

Ever Challenged Union: Exploring Ways Out of the Crises

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The European Union should introduce legislation to harmonise anti-terror laws in the 28 Member States

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Abstract

Reports suggest up to 5000 European Union citizens have joined jihadist militant groups located in Syria, Iraq, Libya and Yemen. Approximately one in 15 of those returning to their Member State of origin are suspected of involvement in terrorist activities. This serious threat challenging European Unions internal borders is unprecedented, observed following the terrorist attacks in Paris and Copenhagen in 2015, and an earlier attack in 2014 perpetrated by an Islamic State operative.

In response, to ensure the safety of their citizens and protect national security some Member States of the European Union have introduced legal measures at port and border controls. Germany is planning new anti-terror legislation aimed at confiscating citizens' identification cards, for a period of three years, and the UK passed legislation allowing for the seizure of passports and travel documents of those suspected of being involved in terrorist activity. Further provision has been created or proposed, introducing temporary exclusion orders lasting for at least two years.

In light of the differing laws and measures between the Member States, the European Union must introduce legislation to harmonise anti-terror laws throughout the 28 Member States with regards to port and border controls, safeguarding a balance between individual fundamental human rights protected under the Charter of Fundamental Rights of the European Union, whilst maintaining public safety and national security.

Introduction

Recent reports suggest that approximately 5000 European Union citizens have been, and are currently engaged in terrorist related activities in conflict zones such as Syria, Iraq, Libya and Yemen. One in 15 returning suspected of involvement in terrorist activities, potentially pose a threat to their respective Member State upon return.¹ The immeasurable nature and vast numbers serves to fashion an extraordinarily difficult if not impossible task of monitoring suspects and accurately managing the risk. In addition to the independent operational ability of potential terrorists, this fact has led Rob Wainwright head of Europol to assert that the European Union currently faces the highest terror threat since the US attack by Al-Qaeda in 2001.²

In the absence of European Union legislation some Member States have proactively shaped their own legal measures to reduce the threat posed from returning citizens. The UK for example enacted the Counter-Terrorism and Security Act 2015, introducing measures that allow authorities to seize passports and travel documents, and further allow the Secretary of State to temporary exclude citizens suspected of involvement in terrorist related activity returning to the UK.³ Germany and France are currently discussing similar yet more intrusive longer-term temporary measures.⁴

This paper will show that Member States actions in response to the current terror threat are not conducive with the aims of the European Union, particularly in terms of conformity and

¹ G. Buttarelli, (2015). 'Counter-terrorism, De-Radicalisation and Foreign Fighters', Joint debate during the extraordinary meeting of the LIBE Committee'. European Parliament, Brussels, 27 January 2015

² V. Dodd, (2015). 'Europe faces highest terror threat since 9/11, MPs told', *The Guardian*, 13 January 2015, <http://www.theguardian.com/uk-news/2015/jan/13/europe-highest-terror-threat-911-europol-fighting-overseas> accessed 30 April 2015

³ Counter-Terrorism and Security Act 2015, s1, 2, 3, 4.

⁴ D. Tost, (2015) 'Germany set to pass one of the harshest anti-terror laws in Europe', EU News and policy debates, across languages, 5 February 2015 <http://www.euractiv.com/sections/justice-home-affairs/germany-set-pass-one-harshest-anti-terror-laws-europe-311851> accessed 30 April 2015

consistency, and the impact these measures pose to citizens' human rights protected under the Charter of Fundamental Rights of the European Union (Charter).⁵

It will be argued the European Union should enact specifically detailed and phrased legislation, somewhat in line with the UK's recent legislative measures.⁶ These are representative of a far less intrusive nature than that proposed by other Member States. This would serve to introduce safeguards and protect Charter rights. What cannot be denied is that the current international terror threat requires an international cohesive response.⁷

The Threat

The current and potential threat to the internal borders of the European Union (EU) has never been so serious, and can be disseminated into two segments.⁸ Firstly, the self-radicalisation of EU citizens represents one of the most fear-provoking realities, brought about by terrorist groups paedophilic use of the Internet and social media, influencing them to leave their host Member State to receive terrorist training and to fight with the group. This is worrying given that such citizens can stay under the State security agencies radar, hence remaining relatively unknown until they have either left the Member State, or a family member or friend notifies the authorities.⁹ Secondly, EU citizens that have successfully left their country to receive terrorist training and fight with terrorist groups after being radicalised, or indeed as part of their radicalisation process. The training provides citizens with independent operational

⁵ Charter of Fundamental Rights of the European Union, see: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT> accessed 1 June 2015

⁶ Counter-Terrorism and Security Act 2015

⁷ J. Bamat, (2015). 'French PM unveils package of anti-terror measures', see: <http://www.france24.com/en/20150121-france-pm-manuel-valls-unveils-new-anti-terror-measures> accessed 1 June 2015

⁸ J. Argomaniz, O. Bures, and C. Kaunert, (2014). 'A Decade of EU Counter-Terrorism and Intelligence: A Critical Assessment', *Intelligence and National Security*, 30:2-3, 191-206, 203. See also: V. Dodd, (2015). 'Europe faces highest terror threat since 9/11, MPs told', *The Guardian*, 13 January 2015, <http://www.theguardian.com/uk-news/2015/jan/13/europe-highest-terror-threat-911-europol-fighting-overseas> accessed 30 April 2015

