
# The Boğaziçi Law Review

Volume III | No. 1 | Year 2025


# The Boğaziçi Law Review

**Biannual Peer-Reviewed Academic Journal |** Yılda İki Kez Yayınlanan Akademik Dergi

**Volume III No. 1 Year 2025 |** Cilt III Sayı 1 Yıl 2025

**ISSN: 3023-4611**



## Contact Info | İletişim Bilgisi

Boğaziçi Üniversitesi Hukuk Fakültesi 34342 Bebek, İstanbul, Türkiye
+90 212 359 4770
bogazicilawreview.bogazici.edu.tr
blr@bogazici.edu.tr

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**The Boğaziçi Law Review**

ISSN: 3023-4611
Journal homepage: https://dergipark.org.tr/tr/pub/blr

# Legal Tools and Components for Attracting FDI, a Comparative Study: Türkiye and the United States

## *Yasal Düzenlemelerin Uluslararası Doğrudan Yatırımlara Etkisine İlişkin Bir Karşılaştırma: Türkiye ve ABD Örneği*

**R. Gülmisal Akkale Çelebi**

**To cite this article:** R. Gülmisal Akkale Çelebi, 'Legal Tools and Components for Attracting FDI, a Comparative Study: Türkiye and the United States' (2025) 3(1) The Boğaziçi Law Review 1.

**Submission Date:** 23 April 2025

**Acceptance Date:** 27 June 2025

**Article Type:** Research Article



Published online: June 2025

The Boğaziçi Law Review | 2025, Vol. 3, No. 1, 1-27 DOI: 10.69800/blr.1682579

# LEGAL TOOLS AND COMPONENTS FOR ATTRACTING FDI, A COMPARATIVE STUDY: TÜRKİYE AND THE UNITED STATES*

## *YASAL DÜZENLEMELERİN ULUSLARARASI DOĞRUDAN YATIRIMLARA ETKİSİNE İLİŞKİN BİR KARŞILAŞTIRMA: TÜRKİYE VE ABD ÖRNEĞİ*

**R. Gülmisal Akkale Çelebi**

Dr., Ohio State University Moritz College of Law, Visiting Scholar; Karabük University Business Faculty, Head of Commercial Law Department.

## ABSTRACT

This paper examines the differences and similarities between the Foreign Direct Investment (FDI) regulations of Türkiye and the United States (US) and their economic impacts by analyzing the evolution of their legal frameworks. The first section provides an overview of FDI and discusses both global and local trends. In the following sections, the FDI legislation and regulations in Türkiye and the US are analyzed comparatively. The final section reviews existing literature on the factors influencing FDI in both countries, highlighting how their legal frameworks may have affected FDI inflows. The study finds that in the US, FDI is influenced by fundamental principles protected by the Constitution. While through several amendments, Türkiye's FDI codes have evolved over the years, resulting in a somewhat more liberal legislative framework. The "national security" is a buzzword in the contemporary US FDI legal framework, which began in the 1970s, and FDI screening mechanism has been settled throughout the years with a deeper institutionalized structure. Türkiye stands with the come as you are policy, while the recent FDI screening wave in developed countries addresses international relations positions and critical sectors. Türkiye has made significant progress in attracting FDI by implementing legal regulations aimed at restoring investor confidence. In Türkiye's experience, the FDI liberalization came into force when stability, the market-friendly reform calendar, the EU harmonization process, positive expectations, and macroeconomic stability were evident and acted as an anchor of the legal system. In the US, in addition to the GDP size, growth, infrastructure, labor price and quality; technology spillover purposes also illustrate that industrialization, technology, and micro capacities make cross-cutting elements for FDI attraction. While a liberal legal framework is a necessary condition for attracting investment, it is not sufficient on its own. Beyond a certain point, structural factors become more influential.

**Key words:** FDI, legal tools, FDI regulations, law and economics, FDI in Türkiye

## ÖZET

Bu makalede, Türkiye'nin ve Amerika Birleşik Devletleri'nin (ABD) Uluslararası Doğrudan Yatırım (UDY) düzenlemeleri arasındaki farklar, benzerlikler ve yasal çerçevelerin oluşum süreci, ekonomik etkileriyle birlikte incelemektedir. İlk bölümde UDY'ye genel bir bakış sunulmakta ve hem küresel hem de yerel eğilimler kısaca tartışılmakta, ardından Türkiye ve ABD'deki UDY mevzuatı ve düzenlemeleri karşılaştırmalı olarak ele alınmaktadır. Son bölümde ise her iki ülkede UDY'yi etkileyen belirleyici faktörlerle ilgili mevcut literatür gözden geçirilerek, yasal çerçevenin UDY akımlarına etkisi incelenmektedir. ABD'de UDY'nin Anayasa tarafından korunduğu ancak doğrudan UDY adıyla

* This article was supported by TÜBİTAK 2219 Post-Doc Research Fellowship.

**CONTACT** *R. Gülmisal Akkale Çelebi* *gulmisalcelebi@gmail.com*

*Submission Date: 23 April 2025; Acceptance Date: 27 June 2025; Article Type: Research Article*

hazırlanan bir kanun bulunmadığı, bunun yanında çeşitli kanunlarda UDY'nin farklı boyutları esas alınarak düzenleme getirildiği vurgulanmaktadır. Türkiye'deki UDY mevzuatının ise yıllar içinde değişikliklere uğrayarak daha liberal bir çerçeveye ulaştığı görülmektedir. "Ulusal güvenlik", kavramı, 1970'lerden itibaren ABD'de UDY'ye ilişkin yaklaşım açısından önem arz etmekte, UDY izleme mekanizması yıllar içinde kurumsallaşmış görünmektedir. Türkiye'de ise UDY için detaylı izleme veya bazı istisnalar dışında kısıtlamanın ABD kadar belirgin olmadığı bir yaklaşım benimsenmektedir. Türkiye, yatırımcı güvenini sağlamayı amaçlayan yasal düzenlemelerle UDY alanında önemli mesafe kaydetmiştir. Türkiye'deki UDY serbestleşmesinin ekonomik istikrar, piyasa dostu reform takvimi, AB uyum süreci, olumlu beklentiler ve makroekonomik istikrar sağlandığında bir ivme sağlayabildiği dikkat çekmektedir. ABD'de ise GSYH büyüklüğü, büyüme, altyapı, işgücü fiyatı ve kaliteye ek olarak; teknoloji transferi amaçları da sanayileşme, teknoloji ve mikro kapasitelerin UDY alanında ilgili sektörleri yatay kesen unsurlar teşkil etmektedir. Liberal bir yasal çerçeve, yatırım çekmek için gerekli bir koşul olsa da tek başına yeterli olmamakta, belirli bir eşikten sonra yapısal faktörlerin belirleyici olduğu görülmektedir.

**Anahtar kelimeler:** UDY, Türkiye'de UDY, hukuk ve ekonomi, uluslararası doğrudan yatırımların hukuki çerçevesi, hukuki araçlar

# 1. INTRODUCTION

Foreign Direct Investment (FDI), an inherent economic phenomenon of globalization, is quite famous in bureaucratic, academic, and political domains, and FDI determinant factor literature is quite vast because of its fame. In this article, FDI determinant literature will not be at the core of a conceptual investigation; rather, it will be a complementary information source to infer how FDI codes of Türkiye and the United States (US) differ or resemble each other and their role in FDI developments. The aim will be to explain the legal and economic effects to understand and help the legal evolution in Türkiye, where FDI policy still means a lot.

The first section will briefly explain the FDI concept, and then global and Turkish FDI inflow developments will be touched upon for groundwork. The following two consecutive sections will contain Turkish and the US FDI regulation frameworks, each discussed chronologically. Afterward, the FDI determinant factor literature in each country will be analyzed to seize the effect of the legal framework covering all the differentiating aspects before deductions.

# 2. FDI IN BRIEF

FDI is a transaction when a company establishes production facilities in countries other than its headquarters or acquires existing production facilities or businesses in that country

to expand its production beyond the borders of the country where it is established.[1] Another definition is also brought forward regarding the type of capital flows that distinguish FDI from portfolio (indirect) investments.[2] Accordingly, FDI is a cross-border investment transaction in which a firm resident in one country exercises control or significant influence over the management of a firm resident in another country.[3] An FDI transaction must involve a firm's current economic activity, and this relationship should take place across borders. The control and managerial influence criterion are determined as %10 share ownership, and investments below this threshold are no longer deemed as FDI transactions and become portfolio investments.[4]

## 2.1. GLOBAL FDI FLOWS

Private-sector investment decisions are conceptualized in terms of risk and return. Accordingly, the expected return on investments must exceed the investment cost plus the risk premium for an investment transaction.[5] Considering the FDI flows this way, making an overseas decision in a completely different climate becomes inherently more sensitive. Thus, FDI inflows are also prone to global or regional developments as they rely on domestic fundamental factors.

FDI flows have risen worldwide, especially in the second half of the 1990s and the 2000s, along with increasing globalization trends (Figure 1). United Nations Trade and Development (UNCTAD) derives an indicator called *the internationalization* of production, which measures the extent to how worldwide production has become internationalized by spre-

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1 Sebastian Mantilla Blanco, *Full Protection and Security in International Investment Law* (Springer 2019) 5 ff.; Rudolf Dolzer, Ursula Krierbaum and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2022) 5 ff.; Mustafa Alper Ener, *Uluslararası Yatırım Hukuku* (2nd Edn. Seçkin 2024) 7 ff.; Halil Seyidoğlu, *Uluslararası İktisat* (Güzem Can Yayınları 2007) 598; Pınar Baklacı and Esen Akıntürk, 'Foreign Direct Investment in Turkey: Legal Framework' (2008) 1(2) International Journal of Emerging and Transition Economics 17 ff.; Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press 2021) 10 ff.; Bahadır Erdem 'Foreign Direct Investment Law' (2004) 36(53) Annales de la Faculte de Droit d'Istanbul 377 ff.; Deniz Arıkan, *Türkiye'de Doğrudan Yabancı Sermaye Yatırımları* (Arıkan Yayınları 2006) 10 ff.

2 For detailed explanation of the term *investment*, see: Lale Ayhan İzmirli, 'Uluslararası Yatırım Hukukunda 'Yatırım' Kavramı' (2018) 8(2) Süleyman Demirel Üniversitesi Hukuk Fakültesi Dergisi 89 ff.; Olcay Işık, 'Uluslararası Hukukta Yatırım Kavramı: Antlaşmalar Temelinde Bir Değerlendirme' (2011) 7(28) Uluslararası Hukuk ve Politika 126; Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2008) 1; Bilgin Tiryakioğlu, *Doğrudan Yatırımların Uluslararsı Hukukta Korunması* (Dayınlarlı Hukuk Yayınları 2003) 2; Krista Nadakavukaren Schefer, *International Investment Law: Text, Cases and Materials* (Edward Elgar Publishing 2020) 50 ff.; Sezgin Açıkalın and Seyfettin Ünal, *Doğrudan Yatırımlar ve Portföy Yatırımları, Global ve Yerel Faktörlerin Türkiye Üzerindeki Göreceli Etkisi* (Ekin Yayınevi 2008) 5 ff.; Dennis Campbell, *International Protection of Foreign Investment Vol. II* (Yorkhill Law Publishing 2008) 590 ff.; Zeynep Çalışkan 'Türkiye'nin Taraf Olduğu İkili ve Çok Taraflı Anlaşmalarda Yatırım Kavramı' (2009) 29(2) Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni 85 ff.

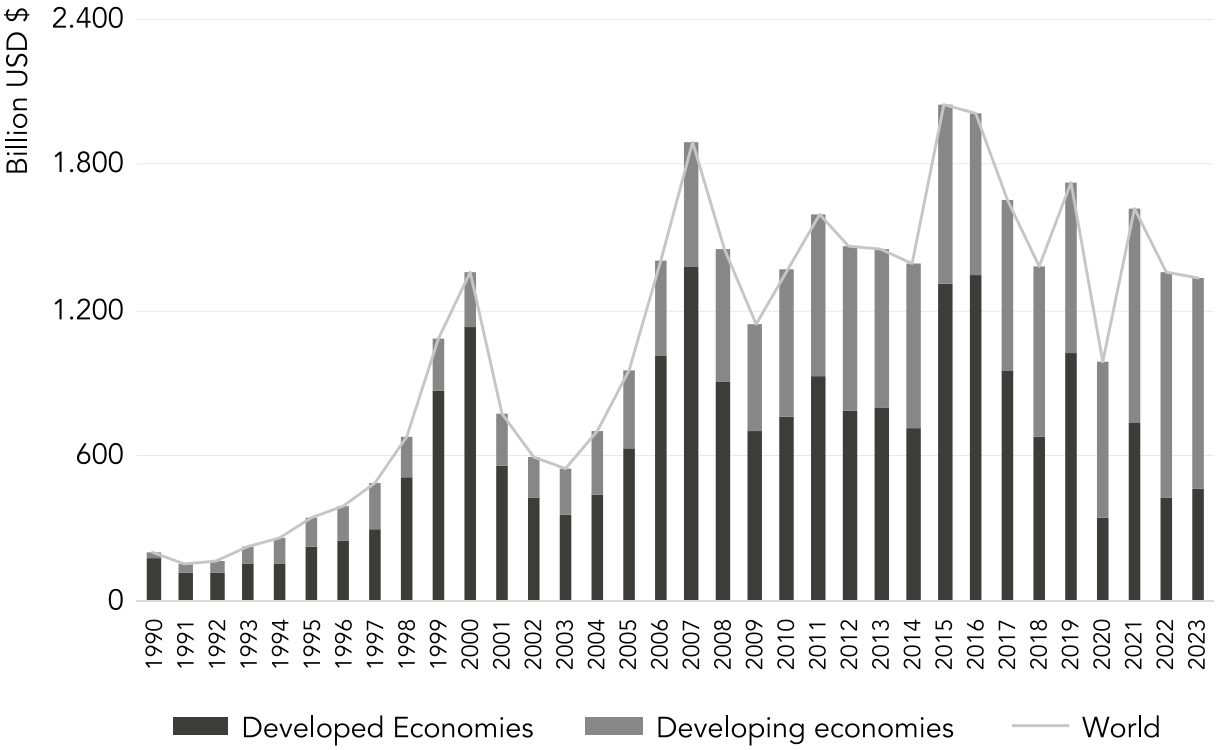
3 International Monetary Fund (IMF), *Balance of Payments and International Investment Position Manual* (6th Edition, IMF 2009) 100.

4 Central Bank of Republic of Türkiye (CBRT), 'Balance of Payments Statistics. The Data: Coverage, Periodicity and Timelines' (2024) 9.

5 Bruce Bolnick, 'Effectiveness and Economic Impact of Tax Incentives in the SADC Region' (2004) Prepared by Nathan Associates for USAID under the SADC-TIFI Project, 33.

ading to different countries through FDI based on sales, production, assets, exports, and employment data.[6] Accordingly, internationalization of production has steadily increased over the last 15 years, with expanding production networks, including periods of crisis. For instance, the value added by foreign affiliates has increased 7-fold, and the total assets of foreign affiliates have increased 20-fold since 1990.

Figure.1 Global FDI Inflows




Source: UNCTAD 2024 World Investment Report[7]

## 2.2. FDI INFLOWS IN TÜRKİYE

The concept of FDI has been expressed as a target component in state policy documents and even development plans since the 2000s. For instance, while the 2001-2005 Development Plan did not mention the FDI term under the investment policies section[8], the 2007-2013 Development Plan included the statement that "*FDI will be encouraged*" in the investment policies section.[9] The liberalization of FDI inflows and the removal of domestic/foreign discrimination were enabled with the Foreign Direct Investment Code[10] No. 4875, which will be detailed further in the next section.

6 United Nations Trade and Development (UNCTAD), 'World Investment Report Investment Facilitation and Digital Government' (2024) 35.

7 ibid.

8 State Planning Organization (SPO), *8th 5-Year Development Plan: 2001-2005* (Prime Ministry, 2000) 31-33.

9 SPO, *9th Development Plan: 2007-2013* (Prime Ministry 2007) 66.

10 Official Journal (OJ), 17.06.2003, No. 25141.

In the 1980s and 1990s, the FDI/GDP ratio in Türkiye was significantly lower than in the following years, averaging %0.5, and remained lower than in peer countries despite geo-political advantages, economic relations with the US and the European Union (EU), and liberalization of capital flows in 1989.[11]

Figure.2 FDI Flows in Türkiye

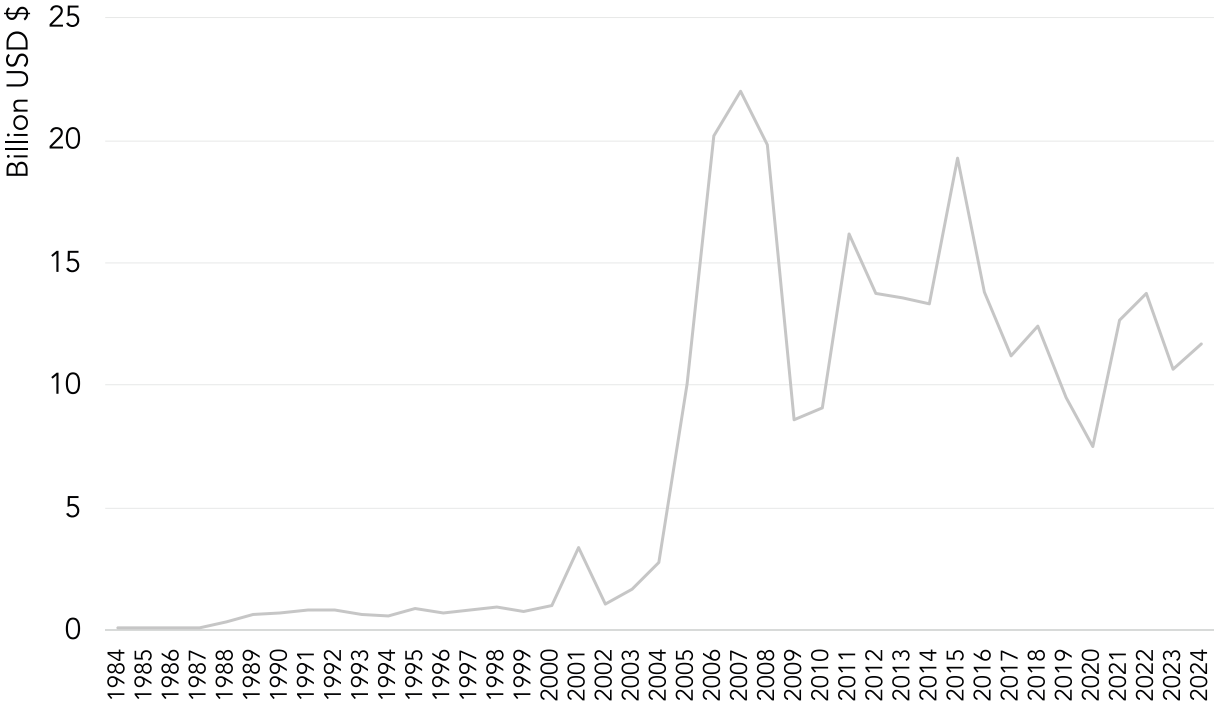

Source: Central Bank of the Republic of Türkiye (CBRT)[12]

Considering the trends at both global and local levels, since the mid-2000s, FDI inflows have increased sharply in Türkiye, in comparison to global developments in which the trend was relatively gradual, yet especially in recent years, FDI inflows in Türkiye have been on a downward trend, at least far from its buoyant period. The recent equity trend is worse when real estate acquisitions are excluded from FDI inflows (Figure.3).

[11] Miguel Eduardo Sanchez-Martin, Gonzalo Escribano Frances and Rafael de Arce Borda, 'How Regional Integration and Transnational Energy Networks Have Boosted FDI in Turkey (and may cease to do so): A Case Study: How Geo-political Alliances and Regional Networks Matter' (2014) World Bank Policy Research Working Paper 6970 11-12.

[12] Balance of Payment Statistics April 2025. <https://tcmb.gov.tr/wps/wcm/connect/EN/TCMB+EN/Main+Menu/Statistics/Balance+of+Payments+and+Related+Statistics/Balance+of+Payments+Statisticss/> accessed 22.06.2025.

Figure.3 FDI Components in Türkiye




Source: CBRT[13]

Therefore, this study aims to contribute to the recent FDI insight in Türkiye to infer what could have been done under legal practices and/or what the legal framework's role is and what the US experience could tell about. In the course of the paper, the legal framework of FDI and determinant factors for each country are isolated and compared in terms of the roles of the legal frameworks.

## 3. FDI LEGISLATION IN TÜRKİYE

Under the arguments in İzmir Economy Congress took place in 1923 when prominent figures gathered to navigate an economic perspective for the Republic of Türkiye, Atatürk, the founder president, said "*When we think and speak in the field of economics, gentlemen, we should not think that we are against foreign capital. No, our country is very prosperous, and we need capital. Therefore, we are always ready to give the necessary guarantees to foreign capital, provided that our laws are respected. Moreover, we desire foreign capital to contribute to our industry and national wealth.*"[14] Nevertheless, the nationalization policy and the Great Depression in 1930, caused the foreign capital to be limited to a couple of joint stock company partnerships[15] such as Konsolide Boraks, İstanbul Tramvay, Havagazı ve Elektrik.[16] Yet, no

[13] Balance of Payment Statistics April 2025. <https://tcmb.gov.tr/wps/wcm/connect/EN/TCMB+EN/Main+Menu/Statistics/Balance+of+Payments+and+Related+Statistics/Balance+of+Payments+Statisticss/> accessed 19.06.2025.

[14] Harun Bal and Devlet Göz, 'Doğrudan Yabancı Sermaye Yatırımları ve Türkiye' (2010) 19(2) Çukurova Üniversitesi Sosyal Bilimler Enstitüsü Dergisi 458.

[15] Erdinç Tokgöz, *Türkiye'nin İktisadî Gelişme Tarihi 1914-2001* (İmaj Yayınevi 2001) 39-42.

[16] Sefer Şener and Cüneyt Kılıç, 'Osmanlı'dan Günümüze Türkiye'de Yabancı Sermaye' (2008) 1 Bilgi Sosyal Bilimler Dergisi 28.

specific FDI regulation was issued until 1951, when the Turkish economic approach tended towards a more market-based sense.[17]

The first code regulating FDI transactions in Türkiye is the Foreign Capital Investment Incentive Code[18] No. 5821, dated 01.08.1951, with the primary purpose of paving the way for mechanization in agriculture, which had suffered severely from a long-lasting Independence War. It is also unsurprising that this Code's enforcement coincides with the Marshall Plan.[19] However, during the three years the Code was in force, only 42 applications were received, and only 10 were accepted, indicating that the law or the circumstances did not yield the expected results.[20]

The Foreign Capital Investment Incentive Code[21] No. 6224, which entered into force on 23.01.1954, repealed Code No. 5821, which was deemed to be liberal among its international peers and revealed efforts to establish a regime to attract FDI.[22] Legal guarantees for FDI have been argued to be increased by this codification.[23] While the profit transfer was previously permitted only by %10 of the capital (Code No. 5821 Art. 3), it was abolished under the 1954 dated Code. The primary purpose of the law is to reflect a liberal and egalitarian approach. Although it has positively impacted FDI applications, almost half of the applications until the end of 1960 were rejected, and the FDI flows remained below the permitted level.[24]

In the aftermath of World War II, seeking opportunities in machinery-equipment-intensive FDI in agriculture motivated policymakers to reduce the productivity gap with Western countries. In 1954, Code No. 6224 provided foreign investors with wider working opportunities. In 1951, the sectoral eligibility for foreign investors was limited; however, in 1954, any sector deemed beneficial to economic development became eligible for FDI transactions.[25]

The FDI legislation framework is relatively stable in Türkiye that, with Code No. 6224 has been in force ever since until the Foreign Direct Investment Code[26] No. 4875 came into force in 2003, which is still in force and shaped the FDI regulatory framework and accom-

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17 Before the enactment of Code No. 5821, the previous regulations, Code No. 1447, Code No. 1567, Code No. 5583, and Code No. 6326 contained provisions that could be related to foreign investments. However, the Foreign Capital Investment Incentive Code No. 5821 is the first code specifically regulating foreign investments by that name. For more see: Ener (n 1) 161 ff.; Rifat Erten, 'Yabancılar ve Uluslararası Koruma Kanunu Hakkında Genel Bir Değerlendirme' (2015) 19(1) Gazi Üniversitesi Hukuk Fakültesi Dergisi 3 ff.

18 OJ. 09.08.1951, No. 7880.

19 Barry Eichengreen and Marc Uzan, 'The Marshall Plan: Economic Effects and Implications for Eastern Europe and the Former USSR' (1992) 7(14) Economic Policy 37-38.

20 Şafak Altun, *Türkiye'de Yabancı Sermayenin Tarihsel Gelişimi* (G.M. Matbaacılık 2008) 126.

21 OJ. 23.01.1954, No. 8615.

22 Bal and Göz (n 14) 458.

23 ibid 134.

24 ibid 135.

25 Avni Zarakoğlu, 'Yabancı Sermayeyi Teşvik Kanunu' (1954) 11(1) Ankara Üniversitesi Hukuk Fakültesi Dergisi 594-600.

26 OJ. 17.06.2003, No. 25141.

panied the most significant FDI leap in history. The legal scope introduced by Code No. 4875 can be briefly stated as follows:

Article 3, paragraph "a" of the Code: *"Freedom of investment and national treatment: Unless otherwise provided by international agreements and provisions of particular regulation;*

*1- Foreign direct investment in Türkiye by foreign investors is free.*

*2- Foreign investors are subject to equal treatment with domestic investors."*

Thus, FDI has been liberalized, and the Turkish investment environment has been fully opened to foreign investors unless otherwise stipulated by another Code or international agreement.[27] According to Code No. 6224 Art. 8, foreign investors were required to obtain permission from the Undersecretariat of Treasury if they wanted to establish a company in Türkiye, to join an existing partnership, to change their share ratios, or to open a branch or a liaison office. In 2003, investment permits, capacity increase permits, merger and liquidation permits, permits for changes in the field of activity, capital increase and share transfer permits, and indirect participation permit obligations were abolished (Code No. 4875, Art.1).

Before 2003, foreign investors were only allowed to establish corporations; however, with the new Code, the establishment of all types of companies was permitted, and the requirement for non-residents to bring capital of a minimum of USD 50,000 to establish/partner in a company or open a branch in Türkiye was abolished[28]. With Code No. 4875, the concept of foreign investor has been revised based on residency, and Turkish citizens residing abroad are accepted as foreign investors when investing in Türkiye (Art. 3).

In subparagraph "b" of Article 3 of Code No. 4875, it is stipulated that any foreign affiliated company shall not be expropriated unless the public interest requires it, and indemnification is paid. Although this provision seems new, as it was not included in the previous Code, the Constitution of the Republic of Türkiye[29] already frames the general expropriation principles. Countries and investors are also looking for alternatives to protect their investments and ensure that they do not expose themselves only to the domestic law of the country where they will operate. Therefore, countries are developing bilateral investment treaties with each other to reinforce the means of legal protection.[30]

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27 See Selcen Nur Kışla, *Uluslararası Yatırım Andlaşmalarının Yorumlanması* (Adalet Yayınevi 2022).

28 According to Code No. 6224 and the related Foreign Capital Framework Decree, each foreign investor who wants to establish a company, join a commercial partnership, open a branch or office in Türkiye must bring a minimum capital of USD 50,000 to Türkiye. Foreign Capital Framework Decree was decided by the Council of Ministers on 07.06.1995 upon the letter of the Ministry of State dated 06.06.1995, No. 23263.

29 Expropriation titled Art. 46 of Constitution of Republic of Türkiye states: "(As amended on October 3, 2001; Act No. 4709) *The State and public corporations shall be entitled, where the public interest requires, to expropriate privately owned real estate wholly or in part and impose administrative servitude on it, in accordance with the principles and procedures prescribed by law, provided that the actual compensation is paid in advance*." Constitution of Republic of Türkiye, official translation published by the Grand National Assembly of Türkiye. Department of Laws and Resolutions, May 2019 <https://www.anayasa.gov.tr/media/7258/anayasa_eng.pdf> accessed 10 April 2025.

30 Rashimi Banga, 'Impact of Government Policies and Investment Agreements on FDI Inflows' (2003) 116 Working Paper 21-22.

The requirement in the abrogated Code that the established enterprise must be "*beneficial to the economic development of the country*" (Code No. 6224, Art. 1) has been abolished in the Code in force.[31] The latest Code aims to remove obstacles and to reassure investors while upholding the definition of international standards.[32]

FDI regulation in Türkiye is one of those that could be deemed relatively liberal. According to the FDI restrictiveness index prepared by the Organization for Economic Cooperation and Development (OECD), considering the parameters such as foreign capital restrictions, monitoring, pre-acceptance requirements, and qualification restrictions for foreign personnel, Türkiye's restrictiveness index was measured as %5.9 more liberal than the OECD average, which is %6.3 in 2020 (latest). As an example, the restrictiveness index scores are %13.5 in Korea, %14.9 in Australia, and %16.1 in Canada, where FDI legislation was found to be more restrictive than the average, while %5.2 in Japan and Italy, %4.5 in France, %3.2 in Greece, %2.3 in Germany, %1.5 in the Netherlands and %0.4 in Luxembourg where the legislation is more liberal.[33]

Foreign Direct Investment Code No. 4875 aims to broaden the concept of FDI and investors, provide assurances, clarify expropriation, arbitration and profit transfer, ensure equal treatment with domestic peers, and remove bureaucratic permitting processes.[34] The aim was to encourage FDI inflows, and instead of permits and approvals, only the obligation to provide informative notification was introduced (Art. 4). Thus, Code No. 6224, dated 1954, on the FDI is repealed, and FDI transactions have been liberated ever since.

There are arguments that the current FDI Code is against the principle of reciprocity, although Turkish foreign law does not systematically refer to it when it is not explicitly recognized. The political-economic administration preferred a liberal FDI approach in seeking competitiveness among developing countries.[35]

In the international arena, two-thirds of FDI regulations prohibit discrimination between

[31] Ensari Yücel, 'Doğrudan Yabancı Yatırımlara İlişkin Türk Mevzuatının Değerlendirilmesi' (2019) 18(71) Elektronik Sosyal Bilimler Dergisi 1473.

[32] İrem Töre, 'Geçmişten Günümüze Türkiye'de Yabancı Sermaye Mevzuatı' (2015) 19(3-4) Erzincan Binali Yıldırım Üniversitesi Hukuk Fakültesi Dergisi 140-141.

[33] OECD, *FDI Restrictiveness Index*, data for 2020 <https://www.oecd.org/en/data/indicators/fdi-restrictiveness.html?oecdcontrol-712178cb81-var3=2020> accessed 10 April 2025.

[34] Cemile Demir Gökyayla and Ceyda Süral, '4875 Sayılı Doğrudan Yabancı Yatırımlar Kanunu Ve Getirdiği Yenilikler' (2004) 6(2) Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi 166.

[35] ibid 140.

domestic and foreign investors[36], and most of the codes that include the principle of national treatment are limited to "special regulations or international treaties" and to specific sectors.[37] In other words, these constraints are commonplace in other countries to a certain extent, which will also be mentioned in the US case.

## 4. FDI LAW IN THE US

There is no explicit constitutional provision authorizing the regulation of FDI in the US. One must, therefore, look at other federal powers set out in the constitution to justify such regulation.[38] The FDI legislation grounds hinge on the interpretation of the Supreme Court of the Fifth[39] and Fourteenth Amendments[40]; such phrases grant every person the right to have property and prohibit confiscation of any kind without compensation or due process law. Specifically, the phrase in the Fourteenth Amendment of, "..*No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws*" is interpreted by the Supreme Court in favor of not only citizens but also the aliens in terms of equal protection.[41] Because the phrase applies to *persons*, these provisions ensure that states cannot restrict the rights of foreign nationals within the US states.[42] Bilateral investment treaties and trade agreements could also be deemed secondary laws that mostly include the term "*national treatment,*" which compels the US to provide no less favorable treatment than domestic

[36] Although foreign investors have equal rights with their domestic peers under the Law, there are certain limitations, such as foreign share limits, local partner requirements, or official authorization in some transactions relating to border, maritime and resource security, national security, financial stability, or some technical reasons. These restrictions are rather exceptional and common by the nature of sovereignty and listed as; foreign owners' share in a company providing radio, television, or media services cannot exceed %50. A foreign media group or individual may be a shareholder in a maximum of two media companies. Foreign owners' share in civil aviation and maritime transportation companies cannot exceed %49. Foreigners cannot obtain fishing licenses, while port services are carried out under concession agreements. Accounting and auditing firms are subject to authorization by the Ministry of Finance. The establishment of financial companies is subject to the special permission of the Banking Regulation and Supervision Agency. Foreigners can only carry out mining activities (with the exemption of boron, uranium, and thorium) in operational cooperation with another Turkish company. Foreign ownership of real estate in a town cannot exceed %10, and a foreigner can only own real estate corresponding to 30 hectares of land and foreign real or legal persons cannot open educational institutions unless all students are foreigners, and in the universities, the majority of administrators must be Turkish citizens. World Trade Organization (WTO), 'Text of the World Trade Organization Trade Policy Review' (2016) World Trade Organization Trade Policy Review - Report by the Secretariat 194-196.

[37] UNCTAD, 'World Investment Report, Investment and the Digital Economy' (2017) 108-109.

[38] Michael V. Seitzinger, 'Foreign Investment in the United States: Major Federal Statutory Restrictions' (2018) Congressional Research Service Library of Congress Report RL33103 3.

[39] Constitution of the United States-Fifth Amendment-: <https://constitution.congress.gov/constitution/amendment-5/> accessed 10 April 2025.

[40] Constitution of the United States-Fifth Amendment: <https://constitution.congress.gov/constitution/amendment-14/> accessed 12 April 2025.

[41] Michael A. Almond and M. Goldstein Shelley, 'Foreign Direct Investment in the United States: An Overview' (1982) 7 NCJ Int'l L. & Com. Reg. 154.

[42] Seitzinger (n 38) 5.

companies.[43] The US is currently a party to 48 Bilateral Investment Treaties[44].

FDI in the US involves several legal aspects governed by various statutes and regulations. According to United States Code Service (USCS) Title 22, Foreign Relations and Intercourse, Chapter 46A, Foreign Direct Investment and International Financial Data[45] (22 USCS §3146), FDI is defined as direct investment by foreign persons in any business enterprise that is a United States person.[46] This definition is further elaborated in USCS §3102, which specifies that direct investment means the ownership or control, directly or indirectly, by one person of 10 percent or more of the voting securities of an incorporated business enterprise or an equivalent interest in an unincorporated business enterprise.[47] The principal negotiating objectives of the US regarding FDI, as outlined in 19 USCS §2901, include reducing or eliminating artificial or trade-distorting barriers to FDI, expanding the principle of national treatment, and developing internationally agreed-upon rules, including dispute settlement procedures.[48] Similarly, 19 USCS Trade Negotiating Objectives[49] §4201 emphasizes the importance of ensuring that foreign investors are not accorded greater substantive rights than US investors and securing important rights for investors comparable to those available under US legal principles and practice.

Additionally, 19 USCS §2114a. negotiating objectives with respect to trade in services, foreign direct investment, and high technology products highlights the need to consider legitimate US domestic objectives, such as the protection of health, safety, essential security, environmental, consumer, or employment opportunity interests, when pursuing FDI objectives.[50] Regulations such as §810.10 Rules and Regulations for BE-12, Benchmark Survey of Foreign Direct Investment in the US[51] and §801.7 Rules and Regulations for the BE-13[52], survey of New Foreign Direct Investment in the US mandate periodic surveys

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43 Almond and Shelley (n 41) 155.

44 United States Bilateral Investment Treaties <https://www.state.gov/investment-affairs/bilateral-investment-treaties-and-related-agreements/united-states-bilateral-investment-treaties/> accessed 21 June 2025.

45 22 USC Ch. 46a: Foreign Direct Investment and International Financial Data <https://uscode.house.gov/view.xhtml?path=/prelim@title22/chapter46A&edition=prelim> accessed 23 June 2025.

46 22 USCS §3146 Definitions: "(1) *the terms "foreign", "direct investment", "international investment", "United States", "business enterprise", "foreign person", and "United States person" have the meanings given those terms in section 3 of the International Investment and Trade in Services Survey Act (22 U.S.C. 3102); and (2) the term "foreign direct investment in the United States" means direct investment by foreign persons in any business enterprise that is a United States person*.". plus.lexis.com, accessed 22 June 2025. For the definiton of "*United States Person*" see also: Stephen C. Carey, 'Foreign Investment in United State Real Property-The Withholding Requirements' (1985) 9 Suffolk Transnat'l LJ 27.

47 22 U.S.C. Foreign Relations and Intercourse Chapter 46 International Investment and Trade in Services Survey §3102. Definitions (10) <https://uscode.house.gov/> accessed 23 June 2025.

48 19 U.S.C. §2901 U.S. Code - Unannotated Title 19. Customs Duties §2901. Overall and principal trade negotiating objectives of the United States, <https://www.govinfo.gov/content/pkg/USCODE-2023-title19/pdf/USCODE-2023-title19-chap17-sec2901.pdf> accessed 23 June 2025.

49 19 U.S.C. 4201 Trade Negotiating Objectives §4201 (2) <https://uscode.house.gov/> accessed 23 June 2025.

50 19 U.S.C. §2114a- Negotiating objectives with respect to trade in services, foreign direct investment, and high technology products <https://www.law.cornell.edu/uscode/text/19/2114a> accessed 23 June 2025.

51 15 CFR 801.10 <https://www.ecfr.gov/current/title-15/section-801.10> accessed 23 June 2025.

52 15 CFR 801.7 <https://www.ecfr.gov/current/title-15/section-801.7> accessed 23 June 2025.

and reporting requirements for US business enterprises with significant foreign ownership, ensuring compliance and data collection for assessing the impact of FDI. These regulations require US affiliates of foreign parents to report their financial and operational details to the Bureau of Economic Analysis (BEA) to facilitate comprehensive monitoring and analysis of FDI trends and impacts.[53]

FDI in the US is not a new phenomenon, as international investors have participated in the US economy since the early days of the Union.[54] For example, European funds helped build the Erie Canal and developed the American railroad system. Even after World War II, the US was deemed to be relatively free in terms of FDI.[55]

Between World War II and the 1970s, the characteristics of the US policy approach in the FDI could be defined as openness. The re-emergence of European investors' interest in the US companies and the Japanese companies joining with them for the first time in FDI and, more importantly, the FDI appetite of some of the Organization of the Petroleum Exporting Countries (OPEC) stemming from petrodollar accumulation after the oil prices surge somewhat alarmed the American public and prompted reform in long-dormant regulations targeting FDI, culminating in the creation of Committee on Foreign Investment in the United States (CFIUS), with authority to examine the potential national security implications of any FDI transaction. As an example of the public reaction to the "*Japanese takeover*" in a 1988 poll, %73 of respondents believed that the Japanese were the largest investors in the US business, while only %3 believed that the British and %2 that the Germans were.[56] Another poll in 1988 indicates that %74 of Americans believed that FDI investment had receded their economic independence.[57]

As a result, with the Exon-Florio amendment to the Omnibus Trade and Competitiveness Act of 1988[58], the federal government obtained an intervention right in foreign acquisitions based on *"national security,"* and it was deemed as a milestone in the US FDI inflows for establishing a mechanism for the federal government to screen FDI the first time in the

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53 U.S. Department of Commerce Economics and Statistcs Administation, A Guide to BEA's Direct Investment Surveys <https://www.bea.gov/sites/default/files/2018-04/a-guide-to-bea-direct-investment-surveys.pdf> accessed 23 June 2025.

54 In 1980s, international investors do not require prior authorization in the US; generally, they are not subject to registration or approval for the investment at the federal level. There are also no restrictions on the transfer of capital, the remittance of profits, or the royalties in manufacturing activities. Adis M. Vila, 'Legal Aspects of Foreign Direct Investments in the United States' (1982) 16 Int'l L. 10.

55 Almond and Shelley (n 41) 153.

56 CS Elliot Kang, 'US Politics and Greater Regulation of Inward Foreign Direct Investment' (1997) 51(2) International Organization 317.

57 Thomas Omestad, 'Selling off America' (1989) 76 Foreign Policy 119.

58 100-418 - Omnibus Trade and Competitiveness Act of 1988 (P.L. 100–418, 102 Stat. 1107, Aug. 23, 1988) (As Amended Through P.L. 115–254, Enacted October 05, 2018) <https://www.govinfo.gov/content/pkg/COMPS-10232/pdf/COMPS-10232.pdf> accessed 23 June 2025.

US.[59] In May 1986, even a tough reciprocity rule was proposed under the Foreign Investment Disclosure and Reciprocity Act under the Bryant Amendment. However, the White House rejected the proposal due to the probable deterring effect on FDI inflows.[60] The Exon-Florio Act differed from the Bryant Amendment in giving the President discretion to eliminate only undesired transactions instead of a blanket regulation targeting all.[61] Though the Exon-Florio amendment did not substantially change liberal US FDI policy, it brought uncertainty for international investors with embedded vagueness and interpretability. The law allowed for discretionary requests for changes to investment conditions, creating an informal screening process with potential performance requirements.[62] CFIUS is chaired by the Secretary of the Treasury, and its other members include the heads of the Departments of Justice, Homeland Security, Commerce, Defense, State, Energy, the Office of the US Trade Representative, and the Office of Science and Technology Policy. The Director of National Intelligence and the Secretary of Labor also serve as ex officio members.[63]

However, the scope of CFIUS has not remained limited to sectors such as defense and telecommunications and has expanded towards sectors with minimal relevance to national security. Since 9/11, CFIUS has evolved into a broad, multi-sector surveillance course and allegedly raising concerns about investor uncertainty.[64] Another milestone in the legislative environment is the Foreign Investment and National Security Act[65] (FINSA), which was passed into law in 2007 and amends the Exon-Florio Act. FINSA provides for an investigation of whether a cross-border acquisition jeopardizes critical infrastructure, security of energy supply, or technologies vital to national defense on an institutional basis.[66] FINSA aimed to establish a broader scope and alleviate irregularities in the bureaucratic loopholes.

