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The Denationalisation of Foreign Fighters: How European States Expel Unwanted Citizens

Mattia Pinto

I. Introduction

On 17 August 2017, the Barcelona terrorist attack shocked Europe; 13 people were killed and another 130 were injured by a driver who deliberately slammed a van into crowds on Las Ramblas, Barcelona's most popular street.¹ European states are increasingly confronted with a continent wide-crises that pose challenges to their security. These threats transcend national borders and, are thus difficult to detect and eradicate. Several terrorist attacks, including: the Charlie Hebdo shootings in 2015; the November 2015 Paris attacks, and; the 2016 Brussels bombings were mainly committed by returning 'foreign fighters',² namely Western citizens who - having been radicalised - returned home to commit and organise acts of terrorism. According to the International Centre for the Study of Radicalisation and Political Violence (ICSR), the number of "foreigners that have joined Sunni militant organizations" in Syria or in Iraq exceeds 20,000, and amongst them almost 4,000 are from Western European countries.³ The scale of this phenomenon represents a serious security threat that requires a response.⁴ Amongst other counter-terrorism measures, several Western states have introduced or are considering the introduction of legislation aimed at depriving foreign fighters' of their citizenship.⁵ For the purposes of clarity it must be clarified that this paper employs the term 'denationalisation' to refer to the legal procedure of depriving citizenship.

A great deal has been written about citizenship deprivation (herein referred to as 'denationalisation') as a Countering Violent extremism measure.⁶ However, little attention has been paid to the link between

¹ 'Spain terror attacks: 13 killed and 100 injured – as it happened' (*The Guardian*, 18 August 2017) <www.theguardian.com/world/live/2017/aug/17/barcelona-attack-van-driven-into-crowd-in-las-ramblas-district>.

Unless otherwise specified, all websites were last accessed on 19 February 2018.

² For a working definition of "foreign fighter", see Geneva Academy of International Humanitarian Law and Human Rights (Geneva Academy), 'Foreign Fighters under International Law' (Academy Briefing No 7 – October 2014) 3 ('non-nationals who are involved in armed violence outside their habitual country of residence, including in armed conflict as defined under IHL').

³ P. Neumann, 'Foreign fighter total in Syria/Iraq now exceeds 20,000; surpasses Afghanistan conflict in the 1980s' *ICSR*, 26 January 2015 <<http://icsr.info/2015/01/foreign-fighter-total-syriairaq-now-exceeds-20000-surpasses-afghanistan-conflict-1980s/>>.

⁴ See UNSC Res 2178 (24 September 2014) UN Doc S/RES/2178.

⁵ Citizenship and nationality are usually used as synonym. However, 'the terms "nationality" and "citizenship" emphasize two different aspects of the same notion: State membership. Nationality stresses the international, citizenship the national, municipal aspect.' (P Weis, *Nationality and Statelessness in International Law* (2nd edn, Sijthoff & Noordhoff 1979) 4-5). In this article, I will use the term "citizenship" to refer to the rights and obligations granted to a citizen by his or her own State at domestic level and the term "nationality" to refer to the rights recognised at the international level thanks to the legal bond between an individual and a state.

⁶ See T. Choudhury, 'The Radicalisation of Citizenship Deprivation', 37 *Critical Social Policy* (2017) 2, 225; E. Fargues, 'The Revival of Citizenship Deprivation in France and the UK as an Instance of Citizenship Renationalisation', 21 *Citizenship Studies*(2017), 8, 984; S. Borelli, M. Vitucci, 'The Fight Against Terrorism, Democracy and the Power to Revoke Citizenship', (2016) 31; *QIL Zoom-in 1*: B. De Hart, A. Terlouw, 'Born Here. Revocation and the Automatic Loss of Dutch Nationality in Case of Terrorist Activities' in M. Van den Brink and others, *Equality and Human Rights: Nothing but Trouble?* (Utrecht University Netherlands Institute of Human Rights 2014); G. Goodwin-Gill, 'Deprivation of Citizenship, Statelessness, and International Law' (2014) at <www.parliament.uk/documents/joint-committees/human-rights/GSGG-DeprivationCitizenship-MoreAuthority.pdf>; A. Harvey, 'Deprivation of nationality: Implications for the

deportation and de-nationalisation. The main argument advanced is that denationalisation is often employed by states as a means to enable the deportation of suspected foreign fighters. Yet, in the literature it remains unclear whether this measure is compliant with public international law. This paper seeks to bring clarity to this issue by exploring the nature, the purposes, and implications of denationalisation and its ties with deportation. In so doing, it aims to offer some additional insights into the debate around the challenges to international law resulting from counter-terrorism legislation.

The article argues for the illegality, under international law, of the deprivation of citizenship from suspected terrorists whereby the main purpose of the measure is expulsion. Although denationalisation is not a practice that is contrary to international law *per se*, for denationalisation to be legitimate, it must not be arbitrary. However, the revocation of citizenship for the purpose of circumventing the prohibition on the expulsion of nationals is in fact *arbitrary*, since this is aimed at doing something that is prevented by international law.

This paper will be limited to providing an analysis of cases within Western European states. The overall structure of the study may be divided into three parts. The first part will consider whether citizenship is an individual right as well as the main differences between denationalisation resulting in statelessness and the same measure against dual nationals. In particular, it will be claimed that, despite its inherent limits, nationality is to be considered an individual right, both for dual and mono-nationals. This section (which serves as an introduction to the main contribution of the article) serves to reject the thesis that citizenship, intended as a privilege and not as an individual right, can be discretionally removed. In the second part, the legislation and practice of European countries will be analysed in order to understand what concrete purpose denationalisation aims to achieve. It will be concluded that states generally see this measure as a way to expel an unwanted citizen from their territory or to prevent him or her from returning. The third part of the article will focus on the legality of denationalisation under international law and, especially, whether expulsion can be considered a legitimate aim.