⁹ T. Burrows, (2015). 'Families of three London schoolgirls believed to have gone to Syria to become 'jihadi brides' travel to Turkey to retrace their steps', *The Daily Mail Online*, 23 March 2015, <http://www.dailymail.co.uk/news/article-3008382/Families-three-London-schoolgirls-believed-gone-Syria-jihadi-brides-travel-Turkey-retrace-steps.html> accessed 1 June 2015

abilities and enhanced skills in using firearms and explosives, evidenced by the terrorists' actions seen in the Paris and Copenhagen attacks in 2015, and in Belgium 2014.¹⁰ This second element poses the greatest risk given that one in 15 of those who have received such training, who then return potentially pose a direct terrorist threat to their host Member States.¹¹ The potential risk to the EU as a whole is dramatically intensified due to the freedom of movement of EU citizens, particularly within the Schengen area.¹² Considering both elements of the fold, the immeasurable nature of the current threat is most concerning in terms of the Member States duty in protecting its citizens and national security.

The main international terrorist groups actively radicalising and pro-offering training to EU citizens are the Islamic State (IS or ISIS or ISIL), Al-Qaeda and its affiliates, the Al-Nusra Front, Al-Shabaab and Boko Haram.¹³ In addition to a paedophilic grooming use of social media and in the course of conducting a huge online marketing campaign they infiltrate EU

¹⁰ V. Dodd, (2015). 'Europe faces highest terror threat since 9/11, MPs told', *The Guardian*, 13 January 2015, <http://www.theguardian.com/uk-news/2015/jan/13/europe-highest-terror-threat-911-europol-fighting-overseas> accessed 1 June 2015. For Paris terrorist attacks see: <http://www.bbc.co.uk/news/world-europe-30708237> accessed 30 April 2015. For Copenhagen terrorism attack see: <http://www.theguardian.com/world/2015/feb/14/copenhagen-blasphemy-lars-vilks-prophet-muhammad-krudttonden-cafe> accessed 1 June 2015. For Belgium terrorist attack please see: <http://www.theguardian.com/world/2014/may/24/brussels-jewish-museum-attack-three-dead> accessed 1 June 2015

¹¹ G. Buttarelli, (2015). 'Counter-terrorism, De-Radicalisation and Foreign Fighters', *Joint debate during the extraordinary meeting of the LIBE Committee*. European Parliament, Brussels, 27 January 2015

¹² 'The free movement of persons is a fundamental right guaranteed by the EU to its citizens. It entitles every EU citizen to travel, work and live in any EU country without special formalities. Schengen cooperation enhances this freedom by enabling citizens to cross internal borders without being subjected to border checks. The border-free Schengen Area guarantees free movement to more than 400 million EU citizens, as well as to many non-EU nationals, businessmen, tourists or other persons legally present on the EU territory.' See http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/index_en.htm accessed 1 June 2015. And see also: 'Free movement of workers is a fundamental principle of the Treaty enshrined in Article 45 of the Treaty on the Functioning of the European Union and developed by EU secondary legislation and the Case law of the Court of Justice.' <http://ec.europa.eu/social/main.jsp?catId=457> accessed 1 June 2015.

¹³ For the Islamic State please see: M. Chulov, (2014). 'Isis: the inside story', *The Guardian*, 11 December 2014, <http://www.theguardian.com/world/2014/dec/11/sp-isis-the-inside-story> accessed 1 June 2015. For Al-Qaeda see: A. Wander, (2008). 'A history of terror: Al-Qaeda 1988-2008', *The Guardian*, 13 July 2008, <http://www.theguardian.com/world/2008/jul/13/history.alqaida> accessed 1 June 2015. For Al-Nusra Front see: H. Mustapha, (2014). 'The al-Nusra Front: From Formation to Dissension', Policy Analysis, *Arab Centre for Research and Policy Studies*, available online at <http://english.dohainstitute.org/file/get/9dd86818-7314-40ec-bf8e-be4a0db226c0.pdf> accessed 1 June 2015. Al-Shabaab see: <http://www.bbc.co.uk/news/world-africa-15336689> accessed 1 June 2015. For Boko Haram see: F. Chothia, (2015). 'Who are Nigeria's Boko Haram Islamists? *BBC Africa*, 4 May 2015 <http://www.bbc.co.uk/news/world-africa-13809501> accessed 1 June 2015.

citizens' homes and target children and vulnerable adults, radicalising them to their perverted interpretation of religious, and political, idealistic values.

In light of the threat posed, the Member States have been left to introduce legal measures to deal with both segments to the threat, to stem the flow of EU citizens leaving their country to engage in terrorist activity, and then to halt their return until an assessment can be made as to their potential threat level. It is at this point the EU should take the lead and set the minimum standards for implementing pre-terrorism sanctions, particularly for those Member States yet to deal effectively with this issue, and to safeguard fundamental rights.

