

WORKING PAPERS

Exploring Counterterrorism Effectiveness and Human Rights Law

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KEY MESSAGES

The continuing expansion of counterterrorism has had a significant impact on human rights. However, whether such measures achieve their goals is often unclear, and their design is rarely empirically informed. In turn, counterterrorism effectiveness has failed to secure its place in the discussion of justifiability of rights' limitations for national security purposes. This paper aims to bridge this gap and stimulate discussion on the effectiveness of counterterrorism measures among the academic, human rights, and policy-making communities.

There is a wide-ranging array of counterterrorism practices adopted in Europe. One common feature they often exhibit is the asymmetry between the certainty of their impact on rights and the uncertainty of the security gains they produce. While some government-mandated review mechanisms exist, their engagement with matters of effectiveness is often limited. Comprehensive and high-quality evaluations are rare, hindering a thorough assessment of measures' effectiveness and impact. This demonstrates a puzzling gap between governments' willingness to embrace counterterrorism and their efforts to scrutinise and disclose such measures' results.

Within the field of social sciences, research on counterterrorism effectiveness remains underdeveloped compared to the substantial scholarship produced annually on radicalisation, violent extremism, and terrorism. Challenges in evaluating counterterrorism effectiveness are multifaceted, including definitional uncertainties, methodological issues, and conceptual ambiguities within the domains of counterterrorism and radicalisation. The lack of a universally accepted definition of 'effectiveness' related to counterterrorism hampers clear operationalization and mutual understanding among stakeholders. Ambiguities surrounding concepts like 'radicalisation' and 'terrorism' further complicate evaluations. Current research predominantly emphasizes quantifiable outcomes, such as the reduction of terrorist activity, yet often overlooks the broader implications of counterterrorism efforts, which include psychological effects and impacts on human rights. Addressing these gaps necessitates further research and theoretical innovation within the sphere of counterterrorism effectiveness.

Building on the recognised need for further exploration and theoretical advancement in counterterrorism effectiveness, our analysis illuminates certain areas necessitating additional research. Among these areas is the under-explored domain of psychological effects, which may be both deliberate, such as cultivating a sense of security, and inadvertent, including the incitement of fear within specific communities. Despite the contentious nature of these effects, it remains uncertain whether and how they should be integrated into evaluations of effectiveness. Further, there is a call for expanding the breadth of decision-making models to encapsulate not only 'effectiveness' in its strictest sense but also factors such as societal impacts, implications for human rights, and interactions with other policies. Our proposal for a standardised, multifaceted decision-making model strives to foster a cohesive understanding of effectiveness among various stakeholders.

Lastly, we advocate for a shift in data collection and effectiveness measurement techniques, suggesting a departure from purely quantitative metrics towards adopting qualitative and innovative methods.

One key question addressed in this paper is the role that effectiveness of counterterrorism measures can play in the analysis of such measures' justifiability in restricting the exercise of 'limitable' rights under human rights law. A concept central to such analysis is the 'proportionality test' – a doctrinal construction that consists of several sequential questions that is used to assess the justifiability of rights' restrictions. Although typically downplayed in the academic literature, it is the 'suitability' or 'rational connection' test that can be beneficial in addressing the effectiveness of national security measures. To demonstrate this, the paper draws on the judicial reasoning by the UK Supreme Court in *Bank Mellat* as well as the engagement of the Israeli Supreme Court with the practice of house demolitions.

The paper then discusses the relevant case law and the approach of the European Court of Human Rights towards engaging with effectiveness of rights' limiting measures in national security contexts. The cases surveyed demonstrate the dynamics in the Court's reasonings created by claims about and evidence of effectiveness of rights' limiting measures. The decisions display a variety of approaches indicating the instability in the Court's accounting for the effectiveness of such measures, with their capacity to achieve the aims being neither central nor foreign to the Court's engagement with them. In addressing the factors contributing to such position of effectiveness in Court's adjudicatory practices, the paper highlights the possible inadequacy of the Court's approach towards the proportionality test it adopts. Indeed, in lacking a coherent 'rational connection' subtest, the Court's approach is not capable of systematically engaging with the question of effectiveness.

The concluding section of this paper clarifies the implications of the preceding discussion by highlighting how greater engagement with counterterrorism effectiveness in judicial review interacts with restraints of judicial deference. Indeed, judicial review alone should not be taken to overcome the existing barriers in counterterrorism review. Still, the improvement of the courts' capacity to appropriately engage with effectiveness requires the participation of various stakeholders. The paper concludes by outlining some of the forms of such participation that are needed, as well as by highlighting the steps that would bring improvements to non-judicial counterterrorism review.

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“While all [the challenges facing researchers] are compelling, the values of democratic governance, which include accountability, legitimacy, legality, safety, and cost-effectiveness of government actions, necessitate the development of a more evidence-based approach to programs and interventions, whether they focus on ‘everyday’ crime or terroristic violence.”¹

INTRODUCTION

Over the past two decades, the sweeping growth of counterterrorism legislation and policies has extensively impacted human rights. What often remains unclear, however, is whether implemented counterterrorism measures achieve their intended goals. Indeed, the legislative responses to terrorism, and debates about their adequacy and lawfulness, are rarely empirically informed. Moreover, initiatives to measure effectiveness have largely failed to integrate the important insights produced by social science research, including the drivers of violent extremism and how these might be addressed through policy and programs. Indeed, this chasm between the fields of international law and the social sciences has hindered progress in finding effective and human rights-compliant solutions.

Another curiosity — given the breadth of publications in every conceivably related discipline (e.g., international relations, the social sciences, international law, the humanities) — is that few scholars have sought to measure counterterrorism effectiveness with a view to improving legal and policy decision-making. Drawing on legal-empirical research being undertaken at the University of Geneva, this paper aims to close some of these gaps and stimulate debate around the effectiveness of counterterrorism measures across the academic, human rights, and policy-making communities. Many of the ideas presented emerged from an expert meeting held in collaboration with the Geneva Academy of International Humanitarian Law and Human Rights.² The meeting brought together leading international humanitarian and human rights legal scholars, social scientists, and practitioners to discuss legal, scientific, and practical aspects of counterterrorism measures, focusing on their effectiveness, unintended consequences and legality.

Section 1 provides a brief overview of counterterrorism measures adopted in Europe, and evidence of their (in)effectiveness and potentially harmful effects on human rights. The focus is on ‘limitable’ rights – rights that can be subject to restriction for the benefit of broader public interest, such as the right to freedom of expression, movement, privacy, and association. **Section 2** examines the challenges of assessing counterterrorism effectiveness and reviews previous studies that have attempted to evaluate effectiveness. For our discussion, we define ‘effectiveness’ as the ability of a counterterrorism policy or measure to produce its intended outcomes when implemented as intended.³ The paper then addresses some of the remaining gaps in the literature, such as (1) how the psychological effects of counterterrorism measures might be addressed, (2) the need for a multi-component approach to effectiveness, and (3) new approaches to measure and evaluate counterterrorism interventions. **Section 3** analyses the role of effectiveness in the contemporary adjudication of limitable rights. It begins with a brief discussion of the proportionality test. It then demonstrates how the proportionality test can accommodate the effectiveness of rights’ limiting measures in national security contexts. The following subsection focuses on the European Court of Human Rights (ECtHR) case law that engages the notion of effectiveness in counterterrorism and crime prevention. The final subsection discusses some factors contributing to the often-inadequate attention paid by the ECtHR to whether rights’ restricting measures can achieve their declared aims. **Section 4** concludes with a discussion of approaches that might better integrate considerations of effectiveness in counterterrorism review.

1. COUNTERTERRORISM IN EUROPE: AMBIGUOUS SECURITY GAINS FOR SIGNIFICANT IMPACTS ON RIGHTS

The first modern wave of counterterrorism legislation was initiated and shaped by the 9/11 attacks in the United States.⁴ In Europe, only a few States had counterterrorism legislation prior to the attacks. By some estimates, the EU

¹ Cynthia Lum and Leslie W Kennedy, ‘The Next Steps: A Need for a Research Infrastructure for Evaluating Counterterrorism’ in Cynthia Lum and Leslie W Kennedy (eds), *Evidence-Based Counterterrorism Policy* (Springer New York 2012) 367

² The meeting on the topic of ‘The Effectiveness and Legality of Counterterrorism Measures’ was held online on 11-12 November, 2020

³ We discuss the notion of effectiveness further in Ilya Sobol and Michael Moncrieff, ‘Evidence of Counterterrorism Effectiveness in Theory and Practice: Incremental Solutions for a Complex Problem’ (Working paper, 22 February 2023) at <https://papers.ssrn.com/abstract=4366895>

⁴ See e.g., Kent Roach, *The 9/11 Effect: Co active Counter-Terrorism* (Cambridge University Press 2011) 1-5; Human Rights Watch, *In the Name of Security: Counterterrorism Laws Worldwide since September 11* (Human Rights Watch 2012).

had adopted more than 200 separate measures by 2013.⁵ A second wave of legislation started around 2013-2014 as a response to ‘foreign fighters’ – individuals who travelled to conflict zones to join various armed groups,⁶ most notably the ‘Islamic State’. In 2016, Human Rights Watch estimated that at least 47 States had enacted new measures to address the problem.⁷ A comprehensive cataloguing of European States’ existing counterterrorism laws, however, is a difficult proposition. Some are adopted at the national level; some are enacted by the EU; others are adopted to comply with regional and international counterterrorism instruments or resolutions of the UN Security Council (UNSC).

As the body of counterterrorism measures grew so did their impact. Counterterrorism measures take different forms, and the interests they impact vary. We focus on measures that restrict the enjoyment of ‘limitable’ rights. Unlike ‘absolute’ rights (e.g., the prohibition of torture and other ill-treatment), limitable rights can be restricted in the public interest. This underscores the importance that rights-limiting measures are effective – they must achieve their intended outcomes for the restriction to be justified. To highlight the impact of counterterrorism measures on limitable rights, the following subsection offers examples of European counterterrorism practices that negatively impact limitable rights and discussions concerning their (in) effectiveness. The subsequent subsection addresses the role of effectiveness in some of the existing counterterrorism review mechanisms.

