
4-20-2018

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Citation Information

Boekestein, Tom. "Deprivation of Nationality as a Counter-Terrorism Tool: a Comparative Analysis of Canadian and Dutch Legislation." *The Transnational Human Rights Review* 5. (2019) : 23-.

DOI: <https://doi.org/10.60082/2563-4631.1083>

<https://digitalcommons.osgoode.yorku.ca/thr/vol5/iss1/2>

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DEPRIVATION OF NATIONALITY AS A COUNTER-TERRORISM TOOL: A COMPARATIVE ANALYSIS OF CANADIAN AND DUTCH LEGISLATION

TOM L. BOEKESTEIN

I. AT THE TIME OF WRITING, most major western countries are faced with a realistic scenario of terrorist attacks, and even those countries who have not yet been successfully targeted have increased their security efforts to prevent potential harm in the future. In addition to traditional criminal law measures and extended surveillance, several states now include their laws on nationality or citizenship in their counter-terrorism efforts.¹ These countries have introduced and/or expanded their rules on revocation of nationality. Deprivation of nationality as such is not a new legal concept, however, but has always been accepted as being the flipside of the state's competence to convey nationality.² The use of deprivation in the context of counterterrorism, in contrast, is a rather recent invention that is somewhat reminiscent of the old practice of exiling criminals. Today, states deprive terrorists and/or foreign fighters³ of their nationality in response to certain actions that may or may not have been criminalized. The purpose is to prevent individuals from exercising their right to return, as states are generally obliged to readmit their own citizens to their territory and thus unable to deport them while they are nationals. Deprivation of nationality as a counter-terrorism tool is thus to be placed on the borderline between an administrative sanction and an act of criminal law punishment.⁴ Although the scope and underlying mechanisms of these measures differ greatly between states, two main categories of such legislation will be distinguished.

The majority of states resorting to deprivation of nationality as a counter-terrorism tool do so in response to a criminal conviction, usually for a terrorist offence. The rationale is simple: a subject convicted of a terrorist crime can consequently be expatriated and will be removed from

¹ For the purposes of this paper, the words citizenship and nationality are used interchangeably.

² L Van Waas, "Foreign Fighters and the Deprivation of Nationality: National Practices and International Law Implications", in A De Grutter, F Capone & C Paulussen eds, *Foreign Fighters under International Law and Beyond* (The Hague: Springer, 2016), at 471-472.

³ The term 'foreign fighter' generally refers to individuals who have left their home countries to join terrorist organizations abroad. These individuals are viewed as posing a significant risk once they return to their home country.

⁴ S Lavi, "Citizenship Revocation as Punishment: On the Modern Duties of Citizens and their Criminal Breach", (2011) 61 U Toronto LJ 783, at 784.

the country, thereby becoming unable to commit new attacks within said country. Far less states have resorted to more extensive deprivation, the paradigm example being certain Sections in the *British Nationality Act* (BNA).⁵ Here, deprivation has been disconnected from a foregoing criminal conviction and is thus more far-reaching. Yet the underlying rationale continues to be protection through exclusion. While it is possible to categorize deprivation of nationality along these two major lines, their implementation and application by various states differs widely. Actions that will most certainly result in a loss of nationality in one country may not have any such consequence in another. To highlight this new trend in nationality law and discuss the different developments in the states that follow it, a comparative analysis of the relevant aspects of Dutch and Canadian Citizenship Acts will be conducted. The scope of the analysis has been limited to these two jurisdictions, as they currently seem to be undergoing strictly antithetical developments in this field: Canada has, at the time of writing, repealed the sections of Bill C-24 which introduced the possibility of revoking the citizenship of subject who had been convicted of a terrorist offence.⁶ In contrast, the Netherlands introduced legislation similar to the Canadian Bill C-24 in 2010⁷ which was expanded in 2016.⁸ It also inured denationalization laws⁹ that forego criminal conviction in March 2017.¹⁰ The Minister of Security and Justice gained discretionary power to revoke citizenship of people who are deemed a threat against national security, circumventing criminal law. These two countries have been selected because of the great legislative similarities at beginning of 2017 and the great differences resulting from amendments adopted by both only six months later. In addition to these initial similarities and diverging developments, the selection of the two countries is also based on the fundamental differences in the way they address the foreign

⁵ United Kingdom, *British Nationality Act 1981*, c. 61.

⁶ Bill C-6, *An Act to amend the Citizenship Act and to make consequential amendments to another Act*, 1st Sess, 42nd Parl, 2017.

⁷ Rijkswet van 17 juni 2010, *houdende wijziging van de Rijkswet op het Nederlanderschap met betrekking tot meervoudige nationaliteit en andere nationaliteitsrechtelijke kwesties*, 2010, Stb. 2010, 242.

⁸ Rijkswet van 5 maart 2016, *wijziging van de Rijkswet op het Nederlanderschap ter verruiming van de mogelijkheden voor het ontnemen van het Nederlanderschap bij terroristische misdrijven*, 2016, Stb. 2016/121.

⁹ For the purposes of this paper, ‘denationalisation’, ‘revocation (of nationality)’, and ‘deprivation (of nationality)’ will be used interchangeably.

¹⁰ Rijkswet van 10 februari 2017, *wijziging van de Rijkswet op het Nederlanderschap in verband met het intrekken van het Nederlanderschap in het belang van de nationale veiligheid*, 2017, Stb. 2017, 52; Article II of Besluit van 10 februari 2017, *wijziging van het Besluit verkrijging en verlies Nederlanderschap met het oog op het vaststellen van de elementen die betrokken worden bij de belangenafweging inzake een besluit omtrent intrekking van het Nederlanderschap en tot vaststelling van het tijdstip van inwerkingtreding van de artikelen I en IB van de Rijkswet van 10 februari 2017 tot wijziging van de Rijkswet op het Nederlanderschap in verband met het intrekken van het Nederlanderschap in het belang van de nationale veiligheid*, 2017, Stb. 2017, 52, published on 28 February 2017 in Stb. 2017, 67.

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fighter threat. A comparative analysis therefore offers important insights into the function of denationalization in different counter-terrorism strategies and its necessity and effectiveness. Finally, while the Netherlands provide a classic example of the general international trend to resort to nationality law as an anti-terrorism measure, the Canadian approach offers an alternative to this that highlights the shortcomings of these laws in particular and offers different approach to counter the threat posed by returning foreign fighters effectively.

This paper will compare the recent changes in Canadian and Dutch nationality law, taking into account the respective lawmaker's positions on legislation of both types as well as criticism raised against these laws. It will be assessed how Canada and the Netherlands use such legislation to counter the threat posed by returning foreign fighters. Before addressing Dutch and Canadian law in more detail, this paper will classify the various types of legislation that exist in national systems into two categories. In doing so, an overview of the rules on deprivation of nationality in counter-terrorism currently in force in a wide range of western and non-western countries will be provided. The purpose of this is not to provide an in-depth discussion of these laws, but rather to showcase the different manifestations of both types of law and their widespread use, thereby putting the recent legislative developments in Canada and the Netherlands into perspective. It will also elaborate on the difficulties inherent in such categorization due to the fact that domestic legislation on deprivation of nationality differs widely. After having sketched out the background, this paper will analyze the relevant provisions of both Canadian and Dutch nationality law, including a comparison of the current legislation and recent developments. The counter-terrorism strategies of both countries, specifically with regard to foreign fighters, will also be discussed and taken into consideration as it provides the backdrop against which the denationalization laws operate. In sum, the general counter-terrorism context, the legislative background of the denationalization measures as such, and the criticism directed at these laws will be used to explain the functioning of these laws and the diverging developments in Dutch and Canadian nationality law. Ultimately, this paper will reach a conclusion on the extent to which Dutch and Canadian laws diverge in this regard and explain these developments in their respective contexts.

II. DEPRIVATION OF NATIONALITY AS A COUNTER-TERRORISM MEASURE

A. NEW USES FOR DEPRIVATION OF NATIONALITY

Recent changes in nationality law that respond to the growing threat of terrorist attacks show the rise of new forms of legislation permitting deprivation. Before the recent changes, states had largely

limited deprivation of nationality to the few cases where it had been fraudulently obtained and refrained from extending its use into the national security context.¹¹ In recent years, however, states have (re)discovered old and new uses for deprivation in the context of counter-terrorism.¹² Several states have adopted laws that allow for deprivation of nationality on ever broader grounds for the purpose of protecting national security and preventing terrorist attacks.¹³ In general, recently adopted forms of this legislation can be classified into two types, which will be established below and substantiated with a limited discussion of some examples from selected domestic legislation.

B. TWO TYPES OF LEGISLATION

The two types of legislation allowing for the denationalization of (suspected) terrorists can be distinguished on the basis of the underlying requirements that trigger their application. The first type can be referred to as *reactive deprivation of nationality*. Legislation of this type commonly requires the individual to have been convicted of a terrorism offence defined in the state's criminal code: a paradigm example is Section 10(2)b of the pre-2017 *Canadian Citizenship Act*, which requires a conviction for a 'terrorism offence as defined in Section 2 of the *Criminal Code*', before citizenship can be revoked. The example clearly demonstrates the purpose of the legislation: by revoking the nationality of an individual who has committed a terrorist offence, the affected state can easily remove that individual from its territory, and effectively bar such individual from re-entering, as well as from committing another offence.¹⁴ The legislation has preventive, deterring, and punitive effects. Furthermore, it should be noted that the underlying offences do not necessarily require the commission of an actual terrorist attack, as more and more states criminalize purely

¹¹ Revocation of nationality in cases of fraud is a common practice, see GR De Groot and MP Vink., "A Comparative Analysis of Regulations on Involuntary Loss of Nationality in the European Union" in SC Nunez and GR de Groot, eds, *European Citizenship at the Crossroads – The Role of the European Union on Loss and Acquisition of Nationality* (Oisterwijk: WLP, 2015), at 64-67; Van Waas (2016), *supra* note 2 at 470-471; in the UK, until 2006 fraud constituted the only ground for revocation of nationality, see SD Wood, "No Going Home: An Analysis of U.S. and U.K. Expatriation Laws as Applied to the Current Crisis in Iraq and Syria", (2015-2016) 25 *Transnat'l L & Contemp Probs* 229, at 243.

¹² A Macklin and R Bauböck eds, "The Return of Banishment: Do the New Denationalization Policies Weaken Citizenship?", (2015) *EUI Networking Papers RSCAS 2015/14*, at 11; T Choudhury, "The Radicalization of Citizenship Deprivation" (2016) 37:2 *Critical Social Policy* 1 at 2.

¹³ Paradigm examples for this are s 40 of the British Nationality Act 1981 c. 61, ss 33-35 of the Australian Citizenship Act 2007 as amended, C2016C00726, or s 10(2)b of the Citizenship Act 1985, R.S.C., 1985, c. C-29; see also Van Waas (2016), *supra* note 2 at 472; GR De Groot and MP Vink, *EUDO Citizenship Policy Brief No. 3: Loss of Citizenship* at 3.

¹⁴ As nationals normally enjoy the right to remain within their country of nationality, as vested in article 12(4) *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

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preparatory or supportive offences.¹⁵ Subtypes of *reactive* laws are manifold, and include *inter alia* the following:

- Requirements that do not or only vaguely specify the offence that must be committed.¹⁶
- Requirements that the conviction of the terrorist offence be punishable or actually punished with a minimum term of imprisonment.¹⁷
- Requirements that include offences committed abroad provided that they would constitute a terrorism offence if they had been committed within the territory of the state.¹⁸
- Legal constructions that assume voluntary revocation of citizenship where an individual performs certain *criminal* acts.¹⁹

Regardless of the specific form assumed by legislation of this type, it is always reactive: some form of criminal conduct needs to be committed by the individual in response to which the citizenship is then lost, usually by a separate administrative decision taken at ministerial level. All of these subtypes are subject to indirect judicial review prior to the revocation. While the courts will not scrutinize the administrative decision itself, they are nevertheless engaged in determining whether the underlying offence and criminal conduct have actually been committed.

The second, rarer type of legislation will be termed *proactive deprivation of nationality*. In contrast to its reactive counterpart, these laws do not require the commission of a specific criminal offence; they bypass the criminal law system, as denationalization will be triggered by certain non-criminal acts.²⁰ A terrorist attack must not necessarily have been committed, prepared, or aided. In the current fight against terrorism, the most prominent form of conduct leading to the revocation of nationality is the joining of a terrorist organization abroad, most often ISIS in Syria or Iraq. It cannot be overstated that legislation permitting proactive denationalization imposes a very low threshold; neither a criminal conviction, nor specific individual conduct contributing to the commission of an actual terrorist attack is required. In doing so, the judiciary is sidestepped in the

¹⁵ See i.a. §129a and b Strafgesetzbuch, published 13 November 1998|3322, as amended by Article 1 G v. 4.11.2016 I 2460 (German Criminal Code); article 421 Wetboek van Strafrecht, BWBR0001854; Terrorism Act 2000, c. 11.

¹⁶ See as an example s 34(2)b(ii) jo. (5) ACA.

¹⁷ Canada requires the individual to be sentenced to at least five years of imprisonment (s10(1)b CCA).

¹⁸ Again, s 10(2)b of the CCA provides a paradigm example for this type of legislation.