The CFIUS-based perspective on US FDI inflows sustained till then and somewhat broadened in 2018 with the changes made by the Foreign Investment Risk Review Modernization Act[67] (FIRRMA), which the US Congress passed by 400 votes against 2 in August 2018. FIRRMA expands CFIUS' jurisdiction in 4 areas: (1) the purchase, lease, or concession by a foreign person of real property near sensitive government facilities; (2) "other

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59 As discussed in analytical materials, the Exon-Florio Amendment authorizes the President to suspend or prohibit acquisitions, mergers, or takeovers by foreign persons that threaten to impair national security, with the Committee on Foreign Investment in the United States (CFIUS) overseeing these reviews. See also: Kang 302-303.

60 ibid 323.

61 ibid 325.

62 ibid 326. See also: Ener (n 1) 317 ff.

63 Jason Jacobs, 'Tiptoeing the Line Between National Security and Protectionism: A Comparative Approach to Foreign Direct Investment Screening in the United States and European Union' (2019) 47(2) International Journal of Legal Information 108.

64 Paul Connell and Tian Huang, 'An Empirical Analysis of CFIUS: Examining Foreign Investment Regulation in the United States' (2014) 39 Yale J. Int'l L. 131-132.

65 Public Law 110-49-July 26, 2007 <https://www.congress.gov/110/plaws/publ49/PLAW-110publ49.pdf> accessed 23 June 2025.

66 UNCTAD, 'World Investment Report' (2008) 77.

67 H.R. 5841 Foreign Investment Risk Review Modernization Act of 2018 115th Congress (2017-2018) <https://www.congress.gov/bill/115th-congress/house-bill/5841/text> accessed 23 June 2025.

investments" that provide a foreign person access to nonpublic technical information under a US business; (3) any change in the rights of a foreign investor that results in foreign control of a local business; (4) any change in foreign investors' rights that result in foreign control of a local business or an "other investment" in certain US businesses; and any other transaction, transfer, agreement, or arrangement designed to circumvent CFIUS jurisdiction.[68] Thereby, the Act expands the coverage towards sensitive personal data and critical infrastructure and technologies[69] to address national security concerns[70] more effectively.[71]

In addition to allowing CFIUS to review non-mergers and acquisitions (M&A) deals and lowering the ownership threshold for reviewing all foreign acquisitions, FIRRMA gives the Department of Commerce more leeway in regulating technology transfers.[72] Another development that can be interpreted in this context came up in 2021 when the US began requiring publicly traded companies to declare that they are not owned or controlled by a foreign government. US citizens are also banned from investing in Chinese firms that the administration considers to be associated with the Chinese military.[73] These restrictions obviously target sustainable national tech industry dominance against Chinese takeovers and hazardous information interaction contingency. Though it seems restrictive in its core presence, positive views also emphasize that a compelling national security[74] review mechanism can actually reduce overly protectionist pressures by building confidence.[75] In addition

[68] Jacobs (n 63) 113.

[69] UNCTAD, 'World Investment Report, Special Economic Zones' (2019) 97.

[70] "*In Ralls Corp. v. Comm. on Foreign Inv., the court held that it had jurisdiction to review the due process claims of a corporation owned by Chinese nationals, despite the statutory bar on reviewing the President's determinations under the Defense Production Act, as the corporation was denied due process in the review process.*" Ralls Corp. v. Comm. on Foreign Inv., 758 F.3d 296.

[71] UNCTAD, 'World Investment Report, Investment and New Industrial Policies' (2018) 84.

[72] Kelan Lu and Glen Biglaiser, 'The Politics of Chinese Foreign Direct Investment in the USA' (2020) 55(2) Journal of Asian and African Studies 267.

[73] UNCTAD, 'World Investment Report, Investing in Sustainable Recovery' (2023) 114.

[74] "*…the D.C. Circuit Court of Appeals upheld the Act's provisions targeting TikTok, ruling that they did not violate the First Amendment, Fifth Amendment, or constitute an unlawful bill of attainder. The court emphasized the government's compelling interest in national security and the narrow tailoring of the Act's measures.*" TikTok Inc. & ByteDance Ltd. v. Garland, 2024 U.S. App. LEXIS 30916.

[75] Lucyna G. Kornecki, 'Inward FDI in the United States and Its Policy Context' (2013) Columbia FDI Profiles 7.

to the restrictions[76], any international investor engaging in business in the US must comply with the same regulations applied to local investors under the major regulatory laws in the areas of antitrust, securities, and labor, as many would expect.[77]

It is no secret that governments increasingly use vague concepts such as *"national interests"* to regulate FDI, mainly focusing on sovereign wealth funds and state-owned enterprises.[78] UNCTAD compiles information on particularly screened investment projects during 2019-2022, and the number of screened projects is rising across developed countries, albeit with lower rejection rates. In the US, the trend is similar to other developed countries, where 1,420 transactions are evaluated. Only 5 projects (%0.4 of the total) were rejected, 52 projects (%3.7 of the total) were withdrawn during the evaluation period, and 232 projects (%8.2 of the total) were authorized with modifications or conditions. National security concerns are becoming more prevalent, and their effect is more obvious on deals amended or dissuaded. As the diversion effect predominates, many more may die in vain in the forthcoming years.[79]

According to the OECD's FDI Regulatory Restrictiveness Index, the US ranks (score is %8.9) above the OECD average (%6.3), which means a stricter regulatory environment than the OECD average. The sectors identified by the OECD as having the highest barriers are maritime and fisheries, which, by type of restriction, are predominantly in the category of equity restrictions.[80]

FDI regulation in the US is liberal, and certain restrictions and national security review

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[76] The US is considered to be encouraging FDI by the WTO, and there are long-standing requirements and restrictions on foreign ownership in various sectors, as outlined in Türkiye. As detailed below, these are mainly inherently highly regulated sectors, including transportation, natural resources, and investment/financial services. According to the regulation, the Ministry of Agriculture must be notified in case of foreign ownership of agricultural land. Foreign ownership of the US-registered vessels is restricted. Government cargo tonnages valued over USD 20 million will be carried by privately owned US-flagged vessels. US vessels must be owned and crewed by US citizens, with limited exceptions. Passenger and goods cabotage are limited to US-flagged vessels owned by US citizens and built in the US. Similar restrictions apply to fishing vessels for both catching and transportation. Cabotage in land transportation is limited to US people using buses and trucks registered in the US and manufactured or duty-paid in the US. The Department of Transportation requires authorization for cross-border bus or truck services. FDI in US-registered aircraft and engaging in domestic air services is restricted. US citizenship or being a US corporation are required to explore, lease or purchase land with mineral deposits such as oil and coal; similar restrictions apply for rights-of-way for oil or gas pipelines on federal lands. Licenses for the construction, operation, or maintenance of facilities for the transmission and use of energy on land and water are under the control of the federal government and are limited to US citizens and domestic companies. A license from the Nuclear Regulatory Commission is required for the production, manufacture, transfer, use, import, or export of nuclear and atomic energy, including medical treatment. Citizenship requirements apply to claim rights under the Desert Land Act and to obtain permission to graze on public lands. Foreign ownership and operation of mass media is restricted. Tighter regulations or restrictions apply to bank holding companies, such as citizenship requirements for national banks. There are limitations on foreign banking companies and branches of foreign banks. WTO, *Text of the World Trade Organization Trade Policy Review. World Trade Organization Trade Policy Review* (Report by the Secretariat 2023).

[77] Vila (n 54) 31.

[78] Karl P. Sauvant, 'FDI Protectionism is on the Rise' (2009) World Bank Policy Research Working Paper 5052 8.

[79] UNCTAD, 'World Investment Report, Investment Facilitation and Digital Government' (2024) 58.

[80] OECD, *FDI Restrictiveness Index* (2020).

screening apply.[81] According to the FDI restrictiveness index prepared by the OECD, considering the parameters such as foreign capital restrictions, monitoring, pre-acceptance requirements, and qualification restrictions for foreign personnel, Türkiye's legal framework is even slightly more liberal than the US; however, the difference is highly minimal, and these are mainly stemmed from the sector-specific regulation approaches.

## 5. DETERMINANTS OF FDI IN TÜRKİYE

Liberalization efforts got steam after 1980 in Türkiye, where the liberalization of capital flows took place in 1989 before FDI flows were liberalized in 2003. Therefore, research in the FDI field emerged gradually after the 1990s, starting with foreign trade capabilities and the impact of the Customs Union. According to a survey[82] of multinational companies in 1996, the executives see Türkiye as a base for accessing the markets of the EU, the Baltic States and the Turkic Republic, underlining foreign trade and economic cooperation opportunities. Loewendahl and Loewendahl[83] referred to a survey by the World Bank in 2000. They inferred that Türkiye's FDI attraction is below its potential due to political and economic instability, institutional weakness and high inflation. Other studies also underline non-compliance with international intellectual property rights protection standards in addition to inflation and economic instability.[84] A comparative analysis among new EU members and candidate countries inferred that GDP size is a driver, while external debt decelerates FDI.[85] The positive effect of GDP size is quite common[86], while others named market size[87] and GDP growth.[88] A causality analysis also revealed the positive effect of per capita GDP and exchange rate depreciation.[89] Some studies also imply a mutual relationship regarding the effect of GDP or GDP growth.[90] Net international reserves are also found to be a positive determinant.[91] Another regression model infers that accountability and control of cor-

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81 Ener (n 1) 318 ff.

82 Deniz Erden, *A Survey of Foreign Direct Investment Firms in Turkey* (Boğaziçi University Press 1996) 192.

83 Henry Loewendahl and Ebru Ertugal-Loewendahl, 'Turkey's Performance in Attracting Foreign Direct Investment: Implications of EU Enlargement' (2004) Centre for European Policy Studies 27.

84 Süleyman Tuluğ Ok, 'What Drives Foreign Direct Investment into Emerging Markets? Evidence from Turkey' (2004) 40(4) Emerging Markets Finance and Trade 112.

85 Mehmet Başar and Şebnem Tosunoğlu, 'EU Integration Process: Will Turkey Overcome the FDI Obstacles?' (2006) 4(2) Managing Global Transitions 126-127.

86 Sevda Yapraklı, 'Türkiye'de Doğrudan Yabancı Yatırımların Ekonomik Belirleyicileri Üzerine Ekonometrik Bir Analiz' (2006) 21(2) DEÜ İİBF Dergisi 39-40.

87 Devrim Dumludağ, 'An Analysis of the Determinants of Foreign Direct Investment in Turkey: the Role of the Institutional Context' (2009) 1 Journal of Business Economics and Management 27.

88 Mehmet Mucuk and Mustafa Tahir Demirsel, 'Türkiye'de Doğrudan Yabancı Yatırımlar ve Ekonomik Performans' (2009) 21 Selçuk Üniversitesi Sosyal Bilimler Enstitüsü Dergisi 370-371.

89 Hüseyin Özer and Taha Bahadır Saraç, 'Türkiye'de Doğrudan Yabancı Sermaye Girişlerini Belirleyen Faktörler: 1980–2006' (2008) 45(523) Finans Politik & Ekonomik Yorumlar 36.

90 Ali Acaravcı and Fikret Bostan, 'Makroekonomik Değişkenlerin Doğrudan Yabancı Yatırımlar Üzerine Etkileri: Türkiye Ekonomisi İçin Ampirik Bir Çalışma' (2011) 8(2) Çağ Üniversitesi Sosyal Bilimler Dergisi 66-67.

91 Güner Koç Aytekin, 'Türkiye'de Uluslararası Doğrudan Yatırımların Belirleyicilerine Yönelik Bir Model Denemesi' (2011) 4(2) Hitit Üniversitesi Sosyal Bilimler Enstitüsü Dergisi 13.

ruption also have a positive impact.[92]

Other empirical studies underline the presence of other preliminary international companies (agglomeration effect) and the EU accession prospects[93], the depth of domestic financial markets, the quality of human capital, and access to ports.[94] Agglomeration[95] and trade openness are also common.[96],[97] Transportation, energy, technological infrastructure, competent and diverse human capital, and sectoral diversity are also emphasized.[98]

In some studies, yet they represent rather a minority of investment incentives found to be effective in a positive way.[99] Some others found that the corporate tax rate does not have an explanatory power on FDI[100] , contrary to common belief.

Erdilek[101] breaks Türkiye's FDI underperformance reasons into economic and non-economic reasons. The author indicates economic reasons such as market entry costs, bureaucratic formalities, chronically high inflation, economic instability, failure to protect intellectual property rights, noncompliance with international accounting standards, poor privatization performance, and infrastructure problems, especially energy, as other studies indicate. Non-economic factors include regional tensions, political instability, lack of FDI promotion, and the negative perception of civil and military bureaucracy on the presence of foreigners in the economy, which is deemed to be caused by capitulations granted to foreigners during the Ottoman Empire period. Like most literature, the study also suggests enhanced international integration and EU accession. Negative foreign perception is particularly important for our study to illustrate the transformation of the Turkish approach over the years. Welcoming a new wave of players can always be complex to some extent for most cultures, but Türkiye is relatively new to an open arms policy compared to its peers in Europe and, indeed the US.

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92 Bilal Özel, 'Doğrudan Yabancı Yatırımların Temel Belirleyicileri Üzerine Bir Analiz: Türkiye Örneği', (Published PhD Thesis, Selcuk University 2018) 118-125.

93 Hakan Güngör and Ayla Oğus Binatlı, 'The Effect of European Accession Prospects on Foreign Direct Investment Flows' (2010) 10(6) Working Papers in Economics 24-25.

94 Joel Deichmann, Socrates Karidis and Selin Sayek, 'Foreign Direct Investment in Turkey: Regional Determinants' (2003) 35(16) Applied Economics 1776-1777.

95 Fatma Turan Koyuncu, 'Türkiye'de Seçilmiş Makroekonomik Değişkenlerin Doğrudan Yabancı Sermaye Yatırımları Üzerindeki Etkisinin Yapısal Var Analizi: 1990-2009 Dönemi' (2007) 2(1) Ekonomi Bilimleri Dergisi 60.

96 Kadir Karagöz, 'Türkiye'de Doğrudan Yabancı Yatırım Girişlerini Belirleyen Faktörler: 1970–2005' (2007) 2(8) Yaşar Üniversitesi E-Dergisi 946.

97 Selin Sayek, 'FDI in Turkey: The Investment Climate and EU Effects' (2007) 1(2) The Journal of International Trade and Diplomacy 131.

98 Hasan Bülent Kantarcı and Ali Sanlıtürk, 'Compliance in the Process of European Union of Foreign Direct Investment Effects of Turkish Economy." (2016) 11(1) Global Conference on Business & Finance Proceedings Institute for Business & Finance Research 232.

99 Cem Payaslıoğlu and Burak Polat, 'Determinants of Foreign Direct Investment to Turkey: A Sectoral Approach' (2015) 17(2) Journal of WEI Business and Economics 72.

100 Metehan Yılgör, Alpaslan Serel and Mehmet Emin Erçakar, 'Doğrudan Yabancı Yatırımların Gelişini Etkileyen Faktörler: Türkiye Üzerine Bir Model' (2011) 14(26) Balıkesir Üniversitesi Sosyal Bilimler Enstitüsü Dergisi 129.

101 Asım Erdilek, 'A Comparative Analysis of Inward and Outward FDI in Turkey' (2003) 12(3) Transnational Corporations 80-83.

Microeconomic reform underperformance and lack of consistent institutional capacity are also underlined through a couple of real-time examples[102] from mining, mobile phone, and sugar merchandise sectors where the rule of law in the business environment was found to be lacking; legal framework may fall short of providing protection and predictability as well as independent organizations could act against the executive body due to unclear framework. Failure of regulations and legislation to catch up with operational requirements can lead to problems in business practice. For this reason, the regulatory authority must be strong; the legislation must be clear.

The literature on the determinants of FDI in Türkiye is centered around structural economic factors. The prominent factors are political and macroeconomic stability, reform capability related to international/regional integration (especially the EU accession), foreign trade opportunities, market size, economic growth, FDI legislation, and reform dedication.

## 6. FDI DETERMINANTS IN THE US

The literature on determinant factors has matured since the US is a long-lasting top destination for FDI inflows. Unlike other countries, US-based studies have investigated intra-state differences in FDI attraction factors where the fundamental aspects and components are accepted to be roughly the same, such as political and economic stability, inflation, exchange rate, overall policy approach, and infrastructure.

A historical comparison provides interesting insights into the motivation and profile of the FDI in the US. Many of the FDI before World War I in the US were called as *"free-standing"* businesses as they were owned by foreigners rather than foreign firms.[103] Such businesses were probably much more likely to become domesticated over time, as their primary driver factor is the owners' migration.[104] Undoubtedly, considering an investment location as a complementary factor for an international business operation, motives are extremely different from local purposes. As an investment site option on the world map, the legal framework and predictability become much more important for a company with sustainable production and market penetration aspirations.

A working paper underlines that the research and development (R&D) potential measured with actual expenditure on R&D in the US is a significant driver of Eurozone outward FDI in the US and the relationship could be mutual as other studies imply that R&D in Europe is also an important determinant factor of FDI from the US and Japan to Europe continent. [105] The technology frontier seems to make a difference among developed count-

[102] Mark Dutz, Melek Us and Kamil Yılmaz, 'Turkey's Foreign Direct Investment Challenges: Competition, the Rule of Law, and EU Accession' (2005) Turkey*:* Economic Reform and Accession to the European Union 269-274.

[103] Robert E. Lipsey, 'Foreign Direct Investment in the United States: Changes Over Three Decades' in Kenneth A. Froot (ed.) *Foreign Direct Investment* (University of Chicago Press, 1993) 114.

[104] ibid.

[105] Roberto A. De Santis, Robert Anderton and Alexander Hijzen, 'On the Determinants of Euro Area FDI to the United States: the Knowledge-capital-Tobin's Q Framework' (2004) Available at SSRN 526992, 22, 26, 29.

ries.[106] Tobin Q value[107] was also effective in the US as intuitively expected.[108] The direction of the relationship of the real exchange rate is found to be significantly negative in the study, as the US dollar appreciates, Eurozone FDI is more encouraged to invest in the US and the authors infer that the increase of the real value of profits is the underlying reason. However, this is quite the opposite of the several studies in the domain[109],[110] which argue that depreciation enhances FDI flows from the Eurozone to the US through more affordable share acquisition values. The discrimination could probably originate from the type of FDI that cheaper shares could entail new mergers or acquisitions, while the overvalued US dollar might spark capital expansion to enlarge market dominance or revenue volume to get more profit. Or the relative valuation between the US dollar and the Euro is rather small, and the effect may not be as sound as the data implies.

The estimates run by UNCTAD from 1999 to 2007 indicate that FDI inflows in the US are negatively correlated to the dollar's value, reflecting the wealth-effect argument.[111]

Another regression model found that the stock market level (S&P returns) and volatility (VIX) are the only significantly effective variables, among others, on the location choice of multinational enterprises' (MNEs) production facilities in the US, underscoring stock market reflections.[112]

Relative increases in real economic growth in the US and sector-specific growth seem to have some positive impact on international companies' investment in the US, while tariff elimination may not be as evident as it is thought to be,[113] apart from the Turkish FDI literature.

A survey analysis[114] based on the company owner respondents from Japan, Canada, and Western Europe recognizes the impact of the market size and cites that non-American firms engage in FDI to acquire US technology and know-how. As a side comment, the authors indicate that companies opt to preserve markets established by exporting.[115] This explanation tended to compare the sum of the marginal production cost of exports and transporta-

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[106] ibid.

[107] Tobin's Q basically, is an economic ratio used to compare a company or index's market value to its book or replacement value. For more see: Robert Bartlett and Frank Partnoy. 'The Misuse of Tobin's Q.' (2020) 73 Vand. L. Rev. 353.

[108] Santis et al (n 105) 26.

[109] Michael W. Klein and Eric Rosengren, 'The Real Exchange Rate and Foreign Direct Investment in the United States' (1994) 36 Journal of International Economics 385.

[110] Bruce A. Blonigen, 'Firm-Specific Assets and the Link Between Exchange Rates and Foreign Direct Investment' (1997) 87 American Economic Review 460.

[111] UNCTAD, 'World Investment Report, Transnational Corporations, and the Infrastructure Challenge', (2008) 21.

[112] Burhan F. Yavas and Rama K. Malladi, 'Foreign Direct Investment and Financial Markets Influences: Results from the United States' (2020) 53(101182) The North American Journal of Economics and Finance 8.

[113] Edward John Ray, 'The Determinants of Foreign Direct Investment in the United States, 1979-85' in Robert C. Feenstra (ed.) *Trade Policies for International Competitiveness*, (University of Chicago Press 1989) 70.

[114] Riad A. Ajami and David A. Ricks, 'Motives of Non-American Firms Investing in the United States' (1981) 12 Journal of International Business Studies 32.

[115] ibid.

tion with the production in the US land, particularly citing the Japanese car manufacturers' auto parts production investments. This could be related to the vibrant car market in the US and companies' desire to respond to demand for spare parts.[116] Other empirical evidence from developed countries, including the US, has also shown that FDI and home-country exports are complementary rather than substitutive. There is a positive relationship between the two, implying that FDI also subserves the export capacity of investors in the US.[117]

A survey[118] of 101 senior company executives focused on researching sequential location choices of investors in the US and factors were sorted by priority as follows: (1) availability of competent labor force, (2) transportation facilities, (3) income tax rate, (4) regulatory legislation on investment, (5) property tax, (6) proximity to major highways and ports, (7) proximity to major airports, (8) cost of government services, (9) construction cost, (10) airport availability. The results emphasize the importance of the labor force and logistics while investors are still paying significant attention to the regulatory framework that they probably encounter at the state level.

An intra-state econometric study[119] analyzes the period between 1997 and 2007. It states that real education expenditure per capita of states, R&D expenditure, and capital expenditure are the variables found to have statistically significant effects on FDI inflows. There are other studies[120] that underline the role of labor productivity and relative education expenditure in addition to the relative crime rate in intra-state site selection. Relative tax incentives became evident when the state contest came down to two states. These are also supporting pieces of evidence that the financial aspects matter when fundamentals are in place. Another regression study[121] on intra-state locational determinants emphasizes energy costs, infrastructure, transportation, and labor capabilities.

A sound attraction component is deemed to be the long-lasting liberal market approach of the US as a flagbearer of market economics so that investors shall not worry about expropriation or capital flow restrictions. A US Government Accounting Office survey revealed that 35 of 50 states strongly encouraged FDI and have particular budget funds for such incentives, while 45 states declared other promotion types.[122] A survey[123] by the UNCTAD revealed that the US remains an attractive investment site, according to the major multina-

[116] Alenka S. Giese, William J. Kahley and Roger F. Riefler, 'Foreign Direct Investment: Motivating Factors and Economic Impact' (1990) 20(1) Journal of Regional Analysis and Policy 108-110.

[117] UNCTAD, 'World Investment Report, FDI from Developing and Transition Economies: Implications for Development' (2006) 181.

[118] Fahri Karakaya and Cem Canel, 'Underlying Dimensions of Business Location Decisions' (1998) 98(7) Industrial Management & Data Systems 329.

[119] Lucyna Kornecki and E.M. Ekanayake, 'State-based Determinants of Inward FDI Flow in the US Economy' (2012) 3(3) Modern Economy 307.

[120] Kostas Axarloglou, 'What Attracts Foreign Direct Investment Inflows in the United States' (2005) 19(3) The International Trade Journal 285-308.

[121] Norman J. Glickman and Douglas P. Woodward, 'The Location of Foreign Direct Investment in the United States: Patterns and Determinants' (1988) 11(2) International Regional Science Review 149.

[122] Giese et al (n 116) 113.

[123] UNCTAD, 'World Investment Report. Transnational Corporations and Export Competitiveness' (2002) 39-40.

tional investors and the leader in the investment potential index in 2002.

An intra-state FDI motives analysis mainly run for Chinese FDI in the US indicates that political partisanship affects FDI location. Chinese firms tend to invest in states governed by the Republican Party, and authors argue that promoting a lower-cost business agenda plays a role. Authors find a negative correlation with the technology level of the states due to national security-driven restrictions on tech-based investments. [124]

As a side factor resulting from the fact that the US is the origin of large multinational companies operating worldwide and of those that also invest in the US, debt and other types of intra-company flows also cast effect on investment trends as observed since the beginning of the 2000s, when international subsidiaries in the US have paid a large amount of intercompany debt as they reimbursing the debt they had accumulated during the M&A boom of 1998-2001, non-equity flows dominated the short term trends.[125] Similarly, in the last decade or two, tax inversion deals have greatly affected FDI inflows to the US. While tax inversion deals continue, the third wave of rules against tax inversion introduced by the US Treasury Department in April 2016 is expected to reduce the volume of such transactions.[126]

From the perspective of the developing countries' outward FDI motivation, organizational learning often plays a role as Korean MNEs actively invested in the US in the 1990s and successfully leveraged technological resources in the country through minority stakes in joint ventures, which enables reverse technology spillovers.[127] It can also positively impact management practices and the skill composition of employment in the home country.[128]

Considering the recent digitalization wave around the globe, tech-focused FDI could hover around the US for a while longer since, most digital MNEs are based mainly in the US (almost two-thirds of the total) and their attitude of keeping most of their tangible assets at home, significantly skews the distribution of geographical sub-affiliates in which %40 of subsidiaries of digital MNEs are based in the US, almost double the proportion of MNEs in other sectors.[129] However, the volume of the informatics sector investment deals can be lower than the traditional sectors[130] as they do not require mass equipment transfer or buy-out, named after *asset-lightness* by the UNCTAD[131] as it deflates worldwide FDI volume. In this vein, another study found the market-seeking motive to be weak while the efficiency-seeking impetus is more decisive in knowledge-intensive industries, as expected.[132]

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[124] Lu and Biglaiser (n 72) 267.

[125] UNCTAD, 'World Investment Report, The Shift Towards Services' (2004) 80.

[126] UNCTAD, 'World Investment Report, Investment and the Digital Economy' (2017) 76.

[127] UNCTAD, World Investment Report (2006) 173.

[128] ibid 177.

[129] UNCTAD, 'World Investment Report, Investment and the Digital Economy' (2017) 174.

[130] UNCTAD, 'World Investment Report Investment facilitation and digital government' (2024) 76.

[131] UNCTAD, 'World Investment Report International Production Beyond the Pandemic' (2020) 126.

[132] Lilach Nachum and Zaheer Srilata, 'The Persistence of Distance? The Impact of Technology on MNE Motivations for Foreign Investment' (2005) 26(8) Strategic Management Journal 759-761.

Another study that focuses on locational determinants within the breakdown of the size of the investment indicates that smaller knowledge-intensive investments prefer urbanized states as expected, while in rural states, large deals in traditional sectors could be more attractive. Furthermore, investments from a home country can build up investments in the same states and surrounding states, implying an enhanced agglomeration effect. The geographical proximity of the home country, the GDP of the host state, lower wages, and workers not being unionized positively impact FDI.[133]

## 7. CONCLUSION

The US implements FDI liberty in its foundation principles as the Constitutional interpretation already permits it, while FDI legislation in Türkiye was liberated step by step throughout the years with a couple of amendments. Both legal systems are liberal, although the Turkish FDI framework is a bit more liberal; FDI liberation matters when the actual liberation message is conveyed to the investors authentically; thereby, legal liberty is rather a necessary condition than a sufficient condition. After a threshold, structural factors dominate and underpin the effect of the legal framework.

Sector-specific restrictions are in effect in both Türkiye and the US, and the regulated sectors are alike. This seems to be the natural outcome of the long-standing political sovereignty perspectives.

Considering the legal developments on FDI in Türkiye, fundamental economic and political reasons have seemed dominant, while the significant FDI leap took place right after FDI liberalization. In Türkiye's experience, the effect of FDI liberalization came into effect when factors such as stability, the market-friendly reform calendar, the EU harmonization process, positive expectations, and macroeconomic stability became evident and acted as an anchor of the legal system. From the legal perspective, what matters most is not the degree of liberalization itself. However, governance is an important determinant of FDI, mainly characterized by policies promoting competition, transparent legal and regulatory regimes, and efficient and predictable public services. While market friendly liberal investment environment is still a strong determinant.

The buzzword in the contemporary US FDI legal framework is *"national security,"* which began in the 1970s, and FDI screening has been settled throughout the years with a deeper institutionalized structure. However, the number of rejected deals is utterly minimal, though withdrawn, altered, and other unheard cancelled transactions are still notable. Türkiye stands with the *come as you are* policy, while the recent FDI screening wave in developed countries addresses international relations positions and critical sectors.

In the US, in addition to the regular determinants such as GDP size, growth, infrastructure, share prices, profitability, labor price, and quality, technology spillover purposes also illustrate that industrialization, technology, and micro capacities are cross-cutting elements for FDI attraction.

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[133] Thomas Halvorsen, 'Size, Location and Agglomeration of Inward Foreign Direct Investment (FDI) in the United States' (2012) 46(5) Regional Studies 679-680.

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**The Boğaziçi Law Review**

ISSN: 3023-4611
Journal homepage: https://dergipark.org.tr/tr/pub/blr

# Controlling the Narrative Through Terrorism Laws: Case of United Kingdom

***Terörizm Yasaları Aracılığıyla Anlatıyı Kontrol Etme: Birleşik Krallık Örneği***

**Polona Florijančič**

**To cite this article:** Polona Florijančič, 'Controlling the Narrative Through Terrorism Laws: Case of United Kingdom' (2025) 3(1) The Boğaziçi Law Review 28.

**Submission Date:** 27 January 2025

**Acceptance Date:** 27 June 2025

**Article Type:** Research Article



Published online: June 2025

The Boğaziçi Law Review | 2025, Vol. 3, No. 1, 28-63 DOI: 10.69800/blr.1627717

# CONTROLLING THE NARRATIVE THROUGH TERRORISM LAWS: CASE OF UNITED KINGDOM

## *TERÖRİZM YASALARI ARACILIĞIYLA ANLATIYI KONTROL ETME: BİRLEŞİK KRALLIK ÖRNEĞİ*

**Polona Florijančič**
Dr., independent legal scholar.

## ABSTRACT

Narratives of terrorism are often used and misused for political goals. This has never been as blatantly apparent as in the UK and the West in general after the 7 October raid where even genocide is being legitimised as self-defence against terrorism. The hypocrisy of presenting resistance fighters as terrorists while entirely disregarding the state terrorism of the oppressor is nothing new. This article looks back at British narratives surrounding apartheid South Africa and the liberation movement fighting against it to draw parallels with the current hypocritical branding of Palestinian resistance fighters as terrorists while ignoring blatant state terrorism perpetrated by the occupier. The paper further analyses the use and abuse of the UK Terrorism Act in the current context, which reveals a severe assault on freedom of expression with the apparent goal of not merely manufacturing consent for the genocide but also forcefully concealing the lack of such consent and the outright rejection of the terrorism narrative in a large part of the general public. Finally, the paper briefly outlines how the UK terrorism narrative has infiltrated the International Criminal Court (ICC) through the language chosen by its British Prosecutor.

**Key words:** terrorism laws, proscription regimes, freedom of expression, Palestine, Israel, United Kingdom

## ÖZET

Terörizme dair anlatılar çoğu zaman siyasi amaçlar doğrultusunda kullanılmakta ve suistimal edilmektedir. Bu, özellikle 7 Ekim baskınından sonra, Birleşik Krallık ve genel olarak Batı'da, soykırımın terörizme karşı kendini savunma olarak meşrulaştırıldığı bir biçimde, hiç olmadığı kadar açık bir şekilde görülmüştür. Zalimin devlet terörizmini tamamen göz ardı ederken direniş savaşçılarını terörist olarak sunma ikiyüzlülüğü yeni bir şey değildir. Bu makale, Birleşik Krallık'ın apartheid Güney Afrika'sı ve buna karşı savaşan kurtuluş hareketi etrafındaki anlatıları geriye dönük inceleyerek, Filistinli direniş savaşçılarının terörist olarak etiketlenmesi ve işgalciler tarafından gerçekleştirilen açık devlet terörizminin göz ardı edilmesi konusundaki ikiyüzlülük ile paralellikler kurmaktadır. Makale, ayrıca Birleşik Krallık Terörizm Yasası'nın mevcut bağlamdaki kullanımını ve kötüye kullanımını analiz etmekte, bu durumun, sadece soykırım için onay üretme amacı taşımakla kalmayıp, aynı zamanda böyle bir onayın yokluğunu ve geniş halk kitlelerinin terörizm anlatısını açıkça reddetmesini zorla gizlemeyi hedefleyen ciddi bir ifade özgürlüğü saldırısını ortaya koyduğunu göstermektedir. Son olarak makale, Birleşik Krallık terörizm anlatısının Uluslararası Ceza Mahkemesi'ne (UCM) İngiliz Savcı tarafından seçilen dil aracılığıyla nasıl sızdığını kısaca özetliyor.

**Anahtar kelimeler**: Terörizm yasaları, yasaklama rejimleri, ifade özgürlüğü, Filistin, İsrail, Birleşik Krallık

**CONTACT** *Polona Florijančič* *polona.florijancic@gmail.com*

*Submission Date: 27 January 2025; Acceptance Date: 27 June 2025; Article Type: Research Article*

# 1. INTRODUCTION

As Edward Said aptly described, the images of *terrorism* and *fundamentalism* are two gigantic reductions which derive entirely from the concerns and intellectual factories in metropolitan centers like Washington and London and serve to reorient international social discourse and process.[1] They 'are fearful images that lack discriminate contents or definition, but they signify moral power and approval for whoever uses them, moral defensiveness and criminalization for whomever they designate'.[2] The label 'terrorist' has furthermore become largely actor-centric instead of act-centric, turning a blind eye to state-terrorism and terrorism in the pursuit of the *status quo* as opposed to that which challenges it, thereby ignoring the most fundamental aspect of terrorism, that is the intention to create and manipulate the psychological state of terror through the use or threat of violence in pursuit of political ends.[3]

The word 'terror' derives from the Latin word 'terrere' (to frighten) and appeared in late Middle English as 'terrður' to describe intense or overwhelming fear or dread.[4] It first became associated with political violence in the context of the extreme state repression and thousands of political executions following the French Revolution from about March 1793 – June 1794, when the Jacobins led by Robespierre, openly embraced 'terror' as a necessary tool to deliver justice and defend democracy.[5] After Robespierre's fall the period began to be referred to as 'la Terreur', translated into English as the 'Reign of Terror'. The term terror has furthermore been used to refer to state violence in a number of other examples, particularly for the political executions and extreme intimidation of the population by communist and other regimes ('Red Terror', 'Great Terror/Great Purge' and 'White Terror').[6] However, since

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1 Edward W Said, *Culture and Imperialism* (Vintage Books 1994) 310.

2 ibid.

3 Simon Taylor, 'Status Quo Terrorism: State-Terrorism in South Africa during Apartheid' (2021) 35 *Terrorism and Political Violence* 304, 305.

4 Merriam-Webster Dictionary, 'terror', Word History https://www.merriam-webster.com/dictionary/terror#h1 accessed 27 June 2025; Oxford English Dictionary, 'terror', Meaning and Use https://www.oed.com/dictionary/terror_n?tl=true#202674584 accessed 27 June 2025.

5 See statement given by Robespierre at the National Convention on February 1794: 'We must smother the internal and external enemies of the Republic or perish with it; now in this situation, the first maxim of your policy ought to be to lead the people by reason and the people's enemies by terror.

If the spring of popular government in time of peace is virtue, the springs of popular government in revolution are at once *virtue and terror:* virtue, without which terror is fatal; terror, without which virtue is powerless. Terror is nothing other than justice, prompt, severe, inflexible; it is therefore an emanation of virtue; it is not so much a special principle as it is a consequence of the general principle of democracy applied to our country's most urgent needs. It has been said that terror is the principle of despotic government. Does your government therefore resemble despotism? Yes, as the sword that gleams in the hands of the heroes of liberty resembles that with which the henchmen of tyranny are armed. Let the despot govern by terror his brutalized subjects; he is right, as a despot. Subdue by terror the enemies of liberty, and you will be right, as founders of the Republic. The government of the revolution is liberty's despotism against tyranny. Is force made only to protect crime? And is the thunderbolt not destined to strike the heads of the proud?', 'Maximillien Robespierre: Justification of the Use of Terror', Fordham University, Modern History Sourcebook, https://sourcebooks.fordham.edu/mod/robespierre-terror.asp accessed 27 June 2025.

6 Oxford English Dictionary (n 4); Robert Conquest, *The Great Terror* (Oxford University Press 1968).

the 19th century the use of the term began gradually shifting from state repression to mainly non-state violence with the Western branding of 20th century anti-colonial movements as terrorist representing a key turning point in the change._

In the decades that followed the international community struggled to reach a united definition of terrorism facing a fundamental split between those countries that pushed for an exclusion of state actions from the label and those that in turn sought the exclusion of liberation movements from the term as well as the recognition of terrorism perpetrated by colonial, repressive, racist and alien powers. Unsurprisingly, despite well over a hundred definitions proposed thus far, the international community has to this day been unable to agree on one. Instead of a universal definition we are thus left with domestic definitions and proscription regimes largely based on self-interest and alliances in foreign policy with a disregard for internationally recognized norms, such as the right of self-determination and the corresponding right to resist colonial domination, alien occupation and racist regimes, including through armed resistance. Both the General Assembly and the UN Commission on Human Rights have sought to limit the term terrorism solely to activity aimed at the destruction of democracy or the destabilising of 'legitimately constituted Governments' and 'pluralistic civil society', yet such constraints have not been included in domestic definitions.[7]

In *Suresh v Canada* the Canadian Supreme Court rightly called terrorism a term open to politicised manipulation, conjecture and polemical interpretation; '[e]ven amongst those who agree on the definition of the term, there is considerable disagreement as to whom the term should be attached'.[8] The so-called proscription regimes, dictated by geopolitical interests more than any objective criteria, are purportedly designed to simply fight criminality yet they negatively impact everything from peace negotiations to war crimes documentation and humanitarian aid.[9] They furthermore entirely delegitimise certain struggles and censor debate around them including discussion about underlying causes of a conflict.[10] This has been the exact effect that the UK terrorism laws and proscription regime have had after 7 October 2023 on debate surrounding Palestinian resistance and anti-apartheid/occupation/genocide speech in general where a plethora of expressions have been interpreted as support for a proscribed terrorist organisation and therefore treated as terrorist offences in and of themselves.

From the perspective of international law, the entirety of the conversation and legal analysis of the 7 October raid, its aftermath and resistance in general should be conducted within the clear parameters succinctly outlined below by the UN Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel in its June 2024 Report,

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7 Mark Muller QC, 'Terrorism, Proscription and the Right to Resist in the Age of Conflict' (2008) 22 *Denning Law Journal* 111, 120.

8 *Suresh v. Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3, 2002 SCC 1, paras. 94-95.

9 Sara Elizabeth Dill, 'Sanctions, Terrorist Designations, and Social Media Content Moderation: The Challenges for Peace Negotiations, War Crimes Documentation, and Humanitarian Aid in the Gaza War' (The Situation in Palestine: Emerging Domestic and International Jurisprudence, Maynooth University, Ireland, 9 July 2024) https://www.youtube.com/watch?v=kwFZaZE2bIA accessed 27 June 2025.

10 Muller (n 7) 128.

> [T]he Israeli occupation of Palestinian territory is unlawful. Palestinians therefore have a right to oppose that unlawful occupation but in doing so they must act in accordance with international law, including international humanitarian law and international human rights law. The unlawfulness of the Israeli occupation does not justify unlawful action by Palestinians in resistance. Equally, unlawful action by Palestinians opposing the occupation does not justify unlawful action by Israel.[11]

While resistance movements waging just wars against occupation/aggression, colonialism or another form of systemic oppression of a people, such as apartheid, can nevertheless commit war crimes, just as they were committed on 7 October, the use of the words *terrorism* and *terrorist organisation* in this context serves nothing but an attempt to delegitimize the entire struggle and paint the oppressed people as barbaric, incomprehensive and inhuman, driven by irrational hatred and sadism, while providing the oppressor with a carte blanche to continue its ethnic cleansing and genocide against them. Anyone not falling in line with such distortion of reality poses a danger to the carefully curated image of legitimacy and justifiability of the genocide and can thus arbitrarily be subjected to political persecution through terrorism laws employed to forcibly sustain the desired narrative. The injustice and discriminatory nature of this persecution are particularly glaring in light of the blatantly terrorist methods and aims used by the Zionist entity, not merely during the current genocide, but since its very inception. Yet professing support for Israel is more than allowed in the UK; it is nothing short of dogmatic for its establishment and what appears to be an odd status symbol for the ruling elite.

In their 2021 Report,[12] the Campaign against Criminalising Communities (CAMPACC) describe the deep colonial roots of the UK terrorism laws and how they build on the body of knowledge and expertise gained through repressing self-determination within the British Empire. CAMPACC trace the first formalisation of many of the current features of the anti-terrorism laws back to the Defence of India Ordinance of 1914, later replaced with the Anarchical and Revolutionary Crimes Act 1919 which was invoked during the now infamous Jallianwallah Bagh massacre, where 379 unarmed civilians were killed and over 1,200

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[11] UN Human Rights Council, Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, 'Detailed findings on attacks carried out on and after 7 October 2023 in Israel' (2024) UN Doc A/HRC/56/CRP.3, 54; See also International Court of Justice, *Advisory Opinion on the Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (19 July 2024) paras. 89-94, confirming previous findings of the Commission on the question of the occupation of Gaza stating that 'Israel remained capable of exercising, and continued to exercise, certain key elements of authority over the Gaza Strip, including control of the land, sea and air borders, restrictions on movement of people and goods, collection of import and export taxes, and military control over the buffer zone, despite the withdrawal of its military presence in 2005.' While the court does not clarify whether it considers this a full or partial occupation, it states in paragraph 95 that 'Israel's withdrawal from the Gaza Strip has not entirely released it of its obligations under the law of occupation. Israel's obligations have remained commensurate with the degree of its effective control over the Gaza Strip.'

