criminal Law", *Criminal law and philosophy*, 2010, Volume 4, Issue 1, (99) 102; D. HUSAK, *Over Criminalization. The Limits of Criminal Law*, New York, Oxford University Press, 2008, 91-92; X., "Indonesia commentary argues against revoking citizenship under draft terror law", in BBC WORLDWIDE LIMITED, *BBC Monitoring Asia Pacific*, 5 April 2016, <http://search.proquest.com/kuleuven.ezproxy.kuleuven.be/docview/1778338869/fulltext/AE3B340B64F644D2PQ/18?accountid=17215>.

⁵⁶ R. BAUBÖCK and V. PASKALEV, "Citizenship Deprivation: A Normative Analysis", *Liberty and Security in Europe* 2015, 9; A. MACKLIN, "On producing the alien within: A reply" in A. MACKLIN and R. BAUBÖCK, *The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?*, Italy, RSCAS, 2015, (51) 53.

2.1 ARGUMENTS IN FAVOUR OF DEPRIVATION TO EFFECTIVELY FIGHT TERRORISM

18. Two of the main arguments in favour of deprivation of citizenship in relation to terrorism-related activities can be introduced by referring to US senator Ted Cruz on the Congress Debate of 8 September 2014. He said that loss of citizenship for citizens who are related to terrorism is necessary in order to effectively reduce the threat to the national security of a State, in this case the United States. Secondly, he said that allowing citizens to travel and fight with or support terrorist groups and then come home with a (US) passport, endangers citizens at home.⁵⁷ These isolationistic arguments were also used by the Australian Minister for Immigration Peter Dutton as an explanation for the modification of their immigration laws. He adds that a State prefers to protect its community and citizens, rather than being offered the possibility to punish the suspected terrorists upon their return.⁵⁸ It seems intuitively correct, in these two respects, that deprivation will prevent the individuals from returning home and spreading terror. In addition to this argument, deprivation is an easy and low cost method to prevent the terrorist's re-entry into the country. If a State were to suspect an individual from terrorism-related activities and allowed them to return home, they would have to monitor this individual using expensive security or intelligence services. This might also become an ineffective affair due certain constitutional or other legal protections such as privacy. In this case, it might seem more effective to just revoke their citizenship.⁵⁹ The rights organization 'Liberty' however, describes the idea that citizenship deprivation reduces the threat to national security as 'a security fallacy' and suggests that it is naïve to believe that in this globalised and internationally connected world, the punishment of banishment or exile will produce any security benefits.⁶⁰ They say that denaturalization renders individuals more vulnerable and susceptible to recruitment by terrorist organizations, because they have nowhere else to go. They refer to the idea that 'deprivation nourishes radicalization'.

⁵⁷ Senator Ted Cruz., 113th Congress Debate, 2nd Session, 8 September 2014; J. H. MARTIN, *Terrorism-related loss of citizenship – a policy review*, Published Thesis, Naval Postgraduate School, Monterey, 2016, 89, <https://www.hsdl.org/?view&did=796632>; X, *Citizenship revocation in response to foreign fighter threat – under what conditions may it be legitimate and permissible*, Published Thesis, University of Oslo, 2016, 23, www.duo.uio.no/bitstream/handle/10852/51468/Thesis_UIO_8012_.pdf?sequence=1&isAllowed=y.

⁵⁸ D. CONIFER, "Terror citizenship laws: Government introduces to Parliament bill to strip dual nationals of citizenship", ABC News, 24 June 2015, www.abc.net.au/news/2015-06-24/government-introduces-citizenship-laws-bill-to-parliament/6569570; J. H. MARTIN, *Terrorism-related loss of citizenship – a policy review*, Published Thesis, Naval Postgraduate School, Monterey, 2016, 90, <https://www.hsdl.org/?view&did=796632>.

⁵⁹ S. JAYARAMAN, "International Terrorism and Statelessness: Revoking the Citizenship of ISIL Foreign Fighters", *Chicago Journal of International Law* 2016, volume 17, Issue 1, (180) 209.

⁶⁰ H. BROWN, *The Hidden Dangers of Ted Cruz's New Anti-ISIS Bill*, Think Process, 8 September 2014, <http://thinkprogress.org/world/2014/09/08/3564312/the-hidden-dangers-of-ted-cruzs-new-anti-isis-bill/>; R. ROBINSON, *Liberty's Second Reading Briefing on Clause 60 of the Immigration Bill in the House of Lords*, London, Liberty, 2014, n° 16-17, <https://www.liberty-human-rights.org.uk/sites/default/files/Liberty%20s%20briefing%20on%20clause%2060%20of%20the%20Immigration%20Bill.pdf>; L. ZEDNER, "Citizenship Deprivation, Security and Human Rights", *European Journal of Migration and Law* 2016, Volume 18, Issue 2, (222) 240.

19. Another common sentiment is that citizenship deprivation is an effective measure to punish and deter future terrorists. This has been rejected in two important events. First of all, in 1958, the US Supreme Court noted that “the civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as a punishment for crime”.⁶¹ Secondly, The International Law Commission has voiced its opinion on this matter in the Commentaries of article 9 of the Draft Articles on the Expulsion of Aliens 2014 and stated that the deprivation of nationality for the “sole purpose” of expulsion is “abusive, indeed arbitrary within the meaning of Article 15, para 2 of the UDHR”.⁶² Furthermore, there is no evidence, nor is it logical, that revoking a suspected terrorist’s citizenship will suddenly deter him more or better from carrying out attacks. If captured, they already face the prospect of being imprisoned, tortured or killed. This would render the measure unnecessary.⁶³

20. There is also an important argument to make in the context of war-on-terror. Revocation would allow States to circumvent any legal protections available to the suspected foreign fighter under domestic law which might prevent the targeted assassinations of nationals. On one hand, this might seem beneficial for a State who wishes to effectively get rid of a suspected terrorist, but on the other hand there are a lot of ethical issues regarding extra-judicial killings. But, because the usage of drone strikes and targeted killings of stateless terrorists is still very insecure under international law, the world turns a blind eye.⁶⁴

21. Looking at each and every State in particular, without taking the rest of the world into account, the best solution to protect your citizens seems to act isolationistic and to just deprive them of their citizenship and leave them on the other side of the world. This appears to be the cheapest, easiest and most effective way to deal with the problem on a short-term basis. But, is looking the other way today and hoping that the problem will solve itself tomorrow really a solution for the global problem of ISIS, Al-Qaeda, and Al-Nusra? It is very

⁶¹ US Supreme Court, 1958, 356 US 86, *Trop v. Dulles, Secretary of State et. al*, para 102; A. HARVEY, “Deprivation of nationality: Implications for the fight against statelessness”, *Questions of International Law* 2016, (21) 22-23; P. SPIRO, “Terrorist Expatriation: All Show, No Bite, No Future” in A. MACKLIN and R. BAUBÖCK, *The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?*, Italy, RSCAS, 2015, (7) 8.