II. Is Citizenship an Individual Right?

Citizenship refers to one's individual membership to a territorial political entity and "denotes entitlement, under the law of a State, to full civil and political rights".⁷ In principle, it is up to each State to determine who its citizens are.⁸ However, the domestic rules on acquisition and loss of citizenship have been increasingly limited by international law. First, nationality laws must respect state obligations towards other states⁹; second, the reserved domain of each state regarding nationality has been affected by the development of human rights law and the international legal regime aimed at the reduction of statelessness.¹⁰ In this regard, there is a trend towards the recognition of citizenship as an individual right

fight against statelessness' 31 *QIL Zoom-in* (2016), 21; P. Lenard, 'Democracies and the Power to Revoke Citizenship' 30 *Ethics & International Affairs* 1(2016), 73; A. Macklin, 'Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien' 40 *Queen's LJ* 1(2014) 1; P. Sykes, 'Denaturalisation and Conceptions of Citizenship in the "War on Terror"', 20 *Citizenship Studies* 6-7 (2016) 749; F. Giustiniani, 'Deprivation of Nationality: In Defence of a Principled Approach', 31 *QIL Zoom-in* (2016) 5.

⁷ A. Aust, *Handbook of International Law* (CUP 2010) 164.

⁸ L. Oppenheim, *International Law* (8th, David McKay Company Inc 1955) 642.

⁹ *Nottebohm Case (Liechtenstein v Guatemala)* (Judgment) [1955] ICJ Reports 1955, para. 21.

¹⁰ See The Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) arts 13, 15; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) arts. 12(4), 24(3); International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (CERD) art. 5(iii); United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) art. 5; United Nations Declaration on the Rights of Indigenous Peoples (adopted 13 December 2007) UN

as opposed to an exclusive prerogative of the State. In the following section, it is contended that nationality should be considered an individual right and that denationalisation represents a state interference with that right.

The right to a nationality has been enshrined for the first time in the Universal Declaration of Human Rights (UDHR)¹¹ and later confirmed in numerous international and regional conventions.¹² Referring to these instruments, the Human Rights Council has recognised the right to a nationality as a fundamental human right.¹³ The right to a nationality is deemed to include the right of each individual to acquire, change and retain a nationality. However, “the acknowledgement of a right to nationality in the human rights law framework is strong on paper but the nature and scope of these provisions is limited”,¹⁴ given the vagueness of the provisions and weakness of enforcement mechanisms both at the domestic and international levels.

The right to a nationality is often also conceived as the prerequisite for the presence of other human rights.¹⁵ In this regard, in the case of *Yean and Bosico v Dominican Republic*, the Inter-American Court of Human Rights observed that:

[para. 137] The importance of nationality is that, as the political and legal bond that connects a person to a specific State, it allows the individual to acquire and exercise rights and obligations inherent in membership in a political community. As such, nationality is a requirement for the exercise of specific rights.¹⁶

This idea also emerges from the case law of the European Court of Human Rights (ECtHR),¹⁷ despite the lack of an explicit provision on the right to a nationality in the European Convention on Human Rights (ECHR).¹⁸ Yet, it is still unclear as to what extent the ECHR protects the right to a nationality. In a recent decision, for example, the European judges agreed that the United Kingdom was right to deprive a suspected terrorist of his citizenship.¹⁹ The ECtHR ruled that the applicant’s complaints were inadmissible, by finding that, although “an arbitrary denial of citizenship might, in certain circumstances, raise an issue

Doc A/61/295 (DRIP) art. 6; Convention on the Rights of Persons with Disabilities (adopted 30 March 2007, entered into force 3 May 2008) 2515 UNTS 3 (CRPD) art. 18; United Nations Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175 (1961 Convention) arts. 1(1), 4(1); American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) (ACHR), art 20(2); European Convention on Nationality (adopted 6 November 1997, entered into force 1 March 2000) (ECN); Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008) art 29.

¹¹ UDHR, art. 15.

¹² See, e.g., CERD, art. 5(iii); ACHR, art. 20. para 2 ; ECN, art 4.

¹³ See, e.g., ‘Human Rights and Arbitrary Deprivation of Nationality, Report of the Secretary General’ (19 December 2013) UN Doc A/HRC/25/28.

¹⁴ H. Lambert, ‘Refugee Status, Arbitrary Deprivation of Nationality, and Statelessness within the Context of Article 1(2) of the 1951 Convention and its 1967 Protocol relating to the Status of Refugees’ *UNHCR Legal and Protection Policy Research Series* (2014), 6.

¹⁵ L. Panella, ‘Sulla revoca della cittadinanza come misura degli Stati per combattere il fenomeno dei foreign fighters’ 4 *Federalismi.it* (2015), 7.

¹⁶ *Yean and Bosico v Dominican Republic* IACtHR Series C No.130 (8 September 2005) para 137.

¹⁷ *Karashev v Finland* App no 31414/96 (ECtHR, 12 January 1999); *Slivenko v Latvia* App no 48321/99 (ECtHR [GC], 9 October 2003), para. 77; *Genovese v Malta* App no 53124/09 (ECtHR, 11 October 2011), para 30; *Ramadan v Malta* App no 76136/12 (ECtHR, 21 June 2016) para 84-85.

¹⁸ Convention for the Protection of Human Rights and Fundamental Freedoms (adopted on 4 November 1950, entered into force 3 November 1953) ETS No.005 (ECHR).