[12] Campaign Against Criminalising Communities (CAMPACC), *20 Years of Terrorism Acts: 20 Years of Injustice* (June 2021).

injured by the British during a peaceful gathering.[13] These counter-terrorism laws were then exported to other British colonies and since the so-called 'war on terror' have returned home to Britain, to be used against the same communities and nations that were targeted during colonial rule.[14] The aim is to isolate them and deter them from political protest against oppressive regimes abroad allied with the UK government in a bid to legitimise said regimes and UK's own global military interventions in pursuit of global domination.[15] In the words of CAMPACC, 'By blurring any distinction between liberation movements and terrorism, and likewise between civil resistance and violence, the UK impedes a political route to conflict resolution abroad, while persecuting those who oppose oppressive regimes'.[16]

In section one, this paper will look back at British narratives surrounding apartheid South Africa (SA) and the liberation movement fighting against it to draw parallels with the current hypocrisy of branding Palestinian resistance fighters as terrorists while ignoring blatant state terrorism perpetrated by the occupier. In section two, the paper will analyse how, in the aftermath of 7 October, this narrative is being forcefully imposed in the UK using its draconian terrorism laws against anti-occupation/apartheid/genocide activists, intellectuals and independent journalists. In the last section, the paper will then briefly outline how the UK terrorism narrative has also infiltrated the so-called International Criminal Court (ICC) through the language chosen by its British Prosecutor both in his public statements and in his choice of legal characterisations of alleged criminality committed by Palestinian and Israeli individuals in his Request for Arrest Warrants issued in May.

## 2. TURNING A BLIND EYE TO STATE TERRORISM - SOUTH AFRICA AND ISRAEL

During apartheid South Africa, the African National Congress (ANC), *i.e.* the national liberation movement fighting against the apartheid, was routinely labelled a terrorist organisation not just by SA itself but by much of the Western international community, including the UK. Ideologically aligned, the Soviet Union provided extensive financial, military, and intelligence support to the ANC, assisted it in working out its 'strategy and tactics' at every turn of its struggle and helped the ANC 'occupy a respected and prominent place in the international arena' thereby crucially contributing to the so-called 'South African miracle' that took the country from apartheid to democracy.[17] In the UK, on the other hand, Margaret Thatcher dismissed the ANC as a 'typical terrorist organisation' while other British politicians felt comfortable even calling for Mandela's execution.[18] Ironically, as MP Dennis

[13] ibid 21.

[14] ibid.

[15] ibid.

[16] ibid 22.

[17] Irina Filatova and Apollon Davidson, *The Hidden Thread: Russia and South Africa in the Soviet Era*, (Jonathan Ball Publishers 2013) Postscript, para 1.

[18] Julian Borger, 'The Conservative Party's Uncomfortable Relationship with Nelson Mandela' *The Guardian* (London, 6 Dec 2013), https://www.theguardian.com/politics/2013/dec/06/conservative-party-uncomfortable-nelson-mandela accessed 27 June 2025.

Skinner later remarked, when Mandela came to deliver a speech at Westminster Hall 'the first four rows of seats were occupied by all the Tory Members of Parliament who had wanted to hang, draw and quarter him'.[19]

Yet merely the branding of liberation or resistance movements as terrorist is not enough for their vilification. The other necessary condition is that the terrorism of the oppressor is ignored. In her now infamous 1986 speech, Nelson Mandela's wife, Winnie Madikizela-Mandela stated that, 'Together, hand in hand, with our boxes of matches and our necklaces we will liberate this country.' She was referring to a gruesome technique whereby a tire filled with gasoline would be placed around a person who was believed to be a collaborator and set alight. The image is often invoked as proof of the terrorist nature of the ANC. What is less known, however, is that the state itself was intentionally fuelling this practice by creating the false perception that certain innocent people were apartheid collaborators in order for their comrades to lynch them and for the general public and the international community to be under the impression that innocent people were being targeted in irrational black on black terror.[20] Moreover, to protect the *status quo*, the state did not only systematically use orthodox terrorism tactics, such as bombings and targeted killings, but also violence which due to its aims should equally be recognized as terrorism, including abductions; murder of the abducted; burying of bodies of the abducted in such a way as to make the liberation movement appear incompetent or make it look as if the individual was a victim of black on black violence; the displaying of bodies as propaganda; detentions without trial; torture, including to death, and more.[21] The Truth and Reconciliation Commission (TRC) estimated that there were over 50.000 cases of torture between 1960 and 1990 and the state even paid for police officers to travel to Europe and South America to learn new torture techniques.[22] Torture was also used to turn those abducted against their comrades, transforming them into so-called *askaris*, i.e. informants/collaborators with the state, who would then play a key role in the state's use of targeted entrapment killings by posing as members of the liberation movements to lure youths to their deaths by supplying them with faulty weapons such as grenades that would detonate immediately or by staging ambushes.[23] Similarly to the testimonies of several other operatives, a former commander of Vlakplaas,[24] explained the aim of their extra-judicial killings as follows, 'It scared off other supporters and potential supporters, it created distrust and demoralization among cadres. It gave white voters confidence that the security forces were in control and winning the fight against communism and terrorism'.[25] Taylor thus concludes that the aim was to manipulate

[19] Dennis Skinner, HC Deb 14 February 1997, vol 290, col 531 <https://publications.parliament.uk/pa/cm199697/cmhansrd/vo970214/debtext/70214-03.htm> accessed 27 June 2025.

[20] Taylor (n 3) 313-314.

[21] ibid 306, 314.

[22] ibid 316.

[23] ibid 314, 315. As the TRC noted, 'entrapment operations… really engender a sense of revulsion and horror because they target not trained military cadres, but callow township youth who were perceived to be threats to the state because of their political beliefs.'

[24] Vlakplaas was the undercover counterinsurgency division of the apartheid police.

[25] ibid 307.

through violence both the activists and the white voters, all the while framing the killings as a fight *against* terrorism.[26]

Much as how the label terrorist was reserved for the ANC liberation movement, it was used in Namibia against the South West Africa People's Organisation (SWAPO) who waged a guerrilla war against SA occupation forces after 1966. SA consistently refused demands from the UN and the International Red Cross to consider captured SWAPO members as prisoners of war, and instead treated them as terrorists.[27] Here SA also used mass arrests and torture against suspected members, and applied the draconian Terrorism Act of 1967 which allowed for retroactive application and indefinite detentions without trial.[28] A report of the United Nations Council for Namibia indicated that hundreds were detained[29] while Amnesty International reported dozens of convictions.[30] Commenting on one of the controversial trials against four SWAPO members under the Terrorism Act, the International Commission of Jurists described it as an 'oppressive and highly unsatisfactory, judicial process'.[31]

Just as its approach to apartheid South Africa was hypocritical, the UK government entirely ignores the terrorist nature of the Israeli state, despite terrorism being a constant and indispensable companion of the Zionist project. Back in December of 1947 Ben Gurion explicitly approved the idea of random violent action against Palestinians and their infrastructure that would 'terrify' them and 'render help from the Arab world useless'.[32] The day after uttering these words, he wrote in a letter that the goal of such action would be to assure that the population understood they were at the Zionists' mercy and anything the Jews wanted could be done to them, including 'starving them to death'.[33] The words are particularly chilling to revisit in light of the current deliberate starvation of the population of Gaza.[34]

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[26] ibid 308.

[27] UN, 'Decolonization, No. 9, Dec. 1977: Issue on Namibia' (Revised edn, United Nations Department of Political Affairs, Trusteeship and Decolonization 1977), <https://www.un.org/dppa/decolonization/sites/www.un.org.dppa.decolonization/files/decon_num_9-2_0.pdf 22>, accessed 27 June 2025.

[28] ibid 23-26.

[29] Official Records of the General Assembly, Thirty-first Session, Supplement No 24 (A/31/24), Vol I para 308.

[30] Amnesty International, *Briefing: Namibia* (Briefing Paper No 10, April 1977) <https://www.amnesty.org/en/documents/afr42/004/1977/en/> accessed 27 June 2025.

[31] UN, 'Decolonization, No. 9, Dec. 1977: Issue on Namibia' (n 27) 24.

[32] Ilan Pappé, *The Ethnic Cleansing of Palestine* (One World 2006) 54.

[33] ibid.

[34] Already on 9 October 2023 the then Israeli Defense Minister, Yoav Gallant, announced a complete siege of Gaza stating that, 'There will be no electricity, no food, no fuel, everything is closed'. Emanuel Fabian, 'Defense minister announces "complete siege" of Gaza: No power, food or fuel' *Times of Israel* (9 October 2023) <https://www.timesofisrael.com/liveblog_entry/defense-minister-announces-complete-siege-of-gaza-no-power-food-or-fuel/> accessed 27 June 2025; on 2 March 2025, after 17 months of a relentless genocide, Israel reimposed a ban on the entry of aid, leading to famine and starvation-related deaths particularly among children. Meanwhile fishermen going out to sea as well as people standing in line for food or water are routinely targeted and are acutely aware they are risking their lives every time they seek out food. Amnesty International 'Israel/OPT: Two months of cruel and inhumane siege and further evidence of Israel's genocidal intent in Gaza' (2 May 2025) <https://www.amnesty.org/en/latest/news/2025/05/israel-opt-two-months-of-cruel-and-inhumane-siege-are-further-evidence-of-israels-genocidal-intent-in-gaza/> accessed 27 June 2025.

It is well known that in the 1940s the Haganah, Irgun and Stern Gang (Lehi) used terrorism both against the Palestinians and the British to achieve their political goals. This terrorism was at the core of the idea of Israel and both tactically and strategically significant in the founding of a Jewish state.[35]

With regards to their attacks against the British, the insurgents sought to legitimise it as self-defence through a well-organised propaganda campaign which characterised Britain's Palestine policy and behaviour as illegal (particularly limits on Jewish immigration in violation of the terms of the mandate) and akin to Nazism and anti-semitism.[36] Regardless of their justifications, the British would often use the terms 'Jewish terrorism' and 'Zionist terrorism' to refer to them.[37] Particularly Irgun and Lehi were considered terrorists and dealt as such by the British courts. Churchill even referred to their members as 'a new set of gangsters worthy of Nazi Germany' that made him rethink his 'dreams for Zionism.'[38] The situation was slightly different for the Haganah which focused on infrastructure only when attacking the British, avoiding casualties. The label terrorist was rarely directly applied to them, instead they were rather characterised as a Jewish 'self-defense' group or 'illegal Jewish resistance organisation' that at worst cooperated with the terrorists and shared their objectives.[39] However the label terrorist did not entirely evade them either.[40]

In its relation to the Palestinians, the Haganah was less considerate than towards the British. To ethnically cleanse the land, they used a systematic campaign of intimidation against Palestinian villagers, called *hasiyar ha-alim* or 'violent reconaissance' whereby they would enter defenceless villages firing randomly at houses and killing at will to terrorise the population into abandoning their homes.[41] With the same aim, in 1948 Irgun and Lehi militants committed the brutal Deir Yassin massacre of at least 107 villagers, riddling corpses with batons and disembowelling pregnant women to maximise the shock and fear.[42]

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35 See David A Charters, 'Jewish Terrorism and the Modern Middle East' (2007) 27 *Journal of Conflict Studies* 80, see also John Louis Peeke, *Jewish-Zionist Terrorism and the Establishment of Israel* (U.S. Naval Postgraduate School 1977).

36 Charters (n 35) 85.

37 Maher Charif, 'Policy Paper: The Roots Of Zionist Terrorism' (Institute for Palestine Studies, 13 December 2023) <https://www.palestine-studies.org/sites/default/files/attachments/policypapers/Maher%20Charif%20Issue%20013%20Fixed.pdf> 2 accessed 27 June 2025.

38 HC Deb 17 November 1944, vol 404, col 2242 https://api.parliament.uk/historic-hansard/commons/1944/nov/17/palestine-terrorist-activities> accessed 27 June 2025.

39 See Prime Minister Attlee justifying raids and arrests targeting the Jewish Agency for their links to the Haganah and the latter's links to the Irgun, 'Attlee Accuses Jew Underground; Vast Cache of Munitions Found' *The Montreal Gazette* (2 July 1946) 1.

40 On 12 April 1948, following the Deir Yassin massacre, led by Irgun and Lehi, Earl Winterton posed the following question: 'how [is it] that one set of Jewish terrorists claim credit, if it is credit, for this, and another set of Jewish terrorists, mainly the Haganah, controlled by the Jewish Agency, regret it? Is it fact that these two sets of thugs are fighting each other, instead of the Arabs?' HC Deb 12 April 1948, vol 449, col 629 <https://api.parliament.uk/historic-hansard/commons/1948/apr/12/palestine-outrages> accessed 27 June 2025.

41 Pappé (n 32) 56.

42 Murat Sofuoglu, 'A Lookback at the Zionist Terrorism that led to Israel's Creation' *TRTWorld* (undated) <https://www.trtworld.com/magazine/a-lookback-at-the-zionist-terrorism-that-led-to-israels-creation-15767166> accessed 27 June 2025.

Ironically, while Israel accuses the Palestinian resistance of having committed systematic rape on 7 October, despite there being no evidence for such claims, it was exactly rapes that were used by the Zionist terrorists to instil terror and drive out the indigenous population in the 1940s. It is believed that the terror of rapes and the subsequent intentional spreading of news about them through so-called 'whispering campaigns', aka psychological warfare, were the primary drive behind the decision of many to flee.

It was British officer and Christian religious fanatic, Orde Wingate, who instructed the Haganah in the use of terrorism. Recently Michael Oren, a Knesset member, called Wingate the father of the Israeli Defence Forces (IDF). He proclaimed that, '[t]he IDF today remains Wingatean in terms of its tactics'.[43] From the testimonies of countless former IDF soldiers, we know this to be true.[44] The main goal of their activities is still the creation of fear and the manipulation of that fear in the Palestinian population. It is for that reason that Palestinians are being detained in the thousands without any due process and routinely tortured and raped in the detention facilities. Life-threatening rape of detainees is even presented by top politicians as a legitimate means of ensuring the 'security of the state' while the lawyers of one of the perpetrators characterised it as 'self-defence', implicitly recognising that the practice is meant to terrorise into submission not just the raped individuals but the wider audience.[45] Israel also systematically uses the raiding of houses, particularly at night, with the aim of creating a sense of persecution,[46] while the 'whole thing' about checkpoints, as one former soldier explained, is to send the message to the Palestinians that, 'We're here, fear us, we're in control here'.[47] The IDF army furthermore protects settler terrorism and pogroms against Palestinians in the West Bank while the Israeli justice system acts as a

[43] Hillel Kuttler, '75 Years After His Death, why Orde Wingate Remains a Hero in Israel' *Times of Israel* (23 March 2019) <https://www.timesofisrael.com/75-years-after-his-death-why-orde-wingate-remains-a-hero-in-israel/#:~:text=%E2%80%9CWingate%20was%20the%20father%20of,optioned%20but%20hasn't%20produced> accessed 27 June 2025.

[44] Rona Segal, *Mission: Hebron* (2020) https://www.imdb.com/title/tt13721328/ accessed 27 June 2025; see also testimonies and reports from Breaking the Silence, a group founded by Israeli veterans to expose the crimes of the IDF. Their most recent report The Perimeter contains testimonies of soldiers deployed to Gaza since October 2023. Breaking the Silence, *The Perimeter: Soldiers' testimonies from the Gaza Buffer Zone 2023-2024* (Breaking the Silence, 2025) <https://www.breakingthesilence.org.il/inside/wp-content/uploads/2025/04/Perimeter_English-2.pdf accessed> 27 June 2025.

[45] Simon Speakman Cordall, 'Everything is Legitimate: Israeli Leaders Defend Soldiers Accused of Rape' *Aljazeera* (9 Aug 2024), https://www.aljazeera.com/news/2024/8/9/everything-is-legitimate-israeli-leaders-defend-soldiers-accused-of-rape accessed 27 June 2025; 'Rape as Self-Defense? Israeli Soldiers Accused of Gang Raping Palestinian Defended as "Heroes"' *Mintpress News* (1 August 2024) <https://www.mintpressnews.com/rape-self-defense-israeli-soldiers-gang-rape-palestinian-defended-as-heroes/288019/>.

[46] *A Life Exposed: Military Invasions of Palestinian Homes in the West Bank* (Yesh Din, Physicians for Human Rights Israel, Breaking the Silence, 2020) <https://life-exposed.com/wp-content/uploads/2020/11/Exposed_Life_EN_FINAL.pdf> 68 accessed 27 June 2025; Breaking the Silence, 'How to create a sense of being pursued' <https://www.breakingthesilence.org.il/testimonies/videos/24744?sg=1> accessed 27 June 2025.

[47] Breaking the Silence, 'The Controller and the Controlled' <https://www.breakingthesilence.org.il/testimonies/database/782670> accessed 27 June 2025.

shield for both the settlers and the army.[48] These examples are just the tip of the iceberg of the terrorism committed or supported by the state of Israel. There is an endless list of other acts designed to spread terror amongst the population, from the 'mowing of the lawn', to the sniping of children or people waving white flags, to the targeting of schools, hospitals and refugee camps, to systematically dismembering the bodies of toddlers and emptying their skulls by dropping multi-ton bombs on densely populated areas, to burning people alive, to stealing the bodies of the dead and desecrating them, to erasing entire families from existence; there is precious little Israel has not tried in order to terrify the Palestinian people into leaving their land.

While the IDF were born out of the Haganah, the Irgun first morphed into the Herut and later the Likud political party. Menachem Begin, the effective commander of Irgun during the King David Hotel bombing, the Deir Yassin Massacre and the Altalena incident, became Prime Minister in 1977 after Likud won the majority of seats in the Knesset. While the Irgun was recognized as a terror group by the UN, the US and the UK, no such sanction has been applied to it after it had transformed into a political movement and adopted a more politically correct phrasing of its goals, despite the continuity in terms of its membership, leadership and its core agenda of expanding the territory of the Jewish state by any means necessary.[49] With the IDF under its command and the unwavering military support of the US, UK, Germany and others, the Likud has taken state terrorism against Palestinians to an unprecedented level.[50]

Yet Israel also uses the creation of fear for political manipulation against its own population, namely through the indoctrination of its youth into perceiving themselves as the ultimate and perpetual victims. By inundating children with stories and images of the holocaust, a state of paranoia is created which is then purposely channelled into fear and hatred of the Palestinians who are presented as an existential threat, justifying mass violence and

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48 *Unwilling and Unable, Israel's Whitewashed Investigations of the Great March of Return Protests* (B'Tselem, Palestinian Centre for Human Rights, December 2021) https://www.btselem.org/sites/default/files/publications/202112_unwilling_and_unable_eng.pdf accessed 27 June 2025; see also *Genuinely Unwilling: An Update The Failure of Israel's Investigative and Judicial System to Comply with the Requirements of International Law, with particular regard to the Crimes Committed during the Offensive on the Gaza Strip (27 December 2008 – 18 January 2009)* (Palestinian Centre for Human Rights, August 2010).

49 Brandon Sellers, 'The Irgun Zvai Leumi: From Terrorists to Politicians' (2013) 7-9 Schemata, PSCI 362 <https://www.lycoming.edu/schemata/pdfs/sellers.pdf> 7 accessed 27 June 2025.

50 A rare moment of disapproval by the British was expressed in 2006 when a 2-day celebration of the bombing of King David hotel was held in Tell Aviv, sponsored by Irgun veterans and the Menachem Begin Heritage Centre. The British Ambassador to the city and the Consul-General in Jerusalem demanded the removal of the plaque commemorating the attack which was unveiled during the celebration. They stated that it was not 'right for an act of terrorism, which led to the loss of many lives, to be commemorated'. On the other hand, Benjamin Netanyahu, speaking at the event, denied that this was an act of terrorism, calling it a legitimate military action and claiming that Irgun were 'freedom fighters' governed by morals, as opposed to 'terror groups' such as Hamas or Hezbollah. Ned Parker and Stephen Farrell, 'British Anger at Terror Celebrations' *The Times* (20 July 2006), <https://www.indybay.org/newsitems/2006/07/20/18290072.php> accessed 27 June 2025.

genocide against them.[51] It is no coincidence, that in the UK, the Prime Minister recently declared that according to his plan '[s]tudying the Holocaust will become a critical, vital part of every single student's identity'.[52] It appears the idea is to also traumatise British children in order to manufacture their support for the current and any future genocide, land grab and war crimes by the Israeli state on the basis of perceived perpetual Jewish victimhood. This author struggles to conceive of any other interpretation of Starmer's chilling plan whereby the Holocaust is to become part of the British children's 'identity'.

Terrorism was also used as a tool for convincing Jews living in Arab states that they could not be safe unless they abandoned their homelands and moved to Israel. In his memoir, Israeli-British historian of Iraqi Jewish descent, Avi Shlaim uncovers proof that Mossad was behind the vast majority of the attacks on the Iraqi Jewish community in Baghdad between 1950-1951. Shlaim describes the purpose of one of the operative's actions as 'not to kill but to frighten hesitant Jews and to prod them to register to cancel their Iraqi citizenship… The grenades, the explosives and the instructions were all carefully calibrated to terrorise and not kill'.[53] This prompted the transfer of 110,000 Jews to Israel, providing it with the numbers it desperately needed for achieving the 'Jewish majority' as well as with the supposed justification of its existence, i.e. the narrative that Jews could not be safe anywhere else, particularly not among Arabs. Once in Israel, Arab Jews have been forced to assimilate and abandon their cultural identities through the educational system which systematically seeks to erase their Arab heritage and their history of peaceful and prosperous coexistence with the Muslims.[54]

To sum up, the state of Israel came into existence and is able to continue its occupation, apartheid and perpetual acquisition of land precisely because of terrorism, yet the term and the proscription regimes are reserved exclusively for the Palestinian resistance groups. Amongst a plethora of other negative impacts this has had, it also creates blatant discrimination in terms of freedom of expression, particularly in the UK where anti-apartheid/occupation/genocide activists as well as intellectuals and independent journalists are being threatened with draconian punishments and subjected to intrusive investigations and bail conditions under the terrorism legislation, while there are no sanctions for expressing support for a state that enacts a policy of terrorism on a mass scale.

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51 Max Blumenthal, *Goliath: Life and Loathing in Greater Israel* (Nation Books 2013) Chapter 2 'The Army of God'; see also: Noam Chayut, *The Girl Who Stole My Holocaust* (Verso Books 2013).

52 Rachel Fink, '"We Won't Look the Other Way": U.K. Starmer Unveils Mandatory Holocaust Education Curriculum Amid Antisemitism Spike', *Haaretz* (17 September 2024) <https://www.haaretz.com/world-news/europe/2024-09-17/ty-article/.premium/u-k-s-starmer-unveils-mandatory-holocaust-education-curriculum-amid-antisemitism-spike/00000191-ffb9-dea8-a595-ffbdb0010000> accessed 27 June 2025 (emphasis added).

53 Avi Shlaim, *Three Worlds: Memoirs of an Arab-Jew* (Oneworld Publications, 2024) Chapter 7 'Baghdad Bombshell' paras. 47, 60.

54 Nurit Peled-Elhanan, *Palestine in Israeli School Books: Ideology and Propaganda in Education* (I.B. Tauris 2012).

## 3. THE UK TERRORISM NARRATIVE AND THE USE OF THE TERRORISM ACT TO IMPOSE IT ON THE GENERAL PUBLIC

The military raid carried out by Hamas and other resistance groups on 7 October 2023 was a watershed moment that seismically shifted perceptions on Israel's invincibility. It also provided many Palestinians with a sense of hope in the context of a complete denial of their rights for over a century.[55] At the same time, the Israeli and Western narrative constructed around the raid, which has included a plethora of falsehoods and the inevitable brand of 'terrorism', has been used to justify the unwavering military and political support for the ensuing assault on Gaza, from the very beginning entirely devoid of the principles of proportionality and distinction. Infamously, the now Prime Minister of the UK, Keir Starmer, in an early statement decried 7 October as terrorism and when asked about Israel withholding power and water from the entire population of Gaza, simply replied that Israel had the 'right to defend herself'.[56] In other words, merely by invoking terrorism this esteemed human rights lawyer felt confident enough to express support for the war crime of collective punishment as well as ignore Israel's duty as an occupier to ensure essential resources for the population of Gaza and the fact that intentionally preventing access to them at a minimum amounted to a war crime[57] and in the context at hand an act of genocide.[58] Furthermore

[55] A poll conducted in March 2024 by the Palestinian Center for Policy and Survey Research showed that three quarters of the Palestinian responders believed the offensive put the Palestinian-Israeli issue at the center of attention after years of neglect at the regional and international levels. The same poll conducted in late May and early June showed an increase in that belief to 82%.

In March a vast majority of the polled Palestinians, i.e. 71% thought Hamas' decision to launch an offensive was correct, whereas in May/June this dropped to 57%. It is important to note that support for this attack, does not necessarily mean support for Hamas and does not mean support for any killings or atrocities committed against civilians. Palestinian Center for Policy and Survey Research (PSR): Survey Research Unit 4, Public Opinion Poll No (92) (12 June 2024) <https://pcpsr.org/sites/default/files/Poll%2092%20English%20press%20release%2012%20June2024%20(003).pdf> 4, 8 accessed 27 June 2025.

In its own poll, the Arab Center for Research and Policy Studies found that 90% of Arabs polled from 16 Arab countries viewed the raid as a legitimate resistance operation; 19% said it was legitimate but somewhat flawed; 3% sait it was legitimate but involved heinous acts; and only 5% believed it was an illegitimate operation. Arab Center for Research and Policy Studies, 'Arab Public Opinion about the Israeli War on Gaza' (10 January 2024) <https://arabindex.dohainstitute.org/EN/Pages/APOIsWarOnGaza.aspx> accessed 27 June 2025.

[56] 'Israel-Palestine war: Keir Starmer Supports Israel's 'Right' to Cut Gaza's Water and Power', *Middle East Eye*, (11 October 2023) <https://www.middleeasteye.net/news/israel-palestine-war-keir-starmer-criticised-right-cut-gaza-water-power> accessed 27 June 2025.

[57] International humanitarian law both in terms of customary law and The Geneva Conventions prohibits the deprivation of civilian populations of essential resources, see: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3, Art. 51 prohibiting the targeting of civilian objects including essential infrastructure, Art. 54 prohibiting the destruction of objects indispensable to the survival of the civilian population, Art. 55 placing on the occupying power the duty of ensuring food and medical supplies to the population to the fullest extent of the means available.

[58] Under Art.II (b) of the Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277, acts of genocide include deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part

he entirely ignored the fact that Israel's right to self-defence as an occupying power is at the very least controversial if not non-existent.[59] Over a year later, Starmer now as Prime Minister, again simply invoked 7 October when MP Ayoub Khan asked him to 'share his definition of genocide' if he did not consider the Israeli assault to amount to one. Starmer's shocking response was that, '[i]t would be wise to start a question like that by reference to what happened in October of last year', implying again that those events automatically make any standards of international law inapplicable to Israeli actions, even when they fit the definition of genocide.

Of course, the 7 October raid easily meets the statutory definition of terrorism under section 3 of the UK Terrorism Act (TA) 2000 in that it included actions involving serious violence against persons and serious damage to property and that the actions were designed to influence a government[60] and/or intimidate the public[61] with the purpose of advancing a political cause. Yet as the UK Independent Reviewer of Terrorism Legislation (IRTL) himself noted, '[t]he terrorism definition applies just as well to the anti-Apartheid actions

[59] In the Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136, para 139, the ICJ noted that Article 51 of the UN Charter recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State. The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence. Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.

Some have interpreted this rather ambiguous paragraph as generally precluding a right to self-defence in situations of occupation. Following 7 October Russia's ambassador to the UN, Vasily Nebenzya was one of the first to raise that argument, while calling out the hypocrisy of the West:

We are witnessing horrific destruction in Gaza. Greater than all that the West criticizes in other regions. Greater by many orders of magnitude. We are seeing strikes on humanitarian objects, including hospitals, thousands of children dying, horrific suffering inflicted on civilians under the conditions of a total blockade and yet the West remains silent. The only thing they can muster is continued pronouncements about Israel's supposed right to self-defence, although, as an occupying power, it does not have that power as confirmed by the advisory opinion of the ICJ handed down in the year 2004.

General Assembly session on the International Criminal Court and Israel and Palestine (1 November 2023) <https://www.youtube.com/watch?v=s2TAZDfRY1I&t=5538s> min. 1.31.52 accessed 27 June 2025.

The preclusion of a right to self-defence also stems from UNGA Resolution 3314, Article 3 (a) which characterises as an act of aggression 'The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof.' UNGA Res 3314(XXIX) (14 December 1947).

In line with the above Ralph Wilde denies that Israel's current actions in Gaza could fall under the right to self-defence and instead characterises 7 October itself as an act of self-defence against a continuous illegal use of force by Israel, albeit violating *ius in bello*. See: Ralph Wilde, 'Israel's War in Gaza is Not a Valid Act of Self-defence in International Law', *Opinio Juris* (9 Nov 2023) <https://www.ejiltalk.org/does-israel-have-the-right-to-defend-itself/> accessed 27 June 2025.

[60] By section 1 (4) (d) this includes any overseas government.

[61] By section 1 (4) (c) this includes the public overseas.

of Nelson Mandela…, as to the terrorist attacks on 7 October 2023'.[62] Setting aside the hypocrisy of recognising only the former as actions against apartheid, the statement reflects the fact that there are no exceptions to the UK definition of terrorism that would take into account any right to resist apartheid, occupation or any other form of oppression.

In contrast, taking a step back from the terrorism narrative and instead applying international law, one would look at the 7 October raid in terms of two types of actions. Roughly, on the one hand, the breaching of the wall, the attacks on military targets and the killings of combatants and on the other, attacks on civilians. The distinction is important since the former fall squarely under the right to resist illegal occupation (or even self-defence against a perpetual crime of aggression). In other words, there was nothing illegal *per se* in the breaching of the wall nor was there anything illegal in attacking the military bases of the belligerent occupier nor in the killing of its combatants nor in the capturing of prisoners of war. On the other hand, the killings of civilians and soldiers *hors de combat*, as well as the various forms of mistreatment and abduction of civilians and the desecrations of corpses, clearly fall under the category of war crimes. Ignoring this distinction, the terrorism narrative effectively lumps all the acts as well as all the casualties together, referring even to the combatants killed as 'innocent civilians.'[63] What is more, the expression of any other point of view is *de facto* being criminalised in the UK as described below.

## 3.1. IMPOSING THE DESIRED NARRATIVE THROUGH TERRORISM LAWS

Since the very beginning of the genocidal assault on Gaza, people in the UK have been taking to the streets of the UK in their hundreds of thousands to protest and demand a ceasefire. Despite up to half a million people marching at a time, the protests have been overwhelmingly peaceful with no threat of major public disorder. The Metropolitan Police (MPS) issued a statement in February 2024 confirming that 'the vast majority of those joining protests have done so in a lawful and peaceful way'.[64] Apparently dissatisfied with the low levels of arrests and the message of solidarity spread through the protests, legislators quickly sought to amend the terrorism legislation in order to make it even more draconian and more useful in suppressing speech supportive of Palestinian liberation. The IRTL was however not in favour of expanding the current provisions noting that '[t]here is a general risk of

[62] Jonathan Hall, KC, Independent Reviewer of Terrorism Legislation, 'Report on Terrorism Legislation and Protests' (2023) para 13.

[63] Going even further, on 7 May 2024, at the US Holocaust Remembrance Ceremony US President Joe Biden painted the picture of nothing short of a genocide: 'Driven by ancient desire to wipeout the Jewish people off the face of the Earth, over 1,200 innocent people – babies, parents, grandparents – [were] slaughtered in their kibbutz, massacred at a musical festival, brutally raped, mutilated, and sexually assaulted.' Joe Biden, 'Remarks by President Biden at the U.S. Holocaust Memorial Museum's Annual Days of Remembrance Ceremony' (US Capitol, Washington DC, 7 May 2024) <https://bidenwhitehouse.archives.gov/briefing-room/speeches-remarks/2024/05/07/remarks-by-president-biden-at-the-u-s-holocaust-memorial-museums-annual-days-of-remembrance-ceremony/> accessed 27 June 2025.

[64] Donna Ferguson and Sammy Gecsoyler, 'Thousands Join Pro-Palestine Marches in London and Edinburgh', *The Guardian* (3 Feb 2024), <https://www.theguardian.com/uk-news/2024/feb/03/hundreds-of-thousands-expected-at-pro-palestine-march-in-london> accessed 27 June 2025.

legislating in response to one set of protests because of the risk of unintended consequences when new legislation comes to be applied to other protests'.[65] This statement openly acknowledges the desire of the UK regime to target the protesters on a discriminatory basis and warns of the danger of more strict criminalisation potentially then applying also to those protesters which the UK likes, such as Iranian royalists.[66] In his Report on Terrorism Legislation and Protest, the Reviewer indirectly recognizes how, fortunately, the terrorism legislation already allows for such discrimination through its reference to the proscription regime which ensures that speech is sanctioned not along objective standards, but along such lines as the UK is currently geopolitically comfortable with. In his own words, the link to proscribed organisations avoids inviting 'legitimate "whataboutery" (Nelson Mandela, William Wallace, etc.)' and 'is essential because it creates a quality control on groups who may be praised, applying only to groups who have been assessed by the government to be concerned in terrorism at the time of proscription and meriting proscription *as a matter of discretion*, subject to Parliamentary oversight'.[67]

The Reviewer has since been proven right on there being no need for further adaptation of the law to achieve the desired effect, as countless arrests have been made under the Terrorism Act not only of anti-genocide protesters but also of activists and journalists for opinions expressed online. The police themselves have even branded this clear political persecution 'Operation Incessantness.'[68] While the statistics are not publicly available, it is estimated that there have been scores of people arrested and raids of properties carried out in conjunction with seizures of electronic devices and passports for an indefinite period. The police have furthermore imposed draconian bail conditions on those being investigated while leaving them in limbo for months on end as to whether they will ever be charged, repeatedly and unjustifiably extending the investigations. Lawyers defending such clients have by and large adopted a strategy of no publicity since this seems to be more favourable for individual clients; however this regrettably obscures the scale of the persecution. In conversations with lawyers this author has heard of the police being overwhelmed with the witch hunt and wishing they could focus on actual crimes instead. Unfortunately certain well known Zionist groups keep pushing the focus of the police in this direction. After the arrest of a Professor following his anti-genocide speech (discussed below), the MPS spo-

65 Hall (n 62) para 4.

66 See Jonathan Hall KC, 'Written Evidence Submitted by Jonathan Hall KC Independent Reviewer of Terrorism Legislation, in reply to Letter of 21 December 2023' <https://committees.parliament.uk/writtenevidence/127502/pdf/> paras. 16-17 accessed 27 June 2025. In response to a question on the potential criminalisation of 'hateful extremism' as suggested by Dame Sara Khan and Sir Mark Rowley in their 2021 Report, the Reviewer states that the definition of the concept is too imprecise and it might imperil legitimate activities and speech. As an example, he gives an Iranian political exile who supports the restoration of the Shah, protests outside of the Iranian embassy and directs hostility at the current regime.

67 Hall (n 62) para 59 (emphasis added).

68 The name was mentioned in a latter handed to Asa Winstanley by the police in connection to the raiding of his home. 'British State Ramps up War on Independent Journalism' *Jewish Voice for Labour* (17 October 2024) <https://www.jewishvoiceforlabour.org.uk/article/british-state-ramps-up-war-on-independent-journalism/> accessed 27 June 2025.

keswoman described it as 'a constant balancing act'.[69]

Apart from direct references to Hamas *any* reference made to 7 October is particularly used as an excuse for persecution, at times under section 1 of the TA 2006 which deals with *glorification* and *encouragement* of terrorism, and section 2 TA 2006 which deals with *disseminating terrorist publications*, but more commonly under sections 12(1) and (1A) of the TA 2000, which deal with *deliberately inviting* or *recklessly encouraging support* for a proscribed organisation, and even section 13 TA 2000, which applies to wearing or displaying an article that might *arouse reasonable suspicion* that one is a member or supporter of a proscribed organisation. The latter two provisions are thus *de facto* also being used as glorification offences. While the maximum sentence for section 13 is 6 months, section 12 carries a staggering potential sentence of up to 14 years' imprisonment and sections 1 and 2 even up to 15 years.

In October 2024, researcher and journalist Mohamed Elmaazi submitted multiple freedom of information (FOI) requests regarding the statistics on the arrests, charges and convictions specifically under Section 12(1A) TA (2000), the most controversial and draconian of the provisions, to the Crown Prosecution Service of England and Wales (CPS), MPS, National Police Chiefs' Council (NPCC), and the UK Home Office, in order to uncover the scale of the persecution.[70] One set of FOI's requests sought the relevant statistics from 12 April 2019 (when the provision came into force) up to 6 October 2023 and the other for information from 7 October 2023 until 10 October 2024. However, following a lengthy back and forth with the relevant governmental bodies, he has thus far received merely partial responses to his requests.

In terms of Section 12(1A) prosecutions the data received shows a dramatic increase from only one in the four years leading up to 6 October 2023 to 11 prosecutions between 7 October 2023 and 6 October 2024. In terms of the number of arrests under Section 12(1A), The National Police Chief's Council confirmed that their records show 12 people arrested, yet importantly, they also noted that it is at 'the officer's discretion' as to what details they provide for the 'reason for arrest' implying that fully accurate statistics may not even exist. On the other hand, the MPS is relying on irrelevant exemptions and unsound justifications in order to justify withholding the information they hold on the number of arrests, including that the release of such information could jeopardise national security, prejudice police investigations, prejudice the detection and prevention of crime and breach the data privacy of individuals. Elmaazi has twice appealed their decision, most recently to the Information Commissioner's Office (ICO), meanwhile the precise data continues to be kept from the public in what can only be understood as a deliberate attempt to conceal the abuses of the law and prevent public outrage about it.

When we speak of expression referencing 7 October potentially falling under the scope

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[69] 'Exclusive: Prof Haim Bresheeth's Anti-Genocide Speech before he was Arrested for 'Terrorism'" *The Skwawkbox* (3 Nov 2023), <https://skwawkbox.org/2024/11/03/exclusive-prof-haim-bresheeths-anti-genocide-speech-before-he-was-arrested-for-terrorism/> accessed 27 June 2025.

[70] The correspondence is not in the public domain. All files mentioned in this context on file with Mohamed Elmaazi.

of sections 12 and 13 of the TA (2000), it is not relevant whether the raid itself or specific actions within that raid fall under the UK definition of terrorism or one of the core international crimes. Rather the only relevant question is whether the actors involved are considered by the UK Parliament to be members of proscribed terrorist organisations or not.[71] This makes an open and honest discussion about this seismic event extremely difficult if not impossible, aggressively stifling the expression of a crucial part of public sentiment.

In February 2024, three women were convicted under section 13(1) for displaying small print-out sketches of paragliders attached to their clothes and to a poster during a protest.[72] The prosecutor told the court that the images displayed could have been viewed as 'celebrating the use of the paragliders' tactic'.[73] At this point one might legitimately ask why the tactic should not have been celebrated. Why should it be a crime to celebrate a humble paraglider defeating the oppressive wall of the brutal occupier and overcoming one of the most internationally supported militaries in the world in a stand up fight? According to the prosecution, that would mean celebrating Hamas *per se* and creating *a risk* of others supporting Hamas and since Hamas is a proscribed organisation under UK law, this makes it a terrorist crime. The three women were indeed found guilty despite the judge concluding that there was no evidence that any of the defendants were supporters of Hamas or were seeking to show support for them. But they did find that the women were 'carrying or displaying' *as per* section 13(1) an article in such a way as to *arouse reasonable suspicion* that they were supporting a proscribed organisation. In short, supporting an entirely legitimate and legal act of resistance was determined to be a terrorist crime in itself.

Similarly, Tony Greenstein, an anti-Zionist Jew and founding member of the Palestine Solidarity Campaign, was arrested in December 2023 under section 12 for the following tweet, 'I support the Palestinians that is enough and I support Hamas against the Israeli army'.[74] Again, clearly not expressing support for any attack on civilians, nor Hamas *per se*, but only for the group's legitimate and legal attacks against the Israeli army. As he had noted, all his views are in the public domain, yet the police had nevertheless confiscated all his computers indefinitely in what was clearly a fishing expedition.[75] This seems to be stan-

[71] For example the Al-Qassam Brigades have been proscribed as a terrorist organisation since March 2001under the Terrorism Act 2000, while the entirety of Hamas was proscribed in November 2021. The Terrorism Act 2000 (Proscribed Organisations) (Amendment) (No3) Order 2021.

Needless to say, not the state of Israel nor its military have ever suffered such proscription, despite the systematic terrorism they inflict on the Palestinian population.

[72] Crown Prosecution Service, 'Three Women Convicted of Displaying Paraglider Stickers at Protest' (13 February 2024) <https://www.cps.gov.uk/cps/news/three-women-convicted-displaying-paraglider-stickers-london-protest> accessed 27 June 2025.

[73] 'Pro-Palestinian Protests: Paraglider Badge Wearers Found Guilty' *BBC News* (13 Feb 2024) https://www.bbc.co.uk/news/uk-england-london-68286945 accessed 27 June 2025.

[74] The tweet was a response to another tweet stating 'Just tweet I support Hamas! 3 words is all you have to tweet and then we know where you stand.' This context further makes it clear that Greenstein did not express support for Hamas *per se* but only their engagement in lawful resistance.