⁶² Draft Articles on the Expulsion of Aliens, with commentaries, International Law Commission, (6 June 2014), 32, <http://legal.un.org/docs/?path=../ilc/reports/2014/english/chp4.pdf&lang=EN&lang=EFSRAC> ; X, *Citizenship revocation in response to foreign fighter threat – under what conditions may it be legitimate and permissible*, Published Thesis, University of Oslo, 2016, 26, https://www.duo.uio.no/bitstream/handle/10852/51468/Thesis_UIO_8012_pdf?sequence=1&isAllowed=y.

⁶³ A. MACKLIN, “Kick-Off Contribution” in A. MACKLIN and R. BAUBÖCK, *The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?*, Italy, RSCAS, 2015, (1) 5.

⁶⁴ S. JAYARAMAN, “International Terrorism and Statelessness: Revoking the Citizenship of ISIL Foreign Fighters”, *Chicago Journal of International Law* 2016, volume 17, Issue 1, (180) 210; S. GHOSHRAJ, “Targeted Killing in International Law: Searching for Rights in the Shadow of 9/11”, *Indiana International & Comparative Law Review*, 2014, Volume 24, Issue 2, 355-418; R. J. VOGEL, “Drone Warfare and the Law of Armed Conflict”, *Denver Journal of International Law and Policy*, Volume 39, Issue 1, (101) 101-103.

clear that these pro arguments justify the protection of the State against terrorism, but how does this help in the eradication of terrorism as a whole?

2.2 ARGUMENTS AGAINST DEPRIVATION TO EFFECTIVELY FIGHT TERRORISM

2.2.1. *Impact of statelessness on the individual*

22. First of all, the impact deprivation has on an individual is really important to understand as to why it might not help in fighting terrorism and maybe even work counter-productive. The 1961 Convention on the Reduction of Statelessness was adopted because of the severe impact statelessness has on an individual's other rights. There are a number of reasons why States should avoid statelessness. First of all, there is an impact on the enjoyment of several civil and political rights. For example, Article 12 of the International Covenant on Civil and Political Rights provides for the right to liberty of movement and the freedom to choose a residence. Individuals who have been arbitrarily deprived of their sole nationality, and who could be innocent, become illegals in every State and might therefore find difficulties to travel. Another example is the right to an effective remedy provided in articles 2, paragraph 3(a), 9 and 14 of the International Covenant on Civil and Political Rights.⁶⁵ Deprived citizens are often left without the effective means and resources to challenge and obtain remedies against the decision of the deprivation of their citizenship or the violation of other human rights. Other examples of civil and political rights that are affected are the right to vote, to take part in public affairs, to be elected, the right to liberty and family life.⁶⁶ Secondly, there is also lot of insecurity and inequity regarding socio-economic rights. An important example is unemployment as a result of statelessness. Without a nationality you are an illegal in every country you enter and are therefore not entitled to work. Other examples of social benefits that are lost or affected are access to pensions, health facilities, birth registration, identity documentation, education, health care, property ownership and more.⁶⁷ The individual will lose every prospect of a decent and humane life. It is clear that deprivation has a very serious impact on a person's life, whether or not he is a terrorist. This is the reason why there is a proportionality condition, that requires there to be proportionality between the legitimate purpose of the deprivation (prevention

⁶⁵ Final report on the rights of non-citizens - Examples of practices in regard to non-citizens (26 May 2003), *UN Office of the High Commissioner for Human Rights*, E/CN.4/Sub.2/2003/23/Add.3, 5, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G03/144/04/PDF/G0314404.pdf?OpenElement>; X., "Indonesia commentary argues against revoking citizenship under draft terror law", in BBC WORLDWIDE LIMITED, *BBC Monitoring Asia Pacific*, 5 April 2016, <http://search.proquest.com.kuleuven.ezproxy.kuleuven.be/docview/1778338869/fulltext/AE3B340B64F644D2PQ/18?accountid=17215>.

⁶⁶ Articles 9, 23 and 25 of the Covenant on Civil and Political Rights; Human Rights and arbitrary deprivation of nationality (19 December 2012), *UN Human Rights Council*, A/HRC/19/43, 11-12, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/174/43/PDF/G1117443.pdf?OpenElement>.

⁶⁷ W. E. CONKLIN, "The Consequences of Statelessness", in X., *Statelessness: The Enigma of an International Community*, London, Hart Publishing, 2014, (96) 131.

of terrorist acts) and the impact of statelessness. This is also why, it seems to me, States should have extensive evidence of the individual committing terrorist acts.

23. If you look at dual nationals however, there are no obstacles in depriving them. In international law, there is as good as no limitation, because this individual's other human rights will still be safeguarded by the State of his other nationality. In literature, deprivation of dual nationals is even supported when there is indeed a terrorist threat. Professor Peter H. Schuck from the Yale Law School defended that the safety of the other citizens of the State should not be endangered to maintain the attacker's legal connection with the State. Why should a State not be able to protect itself and its citizens (which is one of their most important duties) from an individual who wants to launch a dangerous attack? Schuck argues that deprivation is an appropriate and proportionate response (in light of the UDHR) as long as it does not lead to statelessness.⁶⁸ In my opinion, this way of operating could indeed temporarily save that State from a terrorist attack, but it clearly fails to see the bigger picture to effectively fight global terrorism. This will become obvious in the following paragraphs.