1.1. HUMAN RIGHTS IMPACTS OF COUNTERTERRORISM MEASURES

1.1.1 Freedom of movement

Administrative control orders have been frequently criticised for curtailing freedom of movement. Such orders include, for example, night curfews, restrictions on areas of residence or travel, contact prohibitions and police reporting obligations.⁸ They can be instituted against individuals irrespective of being suspected of, or charged with, a crime, and non-compliance attracts criminal liability. Albeit an extreme iteration, Swiss legislation allows for assigned residence — tantamount to house arrest — against persons deemed to be ‘potential terrorists’ by the federal police.⁹

Control orders impact not only individuals, but also their families.¹⁰ Evidence from the UK and France suggests that control orders adversely affect controlees’ mental health, damage their relationships with family members, and lead to prolonged unemployment. When they share the same residence, the family members of controlees have sometimes been surveilled, and certain restrictions (e.g., having visitors) can extend to them.¹¹

Efforts to examine the effectiveness of control orders are rare.¹² One example is the analysis of the (now defunct) regime of the control orders by the UK Independent Reviewer of Terrorism Legislation. Based on a secret government analysis made available to the Reviewer, the conclusion was that the measures fulfilled their primary function by preventing suspected terrorists from travelling internationally, facilitating the travel and training of others, and maintaining contacts with terrorist groups.¹³ However not all specific restrictions were effective, with some resulting in targeted individuals absconding.¹⁴ It was also unclear whether the ef-

5 Ben Hayes and Chris Jones, *Taking stock. The evolution, adoption, implementation and evaluation of EU counter-terrorism policy* in Fiona de Londras and Josephine Doody (eds), *The Impact, Legitimacy and Effectiveness of EU Counter-Terrorism* (Routledge 2015)

6 For a definition of ‘foreign terrorist fighters’ given by the United Nations Security Council, see United Nations Security Council, Resolution 2178 (24 September 2014) S/RES/2178

7 Human Rights Watch, *“Foreign Terrorist Fighter” Laws: Human Rights Rollbacks Under UN Security Council Resolution 2178* (Human Rights Watch 2016)

8 See e.g., Amnesty International, *Dangerously Disproportionate: The Ever-Expanding National Security State in Europe* (Amnesty International 2017) 48–53

9 Loi fédérale sur les mesures policières de lutte contre le terrorisme (MPT); for a discussion see e.g., Gloria Gaggioli and Ilya Sobol, ‘Counter-terrorism control orders come to Switzerland: is assigned residence for ‘potential terrorists’ compatible with art. 5 ECHR?’ (*EJIL: Talk!*, 6 June 2020) at <https://www.ejiltalk.org/counter-terrorism-control-orders-come-to-switzerland-is-assigned-residence-for-potential-terrorists-compatible-with-art-5-echr/>

10 There is also a contested question of the impact on the communities, see e.g., David Anderson, *Control Orders in 2011: Final Report of the Independent Reviewer on the Prevention of Terrorism Act 2005* (The Stationery Office 2012) 6.17–6.22

11 *ibid* 3.37–3.41; also see e.g., Joint Committee on Human Rights, *Post-Legislative Scrutiny: Terrorism Prevention and Investigation Measures Act 2011, Tenth Report of Session 2013–14* (23 January 2014) paras. 56–57; Victoria Brittain, ‘Besieged in Britain’ (2009) 50 *Race & Class* 1, 7–13; Amnesty International, *Punished with Trial: The Use of Administrative Control Measures in the Context of Counter-Terrorism in France* (Amnesty International 2018) 24–27

12 We discuss this further in Sobol and Moncrieff (n 3)

13 The report also stated that the measures were “for the most part successful in ensuring the major, moderate or minor disruption of a key national security target”, see Anderson (n 10) 73–74; also see Bret Walker, *Independent National Security Legislation Monitor – Declassified Annual Report, 20th December 2012* (Department of the Prime Minister and Cabinet 2013) 37–38

14 Anderson (n 10) 74

fects went beyond “temporary containment and disruption”, nor what specific restrictions were most effective: “[i]t is one thing to say that a bundle of restrictions had a preventative effect: quite another to attribute elements of that effect to individual restrictions”.¹⁵

Reviews of the measures that replaced the control orders — the Terrorism Prevention and Investigation Measures (TPIMs)¹⁶ highlighted that the restrictions could not simultaneously prevent and investigate, as prevention necessarily negates any need to investigate.¹⁷ They were, however, deemed likely to have been effective in disrupting terrorist activities.¹⁸ Moreover, “because a TPIM subject is considerably easier and cheaper to monitor than a person who is entirely free of constraint, TPIM notices were undoubtedly effective in releasing resources for use in relation to other pressing national security targets”.¹⁹ Importantly however, individuals being monitored were not being prosecuted “on the basis of evidence discovered during the currency of their TPIM notices, despite the authorities having every incentive to request the [Crown Prosecution Service] to do so”.²⁰

1.1.1 Freedom of expression

Limitations on freedom of expression imposed by counterterrorism legislation primarily involve prohibiting various terrorism-related speech.²¹ This includes broadening the offences of incitement of criminal acts to include ‘indirect’

incitement of terrorist violence – speech that justifies or glorifies terrorist acts.²² Other relevant instances include UK legislation criminalising the publication of images depicting an item of clothing or an article (e.g., a flag) “in such a way or in such circumstances as to arouse reasonable suspicion that the person is a member or supporter of a proscribed organisation”,²³ and streaming online or downloading “information of a kind likely to be useful to a person committing or preparing an act of terrorism”.²⁴ In France, a similar prohibition on “habitually accessing online public communication services that defend or induce the commission of terrorist acts” was struck down as unconstitutional.²⁵

It has been argued that offences of ‘indirect incitement’ may be counterproductive as their enforcement would alienate affected communities and create “a chilling effect in inhibiting constructive political, media and community debate on issues related to terrorism”.²⁶ The currently available evidence of impacts is limited to examples of disproportionate application.²⁷ While studies on their broader effects are scarce, one report found that counterterrorism restrictions on speech led to censorship in the arts, imposed not only by law enforcement, but also by art institutions and artists themselves.²⁸

1.1.3 Freedom of religion

A third example concerns counterterrorism measures that limit religious freedoms by closing places of worship, as

15 *ibid*

16 For details, see David Anderson, *Terrorism Prevention and Investigation Measures In 2012. First Report of The Independent Reviewer On The Operation of The Terrorism Prevention and Investigation Measures Act 2011* (The Stationary Office 2013); Helen Fenwick, ‘Terrorism and the Control Orders/TPIMs Saga: A Vindication of the Human Rights Act or a Manifestation of “Defensive Democracy”?’ (2017) Public Law 609

17 Anderson (n 16) 86

18 *ibid* 87

19 *ibid* 87; further on the debate regarding the effectiveness of TPIMs, see Jessie Blackburn, Fiona de Londras and Lydia Morgan, *Accountability and Review in the Counter-Terrorist State* (Bristol University Press 2020) 74–79

20 Anderson (n 16) 87

21 Amnesty International (n 8) 37–44

22 See e.g., Helen Duffy and Kate Pitcher, ‘Inciting Terrorism? Crimes of Expression and the Limits of the Law’ (2018) Grotius Centre Working Paper Series 2018/076-HRL; Martin Scheinin, ‘Limits to Freedom of Expression: Lessons from Counter-Terrorism’ in Tarlach McGonagle and Yvonne Donders (eds), *The United Nations and Freedom of Expression and Information* (Cambridge University Press 2015); Tufyal Choudhury, ‘The Terrorism Act 2006: Discouraging Terrorism’ in Ivan Hare and James Weinstein (eds), *Extreme Speech and Democracy* (Oxford University Press 2009); Craig Forcese and Kent Roach, ‘Terrorist Babble and the Limits of the Law: Assessing a Prospective Canadian Terrorism Glorification Offense’ (2015) TSAS Working Paper Series No. 15-02

23 Counter-Terrorism and Border Security Act 2019, s 2

24 *ibid* s 3

25 Conseil Constitutionnel, Decision no. 2016-611 QPC (10 February 2017)

26 International Commission of Jurists, *Briefing Paper: Amendment to the Framework Decision on Combating Terrorism – Provocation to Commit a Terrorist Offence* (International Commission of Jurists 2008) 2; Imran Awan, ‘Glorifying and Encouraging Terrorism: Preserving the Golden Thread of Civil Liberties in Britain’ (2012) 4 *Journal of Aggression, Conflict and Peace Research* 144

27 e.g., Duffy and Pitcher (n 22) 7–15

28 Jane Kilpatrick, *Counter-terrorism and the Arts: How counter-terrorism policies restrict the right to freedom of expression* (Transnational Institute 2020)

practised in Austria²⁹ and France. During the 2015-2017 state of emergency, 19 mosques were closed in France.³⁰ The power was extended beyond the emergency period by a law that allowed the executive, “for the sole purpose of preventing the commission of acts of terrorism”, to close a place of worship “in which the ideas or theories spread or the activities held provoke violence, hate or discrimination, or the commitment of acts of terrorism, or glorify such acts” for up to six months.³¹ Since the adoption of this law in November 2017, eight further mosques have been closed,³² one of which reopened.³³

In 2021, the “Law confirming respect for the principles of the Republic” extended the power beyond “the sole purpose of preventing the commission of acts of terrorism” in the same material circumstances but limited it to a maximum of two months.³⁴ One closure was announced in January 2022, with 99 mosques “suspected of separatism”, and 21 closed “due to administrative prescriptions, a court decision, a lease takeover, works or an administrative closure”.³⁵ The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism highlighted the danger of securitising certain religious practices, as well as instituting norms “that intentionally or unintentionally target individual adherents or groups of persons of a particular faith who are perceived to be predisposed to terrorist or other violent acts”.³⁶ She further noted that “the actions of an imam or congregants, related to activities in the mosque or wholly outside, are dispositive to dispro-

portionately affecting the rights of entire congregations”.³⁷

1.1.4 The right to privacy

Surveillance powers continue to expand, impacting the right to privacy.³⁸ In France, a 2015 law allows for “the use of mass surveillance tools that capture mobile phone calls and of black boxes in internet service providers that collect and analyse the personal data of millions of internet users (for the automatic detection of electronic communications that could indicate a ‘terrorist threat’)”.³⁹ It is widely held that mass surveillance measures carry over to curtail the enjoyment of other rights: individuals do not engage in legitimate activities because of their knowledge of being observed. Surveillance thus impacts not only the right to privacy but also the freedoms of expression, association, and assembly.⁴⁰ Murray and Fussey find, however, that the existence of this phenomenon has not been subject to much empirical scrutiny.⁴¹ Indeed, identifying such impacts is a complex matter due to challenges related to generalisability, discerning intentions, and establishing causality.⁴²

An even more complex question is whether mass surveillance delivers on its intended goals (i.e., whether it is effective). As a study undertaken in the context of the *SURVEILLE* project found “a significant body of knowledge regarding the effectiveness of surveillance technology does not exist”, and even in the case of CCTV, a widespread and developed practice, “systematic evaluations of its effectiveness are still

29 Deutsche Welle, ‘Austria closes Vienna mosque after deadly attack’ (Deutsche Welle, 6 November 2020) at <https://www.dw.com/en/austria-closes-vienna-mosque-after-deadly-attack/a-55523158>

30 Yaël Braun-Pivet, Éric Ciotti et Raphaël Gauvain, *Rapport fait au nom de la Commission des Lois Constitutionnelles, de la Législation et de l’Administration Générale de la République sur la mise en œuvre des articles 1er à 4 de la loi n° 2017-1510 du 30 octobre 2017 renforçant la sécurité intérieure et la lutte contre le terrorisme* (Assemblée Nationale, 16 décembre 2020) 29 at https://www.assemblee-nationale.fr/dyn/15/rapports/cion_lois/115b3700_rapport-information.pdf; also see Amnesty International, *Upturned Lives: the Disproportionate Impact of France’s State of Emergency* (Amnesty International 2016) at 24–25

31 Loi n° 2017-1510 du 30 octobre 2017 renforçant la sécurité intérieure et la lutte contre le terrorisme, art 2; also see Action Droits des Musulmans, *Punition Collective: Fermeture de Mosquées et l’application des Outils de Lutte Contre le Terrorisme – France* (Action Droits des Musulmans 2019)

32 As of June 18, 2021, see Assemblée nationale, *Contrôle parlementaire de la loi renforçant la sécurité intérieure et la lutte contre le terrorisme: Mesures de police administrative prises dans le cadre des articles 1er à 4 de la loi n° 2017-1510 du 30 octobre 2017 renforçant la sécurité intérieure et la lutte contre le terrorisme* (Assemblée nationale, 18 June 2021) at [https://www2.assemblee-nationale.fr/15/commissions-permanentes/commission-des-lois/contrôle-parlementaire-silt/contrôle-parlementaire-de-la-loi-renforçant-la-securite-interieure-et-la-lutte-contre-le-terrorisme/\(block\)/45410](https://www2.assemblee-nationale.fr/15/commissions-permanentes/commission-des-lois/contrôle-parlementaire-silt/contrôle-parlementaire-de-la-loi-renforçant-la-securite-interieure-et-la-lutte-contre-le-terrorisme/(block)/45410)