¹⁹ *K2 v United Kingdom* App no 42387/13 (ECtHR, 7 February 2017) (decision on admissibility).

under Article 8 of the Convention because of its impact on the private life of the individual”,²⁰ such issue did not arise in the case at issue.²¹

The conception of nationality as a human right and citizenship as “a status that entitles an individual to particular rights”²² is often contrasted with the idea of citizenship as a bond of loyalty between a State and its citizens. According to the latter position, the recognition by the State of citizenship rights is dependent on the fulfilment of a series of duties by the citizen (in particular the duty of loyalty and alliance toward the State). The commission by a citizen of acts totally in contrast to the state interest (such as espionage and military service in foreign armed forces) constitutes a breach of the bond of loyalty and may justify the decision to deprive the perpetrator of his or her citizenship.²³

These two models of citizenship, albeit based on different political philosophies - the former being based on 'liberal discourse' and the latter on 'civic republican discourse'- are not necessarily incompatible. As Patrick Sykes has suggested, the idea of 'citizenship as loyalty to the state' do not rule out the idea of 'citizenship as rights of the individual'.²⁴ Rather, even for the 'republican model' “citizenship is still conceived of as a body of individual rights, but they are conditional on loyalty to the state”.²⁵

Ultimately, despite its inherent limits, nationality is to be considered an individual right. It is not absolute since its concrete exercise still depends upon each State's willingness, but its importance should not be understated. Nationality is, indeed, the condition necessary to benefit from the protection of a state.²⁶ Although an increasing number of international conventions, national constitutions and bills of rights guarantee protection to everyone regardless of nationality,²⁷ the effective protection of a number of rights (i.e., right to education, right to move, right to property, right to health) still depends, *de jure* or *de facto*, on the possession of a nationality.²⁸ In that sense, nationality can be seen as “no less than the right to have rights”²⁹ because, as Hannah Arendt argued, “the Rights of Man”, supposedly inalienable, proved to be unenforceable ... whenever people appeared who were no longer citizens of any sovereign state”.³⁰

The importance of citizenship is even more evident when analysing its negative side: denationalisation.³¹ Denationalisation “refers to the power of the executive to take away or strip citizenship against the wishes

²⁰ *Ibid.*, para. 49.

²¹ *Ibid.*, para. 64.

²² Sykes (n 6) 756.

²³ S. Lavi, ‘Citizenship Revocation as Punishment: On the Modern Bond of Citizenship and Its Criminal Breach’ 61 *The University of Toronto Law Journal* 4 (2011), 783, 795.

²⁴ *Ibid.*, 789.

²⁵ *Ibid.*

²⁶ Panella (n 15) 3-4.

²⁷ See, e.g., ECHR, art 1.

²⁸ See, e.g., UNCHR, 'Nationality and Statelessness: A Handbook for Parliamentarians' (No. 5-2005), 6. <http://www.ipu.org/pdf/publications/nationality_en.pdf> (“Without citizenship, a person cannot register to vote in the country in which he or she is living, cannot apply for a travel document, cannot register to marry. In some instances, individuals who are stateless and are outside their country of origin or country of former residence can be detained for long periods if those countries refuse to grant them re-entry to their territories. Often, even the most basic of rights – the rights to education, medical care, and employment – are denied to individuals who cannot prove a legal connection with a country.”).

²⁹ This concept is expressed by H. Arendt, *The Origins of Totalitarianism* (Harcourt & Brace 1951) 294.

³⁰ *Ibid.*, 293.

³¹ In this paper, ‘denationalisation’, ‘revocation of citizenship’ and ‘deprivation of nationality’ are used synonymously.

of the person concerned”.³² In general, states may resort to denationalisation where nationality has been acquired through fraud or because the individual has undertaken conduct prejudicial to State interests. It should be noted that denationalisation in response to fraud cannot be equated with denationalisation for the purpose of protecting national security. If one is to accept the principle of *fraus omnia corrumpit* (fraud vitiates everything), citizenship obtained by fraud must be considered void *ab initio*. This principle is not typically applicable where denationalisation is utilised on national security grounds.³³

Another distinction is between cases of deprivation resulting in statelessness and those against dual (or multiple) nationals. International law generally prohibits states from stripping the nationality of their nationals when this would make them stateless.³⁴ Limited exceptions – which should be construed narrowly, as an exception to the general rule³⁵ – are provided for in Article 7 of the European Convention on Nationality and in Article 8 of the 1961 Convention on the Reduction of Statelessness.³⁶ Indeed, statelessness has particularly detrimental consequences and it is difficult to justify such consequences in terms of proportionality.³⁷ A stateless individual is unable to enjoy several fundamental rights, including access to health, education, employment and civil and political rights.³⁸ A stateless individual continues to be subject to state power, but without the wider protection against it offered by citizenship. Conversely, international law does not prohibit denationalisation of multiple nationals (unless it is arbitrary).³⁹ Nonetheless, in the case of *Trop v Dulles*, a US Supreme Court case, Chief Justice Earl Warren ruled that deprivation of citizenship is a 'cruel and unusual punishment' and thus, contrary to the US Constitution.⁴⁰ Moreover, dual nationals may suffer human rights abuses if deprived of one of their citizenships whilst abroad.⁴¹ In particular, as a consequence of the stripping of nationality, the individual is prevented from returning in the country of origin and deprived of the possibility of availing himself or herself of the State's diplomatic protection in cases of abuses abroad. Given these implications, it is clear why the deprivation of citizenship is often severely criticised under both a legal and ethical point of view.

III. European States' Practices Regarding Denationalisation

In most European states, it is already possible to deprive a citizen of his or her citizenship due to national security reasons, but not explicitly as a measure against terrorism.⁴² Generally, the loss of nationality results from acts of disloyalty or treason against the state as well as service in a foreign army. Only in France,⁴³ the Netherlands⁴⁴ and Romania⁴⁵ does legislation specifically refer to the crime of the crime of

³² S. Mantu, 'Citizenship in times of terror: citizenship deprivation in the UK' (*ECPR Standing Groups*, 2015) 1 <<https://ecpr.eu/Filestore/PaperProposal/2ab106b5-1c2a-4be4-9313-8d858890cb39.pdf>>.