2.2.2. *Deprivation nourishes radicalization*

24. A second argument is that the deprivation of an individual's sole citizenship, when he is outside the domestic territory, might prove counter-productive to remedy terrorism related activities. Deprivation might create disaffection among certain populations, their families and communities. It may feed the feeling of exclusion, alienation and hostility which are the breeding grounds for radicalization.⁶⁹ And sometimes the suspected terrorist, after being deprived, may have no other choice than to remain with the terrorist group.⁷⁰ David Anderson, in his independent review of terrorism legislation, called deprivation a "policy of catch and release, setting up today's convicts as tomorrow's foreign fighters", because you identify a suspected terrorist today, deprive him of his citizenship tomorrow and he comes back the day after as a foreign fighter.⁷¹ It creates an "us" versus "them" atmosphere, which causes those that tend to the "them" camp to be a lost cause.⁷²

⁶⁸ P. H. SHUCK, "Should those who attack the nation have an absolute right to remain its citizens?", in A. MACKLIN and R. BAUBÖCK, *The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?*, Italy, RSCAS, 2015, (9) 10.

⁶⁹ L. ZEDNER, "Citizenship Deprivation, Security and Human Rights", *European Journal of Migration and Law* 2016, Volume 18, Issue 2, (222) 241.

⁷⁰ S. JAYARAMAN, "International Terrorism and Statelessness: Revoking the Citizenship of ISIL Foreign Fighters", *Chicago Journal of International Law* 2016, volume 17, Issue 1, (180) 210.

⁷¹ D. ANDERSON, *Citizenship removal resulting in statelessness*, London, Independent Reviewer of Counter Terrorism Legislation, 2016, 12.

⁷² P. SPIRO, "Terrorist Expatriation: All Show, No Bite, No Future" in A. MACKLIN and R. BAUBÖCK, *The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?*, Italy, RSCAS, 2015, (7) 7.

2.2.3. *Loss of the ability to convict suspected terrorists*

25. As said before, the main purpose of why a State deprives an individual related to terrorism of his citizenship, is to solve today's security threat and to prevent such a fighter from returning home. This is only a temporary security solution. But, how does throwing a suspected terrorist out of one State advance the international security? Such an action adds nothing positive to bringing that suspected terrorist to justice. It simply allows that particular State to wash its hands in innocence and to absolve itself of both legal and moral responsibilities and jurisdiction over that individual. Suppose that a wanted terrorist actually wants to re-enter the country and the State wishes to apprehend him. What would be the most effective way to do that? To deprive him of his citizenship and risk him entering the country unknown and illegally, or to let him keep his citizenship in order to stop and detain him using security forces at the border or customs at the airport? It is also very unlikely that the loss of citizenship will deter a person who is determined to commit a terrorist attack to return home, yet States continue to deprive.⁷³ And still, the ability to convict and imprison those that support terrorism is the only way to combat the phenomenon. A suspected terrorist who is imprisoned will always be less dangerous than a suspected terrorist in another country, with the means to enter your country illegally. This is the only punishment that will actually have a deterrent effect on other individuals who tend towards radicalization.⁷⁴ The denationalizations carried out by the UK, for example, have done nothing to stop new recruits from joining ISIS.⁷⁵

26. Secondly, if the measure is meant to prevent a national security threat, it is not adequate to deprive the suspected terrorist when he is already on domestic territory. You can only take away someone's nationality, once you know they are associated with terrorism, Peter Spiro argued. But once you are aware of the threat, and that individual is on domestic territory it is no longer necessary, nor reasonable to deprive him. It is better to use other, more traditional measures such as travel bans, passport revocations, criminal prosecution or increased surveillance.⁷⁶ Deprivation would be a punishment, which is prohibited, and arbitrary.

⁷³ E. CLOOTS, "The Legal Limits of Citizenship Deprivation as a Counterterror Strategy", *European Public Law* 2017, Volume 23, Issue 1, (57) 87.

⁷⁴ S. JAYARAMAN, "International Terrorism and Statelessness: Revoking the Citizenship of ISIL Foreign Fighters", *Chicago Journal of International Law* 2016, volume 17, Issue 1, (180) 210; A. MACKLIN, "Kick-Off Contribution" in A. MACKLIN and R. BAUBÖCK, *The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?*, Italy, RSCAS, 2015, (1) 5; R. ROBINSON, *Liberty's Second Reading Briefing on Clause 60 of the Immigration Bill in the House of Lords*, London, Liberty, 2014, n° 19; X, *Citizenship revocation in response to foreign fighter threat – under what conditions may it be legitimate and permissible*, Published Thesis, University of Oslo, 2016, 23, https://www.duo.uio.no/bitstream/handle/10852/51468/Thesis_UIO_8012_pdf?sequence=1&isAllowed=y.

⁷⁵ K. BENNHOLD, *Britain Expands Power to Strip Citizenship From Terrorism Suspects*, N.Y. Times, 14 May 2014, www.nytimes.com/2014/05/15/world/europe/britain-broadens-power-to-strip-terrorism-suspects-of-citizenship.html?_r=0.

⁷⁶ P. SPIRO, "Terrorist Expatriation: All Show, No Bite, No Future" in A. MACKLIN and R. BAUBÖCK, *The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?*, Italy, RSCAS, 2015, (7) 8; X, *Citizenship revocation in response to foreign fighter threat – under what conditions may*

2.2.4. *The export of terrorism*

27. If a State is not able to prosecute an individual who is suspected of terrorism, or has no need to, because he is outside the State's territory, for example somewhere in the Middle-East, they believe that the only option to solve the threat is to deprive them of their citizenship. By doing that, these governments, in fact, "export terrorism" and shift their responsibility to the international community or to another State.⁷⁷ This becomes a real problem when that particular State, where the individual resides, does not have the same capability, resources, man- or willpower to fight the problem. The terrorist groups could even count on that, because this way they can expand without any counterweight. When the act involved occurs in a country from which the State could gain extradition, the refusal to deal with the terrorist threat and to shift the burden to the other State just is not a proper response.⁷⁸ The threat against global security remains. Moreover, the "dumping" of the individual violates the territorial sovereignty of the State where he resides. If this individual is rendered stateless, he could only travel illegally in other countries and this infringes upon the national sovereignty and violates the law of that particular State. The receiving state can also no longer legally deport or remove the stateless person to another country, because that would, again, infringe that other State's sovereignty and infringe international law.⁷⁹