33 As of December 2020, see Braun-Pivet, Ciotti et Gauvain (n 30) 31–2

34 Loi n° 2021-1109 du 24 août 2021 confortant le respect des principes de la République (1), art 87

35 Le Parisien, ‘Gérald Darmanin annonce fermer une mosquée à Cannes’ (*Le Parisien*, 12 janvier 2022) at <https://www.leparisien.fr/politique/gerald-darmanin-annonce-fermer-une-mosquee-a-cannes-12-01-2022-NRIWRSP7R5CKDI7A672UK37HLA.php>

36 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Visit to France*, A/HRC/40/52/Add.4 (8 May 2019) para. 28

37 *ibid*

38 Amnesty International (n 8) 27–36

39 *ibid* 31

40 See e.g., Martin Scheinin, ‘Impact of post-9/11 counter-terrorism measures on all human rights’ in Manfred Nowak and Anne Charbord (eds), *Using Human Rights to Counter Terrorism* (Edward Elgar Publishing 2018) 118–120; Big Brother Watch, *The State of Surveillance in 2018* (Big Brother Watch 2018) 9–14, 29–31; *Big Brother Watch and Others v. the United Kingdom* Apps nos. 58170/13, 62322/14 and 24960/15 (ECtHR, 13 September 2018) 495

41 Daragh Murray and Pete Fussey, ‘Bulk Surveillance in the Digital Age: Rethinking the Human Rights Law Approach to Bulk Monitoring of Communications Data’ (2019) 52 *Israel Law Review* 31, 43–47

42 *ibid*

lacking”.⁴³ To close this gap, the authors proposed an effectiveness assessment based on three criteria: delivery, context, and sensitivity.⁴⁴ Reflecting on the results, Scheinin concluded that “electronic mass surveillance has failed on all counts: its actual capacity to deliver better security is minimal, or even counterproductive due to the misallocation of resources and attention, while the resulting intrusions into privacy and other human rights are disproportionate and often affect the essential inviolable core of privacy”.⁴⁵

A practice with a similarly questionable record of effectiveness is ‘suspicionless’ stop and search powers. As previously practised in the UK,⁴⁶ police constables were empowered to stop pedestrians or vehicles within a specified geographic area to search for “articles of a kind which could be used in connection with terrorism”, “whether or not the constable has grounds for suspecting the presence of articles of that kind”. Various actors expressed concerns about effectiveness of this practice.⁴⁷

As summarised by the Independent Reviewer:

A handful of charges for terrorist offences have followed from section 44 stops. It is, however, a striking fact that during its currency, none of the more than 600,000 stops in Great Britain under section 44 resulted in a conviction for a terrorist offence. This fact alone makes it difficult to characterise section 44 as a necessary or proportionate response to the terrorist threat. One of the advantages claimed for section 44 was deterrence: but as experience since its demise has shown, at least in Great Britain, other methods such as high-visibility patrols can also play a part in deterring wrongdoers and reassuring the innocent.⁴⁸

Another widely expressed criticism was that minorities were disproportionately targeted.⁴⁹ The government’s review of the practice found that:

The perception of disproportionate use against people

from Asian communities may also fuel perceptions that the police employ racial profiling techniques and that terrorism legislation is not being applied equally. The last available statistics show that of the stops and searches conducted in Great Britain (the vast majority of which were carried out by the Metropolitan Police Service) between April 2009 and March 2010, 59% of individuals were white, 10% were black and 17% Asian. Because of its broad use, section 44 is the counter terrorism power of which the public are most likely to have direct experience. Grievances about section 44 are more common than grievances about many other counter-terrorism powers.⁵⁰

This finding is broadly corroborated by a small-scale study on the impact of counterterrorism measures on Muslim communities in the UK. The study was based on focus group interviews with Muslim and non-Muslim residents of four cities and interviews with policymakers and practitioners.⁵¹ It found that the discretionary nature of power, coupled with individual and shared experiences of others, contributed to a perception among many Muslim participants that they were being targeted because of their ethnicity or religion. This perception of discrimination and unjust treatment resulting from stop and search practices was understood to have the potential to undermine trust and confidence in the police, as well as lower individuals’ willingness to report crime.⁵²

1.2. EFFECTIVENESS IN COUNTERTERRORISM REVIEW

As the examples above demonstrate, effectiveness assessments sometimes have a place in counterterrorism review efforts.⁵³ Still, government-mandated review mechanisms remain uncommon, and their engagement with matters of effectiveness is often limited. An Independent Reviewer is

43 Michelle Cayford, Simone Sillem, Pei-Hui Lin, Bert Kooij, *Perceptions and effectiveness of surveillance—SURVEILLE Deliverable 3.9. Final report of WP3*, 6 at <https://surveillance.eui.eu/wp-content/uploads/sites/19/2015/06/D3-9-Final-Report-of-WP3.pdf>

44 *ibid*

45 Scheinin (n 40) 121; for further discussion, see David Anderson, *Report of the Bulk Powers Review* (The Stationery Office 2016) 47–71

46 For the discussion on the reform of the practice, see John Ip, ‘The Reform of Counterterrorism Stop and Search after *Gillan v United Kingdom*’ (2013) 13 *Human Rights Law Review* 729; for the discussion on the current powers see, e.g., Jonathan Hall, *The Terrorism Acts in 2018: Report Of The Independent Reviewer of Terrorism Legislation on the Operation of The Terrorism Acts 2000 and 2006* (The Stationery Office 2020) 57–63

47 Human Rights Watch, *Without Suspicion: Stop and Search under the Terrorism Act 2000* (Human Rights Watch 2010) 14–17

48 David Anderson, *Report on the Operation in 2010 of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006* (The Stationery Office 2011) 8.21

49 Human Rights Watch (n 47) 41–46

50 HM Government, *Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations* (The Stationery Office 2011) 15–16

51 Tufyal Choudhury and Helen Fenwick, *The impact of counter-terrorism measures on Muslim communities* (2011) Equality and Human Rights Commission: Research report 72

52 *ibid* 34–35; but see Sadi Shanaah, ‘Alienation or Cooperation? British Muslims’ Attitudes to and Engagement in Counter-Terrorism and Counter-Extremism’ (2022) 34 *Terrorism and Political Violence* 71

53 On counterterrorism review beyond effectiveness, see e.g., Blackburn, de Londras and Morgan (n 19) ch 2

one such mechanism.⁵⁴ In the United Kingdom, the review of counterterrorism instruments is mandated by their respective statutes. The Independent Reviewer is also empowered to conduct reviews on their own initiative.⁵⁵ In the case of control orders/TPIMs, the Independent Reviewer's access to classified information left him well-positioned to interrogate their operational effectiveness. However, the extent to which this power is used remains at the mandate-holder's discretion.⁵⁶

In contrast, the Australian statute governing the mandate of the Independent National Security Legislation Monitor explicitly requires it to review "the operation, effectiveness and implications" of counterterrorism legislation.⁵⁷ Questions of effectiveness were embraced by the first mandate-holder throughout his term,⁵⁸ however successive incumbents paid less attention to the matter.⁵⁹

Effectiveness has also been a prominent element in counterterrorism evaluation in the Netherlands.⁶⁰ The Research and Documentation Centre, an independent body within the Ministry of Justice and Security,⁶¹ has produced a vast number of evaluations.⁶² A recent study concerned the Temporary Law on Counterterrorism Administrative Measures

(2017), which empowered the executive to impose various control orders.⁶³ The study's authors emphasised that the measures' absolute effectiveness (in terms of reducing the risk of terrorist attacks or preventing specific attacks) could not be determined empirically.⁶⁴ Instead, it focused on the measures' consequences (i.e., whether the tool was used as intended).⁶⁵ They found that the powers helped monitor and control a small number of individuals which would not have been possible otherwise. However, this did not contribute to the individuals' deradicalisation, failed to enable "better contact or a better relationship to be established with individuals", nor did it enhance the authorities' knowledge of the individuals' behaviour, beliefs or the risks they posed. The Act was also unlikely to prevent individuals from contacting other radicalised individuals, especially given the scope of communication possibilities offered by online platforms.⁶⁶ In short, the Act failed to deliver on many expectations except as a monitoring and surveillance tool.⁶⁷

High-quality evaluations, such as those produced in the Netherlands, remain a rarity. They can be contrasted with the European Commission's 2021 evaluation of the Europe-

54 See, generally, Jessie Blackbourn, 'Independent Reviewers as Alternative: An Empirical Study from Australia and the United Kingdom' in Fergal F Davis and Fiona de Londras (eds), *Critical Debates on Counter-Terrorism Judicial Review* (Cambridge University Press 2014)

55 Independent Reviewer of Terrorism Legislation, 'The Independent Reviewer's Role' at <https://terrorismlegislationreviewer.independent.gov.uk/about-me/>; Jonathan Hall, 'The Role of the Independent Reviewer of Terrorism Legislation' (2022) 27 *Judicial Review* 1; also see *Is It Better to Review or Monitor Terror Laws? The UK and Australian Positions Compared* (The Inner Temple, 2022) <https://www.youtube.com/watch?v=FNSZGHtPVTI>

56 See Blackbourn (n 54) 170–178; also see Jessie Blackbourn, 'Evaluating the Independent Reviewer of Terrorism Legislation' (2014) 67 *Parliamentary Affairs* 955

57 The Independent National Security Legislation Monitor Act 2010 (Cth) s 5(2)(1)(6)(1). The establishment of the office of the 'Independent Examiner of Security Legislation' is foreseen in the 'General Scheme of the Policing Security and Community Safety Bill' is pending in Ireland at the time of writing. According to the bill, the objectives of the Examiner include the assessment of 'whether security legislation is necessary, proportionate and effective' and support of 'the Government in protecting the security of the State, including by assessing whether security legislation is adequate and is effective in combatting threats to the security of the State and by promoting efficiency and effectiveness in addressing threats to the security of the State', see General Scheme of the Policing, Security and Community Safety Bill, Head 194

58 Bret Walker, *Independent National Security Legislation Monitor – Annual Report, 16 December 2011* (Department of the Prime Minister and Cabinet 2012) 4; further, see Jessie Blackbourn, 'The Independent National Security Legislation Monitor's First Term: An Appraisal' (2016) 39 *The University of New South Wales Law Journal* 975, 981–993

59 Roger Gyles, *Certain Questioning and Detention Powers in Relation to Terrorism* (Independent National Security Legislation Monitor 2016) 42–43; James Renwick, *Sections 119.2 and 119.3 of the Criminal Code: Declared Areas* (Commonwealth of Australia, Independent National Security Legislation Monitor 2017) 38; James Renwick, *Review of Division 3A of Part IAA of the Crimes Act 1914: Stop, Search and Seize Powers* (Commonwealth of Australia, Independent National Security Legislation Monitor 2017) 39; James Renwick, *Report to the Attorney-General: Review of the Operation, Effectiveness and Implications of Terrorism-Related Citizenship Loss Provisions Contained in the Australian Citizenship Act 2007* (Commonwealth of Australia, Independent National Security Legislation Monitor 2019). However, the issue appears to be central in the ongoing review, see Nino Bucci, 'Tool to Assess Jailed Terrorists before Release Criticised as Unreliable and Prejudicial to Muslims' (*The Guardian*, 16 July 2022) at <https://www.theguardian.com/australia-news/2022/jul/17/tool-to-assess-jailed-terrorists-before-release-criticised-as-unreliable-and-prejudicial-to-muslims>; James Renwick, *Trust But Verify: A Report Concerning the Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018 and Related Matters* (Commonwealth of Australia, Independent National Security Legislation Monitor 2020)