³³ See also Harvey (n 6) 21.

³⁴ Geneva Academy (n 2) 58.

³⁵ UN Doc A/HRC/25/28 (19 December 2013) para. 12.

³⁶ ECN, art 7; 1961 Convention, art 8.

³⁷ Case C-135/08 *Janko Rottman v Freistaat Bayern* [2010] ECR I-01449.

³⁸ UNCHR (n 28); see also *Kuric v. Slovenia* App no 26828/06 (ECtHR, 26 June 2012), para.356; *Secretary of State for the Home Department v Al-Jedda* [2013] UKSC 62, [2014] AC 253 [12] ('worldwide legal disabilities with terrible consequences still flow from lack of nationality').

³⁹ UDHR, art. 15 (2).

⁴⁰ 356 US 86 (31 March 1958).

⁴¹ Geneva Academy (n 2) 57.

⁴² See GLOBALCIT, 'Global Database on Modes of Loss of Citizenship, version 1.0' (San Domenico di Fiesole: Global Citizenship Observatory, Robert Schuman Centre for Advanced Studies, European University Institute, 2017) <<http://globalcit.eu/loss-of-citizenship>>.

⁴³ Civil Code (France), art. 25.

⁴⁴ Kingdom Act on Netherlands Nationality, art. 14(2).

⁴⁵ Law on Romanian Citizenship no 21/1991, art. 25(1) (a), (d).

terrorism. However, this does not mean that only these three States denationalise individuals involved in terrorist activities.

Arguably, the UK has the most severe legislation. In 2014, the British Nationality Act 1981 (BNA) was amended by allowing the Home Secretary to deprive citizens of their nationality if it is 'conducive to the public good' because of engagements in conduct 'seriously prejudicial' to the UK's vital interests.⁴⁶ The deprivation is even possible when it produces statelessness, provided that the person concerned obtained his or her citizenship through naturalisation and there are "reasonable grounds to believe that they could acquire another nationality".⁴⁷ This amendment can be seen as 'a reaction to the decision taken by the Supreme Court in the *Al-Jedda* case'⁴⁸ where the UK executive was prevented from making a denationalisation order against Mr Al-Jedda',⁴⁹ a former Iraqi citizen who had obtained British citizenship in 2000, since that order would have left him stateless. Decisions on denationalisation do not require particular due process guarantees. The right of appeal against denationalisation is provided, but only before the Immigration and Asylum Tribunal or a Special Immigrations Appeals Commission. Moreover, an appeal against a deprivation order is "non-suspensive" and the Home Secretary may also consider that the information she relied on should not be made public. In 2016 the Bureau of Investigative Journalism reported that since 2010 the UK Government has stripped 33 individuals of British nationality on national security grounds.⁵⁰

Belgium and Austria have also reinforced their legislative provisions during 2014 and 2015 to ensure that crimes of terrorism can be sanctioned with denationalisation.⁵¹ In particular, after the Charlie Hebdo attack, the Belgian Government decided to introduce Article 23 (2) which provides that it may be "possible to deprive citizens of their nationality if convicted for any terrorist offence to more than five years of imprisonment".⁵² In 2014, the Austrian Parliament passed a new amendment that provided allowed for the denationalisation of Austrian dual nationals who had chosen to fight for foreign groups.⁵³ In March 2017, it was reported that the Austrian authorities had deprived a former Austrian citizen of his nationality due to his participation in the activities of the terrorist group commonly known as *The Islamic State of Iraq and Syria*.⁵⁴

⁴⁶ British Nationality Act 1981, sch. 40.

⁴⁷ *Ibid.*,

⁴⁸ *Al Jedda* (n 38).

⁴⁹ Mantu (n 32) 16.

⁵⁰ V. Parsons, 'Citizenship stripping: new figures reveal Theresa May has deprived 33 individuals of British citizenship' (*The Bureau of Investigative Journalism*, 21 June 2016) <www.thebureauinvestigates.com/2016/06/21/citizenship-stripping-new-figures-reveal-theresa-may-deprived-33-individuals-british-citizenship/>.

⁵¹ Belgian Nationality Law, arts 23-23/2; Federal Law on Austrian Nationality 1985, art 33.

⁵² P. Wautelet, 'Deprivation of Citizenship for "Jihadists" Analysis of Belgian and French Practice and Policy in Light of the Principle of Equal Treatment' 30 *RIMO Bundel* 49(2017), 5.

⁵³ L. Van Waas, 'Foreign Fighters and the Deprivation of Nationality: National Practices and International Law Implications' in A de Guttry, F Capone and C Paulussen (eds), *Foreign Fighters under International Law and Beyond* (T.M.C. Asser Press 2017) 472 ss. See also Federal Law on Austrian Nationality 1985 (as amended by BGBI I no 104/2014), art 33.

⁵⁴ 'Austria firstly stripped off citizenship a man for ISIS links' (*REPORT NEWS AGENCY*, 27 March 2017) <<https://report.az/en/other-countries/austria-firstly-stripped-off-citizenship-of-convicted-for-relations-with-isis/>>.

The amendment of legislation to facilitate denationalisation has also been considered in Germany⁵⁵ and Norway,⁵⁶ while other States, such as France,⁵⁷ the Netherlands⁵⁸ and Switzerland⁵⁹ have contemplated the possibility to expand their already-existing powers. Furthermore, it should be noted that, in the context of the European Union, the loss of citizenship of a Member State implicates the loss of European citizenship as well.