Pre-Terrorism Sanctions

A growing tendency in preventing an act of terrorism and combating the threat has been the sanctioning of terrorism before an act has been carried out. Preparatory acts of terrorism, such as the collection of data have been sanctioned in the UK for example since the introduction of the Terrorism Act 2000.¹⁴ Some Member States, however, have implemented precautionary risk management logic providing forward momentum from mere prevention to pre-emption, by way of quasi-criminal measures.¹⁵ These pre-terrorism measures are brought about by legislation, introducing either judicial or special executive prohibition orders.¹⁶ They are utilised when the State lacks adequate evidence to arrest and bring formal criminal charges against a suspect, yet have reasonable suspicion they are, or/and have been engaged in terrorism related activity. The nature and practical implications of restricting movement of

¹⁴ Terrorism Act 2000, s57: 'Possession for terrorist purposes, (1) A person commits an offence if he possesses an article in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism: and s58: Collection of information, (1) A person commits an offence if (a) he collects or makes a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism, or (b) he possesses a document or record containing information of that kind.'

¹⁵ M. D. Boer, and I. Wiegand, (2015). 'From Convergence to Deep Integration: Evaluating the Impact of EU Counter-Terrorism Strategies on Domestic Arenas'. *Intelligence and National Security*, 30:2-3, 377-401, 401

¹⁶ M. D. Boer, and I. Wiegand, (2015). 'From Convergence to Deep Integration: Evaluating the Impact of EU Counter-Terrorism Strategies on Domestic Arenas'. *Intelligence and National Security*, 30:2-3, 377-401, 401

suspects in the absence of formal criminal charges or prosecution, impact heavily upon Charter rights.¹⁷ Whilst the EU's and Member States legal and policy developments in this area have been driven by concerns of security and public safety, the majority of scholars have suggested that as a result human rights have been adversely affected.¹⁸ This may be the case, however, it is argued that without the adequate safeguarding of citizens Article 2 right protected under the Charter, (Right to life), the others such as Articles 6, 7 and 8 are rather redundant.¹⁹

The EU has not been entirely opposed to implementing such restrictive measures. This as seen in the directive preventing the use of the financial system, for the purposes of money laundering and terrorist financing.²⁰ Some individual Member States have a rather long history of dealing with other forms of terrorism whereby quasi-criminal measures have been necessitated. The UK for example has restricted the movement of terrorist suspects since implementing the Terrorism Prevention and Investigation Measures Act 2011 (TPIMA). Using the UK as a case study, their introduction was led by the UK's eventual failure to legitimately and legally deport foreign nationals who posed a potential terror threat and secondly, to provide legal authority to legitimately subject UK nationals to viscous intensities

¹⁷ Such as Article 6 Right to liberty and security and Article 7 Respect for private and family life, The Charter of Fundamental Rights of the European Union.

¹⁸ C. Kaunert, J. D. Occhipinti, and S. Leonard, (2014). 'Introduction: supranational governance in the Area of Freedom, Security and Justice after the Stockholm Programme'. *Cambridge Review of International Affairs*, 27:1, 39-47: 39-40. See also: A. Baldaccini, E. Guild and H. Guild (eds) (2007). '*Whose freedom, security and justice? EC Immigration and asylum law and policy*'. (Oxford: Hart) And: T. Balzacq and S. Carrera (eds) (2006). '*Security versus freedom? A challenge for Europe's Future*'. (Aldershot: UK: Ashgate). And: D. Bigo, S. Carrera, E. Guild and R. Walker (eds) (2010). '*Europe's 21st Century challenge: delivering liberty*'. (Farnham, UK: Ashgate). And: E. Guild and F. Geyer (eds) (2008). '*Security versus justice? Police and judicial cooperation in the European Union*'. (Aldershot, UK: Ashgate). And: J. Huysmans (2006). '*The politics of insecurity: fear, migration and asylum in the European Union*'. (London: Routledge). And: J. Monar, W. Rees and V. Mitsilegas (2003), '*The European Union and internal security: guardian of the people?*' (Basingstoke, UK: Palgrave). And: R. Van Munster (2009). '*Securitizing immigration: the politics of the risk in the EU*'. (Basingstoke, UK: Palgrave Macmillan).

¹⁹ The Charter of Fundamental Rights of the European Union, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT>.

²⁰ Directive on the prevention of the use of the financial system for the purposes of money laundering and terrorist financing (2005/60/EC)

of surveillance in order to reduce the level of a continuing threat.²¹ More intrusive genres of quasi-criminal measures have historically existed and been used by the UK, such as the power of internment issued under the Civil Authorities (Special Powers) Act (Northern Ireland) 1922 (more commonly known simply as the Special Powers Act). Introduced to deal primarily with the geo-political terrorist threat, the increase in suspected Irish Republican Army (IRA) membership in the 1970's led to a surge in the use of these wide sweeping powers.²² Paragraph 23 of the Schedule allowed for the indefinite internment without warrant or trial of,

‘...any person whose behaviour is of such a nature as to give reasonable grounds for suspecting that he has acted or is acting or is about to act in a manner prejudicial to the preservation of the peace or maintenance of order’.²³

The importance of this historical context cannot be overlooked due to the current system of TPIMs being referred to as merely a form of internment with different packaging.²⁴ Although such an assertion lends itself to a good headline, the legal framework and conditional requirements are entirely different. The legal genealogy of the TPIMA can be traced specifically to Part IV of the Anti-Terrorism, Crime and Security Act 2001 (ATCSA) that permitted the Home Secretary to detain foreign nationals indefinitely, suspected of international terrorist activity.²⁵ Although not entirely linked, this particular statute was put before UK Parliament and enacted following Al Qaeda's terrorist attack on the US, on 11th September 2001.²⁶ These measures have since been retracted and the expanded in a game of