2.3 INEFFECTIVE DEPRIVATION IS ARBITRARY DEPRIVATION?

28. We live in a globalised world, where there is inter-connectivity and communication between almost every country in the world. The consequence is that terrorism is no longer confined to the borders of one particular State, but has become a global issue. This is something that countries around the world need to acknowledge. Following the previous paragraphs, it has become clear that deprivation is nothing more than a State's selfish act to get rid of the threat a suspected terrorist poses and does nothing to help fight global terrorism. But, as Liberty showed, the selfish act just creates a security fallacy. The negative consequence is that the suspected terrorist disappears from the

it be legitimate and permissible, Published Thesis, University of Oslo, 2016, 23, https://www.duo.uio.no/bitstream/handle/10852/51468/Thesis_UIO_8012_.pdf?sequence=1&isAllowed=y.

⁷⁷ R. BAUBÖCK and V. PASKALEV, "Citizenship Deprivation: A Normative Analysis", *Liberty and Security in Europe* 2015, 10; C. WALKER, "The Treatment of Foreign Terror Suspects", *Modern Law Review*, 2007, Volume 70, Issue 3, (427) 433; L. ZEDNER, "Citizenship Deprivation, Security and Human Rights", *European Journal of Migration and Law* 2016, Volume 18, Issue 2, (222) 240.

⁷⁸ A. EAGLE, House of Lords Debate on Immigration, Asylum and Nationality Bill, 9 October 2002, column 278, <https://www.publications.parliament.uk/pa/ld200102/ldhansrd/vo021009/text/21009-07.htm>; A. HARVEY, "Deprivation of nationality: Implications for the fight against statelessness", *Questions of International Law* 2016, (21) 32.

⁷⁹ S. JAYARAMAN, "International Terrorism and Statelessness: Revoking the Citizenship of ISIL Foreign Fighters", *Chicago Journal of International Law* 2016, volume 17, Issue 1, (180) 211; W. T. WORSTER, "International Law and the Expulsion of Individuals With More Than One Nationality", *UCLA Journal of International Law and Foreign Affairs* 2009, Volume 14, Issue 2, (423) 427; P. WEIS, *Nationality and Statelessness in International Law*, Dordrecht, Kluwer Academic Publisher Group, 1979, 47-49.

State's radar, becomes invisible and the State loses the ability to convict. He might sneak into the country unknown and strike. Deprivation does not have a deterrent effect either, because the suspected terrorists already face the possibility of imprisonment, torture or death. On top of that, deprivation makes the situation worse because it nourishes radicalisation and you export the individual to a nation who might not be able to deal with it. It is clear that, in practise, deprivation is definitely not an effective means to fight global terrorism. An effective means would in fact be the opposite. Keep the suspected terrorist registered as a national to be able to track his movements in order to apprehend and convict him. This would be the only way forward.

29. As said before, where the legitimate purpose of the State is to reduce and fight terrorism, the realisation that deprivation is not an effective measure to achieve that purpose, might render it arbitrary. For an arbitrary deprivation is unnecessary, unreasonable and disproportionate with the legitimate purpose for which it had been adopted. None of these conditions can be met when the conclusion is that deprivation is ineffective.⁸⁰ First of all, where, in relation to terrorism, the legitimate purpose is to reduce the threat of terrorism, how can the impact of deprivation on the individual's rights still be proportionate with a purpose which the measure will never achieve? The impact of the deprivation will, in practice, outweigh the State's interests where they cannot be accomplished. Secondly, a government is not acting reasonable when depriving a citizen of his citizenship to achieve an unreachable goal. It would be reasonable to adopt a measure which they believed to be adequate.

30. And even if we were to believe that deprivation is an effective measure to prevent the suspected terrorist from returning home, which is most of the States' argument, there are still alternative measures which can be adopted which are not as disproportionate (such as passport revocations, travel bans, supervision,...).⁸¹ The fact that other, less infringing, measures can be adopted would render the deprivation unnecessary and therefore arbitrary.

3. (ARBITRARY?) IMPLEMENTATION IN UK NATIONALITY LAW

3.1 A SHORT HISTORY

31. The following chapter will have a closer look on how the UK takes the international legal framework into account when implementing new nationality laws. The reason why the UK system is examined, is to show how the fear of terrorism caused them to abandon their previous point of view and adopt a system which has been argued to be arbitrary. A recurring view on deprivation throughout the United Kingdom's history of nationality policy was

⁸⁰ A. MACKLIN, "Kick-Off Contribution" in A. MACKLIN and R. BAUBÖCK, *The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?*, Italy, RSCAS, 2015, (1) 2-6.

⁸¹ S. JAYARAMAN, "International Terrorism and Statelessness: Revoking the Citizenship of ISIL Foreign Fighters", *Chicago Journal of International Law* 2016, volume 17, Issue 1, (180) 215.

the reduction and elimination of statelessness as was stated by Mr. Ross at the first conference (1959) on the conclusion of the 1961 Convention on the Reduction of Statelessness: ‘To deprive persons of their nationality so as to render them stateless should certainly be an exceptional step and the freedom of States to deprive persons of their nationality should be severely circumscribed by means of appropriate clauses in the convention...’.⁸²