60 Rapport van de Commissie evaluatie antiterrorismebeleid, 'Naar een integrale evaluatie van antiterrorismemaatregelen' (Mei 2009) ch 5; Hans Nelen, Frans Leeuw and Stefan Bogaerts, *Antiterrorismebeleid En Evaluatieonderzoek* (Boom Juridische uitgevers 2010); Mara Wesseling and Marieke De Goede, 'Beleid Bestrijding Terrorismedinanciering: Effectiviteit En Effecten (2013-2016)' (Amsterdam/Den Haag: University of Amsterdam, AISSR/WODC 2018)

61 Research and Documentation Centre, 'About WODC' at <https://english.wodc.nl/about-wodc>

62 See at <https://repository.wodc.nl/browse?value=Terrorismebestrijding&type=subject>; some have been outsourced to evaluation agencies, see e.g. N Woestenburg and others, 'Evaluatie Nationale Contraterrorismestrategie 2016-2020 Fase 1' (Rijksuniversiteit Groningen, Pro Facto, WODC 2021); and others to universities, see e.g., AT Marseille and others, 'Evaluatie Wijziging van de Rijkswet Op Het Nederlandschap in Het Belang van de Nationale Veiligheid' (WODC Rapport 3107 2020)

63 Unauthorised, 'Summary. Evaluation of 'Temporary Law on Counterterrorism Administrative measures' (Wetenschappelijk Onderzoek- en Documentatiecentrum, Cahier 2020-2) at https://repository.wodc.nl/bitstream/handle/20.500.12832/240/Cahier_2020-2-summary_tcm28-438809.pdf

64 B van Gestel, RF Kouwenberg and JJ Van Berkel, 'Evaluatie Tijdelijke Wet Bestuurlijke Maatregelen Terrorismebestrijding' (WODC 2020) 60

65 *ibid*

66 Evaluation of 'Temporary Law on Counterterrorism Administrative measures' (n 63) 6

67 van Gestel, Kouwenberg, Van Berkel (n 64) 60

an Union’s main counterterrorism instrument — Directive 2017/541.⁶⁸ While the report addresses the issue of effectiveness in some detail,⁶⁹ the utility of the analysis is undercut by the evaluation’s formulation of its objective:

[t]he general objective of the Directive is to combat terrorism through criminal law. The specific objectives are to: [1] approximate the definition of terrorist offences, offences related to a terrorist groups and to terrorist activities, serving as a benchmark for information exchange and cooperation between competent national authorities; [2] establish minimum rules concerning the definition of criminal offences and sanctions in the area of terrorist offences, offences related to a terrorist group and offences related to terrorist activities; and [3] enhance measures of protection of, and support and assistance to, victims of terrorism.⁷⁰

The effectiveness of the instrument is thus primarily understood in terms of its technical *implementation* by the Member States. The actual *impact* of the instrument is difficult to ascertain. Regarding the first objective, evidence suggests that the Directive “has had some impact” in facilitating information exchange.⁷¹ The degree of this impact is unclear, with some stakeholders confirming, some rejecting, and some unsure about its effect on cooperation.⁷² The achievement of the second objective was expected to improve the ability of the Member States to investigate and prosecute terrorist offences.⁷³ What justified this expectation is unclear, and the report’s findings reflect this. Of the national authorities consulted, only a minority reported that the Directive impacted their ability to investigate, prosecute, or adjudicate terrorism-related offences.⁷⁴ The report’s discussion about the factors that limit the Directive’s effectiveness oddly attributes one limitation to the difficulty of proving ‘terrorist intent’ as per the Directive’s requirements.⁷⁵ Equally unusual, a factor contributing to the instrument’s effectiveness is that it applies “to all forms of terrorism, regardless of underlying ideology, [and

thus] could be used to combat all forms of terrorism”.⁷⁶ This example underscores the urgent need for methodological advancements in counterterrorism evaluations to understand the real-world impact of the interventions.

1.3. INTERMEDIARY CONCLUSION

While providing only a snapshot of existing counterterrorism practices, the preceding discussion aimed to highlight three relevant aspects: (1) the broad array of concerns regarding the negative effects of counterterrorism measures, (2) the prevailing uncertainty about their effectiveness in achieving their goals, and (3) the limited attention given to effectiveness in counterterrorism reviews, which still remain relatively uncommon. The gap between States’ willingness to embrace counterterrorism and their efforts to scrutinise and disclose such measures’ results is puzzling. Having explored the complexity of evaluation of counterterrorism effectiveness in the following section, we return to the implications this has for the justifiability of counterterrorism measures under human rights law.

2. EVIDENCE-BASED APPROACHES TO EFFECTIVENESS

Measuring the effectiveness and side-effects of counterterrorism measures should be of paramount importance to States, NGOs, scholars, and the public. Not only are ineffective laws costly,⁷⁷ but they unnecessarily restrict the exercising of rights and erode the legitimacy of institutions. In this section, we briefly review some of the problems facing the evaluation of counterterrorism effectiveness, existing research that has measured the effectiveness of specific counterterrorism interventions, some existing gaps in the literature on counterterrorism effectiveness (for which there are many), and potential ways forward.

68 Commission Staff Working Document, ‘Evaluation of Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA and Amending Council Decision 2005/671/JHA’ SWD(2021) 324 final

69 *ibid* 21–27

70 *ibid* 21

71 *ibid* 22

72 *ibid*

73 *ibid* 23

74 *ibid*

75 *ibid* 25

76 *ibid* 24

77 Cynthia Lum and Leslie W Kennedy, ‘Evidence-Based Counterterrorism Policy’ in Cynthia Lum and Leslie W Kennedy (eds), *Evidence-Based Counterterrorism Policy* (Springer New York 2012)

2.1. DEFINITIONAL UNCERTAINTIES AND METHODOLOGICAL ISSUES

Numerous challenges plague effectiveness evaluations of counterterrorism measures. Van Um and PISOIU note how the study of effectiveness in counterterrorism is “plagued by limitations in its theoretical development and methodological grounding”.⁷⁸ While it is beyond the scope of this discussion to comprehensively discuss all the existing challenges and limitations, some of the most pressing ones include:

- ambiguity around the concept of effectiveness in counterterrorism,
- ill-defined concepts in counterterrorism including the core concepts of ‘terrorism’ and ‘radicalisation’,
- the inherent complexity of counterterrorism measures,
- issues in determining causality and other methodological constraints in measuring effectiveness.

To begin, the very notion of ‘effectiveness’ in counterterrorism is vague and relatively undefined: “A generally accepted definition or framework of [counterterrorism] effectiveness does not exist in the literature to date. What can be found is either an assumed definitional self-evidence or concrete indicators, in the context of a proliferation of stand-alone terms such as impact, success, consequence, etc”.⁷⁹ As later discussed, different actors in counterterrorism (e.g., policymakers, lawyers, social scientists) have preconceived notions of what ‘effectiveness’ means given their different backgrounds and knowledge, which muddles the concept’s operationalisation. Furthermore, scant research has focused on theoretical considerations surrounding effectiveness.⁸⁰ For instance, should indicators of effectiveness be one dimensional (e.g., frequency of arrests) or multidimensional (e.g., combining the frequency of arrests *and* human rights impacts *and* public attitudes)? If multiple indicators are integrated to inform legal and policy decisions, in what way

should the separate components making up effectiveness be combined or weighted? Additionally, if “counterterrorism policy is not just a response to the threat of terrorism [...] but a reflection of the domestic political process”,⁸¹ should political considerations be integrated into assessments of effectiveness?⁸² While some scholars have attempted to provide preliminary answers to these questions,⁸³ their recommendations do not seem to have been widely adopted by evaluators or policymakers.

Theoretical concepts in radicalisation, violent extremism, and terrorism are also ill-defined. The scientific operationalisation of concepts central to counterterrorism such as ‘radicalisation’ and ‘terrorism’ are still debated among terrorism researchers.⁸⁴ This not only complicates the implementation of counter-radicalization policies and programs but can hinder the development of appropriate ways to measure outcomes. For example, how should an evaluator measure the effects of speech acts glorifying terrorism on rates of radicalisation within a community? Counterterrorism measures and programs may further complexify matters when they lack clearly defined aims.⁸⁵ If one’s goals are too broad it can be difficult to determine appropriate outcome measures. Considering how to operationalise concepts, measure outcomes, and collect the data required for rigorous evaluations will help abate counterterrorism laws with unmeasurable or unscientific goals.

A further methodological and data collection challenge that can hamper effectiveness evaluations is how ‘effectiveness’ should be measured.⁸⁶ For instance, should one measure the effects of counterterror policies on the risk of future attacks (e.g., frequency, intensity, damage) or should other outcome variables be used? Indeed, which outcome variables are used can lead to different conclusions: “The frequent use of the number of terrorists killed or arrested as an indicator is particularly problematic; since these individuals can easily be replaced, their number does not necessarily say

78 Eric Van Um and Daniela PISOIU, ‘Assessing Effectiveness in Counterterrorism Policy’ in Hendrik Hegemann, Regina Heller and Martin Kahl (eds), *Studying ‘Effectiveness’ in International Relations: A guide for students and scholars* (Verlag Barbara Budrich 2012) 270

79 *ibid*

80 However, see Sobol and Moncrieff (n 3)

81 Martha Crenshaw, ‘Counterterrorism Policy and the Political Process’ (2001) 24 *Studies in Conflict & Terrorism* 329, 329

82 See also Thomas Renard, ‘Counter-Terrorism as a Public Policy: Theoretical Insights and Broader Reflections on the State of Counter-Terrorism Research’ (2021) 15 *Perspectives on Terrorism* 2, 9

83 See e.g., TW van Dongen, ‘Break It Down: An Alternative Approach to Measuring Effectiveness in Counterterrorism’ (2011) 6 *Journal of Applied Security Research* 357

84 See e.g., Clark McCauley and Sophia Moskalenko, ‘Understanding Political Radicalization: The Two-Pyramids Model’ (2017) 72 *American Psychologist* 205; Peter R Neumann, ‘The Trouble with Radicalization’ (2013) 89 *International Affairs* 873; for discussion of a legal definition of ‘terrorism’ in international law, see e.g., Ben Saul, *Defining Terrorism in International Law* (Oxford University Press 2008) ch 2; Marcello Di Filippo, ‘The Definition(s) of Terrorism in International Law’ in Ben Saul, *Research Handbook on International Law and Terrorism* (Edward Elgar Publishing 2020); Martin Scheinin, ‘A Proposal for a Kantian Definition of Terrorism: Leading the World Requires Cosmopolitan Ethos’ in Arianna Vedeschi and Kim Lane Scheppelle (eds), *9/11 and the Rise of Global Anti-Terrorism Law* (Cambridge University Press 2021)

85 Sobol and Moncrieff (n 3)

86 Cynthia Lum, Leslie W Kennedy and Alison Sherley, ‘Is Counter-Terrorism Policy Evidence-Based? What Works, What Harms, and What Is Unknown’ (2008) 20 *Psicothema* 35

much about the overall state and the size of a terrorist organisation and therefore about the effect on terrorist groups and the number of future attacks”.⁸⁷ Causality is another major issue for effectiveness evaluations. For one, multiple counterterrorism measures are typically introduced at once, which can make parsing their effects challenging. Correlational research can only go so far in determining which interventions are effective, particularly given the interaction effects of existing measures. In later sections, we will return to some gaps in theorising and measuring effectiveness and highlight additional areas requiring further research.