²¹ *Chahal v United Kingdom* [1996] 23 EHRR 413. See also: K. D. Ewing, *Bonfire of the Liberties: New Labour, Human Rights, and the Rule of Law* (Oxford University Press 2010) 227

²² D. McKittrick and D. McVea, (2001). *Making Sense of the Troubles* (Penguin Books) 11

²³ <http://cain.ulst.ac.uk/hmspa/spa1922.htm> accessed 1 June 2015

²⁴ <http://www.theguardian.com/commentisfree/2012/jan/18/ira-marian-price-internment> accessed 1 June 2015

²⁵ Anti-Terrorism, Crime and Security Act 2001 s23; provided that a suspected international terrorist could be indefinitely detained under immigration powers should expulsion from UK fail by way of ECHR obligations. Detainee could appeal to the Special Immigration Appeals Commission.

²⁶ C. Walker, (2009). *Blackstone's Guide to The Anti-Terrorism Legislation* (2nd edition Oxford: Oxford University Press) 25

phrased chess, played out between the UK judiciary and the executive. They remain expanded since 2015 in an attempt to halt both segments of the current terror threat.

Forbidding Free Movement: outbound

Remaining for the moment within the ambit of UK legislation, on the 12th February 2015 the UK coalition government passed the Counter Terrorism and Security Act 2015 (CTSA). This Act was introduced to deal with citizens leaving the UK to engage in terrorist related activity, and to implement measures to halt those who wish to return to the UK after training and fighting with terrorist groups. Part 1 Chapter 1 of the CTSA has introduced more quasi-criminal measures, allowing policing agencies to seize passports and travel documents from persons suspected of involvement in terrorism:

- (1) Schedule 1 makes provision for the seizure and temporary retention of travel documents where a person is suspected of intending to leave Great Britain or the United Kingdom in connection with terrorism-related activity.

Under Schedule One the citizen's passport can be retained for up to 14 days from the day after the initial seizure.²⁷ This time allowance can be extended to 30 days from the day after the initial seizure, should the judiciary agree that the relevant persons have been acting diligently and expeditiously in relation to the matters.²⁸ These provisions were debated heavily during the enactment stages that led Lord Carlile to state:

“...We heard some criticism of Clause 1, but I say...[Lords] have got to get real about what Clause 1 is dealing with. Let me give you [a hypothetical] example...Suppose a suspicious travel agent who is public spirited telephones the police and says, ‘I have just sold an air ticket in suspicious circumstances’, and the authorities decide it is worth following the person who has bought the air ticket. That kind of incident can occur within an hour, and it does not leave the time to go off to a judge to get permission to seize that passport. We have to allow the authorities to deal with the urgent provisions made in Clause 1 and Schedule 1”.²⁹

²⁷ See paragraph 5(2) and (3)(a) of the Counter Terrorism and Security Act 2015

²⁸ See paragraph 8(4), (5), (6) and (7) of the Counter Terrorism and Security Act 2015

²⁹ Lord Carlile of Berriew, Counter-Terrorism and Security Bill 2015, House of Lords Second Reading Stage, (13 January 2015: Column 722 7.27pm)

Following this example the urgency and requirement for such emergency power can be appreciated. Whilst the time limitations are not too restrictive, this clearly impacts upon Article 45 of the Charter, Freedom of movement and of residence. Similar to that of the European Convention on Human Rights, any limitation on the exercise of the rights and freedoms under the Charter must be provided for by law.³⁰ Proportionality is the ultimate test of course and it must be deemed necessary in meeting recognised Union objectives, or to protect the rights and freedoms of others.³¹ The test for any State is their ability to keep its citizens safe. Therefore, expanding this requirement to the EU, the latter seems more appropriate in terms of preventing a citizen from leaving the Member State to engage in terrorist related activity. Ultimately it also protects the vulnerable adults and children from themselves, and from being further radicalised and introduced to terrorist related activity should they be permitted to leave.

Germany, in response to current estimates that 550 individuals have travelled to Syria and Iraq to join organisations such as IS, and the fact at least 180 have returned, has approved draft legislation aimed at preventing travel for individuals involved in terrorist activities, by means of confiscating citizens' personal identification cards (ID). The measures under consideration are much more intrusive than that of the UK, allowing for ID to be withdrawn for up to three years, pushing the boundaries one might say of the phrase 'temporary'.³²

German Justice Minister Heiko Maas recognises this fact stating:

'...we will have one of the harshest criminal anti-terrorism laws in all of Europe...that will make Germany safer.'³³

³⁰ Charter of Fundamental Rights of the European Union, Article 52(1)

³¹ Charter of Fundamental Rights of the European Union, Article 52(1)

³² D. Tost, (2015). 'Germany discusses new law to crack down on foreign fighters' EurActiv.com, 15 January 2015 <http://www.euractiv.com/sections/justice-home-affairs/new-german-law-intended-crack-down-foreign-fighters-311283> accessed 20 May 2015

³³ D. Tost, (2015). 'Germany set to pass 'one of the harshest' anti-terror laws in Europe', EurActiv.com, 5 February 2015 <http://www.euractiv.com/sections/justice-home-affairs/germany-set-pass-one-harshest-anti-terror-laws-europe-311851> accessed 20 May 2015

France has proposed a bill allowing powers similar to that of the UK. The Interior Minister under Article 1 could prevent citizens from leaving France if there were serious reasons to believe such citizens were leaving with the aim of participating in terrorist activities. Should the executive suspect the citizen to be traveling to where terrorist groups operate thereby in environments conducive to their posing a threat to public safety upon their return to France, the passport could be withdrawn and prevented from leaving.³⁴ Although the aims of the Member States are the same, the words and phrases making up the ingredients used differ tremendously.