[75] 'Greenstein Takes Police to Court the Week for Return of Seized Electronics' *The Skwawkbox* (14 April 2024) <https://skwawkbox.org/2024/04/14/greenstein-takes-police-to-court-this-week-for-return-of-seized-electronics/> accessed 27 June 2025.

dard practice with such raids and arrests. He was left in limbo and under bail conditions for nearly an entire year before finally being charged, for that one tweet, under section 12(1A) on 23 November 2024.[76]

Similarly, Mick Napier, founder of the Scottish Palestine Solidarity Campaign, was arrested for stating during a speech at a protest, 'I agree with the Palestinian right to resist by means that they choose'.[77] He was charged on religiously aggravated offences morphed into the terrorist offence of support for a proscribed terrorist organisation, i.e. Hamas, despite not mentioning the group in any way and speaking of the right to resist in an abstract manner. Napier spent less time in limbo, however, as the terrorism charges were soon later dropped.[78]

Recently Prof. Haim Bresheeth, a child of Holocaust survivors, was arrested after a speech he had given against the genocide. When apprehending Bresheeth, the policeman is clearly heard stating that he was being arrested under the TA 2000 for quote 'making a hate speech'. Yet hate speech is not covered by the TA and it seems at some later point the official reasons for his arrest were changed into 'expressing support for a proscribed organisation' as per section 12(1A) TA.[79] What exactly in the speech allegedly qualified for the offence has not been clarified but some have speculated that the police are referring to the following words, '[Israel] cannot win against Hamas. They cannot win against Hezbollah. They cannot win against the Houthis. They cannot win against the united resistance to the genocide that they have started'.[80] Again, this is far from an expression of support for any of the enumerated organisations as such or any attacks on civilians perpetrated by them. It is however an expression of opinion on the current military situation and at 'worst' an expression of support for resistance to genocide which all these groups are indisputably engaged in.

## 3.2. ATTACKS ON JOURNALISTS

Recent months have also seen a rise in the use of counter-terror legislation against several prominent journalists, namely Richard Medhurst and Sarah Wilkinson, both arrested for alleged offences under section 12(1A) TA (2000), as well as Asa Winstanley who is being investigated for possible offences under sections 1 and 2 of TA (2006). The arrests and raids conducted at their properties have included seizures of journalistic material and devices, including microphones, cameras, computers and telephones.

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[76] Jo Wadsworth, 'Tony Greenstein Charged with Terrorism Offence' *Brighton and Hove News* (29 November 2024) <https://www.brightonandhovenews.org/2024/11/29/tony-greenstein-charged-with-terrorism-offence/#google_vignette> accessed 27 June 2025.

[77] Asa Winstanley, '"Anti-terror" Arrests in UK over Support for Palestinian Resistance' *The Electronic Intifada*, (22 Dec 2023) <https://electronicintifada.net/blogs/asa-winstanley/anti-terror-arrests-uk-over-support-palestinian-resistance> accessed 27 June 2025.

[78] 'Terrorism Charges against SPSC Campaigner Dropped' *Scottish Palestine Solidarity Campaign* (26 Jan 2024) <https://www.scottishpsc.org.uk/analysis/latest-news/254-info/about-spsc/statements/2077-terrorism-charge-dropped-against-spsc-campaigner> accessed 27 June 2025.

[79] This author could not confirm definitively whether section 12(1) or 12(1A) was cited.

[80] *The Skwawkbox* (n 69).

The National Union of Journalists has condemned the trend as an 'intimidatory measure' harmful to press freedom and spoke of a 'concerning police culture where the rights of journalists and their ability to ensure the safety of sources is placed at risk'.[81] As far as this author is aware, none of the three journalists were informed by the constabularies of the exact statements they had allegedly made that warranted their arrests/raids on their properties, having only been given general explanations such as arrest for 'content posted online'. However, it is speculated by the Jewish News that in the case of Wilkinson it may have been her characterisation of the 7 October raid as an 'incredible infiltration'.[82] By any objective interpretation this is simply a statement of fact. Her arrest was conducted by the counter-terrorism police in a particularly egregious manner that puts a shameful stain on the UK counter-terrorism police which will be hard to rectify. Among the several intimidation techniques used on the day, the officers, who never showed their IDs, went as far as desecrating the ashes of her late mother, withholding lifesaving medications, and driving her in the opposite direction of the police station in order to create the illusion of a kidnapping.[83] Most concerning, however, Wilkinson was requested to give up the locations of her contacts in Palestine.

## 3.3. TREATING PALESTINE ACTION AS TERRORISTS

In an unprecedented move, in August 2024 the police also used powers under the TA to detain for seven days without charge 10 members of Palestine Action[84] who participated in a raid on an Elbit Systems arms factory in Bristol causing over £1 million in damages.[85] They were later charged with non-terror offences and remanded to prison.[86] However, a month later the co-founder of the group, Richard Barnard, was charged under section 12(1A) for 'expressing an opinion that is supportive of a proscribed organisation' in relation to a speech he had made on 8 October 2023. It is difficult to comment on the specific charge as the content of the speech has not been made available online, however the prosecution

[81] 'NUJ Condemns Abuse of Counter-Terror Legislation as Harmful to Media Freedom, *National Union of Journalists*' (21 Oct 2024) <https://www.nuj.org.uk/resource/nuj-condemns-abuse-of-counter-terror-legislation-as-harmful-to-media-freedom.html> accessed 27 June 2025.

[82] Lee Harpin, 'Palestine Activist who Praised "Incredible Oct 7 Infiltration" Arrested by Counter-Terrorism Police' *Jewish News* (29 Aug 2024) <https://www.jewishnews.co.uk/pro-palestine-activist-who-had-praised-incredible-oct-7-infiltration-arrested-by-terror-cops/?utm_source=substack&utm_medium=email> accessed 27 June 2025.

[83] For full account of the arrest see 'UK Journalist under House Arrest on Terrorism Charges' *The Crispin Flintoff Show* (2 Sep 2024), <https://www.youtube.com/watch?v=WjwycG_9Ujo> accessed 27 June 2025.

[84] Palestine Action is a protest group that has been using direct action tactics against UK-based operations providing weapons to Israel. Juries have been accepting the group's defence arguments in that their actions are being committed in order to prevent harm to civilians and property in Palestine, thus there have been a series of hung juries and acquittals for the actionists. However, steps are now being taken to prevent juries from acquitting on account of their conscience. 'Statement of Solidarity with Palestine Action' *Cage International* (5 Nov 2024) <https://www.cage.ngo/articles/statement-of-solidarity-with-palestine-action> accessed 27 June 2025.

[85] 'Palestine Action Co-founder Back in Court Again. Here's Where and When' *The Canary* (3 Oct 2024) <https://www.thecanary.co/uk/news/2024/10/03/palestine-action-barnard-court/> accessed 27 June 2025.

[86] Areeb Ullah, 'UK Police Charge Co-founder of Palestine Action under Terrorism Act' *Middle East Eye* (30 Aug 2024) <https://www.middleeasteye.net/news/uk-police-charge-co-founder-palestine-action-under-terrorism-act.> accessed 27 June 2025.

points to a wider campaign of using the TA against Palestine Action due to their impressive successes in disrupting Elbit System operations. This includes closing down several Elbit Systems factories, forcing 10 large businesses to cut ties with the weapons manufacturer and reportedly costing the company tens of millions of pounds in losses in the last year alone.[87] In November counter-terrorism police arrested and raided the homes of 10 more people in relation to the action in Bristol. Clare Rogers, the mother of one of the activists, has stated,

> It does feel like Zoe is being branded a terrorist and treated under the Terrorist Act because her actions were pro-Palestinian… labelling someone who is trying to uphold international law a "terrorist" just beggars belief and it is our country who should be calling Israel terrorists.[88]

On the 23 June 2025, two days after activists spray-painted two military planes red, the Home Secretary Yvette Cooper announced that she would be seeking the proscription of Palestine Action.[89]

## 3.4. OVERBROAD DEFINITIONS AND THEIR INTERPRETATION IN PRACTICE

Looking at the definitions of the above-mentioned provisions of the TA and how they have been interpreted, it is essential to understand just how broad they are to begin with. Firstly, the criminalised 'support' under s. 12 does not mean monetary support or any other kind of tangible support and it furthermore does not need to incite violence or encourage terrorism.[90] Mere intellectual support suffices.[91] In other words, simply an expression of an opinion can fall under *support.*

In terms of *mens rea*, s. 12(1) requires that the person knowingly solicits such support. The section therefore crucially does not cover expressions of personal belief or personal approval, or even inviting someone else to share that opinion or belief, nor is it an offence oneself to give moral support for a proscribed organisation.[92] Yet s. 12(1A) then entirely disregards common sense and the principal of minimal criminalisation by including in the realm of terrorism *recklessly* creating a *risk* that encouragement of others to support a proscribed organisation will occur. In other words one need only be aware of a sufficient likelihood that support *may* be encouraged, automatically criminalising the expression of *any* supportive belief or opinion, not only invitations to support.

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87 *Cage International* (n 84).

88 'If you Protest for Palestinian Rights in the UK you Could be Arrested under Antiterrorism Laws' *AJ+* (28 Nov 2024) <https://www.instagram.com/reel/DC4lP-SM6GN/?utm_source=ig_web_button_share_sheet> accessed 27 June 2025.

89 Imogen James and Ellie Price, 'Palestine Action Group to be Banned, Home Secretary Confirms' *BBC* (23 June 2025) <https://www.bbc.co.uk/news/articles/c4g83l33wdeo> accessed 27 June 2025.

90 *R v Choudary and Rahman* [2016] EWCA Crim 61 [40, 46, 89]

91 See *R v Choudary and Rahman* [2016] EWCA Crim 61 [46] Court of Appeal endorsing trial judge's ruling which found that inviting someone else to provide encouragement to or intellectual support for a proscribed organisation, allowing it to grow stronger and more determined, was enough.

92 ibid para 48.

In his Report, the IRTL states that as a matter of proof it must be shown that the expressed supportive belief is supportive of the proscribed organisation itself not merely of actions carried out by them.[93] Yet just a few paragraphs prior he states that recklessness as to creating the risk 'inevitably means that the opinion or belief, even if not expressly supportive of the organisation (for example, praise for terrorist acts on 7 October 2023), must be known by the speaker and his audience to have sufficient connection to a proscribed group'[94] and again later that 'praise for events with which Hamas were obviously involved, might demonstrate a sufficient likelihood or encouraging support for Hamas as an organisation'.[95] The equation of support of particular acts of a group with the group itself, is precisely what leads to the problem described above where references to legitimate acts of resistance have been interpreted as terrorism in itself.

Even worse, in terms of *mens rea*, s. 13 is a strict liability offence, with the only standard to be met being a potential *reasonable suspicion* aroused that someone is a supporter of a proscribed group. They do not even need to be reckless towards any risk of potential encouragement of others occurring, nor do they need to be actual supporters of the group.

When it comes to encouragement of terrorism *per se* under s. 1 TA (2006), there is no need for any connection to proscribed organisations. It rather applies to any statement which is 'likely' to be understood as a direct or indirect 'encouragement' to the commission, preparation, or instigation of 'acts of terrorism', i.e. attacks. What is *likely*, depends on the context[96] and the Independent Reviewer speculated in his Review that in the current context consideration might be given to whether 'people were travelling from the UK to commit terrorist acts in Israel or the Occupied Palestinian Territories' similarly to how they were travelling to Syria and Iraq to fight with ISIS.[97] Yet despite no such travel taking place, s. 1 has been used against Asa Winstanley for example, as described above. It is hard to analyse what exactly the police considered to have created such a risk, since they have not told the suspect which statements of his they deem potentially criminal. A statement which *glorifies* (in any way praises or celebrates)[98] the commission or preparation of a terrorist act is considered *likely to encourage* only if members of the public could reasonably be expected to infer that the person is implying the act should be emulated by them in the existing circumstances.[99] In terms of *mens rea* recklessness again suffices as to whether others will be encouraged, i.e. the person is aware of the *risk* that they might be.

With regards to section 2 TA (2006), the offence applies to disseminating publications that either assist or encourage terrorism. In practice it is mostly used for the latter category which applies to publications which are likely 'to be understood by a reasonable person as a direct or indirect encouragement or other inducement… to the commission, preparation

93 Hall (n 62) para 50.

94 ibid para 44.

95 ibid para 51.

96 Terrorism Act 2006 s. 1(4).

97 Hall (n 62) para 84.

98 Terrorism Act 2006 s. 20(2).

99 Terrorism Act 2006 s. 1(3).

or instigation of acts of terrorism'. This includes publications that glorify terrorism, if it can reasonably be inferred that the glorification seeks for the acts to be emulated in the existing circumstances.[100]

From certain case law, it appears the publications do not need to include an inherently encouraging meaning or message as mere depictions or descriptions of terrorism or interviews with known terrorists will suffice, if they are seen to normalise terrorism, or cast it in a positive or sympathetic light.[101] Again, it is also irrelevant whether the publication actually encourages anyone and recklessness suffices for the *mens rea*.[102] A defence, however, is available, i.e. if the publication neither expressed the defendant's views nor had his endorsement and it was clear in all the circumstances that this was not the case.[103]

To sum up, none of these provisions require proof that anyone was actually encouraged either to support a proscribed organisation or to commit an act of terrorism as a result of the expression, contrary to the principle that criminalisation of speech acts should be limited to expressions that would be directly causally responsible for increasing the actual likelihood of a terrorist act occurring.[104]

Furthermore, in practice, the existence of a *risk* under these provisions has been taken for granted whenever a statement or image is seen as supporting a proscribed terrorist organisation or glorifying an act that has been deemed terrorist, rendering this particular caveat entirely meaningless. Commenting on potential law reform removing the *risk* caveat under sections 12(1) or 1(A) the Reviewer stated that,

> the impacts would be severe. It would be practically impossible to express the view that a group should no longer be proscribed (even though the Terrorism Act 2000 enables members of the public to apply for description). It would prevent neutral or justifiable views being expressed in public or private (for example, "Hamas has done the right thing to agree to lay down its arms!").[105]

He was equally as critical of section 1 TA (2006) potentially applying in circumstances where there would be no reason to believe that anyone would end up being encouraged.[106] Yet, looking at the above described cases, in practice, we have already reached this stage.

## 3.5. DRACONIAN, DISCRIMINATORY AND HARMFUL TO DEMOCRACY

[100] Terrorism Act 2006 s. 2(4).

[101] Andrew Cornford, 'Terrorist Precursor Offences: Evaluating the Law in Practice' (2020) 8 *Criminal Law Review* 663, 672; *R v Mohammed* [2008] EWCA Crim 1465, *R v Iqbal* [2010] EWCA Crim 3215; *R v Ali* [2018] EWCA Crim 547, [2018] 1 WLR 6105.

[102] Terrorism Act 2006 s. 2(8)

[103] Terrorism Act 2006 s. 2(9)-(10)

[104] Report of the Secretary-General, 'The Protection of Human Rights and Fundamental Freedoms while Countering Terrorism' (28 August 2008) UN Doc A/63/337 para 61.

[105] Hall (n 66) para 10.

[106] ibid.

In 2017, Amnesty International published a comparative study of security laws in which it declared the UK laws as some of the most draconian in Europe, highlighting among other issues the inclusion of controversial offences related to direct and indirect forms of encouragement, including the 'glorification' of terrorism and the permission of proscription for organisations based on conduct that 'encourages' or 'glorifies' terrorism.[107] Due to its overbreadth and incompatibility with the harm principle, a broad coalition of actors and legal instruments find criminalisation of glorification of 'terrorist acts' to be unjustifiable altogether, including academic commentators, non-governmental organisations, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, other international bodies and relevant EU-Directives.[108] In 2008 a UN Secretary-General report stated clearly that glorification should not be criminalised at all due to the vagueness and uncertain scope of terminology such as 'glorifying' or 'promoting'.[109] Encouragement offences in general suffer from such overbreadth. According to Human Rights Committee, General Comment No. 34, freedom of expression can be restricted when the State can 'demonstrate in a specific and individualised fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat'.[110] The threat here should be to an enumerated purpose, e.g. harm to others, national security or public order.[111] In other words, only acts of speech that are likely to be causally responsible for actual violence should be justifiably criminalised, whereas the justification for laws criminalising glorification mainly rests on the assumption that the state in which such expression is left unsuppressed is more conducive to terrorist violence, regardless of how imperceptibly small the contribution of any one such expression may be.[112] While this risk may be small or even illusory, the social value of the conduct constituting the alleged encouragement may be great.[113] Criminalising it might furthermore create chilling effects on political and religious speech.[114] Thus even if we accept in theory that there is room for offences extending beyond direct incitement of terrorism, we must carefully weigh their

[107] Terrorism Act 2006 s. 1; Terrorism Act 2000, s. 3 <http://www.legislation.gov.uk/ukpga/2000/11/section/3> (see amendments at 3(5)A-C in particular: <http://www.legislation.gov.uk/ukpga/2000/11/section/3#reference-c16757481>). The case of *R v Faraz* itself highlights the extremely complex considerations required in terms of intent and directness in order for criminal proceedings to correctly consider whether a publication or the expression of a view was in fact intended to 'encourage' terrorism. See *R v Faraz* [2012] EWCA Crim 2820; Edward Craven, 'Case comment: *R v Faraz* – Terrorist publications and free speech in the Court of Appeal' (10 January 2013), <https://inforrm.wordpress.com/2013/01/10/case-comment-r-v-faraz-terrorist-publications-and-free-speech-in-the-court-of-appeal-edward-craven/> accessed 27 June 2025.

[108] See Ilya Sobol, 'Glorification of Terrorist Violence at the European Court of Human Rights' 24 *Human Rights Law Review* 1, 1-28.

[109] Report of the Secretary-General (n 104).

[110] Human Rights Committee, 'General Comment No 34: Article 19: Freedoms of opinion and expression' (12 September 2011) UN Doc CCPR/C/GC/34, para 34.

[111] *Shin v Republic of Korea*, Communication No 926/2000, UN Doc CCPR/C/80/D/926/2000 paras 7-8.

[112] Sobol (n 108) 9.

[113] Cornford (n 101) 17.

[114] *R v Khan* [2015] EWCA Crim 1341.

benefits against their costs.[115]

As Cordnford accurately puts it, encouragement offences requiring only a potential encouraging effect, curtail a range of freedoms,

> most obviously, the freedoms to discuss controversial topics openly, and to share moral, political, and religious opinions. Arguably, there is value simply in being free to engage in such expression, unrestricted by others' potential wrongdoing. But more significantly, such expression can itself be valuable. The potential value of depictions or account of terrorism is obvious: not least of all, in understanding and thus combating terrorism itself. And even glorification and justification of terrorism should not automatically be assumed to be worthless. Again, we must bear in mind here the statutory definition of terrorism: this encompasses politically-motivated violence against any government of any kind. Encouraging terrorism thus includes encouraging justified freedom-fighting against illegitimate regimes.[116]

Not to mention, that in the context of resistance groups vis-à-vis the IDF, a causal link could much more easily be established between the all-pervasive intellectual and military support for Israel and the IDF and subsequently UK citizens joining the genocidal machine, than between UK citizens joining Hamas as a response to some individual's tweets or some tinny images displayed during a protest.[117] But of course, this is irrelevant since it is not even illegal for British dual nationals to join the IDF, an armed force 'legitimately recognised' by the UK, as has officially been confirmed by the Foreign, Commonwealth and Development Office on 13 December 2023 showing no concern or interest over the numbers of those that had already travelled to join by that time.[118]

Implicitly recognizing the absurdity of convictions without any harm or even risk of harm present, in practice other harms have been attached to justify arrests and conviction in the case of encouragement provisions. In April a man was convicted for supporting a prosc-

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[115] Cornford (n 101) 17.

[116] ibid 18.

[117] Declassified has reported that by November 2023 hundreds of Britons had joined the IDF. Phil Miller, 'British Fighters in Israel's Military: is it Legal?' *Declassified UK* (13 November 2023) <https://www.declassifieduk.org/british-fighters-in-israels-military-is-it-legal/> accessed 27 June 2025.

[118] Andrew Mitchell, UK Parliament, Written Questions, Answers and Statements, 'Israel Defense Forces: British Nationals Abroad' Question for Foreign, Commonwealth and Development Office, 22 December 2023 <https://questions-statements.parliament.uk/written-questions/detail/2023-12-13/6894> accessed 27 June 2025:

> We are aware of reports of UK citizens travelling to fight for the Israel Defence Force (IDF), but the Government does not estimate the numbers of those who have done so. The UK recognises the right of British nationals with additional nationalities to serve in the legitimately recognised armed forces of the country of their other nationalities. The IDF is a recognised armed force and British nationals are both able to volunteer into the IDF and eligible for national service. For Israel, one does not have to be Israeli to serve in the IDF.
>
> Section 4 of the Foreign Enlistment Act 1870 makes it an offence for a British subject to enlist in the military of a foreign state at war with another foreign state with which the UK is at peace, however the UK does not recognise Palestine as a state and the prohibition furthermore does not apply to enlistment in a foreign government's forces which are engaged in combating terrorism, which is what the UK characterises the current assault on Gaza as.

ribed organisation simply for wearing a green headband with the inscription of the *shahada*, a statement of faith for any Muslim, because it allegedly resembled the headbands worn by Hamas. Despite no need for actual harm to be established, under s. 13 TA 2000, the Judge nevertheless claimed that serious harm was done. However, by serious harm the Judge not referring to someone potentially joining Hamas as a result or even being encouraged to commit a 'terrorist act'. She was instead referring to 'significant distress' that would have been caused. In other words, feelings would have been hurt. Yet, as mentioned, the provision is not meant to be tackling such harm but the harm of people potentially becoming supporters through being exposed to positive publicity for a proscribed organisation.[119] Also, The European Court of Human Rights (ECtHR) has on several occasions emphasised that freedom of expression was not only applicable to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb; stating that such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'.[120]

Arguably, the core of the unjustifiability of these provisions is their effect on the Overton window along racist and colonialist lines which protect the coloniser and the 'superior' race from 'distress' whereas the dehumanised people enjoy no protection against such distress. There is no sanction against support or praise for the IDF nor the glorification of their terror, war crimes, or acts of genocide, regardless of how much distress such praise may cause those who have directly experienced brutality at their hands or those, who are merely helpless witnesses to the unspeakable sadism committed against the Palestinian people. In fact the later cannot even mitigate their distress by expressing themselves honestly in response. Any limitations placed on freedom of expression should respect the principle of equality and non-discrimination, yet the lack of recognition of state terrorism makes these provisions extremely discriminatory as they only apply to activists on the anti-occupation/genocide/apartheid side. This discrimination also disproportionally affects individuals of Arab and Muslim background as well as Jews, since the latter represent a large part of the most vocal intellectuals speaking out against the occupation and genocide.

The safeguard of 'necessary in a democratic society', as stipulated by Article 10 of the European Convention of Human Right, requires States to demonstrate that there is a pressing social need and that the limitations placed on freedom of expression do not merely have a legitimate aim,[121] but are proportionate to that aim, strike a fair balance between dif-

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[119] Hall (n 62) para 69.

[120] *Handyside v the United Kingdom* App no 5493/72 (ECtHR, 7 December 1976) para 49; *Observer and Guardian* v United Kingdom, App no 13585/88 (ECtHR, 26 November 1991) para 59; *Ligens v Austria* App no 9815/82 (ECHR, 8 July 1986) para 41; *Castells v Spain*, App no 11798/85 (ECtHR, 23 April 1992) para 42.

[121] *Bayev and Others v Russia*, App nos. 67667/09 and 2 others (ECtHR, 20 June 2017) para 64, 83; *Morice v France*, App no 29369/10 (ECtHR, 23 April 2015) para 170; *Perinçek v Switzerland*, App no 27510/08 (ECtHR, 15 October 2015) paras 146-154; *Stroll v Switzerland*, App no. 69698/01 (ECtHR, 10 December 2007) para 54; *Open Door and Dublin Well Woman v Ireland*, App no 14234/88 (ECtHR, 29 October 1992) para 63; *Kilin v Russia*, App no 10271/12 (ECtHR, 11 August 2021) paras 63-66.

ferent rights and interests and do not impair the democratic functioning of society itself.[122] Considering the above discussion, TA encouragement offences cannot be said to either be necessary or proportionate. Furthermore, in light of the numerous prominent independent journalists being persecuted through their use, it is clear that the offences pose another, even more direct threat to the democratic functioning of society. Being informed on key events is critical to the public's ability to participate meaningfully in democratic processes, such as elections and public debate; to hold politicians accountable for their actions and policies; and to ensure democratic institutions are operating transparently and effectively. In Tromsø and Stensaas the ECtHR stressed that an extensive freedom of expression must apply to discussion on matters of general public interest[123] and that the national margin of appreciation is circumscribed by the interest of democratic society in enabling the press to exercise its vital role of 'public watchdog' in imparting information of serious public concern.[124] Furthermore in Lingens v Austria the Court recognized that 'freedom of political debate is at the very core of the concept of a democratic society'[125] and that freedom of the press 'affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders'.[126]

In the context of 7 October and the genocide in Gaza, independent investigative journalism has been crucial in debunking widespread misinformation and bringing essential facts to the public. Journalist Asa Winstanley is associate editor of the Electronic Intifada, which was one of the first outlets to debunk the 7 October rape allegations, the crown jewel of the disinformation efforts to manufacture consent for a disinhibited assault on Gaza.[127] The night before the raid on his home and the seizure of his devices, Winstanley shot a video uncovering another crucial piece of information that the mainstream media has ignored, which is the vast number of Israelis killed on 7 October by their own army.[128] The timing of the raid points to an attempt to silence this reporting.[129] It has recently come to light that on 9 September 2024 a month before Winstanley's home was raided by the Counter-Terror Command (SO15), the Attorney General's Office sent their contact details and those of the Crown Prosecution Service to the Israeli embassy, raising questions as to whether the raid

[122] *Handyside v the United Kingdom*; *Stoll v Switzerland* para 101; *Morice v France* para 124; *Pentikäinen v Finland*, App no. 11882/10 (ECtHR, 20 October 2015) para 87.

[123] *Tromsø and Stensaas* v Norway, 21980/93 (ECHR, 20 May 1999) 35.

[124] ibid para 58. see also *Goodwin v United Kingdom* App no 17488/90 (ECHR, 27 March 1996) para 39.

[125] *Ligens v Austria* (n 120) para 42, see also *Castells v. Spain* (n 120) para 43. Concurring Opinion of Judge De Meyer 'Mr Castells was prosecuted and convicted for having written and published his views on a question of general interest; in a "democratic society" it is not acceptable that a citizen be punished for doing this.'

[126] *Ligens v Austria* (n 120) para 42.

[127] Fank Lunz a pollster for the Israeli lobby conducted a series of polls and found that the allegation that made the polled participants most support Israel's assault on Gaza were those of rape. Max Blumenthal, 'Leaked Israel Lobby Presentation Urges US Officials to Justify War on Gaza with "Hamas rape" Claims' The Grayzone (6 March 2024) <https://thegrayzone.com/2024/03/06/leaked-israel-lobby-officials-war-gaza-mass-rape/> accessed 27 June 2025.

[128] 'How Israel Killed Hundreds of its own People on 7 October, with Asa Winstanley and Ali Abunimah' *The Electronic Intifada*,= (19 October 2024) <https://www.youtube.com/watch?v=_gr_j0JKcfY> accessed 27 June 2025.

[129] Asa Winstanley, 'Did British Police Raid me for This? Palestine is Still the Issue' (31 Oct 2024) <https://asawinstanley.substack.com/p/did-british-police-raid-me-for-this> accessed 27 June 2025.

was prompted by them.[130]

States do not merely have a negative obligation not to interfere with freedom of expression beyond what the test of necessity requires, but they also have a positive obligation that necessitates them to take steps to secure the effective enjoyment of the right.[131] By allowing the police to pursue their witch hunt through the use and abuse of the TA, the UK fails both obligations.

## 4. TERRORISM NARRATIVE INFECTING THE ICC

Considering the manipulative nature of the use of the term 'terrorism' and 'terrorist' in the context of resistance movements, it is regrettable that it has also been used by the Prosecutor of the International Criminal Court, Karim Khan, who referred to Hamas and other resistance groups as terror organisation[132] despite the Rome Statute clearly not containing any crime of terrorism. As Ahmed Abofoul, legal advisor with Al-Haq, has noted, 'legally speaking, this term has no place at the ICC' yet Khan has 'used [it] once before, in the highly controversial decision to 'de-prioritize' US personnel crimes in Afghanistan'.[133] While regrettable, it is not surprising that the Prosecutor is bringing a British narrative to the conflict considering he himself is British and furthermore is quite intent on surrounding himself purely with British advisors and experts. Khan has not only referred to the Palestinian resistance groups as 'terror organisations' but has also adopted in his May request for extradition warrants the approach amongst the Western political discourse and its mainstream media, whereby he reserved excessive outrage for the actions of the resistance on 7 October, while he used no such outraged for the genocidal actions of Israel in his request for

[130] Haroon Siddique, 'Police and prosecutors' details shared with Israel during UK protests inquiry, papers suggest' *The Guardian* (29 April 2025) <https://www.theguardian.com/uk-news/2025/apr/29/police-and-prosecutors-details-shared-with-israel-during-uk-protests-inquiry-papers-suggest> accessed 27 June 2025.

[131] See *Dink v Turkey*, App no 2668/07 and others (ECHR, 14 September 2010) para 137 which established that states have a positive obligation, under Article 10, to create a favourable environment for participation in public debate by all persons, enabling them to express their opinions without fear (the 'Dink principle'), confirmed in *Uzeyir Jafarov v Azerbaijan* App no 54204/08 (ECHR, 29 January 2015) para 68; *Huseynova v Azerbaijan* App no 10653/10 (ECHR, 13 April 2017) para 120; *Khadija Ismayilova v Azerbaijan* App no 65286/13 and 57270/14 (ECtHR, 10 January 2019) para 159; *Haji and Others v Azerbaijan* App no 3503/10 and others (ECtHR, 1 October 2020) para 218; *Tagiyeva v Azerbaijan* App no 72611/14 (ECtHR, 7 July 2022) para 78; *Gaši and Others v Serbia* App no 24738/19 (ECHR, 6 September 2022) para 78; Katie Pentney, 'States' Positive Obligation to Create a Favourable Environment for Participation in Public Debate: a Principle in Search of a Practical Effect' 16 *Journal of Media Law* 146, 146; see also Vladislava Stoyanova, *Positive Obligations under the European Convention on Human Rights:Within and Beyond Boundaries* (Oxford University Press 2023); Laurens Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (Interstitia 2016); Alistair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing 2004).

[132] ICC, Statement, 'ICC Prosecutor, Karim A. A. Khan KC, concludes first visit to Israel and State of Palestine by an ICC Prosecutor: "We must show that the law is there, on the front lines, and that it is capable of protecting all"' (3 Dec 2023) <https://www.icc-cpi.int/news/icc-prosecutor-karim-khan-kc-concludes-first-visit-israel-and-state-palestine-icc-prosecutor> accessed 27 June 2025.

[133] Maureen Clare Murphy, 'ICC's Karim Khan Centers Israelis in Palestine Investigation' *The Electronic Intifada* (6 Dec 2023) <https://electronicintifada.net/blogs/maureen-clare-murphy/iccs-karim-khan-centers-israelis-palestine-investigation> accessed 27 June 2025.

arrest warrants.[134] In fact he does not even use the qualification of genocide.

In terms of the actions of the resistance, he spoke of a 'shocked world', 'unconscionable crimes' and 'unfathomable pain' inflicted through 'calculated cruelty'.[135] He made no mention of a framework of legitimate resistance to Israeli occupation or Israel's widespread criminality spanning decades which he himself has been entirely ignoring until now and continues to ignore in large part by excluding from his request for arrest warrants the lines of inquiry that formed the basis of the opening of the investigation by his predecessor Fatou Bensouda, including illegal settlements in the West Bank and the transfer of people into and out of the occupied territories. In his statement, the Prosecutor also made no mention of the thousands of Palestinian hostages and the crimes committed against them. Instead, he presented the actions of the resistance as something purely wicked, out of the blue and beyond human comprehension.[136]

In contrast, when referring to alleged crimes committed by Netanyahu and Gallant, he began by giving justifications for them saying they were doing this to eliminate Hamas and to secure the return of the hostages.[137] Only as a third reason he alleged collective punishment of the Palestinians, which although more accurate than the first two, still intentionally obfuscates the real motive for the indiscriminate slaughter and destruction, which is to ethnically cleanse the land through terror and genocide.[138] The Prosecutor ignores the characterisation of genocide, even though the genocidal *mens rea* has been clearly displayed through the *modus operandi* of the IDF and through numerous statements made by Israeli officials already recognised as genocidal by a number of UN Special Rapporteurs and other experts which was highlighted by the ICJ as contributing to the plausibility of South Africa's claims in its genocide case against Israel.[139]

In fact, the goal of ethnic cleansing has been part and parcel of the Zionist project from

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[134] Karim A.A. Khan KC, ICC, 'Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine' (20 May 2024) <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state> accessed 27 June 2025.

[135] ibid.

[136] ibid.

[137] ibid.

[138] ibid.

[139] See International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel), Request for the Indication of Provisional Measures, Order of 26 January 2024* [2024] ICJ Rep, para 52 where the Court took note of a number of statements made by senior Israeli officials, in particular on 'fighting human animals', on 'the entire nation out there [being] responsible' and on the civilian population of Gaza not to receive a drop of water 'until they leave the world'. In paragraph 53 the Court further took note of the alarm raised over 'discernibly genocidal and dehumanising rhetoric coming from senior government officials' referring to a press release of 16 November 2023, issued by 37 Special Rapporteurs, Independent Experts and members of Working Groups part of the Special Procedures of the United Nations Human Rights Council. In the same paragraph the Court further took note of the concern expressed by the United Nations Committee on the Elimination of Racial Discrimination 'about the sharp increase in racist hate speech and dehumanization directed at Palestinians since 7 October'. In provisional measure number (3) the Court instructed Israel to take all measures within its power to prevent and punish the direct and public incitement to commit genocide in relation to members of the Palestinian group in the Gaza Strip.

the very beginning. Ezra Danin, the man responsible for identifying individuals for summary execution by the Hagana, quoted Ben-Gurion as saying at a certain point that there was no need anymore for distinguishing between the 'innocent' and the 'guilty' and that the time had come for inflicting collateral damage on the Arabs. By collateral damage he meant that 'every attack had to end with occupation, destruction and expulsion'.[140] Ethnic cleansing is a *sine qua non* of a Jewish ethno-state on the land of historic Palestine and terrorising the civilian population has been the main *modus operandi* at achieving this goal. To feign ignorance about it at this stage, when the terrorism and ethnic cleansing have morphed into a full-blown genocide, is hypocritical to say the least yet is not surprising considering the financial and other restraints placed on the functioning of the ICC, rendering it a court incapable of delivering anything but partial justice, which in fact is no justice at all.

It is the lack of any accountability for Israeli crimes be it at the ICC or in domestic courts and the unwavering support it receives in its perpetual ethnic cleansing campaign against the Palestinian people that drives individuals to join resistance movements more than anything else. It is the feeling of complete lawlessness when it comes to Israel that is the biggest recruiter to political violence and not someone in London displaying an image of a paraglider on a barely visible piece of paper. In their publication, Our Narrative, Hamas clearly pointed out the failure of the ICC as one of the main reasons for their recourse to 7 October raid,

> Palestine is a member-state of the International Criminal Court (ICC) and it acceded to its Rome Statute in 2015. When Palestine asked for investigation into Israeli war crimes committed on its territories, it was faced by Israeli intransigence and rejection, and threats to punish the Palestinians for the request to ICC. It is also unfortunate to mention that there were great powers, which claim to be holding values of justice, completely sided with the occupation narrative and stood against the Palestinian moves in the international justice system. These powers want to keep "Israel" as a state above the law and to ensure it escapes liability and accountability.[141]

There is not a single lie in this statement. If anything, it is being kind to the institution. Raji Sourani, director of the Palestinian Center for Human Rights and one of the most prominent figures fighting for Israeli accountability at the ICC, recently made a speech at a conference in which he touched upon the attitude of the court towards Palestine.[142] During the questions and answers session he shared with the audience his shocking experience with the first prosecutor of the court, Moreno Ocampo. Frustrated with Sourani who kept insisting that the Prosecutor stop dismissing Palestinian victims and start investigating Israeli crimes, Ocampo finally lost his temper and retorted, 'Read my lips: if the United States do

[140] Pappé (n 32) 64.

[141] *Our Narrative, Operation Al-Aqsa Flood* Hamas Media Office (Jan 2024) 11.

[142] Raji Sourani, 'Gaza: The Graveyard of International Law?', (The Situation in Palestine: Emerging Domestic and International Jurisprudence, Maynooth University, Ireland 9 July 2024) <https://www.youtube.com/watch?v=74KvlCH1vsU> accessed 27 June 2025.

not tell me to investigate a case, I will not investigate a case!'[143]

## 5. CONCLUSION

When discussing the possibility for further expansion of liability under section 12(1A) TA by removing even the mental element of recklessness, the UK IRTL stated,

> [in that case] a person who expressed a supportive opinion or belief would commit an offence if it was likely that another person might be encouraged to support the proscribed organisation – whether he appreciated that risk or not… this would be a profound interference with freedom of expression… [and would raise] the spectre of individuals having to self-regulate their expression in public and in private on topics of major interest and debate. They would risk prosecution as terrorists, subject to the major penalty that applies to section 12(1A), despite having no appreciation of any terrorist risk.[144]

Yet this is exactly where we already are. Individuals merely providing political commentary or expressing support for entirely legitimate acts of resistance, legal under international law, are being treated as terrorists. Even worse, independent journalists are being targeted simply for reporting the truth about crucial events in the conflict. Yet it is not merely through the attempted silencing of journalists but also through the suppression of the political expression of millions of ordinary citizens, who form public opinion that the politicians should be responsive to, that this kind of political persecution directly and negatively impacts democracy. The persecution is, furthermore, highly discriminatory, targeting exclusively activists against the occupation, the apartheid and the genocide, while activists supporting a genocidal and apartheid occupier face no threat of criminal prosecution, invasions of their privacy, confiscation of their electronics, and other possible consequences.[145]

[143] There is no recording of this quote and has been reproduced here to the best of this author's recollection.

[144] Hall (n 62) paras 55-56.

[145] The present author categorically denies the appreciation of any terrorist risk resulting from this writing. They furthermore wish to clarify that they do not wish to encourage anyone to support any organisation proscribed as terrorist by the UK.

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**The Boğaziçi Law Review**

ISSN: 3023-4611
Journal homepage: https://dergipark.org.tr/tr/pub/blr

# Srebrenica Genocide and Lessons for Prevention of Genocide

## *Srebrenica Soykırımı ve Soykırımın Önlenmesine Yönelik Dersler*

**Harun Halilović**

**To cite this article:** Harun Halilović, 'Srebrenica Genocide and Lessons for Prevention of Genocide' (2025) 3(1) The Boğaziçi Law Review 64.

**Submission Date:** 1 December 2024

**Acceptance Date:** 27 June 2025

**Article Type:** Research Article



Published online: June 2025

The Boğaziçi Law Review | 2025, Vol. 3, No. 1, 64-78 DOI: 10.69800/blr.1594332

# SREBRENICA GENOCIDE AND LESSONS FOR PREVENTION OF GENOCIDE

## *SREBRENİCA SOYKIRIMI VE SOYKIRIMIN ÖNLENMESİNE YÖNELİK DERSLER*

**Harun Halilović**
Dr., Assistant Professor, International University of Sarajevo, Faculty of Law.

## ABSTRACT

The Srebrenica genocide stands as a stark and enduring reminder of the international community's failure to prevent genocide, despite existing legal frameworks intended to safeguard populations from such atrocities. This event continues to raise pressing concerns regarding the effectiveness of international mechanisms and the actual extent of state obligations under international law. A central legal development in this context is the judgment rendered by the International Court of Justice (ICJ) in the Bosnia and Herzegovina v. Serbia and Montenegro case, which has been widely scrutinized for the ambiguity it presents. Rather than delivering clear and definitive answers, the judgment has, in many respects, generated further questions, particularly concerning the obligations of states to prevent genocide as stipulated in the 1948 Genocide Convention. The ICJ's approach to the interpretation of the duty to prevent genocide is notably inconsistent. In certain paragraphs, the judgment appears to adopt a relatively expansive understanding of state obligations, hinting at a broader responsibility to act against the threat of genocide. However, in other parts of the ruling, the Court takes a more restrictive stance, narrowing the scope of this obligation and potentially limiting its enforceability or applicability in practical terms. As a result, the judgment offers only limited and sometimes conflicting guidance for states seeking to understand the nature and extent of their responsibilities under the Genocide Convention. This inconsistency within the ruling has led to considerable uncertainty regarding the legal contours of the obligation to prevent genocide. While the judgment does provide some degree of clarification, it ultimately leaves unresolved critical aspects of how the duty should be interpreted and implemented in practice. The case, therefore, remains a subject of ongoing debate in both legal scholarship and international political discourse, highlighting the continuing need for greater precision in defining states' preventive obligations under international law.

**Keywords:** Srebrenica, Bosnia, genocide, ICJ, genocide prevention, state responsibility, state obligations, duty to prevent genocide

## ÖZET

Srebrenica soykırımı, uluslararası toplumun mevcut yasal düzenlemelere rağmen soykırımı önlemedeki başarısızlığının çarpıcı ve kalıcı bir hatırlatıcısı olarak durmaktadır. Bu olay, uluslararası mekanizmaların etkinliği ve devletlerin uluslararası hukuk kapsamındaki yükümlülüklerinin gerçek boyutu konusunda günümüzde dahi ciddi endişeler uyandırmaktadır. Bu bağlamda önemli bir hukuki gelişme, Uluslararası Adalet Divanı'nın Bosna-Hersek v. Sırbistan ve Karadağ davasında verdiği karardır ve bu karar, sunduğu belirsizlik nedeniyle geniş çapta eleştirilmiştir. Karar, net ve kesin cevaplar vermek yerine, 1948 Soykırım Sözleşmesi uyarınca devletlerin soykırımı önleme yükümlülükleri konusu başta olmak üzere; birçok açıdan daha fazla soru doğurmuştur.