¹⁹ Section 33AA ACA 2007; This type as also served as reasoning for the Canadian Bill C-24 discussed below, see the position taken by the former Canadian Minister of foreign affairs Chris Alexander in *House of Commons Debates*, 41st Parl, 2nd Sess, No 102 (12 June 2014) at 1900 (Hon Chris Alexander): “They [terrorists] will have, in effect, withdrawn their allegiance to Canada by these very acts.”; see in addition Macklin and Bauböck (Eds.) (2015), *supra* note 12 at 13.

²⁰ Van Waas (2016) *supra* note 2 at 473.

process leading up to the revocation and will only be engaged if the withdrawal is later challenged.

At the time of writing, three subtypes of this form of legislation have been identified:

- Legislation that requires that the conduct of the individual shows that he has joined a certain organization that has been classified as being terrorist.²¹
- Legislation under which citizenship can be revoked as soon as the individual acquires the citizenship of, or a right of residence in, a country deemed to be affiliated with terrorist organizations.²²
- Legislation that allows for the revocation of nationality where the competent Minister is convinced that this is in the public interest.²³

It is evident that proactive legislation, by its very nature, aims at the prevention of possible future offences, rather than responding to offences that have already been committed. Its rationale is as simple as it seems to be effective: individuals who have affiliated themselves with a terrorist organization in a foreign country will be unable to commit offences in their home country if they are barred from re-entering as a result of nationality revocation.²⁴ Although the two types of legislation enumerated above are fundamentally different in their operation, their aims are remarkably similar. Nevertheless, proactive deprivation of nationality clearly is the more intrusive measure, as it is purely preventive and not subject indirectly to judicial review prior to the revocation. It allows for deprivation of nationality irrespective of whether or not the individual will ever commit an attack.

C. DEPRIVATION OF NATIONALITY IN SELECTED COUNTRIES

Having established the two different types of deprivation of nationality in counter-terrorism, an overview over their manifestations will now be provided to flesh out this theoretical background. Canada and the Netherlands will be discussed extensively below and have therefore been omitted from the overview. Its purpose is not to provide an in-depth survey or analysis of the legislative

²¹ This is the requirement adopted in the recently adopted Dutch Amendment, which will be scrutinized more closely in section IV of this paper; see also the recent Israeli amendment in this regard, Israel, Nationality (Amendment No. 13) Law 5777 of 6 March 2017, s 11(b)(2)(b), see also The Law Library of the US Congress, "Israel: Amendment Authorizing Revocation of Israeli Nationality Passed" *Library of Congress* (23 March 2017) online: <<http://www.loc.gov/law/foreign-news/article/israel-amendment-authorizing-revocation-of-israeli-nationality-passed/>> for a comment on this.

²² Israel, Nationality Law (Amendment No. 13) Law 5777 of 6 March 2017, s 11(b)(2)(c).

²³ Paradigm examples for this are s 40(2) BNA and s 34(1)c and (2)c ACA; see also M Goldstein, "Expatriation of Terrorists in the United Kingdom, United States, and France: Right or Wrong?" (2016) 25 *Tul J Int'l & Comp L* 259 at 268-9; Wood (2015-2016) *supra* note 11 at 244-5.

²⁴ As nationals normally enjoy the right to remain within their country of nationality, as vested in Article 12(4) ICCPR.

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peculiarities of the eleven systems to be touched upon, but rather to provide examples of implementations of reactive and proactive deprivation of nationality in practice. It will also touch upon some grey areas, in particular laws that exhibit characteristics associated with both types of legislation. The selected laws will be discussed in order of their extensiveness, starting with South Africa as the country with the most far-reaching laws.

(i) South Africa

The South African provisions on deprivation of citizenship are a combination of the proactive sec. 40(2) *British Nationality Act* (BNA) discussed below and the recently abolished reactive sec. 10(2) *Canadian Citizenship Act* (CCA).²⁵ Adopting a dual approach, South African nationality can be revoked where the Minister of Home Affairs is ‘satisfied that it is in the public interest’.²⁶ This resembles the approach taken by Great Britain, bringing with it the same critique. Section 8(2)(b) *South African Citizenship Act* (SACA) does not specify any other requirements that must be met, leaving the deprivation at the full discretion of the Minister. Additionally, South Africa also recognizes reactive denationalization under Section 8(2)(a) SACA, which grants the Minister the discretion to revoke the citizenship of an individual who has been sentenced to a term of imprisonment of at least twelve months in *any* country. Where the individual was convicted outside South Africa, it is additionally required that the offence committed would also have constituted an offence in South Africa. Interestingly, the application of Section 8(2)(a) is not restricted to terrorist offences but can be applied to any conviction, including low-level crimes such as theft or trespassing.²⁷ Although more precisely and restrictively worded, Section 8(2)(a) might actually be even broader in its application than its proactive counterpart. Arguably, denationalizing an individual convicted of theft can hardly be justified in the public interest. Should the individual have been sentenced to at least a year of imprisonment, however, deprivation of nationality is still possible through Section 8(2)(a)). Consequently, South Africa has created a tight system of proactive and reactive denationalization. Deprivation of citizenship is possible in response to all but the pettiest offences and can also be deployed proactively long before a terrorist offence has reached the preparation stage. The application of the two types of revocation is, however, slightly

²⁵ The relevant sections of the CCA are discussed in Section III of this paper.

²⁶ Section 8(2)(b) South African Citizenship Act 1995, no. 88 of 1995.

²⁷ As an example, an individual convicted of theft in Germany (§242 German Criminal Code, punishable with up to five years of imprisonment) could already be deprived of his South African citizenship.

curbed by section 8(2), which restricts the applicability of the two powers to dual-nationals.²⁸ This ensures that deprivation of nationality does not lead to new cases of statelessness.

(ii) *The United Kingdom*

Any overview over deprivation of nationality would be incomplete if it were not to discuss the relevant section of the BNA 1981, which is notorious for the wide degree of discretion given to the minister. Section 40(2) of that Act states that denationalization is permitted where ‘that deprivation is conducive to the public good.’ This amendment, added in 2006,²⁹ can arguably be categorized as proactive deprivation of nationality, although it can also be applied retroactively. Practically, there are hardly any limitations to the Secretary’s discretion to exercise this power. Following the insertion of section 40(4A) by the *Immigration Act* in 2014 the limitations have been reduced further.³⁰ While originally an individual could not be deprived of his citizenship if statelessness were the consequences, this is now possible in a limited range of circumstances. Following the amendment, naturalized mono-nationals may now be denationalized if their conduct is ‘seriously prejudicial to the vital interests of [the UK]’ and the Home Secretary has reasonable grounds to believe that they can obtain another nationality. Not only does this section raise issues of discrimination by only being applicable to naturalized UK nationals, it also permits rendering foreign fighters stateless, at least temporarily. It does not require that another nationality be obtained before the deprivation takes effect, nor does the Home Secretary have to ensure that another nationality can *actually* be acquired. The seriousness of these deficiencies that actively undermine the global effort to end statelessness cannot be understated. In light of the vagueness of the UK’s laws on proactive deprivation, the great discretion that is given to the Minister, and the limited protection against statelessness, scholars have rightfully placed Britain at the forefront of states using denationalization as a counter-terrorist measure.³¹

(iii) *Australia*

Australian nationality law also contains a pendant to British approach.³² Interestingly, it also includes additional provisions that can be categorized as reactive deprivation of nationality, as

²⁸ Section 8(2) SACA.

²⁹ *Immigration, Asylum, and Nationality Act* 2006.

³⁰ *Immigration Act 2014*, s 66(1); the power had been introduced in response to *Secretary of State for Home Department v Al-Jedda* [2013] UKSC 62, 9 October 2013, where deprivation of nationality had not been possible because it would have led to statelessness.

³¹ Choudhury (2016) *supra* note 12 at 2-3; S Lavi, “Punishment and the Revocation of Citizenship in the United Kingdom, United States, and Israel”, (2010) 13 *New Crim L Rev* 404 at 410-411.

³² Section 34(1)c, 34(2)c *Australian Citizenship Act* 2007 as amended, C2016C00726.

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citizenship may be revoked by ministerial decision where the individual has committed a serious offence,³³ and provisions on the implied renunciation of citizenship by persons who commit one of the acts specified in Section 33AA (2) *Australian Citizenship Act* (ACA) 2007 where it is meant to further a political, religious, or ideological cause, to intimidate the public, or to coerce the government of a state or part thereof or influence it by intimidation.³⁴ Renunciation under the latter provision takes effect automatically and immediately.³⁵ The nature of Section 33AA ACA 2007 is less straightforwardly classifiable under the dualistic distinction outlined above, as it requires the engagement in an act that is at least supportive to terrorism,³⁶ but neither refers to criminal law provisions nor requires a criminal conviction. Whether the provision can be classified as proactive or reactive therefore depends on the applicable type of conduct specified in Section 33AA(2)(a-h) ACA 2007: where the nationality is renounced as a consequence of e.g. ‘engaging in a terrorist act’³⁷ it is *reactive*, whereas renunciation following the ‘receiving [of] training connected with preparation for, engagement in, or assistance in a terrorist act’³⁸ can arguably be categorized as *proactive*. Consequently, Australian nationality law relies on a dual approach and uses both reactive and proactive deprivation of nationality.

(iv) *Switzerland*

Interestingly, Article 48 *Swiss Citizenship Act* corresponds to a large extent to Section 40(2) BNA. The provision allows for revocation of the ‘*Schweizer Bürgerrecht*’ if the conduct of the individual is seriously prejudicial to the interests or reputation of the state and the person in question holds at least one other nationality, thereby effectively preventing statelessness. Nationality can be revoked as soon as these cumulative criteria are met.³⁹ The conduct requirement, arguably, is extremely vague and open to extensive interpretation, especially as despite the age of the provision, it has

³³ Section 34(2)b(ii) ACA 2007 (note that this provision only applies to those to whom citizenship has been conferred).

³⁴ Section 33AA(1) jo. (2) ACA 2007; under subsection (3), it is assumed that the purpose requirement is met where the individual is a member of a terrorist organization or acting under the instructions thereof; the acts include engaging in international terrorist activities using explosive or lethal devices, engaging in a terrorist act, providing or receiving training connected with preparation for, engagement in, or assistance in a terrorist act, directing the activities of a terrorist organization, recruiting for a terrorist organization, financing terrorism, financing a terrorist, or engaging in foreign incursions and recruitment.

³⁵ Section 33AA(9) ACA 2007; see also Choudhury (2016) *supra* note 12 at 2.

³⁶ The conduct listed in section 33ACA(2) ranges from the engagement in international terrorist activities (a) to the financing of a terrorist (g).

³⁷ Section 33AA(2)(b) ACA 2007.

³⁸ Section 33AA(2)(c) ACA 2007.

³⁹ Article 48 Bürgerrechtsgesetz.

never been applied in practice.⁴⁰ Given the absence of information on the application of the provision or the exact scope or severity of the conduct required to warrant denationalization, it could already be triggered by remote conduct not contributing to the commission of an attack yet. Limited guidance on this provision is provided by the handbook accompanying the law, which states that it is intended to apply primarily in the context of war, or to war criminals and terrorists.⁴¹ As application to (returning) foreign fighters is neither explicitly intended nor *prima facie* restricted, it remains to be seen whether the law will be utilized in the fight against foreign fighters.

(v) *Austria*

Deprivation under Austrian Nationality law is similar to, but less extensive than, the English and Australian approach. Under §33(2) *Austrian Citizenship Act*, an individual voluntarily serving in an organized armed group and participating in armed hostilities abroad for that group, is to be deprived of his nationality.⁴² This is again an example of proactive deprivation of nationality, as (a conviction for the) commission of a terrorist attack within the country is not required to trigger the provision. On the one hand, actual participation in combat for the group is required, which clearly goes far beyond the ‘conducive in the public good standard’ adopted in England and requires proof that the prescribed conduct has actually been committed.⁴³ On the other, §33(2) does not seem to leave room for discretion. Rather, the individual *will* lose his nationality by ministerial decision.⁴⁴ Interestingly, Austrian nationality law does not recognize reactive denationalization, neither through a specific provision nor through the infamous ‘public good’ standard adopted in England. Taking into account the ‘abroad’-requirement of §33(2), this creates a mechanism whereby an individual committing a terrorist crime in Austria cannot, whereas an individual fighting for a terrorist group abroad can, be expatriated.

(vi) *Israel*

Following an amendment passed in March 2017, Israel takes a proactive approach that differs from the one adopted by the United Kingdom or Australia. Under the new law, acquisition of citizenship of certain countries, or a right to residence in these countries, is deemed sufficient to establish a breach of allegiance, which subsequently allows for the revocation of nationality independent of

⁴⁰ Staatssekretariat für Migration SEM, “Handbuch Bürgerrecht”, *Eidgenössisches Justiz- und Polizeidepartement EJPD* (27 September 2016) online: <<https://www.sem.admin.ch/sem/de/home/publiservice/weisungenkreisschreiben/buergerrecht.html>> Chapter 2 at 16.

⁴¹ *Ibid.*

⁴² Staatsbürgerschaftsgesetz 1985, BGBl. Nr. 311/1985.

⁴³ §33(2) StbG.

⁴⁴ §33(2) StbG clearly states that nationality ‘*is to be revoked*’ if the conditions specified therein are fulfilled.