Forbidding Free Movement: the return

‘Then, England’s ground, farewell; sweet soil, adieu... Where’er I wander, boast of this I can, Though banish’d, yet a trueborn Englishman’.³⁵ The expression ‘temporary exclusion orders’ raises contemplations of banishment, indicative of Shakespeare’s Richard II whereby two members of Richard’s court were exiled. The UK, by way of Part 1 Chapter 2 of the CTSA fashions further intrusive measures termed ‘temporary exclusion orders’ and orates,

- (1) A temporary exclusion order is an order which requires an individual not to return to the United Kingdom unless-
- (a) the return is in accordance with a permit to return issued by the Secretary of State before the individual began the return, or
 - (b) the return is the result of the individual’s deportation to the UK.

Five conditions must be met before an order by the Secretary of State can be made and the order lasts up to two years.³⁶ Importantly, they require the Secretary of State to reasonably suspect that the individual is, or has been, involved in terrorism-related activity outside the UK, and reasonably considers that it is necessary, for purposes connected with protecting

³⁴ Human Rights Watch, (2014). ‘France: counterterrorism bill threatens human rights’, 10 October 2014 <http://www.hrw.org/news/2014/10/09/france-counterterrorism-bill-threatens-rights> accessed 20 May 2015

³⁵ W. Shakespeare, *The Complete Works of William Shakespeare, ‘The Life and Death of King Richard II’*. Act I, Scene III, as per Boling. (Odhams Press Limited: London) 435. See also: Baroness Hamwee, Counter-Terrorism and Security Bill 2015, House of Lords Second Reading Stage, (13 January 2015: Column 667 and 668)

³⁶ Counter-Terrorism and Security Act 2015, 4(3)(b) limits the temporary exclusion orders to 2 years inclusive

members of the public in the UK from a risk of terrorism, for a temporary exclusion order to be imposed on the individual.³⁷ Either the UK Court can grant the Secretary of State permission to make an order under section 3, or the Secretary of State can show he considers the urgency of the case requires a temporary exclusion order to be imposed without obtaining permission.³⁸ The UK democratic issues are beyond the ambit of this paper, needless to say the Act provides exceptionally wide powers to the executive. The two-year clause was debated heavily during the enactment stages, leading Lord Carlile to state:

‘...I do not understand the two-year period contained in these amendments. The issue which we are dealing with and which is covered in this clause is, unfortunately, going to last for more than two years...having a two-year sunset clause...would send out a completely incorrect message to those who are minded to go abroad and participate in jihad...We have to show some enduring determination over this issue.’³⁹

Although the Charter rights under Union law appear to have lacked discussion, the Marquess of Lothian raised a valid concern:

‘...looking at the time factor here, what is the legal and international status of someone who has been subjected to a temporary exclusion order?’⁴⁰

In fact, Article 19 of the Charter prohibits collective expulsion, or the expulsion of a person to a State where there is a risk of torture, the death penalty or other inhuman, degrading treatment. Although limited by law, it is argued this particular aspect of the Members States legislative measure will increasingly come under judicial scrutiny. The Court of Justice of the European Union (CJEU) is not disinclined in striking down measures that are disproportionate in nature, particularly when such citizens could be permitted to return to the Member State and subjected to other forms of pre-terrorism sanctions, in accordance with

³⁷ Counter-Terrorism and Security Act 2015, Chapter 2

³⁸ Counter-Terrorism and Security Act 2015, Chapter 2(7)(b)

³⁹ Lord Carlile of Berriew, Counter-Terrorism and Security Bill 2015, House of Lords First Committee Stage, (20 January 2015: Column 1212)

⁴⁰ Marquess of Lothian, Counter-Terrorism and Security Bill 2015, House of Lords First Committee Stage, (20 January 2015: Column 1213)

other existing legislative measures.⁴¹ Lord Macdonald of River Glaven appears to have at least recognised the impact of these measures and the potential for such friction between the executive and the courts:

‘...we should not give away our freedoms in response to terrorism...[it] would be a good idea if [we] were to include a sunset clause...[because the] practicalities of this measure—how it will work in practice—are most in doubt. Those practicalities will significantly impact on the rights of people on whom the orders are imposed...I support the idea of a sunset clause so that the House can thoroughly review how the legislation is working in practice.’⁴²

Mere suspicion that a citizen has engaged with terrorist activity is the required threshold. Considering the length of time the temporary exclusion order may be in place and the intrusive nature of these orders, the threshold should be raised and the executive be satisfied the citizen would pose a serious threat upon return.