Citizenship revocation may be used as a counter-terrorism measure. However, it is not always clear how this instrument as such may help strengthen national security against terrorist threat. The rhetoric of denationalisation as the natural result of acts of disloyalty against the State does not explain how revocation may contribute in enhancing the security of the general population. In fact, two are the reasons why citizenship deprivation can be presented as technique for addressing the phenomenon of foreign fighters.⁶⁰ On one hand, it may have a deterrent purpose, since the prospect of losing citizenship might dissuade individuals from engaging in terrorist activities. Yet, evidence suggests that the deterrent effect of citizenship deprivation is very weak.⁶¹ Revoking foreign fighters' citizenship does not prevent them from committing terrorist attacks. If they remain in their home country, and no further measures are adopted, their threat to national security remains the same. On the other hand, denationalisation can be used for expelling and/or preventing the return of unwanted citizens. Stripped of their citizenship, the State can more easily remove from its territory individuals deemed to be involved in terrorist activities. This is especially true in case of dual-nationals, who can be expelled to the State of the other nationality. Moreover, an order of deprivation issued when the (suspected) foreign fighter is abroad has the direct effect of preventing his or her re-entry. If we consider that 'the 'foreign fighter problem' is largely framed as 'a problem of return',⁶² we understand why citizenship deprivation is so appealing for many States.

Making the citizen an alien through denationalisation is a necessary step in the process of deportation. It is worth noting that in recent years immigration law has often been used for counter-terrorism purposes. As correctly observed by Audrey Macklin, "since 2001, states have turned to deportation to resolve threats to national security by displacing the embodied threat to the country of nationality".⁶³ Citizenship revocation is to be contextualised in this framework, and the recent evolution of the UK legislation, where immigration law, nationality law and national security law have been bundled together, is a clear example.⁶⁴

⁵⁵ 'Germany Plans Tougher Controls on Would-Be Jihadists, Returning Islamic State Fighters' (*REUTERS*, 27 September 2014), <<http://uk.reuters.com/article/2014/09/26/uk-mideast-crisis-germany-jihadists-idUKKCN0HL1ZV20140926>>.

⁵⁶ K Fangen and Å Kolås, 'The "Syria traveller": reintegration or legal sanctioning?' (2016) 9(3) *Critical Studies on Terrorism* 414; G Mezzofiore, 'Norway 'to Make Citizens Fighting for Isis Stateless' (*IBTIMES*, 27 August 2014) <www.ibtimes.co.uk/norway-make-citizens-fighting-isis-stateless-1462776>.

⁵⁷ Wautelet (n 52) 54.

⁵⁸ G. De Groot, O. Vonk, 'De ontneming van het Nederlanderschap wegens jihadistische activiteiten' (2015) 6 *Tijdschrift voor Religie, Recht en Beleid* 34.

⁵⁹ 'Swiss to revoke citizenship of dual-national jihadists' (*Swissinfo.ch*, 28 July 2016) <https://www.swissinfo.ch/eng/loss-of-passport_swiss-to-revoke-citizenship-of-dual-national-jihadists/42335686>.

⁶⁰ Lenard (n 6) 85-86.

⁶¹ De Hart, Terlouw (n 6) 316.

⁶² P. Spiro, 'Terrorist expatriation: All show, No Byte, No Future' in A. Macklin, R. Bauböck, *The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?* (EUI Working Papers 2015) 8.

⁶³ A. Macklin, 'Kick-Off contribution' in A. Macklin and R. Bauböck, *The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?* (EUI Working Papers, 2015) 1.

⁶⁴ For example, S. Mantu has noted that "conducive to the public good" is a concept borrowed from immigration law where it is used in the context of deportation of non-nationals' (Mantu (n 32) 11).

In the UK, the Government has repeatedly unveiled that the intended purpose of citizenship revocation is indeed expulsion. In 2014, Theresa May, UK Home Secretary at the time, stated that: “the whole point of the measure is to be able to remove certain people from the UK”.⁶⁵ This idea was echoed by the Prime Minister David Cameron: “We must also keep out foreign fighters who would pose a threat to the UK. ... What we need is a targeted, discretionary power to allow us to exclude British nationals from the UK”.⁶⁶

Deportation powers have effectively been used after individuals had been stripped of their citizenship.⁶⁷ Moreover, deprivation orders have usually been issued whilst the individual affected is overseas and they have been accompanied by exclusion orders, with the intended effect of excluding him or her from the country.⁶⁸ The cases of L1 and Mahdi Hashi have demonstrated how denationalisation has generally been used for expulsion purposes.⁶⁹ Mr L1 was deprived of his citizenship when he was in Sudan for a summer holiday.⁷⁰ Being prevented to go back to the UK, he could not appear in person at his appeal against the deprivation order. Mr Mahdi Hashi, on the other hand, was stripped of his British nationality whilst in Somalia. He was subsequently handed to the US army and put on trial in the United States.⁷¹

IV. Does ‘Denationalisation’ Contravene International Law?

Denationalisation, even if recognised as valid under national law, could still represent a breach of international law. International law specifically prohibits arbitrary acts of denationalisation. This principle was first enshrined in the UDHR⁷² and then reaffirmed by several conventions, including the American Convention on Human Rights, the European Convention on Nationality and the Arab Charter.⁷³ The meaning of ‘arbitrariness’ is not provided for in treaties, but can be derived from the case law of supranational courts⁷⁴ and, especially, from the UN Human Rights Council’s ‘Human rights and arbitrary deprivation of nationality: report of the Secretary-General’.⁷⁵ Denationalisation must be done in pursuit of a legitimate aim, it must be proportionate and it must not be discriminatory. Furthermore, there must be procedural fairness and the possibility of challenge before a court.