32. The British Nationality Act 1981 governs British citizenship deprivation rules. In 1981, article 40 only permitted the deprivation of citizenship of a naturalized individual where it was acquired through fraud, false representation or concealment of a material fact. Citizens born on British soil could not be deprived. After the 9/11 attack in New York, the UK Parliament amended article 40 by section 4(2) of the Nationality, Immigration and Asylum Act 2002 in order to be able to deprive a naturalized individual and a ‘natural born’ from his citizenship when he has acted in a way which is ‘seriously prejudicial to the vital interests of the United Kingdom or a British Overseas Territory’.⁸³ It is clear that the 2002 Immigration Act implemented article 8 (3)(a)(ii) of the 1961 Convention and article 7(1)(d) of the 1997 European Convention on Nationality. There was, however, a slight difference. Where the 1961 Convention allowed a State to leave an individual stateless when they have conducted themselves seriously prejudicial to the vital interests of the State, the United Kingdom did not allow a citizen to be rendered stateless, even when he had conducted himself in such a manner.⁸⁴ Even though the UK made a reservation under article 8 1961 Convention to be able to deprive citizens even if it would render them stateless.⁸⁵ The UK broadened their scope by allowing natural born citizens to be deprived, yet applied a more strict approach when it came to deprivation that lead to statelessness. After the London bomb attacks of 7 July 2005, however, courts began to notice that the ‘prejudicial to the vital interests’ condition was a very high threshold to meet to deprive dual nationals. Baroness Ashton of Upholland said during the debate for the Immigration, Asylum and Nationality Bill on 14 March 2006 that the

⁸² Mr. Ross, United Nations Conference on the Elimination or Reduction of Future Statelessness, 11th Meeting of the Committee of the Whole, 8 April 1959, *UN doc. A/CONF.9/C.1/SR.11*, 7-8, http://legal.un.org/diplomaticconferences/statelessness-1959/docs/english/Vol_2/12_a_conf-9_c-1_sr-11.pdf; G. S. GOODWIN-GILL, *Mr Al-Jedda, Deprivation of Citizenship, and International Law*, 2014, submitted to the Joint Committee on Human Rights and published by the Committee, www.parliament.uk/documents/joint-committees/human-rights/GSGG-DeprivationCitizenshipRevDft.pdf.

⁸³ A. HARVEY, “Recent developments on deprivation of nationality on grounds of national security and terrorism resulting in statelessness”, *Journal of Immigration, Asylum and Nationality Law* 2014, Volume 28, Issue 4, (336) 339; A. MACKLIN, “Citizenship Revocation, the Privilege To Have Rights and The Production of the Alien”, *Queens Law Journal*, 2014, Volume 40, (1) 15; S. MANTU, *Citizenship in times of terror: citizenship deprivation in the UK*, Nijmegen, Centre for Migration Law, 2015, 8.

⁸⁴ Section 40 (4) stated: “*The Secretary of State may not make an order under subsection (2) if he is satisfied that the order would make a person stateless.*”

⁸⁵ Explanatory Notes to the Immigration Act 2014, Section 66, n° 401-405, www.legislation.gov.uk/ukpga/2014/22/notes/division/5/6/2; L. ZEDNER, “Citizenship Deprivation, Security and Human Rights”, *European Journal of Migration and Law* 2016, Volume 18, Issue 2, (222) 231-232.

‘vital interests’ test was ‘too high’ and the ‘hurdles too great’.⁸⁶ Even though the UNHRC requires these exceptions to be narrowly construed the UK still changed the threshold in order for it to be easier to meet.⁸⁷ Section 56 UK Immigration, Asylum and Nationality Act 2006 changed the vital interests test for dual nationals to the ‘conducive to the public good’ – test in section 40 (2) British Nationality Act. This test allows the Secretary of State to deprive dual nationals with the only requirement of his satisfaction that the deprivation is conducive/beneficial to the public good. The threshold is far lower and the test is therefore easier to meet. It is also arguable that the width of discretion now given to the UK Government arguably renders deprivation under UK law arbitrary, but this will be discussed further on. It is important to note that this easier test can only be used if this would not render the individual stateless (dual nationals), which made it in accordance with the 1961 Convention.⁸⁸

3.2 AL JEDDA V SSHD AND THE SUBSEQUENT IMMIGRATION ACT 2014

33. A very important case, which led to further alterations of the United Kingdom’s nationality laws regarding single nationals was *Al Jedda v SSHD*.⁸⁹ Mr. Al Jedda was a refugee from Iraq. He was granted asylum in the United Kingdom and acquired British nationality. This meant that, according to UK nationality laws, he also lost his Iraqi nationality. During the war in Iraq, Mr. Al Jedda was being detained for three years by the British Military on the suspicion that he was part of a terrorist organization. He was released after the Secretary of State deprived him of his British citizenship. He appealed to the Special Immigration Appeals Commission, where he alleged that this deprivation was unlawful, because it would render him stateless, which was prohibited under section 40 (4) of the British Nationality Act 1981. The case went up to the Supreme Court where the Secretary of State alleged that section

⁸⁶ Baroness Ashton of Upholland, House of Lords Debate on Immigration, Asylum and Nationality Bill, 14 March 2006, Column 1190, https://www.publications.parliament.uk/pa/ld200506/ldhansrd/vo060314/text/60314-29.htm#60314-29_spnew1; G. S. GOODWIN-GILL, *Mr Al-Jedda, Deprivation of Citizenship, and International Law*, 2014, submitted to the Joint Committee on Human Rights and published by the Committee, www.parliament.uk/documents/joint-committees/human-rights/GSGG-DeprivationCitizenshipRevDft.pdf.

⁸⁷ Resolution 2005/45 on Human Rights and Arbitrary Deprivation of Nationality (19 April 2005), *UN Commission on Human Rights*, E/CN.4/RES/2005/45, 16, www.refworld.org/docid/429c3b694.html.

⁸⁸ A. BERRY, “Arbitrary deprivation of nationality: Submission of the Immigration Law Practitioners’ Association to the UN Office of the High Commissioner for Human Rights”, *Immigration Law Practitioners’ Administration* 2013, 3; A. HARVEY, “Deprivation of nationality: Implications for the fight against statelessness”, *Questions of International Law* 2016, (21) 32; A. MACKLIN, “Citizenship Revocation, the Privilege To Have Rights and The Production of the Alien”, *Queens Law Journal*, 2014, Volume 40, (1) 16; S. MANTU, *Citizenship in times of terror: citizenship deprivation in the UK*, Nijmegen, Centre for Migration Law, 2015, 11; L. ZEDNER, “Citizenship Deprivation, Security and Human Rights”, *European Journal of Migration and Law* 2016, Volume 18, Issue 2, (222) 229-230.