Although measures of this kind may seem over intrusive the fact that the immeasurable number of EU citizens estimated to be involvement with terrorist related activity should not be overlooked. Remarkably, the International Centre for the Study of Radicalisation reported that Belgium is ranked third in terms of estimated numbers of citizens per capita leaving to fight in Syria, with France and the UK being first and second.⁴³ With approximately 300 Belgian citizens currently fighting, Foreign Minister Didier Reynders confirmed that ‘returned fighters are subject to investigation and monitoring’.⁴⁴ Although similar in nature, the blatant polarised differences between the Member States legislative measures, in particular the immensely intrusive nature of Germanys proposals shows the EU must step in to protect fundamental rights and freedoms under the Charter. The EU should work to protect young and vulnerable adults who have been radicalised and prevent them leaving the

⁴¹ In the UK for example please see, Terrorism Prevention and Investigation Measures Act 2011, s2, and the extension to these measures brought about by the Counter-Terrorism and Security Act 2015, s16

⁴² Lord Macdonald of River Glaven, Counter-Terrorism and Security Bill 2015, House of Lords First Committee Stage, (20 January 2015: Column 1214)

⁴³ For further information please see: <http://icsr.info>

⁴⁴ EurActiv.com, (2015). ‘In Belgium and France, marginalised Muslims fight in Syria ‘out of despair’’, 16 January 2015, <http://www.euractiv.com/sections/justice-home-affairs/belgium-and-france-marginalised-muslims-fight-syria-out-despair-311338> accessed 20 May 2015

EU to take part in terrorist related activity by enacting legislation to harmonise the law that temporarily prohibits EU citizens from returning to the designated Member State.

EU Internal Security Governance

From the historical and traditional perspective, the provision of security to citizens has been provided exclusively by the Member States of the European Union.⁴⁵ Domestic constitutional links between providing internal security and protecting national sovereignty with regards to EU action, remains guarded by individual Member States, as in Article 5 of the Constitution of the Republic of Poland and Article 117 of the Constitution of the Italian Republic.⁴⁶ These examples provide specific domestic provisions highlighting the ultimate responsibility of State internal security, lies with the individual Member States.⁴⁷ However, given the nature of the current international terror threat, EU security governance must become an increasingly accepted concept. Due to the intrinsic nature of the EU Member States relationships, coupled with those in particular who are a part of the Schengen agreement, a united EU international response is required.

The Treaty on the European Union (TEU) specifies that one of the crucial aims of the Union is to deliver citizens a high level of safety within an Area of Freedom, Security and Justice (AFSJ).⁴⁸ This formal mandate providing the EU with the necessary authority exists by way of Article 3(2) TEU and Article 67(3) Treaty on the Functioning of the European Union

⁴⁵ J. Monar, (2014). 'EU internal security governance: the case of counter-terrorism', *European Security*, 23:2, 195-209, 195

⁴⁶ For issues of supremacy please see: V. Bogdanor, (2012). 'Imprisoned by a doctrine: the modern defence of parliamentary sovereignty', *Oxford Journal of Legal Studies*, 32:1, 179-195. And: C. Eckes, (2012). 'Protective Supremacy from External Influences: A Precondition for a European Constitutional Legal Order?' *European Law Journal*, 18:2, 230-250. And: R. Kwiecien, (2005). 'The Primacy of European Union Law over National Law Under the Constitutional Treaty.' *German Law Journal*, 6:11. See: J. Monar, (2014). 'EU internal security governance: the case of counter-terrorism', *European Security*, 23:2, 195-209, 195

⁴⁷ J. Monar, (2014). 'EU internal security governance: the case of counter-terrorism', *European Security*, 23:2, 195-209, 195

⁴⁸ J. Argomaniz, O. Bures, and C. Kaunert, (2014). 'A Decade of EU Counter-Terrorism and Intelligence: A Critical Assessment'. *Intelligence and National Security*, 30:2-3, 191-206, 191

(TFEU). The law surrounding this area is however, somewhat contradictory in nature. Article 3(2) TEU provides the mandate for the EU to deliver citizens with an area of security, yet Article 4 TEU makes it clear that issues of national security remain within the Member States ambit. Although the latter point was acknowledged in the 2010 EU Internal Security Strategy,⁴⁹ Article 5 TEU states;

‘...the EU shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional level and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.’

This Article provides the basis for the argument proposed in this paper. In light of the fact the Terrorism Situation and Trend Reports (TE-SAT) show that Member States national counterterrorism measures are inadequate insofar as defining a EU response, this proposal is not that radical.⁵⁰ The EU’s internal security governance should be rather motivated by the threats it must counter.⁵¹ The EU has made framework decisions as early as 2002, fashioning minimum legislative measure implementation required by Member States, and a directive in 2008 was passed to prevent money laundering and the financing of terrorism.⁵² Indeed, since the Treaty of Lisbon (ToL) the major actors in providing legislation in the area of internal security are the European Council, European Commission and the European Parliament. Article 83(1) TFEU makes it clear that in accordance with the ordinary legislative procedure, the European Parliament and Council may determine a minimum set of standards regarding

⁴⁹ Council of the European Union (March 2010). ‘*Internal security strategy for the European Union: Towards a European Security Model*’, Brussels, 8 March 2010, 7120/10