2.2. EXISTING SOCIAL SCIENCE RESEARCH ON THE EFFECTIVENESS OF COUNTERTERRORISM MEASURES

Vast scholarship is produced every year on radicalisation, violent extremism, and terrorism, however, only a small portion of this literature addresses the effectiveness of counterterrorism measures⁸⁸ and evidence-based policy approaches.⁸⁹ In an oft-cited early 2006 review of the literature on counterterrorism effectiveness, Lum et al.⁹⁰ noted a dearth of research. Of more than 20,000 works on terrorism, only 21 studies empirically tested counterterrorism interventions or programs.⁹¹ Of these studies, only 7 qualified as being “moderately rigorous” evaluations.⁹² In 2012, Lum and Kennedy noted that since their initial literature review in 2006, “no

clear evaluation standard has emerged to guide the public discussion of the effectiveness of these counterterrorism responses”.⁹³ A more recent literature review found 48 publications (37 from after 2013) that examined the effectiveness of counterterrorism measures or programs.⁹⁴ This suggests that evaluation studies have increased, but still represent a small proportion of terrorism research.

Some of the earliest counterterror studies examined the effects of laws and security measures on incident rates using quantitative methods. Landes⁹⁵ examined the effect of counterterrorism laws and interventions on airline hijackings in the United States during the 60s and 70s using a statistical method (ordinary least-squares regression). He found that deterrence actions *ex ante* (i.e., preboard screenings, metal detectors) had a larger effect on hijacking than deterrence *ex post* (i.e., odds of apprehension post-hijacking, likelihood of incarceration, and severity of sanctions). Increasing the severity of punishment had little effect on reducing hijackings.⁹⁶ Scholars have examined the impact of counterterrorism measures using more advanced quantitative approaches such as interrupted time series analysis.⁹⁷ This is a specific type of analysis that explains how certain interventions (e.g., laws, policies) affect outcome variables of interest (e.g., frequency of attacks).⁹⁸ Studies have examined a range of interventions including metal detectors and airport security screenings,⁹⁹ embassy fortifications,¹⁰⁰ UN reso-

87 Van Um and Pissou (n 78) 264

88 To simplify, we avoid labelling measures as either ‘counter-terrorism’, ‘countering violent extremism’ (CVE), or ‘preventing violent extremism’ (PVE). Definitions for these terms vary significantly in the literature and studies regularly evaluate the effectiveness of CT and C/PVE measures together; Lum and Kennedy (n 86)

89 i.e., using empirical evidence and analytic knowledge to examine the effect of measures on outcomes. See, Cynthia Lum, Leslie W Kennedy and Alison Sherley, ‘Are Counter-Terrorism Strategies Effective? The Results of the Campbell Systematic Review on Counter-Terrorism Evaluation Research’ (2006) 2 *Journal of Experimental Criminology* 489; Isabella Pistone and others, ‘A Scoping Review of Interventions for Preventing and Countering Violent Extremism: Current Status and Implications for Future Research’ (2019) 19 *Journal for Deradicalization* 1

90 Lum, Kennedy and Sherley (n 89)

91 *ibid*

92 i.e., the studies were comparative in nature, controlled for relevant variables, or included a timeseries or intervention analysis. *ibid*

93 Lum and Kennedy (n 1) 369

94 Jacopo Bellasio and others, ‘Counterterrorism Evaluation: Taking Stock and Looking Ahead’ (RAND Corporation 2018)

95 William M Landes, ‘An Economic Study of US Aircraft Hijacking, 1961-1976’ (1978) 21 *The Journal of Law and Economics* 1

96 Interestingly, Landes estimated that increased security measures cost between \$3.24 and \$9.25 million to prevent one hijacking.

97 Time series analysis involves the building of mathematical models that analyse ordered temporal data to extract useful statistical information.

98 Jon Cauley and Eric Iksoon Im, ‘Intervention Policy Analysis of Skyjackings and Other Terrorist Incidents’ (1988) 78 *The American Economic Review* 27; Walter Enders, Todd Sandler and Jon Cauley, ‘Assessing the Impact of Terrorist Thwarting Policies: An Intervention Time Series Approach’ (1990) 2 *Defence and Peace Economics* 1; Walter Enders and Todd Sandler, ‘The Effectiveness of Antiterrorism Policies: A Vector-Autoregression- Intervention Analysis’ (1993) 87 *The American Political Science Review* 829; Bryan Brophy-Baermann and John AC Conybeare, ‘Retaliating against Terrorism: Rational Expectations and the Optimality of Rules versus Discretion’ (1994) 38 *American Journal of Political Science* 196; Walter Enders and Todd Sandler, ‘Is Transnational Terrorism Becoming More Threatening?: A Time-Series Investigation’ (2000) 44 *Journal of Conflict Resolution* 307; Carlos Pestana Barros, ‘An Intervention Analysis of Terrorism: The Spanish Eta Case’ (2003) 14 *Defence and Peace Economics* 401

99 Enders, Sandler and Cauley (n 98); Enders and Sandler, ‘Is Transnational Terrorism Becoming More Threatening?’ (n 98); Enders and Sandler, ‘The Effectiveness of Antiterrorism Policies’ (n 98)

100 Enders and Sandler, ‘The Effectiveness of Antiterrorism Policies’ (n 98); Enders, Sandler and Cauley (n 98); Enders and Sandler, ‘Is Transnational Terrorism Becoming More Threatening?’ (n 98)

lutions and public policies,¹⁰¹ military actions,¹⁰² police and military expenditures,¹⁰³ and changes in political regimes.¹⁰⁴ The outcome variables (dependent variables) examined in these studies typically include incident counts (e.g., terrorist attacks, hostage taking, attacks on diplomats, assassinations, kidnappings, skyjackings) or measures of intensity (e.g., number of deaths, wounded, injuries, damage to property). Lum et al.¹⁰⁵ summarise the findings of this early literature. In brief, metal detectors and airport security screenings were found to be effective at preventing hijackings, but non-hijacking events increased, suggesting that ‘displacement’ might have occurred.¹⁰⁶ Scholars found no discernible effect of hardening embassy fortifications or various international instruments (e.g., UNSC and UNGA resolutions) on terrorist incidents. Retaliatory military strikes (e.g., U.S. attack on Libya in 1986) resulted in either no statistically discernible effects or an increase in terrorist attacks.

More recently, scholars have employed advanced mathematical models to examine patterns of terrorist activity and the effectiveness of counterterrorism interventions. White et al.¹⁰⁷ were able to compare the relative effectiveness of direct responses to terrorist activity (i.e., arrests, convictions, or materiel seizures) between three countries (Indonesia, Thailand, Philippines). The models showed that these responses were most effective at reducing the risk of future incidents in Indonesia (large effect) compared to Thailand (small effect) and the Philippines (no effect). Using an inter-

rupted time series design combined with hazard modelling, Carson¹⁰⁸ assessed the effectiveness of high-profile targeted killings and found that such killings either had no effect on terrorism or increased violence in the short-term. Series hazard modelling has also been applied to coercive government interventions; in the case of one terrorist group they appeared to increase (known as the ‘backlash effect’) rather than decrease future violence.¹⁰⁹

In recent years, most of the evaluation research has focused on programs with preventative goals¹¹⁰ (e.g., education, communications, capacity building).¹¹¹ Less represented in the literature are studies examining deradicalisation and disengagement programs.¹¹² Research on counterterrorism programs is primarily conducted by governments, followed by non-governmental actors, and lastly public-private partnerships. Evaluation studies tend to focus on *process evaluations* (i.e., how a program is (un)successfully implemented) rather than *outcome evaluations* (i.e., if the program reached its desired goals or intended effects).

A large portion of evaluation studies examine the effectiveness of programs building youth resilience to violent extremism.¹¹³ Broader, community-focused resilience programs have also been evaluated.¹¹⁴ For instance, scholars have examined public communication programs intended to raise awareness and reporting of terrorist threats,¹¹⁵ counter extremist messaging,¹¹⁶ or mitigate intergroup conflict.¹¹⁷ Aldrich¹¹⁸ examined the effect of peace and tolerance radio

101 Cauley and Im (n 98); Enders, Sandler and Cauley (n 98)

102 Enders, Sandler and Cauley (n 98); Brophy-Baermann and Conybeare (n 98); Enders and Sandler, ‘Is Transnational Terrorism Becoming More Threatening?’ (n 98)

103 Barros (n 98)

104 *ibid*; Enders and Sandler, ‘Is Transnational Terrorism Becoming More Threatening?’ (n 98)

105 Lum, Kennedy and Sherley (n 89)

106 Cauley and Im (n 98); Enders, Sandler and Cauley (n 98); Enders and Sandler, ‘The Effectiveness of Antiterrorism Policies’ (n 98)

107 Gentry White and others, ‘Modelling the Effectiveness of Counter-Terrorism Interventions’ (2014) *Trends and Issues in Crime and Criminal Justice* 1, 8

108 Jennifer Varriale Carson, ‘Assessing the Effectiveness of High-Profile Targeted Killings in the “War on Terror”’ (2017) 16 *Criminology & Public Policy* 191

109 Javier Argomaniz and Alberto Vidal-Diez, ‘Examining Deterrence and Backlash Effects in Counter-Terrorism: The Case of ETA’ (2015) 27 *Terrorism and Political Violence* 160

110 i.e., measures that prevent the intention to commit acts related to violent extremism from developing

111 Bellasio and others (n 94)

112 *ibid*

113 Allard R Feddes, Liesbeth Mann and Bertjan Doosje, ‘Increasing Self-Esteem and Empathy to Prevent Violent Radicalization: A Longitudinal Quantitative Evaluation of a Resilience Training Focused on Adolescents with a Dual Identity’ (2015) 45 *Journal of Applied Social Psychology* 400; Melissa Finn and others, ‘Youth Evaluations of CVE/PVE Programming in Kenya in Context’ (2016) *Journal for Deradicalization* 164; Kris Christmann and others, *Process Evaluation of Preventing Violent Extremism: Programmes for Young People* (Youth Justice Board 2012); Amelia Johns, Michele Grossman and Kevin McDonald, ‘“More Than a Game”: The Impact of Sport-Based Youth Mentoring Schemes on Developing Resilience toward Violent Extremism’ (2014) 2 *Social Inclusion* 57; Max Krafchik and others, *Evaluation of Young and Safe Project: London Borough of Lambeth* (Inspira Consulting Evaluation Report 2011)

114 Tamar Mitts, ‘Do Community Engagement Efforts Reduce Extremist Rhetoric on Social Media?’ (March 24, 2017) at <https://ssrn.com/abstract=2940290>; Eolene M Boyd-MacMillan, ‘Increasing Cognitive Complexity and Collaboration across Communities: Being Muslim Being Scottish’ (2016) 9 *Journal of Strategic Security* 1; Robyn Broadbent, ‘Using Grass Roots Community Programs as an Anti-Extremism Strategy’ (2013) 53 *Australian Journal of Adult Learning* 187

115 Renee Haider and Eduardo Martinez, ‘Engaging Transit Riders in Public Awareness Programs’ (2014) 17 *Journal of Public Transportation* 21

116 Froukje Demant and Beatrice De Graaf, ‘How to Counter Radical Narratives: Dutch Deradicalization Policy in the Case of Moluccan and Islamic Radicals’ (2010) 33 *Studies in Conflict & Terrorism* 408

117 Daniel P Aldrich, ‘Radio as the Voice of God: Peace and Tolerance Radio Programming’s Impact on Norms’ (2012) 6 *Perspectives on Terrorism* 34

118 *ibid*

programming using quantitative survey methods in Mali, Chad, and Niger with mixed results. Greater listening time was associated with higher levels of local civic engagement and support for working with the West to combat terrorism, but had no impact on attitudes toward the use of violence in the name of Islam. Prison programs to prevent radicalisation, deradicalise inmates, and reintegrate have also been evaluated.¹¹⁹ A Dutch program to reintegrate prisoners believed to be radicalised or involved in terrorism was evaluated using semi-structured interview methods.¹²⁰ Both the practical implementation of the program (process evaluation) and its ability to reduce recidivism (impact evaluation) were analysed, finding mixed results in both areas. Using quasi-experimental methods, analysis of the effectiveness of deradicalisation programs on former fighters of the *Liberation Tigers of Tamil Eelam* in Sri Lanka¹²¹ found that the intervention significantly reduced extremism upon program completion and these effects persisted after prison release.