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whether an actual threat is posed by the individual affected.⁴⁵ In addition, actual residence in one of the countries will result in the presumption that a right to residence has been obtained.⁴⁶ This dimension shows some similarities with its Austrian counterpart, as both allow for denationalization where the individual has left the country. On the one hand, while Austrian law requires that the individual has joined an organized armed group, residence in a specific country suffices for the revocation of Israeli nationality. On the other hand, the Israeli approach is more restricted in its scope of application, as the states it covers are explicitly enumerated and strictly limited.⁴⁷

(vii) *United Arab Emirates*

Similarly to Belgium (see below), the UAE only deprives naturalized citizens of their nationality.⁴⁸ Natural born citizens cannot be expatriated for criminal offences committed.⁴⁹ Under Article 16(1) *UAE Nationality and Passport Act*, the commission, or attempted commission, of any action ‘deemed dangerous for the security or safety of the country’ can trigger denationalization. Although the Article applies to both attempts and commission regardless of a criminal conviction, it is less difficult to classify under the proactive-reactive categorization forwarded in the preceding section than it may seem at first sight. Regardless of whether the deprivation is triggered by commission or attempt, it is retroactive, as the threat posed has already materialized itself in the individual’s conduct and is no longer abstract. However, Article 16(1) does not provide a more detailed list, nor does it refer to specific criminal law provisions, to specify which conduct exactly warrants denationalization. The terminology of the provision can cover a wide range of actions and is open to extensive interpretation. Its application is not necessarily restricted to terrorist activities, but it could also be utilized against a wide range of political opponents. In light of the vagueness and broad applicability of the measure, deprivation of nationality becomes difficult to foresee.

(viii) *Belgium*

Belgian nationality can also be revoked reactively: under Article 23/2 *Belgian Nationality Act* an individual convicted of a terrorist offence as listed in Title I ter of the second book of the *Belgian Criminal Code* can be deprived of his nationality as a consequence thereof.⁵⁰ Notably, this only

⁴⁵ Nationality Law (Amendment No. 13) Law 5777 of 6 March 2017, s 11(b)2(c).

⁴⁶ *Ibid.*

⁴⁷ The provision includes Iran, Afghanistan, Lebanon, Libya, Syria, Sudan, Iraq, Pakistan, Yemen, and the Gaza Strip.

⁴⁸ Article 16 United Arab Emirates, Federal Law Concerning Nationality, Passports and Amendments thereof (Nationality and Passport Act), Federal Law no. 17 for 1972.

⁴⁹ Article 15 UAENPA.

⁵⁰ Strafwetboek 1867, 1867-06-08/01; Wetboek van de Belgische Nationaliteit 1984, 1984-06-28/35.

applies to individuals who have received Belgian Nationality by naturalization.⁵¹ Those who are Belgian by birth cannot be deprived of their nationality, regardless of whether or not they possess another nationality. Similar to its Australian counterpart, Article 23/2§1 allows for revocation on a wide array of grounds including preparatory offences, for as long as a punishment of at least five years of incarceration is imposed.⁵² At the time of writing, Belgian law does not include proactive deprivation of nationality.

(ix) *Malta*

Revocation under the *Maltese Citizenship Act* (MCA) can only have retroactive effect against naturalized Maltese Citizens.⁵³ Under Section 14(2)(c), a naturalized Maltese Citizen may be deprived of his citizenship if he has been convicted of an offence and sentenced to a term of imprisonment of at least twelve months within seven years of becoming a citizen. This requirement shows similarities to Section 8(2)(a) *South African Citizenship Act* as it applies to convictions in any country. Furthermore, the nature of the crime is not specified, and revocation can thus respond to any conviction, even regarding petty offences. In contrast to the South African provision, however, the offence committed must not necessarily be recognized in Malta as well. In combination with the low sentencing requirement this might be problematic where the sentence has been imposed by a non-democratic regime. At the same time, the MCA includes a safeguard provision, that is the inverse of proactive denationalization under the BNA, ACA, or SACA. As revocation is only possible within seven years of obtaining Maltese citizenship, the provision can be described as creating a period of probation. Under Section 14(3) MCA, an individual may not be deprived of his nationality, unless the Minister⁵⁴ is satisfied that the retention of nationality would not be conducive to the public good. This is the flipside of the UK approach, as the public good criterion is used as a safeguard against, rather than a ground for, deprivation of nationality.

(x) *The United States*

The United States is the first country in this brief overview in which denationalization is strongly restricted. In the U.S., the Government's powers to revoke citizenship have been greatly restricted by the Supreme Court, which held revocation without consent of the individual by word or conduct to be unconstitutional.⁵⁵ At the time of writing, the United States has not deprived terrorists or

⁵¹ Article 23/2§1 WBN.

⁵² Article 23/2§1 WBN jo. e.g. Article 140 SWB.

⁵³ Section 14(2)(c) Maltese Citizenship Act of 21 September 1964, cap. 188.

⁵⁴ As defined in Section 2(1) MCA.

⁵⁵ Lavi (2010), *supra* note 31 at 414-415; Goldstein (2016) *supra* note 23 at 276-277.

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individuals who support or join a terrorist organization of their citizenship.⁵⁶ The standard adopted for renunciation of citizenship by conduct is notably high, as it requires the individual to perform one of the acts listed in Section 349 INA to ‘voluntarily’ perform those acts ‘with the intention of relinquishing US nationality.’⁵⁷ Ultimately, only legislation drafted along the lines of Section 33AA of the ACA 2007 could be adopted under U.S. law, as it establishes that a citizen performing certain acts renounces his or her citizenship. The currently proposed ETA would introduce such provisions, but it is highly questionable whether it will be passed by Congress.⁵⁸ According to *Spiro*, it is doubtful whether engagement in hostilities against the U.S. in itself suffices to establish intent to relinquish.⁵⁹

(xi) *Germany*

Germany provides the final, and together with the United States, the most restrictive example in this brief overview. Following the extensive abuse of denationalization by the NS-regime, revocation of nationality is now seriously restricted and apart from a few exceptions, prohibited by the *German Basic Law*: Article 16(1) GG prohibits the involuntary revocation of nationality by law or decision.⁶⁰ The German state may under no circumstances withdraw the nationality held by one of its citizens, regardless of that individual's conduct. Reactive or proactive deprivation of nationality as recognized in the states discussed above, is therefore prohibited by the *German Basic Law*. However, German nationality can be *lost* under art. 16(1), even involuntarily, provided the loss is provided for by law and does not result in statelessness. In this context, the distinction between revocation and loss is pivotal. According to the BVerfG, the distinction is based on whether the revocation disregards the individual's justified reliance on the continuance of his nationality.⁶¹ Justified reliance is absent, for example, where nationality has been *fraudulently* obtained.⁶² German nationality can also be lost through voluntary conduct of the individual, e.g.

⁵⁶ United States, Expatriate Terrorist Act H.R. 1021 [introduced in House 13 February 2017], referred to the Subcommittee on Immigration and Border Security on 02 March 2017; Goldstein (2016), *supra* note 23 at 276-277, 279-280.

⁵⁷ Section 349 United States, Immigration and Nationality Act 1952, Pub. L. 82-414, 66 Stat. 163; Wood (2015-2016) *supra* note 11 at 243; Goldstein (2016) *supra* note 23 at 276-277; see A Vasanthakumar, “Treason, Expatriation and ‘So-Called’ Americans: Recovering the Role of Allegiance in Citizenship” (2014) 12 Geo J L & Pub Pol’y 187 at 213-221 for a full discussion of the relevant US Supreme Court jurisprudence.

⁵⁸ *Ibid* at 279-280.

⁵⁹ PJ Spiro, “Expatriating Terrorists” (2014) 82 Fordham L Rev 2169 at 2176; *Spiro* refers to the case of Adam Gadahn, stating that shredding one's passport can be deemed sufficient to show intent to relinquish.

⁶⁰ B Schmidt-Bleibtreu, H Hofmann, & A Hopfau eds, *Kommentar zum Grundgesetz*, 12th ed (Carl Heymanns Verlag, 2011) at 543.

⁶¹ *Ibid*, referring to Judgement of 24 May 2006, 2 BvR 669/04.

⁶² Judgement of 24 May 2006, 2 BvR 669/04.

the acquisition of a foreign nationality or service in foreign armed forces.⁶³ The latter is explicitly limited to other *states*. Joining a terrorist organization is thus not covered. In light of the constitutional prohibition, it seems unlikely that denationalization will be used as a counter-terrorism tool any time soon.

Despite the broad discretionary powers or automatic mechanisms that have been introduced, most of the above provisions include an essential common feature: from a purely legalistic perspective, all are only applicable to multi-nationals, ensuring that the revocation does not render a person stateless.⁶⁴ This degree of protection seems to be the strongest in Germany, where the prevention of statelessness is a constitutional right. Regardless of criticism expressed towards denationalization and the worrisome vagueness of the majority of provisions introducing the deprivation of nationality as measure to counter terrorism, it must be acknowledged that a minimum degree of protection against statelessness is provided. Given detrimental consequences of statelessness for those affected, the importance of such protection must not be underestimated.⁶⁵ However, there is also a downside to this. Due to this limitation, these laws must primarily be applied to the largest communities of dual-nationals, which may in turn lead to indirect discrimination. For example, the Council of Europe Commissioner for Human Rights has raised serious concerns that the recent amendments to the DNA indirectly discriminate against ethnic Moroccans.⁶⁶ The *UAE Nationality and Passport* and Section 40(4A) BNA contain worrying exceptions to the general effort to avoid statelessness, as these laws provide none or only limited safeguards to ensure new cases of statelessness are prevented. This is especially alarming since the provisions of the Act here discussed only apply to naturalized citizens, who must give up any other nationality they hold when obtaining UAE citizenship.⁶⁷ Ergo, the measure is only applied to mono-nationals, who become stateless as a consequence, unless they are able to have their original nationality restored.

⁶³ §§25, 28 Staatsangehörigkeitsgesetz, published 22 July 1913, as amended by Article 3 G v. 11.10.2016 I 2218.

⁶⁴ See section 40(4) BNA 1981; s 34(3)(b), 35(1)(c) ACA 2007; Article 14(8) DNA; s 10.4(1) CCA; Article 32/2§3 WBN; §33(2) StbG; Article 16(1) GG; Article 48 BüG; s 8(2) SACA; s 14(3) MCA.

⁶⁵ The negative effects of statelessness are far-reaching, and individuals are often denied i.a. the enjoyment of legal protection, or are unable to own property or get married. For more a more elaborate list of the consequences of statelessness, see UNCHR, *What would life be like if you had no Nationality?*; and OW Vonk, MP Vink, & GR de Groot, "Protection against Statelessness: Trends and Regulations in Europe", (2013) *EUDO Citizenship Observatory* at 11-12.

⁶⁶ CoE Commissioner for Human Rights, *Letter to Dutch Ministers of the Interior and Kingdom Relations and Security and Justice*, (2 November 2016), CommHR/NM/sf 045-2016 at 2.

⁶⁷ Article 11 UAENPA.

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<i>Country</i>	<i>Reactive Deprivation of Nationality</i>	<i>Reactive Deprivation of Nationality</i>
SA	Recognized, sec. 8(2)(a) SACA.	Recognized, sec. 8(2)(b) SACA.
	Sentenced to 12 months of imprisonment for a recognized offence in any country.	Minister is satisfied that revocation is in the public interest.
UK	Not recognized.	Recognized, sec. 40(2) BNA.
		Minister is satisfied that revocation is conducive to the public good.
AU	Recognized, sec. 33AA ACA.	Recognized, sec. 33AA ACA.
	Citizenship is implicitly renounced by acts specified in sec. 33AA(2)(a, b).	Citizenship is implicitly renounced by acts specified in sec. 33AA(2)(c-h).
	Recognized, sec. 34(2)(b)(ii) ACA.	Recognized, sec. 34(1)(c), (2)(c) ACA.
	Convicted of a serious offence: sentenced to death or a serious prison sentence before obtaining citizenship.	Minister is satisfied that retention of citizenship is contrary to public interest.
CH	Not recognized.	Recognized, art. 48 BüG.
		Conduct that is seriously prejudicial to the interests or reputation of the state.
AT	Not recognized.	Recognized, §33(2) StbG.
		Service in, or participation in hostilities for, an organized armed group abroad.
IL	Not recognized.	Recognized, sec. 11(b)2(c) Law 5777.
		Reception of the nationality of, or a right to residence in, certain Arab countries.
BE	Recognized, art. 23/2 WBN. ⁶⁸	Not recognized.
	Conviction for an offence under section Iter Book 2 of the Belgian Criminal Code.	
AE	Recognized, art. 16(1) UAENPA. ⁶⁹	Not recognized.
	(Attempted) commission of any action deemed dangerous for the security or safety of the country	
MT	Recognized, sec. 14(2)(c) MCA. ⁷⁰	Not recognized.
	Sentenced to 12 months of imprisonment for an offence in any country; retention must not be conducive to public good.	
US	Declared unconstitutional by the USSC in <i>Afroyim</i> and <i>Terrazas</i> .	
	Citizenship must be explicitly or implicitly relinquished by the citizen.	
DE	Prohibited by constitution, art. 16(1) GG.	
	Nationality cannot be revoked by the state unless fraudulently obtained.	

Table 1: Overview of expatriation in the selected countries discussed above⁷¹

⁶⁸ The measure applies only to naturalized Belgian citizens, see above.