**CONTACT** *Harun Halilović* *hhalilovic@ius.edu.ba*

*Submission Date: 1 December 2024; Acceptance Date: 27 June 2025; Article Type: Research Article*

UAD'nin soykırımı önleme yükümlülüğünün yorumlanmasına yönelik yaklaşımı dikkat çekici biçimde tutarsızdır. Kararın bazı paragraflarında, mahkeme devlet yükümlülüklerine dair görece geniş bir anlayışı benimsemekte ve soykırım tehdidine karşı daha kapsamlı bir sorumluluğa işaret etmektedir. Ancak kararın diğer bölümlerinde mahkeme daha dar bir bakış açısı benimseyerek bu yükümlülüğün kapsamını sınırlamaktadır. Bu durum, yükümlülüğün uygulanabilirliğini veya pratikteki geçerliliğini azaltabilmektedir. Sonuç olarak karar, Soykırım Sözleşmesi kapsamındaki devlet sorumluluklarını anlamak isteyenler için yalnızca sınırlı ve zaman zaman çelişkili bir rehberlik sunmaktadır. Karardaki bu tutarsızlık, soykırımı önleme yükümlülüğünün hukuki sınırlarına ilişkin ciddi bir belirsizlik yaratmıştır. Karar belli ölçüde bir netlik sunsa da, bu yükümlülüğün nasıl yorumlanması ve uygulamaya geçirilmesi gerektiği konusunda kritik bazı noktaları nihai olarak çözüme kavuşturmamaktadır. Bu dava, bu nedenle, hem hukuki literatürde hem de uluslararası siyaset alanında süregelen bir tartışma konusu olmaya devam etmektedir ve devletlerin uluslararası hukuk kapsamındaki önleyici yükümlülüklerinin daha açık biçimde tanımlanmasına yönelik süregelen ihtiyacı gözler önüne sermektedir.

**Anahtar Kelimeler:** Srebrenica, Bosna, soykırım, UAD, soykırımı önleme, devlet sorumluluğu, devlet yükümlülükleri, soykırımı önleme yükümlülüğü

# 1. INTRODUCTION

The goal of the article is to analyze the obligation of the States to prevent genocide, as defined by the 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), and the practice of the International Court of Justice (ICJ). The wording of the Genocide Convention can be at times described as vague and dated, therefore the legal practice of the ICJ is of utmost importance. However, there are not many cases related to genocide, and the only one case where genocide and the responsibility of the State for failure to prevent it were established is the Bosnia v Serbia case. In this article, the general concept of genocide will be presented followed by an in-depth analysis of the ICJ Judgment in the Bosnia v Serbia case, especially related to the obligations of the States to prevent genocide. Specifically, the questions of the bearers of the responsibility to prevent genocide and the content of such obligation. Especially important are the issues of responsibility of the bodies of international organizations, primarily the United Nations (UN). During the analysis, certain contradictions are pointed out which result in further misunderstanding of the obligation to prevent genocide. The Srebrenica genocide serves as a stark reminder of the structural inadequacy of the UN system and its inability to prevent genocide. The article uses a case study approach and legal content analysis, together with other legal methods where appropriate, and offers certain recommendations.

# 2. GENOCIDE AS A CRIME IN INTERNATIONAL LAW

The General Assembly of the United Nations, in its Resolution 96(1) declared that genocide "*is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings.*"[1] The nature of genocide is such that it affects not only individual victims and the group they belong to directly but also the entire humanity and human diversity as its hallmark.

[1] United Nations General Assembly Resolution 96 of 11 December 1946.

The concept of genocide as a crime under international law is defined by the 1948 UN Genocide Convention, which sets the main legal elements of the crime of genocide. In legal theory and practice of international tribunals, primarily the International Court of Justice (ICJ), as well as tribunals dealing with the individual criminal responsibility such as International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR), there is an overarching understanding that the Convention, and obligations put forth in it, due to the gravity of the crime of genocide and the widespread acceptance of the Convention, have attained the level of *ius cogens*.[2]

Throughout human history, there have been numerous instances of committed acts that could fall under the scope of the crime of genocide, however, the Genocide Convention represents an understanding on a global level and the point in time from which the commission of acts described in the Genocide Convention are characterized with a specific criminal label of genocide, thus, precluding retroactive labeling and setting legal prerequisites for future characterization of acts as genocide.

The elements required for legal characterization of certain acts as genocide, as defined by the Convention can be divided into *actus reus* and *mens rea* elements. The elements are contained in the definition of the crime of genocide, found in article II of the Genocide Convention, which states that "…*genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group."*[3]

The *actus reus* as physical elements of the crime include the commission of any of the acts enumerated in Article II, however, it is the *mens rea* element that sets the crime of genocide apart from other crimes in international law. The specific requirements that differentiate genocide from other crimes are found in the intent of the perpetrator and in the characteristics of the targeted group. The targeted group is defined as a national, ethnic, or religious group, excluding other types of groups.[4] Thus, certain atrocities, even though leaving a staggering number of victims, such as crimes of the *Khmer Rouge* in general were not deemed as genocide[5], since the targeted group was defined as a social or economic group and not as ethnic or religious. It must be noted that in the example of Cambodia, the Special Tribunal for the prosecution of the crimes of the Khmer Rouge, the Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (ECCC) did find individual Nuon Chea responsible for genocide against the Muslim Cham minority and Vietnamese minority in

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[2] Reservations to the Convention on Genocide and Punishment of the Crime of Genocide, Advisory Opinion, ICJ Reports (1951) 15.

[3] Convention on the Prevention and Punishment of the Crime of Genocide (signed 9 December 1948) 78 UNTS 277.

[4] Melanie Klinkner, 'Proving Genocide' (2008) 6(3) Journal of International Criminal Justice 447, 463.

[5] Robert Cryer, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press 2010) 203.

Cambodia.[6] However, those crimes, even though temporally and spatially parallel are to be differentiated from the crimes of *Khmer Rouge* against the general population of Cambodia, which was targeted based on the socio-economic and political distinction and not on national, ethnic, or religious one.

In addition to a targeted group, genocide is characterized by the special mental element, the so-called "genocidal intent" to destroy in whole or in part, the protected national, ethnic, or religious group, as such. The practice of international courts casts light on the "in whole or in part" expression, concluding that the destruction of the part of the group refers to the part which is vital for the survival of the group as a whole.[7]

The Genocide Convention in its Article III criminalizes acts of commission of genocide, as well as conspiracy to commit genocide; direct and public incitement to commit genocide; attempt to commit genocide, and complicity in genocide.[8]

The specific feature of the Genocide Convention is that it creates certain obligations, or more precisely prohibitions that affect both individuals and thus create individual criminal liability, but on the other hand, creates certain obligations on the part of the States as primary subjects of international law. The precise obligations of the states under the Genocide Convention were points of contention in the cases before the International Court of Justice[9]. The Genocide Convention itself enumerates specifically the obligations of legislative action on the national level aimed at the criminalization of the crime of genocide, its acts, and modes of its commission. In addition to criminalization through national legislation, the Genocide Convention requires the States to prosecute and punish individuals for the commission of acts of genocide. However, the obligations of the states are not only limited to the criminalization of genocide and prosecution of the individuals but also refer to the very prevention of genocide. The very name of the Genocide Convention refers specifically to prevention, which is a major obligation of the States.

The Genocide Convention itself sets out certain rules, however, for better understanding, further clarifications in judicial practice are necessary. The legal practice of ICJ is particularly relevant, since, although scarce, it gives us the main elements needed for understanding the Genocide Convention itself. Not many cases are brought before the ICJ related to genocide, and only one case, with an establishment of occurrence of genocide and some level of state responsibility for the breach of the Genocide Convention, has been completed to date.

## 3. OBLIGATIONS OF THE STATES IN THE PREVENTION OF GENOCIDE

The ICJ in its Judgment in the case of Application of the Convention on the Prevention and Punishment of the Crime of Genocide (also known as the Bosnia v Serbia case or

6 Case 002/02, Case File No. 002/19-09-2007/ECCC/TC E465, Judgment, Trial Chamber ECCC (Nov. 16, 2018).

7 Cryer (n 5) 204.

8 See further: Paola Gaeta, *The UN Genocide Convention: A Commentary* (Oxford University Press 2009).

9 Cases such as: *Bosnia and Herzegovina v Serbia and Montenegro* (2007) ICJ 2 and Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia).

Bosnian genocide case), concluded in Paragraph 162 of the Judgment that the obligation to prevent genocide is a distinct obligation from other ones defined in the Convention, namely prohibition of commission of genocide and obligation to punish the perpetrators.[10]

The issue of obligation to prevent genocide raises several important questions, such as when does failing to prevent lead the State to a status of accomplice, or aid in the commission of genocide? The ICJ, through its decision, indicated that the test is about awareness of the genocidal intent, which is crucial in determining the level of responsibility. The ICJ, in its Judgment concluded in Paragraph 422, that even though Serbia did supply material support to the Army of the Republic of Srpska, which was determined to be the one committing genocide in Srebrenica, and even though some of that material was determined to be used during the commission of the acts of genocide, the lack of proof for the awareness that genocide is about the take place or underway on the part of Serbia, was crucial to deny the existence of complicity or responsibility for aiding in commission of genocide.[11] Such ruling was criticized, both for non-application of the "overall control test" established by ICTY[12] as well as for the decisions on dismissing request for reparations[13].

The ICJ concluded that the main difference between the obligation to prevent genocide and the obligation, or prohibition not to commit or be an accomplice to genocide is in its definition. The obligations, or prohibitions listed in Article III, point out to a negative obligation of the state … "while *duty to prevent places States under positive obligations, to do their best to ensure that such acts do not occur."*[14] Therefore, the level of awareness of possible or ongoing genocide is different between those two obligations. In the case of failure to prevent, the State needs to be *"aware of or should normally be aware of the serious danger that acts of genocide would be committed",*[15] while complicity requires that some action has been taken to aid or assist the commission of genocide, implying the awareness of the intent, and not mere awareness of the danger of occurrence of genocide.

The questions related to the obligation to prevent genocide are not limited to an issue of distinction between prevention and complicity. The most important questions are related to the extent of the obligation to prevent and who are the bearers of those obligations.[16] The ICJ partially answered some of these questions, leaving certain issues open to interpretation.[17]

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[10] *Bosnia and Herzegovina v Serbia and Montenegro* (n 9) 2 para 163.

[11] ibid para 422.

[12] See further: Antonio Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18(4) The European Journal of International Law.

[13] See further: Andrea Gattini, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment' (2007) 18(4) European Journal of International Law 695, 713.

[14] ibid para 432.

[15] ibid para 431.

[16] Roger S Clark, 'State Obligations under the Genocide Convention in Light of the ICJ's Decision in the Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide' (2008) 61 Rutgers Law Review 75.

[17] See further: Federica Paddeu 'Ghosts of Genocides Past? State Responsibility for Genocide in the Former Yugoslavia' (2015) 74(2) The Cambridge Law Journal 198, 201.

When it comes to the content of the obligation to prevent, as said, it is to be understood as a separate obligation from the prohibition of commission and obligation to punish the perpetrators, as the ICJ said the obligation to prevent "…*is not merged with the duty to punish, nor can it be regarded as simply a component of that duty. It has its own scope*…"[18] The punishment of perpetrators, in criminal legal theory and practice, does serve individual and collective prevention and deterrence, however, the obligation to prevent genocide is a stand-alone obligation with a much larger scope. Such point presented by the ICJ Judgment represents an important event in the development of international law related to genocide, however, the ICJ fell short of giving more guidance on the specific content of that obligation, and especially on the scope of bearers of that obligation.[19]

When it comes to bearers of the obligation to prevent, the primary duty holders are the states themselves, however, it is open to interpretation on what is the extent of the obligation of bodies of international organizations.[20] The ICJ and the Genocide Convention and its Article VIII hint at the possibility of the responsibility of the bodies of the United Nations (UN), primarily of the Security Council, but without a concrete constitution of a duty.

In its Advisory Opinion on the Reservations to the Genocide Convention, the ICJ concluded that the "… *principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation.*"[21] Such understanding points to the States as primary holders of obligation and points to the prohibition of genocide as *ius cogens* norm, independent of any convention, understanding prohibition of genocide as a part of general principles of law, as one of the recognized sources of law. On the other hand, the term "*principles underlying the Convention*" is vague and open to interpretation.

Does this position of the ICJ lead to the obligation of prevention of genocide as *in abstracto*, in the sense of the permanent obligation of every state to prevent every genocide, or is the obligation of prevention of genocide triggered by certain circumstances? The practice of the ICJ points to the latter. ICJ has further developed conditions under which the obligation of genocide prevention can be triggered. Those criteria can point to specific situations when states are individual bearers of an obligation to prevent genocide and are primarily related to the question of the existence of knowledge or awareness and the power or ability to prevent genocide from happening in the concrete case.

The condition of awareness is defined more broadly and can include certain behaviors on the part of the state that can be described as "negligent". In its 2007 Judgment, the ICJ found that the obligation of the State to prevent genocide, and its duty to act accordingly is created "*the instant that the State learns of, or should normally have learned of the existence of*

[18] *Bosnia and Herzegovina v Serbia and Montenegro* (n 9) 2 para 427.

[19] William A. Schabas, 'Genocide and the International Court of Justice: Finally, a Duty to Prevent the Crime of Crimes' (2007) 2(2) Genocide Studies and Prevention: An International Journal 19.

[20] See further: Mark Gibney, 'State Responsibility and the Object and Purpose of the Genocide Convention' (2007-2008) 4(2-3) International Studies Journal 141, 150.

[21] Reservations to the Convention on Genocide and Punishment of the Crime of Genocide, Advisory Opinion, ICJ Reports 1951 15.

*serious risk that genocide will be committed*".[22] Therefore, it is not required, as in the cases of complicity, that a level of certainty is required on the part of the State that genocide is taking place/about to take place. Instead, the State is under an obligation to prevent at the moment it knows or normally should have known about the very risk of commission of genocide.

That leads us to the second condition, as defined by the ICJ, one of power, which poses more questions than answers. Firstly and less controversially, the ICJ recognized the obligation to prevent genocide, to include not just the territory of the State, but also "*outside the sphere of territorial sovereignty, when it exercises – whether legally or illegally – effective control outside its borders*"[23] This understanding is in line with the concept of extraterritorial responsibility of the States, especially in exercise of effective control over territory or persons, which is generally known in the theory and practice of international law.

However, the second position of ICJ concerning the obligation to prevent is a bit more puzzling. In Paragraph 461, the ICJ concludes that the obligation to prevent genocide "… i*s imposed by the Genocide Convention on any State party which, in a given situation, has it in its power to contribute to restraining in any degree the commission of genocide."*[24] Such understanding leaves a lot of room for interpretation. It refers to power, or the ability to "*contribute*" not just to achieve the goal of stopping genocide, and regarding effects achieved, the required effect is one of "*restraining in any degree*".

Such wording may imply a very broad obligation and include not just the situations of the States concerned. Moreover, it may imply the obligation of the international community as a whole. Indeed, as mentioned, the issue of obligations of the bodies of international organizations can be linked to this widely cast obligation of individual States as defined by the ICJ, since it is the States that contribute to the work and decision-making of the international organizations. Following that, not all states contribute in the same degree to the work of international organizations, and in the example of the UN, the Permanent Members of the Security Council certainly have "*in any given situation*" more *"power to contribute to restraining in any degree the commission of genocide".*

Article VIII of the Genocide Convention does foresee certain obligations of the bodies of the UN, but its wording can be described as vague. Article VIII of the Convention states: "*Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.*"[25] The seemingly strong obligation is somewhat diluted by the wording "*as they consider appropriate*". Such formulation sanctions a wide area of discretion to the States.

States, especially members of crucial bodies of the UN like the Security Council, and particularly their permanent members are the first ones in the line to decide on actions to

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[22] *Bosnia and Herzegovina v Serbia and Montenegro* (n 9) 2 para 431.

[23] ibid para 12.

[24] ibid para 461.

[25] Convention on the Prevention and Punishment of the Crime of Genocide (signed 9 December 1948) 78 UNTS 277.

counter serious breaches of international law. As per the UN Charter, the Security Council is the body responsible for the authorization of the use of force and decisions on actions in response to serious threats to peace and security. Since permanent members of the Security Council are the ones with greater decision powers and the ability to use veto powers to halt proposals, their actions are more consequential.

However, the ICJ decided not to venture "too far" into the possibility of the responsibility of the actions of States done through the organs of the UN. The ICJ held in Paragraph 159 of the Judgment that: "*Article VII about the competent organs of the United Nations taking action, may be seen as completing the system by supporting both prevention and suppression, in this case, at the political level rather than as a matter of legal responsibility*"[26]. By concluding this, the ICJ practically exonerated Member States of the Security Council of "*legal responsibility*" by pushing the "*prevention and suppression*" actions to the "*political level*" confirming the already stated wide area of discretion of the states, to act "*as they consider appropriate",* as stated in the Genocide Convention.

One might say that the wording of the Judgment is contradictory since on one hand it establishes the obligation of the states to "*contribute to restraining in any degree the commission of genocide".* The degree to which each state can contribute to restraining genocide is not equal, since certain countries have more ability, not just politically or militarily, but institutionally, through recognized powers given to them by virtue of membership of the UN Security Council, especially permanent membership. Nevertheless, the ICJ absolved the organs of the UN from "legal responsibility", and thus the States comprising those organs, precluding any possibility of "piercing the veil" of the actions of the UN institutions to seek the responsibility of the States involved in the decision-making process within those institutions.

When it comes to the content of the obligations to prevent genocide, the ICJ gave points on what is considered as the ability, in the concrete case to influence the commission of genocide, thus concluding in Paragraph 430 of the Judgment that the ability to influence the actions of persons involved in the commission of genocide "*depends among other things, on the geographical distance of the State concerned from the scene of events and on the strength of political links as well as all other links between the authorities of that state and main actors of the event*".[27] The requirement of the political and other links is of course important, however, the geographical distance requirement can be considered as dated, especially in the modern globalized world of today, where one State can exert influence over distant state or non-state actors through different official and unofficial means and channels. Further criteria related to the ability of the actions of the state is the legal assessment, which mandates that the states cannot act illegally, and must confine its actions to the limits permitted by international law.

Therein we can spot another contradiction. Since the UN Charter mandates the Security Council as the only body authorized to sanction the use of force, any use of force unsancti-

[26] *Bosnia and Herzegovina v Serbia and Montenegro* (n 9) para 159.

[27] *Bosnia and Herzegovina v Serbia and Montenegro* (n 9) para 430.

oned by the Security Council, would be considered legally contested. However, the Security Council itself, and its Member States, are not under any "*legal obligation*" and may take actions "*as they consider appropriate"* with the goal of genocide prevention.

This points out to one of the many flaws of the architecture of the UN system, which has proven to be unfit to deliver the promise of genocide prevention, as we have seen in the instances of genocide occurring since the establishment of the UN system under the UN Charter. Since then, genocide has been legally proven in the instances such as Rwanda and Bosnia and Herzegovina. Such a situation shows the inability of the current UN system to prevent genocide, as it is seen in the example of Srebrenica.

The reform of the UN system, primarily of the Security Council, its composition, decision-making process, and powers is crucial. Politically and legally, it is an extremely difficult task, but academics and activists need to continually advocate for action that will bring about change. The clarification of the Genocide Convention as to what are the precise obligations of the States in the prevention of genocide is also necessary. A step in that direction could be made through the adoption of the Resolution in the UN General Assembly, which would, if given widespread support, serve as a supplementing tool in demanding more responsibility from the States and international community in the actions toward genocide prevention. Such a potential resolution, if it would gain widespread support, even though not legally binding, could be used as an argument of emerging customary law and understanding of the international community.

## 4. FAILURE TO PREVENT GENOCIDE: EXAMPLE OF SREBRENICA

The dysfunction of the United Nations system, which is often made ineffective due to competing geopolitical interests, creates a "global paralysis", even in the case of most fundamental issues, crucial for all humanity, such as the prevention of genocide. The prohibition of genocide is considered as one of the most important norms of international law and has reached the level of *ius cogens*. Unfortunately, since the adoption of the 1948 UN Genocide Convention, the international community has not learned the basic lessons in genocide prevention and has failed to keep up with its most basic obligation. The decisions of international bodies, such as the Security Council, even in the situations when they are adopted, are often left without proper means of implementation, as tragically portrayed in the case of Srebrenica.

The UN Security Council in 1993 adopted Resolution No. 819, establishing the "safe area" of Srebrenica, and bringing UN protection forces to safeguard the enclave. However, there was no adequate protection of the so-called "safe area", and no support for the weak battalion of UN forces on the ground. Following the adoption of the UN Security Council Resolution the Bosnian Army forces were required to surrender their weapons in exchange for the promised protection by UN forces on the ground, which were supposed to be supported by air forces. The forces of the Republic of Srpska continued with their attacks aiming to probe for the response of the UN forces. Emboldened by the lack of any

response, they continued with their attacks, culminating in the takeover of the undefended town. After the takeover of Srebrenica, a series of massacres were organized, together with the cover-up of the atrocities in various mass graves.[28] Those were subsequently characterized by the international courts[29] such as ICJ and the International Criminal Tribunal for the former Yugoslavia (ICTY) as genocide[30], most notably in the cases such as highest ranking wartime political and military leaders of the Republic of Srpska: Radovan Karadžić[31] and Ratko Mladić.[32] As stated, the ICJ in its judgment in the Bosnia genocide case found Serbia responsible for failing to prevent genocide in Srebrenica.

Furthermore, the Judgment of the Supreme Court of the Netherlands determined the partial responsibility of the UN Dutch Battalion and the State of the Netherlands.[33] However, no UN official, state official, or military commander was held criminally responsible for not providing protection and for failing to execute the UN Security Council Resolution. The Court established responsibility, albeit limited to approximately 350 persons found within the UN Duch Battalion compound, and deemed to be under their immediate control, before they were evicted from the compound into the hands of Army of Republic of Srpska.

People in Bosnia and Herzegovina learned the bitter lesson of the inefficiency of the UN system and the indifference of the international community, which, with a few exceptions, left Bosnian Muslims completely alone. Moreover, that very UN Security Council imposed in 1992 an embargo on arms sales to Bosnia and Herzegovina, and Bosnians were left without means to defend themselves.[34]

The genocide in Srebrenica is an established legal fact, proven in front of international courts such as the ICJ and ICTY. Yet it faces a strong campaign aimed at denial and relativization. In the theory of genocide studies, the denial itself can be described as the final stage of genocide, opening the doors to new cycles of genocide.[35]

To counter that, and to foster the prevention of genocide through keeping the memory of it, actions aimed at memorialization of genocide are of utmost importance. Aiming to keep the memory of the Srebrenica genocide the Resolution was put to vote in front of

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[28] See Sakib Softić, 'Genocid i njegove posljedice u Bosni i Hercegovini' (2008) 1 Pregled - Časopis Za Društvena Pitanja 103.

[29] See Vedad Gurda, 'The Prosecution of Genocide in Bosnia and Herzegovina Before International, Domestic and National Courts of Other Jurisdictions' (2015) 4 Monumenta Srebrenica 35, 69.

[30] Berglind Halldorsdottir Birkland, 'Reining in Non-State Actors: State Responsibility and Attribution in Cases of Genocide' (2009) 84 NYU Law Review 1623.

[31] See Case IT-95-5/18, case information available at ICTY via: <https://www.icty.org/en/case/karadzic>.

[32] See Case IT-09-92, case information available at ICTY via: <https://www.icty.org/en/case/mladic>.

[33] Kristen Boon, 'The State of the Netherlands v. Respondents Stichting Mothers of Srebrenica' (2020) 114(3) American Journal of International Law 479, 486.

[34] Martin Binder, *The Security Council and the War in Bosnia, The United Nations and the Politics of Selective Humanitarian Intervention* (Palgrave Macmillan 2017) 100.

[35] Meldijana Arnaut Haseljić, 'Genocid – poricanje, negiranje, minimiziranje' (2006) 1 Godišnjak Bošnjačke Zajednice Culture 333.

the UN General Assembly. The public in Bosnia and Herzegovina, as well as neighboring countries, was focused on the vote in the UN General Assembly, which on the 23rd of May adopted Resolution A/78/L.67.[36] The resolution, among other provisions, established the 11th of July as the International Day of Remembrance of the Srebrenica Genocide. Such recognition, although belated, is welcome and will contribute to the reconciliation process. The Resolution reaffirms the facts established by the judgments of national and international courts, such as the International Court of Justice, as a permanent court, and the ICTY, the International Criminal Tribunal for the former Yugoslavia. It should be noted that neither the Resolution itself nor its co-sponsors place any hint of collective guilt on any people, as it was alleged by some. Surviving families of the victims of the Srebrenica genocide are grateful for all the countries that supported and co-sponsored the Resolution, one of them being the Republic of Türkiye. Also, the victims were saddened by some votes of abstention, among which there were several Muslim and Arab countries.[37]

The international recognition of the genocide in Srebrenica is of great importance. The Bosniak population suffered the same crimes during the Second World War, but these crimes were never recognized nor talked about, which led to them being repeated in the 1990s.[38] Establishing a culture of memory and awareness of the historical context is one of the key elements of genocide prevention. In Srebrenica, painful memories must be revisited again and again, to learn new lessons every time, even when, at the same time, the convicted perpetrators of the Srebrenica genocide are celebrated and venerated as national heroes by those who deny the facts established by international courts.

## 5. FAILURE OF GENOCIDE PREVENTION: BEYOND SREBRENICA

One of the biggest problems of genocide prevention is the failure to detect "red flags" and the unwillingness to call the events by their true names. Especially in the case of Gaza, evidence and facts are dismissed as politically motivated and anti-Semitic, while many Jews themselves oppose and protest the actions of the State of Israel.[39] The inefficiency of the UN system leaves tragic results, which we saw in Srebrenica. Unfortunately, this paralysis and unwillingness to act only emboldens those who violate the basic norms of international law.

The lack of international recognition of the historical context of the tragedy in Palestine, and the unwillingness to use mechanisms to stop the perpetrators, also lies in deep-rooted

[36] United Nations General Assembly Resolution A/78/L.67, <https://documents.un.org/doc/undoc/ltd/n24/140/80/pdf/n2414080.pdf> accessed 10 November 2024.

[37] UN, press release, Seventy-eighth Session, 82nd Meeting (AM) GA/12601 23 May 2024 General Assembly Adopts Resolution on Srebrenica Genocide, Designating International Day of Reflection, Commemoration, <https://press.un.org/en/2024/ga12601.doc.htm#:~:text=The%20resolution%20%28document%20A%2F78%2FL.67%2FRev.1%29%2C%20adopted%20by%20a%20recorded,crimes%2C%20crimes%20against%20humanity%20and%20genocide%20by%20internati> accessed 10 November 2024.

[38] Noel Malcolm, *Bosnia A Short History* (NYU Press 1996) 331.

[39] Among others the voices of Holocaust survivors are exemplary in their gravity, see further: "Ten Holocaust survivors condemn Israel's Gaza genocide" available at: <https://www.jewishvoiceforlabour.org.uk/article/ten-holocaust-survivors-condemn-israels-gaza-genocide/>.

Islamophobia that needs to be called out and eradicated. Just as the widespread anti-Semitism in the early twentieth century was a precursor to the horrors of the Holocaust, so is the widespread and normalized Islamophobia, the driving force behind many crimes, including Srebrenica. The public can witness biased narratives and distorted media coverage that only reinforce the Islamophobic attitudes fueled by right-wing political groups that are gaining more and more influence in Western countries.[40] Recognizing the context and removing prejudices is critical to ensure that dialogue leading to peaceful solutions begins.

The international community is largely failing in the duty to prevent genocide, which is defined in the Article I of the Convention on the Prevention and Punishment of the Crime of Genocide. Duty to prevent genocide is especially reaffirmed in the ICJ 2007 Judgment in the case of Bosnia v Serbia. Although the Judgment can be regarded as contradictory, as pointed out in some previously cited Paragraphs, it has some points which could be described as broad in their definition of the obligation to prevent genocide. The ICJ states in Judgment, in Paragraph 430: „*..a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide*."[41] The ICJ states further in the paragraph 431 of the Judgment :"... *This ... does not mean that the obligation to prevent genocide only comes into being when perpetration of genocide commences; that would be absurd, since the whole point of the obligation is to prevent, or attempt to prevent, the occurrence of the act. In fact, a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed*"[42]

Another ongoing case of potentially great significance is the case initiated by Nicaragua against Germany. Nicaragua instituted proceedings before ICJ in March 2024, for the alleged violations by Germany, of its obligations, primarily related to the duty to prevent genocide. The Application claims that "*since October 2023, there has been a recognized risk of genocide against the Palestinian people, directed first of all against the population of the Gaza Strip*". It is the argument of the Nicaragua that, by providing long term "*political, financial and military support to Israel and by defunding the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), Germany is facilitating the commission of genocide and, in any case has failed in its obligation to do everything possible to prevent the commission of genocide*".[43]

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[40] See UN, Office of Human Rights High Commissioner: „UN experts warn Islamophobia rising to "alarming levels", available via: <https://www.ohchr.org/en/statements-and-speeches/2024/03/un-experts-warn-islamophobia-rising-alarming-levels>.

[41] *Bosnia and Herzegovina v Serbia and Montenegro* (n 9) para 430.

[42] *Bosnia and Herzegovina v Serbia and Montenegro* (n 9) para 431.

[43] See Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany), ICJ, available at: <https://www.icj-cij.org/case/193> accessed 19 May 2025.

This case can have far reaching implications, for the understanding of the duty to prevent genocide, especially in light with the previously established understanding of the ICJ, expressed in the cited paragraphs of the Judgment in Bosnia v Serbia case. The case also carries a great significance for Palestine, and especially Gaza and may determine the conduct of other countries towards the actions of the state of Israel.

## 6. CONCLUSION

The obligation of the States to prevent genocide is defined as a stand-alone obligation under international law and following the Judgment of the ICJ in the Bosnian Genocide Case (2007), every State should contribute its best effort to restrain the commission of genocide. The wording of the Genocide Convention and the Judgments of the ICJ are however at times contradictory and open to interpretation.

The seemingly wide cast obligation to prevent is somewhat reduced by additional qualifications of awareness and ability to affect the commission of genocide. That is especially visible when it comes to the issue of legal responsibility of the bodies of the UN, and especially of the conduct of States done through the institutions of the UN, such as Security Council. The responsibility of UN bodies, including the ones that are authorized to deal with serious threats to peace, is reduced, due to the understanding of a wide margin of discretion.

The obligations of international community and individual States are well established in international law. The case of Nicaragua v Germany, instituted in front of ICJ, claiming the breach of duty to prevent genocide, through the support provided by Germany to Israel, can potentially leave far-reaching consequences.

Genocide prevention, although defined as the most fundamental obligation of the international community, proves to be a difficult task. As mentioned, the reasons for this can primarily be identified in the structural deficiencies of the UN system itself. The reform of the UN system is long overdue and needed, regardless of it being a difficult task. A decision-making process that leads to paralysis and nonexistent or inefficient enforcement mechanisms leads to tragic and irreversible outcomes, leaving a permanent scar on the consciousness of humankind. Under the current UN system, humanity cannot deliver on its promise of genocide prevention, as seen by past experiences. That inaction in some cases is fueled by widespread racism and Islamophobia. The subsequent recognition offers some historical closure, but it means nothing to the victims and their pain and cannot reverse the consequences. More clarity and stronger stance on the understanding of obligation of genocide prevention borne by individual States is needed.

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**The Boğaziçi Law Review**

ISSN: 3023-4611
Journal homepage: https://dergipark.org.tr/tr/pub/blr

# Law & the Accommodation of Sikh Religious Emblems

***Hukuk ve Sih Dini Sembollerinin Tanınması***

**Satvinder Juss**

**To cite this article:** Satvinder Juss, 'Law & the Accommodation of Sikh Religious Emblems' (2025) 3(1) The Boğaziçi Law Review 79.

**Submission Date:** 7 February 2025

**Acceptance Date:** 27 June 2025

**Article Type:** Research Article



Published online: June 2025

The Boğaziçi Law Review | 2025, Vol. 3, No. 1, 79-98 DOI: 10.69800/blr.1635133

# LAW & THE ACCOMMODATION OF SIKH RELIGIOUS EMBLEMS*

## *HUKUK VE SİH DİNİ SEMBOLLERİNİN TANINMASI*

**Satvinder Juss**

Prof. Dr., Dickson Poon School of Law, King's College London, London; Distinguished Global Professor of Law at Notre Dame University.

## ABSTRACT

How should the state stand in relation to securing the rights and freedoms to which all its citizens are entitled? Should it exhibit State neutrality and impartiality? If so, are these traits in themselves guarantors of the practice and observance of religion by a minority faith? It is often overlooked how the issue has arisen repeatedly in western democracies in the striking case of the Sikh religion because of the religion's requirement of emblems. These consist not only of the external headwear, the turban, but also the Sikh Kirpan, a blade, which may be worn internally or externally, as well as the Sikh bangle, the kara, worn both my men and women alike signifying the importance of righteous living. Western thinking is apt to misconstrue such emblems. This is because its understanding of an object is rooted in a particular philosophical thinking about what a 'thing' normally is in the physical world. It is a form of thinking that goes back to antiquity and derives from Aristotle's definition of things in terms of their 'essences', with a certain property which defines its 'nature'. Such reductionist thinking is ill-suited for the complexities of the modern world where ethnically diverse communities now inhabit virtually every western democracy. Yet, the Aristotelian form of thinking persists in suggesting that a Sikh Kirpan can only be a common 'blade' or a 'dagger' or a 'sword', and the Sikh Kara can be nothing more than an ordinary bangle on a wrist because of their innate essential qualities by which we all know them. Yet, leading court cases such as Multani, Sarika Angel and Athwal have in recent times challenged the concept of essences in a way that needs to be more widely appreciated, although a case like Jaskeerat Singh Gulshan suggests that there are still limitations to how far minority religious rights can be protected.

**Key words:** Sikh Kirpan, Kara, religious freedom, Athwal, Multani, Sarika Angel, Jaskeerat Singh Gulshan.

## ÖZET

Devlet, tüm vatandaşlarının hakkı olan özgürlükleri ve hakları güvence altına almak konusunda nasıl bir tutum sergilemelidir? Devlet tarafsız ve objektif mi olmalıdır? Eğer öyle kabul edilirse bu nitelikler, azınlıktaki bir inancın dini uygulama ve geleneklerini yerine getirebilmesi için tek başına garanti oluşturur mu? Bu mesele, Batılı demokrasilerde sıkça göz ardı edilmekle birlikte, özellikle Sih dini bağlamında dikkat çekici vakalarla tekrar tekrar gündeme gelmiştir. Bunun nedeni, Sih dininde çeşitli dini sembolleri taşıma gerekliliği olmasıdır. Bu semboller yalnızca görünür bir başlık olan sarık

* This article is a further developed version of the author's earlier blog post, 'The Sikh kirpan as a spiritual, religious and moral sanction' (Law & Religion UK, 20 November 2024) <https://lawandreligionuk.com/2024/11/20/the-sikh-kirpan-as-a-spiritual-religious-and-moral-sanction/>, and the article 'Kirpans, Law, and Religious Symbols in Schools' (2013) 55(4) Journal of Church and State 758.

**CONTACT** *Satvinder Juss* *satvinder.juss@kcl.ac.uk*

*Submission Date: 7 February 2025 ; Acceptance Date: 27 June 2025; Article Type: Research Article*

ile sınırlı değildir; aynı zamanda Kirpan olarak bilinen bir bıçak (hem içte hem dışta taşınabilir) ile hem kadınlar hem erkekler tarafından takılan, dürüst bir yaşamın önemini simgeleyen bileklik (Kara) de buna dahildir. Batı düşüncesi, bu tür sembolleri çoğu zaman yanlış anlamaya eğilimlidir. Bunun sebebi, nesneleri algılayış biçimlerinin, bir nesnenin yalnızca fiziksel dünyada normalde olduğu 'şey' olarak algılanmasına dair bir felsefi düşünme geleneğine dayanmasıdır. Bu, kökeni Antik dönemlere uzanan ve şeyleri belirli bir özelliğe dayanarak, onların 'mahiyet'i yani 'doğası' üzerinden tanımlayan Aristotelesçi anlayıştan türeyen bir düşünme biçimidir. Ancak bu indirgemeci düşünme tarzı, günümüzün karmaşık ve etnik olarak çeşitlenmiş toplum yapıları için uygun değildir. Günümüzde neredeyse her Batı demokrasisi, çok kültürlü topluluklara ev sahipliği yapmaktadır. Yine de, Aristotelesçi düşünce biçimi etkisini halen sürdürmekte ve örneğin bir Sih Kirpan'ı yalnızca sıradan bir bıçak, hançer ya da kılıç olarak, Sih Kara'sı ise bileğe takılan sıradan bir bileklik olarak görülmektedir. Çünkü bu nesneler, bilinen ve tanımlanan mahiyetleri üzerinden değerlendirilir. Ancak Multani, Sarika Angel ve Athwal gibi önemli mahkeme kararları, son yıllarda bu mahiyet algısına meydan okumuş olup bu tür kararlar, aslında çok daha geniş bir şekilde değerlendirilmeyi hak etmektedir. Buna karşılık, Jaskeerat Singh Gulshan vakası ise, azınlık dini haklarının korunmasında halen sınırlamalar olduğunu ve bu korumanın ne kadar mümkün olduğunu sorgulatmaktadır.

**Anahtar kelimeler:** Sih Kirpan, Kara, dini özgürlük, Athwal, Multani, Sarika Angel, Jaskeerat Singh Gulshan.

# 1. INTRODUCTION

Religious freedom is primarily a matter of individual conscience. It carries with it the "freedom to manifest one's religion, alone and in private, or in community with others, in public and within the circle of those whose faith one shares." Indeed, the various forms in which the manifestation of one's religion or belief may take are specifically listed to include "practice and observance."[1] So how should the state stand in relation to securing the rights and freedoms to which its citizens are entitled? Should the State, for example, allow the free wearing of an article of faith which may raise issues of safety and general well-being? The orthodox liberal view emphasises the State's role as the neutral and impartial organiser of faiths and beliefs. This confines the State's role to ensuring public order, religious harmony and tolerance in a democratic society. The State limits its role because it does not wish to be drawn into assessing the legitimacy of competing religious claims and beliefs.[2] If it must be drawn, this must be only to ensure that there is mutual tolerance between opposing groups.[3] In this way, the role of state authorities is not to remove the cause of tension by eliminating pluralism. It is to ensure that the competing groups tolerate each other.[4] All along, however, the state remains neutral.[5]

This article argues that State neutrality and and impartiality are no guarantors of practice

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1 See *Cha'are Shalom Ve Tsedek v. France* App no 27417/95 (ECtHR [GC], 25 June 2000) para 73.

2 See *Manoussakis and Others v. Greece* App no 18748/91 (ECtHR, 26 September 1996) para 47. Also see, *Hassan and Tchaouch v. Bulgaria* App no 30985/96 (ECtHR [GC], 26 October 2000) para 78. Further see, *Refah Partisi (The Welfare Party) and Others v. Turkey* App nos 41340/98, 41342/98, 41343/98 (ECtHR [GC], 13 February 2003) para 91.

3 *United Communist Party of Turkey and Others v. Turkey* App no 19392/92 (ECtHR, 30 January 1998) para 57.

4 *Serif v. Greece* App no 38178/97 (ECtHR, 14 December 1999) para 53.

5 Satvinder S Juss, 'Kirpans, Law, and Religious Symbols in Schools' (2013) 55(4) Journal of Church and State 766.

and observance in religion. Sikhs, as the recent judgment in *Athwal*[6] of the Queensland Supreme Court in Australia explains, have to have five articles of faith on their person – the '5-ks'. These are, a *kachera* (a special undergarment), *kanga* (a wooden comb), *kara* (an iron band), *keshas* (unshorn hair) and a *kirpan* (a ceremonial sword). From the wearing of the Sikh bangle[7], to the performance of Sikh funerary rites[8], to the preparation of Sikh food[9], and to the carrying of the Sikh Kirpan,[10] there have been in recent years a spate of legal decisions challenging restrictions on the right of Sikhs to live by the articles of their faith. This article focuses on two types of such cases: those involving the *kirpan* and those involving the Sikh *kara*. The *kirpan* is chosen because being akin to a knife, it is percevied to raises immediate concerns over the safety of citizens; and the *kara* because being akin to a bangle, it is percived to be the most obtrusive external symbol challenging instituitional policies on unifrom and student discipline. The kirpan is the most controversial of the 5'ks from viewpoint of the secular state; the kara the symbol that is most common external identifier of Sikhism.[11]

This article also argues that although human rights law refers to the 'rights and freedoms of others' religious questions are not always best formulated as rights questions. It is true that the liberal state wants to remain neutral in matters of individual faith and religion. However, not only is neutrality not the best way for a state to resolve its religious tensions,

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6 *Athwal v State of Queensland* [2023] QCA 156 (1 August 2023)

7 See *Watkins-Singh, R (on the application of) v Aberdare Girls' High School & Anor* [2008] EWHC 1865 (Admin) (29 July 2008).

8 *Ghai, R (on the application of) v Newcastle City Council & Ors* [2010] EWCA Civ 59 (10 February 2010).

9 In one case a restaurateur who catered for wedding feasts was held liable for serving food which contained egg resulting in the death of a Sikh man. Lord Justice Moore-Bick giving judgment explained that, "Mr. Bhamra was entitled to rely on Mr. Dubb [the restaurateur] to ensure that he did not suffer harm as a result of eating food that contained egg" (at para 24) and that, "the additional requirement that the food should not contain ingredients that were prohibited by the Sikh religion. In those circumstances he was certainly under a duty to take reasonable care not to serve dishes containing egg in order to avoid offending against Sikh religious principles " (para 25): see, *Amarjit Kaur Bhamra v. Prem Dutt Dubb* (Trading as Lucky Caterers) [2010] EWCA Civ 13.