⁵⁰ For 2013 TE-SAT Report see: <https://www.europol.europa.eu/content/te-sat-2013-eu-terrorism-situation-and-trend-report> accessed 1 June 2015. For 2014 TE-SAT Report see: <https://www.europol.europa.eu/content/te-sat-2014-european-union-terrorism-situation-and-trend-report-2014> accessed 1 June 2015. Also see: J. Monar (2014) ‘EU internal security governance: the case of counter-terrorism’, *European Security*, 23:2, 195-209, 201

⁵¹ J. Monar, (2014). ‘EU internal security governance: the case of counter-terrorism’, *European Security*, 23:2, 195-209, 202

⁵² Framework Decision on combating terrorism (2002/475/JHA and 2008/919/JHA). And: Directive on the prevention of the use of the financial system for the purposes of money laundering and terrorist financing (2005/60/EC)

the definition of criminal offences. Sanctions can also be set particularly when the crime is of a serious nature with cross-border dimensions. The current international terror threat certainly satisfies this criterion and shows the prerequisite commonality to combat it.

According to the European Union Counter-Terrorism Strategy 2005, the responsibility of combating terrorism lies primarily with the Member States. The EU proposes to add value in four ways:

1. Strengthening National Capabilities
2. Facilitating European Cooperation
3. Developing Collective Capability
4. Promoting International Partnership

The third strand ensures ‘EU level capacity to understand and make *collective policy responses* to the terrorist threat...[my emphasis].’⁵³ Under the key priorities for ‘Prevent’ the EU are to ‘Continue research, share analysis and experiences in order to further our understanding of the issues and develop policies’.⁵⁴ The EU further confirms that:

‘...while Member States have primary responsibility for improving the protection of key targets, the interdependency of border security, transport and other cross-border infrastructures require effective EU collective action...with the support of European institutions, [the EU] will provide an important framework in which Member States are able to co-ordinate their policies...’.⁵⁵

The EU can clearly act should they wish under this 2005 and the 2010 Strategy.

Unfortunately it would appear the EU are rather reluctant to have their support of liberty and human rights questioned by introducing intrusive measures. An additional sticking point for the EU is whether any such measure would withstand criticism from the CJEU as seen in joined cases C-293/12 and C-594/12. Although beyond the ambit of this paper, the CJEU here struck down the Data Retention Directive, leaving the legislators now reluctant to impose

⁵³ Council of the European Union (2005). The European Union Counter-Terrorism Strategy, 14469/4/05, Brussels, 30 November 2005, p4

⁵⁴ Council of the European Union (2005). The European Union Counter-Terrorism Strategy, 14469/4/05, Brussels, 30 November 2005, p9

⁵⁵ Council of the European Union (2005). The European Union Counter-Terrorism Strategy, 14469/4/05, Brussels, 30 November 2005, p10

a directive that may not comply with the principle of proportionality in light of the Charter.⁵⁶

Giovanni Buttarelli, the European Data Protection Supervisor provides evidence for this in his address to the European Parliament:

‘...[the test is] whether the EU legislators are able to...[pass] measures whose legality will be questioned’.⁵⁷

It is argued however, by introducing measures the EU will show they take liberty and security seriously, and protect their citizens’ rights and lives, particularly their Article 2 right. The relationship between the EU executive and the courts should not dictate EU legislators in this way. For some time now, counterterrorism measures have acceptably been associated with pushing the boundaries of the constitutionally accepted.⁵⁸ Upholding public good and protecting citizens right to life under Article 2 of the Charter can be used appropriately, to justify wide and far-reaching measures.

The issue now of course is that due to the current terrorist threat, and EU inaction, a revision to the Schengen agreement made between 26 Members has been proposed by some Member States. France and Spain for example have requested the EU look to implement systematic checks on travellers entering the passport-free Schengen area.⁵⁹ Whilst this falls short of rewriting the agreement, any such measures would serve to impact immensely upon the fundamental freedom of movement within the EU.⁶⁰ This could potentially also lead to increased feelings of segregation, felt most by Belgian citizens within certain minority

⁵⁶ G. Buttarelli, (2015). ‘Counter-terrorism, De-Radicalisation and Foreign Fighters-Joint debate during the extraordinary meeting of the LIBE Committee’, European Parliament, Bussels 27 January 2015, 2

⁵⁷ G. Buttarelli, (2015). ‘Counter-terrorism, De-Radicalisation and Foreign Fighters-Joint debate during the extraordinary meeting of the LIBE Committee’, European Parliament, Bussels 27 January 2015, 2

⁵⁸ M. L. Wade, (2014). ‘The European Union as a counter-terrorism actor: right path, wrong direction?’ *Crime Law Soc Change*, 62:355-383, 374

⁵⁹ See: <http://www.euractiv.com/sections/eu-priorities-2020/french-calls-rewrite-schengen-code-fall-deaf-ears-312088> accessed 1 June 2015

⁶⁰ See: <http://www.euractiv.com/sections/eu-priorities-2020/french-calls-rewrite-schengen-code-fall-deaf-ears-312088> accessed 1 June 2015

communities within the EU.⁶¹ Such issues are well documented to go some way towards self-radicalisation.⁶² This has resulted in the European Commission President Jean-Claude Juncker, confirming the Commission perceives no need to revise the Schengen rules for now.⁶³

It is argued that whilst Jean-Claude takes no action, EU citizens' lives are unnecessarily being risked, in light of the fact that terrorists are free to travel unchecked within the internal borders of the EU, and free to leave and return from conflict zones having received terrorist training. Whilst perhaps a UK Schedule 7 type power would be a bridge too far for the EU to cross, systematic and coordinated checks on individuals enjoying the free movement rights must be implemented.⁶⁴ Terrorist organisations, much like transnational crime groups, are taking advantage of the EU's founding principles. In reality 'only random checks are made to see if travellers entering the Schengen area appear in a police data base because they are wanted by authorities or suspected of terrorist links,' and only '30 per cent of passports presented by travellers entering or leaving the Schengen area are checked electronically.'⁶⁵ Compounding the threat further is the fact Member States and the EU has finite resources in terms of providing adequate surveillance, both in terms of security personnel and finances. It is therefore only possible to place a proportion of these individuals under some degree of surveillance.