⁶⁹ The measure applies only to naturalized UAE citizens, see above.

⁷⁰ The measure applies only to naturalized Maltese citizens, see above.

⁷¹ As the holding of a second nationality is a prerequisite for denationalization in all countries discussed, but the UAE and the UK in part (see note on this above), it has been omitted from the overview.

III. DEPRIVATION OF NATIONALITY UNDER THE CANADIAN CITIZENSHIP ACT

A. DEPRIVATION OF NATIONALITY IN THE CONTEXT OF THE CANADIAN COUNTER-TERRORISM STRATEGY

Since 9/11, Canada has significantly increased its counter-terrorism efforts, particularly focusing on criminal and immigration law measures to address new threats.⁷² The counter-terrorism measures that were introduced by amendment to the *Canadian Citizenship Act* (CCA) in 2014 and subsequently removed again in 2017 must therefore be analyzed in the context of Canada's counter-terrorism policy, under which a wide range of measures have been adopted. The four-dimensional policy is based on the principles 'prevent, detect, deny, respond', and emphasizes that the highest priority is prevention, not only of actual terrorist offences, but also of the recruitment and training of new terrorist fighters.⁷³ Its primary response to terrorism is criminal law. While this seems to be an effective approach, its implementation has been subject to criticism. *Forcese* remarks that many of the laws adopted to strengthen counter-terrorism capabilities are not related to the 2012 policy and lack independent review for effectiveness. He points out that this will likely lead to the adoption of measures that seem to increase anti-terrorism efforts but are in fact ineffective and do not fit into the overall strategy.⁷⁴

Many far-reaching changes were introduced by the *Anti-Terrorism Acts* of 2001 and 2015 and expanded the Country's criminal law capacity to counter terrorism.⁷⁵ At the time of writing, the *Canadian Criminal Code* (CCC) contains a specific chapter on terrorism as well as a number of additional provisions that together contain an excessive number of provisions criminalizing specific conduct, but also defines ordinary offences as terrorist crimes where they are committed in a specific context or for a certain purpose. These measures fall under the fourth fundamental principle of the Country's counter-terrorism strategy: to prosecute terrorism as a criminal offence.⁷⁶ Following the *Anti-Terrorism Act 2001*, part II.1 of the *Criminal Code* now contains an elaborate but fragmented set of offences criminalizing different stages of terrorism offences. In light of this,

⁷² For a detailed overview over the development of Canadian anti-terrorism law see R Diab, "Canada", in K Roach, ed, *Comparative Counter-Terrorism Law*, (CUP, 2015), at 78 et seq. and K Roach, *The 9/11 effect: comparative counter-terrorism*, (CUP 2011), at chapter 7.

⁷³ C Forcese and K Roach, *False Security: The Radicalization of Canadian Anti-Terrorism*, (Irwin Law Inc., 2015), at 110-111.

⁷⁴ *Ibid.*

⁷⁵ While the extension of anti-terrorism legislation has seen a significant boost in Canada since 9/11, giving a comprehensive overview over all changes introduced since would exceed the scope of this paper. For a discussion of these developments see *Ibid* particularly at 558 et seq.

⁷⁶ Government of Canada, *Building Resilience against Terrorism: Canada's Counter-Terrorism Strategy*, 2d ed (2013) at 10.

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a comprehensive discussion of all relevant offences cannot possibly be conducted here. Rather, this section will focus on the provisions that address the foreign fighter threat and are of relevance to the discussion of proactive and reactive denationalization. As will be discussed more extensively in the Sections on the Netherlands, foreign fighters pose a particular challenge to criminal law centered approaches to terrorism. They can only be prosecuted for the offences that they commit while abroad, such as the joining of a terrorist organization, if the territorial scope of application of domestic criminal law has been extended accordingly. Furthermore, effective prosecution may be *de facto* impossible until the suspect has returned.

Before turning to the most relevant sections of the *Criminal Code* in more detail, it should be noted that terrorism crimes have extra-territorial effect. With regard to the requirements that must be met for extra-territorial application, terrorist activities must be distinguished from specific terrorism offences. While the latter are explicitly enumerated in a number of specific provisions, terrorism activities include any act that is committed for ‘political, religious or ideological purpose, objective or cause’.⁷⁷ An additional category covers offences related to the financing of terrorism activities.⁷⁸ While those committing a terrorism *offence* can only be prosecuted if they hold Canadian citizenship or the right to permanent residence, terrorist *activities* are prosecutable as long as they are committed against Canadian citizens or the Government.⁷⁹ In addition to these general offences, the CCC contains offences directed specifically at foreign fighters: under Sections 83.181 and 83.191 CCC, leaving the Country to facilitate, or participate in, the activities of a terrorist group or attempting to do so, is a separate criminal offence. The provisions cover any form of participation or facilitation. The *Criminal Code* also criminalizes leaving the country to commit any indictable offence for a terrorist organization.⁸⁰ The Supreme Court has explicitly permitted extraterritorial law enforcement, provided that it complies with Canada’s obligations under international and human rights law.⁸¹

The broad range of general and specific terrorism offences outlined above is supplemented by preventive detention. Under this highly controversial measure,⁸² terrorist suspects can be

⁷⁷ Section 83.01(1)(b)(i)(A) Canadian Criminal Code, R.S.C., 1985, c. C-46; for an elaborate discussion of the provisions see Diab, *supra* note 72, at 81 et seq.

⁷⁸ Section 83.02 CCC.

⁷⁹ Sections 3.74 and 3.75 CCC. The offence of financing terrorism also has extraterritorial affect under the conditions specified in Section 3.73 CCC.

⁸⁰ Specifically, this covers actions for the benefit of, at the direction of, or in association with a terrorist group (Section 83.201 CCC).

⁸¹ Supreme Court of Canada, *Canada (Prime Minister) v Khadr*, 2010 SSC 3.

⁸² Forcese and Roach, *supra* note 73, at 240.

detained on the basis of suspicions for up to three days without criminal charge. Individuals can be arrested by a peace officer without warrant on “reasonable grounds that the detention of the person in custody is likely to prevent a terrorist activity” since the adoption of the Anti-Terrorism Act 2015.⁸³ Furthermore, non-citizens can be detained indefinitely without warrant if they are “inadmissible and [...] a danger to the public”.⁸⁴ It can be effected on the basis of mere suspicion of association with a terrorist organization.⁸⁵ Through security certificates, it is further possible to detain individuals pending their deportation if they are somehow associated with terrorism or pose a general threat to security in Canada, subject to review by a federal court.⁸⁶ Appeal against this decision is only possible if the judge determines that a “serious question of general importance is involved”.⁸⁷ The information on which the certificate is based is often classified and until the Supreme Court’s ruling in *Charkaoui* were often not disclosed to the detainee.⁸⁸ Following the ruling, the measure was amended to allow for the disclosure of the evidence to special advocates.

Bill C-24, which will be discussed in the next section, was not officially a part of Canada’s counter-terrorism strategy but was nevertheless closely associated with it. After all, its proponents stressed the possibility of stripping convicted terrorists of their citizenship during the debate on the reversion of the amendment.⁸⁹ It introduced deprivation of nationality as an extra-criminal law sanction and with it the deprivation of the right to return as guaranteed by Section 6 of the *Charter*. As a consequence, it *de facto* created the power to deport dual-nationals convicted of a terrorism offence. While the overall counter-terrorism strategy is centered around, and based primarily on, criminal law, denationalization supplemented this approach by providing additional forms of deterrence and punishment, as well as a means to prevent convicted terrorist from reoffending in Canada, thus contributing to the ‘prevent’ and ‘response’ dimensions.

⁸³ Section 83.3(4)(b) CCC; for an extensive discussion of this power see Roach *supra* note 72 at 390 et seq.

⁸⁴ Section 55(2)(a) Canadian Immigration and Refugee Protection Act, S.C. 2001, c. 27.

⁸⁵ Diab *supra* note 72 at 97.

⁸⁶ Section 77.1 and 78 Immigration and Refugee Protection Act.

⁸⁷ Section 79 Immigration and Refugee Protection Act.

⁸⁸ Diab *supra* note 72 at 98-99; Supreme Court of Canada, *Charkaoui v Canada (Minister of Citizenship and Immigration)* 2007 SCC 9.

⁸⁹ Canada, House of Commons Debate of March 9 2016, House of Commons Debates, Vol. 148, No. 029, at 1651.

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B. BILL C-24: THE STRENGTHENING CANADIAN CITIZENSHIP ACT

Under the pre-2014 *Canadian Citizenship Act*, revocation of nationality was only possible where citizenship had been obtained through fraud in the first place.⁹⁰ As noted, many states revoke citizenship that has been granted erroneously. In Canada, the grounds for revocation of citizenship were expanded with the entering into force of the *Strengthening of Canadian Citizenship Act* on 19 June 2014.⁹¹ Bill C-24 introduced wide changes to the entire CCA, but some of the most prominent can be found in the provisions on deprivation of nationality.⁹² The amendments introduced by clause 8 established eight new grounds for revocation, all centered around the commission of certain acts against Canada. These grounds were exceptionally broad and controversially had retroactive effect.⁹³ For the purposes of this paper, Section 10(2)(b) CAA is especially relevant, even though it was ultimately repealed when Bill C-6 (discussed below) received royal assent on 19 June 2017. It will therefore be referred to as pre-2017 Section 10(2)(b) CCA. Nevertheless, it is important to discuss the Section to be able to compare the development of the use of nationality law under the Canadian Counter-terrorism strategy to the toughening of similar laws in the Netherlands.

Pre-2017 Section 10(2)(b) CCA allowed for revocation on two different grounds, provided that a sentence of at least five years of imprisonment had been imposed for the offence in question: (1) the individual has been convicted of a terrorism offence as defined in Section 2 of the *Canadian Criminal Code*, which covers *inter alia* preparatory offences and offences of aiding and abetting; or (2) the individual has been convicted of an offence committed outside of Canada, that would be covered by the definition in Section 2 *Canadian Criminal Code* if it had been committed within Canada.⁹⁴ The wording of the provision created a broad scope of applicability, particularly because it enabled retroactive application.⁹⁵ It provided the Minister with a broad degree of discretion to deprive individuals of their nationality and remove them from the country.⁹⁶ After all, the right to

⁹⁰ See the Canadian Citizenship Act before the 19 June 2014 amendment; C Forcese, “A Tale of Two Citizenships: Citizenship Revocation for ‘Traitors and Terrorists’” (2013-2014) 39 Queen’s LJ 551 at 566-567.

⁹¹ Bill C-24, Strengthening Canadian Citizenship Act, 2nd Sess, 41st Parl, 2014.

⁹² *Ibid* at cl. 8; Canadian Association of Refugee Lawyers, “Bill C-24, An Act to Amend the Citizenship Act and to Make Consequential Amendments to Other Acts” (2014) at 6.

⁹³ Canadian Bar Association, National Immigration Law Section, “Bill C-24, Strengthening Canadian Citizenship” (2014) at 4; Canadian Association of Refugee Lawyers (2014) *supra* note 92 at 8; A Macklin, “Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien” (2014) 40:1 Queen’s LJ at 25.

⁹⁴ Note that this specifically refers to terrorism offences and does consequently not include terrorist activity.

⁹⁵ Canadian Bar Association (2014) *supra* note 93 at 4-5; Canadian Association of Refugee Lawyers (2014) *supra* note 92 at 7; s 10(2) CCA.

⁹⁶ Section 10.3 CCA, this was the case before the amendment, when fraudulently obtained citizenship was revoked.

enter and remain in the country under Section 6 of the *Charter of Rights and Freedoms* (‘the *Charter*’) only applies to Canadian citizens. After denationalization, the individual becomes a foreign national rather than a permanent resident and consequently has no right to remain in Canada but can be deported.

Nevertheless, some limitations on the power to revoke nationality had been put in place. Clause 8 of Bill C-24 introduced safeguards to ensure that the newly introduced measures did not render individuals stateless.⁹⁷ The restrictions included in Section 10.4(1) ensured that revocation on the grounds including Section 10(2)(b) did not violate ‘any international human rights instrument regarding statelessness [...]’. The strictness of this limitation was however mitigated by the subsequent subsection. An individual who is to be denationalized but claims to fall within the ambit of section 10.4(1) will have to prove on a balance of probabilities that he is not a citizen of another country if the minister has reasonable grounds to believe that he is. In short, the onus of proof could thus easily be shifted onto the individual who then had to disprove the assumption that he or she held another country’s citizenship.⁹⁸ The minister, on the other hand, was able to base the revocation on the presumption, rather than the certainty, that the individual had claim to another country’s citizenship.⁹⁹

C. CRITIQUE

The brief description of the amendments introduced by the *Strengthening Canadian Citizenship Act* has already hinted at some of the issues inherent in Bill C-24. Indeed, it was widely criticized by different NGOs and associations. However, before their objections can be discussed, it is necessary to briefly consider the issues raised by the adoption of the Bill in and of itself. After all, it is not entirely clear what the objectives of the Bill were and how it fit into Canada’s overall counter-terrorism strategy. According to the statements made by the Minister of Citizenship and Immigration during the discussion of Bill C-24, the measure was based on the perception that it had become common practice in all other NATO states to denationalize disloyal citizens.¹⁰⁰ This

⁹⁷ Section 10 CCA.