Firstly, in order not to be arbitrary, the power to revoke nationality should be authorized by law, which must determine its limits and conditions.⁷⁶ According to the principle of legal certainty, the law in question must be clear, adequately accessible and foreseeable to the person concerned.⁷⁷ At the very least, this

⁶⁵ House of Commons Debates, 30 January 2014, col 1043.

⁶⁶ House of Commons Debates, 1 September 2014, col 26.

⁶⁷ B. Mills ‘Citizenship deprivation: How Britain took the lead on dismantling citizenship’ (*European Network on Statelessness*, 3 March 2016) <www.statelessness.eu/blog/citizenship-deprivation-how-britain-took-lead-dismantling-citizenship>.

⁶⁸ ‘Arbitrary Deprivation of Nationality, ILPA comments for the Office of the High Commissioner for Human Rights’ (ILPA, 15 February 2013) 3-4 <<http://www.ilpa.org.uk/resources.php/17273/arbitrary-deprivation-of-nationality-ilpa-comments-for-the-office-of-the-high-commissioner-for-human>>; Parsons (n 50); Mills (n 67).

⁶⁹ For a general overview of the two cases, see Harvey (n 6) 35-37.

⁷⁰ *L1 v Secretary of State for the Home Department* [2013] EWCA Civ 906.

⁷¹ R. Verkaik, ‘Mahdi Hashi: Guilty of supporting al-Shabaab – but was his plea coerced?’ (*The Independent*, 15 May 2015) <www.independent.co.uk/news/world/americas/mahdi-hash-guilty-of-supporting-al-shabaab-but-was-his-plea-coerced-10254530.html>.

⁷² UCHR, art. 15(2).

⁷³ ACHR, art. 20(3); ECN, art 4(c); Arab Charter, art. 29(1).

⁷⁴ *Karashev v Finland* (n 17); *Rottman* (n 37); *Ivcher Bronstein v Peru* IACtHR (6 February 2001) Series C No 74.

⁷⁵ ‘Human Rights and Arbitrary Deprivation of Nationality, Report of the Secretary General’ (14 December 2009) UN Doc A/HRC/13/34.

⁷⁶ *Ivcher Bronstein v Peru* (n 74), para. 49.

⁷⁷ UN Doc A/HRC/13/34 (14 December 2009), para. 25.

means that national law must refer, specifically or implicitly, to the crime of terrorism. Currently, only the France, the Netherlands, Romania, the UK and Belgium comply with this requirement.

Secondly, the aim of the act of revocation must be legitimate.⁷⁸ At first glance, it may seem that stripping citizenship for national security reasons is a completely legitimate aim. However, since deprivation orders are often issued whilst the individual affected is abroad, it appears that the main goal may often be expulsion. As explained below, denationalisation for this purpose may not be, under international law, a legitimate aim.

Thirdly, denationalisation must be necessary for achieving the desired aim.⁷⁹ This means that 'the grounds for revocation must be limited to only the most extreme, unmitigated attacks on the nation's security'.⁸⁰ Where the act of deprivation leads to statelessness, the State should be able to prove that 'vital interests' of the State are so in danger as to leave no other solutions than denationalisation.⁸¹

Fourthly, before a decision of denationalisation is adopted, national authorities must balance the interests of the State to protect its national security and the interest of the individual concerned not to lose his or her citizenship with its attached benefits.⁸² Measures which totally sacrifice the interest of the individual in favour of state interests are illegitimate. On the contrary, in order to be lawful, the decision must take into account the substantive situation of the recipient: for example, whether he or she is dual national or whether he or she has the opportunity to obtain the nationality of another state, whether such a decision would affect his or her family rights (e.g. individual's ability to reside or communicate with his family), to which extent he or she will lose his or her residence and movement rights.⁸³

Fifthly, the revocation of nationality must respect the principle of non-discrimination.⁸⁴ This means that like cases cannot be treated differently. However, the fact that in many States the power to deprive someone of his citizenship is limited to naturalised citizens is potentially discriminatory.⁸⁵ This practice introduces discrimination between those who are citizens by birth and those who receive citizenship at a later time.⁸⁶ Moreover, one might also sustain that even limiting the revocation of citizenship to dual

⁷⁸ UN Doc A/HRC/25/28 (19 December 2013), para. 4.

⁷⁹ *Ibid.*

⁸⁰ Spiro (n 62) 9. *See also*, European Commission for Democracy through Law (Venice Commission), Opinion on the Draft Constitutional Law on 'Protection of the Nation', adopted at its 106th Plenary Session (Venice 11-12 March 2016) CDL-AD (2016)006, para. 25

⁸¹ UNCHR, 'Expert Meeting - Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality' (March 2014) para 68 <www.refworld.org/docid/533a754b4.html>.

⁸² UNSC Res 2178 (24 September 2014) UN Doc S/RES/2178, preamble ("measures to counter the phenomenon of foreign fighters must comply with the UN Charter and with States' obligations under international law, in particular international human rights law, international refugee law and international humanitarian law").

⁸³ *Rottman* (n 37).

⁸⁴ *See, inter alia*, CERD, art. 5(c)(iii); 1961 Convention, art. 9; Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 art 9(1); Human Rights Council Res 7/10 (27 March 2008) UN Doc A/HRC/RES/7/10 paras. 2-3; Res 10/13 (26 March 2009) UN Doc A/HRC/RES/10/13 paras. 2-3; UN Doc A/HRC/20/L.9 (28 June 2012) para. 2; Res 20/5 (16 July 2012) UN Doc A/HRC/RES/20/5 paras. 2-4.

⁸⁵ *See, e.g.*, the US Supreme Court in *Schneider v Rusk* 377 US 163 (1964), paras. 168–169. *See also* ECN, art 5(2) ('Each State Party shall be guided by the principle of non-discrimination between its nationals, whether they are nationals by birth or have acquired its nationality subsequently.')