10 The tribunal in one case recently had to consider whether 'Amritdhari Sikhs' (ie baptised Sikhs) were a separate and distinct group when deciding if there had been indirect discrimination. It held that Sikhs in general were an ethnic group for the purposes of the Race Relations Act, but that under the Religion or Belief Regulations, the Amritdhari Sikhs' requirement to adhere to a strict code including the wearing of a kirpan was a religious belief that was protected by the Regulations. In the event, the tribunal held that the banning of the kirpan was a proportionate means of achieving the legitimate aim of ensuring security of staff, visitors and prisoners in prisons. *Dhinsa v (1) SERCO (2) Secretary of State for Justice* (ET/1315002/09, 18 May 2011). See <http://www.eordirect.co.uk/default.aspx?id=407123> accessed 11 February 2025.

11 See *Watkins-Singh, R (on the application of) v Aberdare Girls' High School & Anor* (n 7) para 64.

but the State is often not neutral and it is artificial to expect it to be so.[12] The challenge of how to 'to manifest one's religion' can best be met not through the language of rights but by a contextually attuned approach to understanding religious practice. The language of rights posits the individual against the State. The State, however, proclaims a neutral stance on religion. This article accordingly demonstrates that where individual claims have succeeded with respect to the 5-ks they have done so through Expert written evidence that have focused on the understanding of religion as a practice. Whether this is from a Sikh Chaplain in *Multani*[13] or a Professor of Religion in *Sarika Angel*[14] it is the lived experience of the practitioner of the sikh faith that matters rather a bland focus on the *kirpan* or the *kara* as a object in common currency. Take the example of the *kirpan*. In 2008 a Sikh employee at an Asda Supermarket in the UK was told that he could return to work after being asked by managers to either remove his Kirpan or risk losing his job.[15] The following year, British media reported how, "in Sikhism the Kirpan is an instrument of non-violence that should be used to prevent harm from being done to a defenceless person."[16] Not only do these two separate events not focus on rights *per se*, but they do not focus on the object in question either. Instead, their focus is on the understanding of the object in religion. Yet, western thinking remains on the whole rooted in conceptualising an object as it exists in the physical world. The kirpan claim succeeded in *Athwal,*[17] but where it has failed as in *Jaskeerat Singh Gulshan*,[18] this is because it has been seen in terms of its essentialism. Yet, the reason why eastern religious thought accommodates such religious symbols so easily is because it is based on anti-essentialism.

## 2. THE CONCEPT OF ESSENCES

Western thinking about objects is rooted in a particular philosophical understanding about things in the physical world. Such thinking goes back to antiquity. It derives from

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[12] *Dahlab v Switzerland* App no 42393/98 (ECtHR, 15 February 2001), where the Court declared inadmissible a complaint by a primary school teacher who had been prohibited from wearing an Islamic headscarf at her school. The court acknowledged the margin of appreciation afforded to the national authorities when determining whether this measure was "necessary in a democratic society", and explained its role in these terms (at para 11):

*"The Court's task is to determine whether the measures taken at national level were justified in principle – that is, whether the reasons adduced to justify them appear 'relevant and sufficient' and are proportionate to the legitimate aim pursued… In order to rule on this latter point, the Court must weigh the requirements of the protection of the rights and liberties of others against the conduct of which the applicant stood accused. In exercising the supervisory jurisdiction, the court must look at the impugned judicial decisions against the background of the case as a whole…"*

[13] *Multani v. Commission scolaire Marguerite-Bourgeoys* [2006] 1 S.C.R. 256, 2006 SCC 6.

[14] *Watkins-Singh, R (on the application of) v Aberdare Girls' High School & Anor* (n 7).

[15] See <http://www.sikhsangat.com/index.php?/topic/38514-discrimination-of-sikh-employee-at-asda-comes-to-an-end/> accessed 11 February 2025.

[16] BBC News, 'Boy's Sikh dagger in school ban' (13 October 2009) <http://news.bbc.co.uk/1/hi/england/london/8304088.stm> accessed 11 February 2025.

[17] *Athwal v State of Queensland* (n 6).

[18] *Jaskeerat Singh Gulshan* [2023] EWCA Civ. 306.

Aristotle's definition of things in terms of their 'essences'.[19] When Aristotle talked about the 'essence' of a thing, what he meant was that the essence is the attribute that makes a thing be what it fundamentally is.[20] According to this philosophical construct, a thing has a certain property or metaphysical characteristic which is necessary to possess it with a 'nature' that helps us to distinguish it from sets of attributes which are simply contingent or merely accidental to the thing.[21] For they do not define the thing with its essential nature. In western thinking the Kirpan is invested with the same essences and attributes as a 'blade', a 'dagger' or a 'sword' and a Kara is invested with the attributes of nothing more than an ordinary bangle on a wrist. All are possessed of the same essential qualities that enable us to make sense of it as an object. Each of these objects, according to Aristotle, has the same specific power, the same function, and the same internal relations as the other. In this way, each one of these objects is enabled to be the kind of thing that it is. The essence thus defines the thing. It makes it what it is. Consequently, the Kirpan or the kara could be defined in terms of their essences. Such certainty had much to commend it, and Aristotle's thinking had such a profound effect in western philosophical traditions, that it continued virtually unchanged during the Scholastic period.[22]

What the courts need to do is to note, as they have done in *Multani* and in *Sarika Angel*, how in recent times the concept of essences has been challenged. One influential philosopher of the twentieth century, Edmund Husserl (1859-1938), who is accredited with founding the phenomenological movement, suggested that the search for essences can only be meaningful when applied to a specific category of human experience.[23] Other western philosophers such as, Willard Van Orman Quine (1908 – 2000), have argued that only in the description of certain phenomena does Aristotle's notion of defining a thing in terms of its essences actually work. For the most part objects do not have essential properties that help to define them.[24] If this is right then one can see the meaning of the Kirpan or the kara having a very different meaning from that of a knife or a bangle respectively. This is because just as the Kirpan is not used to threaten, molest or to harm anyone, but stands as an article of faith for the Sikh people, so is the kara not an emblem of personal jewellery for a school child but a reminder to her of her commitment to her God. Metaphysical assertions should, therefore, not be used to describe an essence as the necessary property of real objects because if we do this we ignore our experience of the object in question – which in the case of both the Kirpan and the Kara is entirely benign. Eastern thinking takes exactly

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[19] J. L. Ackrill, *Aristotle's Categories and De Interpretatione* (OUP 1975). Also see, David Charles, *Aristotle on Meaning and Essence* (OUP 2002). Further see, Charollette Witt, *Substance and Essence in Aristotle: An Interpretation of Metaphysics VII –IX* (Cornell Univ Pres 1989).

[20] Aristotle, *Metaphysics* (Penguin Books 1998) 168.

[21] Steven K. Strange, *Porphyry: On Aristotle, Categories* (Cornell University Press 1992).

[22] Though see N. Kretzmann, Anthony Kenny and Jan Pinborg, *Cambridge History of Later Medieval Philosophy* (Cambridge University Press 1982). Also see D. Chalmers, '*Is there Synonymy in Occam's Mental Language*?' in Paul Vincent Spade (ed.), *The Cambridge Companion to Ockham* (Cambridge University Press 1999).

[23] See Jitendranath Mohanty, *The Philosophy of Edmund Husser* (Yale Univ. Press 2008); also see Edmund Husserl, *Crisis of European Sciences and Transcendental Phenomenology* (Northwestern University Press 1970).

[24] Willard Van Orman Quine, *Word and Object* (MIT 1960).

that view, and these modern philosophical tenets are actually more akin to the different forms of eastern thought which believe that all phenomena are devoid of essence. Indeed, a Sikh would be surprised – if not alarmed – at any suggestion that the Kirpan or Kara had any malign connotations because the very root of eastern thought rejects anti-essentialism. From the perspective of the religiously observant, a Sikh who wears a Kirpan is not wearing it because it is a weapon. A person who wears a Kara is not wearing a personal jewellery. He or she is wearing it because it is part of their officially prescribed religious uniform. Yet, to an uninitiated western mind, it may be perceived wholly differently as something already known in the physical world.

To say that the Kirpan is intrinsically dangerous or a Kara an emblem of fashion is, however, to continue to subscribe to Aristotle's philosophy of essences, which no doubt still retains an enduring affect on western thought. It is, however, apt to lead to serious misunderstandings of religious artefacts. One could argue that a knife is dangerous. Or that scissors are dangerous. But they are not inherently so. Hands may be dangerous. A knife may be used for cooking purposes or it may be used to kill. Scissors may be used to cut paper in the classroom. Or, they may be used to kill. They rarely are. In the same way, our hands may be used to affect greetings, to eat our food, to embrace friends, or to strangle our foes. That does not make our hands inherently dangerous. Neither do they make our hands have an inherent essence, anymore than a pair of scissors do. The fact is that the meaning of an object can only be understood in context of its particular purpose and use. Outside its context it is devoid of meaning. This is how eastern thought views an object. The meaning of a 'Kirpan' or 'kara' can only be understood in the context of its religious, cultural, and historical use. Without this context, they are apt to be misunderstood. To ban them on this basis is illiberalism of the worst kind. It does nothing to promote individual freedoms – and certainly not the freedoms of individual believers. One might just as well ban knives in the kitchen, scissors in the classroom, or the use of our hands outside the home.

## 3. THE *KIRPAN*

### 3.1. ATHWAL

A recent decision from an Australian court has given the most fullsome explanation. In *Athwal*[25] the Court explained how, "Sikhism is a monotheistic religion that was founded in the Punjab region of South Asia in the 15th Century by Guru Nanak" and whose followers "share a religion, language, heritage and tradition" so that, " Sikhs have a distinct appearance as men and some women wear a turban" and "Sikhs have unshorn hair and men have a beard."[26] The Court explained how orthodox Sikhs undergo an initiation ceremony, an "Amrit Sanchar" and "which can occur at any age when a person has the maturity to understand the Sikh code of conduct" known as the "Rahit Maryada" when that person "is ready to commit themselves to living as an initiated" Sikh known as an "Amritdhari Sikh." The solemnity of the initiation ceremony is such that it "is conducted by five initiated Sikhs"

[25] *Athwal v State of Queensland* (n 6).

[26] ibid para 64.

who are known as "the five 'Beloved Ones'".[27]

And, herein lies the problem for the liberal secuar State. This is because, as the Court explained, "[o]nce a Sikh is initiated, they are required at all times to wear or possess the five articles of faith, which collectively symbolise that the person has dedicated themselves to the Sikh way of life."[28] But then what are these such as to provoke such controversy? They are, "a *kachera* (a special undergarment), *kanga* (a wooden comb), *kara* (an iron band), *keshas* (unshorn hair) and a *kirpan* (a ceremonial sword)." Prior to becoming an initiated "Amritdhari Sikh" a Sikh will live as a "Sehajdhari Sikh" and it remains the case that, "[o]ften Sehajdhari Sikh also wear or possess the five articles of faith in preparation for the commitment they will make when initiated.[29] Of the five articles of faith, the kirpan is the most controversial, as the Court explained because it "is a small ceremonial sword made of either steel or iron" although "[i]t comes in a variety of different shapes, sizes and degrees of sharpness/bluntness." Its huge importance for "Amritdhari Sikh" lies in the fact that, "[t]he kirpan represents spiritual, religious and moral sanctions and rights and responsibilities of an initiated Sikh" a significance which has never been expolicated by a judicial tribunal in quite the same manner before. However, potential as a damgerous article is considerable diminished by the fact, as the Court explained, by the fact that "the kirpan is worn sheathed and typically concealed beneath clothing and is not publicly on display" and "is usually worn on a cloth sling called a *Gatra,* which holds the kirpan tightly and usually has a cloth loop to keep the kirpan within its sheath." Indeed, in an observation of even greater significance, the Court pointed out how, "[t]he use of the kirpan in a non-ceremonial manner would be inconsistent with the Sikh code of conduct."[30] So much so that, "approximately 80 - 90% of kirpans worn by initiated Sikhs in Australia are short and blunt without a cutting edge."[31] It is unsurprising, therefore that "[i]t is a breach of religious faith and counter to the beliefs of an initiated Sikh to remove or have removed any of the five articles of faith," so that, "[i]f any one or more of the five articles of faith is removed from an initiated Sikh, they must go through a lengthy and rigorous absolution process."[32] Against that background, the court explained how the issue of Sikh religious practises was not likely to go away anytime soon for western society because "[o]ther than a few converted Sikhs around the world, nearly all Sikhs originate from the Punjab region" and "[n]early all Sikhs continue to have a link with family in Punjab, practice elements of Punjabi culture and speak the Punjabi language" and "[n]early all Sikh places of worship (Gurdwaras) outside of India have a Punjabi language school to keep their respective communities connected to Punjabi language and culture." Today one finds that, "[m]illions of Sikhs have migrated from their homeland of Punjab over the last century" and "[o]ut of the 30 million adherents, it is estimated over 5 million

[27] ibid para 65.

[28] ibid para 66.

[29] ibid.

[30] ibid para 67.

[31] ibid para 68.

[32] ibid para 69.

reside outside of Punjab."[33]

*Athwal*[34] itself concerned a an initiated Sikh school-girl brought proceedings against the State in the Supreme Court of Queensland, claiming that Section 51(5) of the Weapons Act, operated in a discriminatory manner to prevent Sikhs from entering a school while adhering to their religious beliefs, and so was inconsistent with the *Racial Discrimination Act 1975*, making the former invalid. The Court referred[35] to the seminal 1982 British decision, where an 11-year old was refused admission to a private school because he insisted on wearing his turban over his uncut hair contrary to school uniform rules, of *Mandla v Dowell Lee.*[36] The House of Lords held that Sikhs were a group of persons defined by ethnic origins for the purposes of an anti-discrimination provision contained in the *Race Relations Act 1976* (UK). As the Supreme Court of Queensland now pointed out "[t]he judgment records and rejects an argument to the contrary, that Sikhs 'were essentially a religious group, and they shared their racial characteristics with other religious groups, including Hindus and Muslims, living in the Punjab'"[37] and that "[t]his was discussed in terms of cultural practice rather than religion," whereas the question before the Queensland Court was a religious one. Section 51 (4) provided that it is *not* a reasonable excuse to physically possess a knife in a school for genuine religious purposes. The court entered into a discussion as to whether a 'kirpan' was a knife[38] and concluded that it was because it was "unlikely that Parliament would have objectively intended" this "to depend on the particular degree of sharpness of the blade of the instrument said to be a knife" and not least because "[s]harpness is a relative term, and there is no statutory test for the degree of sharpness required…"[39] The Court then asked itself whether a knife sewn into a pouch was still a knife[40] and held that it was because, "[a]s a matter of ordinary language, a knife remains a knife even though it is located in a place that is difficult to access,"[41] especially given that definition in Weapons Act is one which, "refers to a thing which is reasonably capable of being used to wound or threaten to wound anyone…."[42]

However, its conclusion in this regard that, "[t]here is nothing in the text, context or purposes of the Weapons Act which indicates that a knife sewn into a pouch ceases to be a knife for the purposes of the Act"[43] is problematic. It is the sort of error that lawyers not infrequently fall into. Sikh students wanting to wear the 'Kirpan' in schools has been an

33 ibid para 70.

34 *Athwal v State of Queensland* [2023] QCA 156 (1 August 2023)

35 ibid para 15.

36 *Mandla (Sewa Singh) v Dowell Lee* [1982] UKHL 7 (24 March 1982)

37 Which the House of Lords did at page 561 of its judgment.

38 ibid paras 96-99.

39 ibid para 98.

40 ibid paras 100-102.

41 ibid para 100.

42 ibid para 101.

43 ibid para 102

issue across countries as diverse as Canada,[44] the USA,[45] Great Britain, Australia, and New Zealand. Often described as "a small, curved ornamental steel dagger"[46] or " a sword,"[47] that is " commonly 7.5 centimetres long" and "is carried in a sheath and strapped to the body, usually under clothing,"[48] Court decisions have failed to capture its true essence while still expressing liberal society's commitment to multiculturalism, pluralism, tolerance, and broad-mindedness that is the hallmark of the western liberal democratic state.[49]

Finally, in *Athwal* the Court asked itself whether the possession of a kirpan for religious purposes is a use for a lawful purpose.[50] After noting how "[t]hese provisions as to the physical possession of a knife are made in an Act which has the object of preventing the misuse of weapons"[51] it then made the interesting observation of how, "[t]he physical possession of a concealed kirpan as a symbol of a religious commitment would, at least ordinarily, constitute a use of the knife for a lawful purpose (namely, religious observance)."[52] However, although there was a "specific provision that physical possession of a knife in a public place for genuine religious purposes is a reasonable excuse" in Section 51(4) which, " removes any doubt about that question in relation to the physical possession of a kirpan in public places other than schools"[53] the fact was that "section 51(5) specifically provides that genuine religious purposes are not a reasonable excuse for physically possessing a knife in a school"

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[44] See the decision of the Supreme Court of Canada in *Multani v Commission scolaire Marguerite-Bourgeoys* [2006] SCC 6, under under the Canadian Charter of Rights and Freedoms, where safety measures were for the kirpan to be worn under a school boy's clothes, for its sheath to be made of a material (wood not metal) which meant that it would not cause injury to anyone, and it was then to be sewn into a sturdy cloth envelope. Also referred to in the UK case of *Begum, R (on the application of) v. Denbigh High School* [2006] UKHL 15.

[45] A case that needs to be better known is the pre-9/11 US case of *Gurdev Kaur Cheema v. Harold Thompson,* 67 F. 3d 883 (9th Cir. 1995), where circuit Judge Hall held that, *"…. the children had to prove that their insistence on wearing kirpans was animated by a sincere religious belief and that the school district's refusal to accommodate that belief put a substantial burden on their exercise of religion….. The children unquestionably carried their burden."* Available at <http://www.sikhcoalition.org/LegalUS1.asp>. Also see, <http://www.hg.org/judges.html> accessed 11 February 2025.

[46] See <http://www.nriinternet.com/NRIsikhs/KIRPAN/Kirpan_wearing_in_Schools/Asia/Australia/Victoria_ALLOWED_KIRPAN.htm> . It is said that, *"[t]he practice of carrying the sheathed scimitar can be traced back to the lifetime of the 16th Century Sikh prophet Guru Hargobind, who regularly carried two swords as a symbol of a Sikh's spiritual as well as temporal obligations."* See, Rebecca Lowe, '*Sikh dagger banned by Finchley School*' (The Times, 13 October 2009) <http://www.times-series.co.uk/news/topstories/4679126.Sikh_dagger_banned_by_Finchley_school/ > accessed 11 February 2025.

[47] <http://www.nydailynews.com/news/national/2011/02/01/2011-02-01_michigan_school_district_allows_students_to_wear_daggers_to_class.html#ixzz1DSGsnj5g> accessed 11 February 2025.

[48] The Sydney Morning Herald, 'Sikh Knives should be allowed in schools' (10 February 2010) <http://www.smh.com.au/world/sikh-knives-should-be-allowed-in-schools-20100209-npsy.html> accessed 11 February 2025.

[49] In *Sahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005), the Court explained how, "Pluralism, tolerance and broadmindedness are hallmarks of a 'democratic society'" (para 108). Also see, *Kokkinakis v. Greece* (1993) Series A no 260-A/17 para 3; and see, *Buscarini and Others v San Marino* [GC] App no 24645/94 (ECtHR, 18 February 1999) para 34.

[50] *Athwal v State of Queensland* (n 6) paras 103-106

[51] ibid para 104

[52] ibid para 106

[53] ibid para 106

and therefore the "physical possession of a kirpan by a Sikh in a school will constitute an offence"[54] under the Weapons Act. For this reason the Court was clear, and made a declaration to the effect that,

Section 51(5) was inconsistent with Section 10 of the Racial Discrimination Act 1975, which prohibits discrimination on grounds of "race, colour or national or ethnic origin." That being so it was unconstitutional under s 109 of the Australian Constitution Act for 'Inconsistency of laws.' The Court rejected the argument that people of other religions were not put in an advantageous religion because in the words of Dalton J., "[t]here is nothing before the court indicating the presence of any other significant group in the community whose religious beliefs require members to carry a knife" and "carrying a knife is only a feature of the religious observance of Sikhs." The plain fact was that, "[a] law which prohibits a person from carrying a knife in a school for religious purposes impacts on Sikhs by preventing them from lawfully entering schools while adhering to their religious beliefs" and "[t] hat law has no impact on the practice of religion or freedom of movement of other persons." For this reason, "[a]ccount must be taken of the different practical impact which the law directed to a particular ethnic group has on e exercise of freedom of religion and freedom of movement by members of that targeted group"[55] Mitchell AJA agreed, concluding that "the only question raised by this appeal is whether a Sikh necessarily commits a criminal offence against s 51 of the Weapons Act by having physical possession of a kirpan at a school for religious purposes …" and because the restriction was incompatible with the Constitution, " the answer to the question raised by this appeal is 'no'".[56]

## 3.2. MULTANI

The Canadian case of *Multani*,[57] where is even more interesting. This was a case where school entry was not being denied to the pupil, Gurbaj Singh Multani, for wearing a kirpan but only that it be subject to a 'reasonable accommodation." The Court began from the presmise that "[t]he risk of G using his kirpan for violent purposes or of another student taking it away from him is very low…." but on the other hand, "[t]he interference with G's freedom of religion is neither trivial nor insignificant…" in circumstances where "the appellant had proven that his son's need to wear a kirpan was a sincerely held religious belief and was not capricious."[58] The school board, the Commission scolaire Marguerite-Bourgeoys ('CSMB'), sent the parents a letter requiring "reasonable accommodation" requiring them to authorize their son "to wear his kirpan to school provided that he complied with certain conditions to ensure that it was sealed inside his clothing" and both Gurbaj Singh and his parents agreed to this arrangement."[59] Whilst the Court recognised that, "freedom of reli-

[54] ibid para 107

[55] ibid para 36 of *Athwal*

[56] ibid para 122.

[57] *Multani v. Commission scolaire Marguerite-Bourgeoys* (n 12).

[58] ibid para 11.

[59] ibid para 3.

gion is not absolute and that it can conflict with other constitutional rights,"[60] and "that freedom of religion can be limited when a person's freedom to act in accordance with his or her beliefs may cause harm to or interfere with the rights of others,"[61] it also noted[62] how "[t]his Court has on numerous occasions stressed the importance of freedom of religion." To demonstrate this, it observed, "it is sufficient to reproduce the following statement from *Big M Drug Mart*, at pp 336-37 and 351:

> *"'The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.*
>
> *. . . Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.'"*

Crucially, what this meant was that, "it has become the right of every Canadian to work out for himself or herself what his or her religious obligations, if any, should be and it is not for the state to dictate otherwise."[63] Importantly, it explained that, "[t]he fact that different people practise the same religion in different ways does not affect the validity of the case of a person alleging that his or her freedom of religion has been infringed" because "[w]hat an individual must do is show that he or she sincerely believes that a certain belief or practice is required by his or her religion," so that, "[t]he religious belief must be asserted in good faith and must not be fictitious, capricious or an artifice."[64] The Court was in no doubt that "[n]o one contests the fact that the orthodox Sikh religion requires its adherents to wear a kirpan at all times." Moreover, it had evidence before it:

> *"that the Sikh religion teaches pacifism and encourages respect for other religions, that the kirpan must be worn at all times, even in bed, that it must not be used as a weapon to hurt anyone, and that Gurbaj Singh's refusal to wear a symbolic kirpan made of a material other than metal is based on a reasonable religiously motivated interpretation."*[65]

Yet, what the CSMB had based its argument on was once again, the Aristotleian search for essences arising from a specific category of human experience, namely, that, "the kirpan is essentially a dagger, a weapon designed to kill, intimidate or threaten others." To this the Court responded by noting that, "[w]ith respect, while the kirpan undeniably has characteristics of a bladed weapon capable of wounding or killing a person, this submission disregards the fact that, for orthodox Sikhs, the kirpan is above all a religious symbol." Indeed,

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60 ibid para 30.

61 ibid para 26.

62 ibid para 32.

63 ibid para 32.

64 ibid para 35.

65 ibid para 36.

as "Chaplain Manjit Singh mentions in his affidavit that the word 'kirpan' comes from 'kirpa', meaning 'mercy' and 'kindness', and 'aan', meaning 'honour'" so that although "[t]he there is no denying that this religious object could be used wrongly to wound or even kill someone, but the question at this stage of the analysis cannot be answered definitively by considering only the physical characteristics of the kirpan."[66] Such a decision displays considerable judicial sagacity and acumen and not least because, "the standard that seems to be applied in schools is reasonable safety, not absolute safety" which were it to be the case would mean that, "[t]he application of a standard of absolute safety could result in the installation of metal detectors in schools, the prohibition of all potentially dangerous objects (such as scissors, compasses, baseball bats and table knives in the cafeteria)."[67] However, it then added the observation which other judicial tribunals would do well to emulate, namely, that "[t]here is no evidence that kirpans have sparked a violent incident in any school."[68] In the end this was why, "the courts have held that there is a duty to make reasonable accommodation for individuals who are adversely affected by a policy or rule that is neutral on its face, and that this duty extends only to the point at which it causes undue hardship to the party who must perform it."[69]

The decision of the Court was in line with the views of the local state authorities. Whilst the Surrey School District spokeswoman was clear that, "[w]e have a strict zero-tolerance policy on weapons or something that could be used as a weapon or taken to be a weapon, like a fake gun," the kirpan itself was a religious symbol, not a weapon and that, "[t]he key is how things are used" because "a pen could be used as a weapon, but we're not saying, 'No pens in schools'."[70] Of course, "it is not necessary to wait for harm to be done before acting, but the existence of concerns relating to safety must be unequivocally established for the infringement of a constitutional right to be justified."[71] As for the idea that, "other students who learn that orthodox Sikhs may wear their kirpans will feel the need to arm themselves so that they can defend themselves if attacked by a student wearing a kirpan"[72] the court held that such an argument, "is purely speculative."[73] The Court concluded by deciding that, "[t]he argument that the wearing of kirpans should be prohibited because the kirpan is a symbol of violence and because it sends the message that using force is necessary to assert rights and resolve conflict must fail" because "[n]ot only is this assertion contradicted by the evidence regarding the symbolic nature of the kirpan, it is also disrespectful to believers in the Sikh religion and does not take into account Canadian values based on multiculturalism.'[74]

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66 ibid para 37.

67 ibid para 46.

68 ibid para 60.

69 ibid para 53.

70 ibid para 61.

71 ibid para 67.

72 ibid para 68.

73 ibid para 69.

74 ibid para 71.

## 3.3. JASKEERAT SINGH GULSHAN

The values of multiculturalism have not always trumped concerns over the safety of the public. This is clear from a recent British case of *Jaskeerat Singh Gulshan*.[75] Sikhs living in Britain have had religious exemptions[76] from facially neutral and generally applicable laws to which the general population as a whole is subject.[77] These exemptions are long-standing. They extend to health and safety regulation. One of the oldest, and the most hard-won exemptions, was the 30-year old Motor Cycle Crash Helmet (Religious Exemption) Act 1976[78] which exempts a turbaned Sikh from wearing a crash helmet when riding a motor-cycle.[79] [80] This exemption was confirmed some fifteen years later by the Road Traffic Act 1988.[81] Since then other exemptions have followed and after 1988 Sikhs can now carry a Kirpan[82] (a blade) of more than 3 inches long in public as a religious symbol under the Criminal Justice Act 1988.[83] This is despite the fact that specific provisions in the Criminal Justice Act 1988 refer to any article which has a blade or point or is sharply pointed[84], except for a folding pocket-knife. A folding pocket-knife is one which has a cutting edge of no more than 3 inches in length and which must be readily foldable at all times.[85] Further,

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[75] Jaskeerat Singh Gulshan (n 18).

[76] Consider the Equality and Human Rights 'Guidance On the Wearing of Sikh Articles of Faith in the Workplace' and public Places: available at <http://www.equalityhumanrights.com/uploaded_files/publications/sikh_articles_of_faith_guidance_final.pdf> accessed 11 February 2025.

[77] For a measure see Tom Peterkin, 'Symbols of Controversy' (*The Telegraph,* 30 July 2008) <http://www.telegraph.co.uk/news/2471337/Symbols-of-controversy.html> accessed 11 February 2025.

[78] Section 2 (A) of the Act Section 2A *"exempts any follower of the Sikh religion while he is wearing a turban from having to wear a crash helmet."* As Lord Avebury explained in the House of Lords on 4th October 1976 : *"The Bill has the very simple purpose of exempting Sikhs from the requirement of wearing crash helmets when riding motorcycles. In considering the Bill there are three questions which we should evaluate: first, is the wearing of the turban an essential article of the Sikh faith? Secondly, if so, what special arrangements have been made in the United Kingdom and in other countries for Sikhs to wear the turban in circumstances where others must wear some other type of headgear? Thirdly, in the light of the answers to the first two questions, should the arguments for religious freedom outweigh those of public policy which led to the compulsory introduction of crash-helmets in the 1972 Road Traffic Act?"* See the relevant debates in the House of Lords at <http://hansard.millbanksystems.com/lords/1976/oct/04/motor-cycle-crash-helmets-religious>. The relevant debates in the House of Commons are available at Sikh Missionary Society UK, "Third Reading: House of Lords" <http://www.gurmat.info/sms/smspublications/theturbanvictory/chapter3/> Also see <http://www.justice.org.uk/data/files/events/17/for.pdf> accessed 11 February 2025.

[79] Juss (n 5) 779.

[80] What is evidently not permitted one assumes is the wearing of both a turban and a crash helmet!

[81] See, Section 16(2) of the Road Traffic Act 1988 which reads that, "*A requirement imposed by regulations under this section shall not apply to any follower of the Sikh religion while he is wearing a turban*": Available at <http://www.legislation.gov.uk/ukpga/1988/52/section/16>. Also see <http://www.opsi.gov.uk/acts/acts1988/ukp… > accessed 11 February 2025.

[82] For a history of the Kirpan see <http://www.sikhism101.com/node/235> accessed 11 February 2025.

[83] Section 139 deals with *"Offence of having article with blade or point in public place."* Available at <http://www.legislation.gov.uk/ukpga/1988/33/section/139> accessed 11 February 2025.

[84] Section 139 (2) states *"this section applies to any article which has a blade or is sharply pointed except a folding pocket knife".*

[85] Under s139 (3) *"applies to a folding pocket knife if the cutting edge of its blade exceeds 3 inches."* Available at <http://www.legislation.gov.uk/ukpga/1988/33/section/139 > accessed 11 February 2025.

under the Offensive Weapons Act 1996[86] it is permissible for a Sikh to carry a kirpan with a blade, for religious reasons.[87] The Kirpan exemption is all the more remarkable given that the definition of offensive weapons under the Prevention of Crime Act 1953, includes "any article made or adapted for causing injury to the person; or intended by the person having it with him/her for such use by him/her."[88] In this way, the state in Britain in recent years has fostered communal harmony by taking active steps to respect the religious traditions of faith communities, that are not framed as 'rights'.[89]

In the *Jaskeerat Singh Gulshan* the Claimant attended Ealing Magistrates Court in order to support a relative who was appearing there.[90] The court described him as "an observant Sikh" and "in accordance with the tenets of his faith he always wears a kirpan.."[91] However, under the Courts Act 2003, court security officers have the power to exclude persons from court buildings and to require the surrender of various articles, including knives.[92] The published guidance for security officers was the Security and Safety Operating Procedures Guidance, version 11 (published in 2018) issued by HMCTS. Section 4 (e) of the Guidance provided that: "Where a member of the Sikh community wishes to enter a court building, they can bring in a Kirpan that meets the following requirements: Overall length is no more than six inches, Blade is no more than four inches in length." The Guidance went onto say that, "If the Kirpan exceeds these lengths, permission to enter may be refused but the senior person onsite must be consulted before any decision is taken." In the Court of Appeal, Underhill LJ explained that the final sentence gave officers a discretion, if they judged appropriate to allow a person to bring in a kirpan of more than the prescribed length.[93]

However, what the claimant argued was "that guidance issued by the Scottish Courts and Tribunals Service is in different terms from HMCTS's Kirpan Guidance."[94] The Scottish guidance reads:

> *"Wearing a Kirpan*
> *A Kirpan may be carried for religious reasons under Section*

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[86] The preamble of the this statute states that it is, *"An Act to make provision about persons having knives, other articles which have a blade or are sharply pointed or offensive weapons…"* and Section 3 makes provision for an "*Increased penalty for offence of having article with blade or point in public place" whereas section 4 makes provision for an "Offence of having article with blade or point (or offensive weapon) on school premises etc."* see <http://www.legislation.gov.uk/ukpga/1996/26/data.pdf> . Also see

<http://www.legislation.gov.uk/ukpga/1996/26/contents > accessed 11 February 2025.

[87] Under s.139 (5)(b) *"it shall be a defence for a person charged with an offence under this section to prove that he had the article with him….for religious reasons."* Available at <http://www.legislation.gov.uk/ukpga/1988/33/section/139 > accessed 11 February 2025.

[88] See section 1(4) which is available at <http://www.legislation.gov.uk/ukpga/Eliz2/1-2/14/data.pdf > accessed 11 February 2025.

[89] Juss (n 5) 781.

[90] *Jaskeerat Singh Gulshan* (n 18) para 2.1

[91] ibid para 2.2

[92] Sections 52-55A of the Courts Act 2003.

[93] *Jaskeerat Singh Gulshan* (n 18) para 2(3).

[94] *Jaskeerat Singh Gulshan* (n 18) para 14.

> *49(4) of the Criminal Law (Consolidation) (Scotland) Act 1995.*
> *Informing the Court*
> *An initiated Sikh attending court should inform court officials in advance when possible, or on arrival, that a Kirpan is worn. Normal security procedures will be carried out, and the Sikh will be able to wear the Kirpan in court and the court environment.* In the court and its vicinity, the Kirpan must always be sheathed and worn out of sight. If you have any questions regarding the wearing of the Kirpan please contact the court concerned.*
> **there may be exceptional circumstances when this will not be possible and those circumstances will be discussed on application."*

What the claimant argued was that the Scottish guidance contains no restriction on the length of the kirpan that may be worn, although the right is reserved not to permit the wearing of a kirpan in "exceptional circumstances".[95] Although in *Athwal* the Queensland Court had observed that, "[k]irpans come in a variety of shapes and sizes and may or may not have sharp blades,"[96] Underhill LJ gave the argument short shrift, pointing out:

> *"That argument has no prospect of success. Different authorities may reasonably form different views about the risk posed by the wearing of a kirpan in court and how to address it. It is to be noted that even in Scotland the right is not absolute: Sikhs wishing to wear a kirpan in court still have to declare that fact, in advance where possible, and the authorities reserve the right, albeit in exceptional circumstances, to decline permission."*[97]

Insofar as it was argued (at §21) "that the restriction on the right to wear a kirpan of more than six inches in length (albeit subject to a discretion) violates the Claimant's rights under articles 9 and 14 of the European Convention on Human Rights and is accordingly unlawful by virtue of section 6 (1) of the 1998 Act," that argument too was rejected.[98] The rule was not disproportionate to the rights of Sikhs. As Underhill LJ explained, "[i]t is important to appreciate that there is a clear basic rule which enables observant Sikhs to regulate their conduct: they know that they will be permitted to wear a kirpan in court, provided it is no more than six inches long." The result is that, "[b]y definition, any departure from that policy will be exceptional, and it is neither possible nor necessary for guidance of this character to specify in advance what such exceptional circumstances may be….'"[99]

## 4. THE KARA

[95] ibid para 15.

[96] *Athwal v State of Queensland* (n 6) para 36.

[97] *Jaskeerat Singh Gulshan* (n 18) 16.

[98] ibid para 21.

[99] ibid para 25.

The legal cases on the 5 K's have not just been confined to the *kirpan* but have also extended to the *kara*. In the words of Silber J. in *Sarika Angel*[100] *"[i]n recent years, a number of school girls have sought unsuccessfully to challenge rules made by their schools which prevented them from wearing items which they considered necessary as part of their religious faith…."*[101] *One such here was "the wearing of a Kara, which is a small plain steel bangle worn by Sikhs as a visible sign of their identity and faith." This is "5 millimetres wide and is therefore much narrower than a watch strap and many ordinary bangles" and furthermore, "it cannot be seen when the claimant is wearing a long-sleeved sweater."*[102] *Sarika Angel,* a 14 year-old Sikh school girl of Punjabi-Welsh heritage, challenged a decision made by her school, preventing her from wearing a Kara at her school.[103] A teacher at the school had observed the claimant wearing it and asked that it be removed "because it contravened the school's uniform policy; which permitted only one pair of plain ear studs and a wrist watch to be worn by pupils." Interestingly, the Court noted how the claimant "was and remains an observant, although a non-initiated, Sikh."[104] The success of such cases is as is well known often dependent to a very high degree on the quality of the Expert evidence before the Court. In this case, it was assisted, in evaluating "the significance of the Kara to Sikhs"[105] Professor Eleanor Nesbitt, Professor in Religions and Education. She explained the significance of the kara with a depth that had not been done before in a judicial tribunal:

> "The 5 Ks are important as they are intended to distinguish Sikhs from both their Muslim and Hindu contemporaries. In their origin they are closely associated with armed combat and the Sikhs' history of struggle. When Sikhs learn about these martyrs of Sikh identity, they are told about the readiness of some Sikhs to lose their lives rather than to sacrifice their kesh, and this courage-to the point of martyrdom – is emphasised. Thus, the five Ks are regarded as demonstrating both loyalty to the Gurus' teaching and the bravery to be counted at times when even their lives are endangered by this visibility."[106]

However, more importantly, she explained how the significance of the kara extends beyond the tradition of armed combact and into the very realm of a connectedness with God:

> 'The Kara is in origin likely to have been a defence for the sword arm. Sikhs explain its symbolism as a circle that reminds them of God's infinity and speak of their being linked ("handcuffed") by it to God. For many it is a reminder to behave in accordance with religious teaching. Hiding the five Ks is a matter of deep sensitivity. It is important that the Ks be visible, but even more important

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[100] *Watkins-Singh, R (on the application of) v Aberdare Girls' High School & Anor* (n 7).

[101] ibid para 2.

[102] ibid para 4.

[103] ibid para 6.

[104] ibid para 10.

[105] ibid para 23.

[106] ibid para 25.

> (even if circumstances necessitate that the Kara be temporarily hidden from view) that the Sikh concerned continues to wear it on his/her right arm/wrist."[107]

In fact, the kara is not confined to baptised 'Amritdhari Sikhs' because although "[i]n practice, it is the initiated or amritdhari Sikhs, who observe all 5 Ks" the fact is that "there are of course different levels of devoutness and observance amongst Sikhs" and that "[o]nly a small minority of Sikhs undergo the initiation ceremony or ever intend to." This is why the kara is unique in "that of the 5 Ks, the Kara is the symbol most commonly worn by Sikhs as an external identification of Sikhism."[108]

Given that, "it has never been suggested that the claimant insisted on wearing the Kara merely because she was engaged in challenging the authorities at her school" Silber J. in the High Court was quite clear against the background of the expert evidence before him that, "I can reject the possibility that she is insisting on wearing the Kara in order to be rebellious or just to defy authority." The judge even held that, "I do not believe that the claimant would have taken the stand which she did if she had not come to the considered decision that wearing the Kara was of exceptional importance to her."[109] Referring to "[t]he evidence of Professor Nesbitt" which the Judge held not only "stresses, …, the significance of wearing the Kara to Sikhs" but also "that hiding the Kara is a matter of deep sensitivity" in just the same way, "as is the question is of removing it from the wrist" the Judge went onto refer once again to Professor Nesbitt, who had concluded in her Report that:

> "in my extensive experience of working with and studying Sikhs, of the 5 Ks the Kara is a symbol most commonly worn by Sikhs as an external identifier of Sikhism".[110]

In an emphatic affirmation of the values of pluralism, tolerance and broad-mindedness, which undergird contemporary liberal democratic society, Silber J. went onto point out how, "there is a very important obligation imposed on the school to ensure that its pupils are first tolerant as to the religious rites and beliefs of other races and other religions and second to respect other people's religious wishes" because "[w]ithout those principles being adopted in a school, it is difficult to see how a cohesive and tolerant multi-cultural society can be built in this country."[111] The result was that "the school should not have sought to remove the potential cause of tension by refusing to allow the claimant to wear the Kara but second that instead it should have taken steps to ensure that the other pupils understood the importance of wearing the Kara to the claimant and to other Sikhs so that they would then tolerate and accept the claimant when wearing the Kara."[112] Accordingly, "the decision of the defendants not to grant a waiver to the claimant to permit her to wear the Kara

[107] ibid para 26.

[108] ibid para 27.

[109] ibid para 62.

[110] ibid para 64.

[111] ibid para 84.

[112] ibid para 85.

constitutes indirect discrimination on grounds of race" and also "on grounds of religion." For Silber J., there could be no fear of the floodgates opening because, "[i]f the claimant is permitted to wear the Kara at school, this will be creating an extremely limited exception because at present it is not obvious that there will be other pupils of whatever religion or race who can invoke this exception…" There were two reasons for this. The first was "the belief of the pupil justified by objective evidence that the wearing of the article is a matter of exceptional importance as an expression of her race and culture." The second was "the unobtrusive nature of the Kara being 50 mm wide and made of plain steel" which put paid to any "fears of the school that by permitting the claimant to return to school wearing her Kara, it will make great inroads into its uniform policy" which were "unjustified."[113]

## 5. CONCLUSION

What the decided cases on religious freedom tell us is that the orthodox idea of state neutrality in matters of religion must be modified to become more pragmatic and community based. This is because it is one thing to say that the State keeps an equal distance between itself and each one of its faith communities because neutrality stops the State from favouring one religion over another. However, it is quite another thing to say that just because state should remain neutral it has no positive obligation to promote the cause of religious freedom in it community, in the interests of public order, public harmony and public harmony. The State must not stand by the side-lines. It is not for the State to judge. That does not mean to say that the State should not be a facilitator of democratic norms and religious values and freedoms.