The unintended side-effects of counterterrorism measures have also been examined by scholars. Using a survey research method, Burniske and Modirzadeh¹²² studied how counterterrorism policies unintendedly affected a broad range of actors.¹²³ The pilot study found that over 90 percent of humanitarian actors surveyed indicated that counterterrorism policies negatively impacted their commitment to humanitarian principles and 69 percent indicated a ‘chilling effect’ on their efforts to provide humanitarian aid because of vague, restrictive, and expansive laws. Choudhury and Fenwick¹²⁴ looked at how specific counterterrorism measures (e.g., stop and search, counterterror policing) in the United Kingdom affect Muslim communities using interviews with participants from four UK regions. Their research showed significant differences between Muslims and non-Muslims living in the same region with respect to the negative impacts that counterterror measures had on their lives.

Other scholars, also using qualitative approaches, have

studied the negative side-effects of UK programs (i.e., the ‘Prevent’ program),¹²⁵ most concluding that the measures cause problematic externalities. While the work of these scholars importantly identifies certain problems, particularly those facing minority communities, the theoretical approach employed may limit their insight into specific counterterrorism side-effects (e.g., ‘displacement’ – the shifting of attack modes or targets). A stronger focus, not only on the intended effects of counterterrorism measures, but also their unintended side-effects is therefore necessary.

As noted in the preceding section, the Dutch Research and Documentation Centre has produced a number of high-quality evaluations. One qualitative study¹²⁶ examined data collected over a five-year period (2007-2011) on the effectiveness of five extended legal powers including (1) special investigative powers, (2) time extensions to collect information, (3) power to search persons in security risk areas without suspect, (4) enabling remand in custody on mere suspicion, and (5) the postponement of procedural document inspections. In summary, the results indicated that only one of the fifteen criminal investigations¹²⁶ initiated on the basis of the new law resulted in a prosecution for “suspicions of preparations for a terrorist crime”. Thirteen of the investigations were later cancelled for lack of sufficient evidence. The study called into question the effectiveness of the other extended legal powers showing that they provided few added benefits over the research period. Indeed, the scholars noted that increased searching in “safety risk areas” had the unintended consequence of contributing mainly to investigations of less serious forms of organised crime around airports rather than terrorist related offenses.

As this section has shown, a range of studies have examined ‘effectiveness’, but approached it in a haphazard and piecemeal manner. For example, some scholars operationalise effectiveness as a reduction in the sheer number of terrorist attacks or attempted attacks over time (i.e., indicator

119 Tinka M Veldhuis and others, ‘Summary, Terrorists in Prison: Evaluation of the Dutch terrorism wing’ (2011) at https://repository.wodc.nl/bitstream/handle/20.500.12832/1842/summary_tcm28-71209.pdf; Bart Schuurman and Edwin Bakker, ‘Reintegrating Jihadist Extremists: Evaluating a Dutch Initiative, 2013-2014’ (2016) 8 Behavioral Sciences of Terrorism and Political Aggression 66; Tinka Veldhuis, *Captivated by Fear: An Evaluation of Terrorism Detention Policy* (University of Groningen 2015); Stephen Webster, Jane Kerr and Charlotte Tompkins, *A Process Evaluation of the Structured Risk Guidance for Extremist Offenders* (Ministry of Justice Analytical Series 2017)

120 Schuurman and Bakker (n 119)

121 David Webber and others, ‘Deradicalizing Detained Terrorists: Deradicalizing Detained Terrorists’ (2018) 39 Political Psychology 539

122 Jessica Burniske and Naz Modirzadeh, *Pilot Empirical Survey Study on the Impact of Counterterrorism Measures on Humanitarian Action & Comment on the Study* (Harvard Law School Program on International Law and Armed Conflict 2017)

123 United Nations Security Council Counter-Terrorism Committee Executive Directorate, *The Interrelationship between Counter-Terrorism Frameworks and International Humanitarian Law* (United Nations Security Council Counter-Terrorism Committee Executive Directorate 2022)

124 Choudhury and Fenwick (n 51)

125 Suraj Lakhani, ‘Preventing Violent Extremism: Perceptions of Policy from Grassroots and Communities’ (2012) 51 The Howard Journal of Criminal Justice 190; Therese O’Toole, Daniel Nilsson DeHanas and Tariq Modood, ‘Balancing Tolerance, Security and Muslim Engagement in the United Kingdom: The Impact of the “Prevent” Agenda’ (2012) 5 Critical Studies on Terrorism 373

126 B van Gestel and CJ de Poot, ‘Evaluatie Wet Opsporing Terroristische Misdrijven’ (WODC 2014)

frequencies), while others conceptualise effectiveness as the successful implementation of counterterrorism programs, and still others focus not on effectiveness *per se* but on the unintended effects of specific counterterrorism measures. This non-systematic approach to evaluating counterterrorism effectiveness means that many gaps still exist in how effectiveness is conceptualised in a broader sense, and how it can be measured in a practical sense. We now turn to those gaps that remain particularly unexplored in counterterrorism studies.¹²⁷

2.3. PSYCHOLOGICAL EFFECTS OF COUNTERTERRORISM MEASURES?

The psychological effects of counterterrorism measures have received scant attention in the counterterrorism literature.¹²⁸ There is also a lack of discussion on how psychological effects should be incorporated into comprehensive assessments of effectiveness. Counterterrorism measures may, for example, be created with the explicit goal of reducing fear and reassuring the public (e.g., stationing militarised police in crowded public places). Other measures may have unintended or unforeseen psychological effects (e.g., increased police presence in 'suspect' minority communities causing fear among residents). The psychological impact of counterterrorism measures begs a number of yet unresolved questions: is it justifiable to introduce measures whose *primary* goal is psychological in nature? How should psychological effects be measured and evaluated? Should the psychological side-effects of measures be considered in effectiveness evaluations?

Whether psychological effects should be considered when evaluating the effectiveness of counterterrorism measures is a matter of debate. A central question is how to delineate those psychological effects that could be considered justifiable or legitimate, from those effects that should be dismissed as ineffective 'security theatre'. Such questions are most relevant to counterterrorism measures that have no discernible impact on security but rather seek to reassure the public. For example, the presence of armoured vehicles with battlefield-like arma-

ments at airports or on city streets may create a sense of security but offer little in terms of enhancing the physical security of the space. Scholars remain divided on whether this would be a justifiable response to terrorism.¹²⁹

We now briefly discuss some points in favour of taking the psychological effects of counterterrorism measures into consideration, and those against such an approach who prefer to prioritise tangible effects over psychological ones. We provide our perspective on this issue before concluding with some insights that could inspire novel research on the psychological effects of counterterrorism measures.

Spencer¹³⁰ argues that some counterterrorism measures may be effective if they help reduce the fear of terrorism in the general population. "If fear is one of the main components of terrorism, should not the effectiveness of counterterrorism measures also be assessed by the level of fear they reduce?"¹³¹ As Spencer aptly points out, terrorist attacks directly affect few individuals each year when compared to other harms such as heart disease and suicide. This suggests that it is not the physical harm of terrorist attacks that causes the greatest impact, but the psychological effects, namely the fear evoked in a population and its behavioural consequences. This begs the question: if psychological effects are to be considered in evaluations of effectiveness, which effects might be warranted and which should be viewed as arbitrary? As Spencer notes, another "obvious problem one faces is how to 'measure' or gauge fear".¹³² Friedman¹³³ similarly argues that "[p]eople tend to dismiss [security theatre] as dishonest and useless. Only the former is true. The reduction of exaggerated fears is useful, particularly if it prevents more costly responses". De Graaf¹³⁴ also focuses on the sociopsychological impacts of counterterrorism measures and what this implies for effectiveness. De Graaf argues that 'performativity' is an important factor when evaluating the effectiveness of counterterrorism measures. Performativity is defined as "the extent to which a national government, by means of its official counterterrorism policy and corresponding discourse, is successful in selling its representation of events, its set of solutions to the terrorist problem, as well as

127 See Renard (n 82)

128 But see Beatrice De Graaf, *Evaluating Counterterrorism Performance: A Comparative Study* (Routledge 2011); Beatrice de Graaf and Bob de Graaff, 'Bringing Politics Back in: The Introduction of the "Performative Power" of Counterterrorism' (2010) 3 *Critical Studies on Terrorism* 261; Alexander Spencer, 'The Problems of Evaluating Counter-Terrorism' (2006) *Revista UNISCI* 179

129 e.g., Cristina Archetti and Philip M Taylor, 'Managing Terrorism after 9/11: The War on Terror, the Media, and the Imagined Threat', *Communicating the War on Terror conference, June 5-6, Royal Institution, London* (2003) 9; Benjamin Friedman, 'Managing Fear: The Politics of Homeland Security' (2011) 126 *Political Science Quarterly* 77, 104

130 Spencer (n 128)

131 *ibid*

132 *ibid*

133 Friedman (n 129)

134 de Graaf and de Graaff (n 128); De Graaf (n 128)

being able to set the tone for the overall discourse on terrorism and counterterrorism”.¹³⁵ By focusing on performativity, de Graaf calls attention to the fact that the psychological impact of counterterrorism measures may be equally as important as more ‘concrete’ or tangible effects like the number of terrorists detained.

In opposition to considering the psychological effects of counterterrorism measures, scholars have criticised “overinvesting in certain instruments for their ‘symbolic or ideological value’, and for addressing a problem ‘politically rather than substantively””.¹³⁶ Indeed, it seems unjustifiable that an artificially created *sense* of security be achieved at the expense of citizens *forced* to play a role in ‘security theatre’.

Examples of contemporary counterterrorism practices that have no discernible impact on rights are rare, and a sense of security for the general public is often attained at the expense of rights belonging to minority communities. Citizenship deprivation in the context of counterterrorism is illustrative in this regard. Such practices are employed for mainly symbolic purposes – ostracising those breaking the “bond of loyalty”¹³⁷ to the state. The security impacts of such practices are unclear – some suggest that, at best, the threat is displaced elsewhere.¹³⁸ The measure’s impact on rights is obviously high: the person might be forced to leave or not allowed to enter the country, separated from their family, and left without sufficient legal remedy. Given the general prohibition of rendering individuals stateless,¹³⁹ such measures can only be applied against those who hold another citizenship. For this reason, it is asserted that they effectively lead to the targeting of ethnic and religious minorities, who tend to be overrepresented among those holding dual citizenships.¹⁴⁰ Another concern of the measure’s effects is broader, relating to democratic values and the appropriateness of banishment. However sensitive one is to these concerns, counterterrorism-related citizenship deprivation illustrates how counterterrorism can operate in a way that prioritises

symbolic security for many over *severe deprivation* for a few.