⁹⁸ Section 10.4(2) CCA; Canadian Library of Parliament, *An Act to amend the Citizenship Act and to make consequential amendments to other Acts*, Publication No. 41-2-C24-E (2014) at 16-17; Canadian Association of Refugee Lawyers (2014), *supra* note 92 at 8; Forcese (2013-2014) *supra* note 90 at 569.

⁹⁹ Canadian Bar Association (2014) *supra* note 93 at 3; Canadian Association of Refugee Lawyers (2014) *supra* note 92 at 8.

¹⁰⁰ Canada, House of Commons Debate of June 12 2014, House of Commons Debates, Vol. 147, No. 102 at 6742, stating that all NATO states but Portugal allow for denationalization.

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reasoning is not only weak, but also obviously flawed. The fact that other states adopt certain measures does not necessarily guarantee the effectiveness of a measure nor show the need for it in a specific country. Additionally, as has been shown in the survey in Section 2 of this paper, Germany and the United States both strictly oppose depriving their nationals of their citizenship, even where they have openly turned against the state. In light of this, it seems that the main purpose of the amendment was to reflect the value of Canadian citizenship, strengthening it through denationalization in cases of serious disloyalty or breaches of allegiance, such as the commission of a terrorism offence.¹⁰¹ The introduction of this quasi-criminal law sanctioning mechanism seems to have been the primary aim of the amendment, which was reiterated in the debates surrounding the abolition of the measure.¹⁰² While this may be a valid reason, it does not fit the approach set out by the 2012 strategy. After all, the strategy advocates the use of criminal law, not quasi-criminal law sanctioning under administrative law, as the main tool to ‘respond’ to terrorist conduct. Worse still, pre-2017 Section 10(2)(b) weakened Canadian and global counter-terrorism efforts in general. By denationalizing individuals and deporting them to the country of second nationality, the measure risked that these individuals would commit terrorist offences abroad for which they could not then be prosecuted in Canada. This would effectively have relocated the threat to another country rather than addressed it for good. This issue has also been raised by the NGOs criticizing the measure and will be addressed in the next section. The issue is nevertheless remedied to a certain extent by the fact that the requirements for the extra-territorial application of Canadian criminal law to terrorist *activities* differ from those required to prosecute a terrorism *offence* committed abroad, as in the former case it suffices that the activity was directed against a governmental facility or the Canadian Government.¹⁰³

Returning to the issue of exporting the terrorist threat, a point of critique that is generally applicable to all types of deprivation of nationality, the issue that denationalization does not resolve the terrorist threat in and of itself will be addressed.¹⁰⁴ Although the revoking state is, at least in theory, no longer threatened by the individual within its own territory, the threat itself has not been resolved. As denationalization is only possible where the individual possesses another nationality, the country of the remaining citizenship will be forced to take in the individual, and with him the

¹⁰¹ *Ibid.*

¹⁰² House of Commons Debate of March 9 2016 *supra* note 89 at 1647 et seq.

¹⁰³ Section 7(3.35) CCC.

¹⁰⁴ Canadian Library of Parliament (2014) *supra* note 98 at 25; Canadian Association of Refugee Lawyers (2014), *supra* note 92 at 9.

threat of an attack. Should a sufficient number of states adopt legislation of either type, this could lead to a race for revocation¹⁰⁵ and potentially result in a viscous circle in which states adopt ever broader revocation provisions to be able to denationalize citizens before another state does so.¹⁰⁶

Another set of problems inherent in Canada's pre-2017 legislation was that Section 10 practically introduced a form of retroactive banishment limited to dual-nationals. This raised several points of criticism at once. First, the fact that the punishment of banishment was reintroduced.¹⁰⁷ Even though the bill does not (re-)introduce banishment as a criminal law sanction, the effects of the revocation were comparable. A more pressing, second, point is that the denationalization could also have been used to prevent potential future offences. On the sole basis of past conduct, individuals could have been denationalized to prevent them from reoffending. Although numerous criminal law systems impose punishment for aiding, abetting, or preparatory acts, the revocation was a purely administrative measure and not subject to the rules and standards of protection of criminal procedure. Critics argued that future conduct should be addressed through criminal law rather than administrative measures.¹⁰⁸ Punishment should be imposed as a response to conduct prohibited by criminal law and not through quasi-criminal law administrative measures, especially not where they only seek to prevent distant harm that may never materialize. A final point of critique that was raised in this regard addressed the dilemma of the measure only being applicable to dual-nationals. On the one hand, the measure cannot apply to mono-nationals, as this could render individuals stateless. However, including protection against statelessness while maintaining the measure will necessarily place dual-citizens in a less favorable position than mono-nationals.¹⁰⁹ It raised the serious issue of direct discrimination against dual-nationals¹¹⁰ and had the potential to fuel stereotypes against certain parts of the population in which dual-nationality is

¹⁰⁵ Canadian Association of Refugee Lawyers (2014) *supra* note 92 at 9.

¹⁰⁶ This is a general issue inherent in denationalizing (suspected) terrorists, compare GR De Groot, *Towards a Toolbox for Nationality Legislation* (Maastricht: Nexus Legal, 2016) at 32; and S Jayaraman, "International Terrorism and Statelessness: Revoking the Citizenship of ISIL Foreign Fighters" (2016) 17 *Chi J Int'l L* 178 at 203; the extension of the Home Secretaries powers under the BNA through s 66(1) Immigration Act 2014 (see Section II) could be seen as an indication of this, as it was adopted specifically as a response to the impossibility of denationalizing a naturalized mono-national.

¹⁰⁷ Canadian Bar Association (2014) *supra* note 93 at 3-4; Amnesty International Canada, "Bill C-24: Amnesty International's concerns regarding proposed changes to the Canadian Citizenship Act" (2014) at 4; Canadian Association of Refugee Lawyers (2014) *supra* note 92 at 8.

¹⁰⁸ Canadian Library of Parliament (2014) *supra* note 98 at 25.

¹⁰⁹ Canadian Bar Association (2014) *supra* note 93 at 4.

¹¹⁰ Amnesty International Canada (2014) *supra* note 107 at 2-3.

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especially common. Bill C-24 was heavily criticized for being discriminatory, creating two classes of citizens, and placing certain groups of Canadians under general suspicion.¹¹¹

The criticism raised against Bill C-24 does not end here, however. In addition to the issues outlined above, the possibility of depriving individuals of their citizenship where they had been convicted for certain offences abroad was also subject to critique. It highlighted the serious issues that would arise where the conviction had occurred in a country that does not adhere to due process and fair trial standards, or deliberately persecutes those opposing the local government for terrorism offences.¹¹² Another, final point of criticism was raised by UNICEF, which found that the legislation may have severe, two-fold impact on children and juveniles. First, it was remarked that Section 10(2) contained no restrictions regarding the age of those who could be denationalized.¹¹³ While this issue was slightly mitigated by the requirement of a criminal conviction and the fact that Canadian criminal law only assigns responsibility to those above the age of 12, the issue nevertheless continues to exist for juveniles above that age.¹¹⁴ Secondly, children whose parents have their nationality revoked, will be either be forced to leave the country, or separated from their families.¹¹⁵

Next to the shortcomings of pre-2017 Section 10(2)(b), the safeguards against statelessness included in Section 10.4 were also flawed. Although the provision prohibits the revocation where it would result in statelessness, it also places the onus on the individual, who will have to disprove the minister's initial findings that the individual will be able to obtain another nationality. This shift contravenes the UNHCR's findings that possession of a second nationality must always be demonstrated by the party advancing the claim, here the Minister.¹¹⁶ Additionally, the construction is disadvantageous to the individual, as the minister will have significantly better resources to establish whether a second nationality could be obtained.

In summary, the rationale behind the introduction of the measure as well as its quality were highly questionable. It is unclear why, taking into account the serious concerns and problems outlined in the preceding paragraphs, there was need for an additional administrative sanction for

¹¹¹ Canadian Bar Association (2014) *supra* note 93 at 4; Amnesty International Canada (2014) *supra* note 107 at 2-3.

¹¹² Amnesty International Canada (2014) *supra* note 107 at 6.

¹¹³ UNICEF Canada, "Bill C-24: The Strengthening Canadian Citizenship Act - Brief submitted by UNICEF Canada to the House of Commons Standing Committee on Citizenship and Immigration" (2014) at 10.

¹¹⁴ Section 13 Canadian Criminal Code.

¹¹⁵ UNICEF *supra* note 113.

¹¹⁶ UNHCR, *Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality – Summary Conclusions* (2013).

those who have already been convicted of a terrorist offence in Canada, especially when considering the broad scope of the relevant criminal law provisions and the general focus of Canada's anti-terrorism strategy.¹¹⁷

D. BILL C-6: REVERTING THE CHANGES INTRODUCED BY BILL C-24

Following the Canadian elections in the fall of 2015, the new liberal government introduced Bill C-6 on 25 February 2016.¹¹⁸ The amendment was adopted by the Canadian House of Commons and passed by the Canadian Senate with amendments on 3 May 2017. It received Royal Assent on 19 June and subsequently entered into force.¹¹⁹ The amendment reverts many of the changes introduced by the 2014 amendment. For the scope of this paper, clauses 3 and 5 on deprivation of citizenship are particularly relevant. Bill C-6 made short work of the expatriation sections previously included in the CCA. Clause 3 simply repealed Section 10(2) altogether, thereby removing the possibility of denationalizing those convicted of terrorism offences. Section 10.4, which provided insufficient and unfair protection against statelessness was abolished by clause 5 of the Bill C-6. In short and with regards to deprivation of citizenship, the CCA was reverted to its pre-2014 status, making fraud the only ground on which citizenship may be revoked.¹²⁰ The new amendment has been welcomed widely for its reversion of Bill C-24: by limiting revocation to instances where citizenship has been obtained by fraud, the broad and heavily criticized grounds for revocation in the pre-2017 Section 10(2)(b) have been removed.¹²¹ The reform has been praised for reintroducing equality in citizenship by no longer subjecting dual- and mono-nationals to

¹¹⁷ See i.a. s 2 jo. 83.02-04 and 83.18-23 Canadian Criminal Code, RSC 1985, c C-46.

¹¹⁸ Parliament of Canada, LEGISinfo on Bill C-6, online: <<http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&billId=8117654&View=0>>; Levitz, S., "Liberals to Pull back Tory Citizenship Rules – Terrorism to No Longer Be Grounds for Revoking Citizenship" *National Post* (25 February 2016) online: <<http://news.nationalpost.com/news/canada/liberals-to-pull-back-tory-citizenship-rules-restoring-citizenship-terrorism>>.

¹¹⁹ Parliament of Canada, LEGISinfo on Bill C-6, online: <<http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&billId=8117654&View=0>>.

¹²⁰ Canadian Library of Parliament, An Act to amend the Citizenship Act and to make consequential amendments to another Act, Publication No. 42-1-C6-E (2016) at 4.

¹²¹ Canadian Association of Refugee Lawyers, "CARL Comments Amendments to Citizenship Act", *CARL* (26 February 2016) online: <<http://www.carl-acaadr.ca/articles/124>>; Canadian Bar Association, Immigration Law Section, "Bill C-6, Citizenship Act Amendments" (2016).

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different standards, and removing the ‘two tiers’ of citizenship¹²² and for removing denationalization as a form of punishment outside the realm of criminal law.¹²³

IV. DEPRIVATION OF NATIONALITY UNDER THE DUTCH NATIONALITY ACT

On 10 March 2016, the Netherlands amended the Dutch Nationality Act (DNA)¹²⁴ to widen the possibility of revoking nationality of those convicted of preparatory terrorist offences, similar to Bill C-24.¹²⁵ In addition to the 2016 amendment, the Netherlands adopted further reaching legislation in 2017. The Act amending the DNA in relation to the revocation of nationality in the interest of national security has been published in the official journal on 22 February 2017¹²⁶ and entered into force on 1 March 2017, introducing proactive denationalization.¹²⁷ Both Acts have been adopted in the context of the 2014 action plan for an integral approach to jihadism,¹²⁸ which seeks to reduce the threats originating from jihadists by all means.¹²⁹ Both amendments find their policy basis in the fourth measure announced in the first section of the plan, which clearly stipulates that Dutch nationality will be used as a means in the fight against terrorism, by making it revocable with and without a previous conviction for a terrorist offence.¹³⁰ The new measures are particularly serious, as Dutch nationality that has been revoked under either of the two provisions cannot be reinstated.¹³¹ Deviation from this rule is only possible under exceptional circumstances provided that at least five years have passed since the denationalization.¹³²

In discussing these legal developments in depth, the subsequent sections will first elaborate on the counter-terrorism context within which these laws operate, following which the 2016 and 2017 amendments will be analyzed and classified according to the two types established above., before highlighting the problems inherent in the new legislation.

¹²² Canadian Council for Refugees, “Bill C-6: An Act to Amend the Citizenship Act and to Make Consequential Amendments to Another Act – Submission of the Canadian Council for Refugees” (2016) at 5-6; Canadian Civil Liberties Association, “CCLA Welcomes Restoration of Equality in Citizenship” CCLA (26 February 2016) online: <<https://ccla.org/ccla-welcomes-restoration-of-equality-in-citizenship/>>.

¹²³ Canadian Council for Refugees (2016) *supra* note 122 at 6.

¹²⁴ Rijkswet op het Nederlanderschap (Dutch Nationality Act), BWBR0003738.