⁸⁶ For general considerations, *see* Wautelet (n 52) 69.

national means to violate the principle of equality of citizenship.⁸⁷ In this case citizenship becomes 'a right for mono-citizens but a privilege for dual or multiple citizens'.⁸⁸

Finally, the procedure for revocation must comply with safeguards designed to protect the rights of the person concerned.⁸⁹ In particular, decisions on revocation 'shall be issued in writing and shall be open to effective administrative or judicial review'.⁹⁰ The state must also give a full explanation of the reasons which have allowed the revocation, so that the recipient's ability to challenge the orders will not be impeded. The right to be actually or virtually present in the country should be granted, so that the individual would not be forced to challenge the act of revocation from abroad. Whilst abroad, (suspected) terrorists who have lost their citizenship may find the revocation impossible to challenge and may also miss the deadline to file their appeal.⁹¹ Further, proportionality may require that the decision has no immediate effect in order to allow the person concerned to have an effective access to a judicial authority.⁹²

Whilst the main purpose of foreign fighters' citizenship deprivation often appears to be expulsion, it has become necessary to consider whether the denationalisation of foreign fighters for the purpose of expulsion is permitted by international law. Although international law generally allows states to expel aliens, this is prohibited when the states' own nationals are concerned.⁹³ This principle has several reasons. To begin with, some human rights treaties expressly prohibit the expulsion of nationals. This is the case of Article 22(5) of the American Convention of Human Rights, Article 3 of the Fourth Protocol to the ECHR and Articles 22 and 27 of the Arab Charter on Human Rights.⁹⁴ The right expressed in these instruments are considered by some authors as declarative of a general principle of international law.⁹⁵ In the case *Van Duyn v Home Office*, the European Court of Justice held that it is a principle of international law that "a state is precluded from refusing its own nationals the right of entry or residence".⁹⁶

In addition, the prohibition of expulsion of nationals can be derived from the right to reside, leave and return to the country of nationality, enshrined in the UDHR and in the International Covenant on Civil and Political Rights (ICCPR).⁹⁷ Although this right is not absolute (since the ICCPR only prohibits measures that violate the right arbitrarily), the Human Rights Committee has specified that "there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable".⁹⁸ Furthermore, the expulsion of a state's own national may infringe on the sovereignty of other states and,

⁸⁷ Article 17 of the ECN provides that dual nationals should have "the same rights and duties as other nationals of that State Party".

⁸⁸ A. Macklin, 'Kick-Off contribution' (n 63) 6.

⁸⁹ UN Doc A/HRC/13/34 (14 December 2009) para. 43.

⁹⁰ Draft art. 17 of the International Law Commission's Draft Articles on Nationality of Natural Persons in relation to the Succession of States, with commentaries, YB ILC (1999) Vol II (Part Two) 38.

⁹¹ Geneva Academy (n 2), 57.

⁹² *Rottman* (n 37) para 58. Today this is not the case for the UK, where the decision of revocation has immediate effect (*G1 v Secretary of State for the Home Department* [2012] EWCA Civ 867).

⁹³ G. Goodwin-Gill, *International Law and the Movement of Persons between States* (OUP 1978) 203.

⁹⁴ ECHR, Prot 4, art. 3; ACHR, art. 22(5); Arab Charter, arts. 22, 27.

⁹⁵ H. Hannum, *The Right to Leave and Return in International Law and Practice* (Martinus Nijhoff Publishers 1987), 60; Weis (n 5), 45; D. Martin, 'New Rules on Dual Nationality for a Democratizing Globe: Between Rejection and Embrace', 14 *Georgetown Immigration Law Journal* 1 (1999), 1.

⁹⁶ Case 41/74 *Van Duyn v Home Office* [1974] ECR I-1337, para. 22 ("It is a principle of international law ... that a state is precluded from refusing its own nationals the right of entry or residence").

⁹⁷ UDHR, art. 13(2); ICCPR, art. 12(4).

⁹⁸ Human Rights Committee, 'CCPR General Comment No 27: Article 12 (Freedom of Movement)' (2 November 1999) UN Doc CCPR/C/21/Rev.1/Add.9 (General Comment 27), para. 21.

in particular, on the right not to receive undesirable aliens on their territory.⁹⁹ Even those who negate the right of nationals against expulsion acknowledge this principle, by arguing that “the deportation of a citizen is possible only when another state consents to open its doors to the deportee”.¹⁰⁰ Accordingly, as William Worster puts it, a state may only expel a dual national to the other state of nationality if the other state consents to accept that person.¹⁰¹ In this regard, it appears that expulsion of a national on grounds of terrorism is not effectively possible, since it is unlikely that another state is willing to accept him or her.

Not only is the direct expulsion of nationals contrary to international law, but also is a ‘two-step exile’¹⁰² carried out through denationalisation and then, expulsion of the ‘newly-made foreigner’.¹⁰³ Indeed, revocation of citizenship for the sole purpose of circumventing the prohibition on the expulsion of nationals is illegal, since it is aimed at doing something prevented by international law.¹⁰⁴

Denationalisation whilst the recipient is abroad is particularly problematic. Under Article 12(4) of the ICCPR, the right to enter one's own country is granted to citizens as well as to ‘nationals of a country who have been stripped of their nationality in violation of international law’.¹⁰⁵ This implies that denationalisation cannot be used for removing an unwanted individual from the state, since foreign fighters who are stripped of their nationality whilst abroad should be granted the same right to return as citizens.¹⁰⁶ If they were to be a citizens, expulsion would not be lawful.¹⁰⁷ Moreover, if the act of citizenship deprivation occurs when the affected individual is abroad, it may violate international obligations of a State vis-à-vis other States.¹⁰⁸ Paul Weis has argued that “the good faith of a State which has admitted an alien on the assumption that the State of his nationality is under an obligation to receive him back would be deceived if by subsequent denationalisation this duty were to be extinguished”.¹⁰⁹ This is especially true when the act of revocation leaves the individual stateless, since in this case international law prevents the receiving state from deporting the person to another country.¹¹⁰