Returning to the question of whether it is justifiable to introduce measures whose primary goal is psychological in nature, it is the authors’ opinion that when a counterterrorism measure leads to a limitation of human rights, it is the benchmarks of human rights law that must be used to evaluate it. For a measure to comply, it must pursue a ‘legitimate aim’,¹⁴¹ and reassurance of the public would fail to fall within such ‘aims’ recognised under human rights law. For a measure that engages rights, to merely reassure the public would not be enough: security theatre can only remain within the bounds of legality (and arguably legitimacy) insofar as it does not impose limitations on rights. However, a psychological impact that may reduce, for instance, the radicalisation process would appear more acceptable insofar as it can have an indirect impact on public security or public order more broadly. Therefore, deciding the degree to which a measure impacts human rights is a useful starting point from which decisions about a measure’s appropriateness could be drawn.

As mentioned previously, despite the importance of evaluating the psychological effects of counterterrorism measures, little research has focused on this issue. While whether psychological effects can be measured and evaluated remains unanswered, several theoretical lenses can be posited. For instance, in addition to performativity,¹⁴² *signalling theory*¹⁴³ (which has been used to glean insights into terrorist decision-making),¹⁴⁴ might be applied to the psychological effects of counterterrorism measures on the public and terrorist actors.

Research on the psychological effectiveness of counterterrorism measures might also benefit from emerging scholarship examining the psychology of warfare and conflict. For example, the finding that particular psychological systems may be uniquely activated by situations of collective conflict, could be applied to better understand the

135 de Graaf and de Graaff (n 128) 261

136 See Renard (n 82) 8

137 *Ghoulid and Others v. France* App no 52273/16 (ECtHR, 25 June 2020)

138 For a discussion of the measure’s effectiveness see e.g., Institute on Statelessness and Inclusion, ‘Citizenship stripping as a security measure – Policy issues and the ‘effectiveness’ question’ (World Statelessness Report 2020) 227–238; Maarten P Bolhuis and Joris van Wijk, ‘Citizenship Deprivation as a Counterterrorism Measure in Europe; Possible Follow-Up Scenarios, Human Rights Infringements and the Effect on Counterterrorism’ (2020) 22 *European Journal of Migration and Law* 338

139 Certain limitative exceptions to that general rule exist under relevant treaty rules, including e.g., instances of persons conducting themselves ‘in a manner seriously prejudicial to the vital interests of the State’ as well as for cases of the citizenship obtained by ‘misrepresentation or fraud’, see 1961 Convention on the Reduction of Statelessness, art. 8; 1997 European Convention on Nationality, art. 7

140 See e.g., Laura van Waas and Sangita Jaghai, ‘All Citizens Are Created Equal, but Some Are More Equal Than Others’ (2018) 65 *Netherlands International Law Review* 413

141 See e.g., Janneke Gerards, *General Principles of the European Convention on Human Rights* (Cambridge University Press 2019) 220ff

142 de Graaf (n 128)

143 For review and examples, see Brian L Connelly and others, ‘Signaling Theory: A Review and Assessment’ (2011) 37 *Journal of Management* 39; Lee Cronk, ‘The Application of Animal Signaling Theory to Human Phenomena: Some Thoughts and Clarifications’ (2005) 44 *Social Science Information* 603

144 See e.g., the application of signalling theory to terrorist behaviour in Bruce Hoffman and Gordon H McCormick, ‘Terrorism, Signaling, and Suicide Attack’ (2004) 27 *Studies in Conflict & Terrorism* 243

psychological effects of terrorism and counterterrorism.¹⁴⁵ Lindner,¹⁴⁶ for instance, found that whether members of the public label an act of violence as ‘terrorism’ seems to depend upon whether harm occurs *between* group boundaries (but not within). Such research is relevant to our understanding of counterterrorism measures as it is possible that certain actions typically motivated in response to terrorism, may in fact be a result of such psychology. If the psychological effects of counterterrorism measures are to be considered as a component of effectiveness, further research will need to design refined measures of the psychological impacts of counterterrorism measures that are both valid and reliable. Emerging psychological research suggests that cognitive and behavioural changes in response to collective threats are universal (i.e., occurring among all humans) and measurable.¹⁴⁷ If these mechanistic processes are better understood, such insights could allow the development of tools (e.g., survey measures) that might facilitate standardised and reliable measurements of the psychological effects of counterterrorism measures on members of the public.

2.4. A MULTIFOCAL APPROACH TO EFFECTIVENESS IN DECISION-MAKING?

Little has been published in the field of counterterrorism studies regarding how to conceptualise effectiveness or consider it within broader decision-making models.¹⁴⁸ Meanwhile, in other disciplinary fields, such as the policy sciences, scholars have developed more robust criteria for the factors that should be considered alongside the effectiveness of policies.¹⁴⁹ Making further progress will require integrating knowledge about the evaluation of effectiveness outside the field of counterterrorism, most importantly from fields that share the same challenges, including limitations in determining causality and parsing complex interaction effects (e.g., climate change policy, health policy). Despite the utility of integrating ideas from other fields, counterterrorism has

unique challenges. This will require tailoring the concept of effectiveness to the specific context of counterterrorism so that policymakers, lawyers, social scientists, and other stakeholders can share a common ground of understanding. Indeed, one of the main reasons for the ambiguity surrounding the concept of effectiveness is that stakeholders tend to define effectiveness differently.¹⁵⁰ We briefly detail some of these differences, then address potential ways forward in which various perspectives of effectiveness could, in theory, be integrated into a comprehensive and multicomponent measure to inform policy decision-making.

Discussions with experts from a variety of fields in academia and policy¹⁵¹ highlighted how stakeholders conceptualise effectiveness in different ways. Social scientists tend to view effectiveness from a strictly empirical perspective, which involves extending and applying ideas from scientific research methodology. Given the rich body of theorising about the causes of radicalisation and terrorist violence within the social sciences, *ex ante* assessments of counterterrorism measures are also seen as important (i.e., using existing empirical and theoretical research to assess the feasibility of a measure’s effectiveness). For instance, drawing upon preexisting empirical data, not only from the field of counterterrorism but also from other fields such as criminology, to draw conclusions about the effectiveness of certain policies before their deployment. This *ex ante* emphasis closely resembles recommendations from the policy sciences that view effectiveness in light of ‘anticipatory designs’ – establishing “a system of institutions, rules and norms that provides a way to use foresight for the purpose of reducing risk and to increase capacity to respond to events at early rather than later stages of their development”.¹⁵²

While a strictly empirical approach to measuring effectiveness is appealing, relying too narrowly on existing science may have negative consequences. Indeed, there are reservations about making strong claims of causality in terrorism and counterterrorism because of significant

145 e.g., Miriam Lindner, ‘Of Friends and Foes: How Human Coalitional Psychology Shapes Public Reactions to Terrorism’ (Aarhus University 2018)

146 *ibid*

147 Pascal Boyer, Rengin Firat and Florian van Leeuwen, ‘Safety, Threat, and Stress in Intergroup Relations: A Coalitional Index Model’ (2015) 10 *Perspectives on Psychological Science* 434

148 But see, Van Um and Pisiou (n 78); Eric van Um and Daniela Pisiou, ‘Dealing with Uncertainty: The Illusion of Knowledge in the Study of Counterterrorism Effectiveness’ (2015) 8 *Critical Studies on Terrorism* 229; Spencer (n 128); Renard (n 82); Fiona de Londras, ‘Evaluation and Effectiveness of Counter-Terrorism’ In J. P. Burgess, G. Reniers, K. Ponnet, W. Hardyns, & W. Smit (Eds.), *Socially Responsible Innovation in Security: Critical Reflections* (Routledge 2018); van Dongen (n 83); Sobol and Moncrieff (n 3)

149 See, for instance, Ishani Mukherjee and Azad Singh Bali, ‘Policy Effectiveness and Capacity: Two Sides of the Design Coin’ (2019) 2 *Policy Design and Practice* 103; Mallory Compton and Paul’t Hart, *Great Policy Successes* (Oxford University Press 2019)

150 We discuss this further in Sobol and Moncrieff (n 3)

151 Discussions from the aforementioned expert meeting (n 2)

152 Mukherjee and Bali (n 149) 108

uncertainty and a lack of existing scientific knowledge.¹⁵³ Some scholars have criticised issues such as “case and data selection biases” and noted that “the results produced [by studies] are oftentimes contradictory, mostly due to the use of different indicators”.¹⁵⁴ Human rights activists are justifiably wary of the language of ‘effectiveness’ when criticising governments’ counter-terrorism efforts to avoid elevating the notion and thereby allowing space for abuse under the guise of effectiveness.¹⁵⁵ For these reasons, some believe that the starting point for thinking about effectiveness as it relates to human rights should be the (negative) societal impacts of counterterrorism measures.¹⁵⁶ Indeed, unintended impacts of counterterrorism measures are well documented and little disagreement exists regarding the need for ongoing monitoring and scrutiny. The difference that appears to exist among various institutional actors in the broader counterterrorism field is the importance that should be given to such effects. It is one’s institutional alignments that appear to determine the interest in, and importance of, assessing such impacts. Such assessment work is primarily the focus of rights advocates, while states, which tend to concentrate on operational effectiveness, pay much less attention to the negative societal impacts.¹⁵⁷ Given the marginalised position of civil society organisations in counterterrorism decision-making and review, the results of their work is unlikely to be appropriately included in the body of evidence used to evaluate specific measures. Beyond this problem is a larger question of what *should* be the appropriate weight given to the side effects when considered alongside effectiveness in decision-making models. Indeed, “a particularly problematic aspect in terms of measurement is the impact of measures on human rights and whether this should be counted as a side-effect or an indicator in its own right”.¹⁵⁸

From a social science perspective, limiting the scope of investigation to counterterrorism measures with apparent negative side-effects could streamline evaluation efforts. However, such limited approaches to evaluation¹⁵⁹ may create a distorted view of effectiveness, not least because of the case selection bias it would cause (i.e., limiting the generalisability of conclusions about effectiveness). Furthermore, some measures that appear on the surface to lack human rights impacts may, under closer examination, be found to have unintended and unpredictable side-effects on human rights. Side-effects may generally not be known until after implementation. The measurement of indicators and side-effects throughout a predetermined chain of outcomes, for instance, the points of “output effectiveness,” “outcome effectiveness,” and “impact effectiveness”,¹⁶⁰ may be a more systematic and robust way to measure effectiveness and human rights impacts.