¹²⁵ Rijkswet van 5 maart 2016 *supra* note 8; now incorporated in Article 14(2) DNA.

¹²⁶ Rijkswet van 10 februari 2017 *supra* note 10; now incorporated as article 14(4) in the DNA.

¹²⁷ Article II of Besluit van 10 februari 2017 *supra* note 10.

¹²⁸ Dutch Ministry of Security and Justice, national Coordinator Counter-terrorism and Security, and Minister of Social Affairs and Employment, *Actieprogramma Integrale Aanpak Jihadisme* (2014), at 3.

¹²⁹ *Ibid* at 4-8.

¹³⁰ *Ibid* at 6, 4(a), (b).

¹³¹ Article 14(5) DNA.

¹³² *Ibid*.

A. DEPRIVATION OF NATIONALITY IN THE CONTEXT OF THE DUTCH COUNTER-TERRORISM STRATEGY

Before discussing the counter-terrorism measures recently inserted into the *Dutch Nationality Act* to respond to the foreign fighter threat, it is necessary to discuss the range of other counter-terrorism measures that have been enacted as part of the Country's anti-terrorism strategy. While the primary response of Dutch law is also centered around penal law, several non-criminal law measures have also been adopted to prevent radicalization and de-radicalize foreign fighters who have returned to the Netherlands. Under the name Exits, a facility intended to de-radicalize and re-socialize extremists was created in 2015. It is directed at specific groups of radicalized individuals who reside in the Netherlands. However, it does not extend to Dutch foreign fighters who succeeded in leaving the Country and have not (yet) returned.¹³³ The facility's task is to support individuals who voluntarily want to leave jihadism behind. Continuing to resemble a carrot-and-stick approach to terrorism and foreign fighters in particular, the Dutch counter-terrorism strategy includes other non-criminal law measures, such as blocking the financial means and support of foreign fighters whilst simultaneously offering consular assistance to foreign fighters abroad who want to leave the organization they had joined.¹³⁴ This is a first indication of the bipartite approach that the Netherlands have adopted: tackling the terrorist threat at home through criminal and non-criminal law measures, while simultaneously striving to prevent radical foreign fighters from returning home and continuing their fight within the Country.

As mentioned, the Dutch approach includes a strong criminal law framework to address the foreign fighter problem as such, as well as the threats that are posed by their return. Given the great range of offences that are potentially applicable, it must suffice to mention a few notable and particularly relevant examples here. Under Article 83 *Dutch Criminal Code* (DCC) an extensive list of ordinary crimes is deemed a terrorism offence where it is committed with the intention to further a terrorist aim.¹³⁵ Furthermore, specific terrorism offences such as joining a terrorist

¹³³ Specifically, Exits is directed at active jihadists without the intention to leave the Netherlands, radicalized individuals with the intention to leave the country to become foreign fighters, returning foreign fighters, those suspected or convicted of a terrorist offence and detained in special terrorist sectors of a penitentiary, see The Netherlands, Bill 34356 (R2064): *Wijziging van de Rijkswet op het Nederlantschap in verband met het intrekken van het Nederlantschap in het belang van de nationale veiligheid*, nr. 6 'Nota naar aanleiding van het verslag', 1 April 2016.

¹³⁴ *Actieprogramma Integrale Aanpak Jihadisme*, *supra* at note 128, measures 8, 9, and 12.

¹³⁵ The wide range of offences includes murder (Article 289 DCC), obstructing a session of either chamber of parliament by force or threat (Article 121 DCC), or the unlicensed acquisition of firearms or ammunition (Article 55(5) jo. 9 Dutch Weapons and Ammunition Law).

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organization have been included¹³⁶ and the preparation of any offence subject to a term of imprisonment of at least eight years is in itself a criminal offence.¹³⁷ In addition to this general doctrine of preparation, Article 134a DCC criminalizes a number of specific preparatory terrorism offences. In addressing terrorism, Dutch criminal law emphasizes prevention by criminalizing conduct that takes place before the commission can be attempted or completed. Importantly, these offences have extraterritorial effect.¹³⁸ Dutch nationals who commit a terrorism offence outside the territory of the Netherlands will still be subject to Dutch criminal law and prosecuted accordingly.

However, the measures listed above were deemed insufficient and incapable of targeting foreign fighters abroad in particular, despite the extensive territorial scope. In the parliamentary debate on the 2017 amendment, the government highlighted the factual impossibility of applying the above measures to foreign fighters before their return to the Netherlands. While Dutch criminal law does not suffer from material shortcomings in this regard and is *de jure* applicable to foreign fighters, the government has stressed that effective prosecution is *de facto* impossible.¹³⁹ The prosecution of an individual who has committed one of the offences outlined above is seriously obstructed as arresting and detaining the individual is nearly impossible before the return. But according to the Government, the return is exactly what must be prevented at all cost in light of the serious threat posed by these individuals. In light of this approach, prosecution of terrorism offences committed abroad is indeed not a viable option. Instead, foreign fighters are to be denationalized whilst still abroad and declared *persona non grata* to prevent them from returning to the Netherlands altogether.¹⁴⁰ Nevertheless, it seems that criminal law has not entirely been rejected in this context. In November 2016, an amendment to the DCC was discussed that sought to criminalize the intentional presence in regions controlled by a terrorist organization without the prior approval of the Minister of Security and Justice.¹⁴¹ Due to severe criticism from advisory bodies and the Council of State, the proposal was not included in the amendment introduced into

¹³⁶ Article 140a DCC.

¹³⁷ Article 46 DCC.

¹³⁸ Article 4 Besluit van 28 januari 2014, internationale verplichtingen extraterritoriale rechtsmacht (decision on international obligation of extraterritorial jurisdiction), BWBR0034775.

¹³⁹ Bill 34356, nr. 6 *supra* at note 133, 7.

¹⁴⁰ *Ibid* at 5.

¹⁴¹ C Pelgrim, 'Kabinet: verblijf op terroristisch grondgebied wordt toch niet strafbaar', NRC (27 June 2017), online: <<https://www.nrc.nl/nieuws/2016/11/18/van-der-steur-wil-verblijf-in-is-gebied-strafbaar-stellen-5344532-a1532477>>.

parliament in June 2017.¹⁴² Particularly, the Associations of Dutch Journalist and Judges had taken serious issue with the proposed amendment.¹⁴³

In line with the discussion of the Canadian approach, it should lastly be noted that Dutch authorities hold the power to take those suspected of one of these terrorist offences into remand on the basis of a judicial order thereto.¹⁴⁴ This is not an equivalent to preventive detention under Canadian law, however; reasonable grounds to believe that a terrorism offence will be prevented do not suffice to detain an individual. The power to detain aliens is also greatly restricted in Dutch law. While detention on grounds of national security is possible, its application is explicitly restricted to cases where no less intrusive means are available and until the individual agrees to deportation.¹⁴⁵ The length of detention is also strictly limited and may usually not extend beyond six months.¹⁴⁶

In summary, the Netherlands have adopted a counter-terrorism strategy that addresses two different types of threats very differently. On the one hand, criminal law measures and rehabilitation efforts such as Exits address the internal terrorist threat posed by individuals who reside within the country or have returned to the country. Criminal prosecution is possible long before a concrete threat materializes, and individuals are supported in their efforts to leave jihadism behind. On the other hand, the country adopts a strong stance against foreign fighters based on the underlying premise that once an individual has succeeded in leaving the Netherlands to join a terrorist organization, despite the strong internal efforts to prevent this, their return must be prevented at all cost. The counter-terrorism measures under nationality law, that will be discussed below, are thus not the only means that have been adopted to address the foreign fighter threat. Rather, they are meant to fit into the existing approach and fill the gaps that have been identified therein, particularly the risks posed by foreign fighters who intend to return from fighting abroad

¹⁴² *Ibid*; Nederlandse Vereniging voor Rechtspraak, *Advies over het conceptwetsvoorstel versterking strafrechtelijke aanpak terrorisme*, 13 Januari 2017; Nederlandse Vereniging van Journalisten, *Response to the Minister of Security and Justice's conceptwetsvoorstel versterking strafrechtelijke aanpak terrorisme*, 17 January 2017.

¹⁴³ *Ibid*.

¹⁴⁴ Article 63 jo. 67 Wetboek van Strafvordering, BWBR0001903 (Dutch Code of Criminal Procedure); Article I(C) Rijkswet van 20 november 2006 tot wijziging van het Wetboek van Strafvordering, het Wetboek van Strafrecht en enige andere wetten ter verruiming van de mogelijkheden tot opsporing en vervolging van terroristische misdrijven (Stb. 2006, 580).

¹⁴⁵ Article 59 jo. 59c Vreemdelingenwet, BWBR0011823 (Dutch Aliens Act).

¹⁴⁶ Article 59(5) Dutch Aliens Act; under Article 59(6), detention may be extended by an additional twelve months only if it is not reasonably possible to deport the alien earlier.

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and the lack of effectiveness in the enforcement of criminal law extraterritorially. They contribute to the second dimension of the Dutch anti-terrorism strategy in particular.

B. THE 2016 AMENDMENT: DENATIONALISING THOSE CONVICTED UNDER ARTICLE 134(A) DUTCH CRIMINAL CODE

The most important change introduced by the 2016 amendment is the addition of Article 134a *Dutch Criminal Code* to the grounds upon which nationality can be revoked under Article 14(2)(b) DNA: the Minister of Justice and Security is granted the discretion to revoke the nationality of an individual after that person has been convicted of an offence under 134a DCC.¹⁴⁷ This provision criminalizes *inter alia* the factual acquisition of, or mere intention to acquire, means for the commission of a terrorist attack or the preparation of such an attack.¹⁴⁸ The 2016 amendment is clearly a measure of reactive revocation. In contrast to its Canadian counterpart, the amendment itself does not introduce deprivation in response to a conviction for a terrorism offence, but rather widens the range of offence that can trigger denationalization. While many terrorism offences had already been included in Article 14(2)(b) DNA through Article 83 DCC since an amendment in 2010,¹⁴⁹ the 2016 amendment extended the scope significantly by adding Article 134a DCC as a ground for deprivation. The provision criminalizes the acquisition of information, means, or skills for the purpose of committing a terrorist offence, as well as the attempt to do so. The scope of denationalization is thereby extended to include a wide range of preparatory conduct, whereby its preventive capabilities are significantly strengthened. This fits into the generally preventive approach that is also reflected in Dutch criminal law as discussed briefly above. In summary, the amendment enables the Minister to deprive a multi-national irreversibly convicted under one of the provisions enumerated in Article 14(2), a decision that is to be based on the individuals' circumstances and the threat they pose. Because the denationalization must be based on a conviction, it is to some extent subject to indirect review by the courts who have to determine the terrorist nature of the underlying offence. The application of Article 14(2) DNA is subject to limitations that are similar to those of the pre-2017 Section 10(2)(b) CCA, although the standards of protection differ. Under Article 14(8) DNA, only multi-nationals can be deprived of their nationality, as denationalizing mono-nationals would render them stateless. In accordance with international law, this limitation does not apply where nationality is revoked that had been

¹⁴⁷ See also HU Jessurun D'Oliveira, "Intrekking Nederlanderschap bij terrorisme" (2016) *NJB* 2016/725.

¹⁴⁸ Article 134a Wetboek van Strafrecht, BWBR0001854.

¹⁴⁹ M Klaus, "De bestuurlijke aanpak van terrorisme gezien vanuit het non-discriminatiebeginsel", (2017) *SecJure*.

fraudulently acquired in the first place.¹⁵⁰ However, the onus of proof is different from that under the CCA. It is not for the person who is to be denationalized to prove that he would become stateless; revocation is simply prohibited if it results in statelessness.

The 2016 amendment and the powers that it extends addresses the threat posed by those who participate in terrorist training camps or attempt to do so.¹⁵¹ While the Netherlands had long recognized the power to deprive individuals who had joined another states' armed forces of their nationality, this power does not extend to the forces of non-state actors.¹⁵² This lacuna was closed by the 2016 amendment, as the grounds for denationalization now include convictions for participating in training camps. It is aimed at the threat posed by IS and the foreign fighters that join it in particular.¹⁵³ In addition, the amendment communicates that the use of Dutch citizenship to facilitate terrorism in any state is not acceptable, thereby also stressing the values that are attributed to Dutch citizenship.¹⁵⁴

While content and purpose of reactive deprivation under Dutch law are rather straightforward, it must be acknowledged that the practical effectiveness of the measure may be reduced in certain individual cases following the CJEU's rulings in *Ruiz Zambrano*¹⁵⁵ and *CS*.¹⁵⁶ In the former case, a Columbian national challenged the refusal of the Belgian authorities to grant him a working permit, as this would force him to leave the Union altogether, taking his two children with Belgian nationality with him.¹⁵⁷ The CJEU held that member states are not allowed to adopt measures depriving EU citizens of their fundamental rights under EU law.¹⁵⁸ By leaving the EU altogether, the children would have been unable to exercise e.g. their free movement rights, which under the *Ruiz Zambrano* rule is unacceptable.¹⁵⁹ Although this rule was originally unqualified,

¹⁵⁰ As permitted under article 8(2)(b) *Convention on the Reduction of Statelessness*, 30 August 1961, 989 UNTS 175 (entered into force 4 December 1954) and Article 7(1)(b) jo. 7(3) *European Convention on Nationality* 1997, ETS No. 166.