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[113] ibid para 92.

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**The Boğaziçi Law Review**

ISSN: 3023-4611
Journal homepage: https://dergipark.org.tr/tr/pub/blr

# The Boundaries of Discrimination in Citizenship Revocation: Legal and Ethical Dilemmas for Naturalised Immigrants

## *Vatandaşlığın Kaybettirilmesinde Ayrımcılığın Sınırları: Vatandaşlığa Kabul Edilmiş Göçmenler için Hukuki ve Etik İkilemler*

**Vebi Levni**

**To cite this article:** Vebi Levni, 'The Boundaries of Discrimination in Citizenship Revocation: Legal and Ethical Dilemmas for Naturalised Immigrants ' (2025) 3(1) The Boğaziçi Law Review 99.

**Submission Date:** 1 February 2025

**Acceptance Date:** 25 June 2025

**Article Type:** Research Article



Published online: June 2025

The Boğaziçi Law Review | 2025, Vol. 3, No. 1, 99-132 DOI: 10.69800/blr.1631019

# THE BOUNDARIES OF DISCRIMINATION IN CITIZENSHIP REVOCATION: LEGAL AND ETHICAL DILEMMAS FOR NATURALISED IMMIGRANTS

## *VATANDAŞLIĞIN KAYBETTİRİLMESİNDE AYRIMCILIĞIN SINIRLARI: VATANDAŞLIĞA KABUL EDİLMİŞ GÖÇMENLER İÇİN HUKUKİ VE ETİK İKİLEMLER*

**Vebi Levni**
Lawyer, member of Istanbul Bar Association.

## ABSTRACT

In recent years, hundreds of individuals have been stripped of their citizenship under the guise of safeguarding national security. As the threat of terrorism looms large, Western governments have increasingly resorted to this drastic measure as part of their counter-terrorism strategies, prompting debates about its compatibility with international law and its implications for fundamental human rights. Despite extensive discussions, significant uncertainty persists about whether citizenship revocation complies with international legal standards, including States *erga omnes* obligations. This article argues that while States have a legitimate interest in national security, such measures often risk contravening human rights and eroding international legal norms. Particular attention is given to the precarious position of naturalised immigrants, who are disproportionately targeted and often lack the same legal protections as birthright citizens, rendering them especially vulnerable to rights violations. Drawing on international legal instruments, case law, and scholarly perspectives, this article critically examines citizenship revocation's legal and ethical dimensions and evaluates its alignment with international human rights obligations.

**Key words:** International human rights, sovereignty, citizenship revocation, discrimination, naturalised immigrants.

## ÖZET

Son yıllarda, yüzlerce kişi ulusal güvenliği koruma bahanesiyle vatandaşlıklarından mahrum bırakılmıştır. Terör tehdidinin giderek büyümesiyle birlikte, batılı hükümetler bu radikal önlemi terörle mücadele stratejilerinin bir parçası olarak daha sık kullanmaya başlamış ve bunun uluslararası hukukla uyumluluğu ile temel insan hakları üzerindeki etkileri konusunda tartışmalar doğmuştur. Geniş çaplı tartışmalara rağmen, vatandaşlık iptali uygulamasının, devletlerin *erga omnes* yükümlülükleri de dahil olmak üzere, uluslararası hukuk standartlarına uygun olup olmadığına dair önemli bir belirsizlik devam etmektedir. Bu makale, devletlerin ulusal güvenliği sağlama konusundaki meşru çıkarlarını kabul etmekle birlikte, bu tür önlemlerin çoğu zaman insan haklarını ihlal etme ve uluslararası hukuk normlarını aşındırma riski taşıdığına dikkat çekmektedir. Özellikle, doğumla vatandaşlık kazanmış kişilere kıyasla daha sınırlı hukuki korumalara sahip olan ve orantısız biçimde hedef alınan, vatandaşlığa kabul edilmiş göçmenlerin kırılgan konumuna özel bir vurgu yapılmaktadır. Uluslararası hukuk metinleri, içtihatlar ve akademik yaklaşımlardan yararlanılarak hazırlanan bu makale, vatandaşlığın kaybettirilmesinin hukuki ve etik boyutlarını eleştirel bir bakışla incelemekte ve bu uygulamanın uluslararası insan hakları yükümlülükleriyle ne ölçüde bağdaştığını değerlendirmektedir.

**CONTACT** *Vebi Levni* *levnivebi@gmail.com*

*Submission Date: 1 February 2025; Acceptance Date: 25 June 2025; Article Type: Research Article*

**Anahtar kelimeler:** Uluslararası insan hakları, egemenlik, vatandaşlığın kaybettirilmesi, ayrımcılık, vatandaşlığa kabul edilmiş göçmenler.

# 1. INTRODUCTION

Recognized as a fundamental human right in international legal instruments, citizenship serves as more than a legal status; it is a vital aspect of personal identity and the foundation for accessing other rights. At the same time, citizenship defines the relationship between individuals and the State, conferring both rights and duties. Historically, it has evolved from a political privilege to a universal right, essential for safeguarding individual identity, legal protection, and societal participation. However, its complexity becomes evident in its intersection with States sovereignty, particularly when national security concerns prompt States to revoke citizenship.

Citizenship reflects ongoing debates on its meaning and scope—issues universally relevant in the contemporary world. Particularly in the six decades following the adoption of the Universal Declaration of Human Rights (UDHR), various international and regional human rights instruments and principles have been developed to safeguard the rights outlined in UDHR. However, normative gaps in the legal framework concerning citizenship continue to exist, and the full realization of the right to citizenship remains challenging.[1]

The use of citizenship revocation as a counter-terrorism measure,[2] has raised significant legal and ethical concerns, particularly when it risks rendering individuals stateless. Such practices challenge core principles of international law, including proportionality, the prevention of statelessness, and the prohibition of arbitrariness. While often justified as necessary for national security, they raise important questions about the balance between State interests and individual rights, testing the limits of human rights protections.

To address these tensions, the discussion begins by tracing the historical development of citizenship, highlighting its transition from a selective privilege to a fundamental right embedded in international instruments. It then explores how international law protects

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1 Mirna Adjami and Julia Harrington, 'The Scope and Content of Article 15 of the Universal Declaration of Human Rights' (2008) 27 Refugee Survey Quarterly 94.

2 This article does not aim to provide a comprehensive discussion of the meaning and scope of terrorism, which would be more appropriately explored in a separate study. However, it is important to remind the reader that the definition of terrorism in the contemporary world is excessively broad. Powell, an advisor to the UN (United Nations) during the drafting of the Handbook on the Criminal Justice Response to Terrorism, emphasizes that this broad definition leaves significant room for abuse. She notes: *"The UN Charter imposes almost no express limits on the UN Security Council in its exercise of these powers. In this way, the UN Security Council is able to operate without any judicial oversight or consideration for the rules of natural justice in its listing mechanism … exercising untrammelled power in a manner which would be unthinkable in a domestic constitutional system subject to the rule of law*." Cathleen Powell, 'Defining Terrorism: How and Why', in *The Human Rights of Anti-Terrorism, eds. Nicole Laviolette and Craig Forcese* (Irwin Law Inc 2008) 139; Arianna Vedaschi and Kim Lane Scheppele (eds), *9/11 and the Rise of Global Anti-Terrorism Law: How the UN Security Council Rules the World* (Cambridge University Press 2021) 131 <https://www.cambridge.org/core/product/identifier/9781009023146/type/book> accessed 29 November 2024; Njuguna Catherine Wanjiru, 'Redefining Terrorism: Can State Actors Commit And Be Responsible For Acts Of Terrorism?' (Master Thesis, Cape Town 2022) 15. <https://open.uct.ac.za/server/api/core/bitstreams/4cee5ebc-e524-4584-b721-eab7f98a9ce2/content> accessed 30 November 2024.

against statelessness and arbitrary revocation of citizenship, analysing whether citizenship revocation can be reconciled with principles such as proportionality and non-arbitrariness. These discussions establish the basis for understanding the broader implications of revocation as a counter-terrorism tool. While these debates are examined on a global level, they also lead to an evaluation of how international principles are reflected and/or challenged in specific national and regional contexts.

This article adopts a comparative case law approach to assess how different legal systems engage with the international framework on citizenship revocation. By engaging with national laws in the United Kingdom (UK) and Ireland, alongside regional jurisprudence from the European Court of Human Rights (ECtHR), this analysis explores how legal systems reconcile security concerns with their human rights obligations. By examining legal standards, procedural safeguards, and the role of courts in these cases, the article seeks to identify divergences and convergences in state practice, especially in contexts involving naturalised immigrants.

Through this comparative lens, the article evaluates whether states can lawfully revoke citizenship while remaining compliant with international human rights law. It pays particular attention to the discriminatory impact on naturalised immigrants, the use of deprivation powers in counter-terrorism contexts, and the evolving role of courts in mediating the tension between state sovereignty and individual rights. This method allows for a grounded analysis of how legal norms are applied in practice, and whether the revocation of citizenship can ever be consistent with the international legal order.

# 2. THE HUMAN RIGHT TO CITIZENSHIP IN INTERNATIONAL LAW

## 2.1. CITIZENSHIP AS THE CORNERSTONE OF STATEHOOD AND ITS HISTORICAL OVERVIEW

Beyond international universal rights, individuals hold specific entitlements derived from their affiliation with communities, often referred to as citizenship,[3] or membership,[4] rights. Citizenship has historically been viewed as a fundamental element of national self-definition, closely tied to identity. In many cases, it aligns with ethnic, religious, or other sociocultural markers that correspond to specific territorial boundaries.[5] This historical nexus illustrates how, in the modern era, citizenship remains deeply intertwined with both national identity and territorial sovereignty, serving as a key mechanism for defining belonging within a state.

Citizenship is the only human right that is defined in relation to a sovereign territory. While the executive has the authority to regulate immigration in the interest of the common

[3] John Tasioulas, 'Saving Human Rights from Human Rights Law' (2021) 52 Vanderbilt Law Review 1191.

[4] The concept of citizenship made its way from Anglo-Saxon debates into German-speaking regions, where it intersected with the older term Staatsangehörigkeit (nationality), which specifically refers to the legal aspect of State membership. Thomas Faist, 'Shapeshifting Citizenship in Germany: Expansion, Erosion and Extension' (2013) Bielefeld: Universität Bielefeld 115 <https://d-nb.info/1186510234/34> accessed 1 November 2024.

[5] Peter J Spiro, 'A New International Law of Citizenship' (2011) 105 American Journal of International Law 694.

good, this power is often viewed as a legitimate policy prerogative of the legislature and executive, even if it may disadvantage naturalised citizens. However, although the authority to control immigration derives from the sovereign power of the state, the Irish Human Rights and Equality Commission contends that sovereignty today is a more relativised concept. In the contemporary world, sovereignty does not necessarily equate to absolute control over immigration, particularly when such control undermines principles like equality, which are increasingly seen as integral to modern governance.[6]

In international law, the Montevideo Convention (MC) defines a State through core elements. A permanent population, a defined territory, a government, and the ability to engage in relations with other States.[7] A *permanent population*, as defined in the MC, refers to a stable and organized community within a specific territory. In contemporary practice, this community is often equated with a state's citizenry, reflecting the legal bond between individuals and the state, which forms the basis for mutual rights and duties.[8]

This makes citizenship,[9] one of the elements of statehood. Hence, citizenship directly impacts statehood, and *vice-versa*, statehood shapes the framework of citizenship. The authority to determine access to citizenship and the rules governing it is, therefore, central to the state's identity and sovereignty as a political entity.[10] It must be stated that over the centuries, defining citizens' rights has been instrumental in establishing principles like sovereignty and citizenship, deepening power struggles and quests for identity as territorial

6 Chidi Anselm Odinkalu, 'Chapter 6. Natives, Subjects, and Wannabes: Internal Citizenship Problems in Postcolonial Nigeria' in Rhoda Howard-Hassmann and Margaret Walton-Roberts (eds), *The Human Right to Citizenship* (University of Pennsylvania Press 2015) 97 <https://www.degruyter.com/document/doi/10.9783/9780812291421-007/html> accessed 5 November 2024; Áine Doyle, 'Citizenship Revocation: An Opportunity for Change in Ireland' [2023] University College Dublin Law Review <https://theucdlawreview.com/2023/04/19/citizenship-revocation-an-opportunity-for-change-in-ireland/#_edn7> accessed 2 December 2024.

7 Article 1: *"The State as a person of international law should possess the following qualifications : (a) a permanent population ;(b) a defined territory ;(c) government ;and (d) capacity to enter into relations with the other States."* Montevideo Convention on the Rights and Duties of States 1933 (3802) 25.

8 Barbara von Rütte, *The Human Right to Citizenship: Situating the Right to Citizenship within International and Regional Human Rights Law* (Brill 2022) 59-60; 'Citizenship and Participation' <https://www.coe.int/en/web/compass/citizenship-and-participation#3> accessed 7 November 2024; Amy Tikkanen, 'Citizenship', *Encyclopedia Britannica* (2024) <https://www.britannica.com/topic/citizenship> accessed 7 November 2024.

9 In some EU Member States, a difference is drawn between citizenship and nationality. However, within the EU framework and for the purposes of this glossary, the two terms are used interchangeably. In countries that do differentiate, citizenship typically refers to the specific legal rights and responsibilities held by citizens. Notably, sources such as the European Convention on Nationality, the IOM Glossary, and the GLOBALCIT Glossary on Citizenship and Electoral Rights favour the use of the term nationality. 'Citizenship' <https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/citizenship_en> accessed 11 November 2024. For the sake of consistency throughout this article, the term citizenship will be used to refer to the legal bond between an individual and a state.

10 von Rütte (n 8) 60.

boundaries took shape.[11]

The historical development of citizenship reveals not only its legal utility but also its function as a tool of statecraft. In the formation of the modern nation-state, citizenship became instrumental in consolidating political authority and homogenising diverse populations under a common national identity. As Anderson argues in "Imagined Communities," the nation is *"an imagined political community,"*[12] and citizenship acts as the legal mechanism through which individuals are imagined as members of this bounded entity.

This conceptual evolution underscores that citizenship, beyond merely denoting legal status, has operated as a strategic instrument of inclusion and exclusion—determining who belongs and who does not. The exclusivity embedded in historical citizenship regimes laid the groundwork for policies that continue to shape access to rights and privileges, from voting and residency to national security protections.

A closer examination of history reveals how this dynamic underpins modern legal systems and the concept of the nation-state.[13] To understand the role of citizenship more comprehensively, it is valuable to look at historical foundations. Tracing its evolution from the early frameworks of ancient civilizations to its transformation in the modern era reveals the foundational principles that underpin and inform contemporary discussions.

Historically, the notion of citizenship can be traced back to ancient Greece, where citizens held the legal right to engage in State affairs. However, citizenship was highly exclusive groups such as slaves, peasants, women, and resident foreigners were not granted this status and were considered subjects instead. For those privileged as citizens, civic virtue—the responsibility of being a good citizen—was central. Participation was regarded not just as a right but primarily as a duty. A citizen who did not meet his responsibilities was considered socially disruptive.[14]

The concept of *good citizen* and its evolving standards continue in contemporary world to be a subject of legal debate. For instance, in naturalisation procedures today, applicants are often expected to demonstrate that they are good citizens.[15] This requirement can determine the success or failure of their application. However, the criteria for what constitutes a *good citizen* are frequently vague, inconsistently applied, and open to interpretation by

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[11] The concept of citizenship associated with State sovereignty has historically been evident in the Ottoman Empire as well. During this period, consular courts were established to resolve disputes among citizens of foreign States benefiting from capitulations. These courts functioned by designating the relevant consulate as the competent judicial authority, allowing foreign citizens to seek justice through their own diplomatic representatives. For detailed information about the history of legal pluralism, see Vebi Levni, 'Legal Pluralism: The Experience of Yugoslavia During and After the Ottoman Empire' (Master Thesis, Kocaeli 2024) 81-82, 97 <https://tez.yok.gov.tr/UlusalTezMerkezi/> accessed 3 November 2024.

[12] Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Revised Edition, Verso 2006) 6.

[13] Yuval Feinstein, 'Nation-State', *Encyclopedia Britannica* <https://www.britannica.com/topic/nation-state> accessed 4 November 2024.

[14] 'Citizenship and Participation' (n 8).

[15] *Talla v Minister for Justice and Equality* App no 2019/184 (The Court of Appeal, 12.05.2020).

state authorities. This raises critical questions about who holds the power to define these standards, and whether such assessments risk entrenching exclusionary or discriminatory practices under the guise of character evaluation.

After ancient Greece, as the Roman Empire expanded, citizenship evolved as a tool to build loyalty among diverse populations, encouraging allegiance both to local communities and to the empire as a whole. Citizens were expected to show allegiance to Rome, which in turn granted them privileges such as freedom of trade and movement within the empire. This policy facilitated easier tax collection and reduced the need for costly military presence in regions populated by Roman citizens. Over time, Roman citizenship shifted from a marker of political involvement to a more judicial role, representing the rule of law rather than political engagement. Nevertheless, active citizenship rights largely remained with the elite, so citizenship still held a degree of symbolic status.[16]

Unlike the active civic engagement in classical times, citizenship in the Middle Ages was largely passive. The classical ideal of *vita activa* shifted towards a *vita contemplativa*, where people were expected to accept their fixed roles within a social hierarchy, with little emphasis on active civic involvement. This transition marked a departure from the classical notion of citizenship, though not from citizenship itself.[17]

An important aspect of medieval citizenship, especially regarding naturalisation, was the equality of birthright and naturalised citizens. Since both groups were governed under the same citizenship laws, it became unacceptable to distinguish legally between those born into citizenship and those who obtained it later.[18] The modern concept of citizenship, however, emerged with the revolutionary changes of the late 18th century. The modern concept of citizenship is frequently attributed to the 1789 French Revolution (FR).

Although it is true that the FR was the first to establish citizenship as a cornerstone of the modern socio-political order, it was the British experience, including the pivotal American developments over the preceding one-and-a-half centuries, that laid the groundwork for the shift from a monarch–subject dynamic to a state–citizen relationship. Paradoxically, the terms citizen and citizenship were rarely used in their liberal sense within the English-speaking world.[19]

With the FR, citizenship took on a new and unprecedented significance, especially compared to the medieval period.[20] The development of constitutionalism brought about declarations such as the *Virginia Declaration of Rights,*[21] and the *Declaration of the Rights of Man*

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16 'History Of Citizenship' <https://greenschoolsireland.org/wp-content/uploads/2024/01/History-of-Citizenship.pdf> accessed 7 November 2024.

17 Gonçalo Matias, *Citizenship as a Human Right: The Fundamental Right to a Specific Citizenship* (Palgrave Macmillan 2018) 32.

18 ibid 32.

19 Derek Benjamin Heater, *What Is Citizenship?* (Polity Press 1999) 9.

20 Matias (n 17) 33.

21 *"....all men are by nature equally free and independent, and have certain inherent natural rights, of which when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity...."* Declaration of Rights 1776.

*and of the Citizen,*[22] which outlined citizens' fundamental rights and freedoms.[23] Moreover, for the first time, a codified regulation of citizenship appeared in the Constitution.[24]

Rogers Brubaker elucidates the transformative impact of the FR on the concept of citizenship, stating: *"The formal delimitation of the citizenry; the establishment of civil equality, entailing shared rights and shared obligations; the institutionalization of political rights; the legal rationalization and ideological accentuation of the distinction between citizens and foreigners; the articulation of the doctrine of national sovereignty and of the link between citizenship and nationhood; the substitution of immediate, direct relations between the citizen and the state for the mediated, indirect relations characteristic of the ancien régime—the Revolution brought all these developments together on a national level for the first time."*[25]

Additionally, the dynamic interaction between state sovereignty and citizenship has continued to evolve in the face of globalisation. As global migration increases and the number of individuals residing outside their country of origin, questions surrounding dual or multiple citizenships and the recognition of non-citizen residents challenge the classical model of one state–one citizenship.

The increasing prevalence of transnational identities calls into question the adequacy of rigid citizenship regimes. For instance, the European Union's introduction of EU citizenship, supplementing national citizenship without replacing it,[26] reflects this shift toward a multi-layered legal identity. In this way, while rooted in state-centric principles, citizenship has begun to reflect more pluralistic and flexible conceptions of belonging that exceed the confines of territorial sovereignty.

## 2.2. CITIZENSHIP AS A FUNDAMENTAL HUMAN RIGHT

These revolutionary concepts are highly significant and were probably only properly interpreted much later in the era of Universal Human Rights.[27] From 1920 to 1930, the international community demonstrated an extraordinary focus on citizenship, recognizing

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[22] *Article 6: "The Law is the expression of the general will. All citizens have the right to take part, personally or through their representatives, in its making. It must be the same for all, whether it protects or punishes. All citizens, being equal in its eyes, shall be equally eligible to all high offices, public positions and employments, according to their ability, and without other distinction than that of their virtues and talents."* Declaration of the Rights of Man and of the Citizen 1789.

[23] Heater (n 19) 10.

[24] *Title 2 § 2: "French citizens are: Those who are born in France of a French father; Those who, born in France of a foreign father, have fixed their residence in the kingdom; Those who, born in a foreign country of a French father. have become established in France and have taken the civic oath; Lastly, those who, born in a foreign country and descended in any degree whatsoever from a French man or a French woman expatriated on account of religion, may come to live in France and take the civic oath." § 3: "Those residing in France, who were born outside of the kingdom from foreign parents, become French citizens after five years of continued domicile in the kingdom, if they have in addition acquired real estate, or married a French woman, or formed an agricultural or commercial establishment, and have taken the civic oath."* French Constitution 1791.

[25] Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (6th edn, Harvard Univ Press 2002) 35.

[26] Antje Wiener, 'Making Sense of the New Geography of Citizenship: Fragmented Citizenship in the European Union' (1997) 26 Theory and Society 548. <http://link.springer.com/10.1023/A:1006809913519> accessed 13 June 2025.

[27] Matias (n 17) 36.

its crucial role in the evolving international legal order. During this period, the League of Nations prioritized citizenship as one of the key areas requiring codification.[28]

In its advisory opinion in the *Nationality Decrees Issued in Tunis and Morocco* case (1923), the Permanent Court of International Justice (PCIJ) —which was the predecessor to the International Court of Justice (ICJ)— concluded that matters of citizenship fall exclusively within the sovereign jurisdiction of States, affirming a state's inherent right to determine its citizens. The Court held that: *"…From this point of view, the Court considers the contention that France enjoys in Tunis and Morocco the same exclusive right to legislate on questions of nationality as in France itself, and that the local sovereignty of the protected State in conjunction with the public powers exercised by the protecting State may be equivalent to full sovereignty…"*[29]

In fact, it is a long-established rule of international law that States are—at least *a priori*—free to determine who is and who is not a citizen.[30] International law indeed, through the adoption of international treaties, has introduced important constraints on how States exercise this discretion, but the power to determine citizenship still largely remains a sovereign prerogative.[31]

The authority of States to determine their own citizens and the limits of this authority were first codified in the Hague Convention (HC). HC recognizes the sovereign right of States to define their citizens, but it also stipulates that this authority must be exercised in accordance with international conventions, customary international law, the principles of law generally recognised regarding citizenship. HC establishes that the exclusive competence of States in citizenship matters is subject to international legal standards, and any deviation from these standards may lead to non-recognition by other States.[32]

The discussions during this period primarily focused on establishing positive legal norms and harmonizing national citizenship laws, rather than framing citizenship as a *human right*. An analysis of international treaties on citizenship, from the HC to the present, demonstrates a shift towards emphasizing specific aspects of citizenship and safeguarding particular rights.

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[28] ibid 42.

[29] United Nations, *Summaries of Judgments, Advisory Opinions and Orders of the Permanent Court of International Justice. 1922/40* (2012) 9 <https://legal.un.org/PCIJsummaries/documents/english/PCIJ_FinalText.pdf> accessed 8 November 2024; F. C. v Docket II Series B no 4 (PCIJ, 08.02.1923).

[30] Radolfo Riberio, 'Protecting the Rights of the Rightless: The UN Human Rights Committee and the Right to Acquire a Nationality under International Law' *European Journal of International Law* (Blog, 11 February 2021) <https://www.ejiltalk.org/protecting-the-rights-of-the-rightless-the-un-human-rights-committee-and-the-right-to-acquire-a-nationality-under-international-law/> accessed 8 November 2024.

[31] The modern concept of State sovereignty in international law originates from the Peace of Westphalia of 1648, which established the framework for sovereign, territorially independent, and formally equal nation-states in Europe. Since then, State sovereignty has been a cornerstone of the legitimacy and autonomy of nation-states as entities under international law. However, it continues to be a subject of significant debate to this day. von Rütte (n 8) 61.

[32] Article 1: *"It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality."* Convention on Certain Questions Relating to the Conflict of Nationality Laws 1930 (179) 99.

These include the legal status of stateless individuals, diplomatic protection, dual citizenship, naturalisation, gender equality in citizenship laws, children's rights, and the protection of civil and political rights. These developments have placed both positive and negative obligations on States and individuals, reflecting an evolving international framework for citizenship.[33]

Today, the right to a citizenship is recognized as a universal fundamental human right, encompassing the ability of individuals to acquire, change, and retain their citizenship.[34] The right to a citizenship is recognized in a series of international and regional legal instruments, including the UDHR, the International Convention on the Elimination of All Forms of Racial Discrimination, the European Convention on Human Rights (ECHR), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention on the Nationality of Married Women.[35] International law, asserts that while States have the authority to determine who qualifies as their citizens, this power is not unrestricted; States must adhere to their human rights obligations when granting or revoking citizenship.[36]

Although human rights have advanced greatly, the UDHR remains subject to criticism, especially its implementation and interpretation. For instance, when Article 15 § 1 of the UDHR asserts that *everyone* has the right to a citizenship—emphasizing the universal nature of this right—a key question arises in interpreting this provision: *"Who is entitled to the right to citizenship?"* The rights enshrined in the UDHR are generally considered human rights, inherent to all individuals. Nonetheless, the phrasing *everyone has the right to a nationality* could lead interpreters to conclude that the right is to have one citizenship and not a *certain* citizenship.[37]

*Secondly*, Article 15 § 2 of the UDHR raises the issue of when revocation of citizenship constitutes arbitrariness. A broad interpretation of arbitrariness prevails, encompassing all State actions—legislative, administrative, or judicial—that exhibit elements of inappropriateness, injustice, illegitimacy, or lack of predictability.[38] As these examples illustrate, there is no clear or exhaustive standard for determining arbitrariness in this context.

According to Foster and Lambert, to avoid being arbitrary, the revocation of citizenship must conform to domestic legal frameworks and meet specific procedural and substantive

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[33] Spiro (n 5) 700-714.

[34] Article 15 § 1: *"Everyone has the right to a nationality."* § 2: *"No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."* Universal Declaration of Human Rights 1948 (A/RES/217(III)) 1.

[35] For a more comprehensive list of relevant legal instruments, see 'International Standards Relating to Nationality and Statelessness' <https://www.ohchr.org/en/nationality-and-statelessness/international-standards-relating-nationality-and-statelessness> accessed 5 November 2024.

[36] 'OHCHR and the Right to a Nationality' <https://www.ohchr.org/en/nationality-and-statelessness> accessed 5 November 2024.

[37] Matias (n 17) 49.

[38] Iseult Honohan, 'Just What's Wrong With Losing Citizenship? Examining Revocation of Citizenship From Non-Domination Perspective' (2020) 24 Citizenship Studies 355, 358; 'Human Rights and Arbitrary Deprivation of Nationality' (2009) Report of the Secretary-General A/HRC/13/34, para 25 <https://www.right-docs.org/doc/a-hrc-13-34/> accessed 10 November 2024.

standards under international human rights law. This includes adherence to the principle of proportionality, requiring that the action serve a legitimate purpose, be the least intrusive means available, and remain proportionate to the interest at stake. Additionally, the decision must be documented in writing and subject to effective administrative or judicial review.[39]

# 3. INTERNATIONAL SAFEGUARDS AGAINST STATELESSNESS

## 3.1. INTERNATIONAL PROTECTIONS AGAINST ARBITRARY CITIZENSHIP REVOCATION

The adverse impact of statelessness and citizenship-related barriers,[40] continues to highlight the critical role that legal identity plays in accessing fundamental rights and protections. Building on Article 15 of the UDHR, which affirms the right to be free from arbitrary revocation of citizenship, Article 8 § 1 of the 1961 Convention on the Reduction of Statelessness (1961 Convention) imposes an obligation on States to prevent statelessness resulting from the loss of citizenship.[41]

Although Article 8 allows for the revocation of citizenship on certain narrowly defined and legitimate grounds, even when it leads to statelessness, it includes a crucial safeguard by mandating that such actions only take place after the individuals concerned are provided with due process protections. Similarly, just as the 1951 Refugee Convention (RC) does not incorporate Article 14 of the UDHR, which proclaims asylum as a human right, the 1954 and 1961 Statelessness Conventions also fail to explicitly recognize Article 15 of the UDHR

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[39] Michelle Foster and Hélène Lambert, 'Statelessness as a Human Rights Issue: A Concept Whose Time Has Come' (2016) 28 International Journal of Refugee Law 578.

[40] For instance, a recent survey evaluating the world's most *powerful* passports ranked countries based on the level of travel freedom their citizens possess. See 'Global Passport Power Rank 2024' *Passport Index* (Web) <https://www.passportindex.org/byRank.php> accessed 1 November 2024.

[41] *"8 § 1. A Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless. 2. Notwithstanding the provisions of paragraph I of this article, a person may be deprived of the nationality of a Contracting State: (a) should lose his nationality; in the circumstances in which, under paragraphs 4 and 5 of article 7, it is permissible that a person (b) where the nationality has been obtained by misrepresentation or fraud. 3. Notwithstanding the provisions of paragraph 1 of this article, a Contracting State may retain the right to deprive a person of his nationality, if at the time of signature, ratification or accession it specifies its retention of such right on one or more of the following grounds, being grounds existing in its national law at that time: (a) that, inconsistently with his duty of loyalty to the Contracting State, the person (i) has, in disregard of an express prohibition by the Contracting State rendered or continued to render services to, or received or continued to receive emoluments from, another State, or (ii) has conducted himself in a manner seriously prejudicial to the vital interests of the State; (b) that the person has taken an oath, or made a formal declaration, of allegiance to another State, or given definite evidence of his determination to repudiate his allegiance to the Contracting State. 4. A Contracting State shall not exercise a power of deprivation permitted by paragraphs 2 or 3 of this article except in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body."* Ireland's declaration for the article: *"In accordance with paragraph 3 of article 8 of the Convention Ireland retains the right to deprive a naturalised Irish citizen of his citizenship pursuant to section 19 (1) (b) of the Irish Nationality and Citizenship Act, 1956, on grounds specified in the aforesaid paragraph."* Convention on the Reduction of Statelessness 1961 (989).

as the foundational right underpinning efforts to address and reduce statelessness. [42]

International human rights law provides robust protections against the arbitrary revocation of citizenship through several key instruments. The 1961 Convention prohibited the revocation of citizenship based on race, ethnicity, religion, or political orientation, and required that revocation for other causes be made contingent on having acquired citizenship in another state. Article 9 states that, *"A Contracting State may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds."* Convention established a framework to prevent future cases of statelessness.

It limited States unrestricted control over citizenship by imposing a positive obligation on States to eliminate and prevent statelessness in their citizenship laws and practices. Legal scholars argues that 1961 Convention reflects the UDHR's goal of ensuring that no individual is arbitrarily revoked of their citizenship, a principle aimed at combating statelessness. The approach specifically targeted mass denationalizations, such as those carried out by the Nazi regime against German Jews. However, while some pushed for a universal standard prohibiting arbitrary revocation of citizenship, the establishment of such a norm remained a subject of debate, and no clear standard for arbitrariness was defined. [43]

The European Convention on Nationality (ECN) recognizes this prohibition as a general principle of international law.[44] The ECN, adopted by the Council of Europe, is a key regional instrument on citizenship, consolidating widely accepted international legal norms into a single framework and advancing the normative framework of citizenship laws by providing clear, actionable provisions for States to incorporate into their legal systems. However, according to Pilgram the success of the ECN is undermined by several issues.

> *"1. The ECN attracted more reservations than any of the other specialised or general human rights treaties.*
>
> *2. The absence of any form of independent reviewing and enforcement mechanism makes it difficult to monitor compliance and promote progress concerning the standards set by the Convention.*
>
> *3. Although common obstacles to ratification are state objections to only a few of the ECN's provisions, these obstacles are very significant.*

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[42] Adjami and Harrington (n 1) 97.

[43] 1961 Statelessness Convention; Spiro (n 5) 711; Adjami and Harrington (n 1) 96-97.

[44] *Article 18 § 1 (a): "Have the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability."* Convention on the Rights of Persons with Disabilities 2006. Convention on the Rights of Persons with Disabilities 2006; Article 18 § 5 (d) (iii): *"In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: The right to nationality."* CERD. International Convention on the Elimination of All Forms of Racial Discrimination 1965; Article 20 § 3: *"No one shall be arbitrarily deprived of his nationality or of the right to change it."* ACHR. American Convention on Human Rights 1969; Article 29 § 1: *"Everyone has the right to nationality. No one shall be arbitrarily or unlawfully deprived of his nationality."* ArCHR. Arab Charter on Human Rights 2004; Article 4 § c: *"no one shall be arbitrarily deprived of his or her nationality".* European Convention on Nationality 1997 (166).

*- The single most prominent obstacle to ratification appears to be an unwillingness to be bound by the ECN's prohibition of discrimination on the basis of race, national or ethnic origin (ECN article 5(1)) and also between nationals by birth and those who acquired nationality subsequently (ECN article 5(2)). Note that the latter principle constitutes a recommendation rather than a clear prohibition.*

*- State objections to offering administrative or judicial review (ECN article 12) and to charging 'reasonable' fees (ECN article 13(1)) represent further obstacles to ratification.*

*- The ECN demonstrates and consolidates a gradual transition from an understanding of citizenship as privilege to an understanding of citizenship as right in international law on nationality. Not all national codes sit easily with this increased emphasis on rights of the individual, including foreign residents."*[45]

Like the 1961 Convention, the ECN prioritizes the prevention of statelessness and the non-discriminatory enjoyment of citizenship rights. Nonetheless, it introduces notable innovations, particularly its stricter approach to statelessness arising from the loss of citizenship. The ECN permits only one exception—when citizenship was obtained through fraud, false information, or concealment of relevant facts—unlike the 1961 Convention, which allows a few additional grounds for revocation.[46]

Regional instruments like the ECN and international frameworks such as the 1961 Convention provide crucial legal standards, but their practical implementation varies widely among States. The discursive shift towards recognizing a right to citizenship did not lead to the establishment of broadly enforceable international norms. Article 15 of the UDHR, which enshrines the right to citizenship, does not impose an obligation on any specific State to ensure its fulfilment. Furthermore, the Declaration itself lacks legal binding force, limiting its capacity to create actionable duties under international law. [47]

On the other hand, it is essential to point out that rulings by the ECtHR in this area have opened a promising path, offering hope for progress. In *Genovese v. Malta*,[48] the Court ruled that denying citizenship to a child born out of wedlock, based solely on the Maltese parent's gender, constituted discrimination under Article 14,[49] in conjunction with Article 8 of the

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[45] Lisa Pilgram, 'European Convention on Nationality (ECN) 1997 and European Nationality Laws' Policy Brief No. 4 EU Democracy Observatory on Citizenship 1 <https://globalcit.eu/wp-content/uploads/2010/06/policy%20brief%20International%20Law.pdf> accessed 7 November 2024.

[46] Laura van Waas, 'Fighting Statelessness and Discriminatory Nationality Laws in Europe' (2012) 13 European Journal of Migration and Law 247-249.

[47] Spiro (n 5) 710.

[48] *Genovese v Malta* App no 53124/09 (ECtHR, 11.10.2011).

[49] *"Article 14: The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."* European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (213 UNTS 221).

ECHR.[50] This decision underscored the importance of access to citizenship as an element of personal identity, protected under the right to private life.

Similarly in *Ramadan v. Malta,*[51] ECtHR has consistently held that arbitrary revocation of citizenship can, in certain cases, violate the ECHR due to its profound impact on an individual's private life.[52] However, while this interpretation is laudable, it raises critical questions about whether citizenship should be viewed solely through the lens of private life or recognized as an independent, fundamental human right. The current framework of the ECHR does not explicitly recognize the right to citizenship, leaving it dependent on an indirect interpretation through Article 8. This omission creates gaps in the legal protection of individuals, particularly stateless persons, who are often excluded from accessing remedies under the Convention.

Recognizing the right to citizenship as a standalone human right would reflect its intrinsic importance to personal identity, State membership, and access to rights. Citizenship is not merely a private matter. It serves as a legal bond between an individual and the state, enabling the exercise of civil, political, and social rights. Without explicit recognition, individuals remain vulnerable to the arbitrary deprivation of citizenship, with limited recourse under international human rights law. This argument gains further support from the African Committee in its findings on citizenship and statelessness. The Committee emphasized that the prolonged refusal to grant Nubian children a secure citizenship breaches their right to acquire a citizenship. In the absence of a clear legal status, these children effectively face statelessness and are left exposed to significant uncertainty and vulnerability throughout their lives.[53]

Building on these international and regional efforts, the inclusion of statelessness and access to citizenship in two Global Compacts signals a broader acknowledgment of statelessness as a critical issue inherently linked to migration, particularly forced displacement.[54] The Global Compact on Refugees also acknowledges that statelessness can serve both as a cause and a consequence of refugee movements, emphasizing the need for international

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[50] *"Article 8 § 1: Everyone has the right to respect for his private and family life, his home, and his correspondence. 8 § 2: There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."* ibid.

[51] *Ramadan v Malta* App no 76136/12 (ECtHR, 17.10.2016).

[52] See also further cases where the ECtHR found a violation of Article 8 in matters relating to citizenship revocation. <https://www.institutesi.org/news/european-court-of-human-rights-rules-that-nationality>.

[53] *Nubian Children v Kenya* Series C no 130 (African Committee of Experts on The Rights And Welfare of The Child, 08.09.2005).

[54] The most recent initiative at the UN level was the adoption of the New York Declaration for Refugees and Migrants on 19 September 2016. This landmark Declaration resulted in the creation of two significant Compacts. The Global Compact for Safe, Orderly and Regular Migration and the Global Compact on Refugees, both aimed at enhancing international cooperation on migration and refugee issues. von Rütte (n 8) 140, 142; 'Global Compact for Safe, Orderly and Regular Migration' <https://documents.un.org/doc/undoc/gen/n18/451/99/pdf/n1845199.pdf> accessed 9 November 2024.

cooperation to mitigate its impact.[55] Moreover, Global Alliance to End Statelessness by the UN reinforces this commitment by fostering collaboration among States, UN agencies, and civil society.[56]

Collectively, all these instruments affirm a global commitment to preventing statelessness and safeguarding the right to citizenship. The ICJ has affirmed that certain international obligations, particularly those concerning fundamental human rights, possess an *erga omnes* character—duties owed to the international community. In the Barcelona Traction case, the ICJ identified obligations concerning the protection of human rights as having an *erga omnes* character, emphasizing that such obligations are the concern of all States.[57]

Even though various international and regional initiatives reflect a shared commitment to preventing and reducing statelessness, many of them lack concrete enforcement mechanisms or effective remedies to fully protect individual rights. This gap allows domestic legal systems to exercise considerable discretion in citizenship matters, often resulting in arbitrary or discriminatory practices that leave individuals stateless.[58] At both the European and universal levels, the enforcement of principles aimed at preventing statelessness and ensuring the *non-discriminatory* enjoyment of citizenship remains inconsistent.[59]

## 3.2. STATELESSNESS AS A HUMAN RIGHTS ISSUE

It can be posited that the conceptual significance of citizenship has arguably diminished in the era of the United Nations, largely due to the broader acknowledgment of human rights that are inherent to every individual based on their intrinsic humanity, rather than their legal status as a national of any given state. Nevertheless, practical experience demonstrates that citizenship—whether it involves having an undesirable one or lacking any citizenship altogether—continues to be a significant source of disadvantage, disempowerment, exclusion, and human suffering.[60]

International law grapples with the dual reality of upholding universal human rights while addressing the practical challenges posed by statelessness and exclusion. To be stateless means that a person is not recognized as a citizen of any state, leaving them excluded from the protection and rights afforded by national citizenship. Statelessness, as a violation of the right to a citizenship under Article 15 of the Universal Declaration of Human Rights (UDHR), remains one of the most neglected areas of the global human rights agenda. This neglect is often exacerbated by the argument that States should prioritize the human rights of their own citizens, ensuring that any advancements in the rights of non-citizens do not

[55] 'Global Compact on Refugees' (High Commissioner for Refugees 2018) A/RES/73/151, 2.9 Statelessness para. 83 <https://www.unhcr.org/media/global-compact-refugees-booklet> accessed 12 November 2024.

[56] 'Global Alliance to End Statelessness' <https://www.unhcr.org/news/press-releases/unhcr-new-global-alliance-launched-consign-statelessness-history> accessed 13 November 2024.

[57] *Barcelona Traction, Light and Power Company, Limited v the Kingdom of Belgium* App no 1962 (ICJ, 05.02.1970)

[58] von Rütte (n 8) 140, 142.

[59] van Waas (n 46) 249.

[60] Brian Opeskin, 'The Human Right to Citizenship: A Slippery Concept' (2016) 28 International Journal of Refugee Law 355.

come at the expense of those at home. Such an approach reflects a *citizens first* principle, which can further marginalize stateless individuals and hinder efforts to address their plight.[61]

The international human rights protection system has made significant progress since World War II, yet citizenship continues to play a decisive role in determining how individuals are treated. The rights people can effectively exercise remain largely dependent on their country of citizenship. Although international human rights law provides certain guarantees for both citizens and non-citizens, many States fail to implement these protections effectively. This inconsistency leaves stateless individuals particularly vulnerable, exposing the gap between international commitments and their practical enforcement. Much of this failure stems from the inability or unwillingness of numerous countries to adhere to international conventions, resulting in stateless individuals being systematically denied their rights on a global scale.[62]

Citizenship law itself operates within this contested space, navigating complex ideas about who qualifies as a member and by what standards.[63] This complex framework becomes even more critical in the context of immigration. Due to compelling circumstances, individuals may voluntarily or forcibly,[64] leave their home countries, relocating to areas under another States jurisdiction.[65] Although some immigrants maintain legal and emotional ties to their country of origin, benefiting from its protection, others are left without safeguards, either because they are denied protection, revoked of it, or choose not to seek it.