⁸⁹ Supreme Court, 9 October 2013, UK SC 62, *Al Jedda v SSHD*; G. S. GOODWIN-GILL, *Mr Al-Jedda, Deprivation of Citizenship, and International Law*, 2014, submitted to the Joint Committee on Human Rights and published by the Committee, www.parliament.uk/documents/joint-committees/human-rights/GSGG-DeprivationCitizenshipRevDft.pdf.

40 could be satisfied if that person could apply for, and would be granted, citizenship elsewhere. The Supreme Court rejected the argument, because it did not matter whether the individual had the possibility to acquire another nationality. It was important, however, and also according to the UNHCR, whether the individual possessed another nationality at the time of the deprivation.⁹⁰ Al Jedda did not and therefore the deprivation was unlawful.

34. The decision by the Supreme Court in *Al Jedda v SSHD* caused a lot of debate in the UK parliament, leading to another amendment in the law. This time, the UK took a step far beyond their original view on statelessness, by allowing deprivation even if it leads to statelessness. Section 66 of the Immigration Act 2014 has amended section 40 (4) of the British Nationality Act 1981 one more time, by adding section 40 (4A). It provides that a single national who obtained his British citizenship through naturalization can be denaturalized when the Secretary of State is satisfied that the deprivation is conducive to the public good, because the individual has conducted him or herself in a manner that is seriously prejudicial to the vital interests of the United Kingdom. The Explanatory Notes suggest that such conduct entails a national security concern, terrorism, espionage, or taking up arms against the British or allied forces.⁹¹ Taking *Al Jedda v SSHD* into account, the Secretary of State can only deprive a suspected terrorist of his nationality and render him stateless if they have reasonable grounds for believing that believe that the individual is able to acquire another nationality. However, this rule does not entail any legal requirement for the individual to already have acquired or been promised citizenship of another country before the deprivation. There is not even a requirement that the acquisition has to happen within a certain period. More so, Helena Kennedy, a member of the House of Lords for the opposition Labour Party thought it to be questionable that another country would even consider giving nationality if it knew that the individual's British citizenship had been revoked because of suspected terrorist activities.⁹² A view I share. Section 66 seems to be an empty condition. It seems perfectly possible to deprive naturalised citizens 'regardless of whether or not it will render them stateless'.⁹³ But, as said before, nor the UDHR, nor the 1961 Convention

⁹⁰ G. S. GOODWIN-GILL, *Mr Al-Jedda, Deprivation of Citizenship, and International Law*, 2014, submitted to the Joint Committee on Human Rights and published by the Committee, www.parliament.uk/documents/joint-committees/human-rights/GSGG-DeprivationCitizenshipRevDft.pdf; A. HARVEY, "Deprivation of nationality: Implications for the fight against statelessness", *Questions of International Law* 2016, (21) 33; A. MACKLIN, "Citizenship Revocation, the Privilege To Have Rights and The Production of the Alien", *Queens Law Journal*, 2014, Volume 40, (1) 16; UNHCR, *Handbook on Protection of Stateless Persons under the 1954 Convention Relating to the Status of Stateless Persons*, Geneva, 2014, 20, www.refworld.org/pd/53b676aa4.pdf.

⁹¹ Explanatory Notes to the Immigration Act 2014, Section 66, n° 405, www.legislation.gov.uk/ukpga/2014/22/notes/division/5/6/2.

⁹² K. BENNHOLD, *Britain Expands Power to Strip Citizenship From Terrorism Suspects*, N.Y. Times, 14 May 2014, www.nytimes.com/2014/05/15/world/europe/britain-broadens-power-to-strip-terrorism-suspects-of-citizenship.html?_r=0.

⁹³ S 66 (1) Immigration Act 2014; Explanatory Notes to the Immigration Act 2014, Section 66, n° 401-406, www.legislation.gov.uk/ukpga/2014/22/notes/division/5/6/2; A. HARVEY, "Deprivation of nationality: Implications for the fight against statelessness", *Questions of International Law* 2016, (21) 34; L. ZEDNER, "Citizenship Deprivation, Security and Human Rights", *European Journal of Migration and Law* 2016, Volume 18, Issue 2, (222) 234.

prohibits a State to adopt laws which could render an individual stateless when he has conducted himself in a manner prejudicial to the vital interests of the state. Also, the UK was not part of and did not intend to become a party to the 1997 European Convention on Nationality, which prohibits deprivation on grounds conducive to the public good if it results in statelessness. In this regard, there is no problem concerning international law.

3.3 IS THE UK-DEPRIVATION SYSTEM ARBITRARY?

35. Mr. Adrian Berry, chairman of the Immigration Law Practitioners' Association said the following: "National security is perceived as a reason to ignore safeguards that provide for a fair trial, not least of the question of whether the person facing deprivation of their nationality is a national security risk at all."⁹⁴ I believe this to be a very good statement regarding the critiques that have been given on the UK deprivation system in the past. It has been argued that some aspects of the system are not in accordance with the procedural safeguards provided by article 15 (2) UDHR and 8 (4) 1961 Convention. Hereafter, the most important ones will be discussed.

36. 'Due process' and 'fair trial', means that the individual is able to appeal to the decision to deprive, is offered enough possibilities to develop a defence and is able to be present at his trial. In the United Kingdom the decision to deprive lies with the Secretary of State. In case of dual nations, he can do this by only showing that it would be conducive to the public good, which covers terrorism, without showing any actual infringement of the law. This is different in Canada, where the minister has the power to revoke the citizenship due to terrorism, but, previous to the decision, a court has to determine whether that person actually engaged in terrorist activities.⁹⁵ In other words, deprivation is only possible after a conviction. In the UK, this poses a problem when the individual has no capability of appealing to the decision.⁹⁶ In that case, the decision will never be substantively tested on proportionality, necessity and reasonableness. Moreover, the appeal is even more difficult in two respects. First of all, since the Immigration Act 2004, it is perfectly possible for the UK to order the deprivation whilst the citizen is outside the UK (and they might even wait for such a moment).⁹⁷ After the deprivation, the individual immediately loses his nationality and does not continue to hold it during the appeal. This means that after the order, this person has no right to re-enter the

⁹⁴ A. BERRY, "Arbitrary deprivation of nationality: Submission of the Immigration Law Practitioners' Association to the UN Office of the High Commissioner for Human Rights", *Immigration Law Practitioners' Administration* 2013, 8.