¹⁵¹ The Netherlands, Bill 34016 (R2036): Wijziging van de rijkswet op het Nederlanderschap ter verruiming van de mogelijkheden voor het ontnemen van het Nederlanderschap bij terroristische misdrijven, Nr. 3 Memorie van Toelichting, 1-2.

¹⁵² *Ibid* Nr. 4 Nota naar Aanleiding van het Verslag, 6.

¹⁵³ Memorie van Toelichting, *supra* note at 151, 1-3; Note that at the time the 2016 amendment was passed, proactive deprivation had not yet been adopted as a counter-terrorism measure in the Netherlands.

¹⁵⁴ *Ibid* at 2.

¹⁵⁵ *Ruiz Zambrano v Office national de l'emploi (ONEm)*, CJEU, Case C-34/09.

¹⁵⁶ *Secretary of State for the Home Department v CS*, CJEU, Case 304/14.

¹⁵⁷ GR De Groot and NC Luk, "Twenty Years of CJEU Jurisprudence on Citizenship" (2014) 15 German LJ 821 at 829.

¹⁵⁸ *Ruiz Zambrano*, *supra* note 155.

¹⁵⁹ It must be underlined in this context that the Court did not create an autonomous, but only a derivative right for third-country nationals, as reiterated i.a. in *Ymeraga et. al. v Ministre du Travail, de l'Emploi et de l'Immigration*, CJEU, Case C-87/12.

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this has changed since CJEU's ruling in *CS v UK*, where the Court, for the first time, established limitations on the derived right. According to the CJEU, a derived right of residence may be denied only the grounds of public policy and security as defined under EU law,¹⁶⁰ and requires an individual assessment of the case, meaning that it may not be the automatic consequence of e.g. a conviction.¹⁶¹ Following these rulings, EU law can curb the effectiveness of the 2016 amendment: should the denationalized individual have a relative, a child for example, who is an EU national and dependent on him, he may nevertheless enjoy a derived right of residence. Should the threat posed by the individual be insufficiently serious to trigger the *CS* exception, the denationalization would *de facto* be rendered meaningless.¹⁶² Thus, EU law imposes at least light restrictions on the effectiveness of the 2016 amendment. The exact impact and scope of this limitation will however remain unclear until the first cases on this matter are brought before the Dutch courts or the CJEU. Nevertheless, should it ever prevent the expulsion of a convicted and denationalized terrorist, this would be a significant blow to the overall effectiveness of the 2016 amendment.

Following the enactment of the 2016 amendment, Dutch and Canadian laws on deprivation of nationality as a counter-terrorism means had become akin. Both allowed for reactive denationalization on a similar set of grounds and had strong preventive notions. Neither required the commission of an actual terrorist attack to be triggered, as the commission of preparatory offences sufficed. The two approaches branched with the adoption of Bill C-6 and the 2017 amendment, which will now be discussed.

C. THE 2017 AMENDMENT: DENATIONALISING THOSE WHO JOIN A TERRORIST ORGANISATION

Less than a year after the 2016 amendment had entered into force, the second amendment to the DNA announced by the action plan became law.¹⁶³ It had been submitted to the lower chamber of the Dutch Parliament on 4 December 2015,¹⁶⁴ and was ultimately adopted by the upper chamber on 7 February 2017.¹⁶⁵ As suggested by the name of the amendment, the Act allows for the

¹⁶⁰ *CS supra* note 156 §37.

¹⁶¹ *Ibid* §41.

¹⁶² HU Jessurun D'Oliveira, "Commentaar bij de Concept-Wijziging van de Rijkswet op het Nederlanderschap in verband met het intrekken van het Nederlanderschap in het belang van de nationale veiligheid", (2015) online: <http://www.prakkendoliveira.nl/user/file/150224_commentaar_prof_jessurun_d_oliveira.pdf> at 4.

¹⁶³ *Actieprogramma integrale aanpak jihadisme supra* note 128 at 6, Article 4(b).

¹⁶⁴ Bill 34356, nr. 6, *supra* note 133, Nr 1 Koninklijke Boodschap.

¹⁶⁵ Stemming Intrekken Nederlanderschap 7 February 2017, Eerste Kamer Handelingen 2016-2017, nr. 17 reprinted, item 4.

revocation of nationality in the ‘interest of national security’. The amendment was deemed a necessary response to the ineffectiveness and undesirability of extraterritorial enforcement of Dutch criminal law against foreign fighters in particular. It addresses a lacuna in the Dutch counter-terrorism policy, particularly with regard to foreign fighters who have succeeded in leaving the country and not yet returned to the Netherlands. While the individuals could certainly be convicted *in absentia*, the sentence could not be executed.¹⁶⁶ This creates a lacuna, as the threat posed by foreign fighters upon their return cannot be effectively addressed pre-emptively under the pre-amendment framework. Under the bipartite approach discussed above, the Netherlands is first and foremost determined to prevent or hinder foreign fighters from returning to their home country due to the extreme risk they are said to pose.¹⁶⁷

The 2017 amendment seeks to close this gap in the pre-emptive efforts against foreign fighters through nationality law. The Dutch minister of Justice and Security is granted the broad discretionary power to revoke the nationality of individuals residing outside the Netherlands if their conduct indicates that they have joined an organization listed as engaging in an internal or international armed conflict and endangering national security.¹⁶⁸ Whether the individual has joined such an organization is established where:¹⁶⁹ (1) based on the conduct of the individual, it can be established beyond reasonable doubt that the individual supports the aims of the organization and intends to join it, or (2) the individual carries out actions for, or to the benefit of, the organization.

Together with their nationality, the individuals are also deprived of their right to return and declared *persona non grata* to prevent their lawful return to the Netherlands. Although this does not provide absolute protection against factual return, it is said to seriously obstruct it. The scope of application of the measure is limited to dual-nationals under Article 14(8) DNA to prevent new cases of stateless. In practice, the deprivation of Dutch nationality has been disconnected from criminal law and is now possible before an attack or any other terrorism offence has been committed, prepared, or even planned. Joining a terrorist organization under the above criteria in and of itself warrants denationalization at the discretion of the minister. Thus, as of 1 March 2017, the Netherlands also employs proactive deprivation of nationality as a counter-terrorism tool. The

¹⁶⁶ Bill 34346, nr. 6, *supra* note 133 at 6.

¹⁶⁷ Bill 34356 (R2064), *supra* note 164, Nr. 3, Memorie van Toelichting, 3 et seq.

¹⁶⁸ Article I(B) Rijkswet van 10 februari 2017, *supra* note 10; Article 14 DNA; The list is to be established by the Dutch Minister of Justice and Security, see *Ibid* at 6.

¹⁶⁹ *Ibid*.

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newly created power was first used in September 2017, when the Dutch Minister of Justice and Security deprived four Dutch dual-nationals of their citizenship for the first time.¹⁷⁰ At the time of writing, cases that challenge the new law or a decision thereunder have not been reported. It remains to be seen whether individuals who have been deprived of their nationality will challenge the underlying decision in court. In light of the recent case of *K2 v UK* it seems highly likely that this will be the case, however.¹⁷¹ In this case, a decision of the British Home Secretary depriving a British dual national of his citizenship and forcing him to return to Sudan was challenged from abroad. This shows that even deportation or residence abroad is not necessarily an obstacle to challenging these decisions. In light of the British case, it seems to be only a question of time until cases against a decision adopted under Article 14(4) DNA will be brought.¹⁷²

Despite its purely proactive and very broad scope, the new Article 14(4) DNA is not free from restrictions. As stated, it cannot be applied to mono-nationals as this would render them stateless, nor to individuals under the age of sixteen.¹⁷³ This restriction was absent from the original proposal, but was added by the left wing of the lower chamber of the Dutch Parliament during the final voting on the proposal.¹⁷⁴ The authors of the amendment were concerned that the original proposal itself did not limit the applicability of the law to a certain age, nor did it include such protection indirectly through criminal law as had been the case with the 2016 amendment.¹⁷⁵ Finally, it must be noted that the new Article 14(4) is a temporary measure. Article IA of the amendment automatically removes subsection 4 from Article 14 after five years in March 2022 due to the intrusiveness of the measure.¹⁷⁶

¹⁷⁰ Dutch Ministry of Security and Justice, ‘Minister Blok trekt Nederlanderschap in van 4 personen’ (13 September 2017), [online: <https://www.rijksoverheid.nl/ministeries/ministerie-van-justitie-en-veiligheid/nieuws/2017/09/13/minister-blok-trekt-nederlanderschap-in-van-vier-personen>](https://www.rijksoverheid.nl/ministeries/ministerie-van-justitie-en-veiligheid/nieuws/2017/09/13/minister-blok-trekt-nederlanderschap-in-van-vier-personen).

¹⁷¹ ECtHR, *K2 v The United Kingdom*, no. 42387/12, 7 February 2017.

¹⁷² For an elaborate discussion of *K2* and its relevance for the recent Dutch Amendment see TL Boekestein and GR de Groot, “*K2 t. het Verenigd Koninkrijk*”, (2017) *European Human Rights Cases 2017/146*, at 6 et seq.

¹⁷³ Article 14(4) DNA.

¹⁷⁴ Bill 34356, nr. 6 *supra* note 133, Nr. 2 Voorstel van Rijkswet, Article II and Nr. 29 Amendement van het lid Gesthuizen c.s.; Stemming Intrekken Nederlanderschap in belang van de nationale veiligheid 24 May 2016, Handelingen 2015-2016, nr. 86, item 12.

¹⁷⁵ Bill 34356, nr. 6 *supra* note 133, Nr. 29; in contrast to the 2016 amendment, the 2017 amendment is disconnected from criminal law, and its applicability thus not restricted by the age restrictions on liability in article 77a, b DCC.

¹⁷⁶ Article II(1) Rijkswet van 10 februari 2017 *supra* note 10; note that this was not part of the original bill; Bill 34356, nr. 6 *supra* note 133, Nr. 24 Gewijzigd amendement van het lid Recourt ter vervanging van dat gedrukt onder nr. 14.

D. CRITIQUE

Much like their Canadian counterpart, both recent amendments in the Netherlands have attracted a substantial amount criticism, most of which is directed at the more recent amendment. Although the two laws differ in nature (reactive v proactive), most of the critique raised can be applied to both acts and the amendments will therefore be addressed together.

A first point of criticism has already been addressed in Section 3.3 and been referred to as the “race for revocation” or “export of the problem”. Clearly, neither of the Dutch amendments is directed at resolving the threat posed by foreign fighters properly. Rather, both simply export the problem to the country of the individual’s other nationality. This approach merely prevents harm by hindering the individual in legally re-entering the country. It is however incapable of eliminating the actual threat the individual poses. Additionally, where several states adopt such legislation, it may lead to a “race for revocation” through which both countries of nationality seek to expatriate the individual before the other. Such a race is most likely won by the state with the harshest laws and the lowest standards of protection, neither of which is desirable from a human rights perspective. Additionally, the laws will likely cause the individual remaining with the terrorist organization longer and might even result in the creation of new terrorist organizations in the countries of remaining nationality.¹⁷⁷ The 2017 amendment in particular is based on short-sighted, insufficient, and ineffective attempt to prevent the return of the foreign fighter in exchange for a feeling of security. A second issue applicable to both amendments is that it remains unanswered why the current criminal law measures are insufficient to deal with the problem, even despite the alleged gaps in extra-territorial enforcement. Whilst penal sanctions are still to a limited extent part of the 2016 amendment, they are disregarded entirely under the new law.¹⁷⁸ Most notably, the Dutch Council of State has uttered serious concerns in this regard, referring to the extensive possibilities of imposing criminal law sanctions on individuals long before an actual attack has been committed under the current DCC¹⁷⁹ and questioning why these measures are deemed

¹⁷⁷ GR De Groot and O Vonk, “De ontneming van het Nederlanderschap wegens jihadistische activiteiten”, (2015) 6 *Tijdschrift voor Religie, Recht en Beleid* 1 at 52.

¹⁷⁸ HU Jessurun D’Oliveira, “Nationaliteitsrecht als wapen in de strijd tegen de jihad”, (2016) *NJB* 2014/1908 at 1-2; JR Groen, “De wetsvoorstellen ter uitvoering van het Actieprogramma Integrale Aanpak Jihadisme”, (2016) 2016 *Tijdschrift voor Constitutioneel Recht* at 141.

¹⁷⁹ See for example, joining a terrorist organization is a criminal offence under Article 140a Dutch Criminal Code and through the general doctrine of preparation under article 83 DCC, those intending to commit a terrorist attack can be prosecuted long before their efforts reach the attempt stage, even where the individual is not residing in the Netherlands.