⁶¹ A. Tailouti, (2015). 'School, segregation and second-generation Belgian Muslims', ForMENA, Council for MENA Affairs, 27 March 2015, available at: <http://formena.org/en/articles/school-segregation-and-second-generation-belgian-muslims-746387> accessed 1 June 2015

⁶² See: *BBC News Report* 'State multiculturalism has failed, says David Cameron', 5 February 2011 <http://www.bbc.co.uk/news/uk-politics-12371994> accessed 1 June 2015

⁶³ See: <http://www.euractiv.com/sections/eu-priorities-2020/french-calls-rewrite-schengen-code-fall-deaf-ears-312088> accessed 1 June 2015

⁶⁴ See Terrorism Act 2000, Schedule 7 Port and Border Controls; whereby reasonable suspicion is not required

⁶⁵ EurActiv.com, (2015). 'French calls to rewrite Schengen code fall on deaf ears' 13 February 2015 <http://www.euractiv.com/sections/eu-priorities-2020/french-calls-rewrite-schengen-code-fall-deaf-ears-312088> accessed 20 May 2015

The language used with regards to passport seizures and temporary exclusion orders must not be misunderstood, suggesting something rather more aggressive and alienating than is intended. The idea is not to banish but to manage a citizen's return to the EU.⁶⁶ Through this management process, citizens who have been disillusioned by terrorist organisations and de-radicalised, could be detected and used to assist in helping other vulnerable citizens, deterring them from joining such groups. Baroness Hamwee summed up this potential during the debating stages for the UK's CTSA 2015:

'...The most effective dissuasion of individuals from going out to fight may come from those who return disillusioned'.⁶⁷

Conclusion

The UK's approach to passport and travel document seizures should be used to reformulate the EU response. It is far less intrusive and ensures the least amount of impact upon citizens given the strict time limitations. The second element, however, requires specifically detailed phrasing, only allowing for such a measure if a citizen poses a serious risk should they be permitted to return. Additionally, once the executive of the Member State has made an order, judicial review should be made available to the citizen at the earliest possible opportunity, financed by the State in full, ensuring the principle of proportionality, and justice. Whilst it is accepted that Member States are perhaps best placed to enact their individual legal counterterrorism measures, the EU must set the standards of legislation for those Member States that have not yet dealt with this issue, and to raise the threshold to protect fundamental

⁶⁶ Baroness Hamwee, Counter-Terrorism and Security Bill 2015, House of Lords Second Reading Stage, (13 January 2015: Column 667 and 668)

⁶⁷ Baroness Hamwee, Counter-Terrorism and Security Bill 2015, House of Lords Second Reading Stage, (13 January 2015: Column 667 and 668). See also: M. Nawaz, (2015). 'I was radicalised. So I understand how extremists exploit grievances', *The Guardian*, 26 February 2015, available at: <http://www.theguardian.com/commentisfree/2015/feb/26/tackle-extremism-understand-racism-islamism> accessed 1 June 2015

rights under the Charter. The current international threat requires an international cohesive response. However, the majority of Member States are yet to deal with this issue and in the absence of an EU measure, suspected terrorists who pose a serious risk are returning to the internal borders of the EU un-surveyed. In light of the current terror threat, this paper has shown the aims of the EU demand consistency and uniformity in terms of anti-terrorism legislation.

Given the current separatist climate seen throughout the EU and in particular the UK, the EU should take this opportunity to show the Member States and the international community it is a serious player in terms of combating terrorism, providing its citizens with safety and liberty by balancing State powers with fundamental rights under the Charter.⁶⁸ Setting minimum standards of protection for its citizens by providing legislation would also show the citizens of the EU that it is much better to be apart of EU internal security governance.

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⁶⁸ See: N. Gutteridge, (2015). 'Britain WILL vote to leave EU unless there is a 'substantial' treaty change, says top Tory', *The Express*, 28 May 2015, <http://www.express.co.uk/news/politics/580612/Philip-Hammond-EU-European-Union> accessed 1 June 2015. See also T. Wagner-Nagy, (2014). 'European disintegration? Separatist movements across the continent are gaining momentum', University for Peace, Peace and Conflict Monitor, Special Report, November 24 November 2014, http://www.monitor.upeace.org/innerpg.cfm?id_article=1072 accessed 1 June 2015. See also: I. Traynor, (2012). 'Across Europe, leaders fear spectre of separatists breaking countries apart', *The Guardian*, 22 November 2012, <http://www.theguardian.com/world/2012/nov/22/europe-separatist-movements> accessed 1 June 2015

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