⁹⁵ A. MACKLIN, "Kick-Off Contribution" in A. MACKLIN and R. BAUBÖCK, *The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?*, Italy, RSCAS, 2015, (1) 2.

⁹⁶ M. SCALVINI, "The secret war: British nationals stripped of their citizenship", *Open Democracy*, 2013,

http://eprints.lse.ac.uk/69460/1/Scalvini_The%20secret%20war_%20British%20nationals%20stripped%20of%20their%20citizenship%20_%20openDemocracy_published_2013%20LSERO.pdf; A. ROSS, "Deprivation of Citizenship: What Do We Know?", *Immigration, Asylum and Nationality Law* 2014, Volume 28, Issue 4, (316) 320.

⁹⁷ The Asylum and Immigration Act 2004 Schedule 2 repealed section 40A(6) of the British Nationality Act 1981, which did not allow an order to be enforced whilst the individual was not on UK soil.

UK in order to appeal to the decision and claim a fair trial. And even if this person has enough resources to appoint a legal representative in the UK, and appeals to the decision, he might still find hurdles in instructing and communicating with them in a secure and confidential way.⁹⁸ Secondly, another issue which causes the test against the law to be bypassed is that an appeal to an order for deprivation has to be filed within 28 days after the order. This very narrow timeframe does not allow the individual to develop a viable defence, and this deadline is easily expired. It is clear that in this particular case, the procedural safeguard against arbitrary deprivation in article 15 (2) UDHR and article 8 (4) 1961 Convention is not taken into account.

37. Since the 1997 Special Immigration Appeals Commission Act, a deprivation procedure was implemented in which the UK can keep oral or written evidence secret from the individual for the sake of national security. Only a special advocate, who is appointed by the State, is permitted to see the evidence that is kept secret and he may not speak to the individual or legal representative after seeing the evidence, unless granted permission to do so (by the State). In this case, the ‘national security’ reason might be used as a valid reason to avoid the necessity of a fair trial. This procedure is a very good example of Mr. Berry’s statement. It is very dubious whether in these proceedings, there still is ‘due process’.⁹⁹ An individual could be deprived for reasons which have never (note: in his respect) been proven by tangible evidence.¹⁰⁰ The European Court of Human Rights concluded in *A. and Others v the United Kingdom* that this system can only be applied, non-arbitrarily, after there has been a careful examination of the facts and the person.¹⁰¹

38. It is clear now that in the past, the UK always committed to reducing statelessness, but due to the increasing threat of international crime and terrorism, the UK has significantly and regrettably undermined its own historic commitment to reducing statelessness and upholding human rights. By allowing deprivation of all citizens and allowing to render naturalized citizens stateless, they have not infringed international treaties, but there is a clear evolution which leads towards a broader discretion for the government due to the “conducive to the public good”-test. On one hand, the UK legislator must be careful not to allow the government a too broad discretion, for this might lead to unreasonable, disproportionate or unnecessary deprivations. On the

⁹⁸ A. BERRY, “Arbitrary deprivation of nationality: Submission of the Immigration Law Practitioners’ Association to the UN Office of the High Commissioner for Human Rights”, *Immigration Law Practitioners’ Administration* 2013, 2; A. ROSS, “Deprivation of Citizenship: What Do We Know?”, *Immigration, Asylum and Nationality Law* 2014 Volume 28, Issue 4, (316) 323.

⁹⁹ Article 15 (2) UDHR & article 8 (4) 1961 Convention; A. ROSS, “Deprivation of Citizenship: What Do We Know?”, *Immigration, Asylum and Nationality Law* 2014, Volume 28, Issue 4, (316) 322.

¹⁰⁰ A. BERRY, “Arbitrary deprivation of nationality: Submission of the Immigration Law Practitioners’ Association to the UN Office of the High Commissioner for Human Rights”, *Immigration Law Practitioners’ Administration* 2013, 6.

¹⁰¹ ECtHR, 19 February 2009, no 3455/05, *A. and Others v The United Kingdom*; A. HARVEY, “Deprivation of nationality: Implications for the fight against statelessness”, *Questions of International Law* 2016, (21) 35; L. ZEDNER, “Citizenship Deprivation, Security and Human Rights”, *European Journal of Migration and Law* 2016, Volume 18, Issue 2, (222) 229.

other hand, from a procedural standpoint, unilateral action taken by an executive agency (Secretary of State) with only limited judicial review and a limited amount of time to appeal violates conventional understandings of due process.¹⁰²

CONCLUSION

39. As the introduction has shown, several States all over the world regard deprivation of citizenship as a possible instrument to fight terrorism. This mind-set of States brought up the following question: In the wake of recent terrorist attacks, what kind of denationalization program, regarding suspected terrorists, would be in accordance with the international human rights law and is this really an effective tool to fight global terrorism? Two questions came up.

40. Can States implement denationalization programs to combat terrorism in light of the international law? Yes, they can. A lot, however, depends on whether they attempt to deprive a single national or a dual national and whether they have adopted sufficient procedural safeguards. It also depends on what other treaties the State is party to (ECN for example), how these are interpreted and what reservations the States made. The general theory is this. Principally, States are completely sovereign to determine their nationality laws, but limitations are imposed predominantly by the Universal Declaration of Human Rights and the 1961 Convention on the Reduction of Statelessness. Article 15 (2) UDHR has been interpreted by the UNHCR to offer a suspected terrorist and any other individual both a procedural and substantive protection against an arbitrary deprivation of citizenship. The procedural protection offers the individual due process, which means that every decision has to be taken in accordance with a domestic law which prohibits the particular terrorist activity. Also, a meaningful possibility to contest the decision before an independent tribunal must be open. The substantive protection requires the decision to be necessary, reasonable and proportionate. It must have a legitimate purpose and the impact of the deprivation has to be proportionate with that legitimate purpose. The court has to engage in a balancing exercise between the impact of the deprivation on the rights of the individual on one hand and the legitimate purpose for which the State deprives on the other hand. In relation to terrorism that legitimate purpose is to reduce the threat of an imminent attack. In case of single nationals, deprivation resulting in statelessness would always be arbitrary, according to article 8 (1) 1961 Convention, because the impact of the individual losing his right to all other rights will always outweigh the interests the State seeks to protect. However, in the 1961 Convention, exceptions have been made in certain circumstances. In relation to terrorist activities, the interests the State seeks to protect actually outweigh the impact of statelessness due to the severity of the acts committed. Article 8 (3)(a)(ii) claims that where an individual has acted in a manner which is prejudicial to the vital interests of the State, the State can deprive that