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insufficient.¹⁸⁰ Proactive deprivation of nationality prevents the individual from returning in the first place and makes the extraterritorial application of Dutch Criminal law impossible. The application of the wide range of available criminal law sanctions becomes impossible. Should the foreign fighter nevertheless succeed in returning to the Netherlands, prosecution for the crimes committed abroad would not be possible. After all, Dutch Criminal Law is only applicable to those who commit terrorist offences abroad who are *Dutch nationals*.¹⁸¹ For these reasons, the Council of State deemed the 2017 amendment to be of insufficient benefit to the existing approach.¹⁸²

Furthermore, Dutch scholars have raised concerns that the measure in itself may be considered a form of penal sanction (e.g. banishment), similarly to their Canadian colleagues.¹⁸³ Although, the measure falls within the realm of administrative law, it is similar to a criminal law punishment in nature, but can be imposed without the need to adhere to the standards and safeguards of criminal procedure. Nevertheless, despite the intrusiveness measures and their limited effectiveness, the most pressing problem they pose is that of discrimination. The problem applies to the two Dutch amendments in a similar fashion as it does to the SCCA. Both Dutch measures can only target multi-nationals, as application to mono-nationals is prohibited.¹⁸⁴ The issue is especially pressing with regard to the Dutch amendments. The list of terrorist organizations whose members may be stripped of the nationality is highly very limited and specifically directed at Islamist terrorist groups such as Al-Qaida and ISIS.¹⁸⁵ In light of research into the background of foreign fighters that join these organizations in particular, it is clear that individuals of ethnic Arab background are more likely to be targeted than other dual-nationals.¹⁸⁶ Consequently, they are at least implicitly targeted and indirectly discriminated against by the new amendments.¹⁸⁷

¹⁸⁰ Bill 34356, nr. 6 *supra* note 133, Nr. 4, Memorie van Toelichting at 4.

¹⁸¹ Article 4 Besluit internationale verplichtingen extraterritoriale rechtsmacht van 28 januari 2014, BWBR0034775.

¹⁸² Bill 34356, nr. 6 *supra* note 133, Nr. 4, Memorie van Toelichting, 4-6; De Groot and Vonk (2015) *supra* note 177 at 52.

¹⁸³ HU Jessurun D'Oliveira, "Geen directe werking Europees Nationaliteitsverdrag? So what?", (2017) NJB 2017/98 at 3.

¹⁸⁴ By revoking the citizenship of a mono-national, that individual would effectively be rendered stateless.

¹⁸⁵ Groups such as the PPK or Tamil Tigers are omitted from the list, see De Groot and Vonk (2015) *supra* note 177 at 51-52; Besluit van de Minister van Veiligheid en Justitie van 2 maart 2017, nr. 2050307, *tot vaststelling van de lijst met organisaties die een bedreiging vormen voor de nationale veiligheid*, 2017, Staatscourant nr. 13023, published on 10 March 2017 in Staatscourant nr. 13023.

¹⁸⁶ De Groot and Vonk (2015) *supra* note 177 at 51-52; E Bakker and R de Bont, "Belgian and Dutch Jihadist Foreign Fighters (2012–2015): Characteristics, Motivations, and Roles in the War in Syria and Iraq" (2016) 27:5 *Small Wars & Insurgencies* 837 at 841; National Coordinator Terrorism and Security, Summary, "De jihad beëindigd? 24 teruggekeerde Syriëgangers in beeld", NCTV 2016, online: <https://www.nctv.nl/binaries/samenvatting-jihad-beeindigd-def_tcm31-32539.pdf>.

¹⁸⁷ Klaus (2017) *supra* note 149 at 3.

Legal scholars have stated that, in light of these three primary concerns, the deployment of nationality law in against foreign fighters and terrorism by the Netherlands remains insufficiently motivated, especially when considering the fact that both criminal law and the Dutch Passport Act seem to provide proper, less intrusive, and better safeguarded measures to address the problem.¹⁸⁸ Experts fear that the expatriation of foreign fighters will not only radicalize them further, but also raise that counter-terrorism agencies will likely miss out on from gathering valuable information from returnees.¹⁸⁹

Despite the harsh criticism raised in legal doctrine, it must be noted that some of the issues raised with regard to Bill C-24 are not, or only to a small degree, applicable to the two Dutch amendments. Firstly, the Dutch 2016 amendment on reactive denationalization does not contain an equivalent to deprivation of nationality following a conviction for certain offences in a foreign country. Issues relating to the possible absence of fair trial standards, abuse of power, or persecution of the political opposition, that have been raised in connection to Bill C-24 are thus not applicable.¹⁹⁰ Secondly, both Dutch amendments offer a certain degree of protection to minors. Under the 2016 amendment, protection is afforded indirectly through the DCC and its age restrictions on criminal responsibility.¹⁹¹ Under the 2017 amendment, direct protection is guaranteed: the new Article 14(4) DNA only allows for expatriation of those above the age of sixteen. Although it remains possible to revoke the nationality of youths under the age of majority, a certain degree of protection is nevertheless afforded. Unfortunately, the second issue raised by UNICEF in this regard relating to cases where parents are expatriated, and children thus forced to leave the country or to be separated, are equally applicable in the Netherlands.¹⁹² However, these concerns are counterbalanced where children hold EU citizenship, as this will grant an additional degree of protection, and may even prohibit the Netherlands from expelling the parent at all.¹⁹³

The final point of criticism directed at the SCCA addressed its insufficient standard of protection against statelessness. The DNA affords more protection than its Canadian counterpart. Whilst under Section 10.4 CCA it is for the individual to prove that he is not the citizen of a country

¹⁸⁸ D'Oliveira (2017) *supra* note 183 at 3-4.

¹⁸⁹ R Briggs, and T Silverman, "Western Foreign Fighters: Innovations in Responding to the Threat", (2014) Institute for Strategic Dialogue at 47-48.

¹⁹⁰ Amnesty International Canada (2014) *supra* note 107 at 6.

¹⁹¹ Article 77a, b DCC.

¹⁹² UNICEF Canada (2014) *supra* note 113 at 10.

¹⁹³ See the previous discussion on Ruiz Zambrano *supra* note 155; Ymeraga *supra* note 159; and CS *supra* note 156.

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of which the minister has reasonable grounds to believe he is, Article 14(8) DNA sets forth a stricter standard: it simply states that expatriation is not possible where it would result in statelessness.

V. EXPLAINING THE ANTITHETICAL DEVELOPMENTS IN CANADA AND THE NETHERLANDS

The above analysis has shown that originally, both Canada and the Netherlands relied only on reactive deprivation of nationality to strengthen their counter-terrorism efforts. Since 2017, however, both countries are undergoing antithetical developments. Whereas the Canadian legislature has adopted Bill C-6, which removes any form of denationalization as a means to counter terrorism from the Canadian Citizenship Act, the Netherlands has strengthened its efforts to utilize deprivation of nationality in fighting the threat posed by returning foreign fighters. Comparing the two systems could thus not yield more antithetical results. Before the 2017 amendment, the possibility of depriving Dutch nationals of the citizenship was more restricted compared to its Canadian pendant. This has changed fundamentally. Dutch and Canadian laws on deprivation of nationality are now developing in opposite direction. In light of the above survey, the developments in Canada seem to be unique. While not all of the countries discussed denationalize foreign fighters or convicted terrorists, the abolition of such laws shortly after their adoption clearly moves against the ongoing trend to extend such legislation. This raises the question why Canada has moved away from denationalization, whereas similar laws have been maintained and even extended in the Netherlands? In light of the debate that accompanied the adoption of Bill C-6, it seemed that the primary reason was the perception that the old law had created two classes of Canadians; mono-nationals whose citizenship was irrevocable and dual-nationals whose was not.¹⁹⁴ Furthermore, when viewing the old denationalization law in the context of the overall counter-terrorism approach within which it operated, it is also clear that the measure did not fit into it. Denationalization is difficult to reconcile with a strong emphasis on criminal law and the prosecution of terrorism as an offence, because it is an administrative sanction operating outside of the criminal courts. Furthermore, a criminal law approach implies an emphasis on punishment and rehabilitation, which are difficult to reconcile with denationalization given that in light of its exclusionary nature it has the potential to undermine both by simply removing the individual from society and territory. This applies equally to the development in the Netherlands, especially with regard to the 2017 amendment.

¹⁹⁴ House of Commons Debate of March 9 2016 *supra* note 89 at 1647 et seq.

In the above discussion, it has become clear that denationalization is an integral part of the Dutch approach to counter the threat posed by foreign fighters, which targets the prevention of their return in particular. As Dutch criminal legislation on terrorism is more limited than its Canadian counterpart, especially with regard to extra-territorial application and preventive arrests, the measure fits well into the Country's overall carrot-and-stick-approach to foreign fights and the different strategies that apply to foreign fighters who have and have not returned to the country. As an essential part of this policy, the 2017 amendment closes the gap previously left by the factual ineffectiveness of prosecuting foreign fighters for crimes committed abroad before their return to the Netherlands. This approach is in stark contrast with the Canadian approach, which is almost exclusively centered around criminal law, relies on a multitude of specific terrorism offences, and defines ordinary crimes as terrorist activity where they are committed in a terrorist context. The effectiveness of the Canadian approach against domestic terrorism and returning foreign fighters alike is further supplemented by the broad scope and low requirements for preventive detention.¹⁹⁵ As discussed, this strategy views terrorism as a crime and addresses it accordingly. Especially in the 'respond' dimension, there is thus hardly any room for non-criminal law measures. Arguably, the disruptive effect of denationalization is much greater in the Canadian approach where the prosecution of extra-territorial terrorism offences requires a link through nationality or residence. While this is also true for the Netherlands, its decision to adopt differing approaches to domestic terrorism and Dutch terrorists abroad circumvents most of these shortcomings. By focusing on the prevention of the return all together, the prosecution of returnees becomes moot. It is thus not surprising that the Netherlands have opted for an alternative approach to remedy the lacuna and simply sidestep it. On the other hand, and in light of the Canada's general approach, it is also no surprise that Bill C-24 was reversed. The measure never fit into the counter-terrorism strategy to begin with, nor was it originally intended to be directed at terrorism specifically. Rather, it was later on viewed as a tool to punish terrorists and disrupt their activities.¹⁹⁶ In light of this, the changes introduced by Bill C-24 must be viewed as a misguided attempt to keep up with a misperception of the approach adopted by other NATO countries. The Bill did not offer any particular benefits to security whilst simultaneously creating two different classes of Canadian citizenship and its many shortcomings led to the reversion of the amendment just three years later.

¹⁹⁵ While these measures seem to fit well into the Country's overall strategy, they have also been extensively criticized, see Forcese and Roach, *supra* note 73 at 238-244.

¹⁹⁶ House of Commons Debate of March 9 2016 *supra* note 89 at 1651.

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In contrast, the developments in the Netherlands fit well into the overall strategy and the specific effort of prevent terrorism as early as possible. In light of this and the prioritization of collective security over individual rights and liberties, the introduction of proactive denationalization is coherent with the overall strategy.

VI. CONCLUSION

The now largely reverted Bill C-24 was the Canadian counterpart to the Dutch 2016 Amendment, both being measures of reactive deprivation of nationality. While similar functioning and effect, the two measures differed in some respects. Denationalization under the pre-2017 section 10(2)(b) CCA was broader in scope than the Dutch law, as convictions abroad could also trigger revocation. Furthermore, the two laws allow for deprivation of nationality on different criminal law grounds. Whilst under the pre-2017 Section 10(2)(b) CCA any conviction carrying a sentence of more than five years could trigger denationalization, the Dutch law lists the offences for which expatriation is possible and explicitly refers to specific terrorism offences, albeit without a minimum term requirement. A final major difference could be found when looking at the safeguards against statelessness. Here, Dutch law seems to provide stronger protection as it does not, in contrast to the pre-2017 CCA, create a complex system by shifting the onus of proof after reasonable grounds to belief that another citizenship can be obtained have been established by the minister. Rather, the Dutch law pragmatically states that deprivation of nationality is simply not possible where statelessness would be the result.

The above discussion of the synergies and divergences between Canada and the Netherlands' general approach to terrorism, as well as the use of denationalization specifically, has revealed that the underlying strategy to address the foreign fighter threat of both countries also differ and provide good explanations for the different developments. It has been demonstrated that the pre-2017 Section 10(2)(b) CCA never sat well with the Canadian anti-terrorism strategy to begin with. In light of the criminal-law centered approach with its extensive extra-territorial application and preventive detention powers, the introduction of reactive denationalization was neither necessary nor appropriate. In contrast, the use of reactive and proactive deprivation of nationality fits well into the overall Dutch strategy that does not focus on criminal law exclusively in its particularly harsh stance towards foreign fighters, seeking to prevent their return at all costs.

Ultimately, both developments can be explained by reference to their respective countries' overall counter-terrorism strategies. However, the wide criticisms that have been raised with

regards to both criminal and nationality law measures must not be neglected. Especially in light of the serious concerns and objections that have been raised against reactive and proactive deprivation of nationality, which ultimately contributed to the adoption of Bill C-6, the use of such measures should be strongly opposed. Indeed, the Canadian counter-terrorism strategy demonstrates that denationalization of (suspected) terrorists is neither necessary nor desirable. Therefore, this paper suggests that the Netherlands follow the recent amendments to the *Canadian Citizenship Act* and repeal the 2017 amendment as soon as possible. If not, it is very well possible that the law is struck down for violating EU law or the ECHR. While there are no cases on the matter yet, it is not unlikely that a decision depriving an alleged foreign fighter of his nationality will be challenged in the near future, particularly in light of *K2 v the UK*. However, this does not imply that the Netherlands should introduce an excessively intrusive criminal law measure such as preventive detention. Until the measure is struck down by a Court, it is very likely that the Dutch Government will continue to insist on denationalization as a counter-terrorism measure. From a global perspective, it even seems likely that these powers will be expanded.