A distinction is often made between *de jure* and *de facto* stateless persons. *De jure* stateless individuals are those who are not citizens of any State. *De facto* stateless persons are individuals who having left their country of citizenship, no longer receive protection or assistance

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61 Kristy A Belton, 'Chapter 2. Statelessness: A Matter of Human Rights' in Rhoda Howard-Hassmann and Margaret Walton-Roberts (eds), *The Human Right to Citizenship* (University of Pennsylvania Press 2015) 31 <https://www.degruyter.com/document/doi/10.9783/9780812291421-003/html> accessed 5 November 2024; Tasioulas (n 3) 1200.

62 David Owen, 'On the Right to Have Nationality Rights: Statelessness, Citizenship and Human Rights' (2018) 65 Netherlands International Law Review, 300; Nasir Uddin, 'Chapter 4. State of Stateless People: The Plight of Rohingya Refugees in Bangladesh' in Rhoda Howard-Hassmann and Margaret Walton-Roberts (eds), *The Human Right to Citizenship* (University of Pennsylvania Press 2015) 62 <https://www.degruyter.com/document/doi/10.9783/9780812291421-005/html> accessed 5 November 2024.

63 Anupama Roy, *Citizenship Regimes, Law, and Belonging: The CAA and the NRC* (Oxford University Press Oxford 2022) 4 <https://academic.oup.com/book/43025> accessed 6 November 2024."plainCitation":"Anupama Roy, Citizenship Regimes, Law, and Belonging: The CAA and the NRC (Oxford University Press 2022).

64 For a comprehensive examination of the distinctions between voluntary and forced migration see, Oliver Bakewell, 'Unsettling the Boundaries Between Forced and Voluntary Migration' in Emma Carmel, Katharina Lenner and Regine Paul (eds), *Handbook on the Governance and Politics of Migration* (Edward Elgar Publishing 2021) <https://china.elgaronline.com/view/edcoll/9781788117227/9781788117227.00017.xml> accessed 5 November 2024.

65 Over the past fifty years, the global number of international migrants has risen significantly. In 2020, an estimated 281 million people were residing outside their countries of birth—an increase of 128 million since 1990 and more than three times the figure recorded in 1970. International Organization for Migration, 'World Migration Report 2024' (United Nations 2024) <https://publications.iom.int/books/world-migration-report-2024> accessed 5 November 2024.

from their national authorities—either because such protection is denied or because they have renounced it. Stateless persons, in the legal sense, are those who are not recognized as citizens by any State under its laws. In contrast, *de facto* stateless individuals still possess citizenship but lack State protection while abroad. These individuals might be better referred to as *unprotected persons*, with *de facto* unprotected persons distinguished from *de jure* unprotected persons, the latter being truly stateless.[66]

Refugees may fall into either category. They may be *de jure* unprotected if stateless, or *de facto* unprotected if they retain citizenship but lack protection. UNHCR's mandate to offer international protection to refugees extends beyond individuals who meet the eligibility criteria for refugee status under the 1951 Convention and its 1967 Protocol. It also includes those who fall under the broader refugee definition outlined in the Office's mandate. As such, UNHCR's responsibilities encompass de facto stateless individuals who qualify for protection under the 1951 Convention and 1967 Protocol, as well as many de facto stateless persons covered by regional complementary protection frameworks.[67]

The disconnection places certain individuals in highly vulnerable positions, further complicating their sense of belonging and exposing them to legal and social marginalization.[68] Citizenship law, operating within these contested boundaries, must navigate these challenges to provide meaningful inclusion and protection. Statelessness—the lack of a citizenship—can severely restrict a person's ability to access essential services such as education, healthcare, employment, financial services, or even the right to marry.[69] Its consequences are now increasingly framed as human rights violations, as it often leads to systemic discrimination and heightened vulnerability, including exposure to exploitation and human trafficking.[70]

Especially the unequal treatment of women in citizenship laws increases their vulnerability to statelessness, both by being born stateless and by later becoming stateless. In countries with neglected birth registration systems, women may be born stateless due to a lack of documentation verifying their place of birth. Women can lose their citizenship if their identity documents are lost or stolen during conflicts, leaving them unable to prove their citizenship.[71]

This issue is particularly severe in post-colonial or divided nations, where political uphe-

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66 Manley O. Hudson, 'Report on Nationality, Including Statelessness' (1952) A/CN.4/50 17. <https://legal.un.org/ilc/documentation/english/a_cn4_50.pdf> accessed 11 November 2024.

67 Hugh Massey, 'UNHCR and De Facto Statelessness' (2010) LPPR/2010/01 65-66. <https://www.unhcr.org/sites/default/files/legacy-pdf/4bc2ddeb9.pdf> accessed 13 November 2024.

68 Moh Asmahil Kohan, *Vatansızlık: Uluslararası Temel Belgelerde Vatansız Kişiler ve Hakları* (Migration Research Foundation 2024) 224 <https://tjds.org.tr/index.php/tjds/article/view/88/91> accessed 1 December 2024.

69 ECtHR highlighted that the applicants erasure from the residence register and lack of personal documents resulted in the loss of access to fundamental social and economic rights, including the right to work, health insurance, and pension benefits. *Hoti v Croatia* App no 63311/14 (ECtHR, 26.07.2018).

70 Foster and Lambert (n 39) 567.

71 Neda Shaheen, 'Discriminatory Nationality Laws Must Be Eliminated In Order To Eradicate Statelessness' (2018) 11 DePaul Journal for Social Justice 11.

avals have rendered many stateless. For instance, the dissolution of Yugoslavia left thousands without documentation to verify their origins. In human trafficking cases, women often have their documents confiscated or destroyed, stripping them of their citizenship and legal protection.[72] According to Mullally, *"the concern to respond to women's apparent vulnerability continues to be a core motivating impulse in the anti-trafficking movement, at both the national and international levels."*[73]

Children are another vulnerable group to consider. International law recognizes the right of every individual, particularly children, to possess a citizenship.[74] States adhering to the principle of *jus soli* have a duty to grant citizenship to children born on their territory, thereby preventing statelessness. The Committee on the Rights of the Child supports this interpretation. It has concluded that the Convention on the Rights of the Child (CRC) should be interpreted to mean that States must take all steps to ensure children born in the State acquire a citizenship. Furthermore, the Committee has stated that, where the State cannot secure the child's citizenship through State cooperation elsewhere, then the State must grant its citizenship.[75]

Around the globe, millions of individuals find themselves in dilemma, enduring the hardships of being *stateless*.[76] Stateless individuals are unable to claim rights from any state. To lack a nationality or citizenship is to stand exposed in the realm of international affairs. It is to exist as an isolated individual, without the protection of a State, vulnerable to aggression, exploitation, and exclusion, caught in an unequal struggle with little chance of prevailing.[77] For many, their only hope of enjoying citizenship lies in the prospect of naturalisation, which offers a critical pathway to gaining legal recognition and the associated rights and protections of citizenship.

It must never be overlooked that history offers powerful warnings about the devastating consequences of denationalization. Far from being just a legal measure, it has often paved the way for serious human rights violations. Under the Nazi regime, for instance, Jews were deliberately revoked of their citizenship, rendering them stateless and exposing them to systematic persecution. Without the protection of any state, stateless individuals were left defenceless, with no country willing or able to act on their behalf. This dark chapter in his-

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[72] ibid 11-12.

[73] Siobhán Mullally, 'Trafficking in Persons, Especially Women and Children' (UN Human Rights Office 2024) A/79/161, §50 <https://documents.un.org/doc/undoc/gen/n24/210/33/pdf/n2421033.pdf> accessed 13 November 2024.

[74] *"Article 7 § 1: Every child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality, and, as far as possible, the right to know and be cared for by their parents. § 2: States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under relevant international instruments, particularly in cases where the child would otherwise be stateless."* Convention on the Rights of the Child 1989 (27531).

[75] William Thomas Worster, 'The Obligation to Grant Nationality to Stateless Children Under Treaty Law' (2019) 24 Tilburg Law Review 210.

[76] 'OHCHR and the Right to a Nationality' (n 36).

[77] Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press 1999) 80.

tory highlights the urgent need to prevent statelessness, as its impact goes far beyond legal marginalization and can lead to severe abuses—even genocide.[78]

# 4. THE USE OF CITIZENSHIP REVOCATION AGAINST NATURALISED IMMIGRANTS AS A COUNTER-TERRORISM MEASURE

## 4.1. THE HUMAN RIGHT TO NATURALISATION

Since the time of the FR, citizenship has been closely linked to efforts aimed at dismantling legal inequalities. Paradoxically, as the 21st century began, the global practice of assigning citizenship based on birthright has emerged as a significant obstacle to both mobility and access to opportunities.[79] The challenge today lies in addressing the injustice of a birthright transmission system that allows morally arbitrary circumstances of birth to dramatically shape people's life chances, while simultaneously preserving the collective good and the sense of belonging that citizenship provides.[80]

Emerging State practices enable both locals and immigrants to reshape their identities around a narrative of inherited traits, which frames aspects like class and race as though they were biologically determined.[81] If citizenship is understood in terms of heritability, then naturalised citizens—those who have acquired citizenship rather than inherited it by birthright—may be viewed as inherently different or less *permanent* members of the nation. This perception can make naturalised citizens more vulnerable to revocation, as they may be seen as not fully belonging in the same way as birthright citizens, whose identity and rights are often viewed as *inherited*.

According to Brubaker, citizenship functions as both an instrument and an object of social closure, reflecting its inherently bounded nature. The boundaries of belonging are drawn differently across various political systems. This was true in ancient Greece, where, as Aristotle observed, *"the man who is a citizen in a democracy is often not one in an oligarchy."* It remains true in modern Europe today, where an immigrant who would qualify for citizenship in one polity might not be eligible in another.[82]

There are currently three interconnected means of acquiring citizenship. (1) Through descent, known as *jus sanguinis*, (2) by being born within a country's territory, referred to as *jus soli*, (3) and an emerging alternative, the stakeholder principle or *jus nexi*, which emphasizes a genuine and lasting connection to the political community, granting citizenship rights to those with a real and effective link or a permanent interest in membership. Acqu-

[78] Audrey Macklin, 'Citizenship Revocation and the Privilege to Have Rights' [2014] SSRN Electronic Journal 8 <http://www.ssrn.com/abstract=2507786> accessed 13 November 2024.

[79] Ayelet Shachar, 'The Worth of Citizenship in an Unequal World' (2007) 8 Theoretical Inquiries in Law 368 <https://www.degruyter.com/document/doi/10.2202/1565-3404.1154/html> accessed 4 November 2024.

[80] Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Harvard University Press 2009) 85.

[81] Bill Maurer, '"Belonging," Citizenship and Flexible Specialization in a Caribbean Tax Haven (British Virgin Islands)' (1993) PoLAR: Political and Legal Anthropology Review 9 15.

[82] Brubaker (n 25) 75.

iring citizenship through jus sanguinis principle, or citizenship by descent, was seen as a necessary response to the challenges of emigration and depopulation, which threatened the nation-building process.[83]

Naturalisation,[84] remains the sole legal route to obtain citizenship after birth.[85] As a matter of State practice, virtually all countries offer a pathway for naturalisation, allowing individuals to acquire citizenship following birth. This practice is increasingly seen as a requirement under international law. The RC for instance, encourages States to facilitate the naturalisation of refugees. Article 34 states that: *"The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings."*[86]

The understanding of RC is further supported by the ECN, which mandates that Member States ensure the possibility of naturalisation of persons lawfully and habitually resident on their territory.[87] Even though the Explanatory Report of the Convention states that the right to citizenship does not diminish the sovereign discretion of States, the actual shift introduced by the Convention reveals a deeper transformation. While the Report highlights that the primary aim is to prevent statelessness, which is recognised as a rule of customary international law, [88] the Convention also reflects a growing understanding of naturalisation as more than a discretionary act.

This shift reflects the evolving understanding of naturalisation, transforming it from a discretionary *favour* into a recognized *right.* Political theorist Benhabib supports this view, arguing that: *"Would be objectionable from a moral point of view is the absence of any procedure or possibility for foreigners and resident aliens to become citizens at all; that is, if naturalisation were not permitted at all, or if it were restricted on the basis of religious, ethnic, racial, and sexual preference grounds, this would violate the human right to membership."*[89]

For decades, the right to belong to a community has been regarded as fundamental, often

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[83] Gijsbert Oonk, 'Sport and Nationality: Towards Thick and Thin Forms of Citizenship' (2022) 24 National Identities 199; Siobhán Mullally, 'Defining The Limits of Citizenship: Family Life, Immigration and "Non-Nationals" In Irish Law' (2004) 39 Irish Jurist 335-336.

[84] That is any mode of acquisition after birth of a citizenship not previously held by the target person that requires an application by this person or their legal agent as well as an act of granting citizenship by a public authority. *Naturalisation* <https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/naturalisation_en> accessed 11 November 2024.

[85] Shachar (n 80) 113.

[86] Convention Relating to the Status of Refugees 1951 (UNTS 189).

[87] *"Article 6 § 3: Each State Party shall provide in its internal law for the possibility of naturalisation of persons lawfully and habitually resident on its territory. In establishing the conditions for naturalisation, it shall not provide for a period of residence exceeding ten years before the lodging of an application."* European Convention on Nationality.

[88] 'Explanatory Report to the European Convention on Nationality' (1997) 166, 7-8 <https://rm.coe.int/16800ccde7> accessed 10 November 2024.

[89] Spiro (n 5) 723; Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge University Press 2004) 141 <https://www.cambridge.org/core/product/identifier/9780511790799/type/book> accessed 6 November 2024.

termed the *right to have rights* and the *sine qua non* of various basic rights. [90] Belonging is often shaped by factors beyond the legal frameworks of citizenship or residency and is influenced by what have been called *identity-infused* definitions of inclusion and exclusion.[91] Together, these levels help to construct and reinforce the boundaries of political communities, defining who is accepted as a member and who is not. This interplay between legal status and social belonging is particularly evident in citizenship frameworks.

A critical manifestation of this interplay arises in systems that differentiate between birthright citizens and those acquiring citizenship through naturalisation, creating a hierarchical or two-tiered citizenship structure evident across multiple jurisdictions. For instance, in France, under Article 25 § 1 of the French Civil Code, citizenship revocation explicitly targets only those individuals who became citizens through naturalisation. According to this provision, denaturalisation can only occur if the acts were committed before the acquisition of French citizenship or within a period of ten years following it. In cases of particularly grave crimes, such as those outlined in Article 25 § 1, this time frame is extended to fifteen years.[92]

Ireland similarly distinguishes naturalised citizens from birthright citizens in terms of the security of their citizenship. Under Section 19 of the Irish Nationality and Citizenship Act 1956, the Minister for Justice has the discretion to revoke a certificate of naturalisation if satisfied certain conditions are met, creating a distinct vulnerability for naturalised citizens.[93] Within this system, certain individuals enjoy secure citizenship, while others face the risk of having their citizenship revoked.[94] This practice raises concerns of discrimination, as it differentiates between citizens based on how they acquired their status.

The power to revoke the citizenship of naturalised citizens is inherently discriminatory, as it is a law which targets only certain categories of citizens. Additionally, the requirement for naturalised Irish citizens residing abroad to file an annual "Declaration of Intention" to retain their citizenship raises significant concerns about whether this practice constitutes

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[90] Hannah Arendt, *The Origins of Totalitarianism* (New ed with added pref, Harcourt Brace Jovanovich 1973) 298-299; Matthew J Gibney, 'Should Citizenship Be Conditional? The Ethics of Denationalization' (2013) 75 The Journal of Politics 646, 651.

[91] Yuval-Davis offers a framework for understanding belonging at three levels: (1) Social locations (including race, gender, and birthplace), (2) emotional and identity-based aspects (such as language, culture, and sometimes religion), (3) and values connected to ethics and politics, like democracy and human rights. Maurer (n 81) 10; Nira Yuval-Davis, 'Belonging and the Politics of Belonging' (2006) 40 Patterns of Prejudice 197.

[92] Code Civil 2016.

[93] *"Article 19 § 1: The Minister may revoke a certificate of naturalisation if he is satisfied—(a) that the issue of the certificate was procured by fraud, misrepresentation whether innocent or fraudulent, or concealment of material facts or circumstances, or (b) that the person to whom it was granted has, by any overt act, shown himself to have failed in his duty of fidelity to the nation and loyalty to the State, or (c)...., or (d) that the person to whom it is granted is also, under the law of a country at war with the State, a citizen of that country, or (e) that the person to whom it is granted has by any voluntary act other than marriage acquired another citizenship."* Irish Nationality and Citizenship Act 1956.

[94] Joint Submission, 'Universal Periodic Review' (The Immigrant Council of Ireland (Immigrant Council), European Network on Statelessness (ENS), and Institute on Statelessness and Inclusion (ISI) 2021) Review 39th Session 11-12 <https://www.statelessness.eu/sites/default/files/2022-11/ENS-UPR_39_Submission_Ireland.pdf> accessed 11 November 2024.

unequal and discriminatory treatment.[95] This legal approach fosters the marginalization of naturalised citizens, creating a reality in which a naturalised citizen may acquire Irish citizenship but, as Otukoya states, is never fully recognised as *"genuinely Irish."*[96]

International human rights law, such as ICCPR, emphasizes equal protection under the law without discrimination. Article 26 states that, *"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*[97] This provision provides grounds for legal challenges against the unequal treatment of naturalised citizens. However, in practice, naturalised citizens are particularly at risk, as there are no explicit safeguards to prevent the revocation of their citizenship from resulting in statelessness,[98] leaving them exposed to legal and social disenfranchisement.

Beyond citizenship revocation, Irish law permits the refusal or cancellation of passports, such as when a child born in Ireland doesn't qualify for citizenship due to their parent's status. While an appeal process exists, there are no safeguards to prevent statelessness during this period. Ireland's approach should align with CRC, emphasizing the child's right to citizenship, the best interests of the child, and non-discrimination. Compared to international standards, including the Principles on Deprivation of Nationality, Irish law lacks sufficient protections against statelessness and disproportionately affects naturalised citizens, often from minority backgrounds.[99] The distinction between birthright and naturalised citizens becomes even more evident, particularly when considering the additional requirements placed on naturalised citizens.[100]

On the one hand, unlike birthright citizens, naturalised individuals undergo a thorough evaluation process, including background checks and an oath of allegiance, sometimes even relinquishing their original citizenship. This act of dedication is a more deliberate choice compared to birthright citizens, who inherit their citizenship without any comparable commitment. Consequently, naturalised citizens are more vulnerable to revocation, highlighting the inequities between the two groups. Their commitment appears more substantial, as they

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[95] Doyle (n 6); *"Article 19 § 1—(c) that (except in the case of a certificate of naturalisation which is issued to a person of Irish descent or associations) the person to whom it is granted has been ordinarily resident outside Ireland (otherwise than in the public service) for a continuous period of seven years and without reasonable excuse has not during that period registered annually in the prescribed manner his name and a declaration of his intention to retain Irish citizenship with an Irish diplomatic mission or consular office or with the Minister."* Irish Nationality and Citizenship Act 1956.

[96] Bashir Otukoya, 'Bheith Éireannach (Becoming Irish): Privilege or Right' (2016) 27 Irish Studies in International Affairs 57, 70.

[97] International Covenant on Civil and Political Rights 1966 (999).

[98] 'Joint Submission Universal Periodic Review' (n 94) 11-12.

[99] ibid 1-13.

[100] In Ireland, historically a land of emigration, debates around immigration and citizenship did not become central to political discussions until more recent years. Mullally, 'Defining The Limits of Citizenship: Family Life, Immigration and "Non-Nationals" In Irish Law' (n 83) 336.

make life-altering choices that birthright citizens do not face.[101]

The issue of revoking citizenship for naturalised individuals becomes even more critical in the context of evolving global trends, where counter-terrorism and security measures increasingly blur the lines between administrative actions and punitive revocations. In exploring the punitive nature of citizenship revocation, Sandra Mantu argues that *"we are actually witnessing a new way of conceptualising state power whereby depriving individuals of their citizenship status is a form of penal sanction to be applied to citizens in response to perceived crimes against public security by act or by association."*[102] This perspective highlights the shift in how States exercise authority over individuals, framing citizenship revocation not merely as an administrative measure but as a punitive response with significant consequences for the individual concerned.

On the other hand, disregarding the international non-punishment principle may result in additional grave human rights violations.[103] The past two decades have seen a convergence of counter-terrorism laws, immigration policies, and citizenship regulations. Countries like Canada, Australia, the UK, and several European nations have enacted or are considering laws that allow for citizenship revocation based on suspicions of terrorism.[104] Such developments amplify the existing disparities, further entrenching a system where certain citizens remain at risk of losing their status, reflecting broader debates around national security and human rights.[105]

## 4.2. COMPARATIVE CASE LAW IN CITIZENSHIP REVOCATION

While international law permits the revocation of citizenship under very limited circumstances, its use in addressing national security concerns, particularly in cases involving individuals detained in Syria, has sparked significant debate.[106] Shamima Begum (SM), for instance, left her home country of the UK as a teenager to join ISIS in Syria and was later

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[101] Shachar (n 79) 374.

[102] Sandra Mantu, 'Citizenship in Times of Terror: Citizenship Deprivation in the UK' [2015] Centre for Migration Law Faculty of Law Radboud University Nijmegen, 5 <https://repository.ubn.ru.nl/bitstream/handle/2066/143370/143370.pdf?sequence=1&isAllowed=y> accessed 26 November 2024.

[103] Siobhán Mullally, 'Implementation of the Non-Punishment Principle' (United Nations General Assembly 2021) A/HRC/47/34 3 <https://documents.un.org/doc/undoc/gen/g21/108/00/pdf/g2110800.pdf> accessed 9 December 2024.

[104] Zahra Babar, 'The "Enemy Within": Citizenship-Stripping in the Post–Arab Spring GCC' (2017) 71 The Middle East Journal 528.

[105] Historically, Western democracies restricted the withdrawal of citizenship to naturalised individuals, treating it as an administrative measure for cases like fraudulent acquisition. T Alexander Aleinikoff, 'Theories of Loss of Citizenship' (1986) 84 Michigan Law Review 1471-1503; According to Craig Forcese, those proceedings were mired in court battles, not least because the grounds for revocation were limited to fraud—or more precisely, to obtaining citizenship by *"false representation or fraud or by knowingly concealing material circumstances."* Craig Forcese, 'A Tale of Two Citizenships: Citizenship Revocation for "Traitors and Terrorists"' [2013] SSRN Electronic Journal 553.

[106] von Rütte (n 8) 287; Tanya Mehra, 'Deprivation of Nationality after a Terrorist Conviction: The Uncomfortable Truth' *The International Centre for Counter-Terrorism* (5 April 2024) <https://www.icct.nl/publication/deprivation-nationality-after-terrorist-conviction-uncomfortable-truth> accessed 14 November 2024.

revoked of her British citizenship in the interest of national security.[107] One of the central and most debated aspects of SM's defence is the assertion that she was a victim of human trafficking.

As a minor at the time, she was allegedly groomed or coerced by ISIS recruiters, who persuaded her and two other girls of similar age to leave the UK and travel to Syria. Upon her arrival, she was swiftly married, which her legal representatives argue is clear evidence that she was trafficked for the purposes of sexual exploitation and domestic servitude. In her appeal, SM's lawyers placed significant emphasis on this trafficking claim. Importantly, the Special Immigration Appeals Commission (SIAC) recognised that there were credible grounds to suspect she had indeed been trafficked to Syria.[108]

According to both international standards and domestic UK policy, such circumstances should prompt protection and support rather than punishment. Nevertheless, SIAC ultimately held that the trafficking concerns did not override national security considerations. The tribunal concluded that, even if she had been subjected to exploitation, the Home Secretary had the legal authority to prioritise her classification as a security threat.[109] These objections highlight broader issues, as the debate over citizenship revocation remains deeply intertwined with the so-called *war on terror*, national security priorities, and the adoption of increasingly strict immigration and denaturalisation policies.[110]

UN experts have raised concerns about the decision to revoke SM's citizenship, highlighting her vulnerability as a potential victim of trafficking and calling for the UK Government to reconsider its approach. They emphasized the importance of ensuring protections for individuals at risk, particularly in cases involving trafficking. They stressed that, *"under international, European and UK law, any supposed question of consent or voluntariness, or use of force, deception or coercion is irrelevant, where the victim of trafficking is a child."*[111]Additionally, revocation policies do not guarantee protection against other forms of exploitation, such as sexual exploitation, which could affect men as well as women.

The case of Ali Charaf Damache (ACD) in Ireland similarly underscores the complexities of citizenship revocation in the context of national security. ACD, a naturalised Irish

[107] The Court of Appeal concluded that the decision to revoke SM of her British citizenship was not unlawful. As a result, SM's appeal from the decision of the Special Immigration Appeals Commission (SIAC) was dismissed. Begum v The Secretary of State for The Home Department Civ 152 (The Court of Appeal, 23.02.2024).

[108] Vebi Levni and Nicole Cumiskey, 'Revocation of Shamima Begum's Citizenship: What Happened and What Comes Next?' (*Irish Centre for Human Rights*, 24 April 2025) <https://ichrgalway.org/2025/04/24/revocation-of-shamima-begums-citizenship-what-happened-and-what-comes-next/> accessed 12 June 2025.

[109] ibid.

[110] Shai Lavi, 'Citizenship Revocation as Punishment: On the Modern Duties of Citizens and Their Criminal Breach' (2011) 61 University of Toronto Law Journal 784.

[111] 'UN Experts Deplore Continuing Failures of Protection for Shamima Begum' (Human Rights Office of the High Commissioner 2024) <https://www.ohchr.org/en/press-releases/2024/03/un-experts-deplore-continuing-failures-protection-shamima-begum> accessed 29 November 2024.

citizen who also holds Algerian citizenship,[112] was implicated in terrorism-related activities, leading to legal proceedings and his subsequent conviction.[113] Following these events, the Irish Minister for Justice sought to revoke his Irish citizenship under Article 19 of the Act of 1956. Nonetheless, the Supreme Court of Ireland struck down the revocation process,[114] ruling that it failed to meet the *high standards of natural justice* required for such a significant decision.

The Court declared that the existing law governing the revocation of citizenship was unconstitutional on the grounds of natural justice, citing insufficient safeguards. It held that any revocation process must adhere to fair procedures and incorporate adequate protections to safeguard the rights of individuals facing the loss of citizenship. The Court emphasized that the procedure for revoking someone of their citizenship must meet minimum procedural standards to align with the State's human rights obligations. Consequently, procedural safeguards are necessary to prevent individuals from becoming stateless if their naturalisation certificate is revoked.[115]

In ACD case, the Irish Human Rights and Equality Commission (IHREC) intervened as *amicus curiae*, emphasizing the importance of procedural fairness and judicial oversight to prevent executive overreach. The IHREC warned that revoking citizenship without robust safeguards could violate fundamental rights and set a dangerous precedent.[116] This reflects broader international concerns regarding the use of citizenship stripping as a counter-terrorism measure, which is often criticized for undermining due process and fundamental human rights.

The principle of legal proportionality plays a central role in cases concerning the revocation of citizenship as a counter-terrorism measure. To satisfy this standard, any measure resulting in the loss of citizenship must pursue a legitimate aim in line with the objectives of international human rights law and must represent the least intrusive means available to

[112] According to Article 22 of the Algerian Citizenship Code, any individual's citizenship may be revoked. This broad scope raises significant concerns when considered alongside the views of UN experts, particularly in cases where revocation risks rendering individuals stateless. If Ireland had revoked ACD's citizenship, he could also lose his Algerian citizenship under Article 22, which permits revocation for acts deemed harmful to State interests. This could leave him stateless, raising significant human rights challenges, as statelessness often results in the loss of fundamental protections under international law. Algerian Citizenship Code 1970 [Decree no. 70-86].

[113] Damache v Minister for Justice IEHC 444 (The High Court, 31.05.2019)

[114] The new Bill is signed by the Irish President on 23 July 2024, with several concerns. These include restrictive timeframes for naturalised citizens to respond to revocation notices (as little as 28 days under Sections 19(IC) and (IJ), limitations on the method of serving such notices, and doubts about the independence of the Committee of Inquiry, whose procedures will be determined by the Minister. Furthermore, the Bill permits withholding reasons for revocation when national security is invoked (Section 19(1O) which further compromises transparency and procedural fairness. Courts, Civil Law, Criminal Law and Superannuation (Miscellaneous Provisions) Act 2024 <https://www.oireachtas.ie/en/bills/bill/2024/48> accessed 7 November 2024.

[115] Damache v Minister for Justice IESC 6 (The Supreme Court, 10.02.2021).

[116] 'Outline Submissions in Respect of the Final Orders of the Supreme Court' <https://www.ihrec.ie//app/uploads/2021/01/Damache-v-MJE-ors-2019-141-IHREC-Submissions-FINAL-111220_310243.pdf> accessed 13 November 2024.

achieve that aim.[117] This ensures that state actions remain balanced and do not exceed what is necessary in a democratic society.

Indeed, there is no explicit safeguard in Irish legislation to prevent statelessness in cases where an individual's certificate of naturalisation is revoked. In 2022, the UNHCR recommended amending citizenship revocation laws to include protections against statelessness in individual cases.[118] Nevertheless, these recommendations were not incorporated into the revised legislation. The Minister for Justice stated during the debate that statelessness could be considered in revocation decisions should such a scenario arise. This has raised concerns for the Immigrant Council of Ireland, particularly due to the lack of a formal statelessness determination procedure in Ireland.[119]

There are also particular risks of creating de facto statelessness, which raises significant concerns under international human rights law. For dual citizens, evaluating the genuine nexus to their country of origin is crucial; revocation without substantive ties to another State can leave individuals vulnerable to legal limbo,[120] undermining the obligation to prevent and reduce statelessness. This is crucial to ensuring that all citizens—whether by birth or naturalisation—are afforded equal dignity and protection under the law.

Last but not least, the principle of non-refoulement prohibits deporting individuals to countries where they may face persecution, torture, or other serious harm.[121] Revoking citizenship in such cases could pave the way for deportation to jurisdictions with severe irreversible human rights violations, including the death penalty,[122] violating international law and compromising Ireland's role as a protector of fundamental human rights.[123]

This practice erodes the universality of citizenship, reducing it from a protected right to a revocable privilege. Judicial interpretations of citizenship revocation reflect this divide. The Irish Supreme Court declared citizenship revocation unconstitutional in the ACD case. Conversely, the ECtHR unanimously upheld Denmark's decision to revoke the citizenship

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[117] Fionnuala Ní Aoláin, 'The Human Rights Consequences of Citizenship Stripping in the Context of Counter-Terrorism with a Particular Application to North-East Syria' (The United Nations Special Rapporteur on Counter-Terrorism and Human Rights 2022) 13 <https://www.ohchr.org/sites/default/files/documents/issues/terrorism/sr/Final-Report-Deprivation-Citizenship.pdf> accessed 13 November 2024.

[118] Filippo Grandi, 'Mapping Statelessness in Ireland' (The UN Refugee Agency 2022) 7 <https://www.unhcr.org/ie/sites/en-ie/files/2023-05/2022_Statelesseness_Ireland-print%20%282%29.pdf> accessed 13 November 2024.

[119] 'Seanad Éireann Debate' (17 July 2024) <https://www.oireachtas.ie/en/debates/debate/seanad/2024-07-17/22/> accessed 13 November 2024; 'To Members of Seanad Éireann' <https://www.iccl.ie/wp-content/uploads/2024/07/240716-ICCL-Letter-to-Senators-on-Revocation-of-Citizenship-.pdf> accessed 13 November 2024.

[120] 'Statelessness' *Immigrant Council of Ireland* <https://www.immigrantcouncil.ie/campaign/statelessness> accessed 17 November 2024.

[121] 'The Principle of Non-Refoulement under International Human Rights Law' <https://migrationnetwork.un.org/resources/principle-non-refoulement-under-international-human-rights-law> accessed 22 November 2024.

[122] 'The Death Penalty in Law and Practice Algeria' *Together Against the Death Penalty* (2023) <https://www.ecpm.org/app/uploads/2022/10/flyer-ALGERIE-GB-171022-MD.pdf> accessed 17 November 2024.

[123] Ireland presents itself as a strong supporter of international human rights and upholds a liberal tradition grounded in the protection of individual rights. Mullally, 'Defining The Limits of Citizenship: Family Life, Immigration and "Non-Nationals" In Irish Law' (n 83) 334.

of a dual national involved in counter-terrorism activities and to ban him from re-entering Denmark, even though he had children residing in the country.[124]

The revocation was based on Section 8B § 1 of the Danish Nationality Act, which permits the deprivation of nationality for dual citizens convicted of terrorism-related offences.[125] Although Johansen held Tunisian citizenship, his ties to Tunisia were limited to brief visits and some cultural familiarity. Nevertheless, the ECtHR found no violation of Article 8 of the ECHR, accepting that the Danish authorities had conducted an adequate and proportionate review of the case.[126]

While the Court acknowledged Johansen's attachment to Denmark, it held that his connection to Tunisia was not "insignificant," despite being largely symbolic. This decision has been widely criticised for contributing to the legal ambiguity surrounding the threshold of connection to another state that would render revocation disproportionate.[127] As the Court continues to afford States a wide margin of appreciation in terrorism-related cases,[128] Johansen exemplifies a growing jurisprudence that, despite its reference to proportionality and human rights safeguards, offers limited substantive protection against the revocation of citizenship.

Well-established case-law underscores the importance of a genuine nexus between the individual and the States.[129] When an individual's actions fundamentally betray this nexus, the erosion of mutual bonds could, in limited circumstances, justify the loss of citizenship. Nonetheless, any decision to revoke citizenship must be accompanied by rigorous procedural safeguards, clear adherence to human rights norms, and thorough judicial oversight to ensure it remains an exceptional measure, strictly proportionate to the nature and severity of the individual's breach of loyalty.

Punitive measures like citizenship revocation risks exacerbating security threats rather than addressing them. Stripping individuals of their citizenship can lead to alienation and resentment, potentially fostering further radicalization and strengthening ties to extremist networks.[130] Instead, effective counter-terrorism strategies should prioritize accountability through judicial processes, ensuring that perpetrators are held responsible within the framework of the rule of law, rather than displacing the problem through exclusion.

In this context, national and regional courts must critically assess the legal frameworks

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[124] Johansen v Denmark App no 27801/19 (ECtHR, 01.02.2022).

[125] Article 8B. (1). *"A person convicted of violation of one or more provisions of Parts 12 and 13 of the Criminal Code may be deprived of his or her Danish nationality by court order unless this will make the person concerned stateless."* Consolidated Act on Danish Nationality 2004 (Act No 422).

[126] Christian Prener, 'The ECtHR on Citizenship Revocation: Solving or Compounding the Confusion?' (*Global Citizenship Observatory*, 29 March 2022) <https://globalcit.eu/the-ecthr-on-citizenship-revocation-solving-or-compounding-the-confusion/> accessed 13 June 2025.

[127] ibid.

[128] Ghoumid and others v France App no 52273/16 (ECtHR, 25.09.2020).

[129] *Nottebohm Case* Liechtenstein v Guatemala no 18 (ICJ, 06.04.1955).

[130] Many stakeholders interviewed for the Tanya's study in the Netherlands expressed their concern that revocation of citizenship is counter-productive and can lead to re-engaging with radical networks. Mehra (n 106).

governing citizenship revocation and the treatment of naturalised citizens to ensure alignment with international standards. This is necessary to uphold the principles of equality and non-discrimination, guaranteeing that all citizens, whether by birth or through naturalisation, are treated with equal dignity and legal protection.[131] Revocation of citizenship should be handled as a judicial matter rather than an administrative one, incorporating procedural safeguards and respecting the requirements of natural justice.[132]

## 5. CONCLUSION

The case law demonstrates the tensions inherent in balancing national security with individual rights, particularly within the context of citizenship revocation. These tensions span both scholarly debates and judicial decisions across jurisdictions, underscoring the lack of consensus on the issue. Lavi argues that revocation, as an inherently political act, should serve as a punitive response to political crimes, such as terrorism.[133] According to this view, individuals who commit politically motivated violence effectively renounce their citizenship by violating the constitutional bond that sustains the state's self-governance.[134]

In contrast citizenship scholar, Gibney warns that citizenship revocation, even in cases of terrorism, conflicts with fundamental human rights principles. He argues that using revocation as a tool to punish or protect the State risks creating a hierarchy of citizenship, where naturalised individuals are disproportionately vulnerable. [135] Macklin also warns that such measures pose significant human rights risks, particularly when they result in statelessness. She argues that revocation undermines the core value of citizenship and breaches international norms protecting the right to citizenship.[136]

While this article has demonstrated that revocation of citizenship may result in grave consequences, including statelessness and *erga omnes* breaches of *jus cogens* norms, it may be overly simplistic or idealistic to advocate that the practice is entirely unlawful or unconstitutional in the contemporary complex global landscape. PCIJ established early on that citizenship matters fall primarily within the sovereign jurisdiction of States, affirming each

[131] Prime Minister Justin Trudeau emphasized that making citizenship conditional for certain individuals undermines the value of citizenship for all Canadians. It can be suggested that Ireland adopt a similar perspective in its approach to citizenship policies. Vice News, '"A Canadian is a Canadian": Liberal Leader Says Terrorists Should Keep Their Citizenship' (28 September 2015) <https://www.vice.com/en/article/7xaxby/a-canadian-is-a-canadian-liberal-leader-says-terrorists-should-keep-their-citizenship> accessed 03 December 2024.

[132] Given the significance of citizenship to an individual, the process for its revocation must be thorough and robust. In line with Resolution 32/5 of the Human Rights Council, endorsed by the UN General Assembly in July 2016, the procedure must observe minimum procedural standards in order to comply with the States human rights obligations. This necessitates the involvement of an independent and impartial decision-maker. 'Ireland - Damache v Minister for Justice' <https://caselaw.statelessness.eu/caselaw/ireland-damache-v-minister-justice> accessed 27 November 2024.

[133] Shai Lavi, 'Citizenship Revocation as Punishment: On the Modern Duties of Citizens and Their Criminal Breach' (2011) 61 University of Toronto Law Journal 805-808.

[134] Babar (n 104) 529.

[135] Matthew J Gibney, 'Should Citizenship Be Conditional? The Ethics of Denationalization' (2013) 75 The Journal of Politics 646-657.

[136] Macklin (n 78) 50-51.

States inherent right to determine its citizens. The well-established Nottebohm case also underscores the importance of a genuine nexus between the individual and the State, illustrates that State discretion in matters of citizenship retains legal and normative weight within the current global framework.

Together, these principles demonstrate that State authority over citizenship retains legal weight, even amid growing human rights scrutiny in the global landscape. As a result, in exceptional cases such as individuals who lead organisations responsible for mass atrocities or serious human rights violations, international law may justify revocation. In these circumstances the principle of proportionality may support revocation as a rare and extraordinary measure if it serves the legitimate aim of protecting public safety.

As stated by the United Nations Special Rapporteur on Counter-Terrorism and Human Rights Ní Aoláin, for the revocation of citizenship to be proportionate, measures must serve a legitimate purpose consistent with the objectives of international human rights law and be the least intrusive means necessary to achieve the aim pursued by the State.

Effective counter-terrorism measures must prioritize accountability over the exclusion of individuals from communities. States must prosecute individuals within the rule of law framework, ensuring fair trials and adherence to justice principles. Administrative revocation procedures undermine procedural safeguards and erode public trust in legal systems. Instead, decisions about citizenship revocation must be firmly rooted in judicial processes that uphold natural justice, proportionality, and international human rights standards.

However, any discussion of the lawfulness or legitimacy of citizenship revocation must also confront the discriminatory practices often embedded in its application. In many jurisdictions, revocation powers disproportionately target naturalised citizens, while birthright citizens are largely shielded from similar measures. This disparity undermines the principle of equality before the law and reinforces a two-tiered system of citizenship. Unlike birthright citizens, naturalised individuals undergo a thorough evaluation process, including background checks and an oath of allegiance, and are often required to relinquish their original citizenship.

This act reflects a deliberate and legally conscious decision to join a new political community—one that arguably demonstrates a deeper level of commitment than the unexamined inheritance of citizenship at birth. Yet despite fulfilling legal obligations and often showing strong integration, naturalised immigrants remain more vulnerable to the loss of status. Such differentiation risks normalising a hierarchy of citizenship that is fundamentally incompatible with international human rights standards.

On the other hand, the traditional genuine nexus between citizenship and State sovereignty demands reassessment considering contemporary challenges. As Doyle quoted, sovereignty is no longer an absolute authority but a concept that must be balanced with human rights principles like equality. A global approach, wherein States voluntarily cede sovereign powers over citizenship to a transnational entity, could offer a transformative solution.

The establishment of a transnational framework under the United Nations or another international body to oversee denaturalisation policies would ensure alignment with global

human rights norms. Such a system could either suspend or entirely prohibit citizenship revocation through binding international regulations. This approach would address critical issues such as statelessness and fundamental human rights violations while advancing a more equitable global standard for citizenship.

A transnational system that treats citizenship as an inseparable part of human rights would not only protect individuals but also establish the foundation for a more just and inclusive global order. This framework, which is very significant for immigrants who acquire their citizenship through naturalisation, would guarantee the fundamental rights of individuals, irrespective of whether citizenship is acquired by birth or through naturalisation, ensuring uniform protections for all.

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