¹⁰² S. JAYARAMAN, "International Terrorism and Statelessness: Revoking the Citizenship of ISIL Foreign Fighters", *Chicago Journal of International Law* 2016, volume 17, Issue 1, (180) 202.

individual of his citizenship even if it rendered him stateless. The Office of the UN High Commissioner for refugees stated that terrorist acts fall under this provision. What “terrorist acts” constitutes, is left open to the State’s discretion, so they would be able to extend the scope to suspected terrorist acts. Moreover, it is important to note that parties to the 1997 European Convention on Nationality are not allowed to deprive their citizens of their citizenship in any case (except fraud) if it would render them stateless. In case of dual nationals, as long as the deprivations is in compliance with the conditions of non-arbitrary deprivation, it should be allowed. The conclusion here would be that, subject to conditions, States are allowed to adopt denationalization programs to deprive their citizens of their citizenship for terrorism-related activities. In case of a dual national, deprivation for terrorism is allowed, unless the deprivation is not in accordance with the procedural rules, is not necessary, nor proportionate, nor reasonable, in which case the deprivation would be arbitrary. In case of a single national, deprivation is prohibited, unless in the special circumstances listed in article 8 (2) & (3), where terrorism falls under the acts prejudicial to the vital interests of the State.

41. Should States implement denationalization programs to combat terrorism? The question here is whether the decisions to deprive an individual are indeed an effective measure for the purposes for which they were adopted. The scale clearly tipped over to the arguments against deprivation. Why is this? It is very clear that all the arguments in favour of deprivation to fight terrorism are argued from an isolationistic point of view. The State wishes to solve the threat to their national security today and protect their citizens today, without thinking about the bigger picture in the future. Deprivation seems the most inexpensive and effective way to deal with the problem. By “punishing” these terrorists, States believe they deter future individuals from engaging in terrorist activities. But this only creates a so-called “security fallacy”. Depriving that citizen, who is merely suspected of terrorism, will only push him and his relatives more towards radicalization and hatred for the country. If, on top of that, the individual is rendered stateless and loses every prospect of a decent and humane life, where he cannot enjoy his civil, political and socio-economic rights, the more he will be alienated from society. Also, the selfish act of exporting terrorism to another part of the world, where there are not enough resources, will-or manpower to fight it, certainly does not help to fight global terrorism, it even supports it. After consideration, the negative consequences of deprivation clearly outweigh the positive consequences. If the world is to fight terrorism on a long term, and clear out the root instead of trimming the branches, deprivation is not an effective tool. The consequence of the ineffectiveness is that it might tackle the entire idea behind the deprivation system for terrorist activities. According to the UDHR, a deprivation has to be necessary, reasonable and proportionate. It seems hard to understand that a measure which is adopted for a specific purpose, but is not capable of achieving that purpose is still a reasonable and necessary measure. It does not seem proportionate to strip an individual from all his rights in that country for a purpose which it will never accomplish, either. If States were to adopt measures to prevent suspected terrorists from returning home, they have less infringing measures to their disposal, such as passport revocations, travel bans and many

more. Instead of losing the ability to convict suspected terrorists, States should keep the suspected terrorist registered as a national in order to track his every movement and work together to be able to apprehend him. A suspected terrorist who has been convicted and imprisoned is less dangerous than a suspected terrorist in another country with the means to enter your country illegally and undetected. Only this would be the way forward.

42. In order to show how a national system could be regarded arbitrary in light of international law, the nationality laws of the United Kingdom were examined. In relation to the substantive protection offered by international law, they are in accordance with the international legal framework. Since 2006 and according to section 40 (2) of the British Nationality Act, the Secretary of State can deprive both naturalized and natural born, of terrorism suspected, citizens when he is satisfied that the deprivation is conducive to the public good, as long as it does not render the suspected terrorist stateless (dual nationals). Since 2014 and according to section 40 (4A), the Secretary of State can now deprive naturalized, of terrorism suspected, citizens and render them stateless when it is conducive to the public good, because the individual has acted in a manner which is prejudicial to the vital interests of the State and reasonable grounds exist to believe the individual will acquire a new citizenship elsewhere. Some of the aspects in the UK system, however, are not in accordance with the due process requirements in the UDHR and 1961 Convention. Due process means that the individual is able to appeal to the decision, is offered enough possibilities to develop a defence and is able to be present at his trial. In the UK, the decision to deprive is made by the Secretary of State without the need to prove any actual infringement of the law. The UK legislator must be careful not to allow the government a too broad discretion, for this might lead to unreasonable, disproportionate or unnecessary deprivations. The lack in due process exists where the possibilities for an appeal and legal scrutiny on those conditions are limited. This is an issue for example, where the UK deprives their citizens whilst being outside the territory. They will lose their citizenship immediately, so they don't have a right to re-enter the UK to appeal to the decision. An appeal from abroad is not evident. Another issue is that there is only a 28-day timeframe to appeal to the decision. This does not permit to create a viable defence.

43. It is clear now, that States are principally allowed to deprive their citizens, suspected of terrorism, of their citizenship to reduce the threat to national security even if it were to render the individuals stateless, depending on which treaties they are party to. The consequences of this deprivation, however, have shown not to be effective instruments to combat neither domestic threats on a short-term basis, nor global terrorism on a long-term basis. This realisation might tackle the idea behind denationalization programs.