In addition, denationalisation *in absentia* is likely to negatively affect basic procedural guarantees, such as: the right of the person to effectively defend him or herself; to be present at his or her appeal; and to communicate with legal representatives.¹¹¹ As a result and without such procedural standards in place, the revocation of citizenship ends up being illegal.¹¹² The aforementioned considerations were recently reiterated by the International Law Commission in its 2014 Draft Articles on ‘the Expulsion of Aliens’.¹¹³ Indeed, Article 8 expressly prohibits deprivation of nationality for the sole purpose of expulsion. In the

⁹⁹ W. Worster, 'International Law and the Expulsion of Individuals with More than One Nationality' (2009) 14 *UCLA Journal of International Law and Foreign Affairs* 2, 423, 432.

¹⁰⁰ E. Gross, 'Defensive Democracy: Is It Possible to Revoke the Citizenship, Deport, or Negate the Civil Rights of a Person Instigating Terrorist Action Against His Own State?' (2003) 72 *UMKC Law Review* 51, 90.

¹⁰¹ Worster (n 99) 498-499.

¹⁰² Macklin (n 6) 1.

¹⁰³ J. Crawford, *Brownlie's Principles of Public International Law* (OUP 2012) 520-521.

¹⁰⁴ Hannum (n 97) 61.

¹⁰⁵ General Comment 27, para. 20.

¹⁰⁶ *Ibid.*, para. 21 (“A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country”).

¹⁰⁷ This opinion is shared, *inter alia*, by Macklin (n 6) 10.

¹⁰⁸ E. Fripp, 'Deprivation of Nationality and Public International Law – An Outline' (2014) 28(4) *Immigration, Asylum and Nationality*, 382-83 <<http://sprc.info/wp-content/uploads/2015/02/Fripp-article.pdf>>; Goodwin-Gill (n 6).

¹⁰⁹ Weis (n 5) 55.

¹¹⁰ Worster (n 99) 427.

¹¹¹ ILPA (n 68).

¹¹² UN Doc A/HRC/25/28 (19 December 2013) para 31.

¹¹³ International Law Commission's Draft Articles on the Expulsion of Aliens, with commentaries, YB ILC (2011) vol II (Part Two).

attached report, the International Law Commission stated that such a deprivation of nationality “would be abusive, indeed arbitrary within the meaning of Article 15(2) UDHR”.¹¹⁴

Thus, whether arbitrary or not, the decisions of revocation may violate the principle of *non-refoulement* when individuals who have lost their citizenship are removed from the territory of the state to another state where there is a clear risk of human rights violations.¹¹⁵ In this regard, the British Bureau of Investigative Journalism have reported that at least two individuals stripped of their citizenship were then executed by drone strikes, no longer enjoying the protection that citizenship would have provided them.¹¹⁶

V. Conclusion

The revocation of individual citizenship is therefore, not a practice that is contrary to international law *per se*. Nevertheless, for this revocation to be legitimate, it must comply with certain basic safeguards and international legal instruments. In particular, orders of deprivation should be issued only after a conviction for crimes related to terrorism and only with regard to individuals who are physically present in the territory of the state. No person who has been stripped of his or her citizenship should be expelled to another state. This measure should be proportionate, in relation to the fundamental rights of the person concerned and adequate procedural guarantees should be respected. Finally, denationalisation resulting in statelessness should be avoided except in the most extreme cases.

As a matter of fact, European states' practice and their intention to use this measure fail to meet the above requirements. In fact, citizenship revocation is seen as a way to expel an unwanted citizen from their territory or to prevent him or her from returning. Yet, this instrumental use of denationalisation is hardly compatible with international law. Given the afore-mentioned implications from the perspective of international law, states ought to begin to question whether citizenship revocation is actually the appropriate response. From a national security standpoint, the main consideration is whether the measure will make Europe a safer place. Revoking foreign fighters' citizenship when they are abroad will perhaps prevent them from returning to their home country, but it will may also induce them either to remain involved in terrorist activities or travel to other countries and establish contacts with other foreign fighters. They may also remain in contact with individuals in Europe, finance terrorist activities or being involved in attacks in other states. Thus, it appears that deprivation of citizenship is not always an effective measure for protecting national security, because it merely shifts the problem without positively affecting the actual phenomenon.

Most importantly, a controversial measure like denationalisation does not strike a fair balance between the need for security and protection of individual rights. Denationalisation challenges and weakens the European commitment to freedom and human rights. European states should not cease to adhere to these fundamental principles to defend themselves against terrorist organisations such as ISIS which as a wider part of their agenda seek to attack and undermine such principles. European states must respond firmly to terrorism, but their measures must fully comply with the rule of law and human rights obligations under international law.

¹¹⁴ ILC, 'Report of the International Law Commission on the Work of its Sixty-six session' (5 May-6 June and 7 July-8 August 2014) UN Doc A/69/10 ch IV 33.

¹¹⁵ Geneva Academy (n 2) 58.

¹¹⁶ C. Woods, A. Ross, 'US Covert Actions in Somalia: Former British Citizens Killed by Drone Strikes After Passports Revoked' (*The Bureau of Investigative Journalism*, 27 February 2013) <www.thebureauinvestigates.com/2013/02/27/former-british-citizens-killed-by-drone-strikes-after-passports-revoked/>.