The idea that there needs to be some type of composite or multicomponent approach to determine how effectiveness is integrated into decision-making models is not new.¹⁶¹ Intuitively it seems necessary to establish a method of combining and weighting different components so that institutional actors know when to adopt – or reject – counter-terrorism policies. However, a systematic approach for evaluating the impact of counterterrorism measures is currently lacking. There is also “no generally accepted standard for linking components of [counterterrorism] measures”.¹⁶² One reason for this, as we have shown, is that effectiveness means different things depending on who one asks (e.g., scientists, legal scholars, institutional actors) and integrating such different perspectives is challenging. While indeed complex, developing a standardised composite method of assessing counterterrorism interventions might indeed be possible.¹⁶³ What would

153 Van Um and Pisiou (n 148)

154 *ibid*

155 See e.g., Josephine Doody and Rosemarijn van der Hilst, ‘Civil society and policy-maker perspectives on EU counter-terrorism’ in de Londras and Doody (n 5); Azfar Shafi, *The 9/11 Complex. The Political Economy of Counter-Terrorism* (Transnational Institute, May 2021); for examples of rights advocacy based on ineffectiveness of counterterrorism measures, see e.g., James Goldston, *Ethnic Profiling and Counter-Terrorism Trends, Dangers, and Alternatives* (Open Society Justice Initiative 2006) 10; CAGE, *Schedule 7: Harassment At Borders. The impact on the Muslim community* (CAGE 2019) 43; Ruth Blakeley and others, *Leaving the War on Terror: A Progressive Alternative to Counter-Terrorism Policy* (Transnational Institute 2019) 7–8; Faiza Patel, Rachel Levinson-Waldman and Harsha Panduranga, *A Course Correction for Homeland Security: Curbing Counterterrorism Abuses* (Brennan Center for Justice at New York University School of Law 2022) 24

156 For a similar account, see e.g., Michael Lister and Lee Jarvis, ‘The Counter-Terrorism Review: Trading liberty for security’ (*Open Democracy*, 5 February 2011) at <https://www.opendemocracy.net/en/opendemocracyuk/counter-terrorism-review-trading-liberty-for-security/>

157 See e.g., Blackburn, de Londras and Morgan (n 19) 51–79; John Holmwood and Layla Aitlhadj, *The People’s Review of Prevent* (Prevent Watch 2022) 1–16

158 Van Um and Pisiou (n 78)

159 Whether a narrow view to assess the effectiveness of only those measures known to impact human rights or the effectiveness of legal procedural safeguards that accompany extraordinary counter-terrorism powers

160 Van Um and Pisiou (n 78)

161 e.g., van Dongen (n 83); Van Um and Pisiou (n 78)

162 Van Um and Pisiou (n 148) 267

163 See, e.g., a proposal to measure U.S. foreign policy effectiveness by Amos N Guiora, Marcel C Minutolo and Luis G Vargas, ‘Measuring US Foreign Policy Effectiveness’ (2020) 21 *Journal of Behavioral and Applied Management* 18

such a model need to include? We can draw some preliminary notions around the components from other policy domains.¹⁶⁴ At a minimum, such a decision-making model would need to take into consideration: (a) the degree to which the measure achieves its aim(s)/intended objectives (specific/direct goals and general/long-term goals¹⁶⁵), (b) the human rights impacts of the measure, (c) the unintended side effects of the measure (both positive and negative), (d) and interaction effects with other measures (policies and/or laws).

Whether such a standardised decision-making model is feasible, given the wide range of counterterrorism interventions used by governments, remains a question for future research. Indeed, additional aspects of effectiveness might need to be considered.¹⁶⁶ Future research may also need to establish the extent to which different components in decision models should be weighted. Giving greater weight to some components (e.g., the achievement of security aims) over others (e.g., unintended effects) will impact how decisions would be made.¹⁶⁷

2.5. NEW WAYS TO COLLECT DATA AND MEASURE EFFECTIVENESS

Despite a growing body of studies, measurement and data collection challenges can still hamper evaluations of effectiveness. One common concern involves the type of variables being measured to determine effectiveness. “In quantitative terms, the main focus of the literature is on the impact component of effectiveness, often in the sense of a reduction in terrorist attacks in general or a reduction in certain methods of terrorism (such as suicide attacks)”.¹⁶⁸ Focusing too narrowly on the impact component of effectiveness, which is typical in early studies on counterterrorism effectiveness, may not be ideal. Van Um and Pisiou¹⁶⁹ note how “there is a preponderance of quantitative methods [in the effectiveness literature], while the potential of methods such as interviews or surveys has not been exploited to the full[est] [...]”. Indeed, there are preliminary outcomes that should be of relevance for determining effectiveness: indicators or other things that happen before ‘the bomb goes off’. Preliminary indicators might include shifting attitudes or

behavioural changes. Such changes could be detected using surveys or observational techniques. Indeed, the increased use of survey, interviews, and other qualitative data sources could be helpful in measuring effectiveness, particularly when attempting to evaluate the side-effects and potential human rights impacts of counterterrorism interventions.

In addition to employing traditional methods, it would be advantageous for researchers to explore innovative and unconventional approaches to data collection, expanding the range of analytical techniques at their disposal.¹⁷⁰ Virtual reality is one approach that could be used to measure how participants respond to counterterrorism interventions. By placing participants in immersive environments that mimic intervention conditions (e.g., interactions with militarised police, the placement of armoured vehicles in communities) it may be possible to monitor cognitive and physiological changes, which could indicate positive or negative effects of proposed measures *ex ante*. Such data could also be used, for instance, to see if members of certain communities are sensitive to negative psychological impacts after the implementation of specific interventions. Research incorporating community mapping methodologies may prove valuable in this context. Community mapping entails requesting participants to delineate their daily activities on maps of their community, both before and after the implementation of a local intervention. This approach allows researchers to observe potential shifts in participants’ interactions with their physical and social environments. Identifying changes in individuals’ use of space after an intervention can highlight potential side effects of the measures or confirm specific intended outcomes.

While measurement has focused primarily on outcome (frequency) data or measuring the side effects of counterterrorism measures on members of the public, an interesting way forward would be to measure how counterterrorism measures impact the psychology of radicalised individuals, which might have downstream effects on their willingness (and/or ability) to carry out violent acts. Such research could create counterterrorism interventions using theoretical models on radicalisation and violent engagement, then test

164 e.g., UN Environment (ed), *Global Environment Outlook – GEO-6: Healthy Planet, Healthy People*: (Cambridge University Press 2019) 273–280

165 Berenice Boutin, ‘Do Counter-Terrorism Measures Work? Appraising the Long-Term and Global Effectiveness of Security Policies’ (2018) Asser Institute Policy Brief 2018-03

166 e.g., “process (the extent to which the design process is socially appropriate and perceived as being just), political (the extent to which there is widespread political support), and temporal (the extent to which a policy sustains its performance in the face of changing circumstances)” are some of the additional aspects that will have to be considered in decision-making models that integrate counterterrorism effectiveness, see Mukherjee and Bali (n 149) 103

167 Van Um and Pisiou (n 148)

168 *ibid* 257

169 Van Um and Pisiou (n 148)

170 Many of these ideas were inspired by social scientist participants at the aforementioned expert meeting (n 2)

those models using experiments with obtainable populations (e.g., non-violent political activists). Or, perhaps more challengingly, test the effects of existing or proposed counterterrorism interventions on militant reasoning and decision-making. While the latter proposal may seem unreasonable, it is worth noting that scholars have already examined psychological processes in radicalised individuals, for instance, using fMRI neuroimaging to analyse decision-making¹⁷¹ and measuring the influence of propaganda and news media on disengaged individuals.¹⁷² It would not be too far of a stretch to imagine using such methods to evaluate the psychological effects of counterterrorism interventions on the (de)radicalised mind.

2.6. INTERMEDIARY CONCLUSION

Given the challenges of measuring the effectiveness of counterterrorism measures, previous studies of counterterrorism effectiveness, and the gaps within this field, what might be gleaned in terms of potential ways forward? It is sufficient to say that scholars have found unique ways to increase scientific rigor and circumvent the many challenges around definitions, data availability, and secrecy. These include (a) using (quasi)experimental research to better determine cause and effect,¹⁷³ (b) advocating that States allow scholars access to classified data,¹⁷⁴ (c) utilising novel data sources,¹⁷⁵ and (d) establishing standard evaluation practices and measurement tools that are specific to the counterterrorism field (e.g., Impact Europe¹⁷⁶, the RAND Program Evaluation Toolkit for Countering Violent Extremism¹⁷⁷).

It is also clear that the field of counterterrorism studies requires additional research to clarify the concept of effectiveness. It remains unclear if certain effects, particularly psychological effects, should and could be integrated into assessments. There is also uncertainty about more funda-

mental issues, for instance, how to establish a common understanding of effectiveness that would accommodate and satisfy academics, policymakers, and stakeholders, among others. Operationalising the concept of effectiveness in counterterrorism will require a better understanding of how various factors should be integrated and weighted. Gaining insights from outside the field of counterterrorism, particularly research in public policy and the policy sciences, will be valuable in this regard. Lastly, developing novel approaches for assessing the effects of counterterrorism measures and encouraging States to collect and share data with researchers will be crucial.

In the following Section, we proceed to discuss the role that the effectiveness of counterterrorism measures plays in human rights law analysis of such measures' justifiability in restricting the exercise of 'limitable' rights.

3. EFFECTIVENESS OF COUNTERTERRORISM MEASURES AND HUMAN RIGHTS LAW

Rules governing restrictions on limitable rights are typically found in 'limitation clauses'. In addition to requiring that the limiting measures are provided by law, limitation clauses outline the aims that such measures can pursue (e.g., 'national security', 'public order', 'rights of others') when such measures are 'necessary' for the achievement of these aims. The form and content of limitation clauses vary.¹⁷⁸ Still, the fundamental logic behind them transcends these differences in that enjoyment of rights is the 'default setting', while the limitations must be justified. Such justifications commonly take the form of proportionality analysis – an adjudicative method employed to assess the appropriateness of rights' restrictions.¹⁷⁹ Limitation clauses signal the permissibility of restrictions on the enjoyment of specific rights where such enjoyment conflicts with public interests or the

171 Nafees Hamid and others, 'Neuroimaging "Will to Fight" for Sacred Values: An Empirical Case Study with Supporters of an Al Qaeda Associate' (2019) 6 Royal Society Open Science 181585

172 Philip Baugut and Katharina Neumann, 'Online News Media and Propaganda Influence on Radicalized Individuals: Findings from Interviews with Islamist Prisoners and Former Islamists' (2019) *New Media & Society* 1

173 Bellasio and others (n 94)

174 Lum and Kennedy (n 1); Bellasio and others (n 94)

175 Lum and Kennedy (n 86)

176 IMPACT Europe, see impacteurope.eu

177 Todd Helmus and others, *RAND Program Evaluation Toolkit for Countering Violent Extremism* (RAND Corporation 2017)

178 Martin Borowski, 'Limiting Clauses: On the Continental European Tradition of Special Limiting Clauses and the General Limiting Clause of Art 52(1) Charter of Fundamental Rights of the European Union' (2007) 1 *Legisprudence* 197; also see Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press 2011) 133ff

179 The body of literature on the topic is vast, see e.g., Barak (n 178); Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Martinus Nijhoff Publishers 2009); Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4 *Law & Ethics of Human Rights* 142; Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 72; Moshe Cohen-Eliya and Iddo Porat, 'Proportionality and the Culture of Justification' (2011) 59 *American Journal of Comparative Law* 463

rights of others; proportionality offers a method of resolving such conflicts.¹⁸⁰

3.1. PROPORTIONALITY OF RIGHTS' LIMITATION AND SUITABILITY OF MEANS TO ENDS

The practice of domestic courts that have adopted proportionality as the primary method in their rights' adjudication has been the primary driver in maintaining and shaping its contemporary form.¹⁸¹ The proportionality test is conventionally depicted as comprising several prongs or steps.¹⁸² Some variation in the requirements of each step exist across jurisdictions, but the 'core' of proportionality is well-illustrated by the four sequential questions adopted by the UK Supreme Court for cases involving human rights claims: "(i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community".¹⁸³

The 'steps' of the test represent minimal relationships that must exist between the right, the right-limiting measure, and the competing interest. Each element must be satisfied to maintain the exceptionality of the rights' limitation. However construed, a rights' restricting measure must possess at least some degree of potential or actual effectiveness – it must be capable of contributing to achieving the goal it pursues. Three subtests of proportionality outline relevant relational links that must exist between a measure and its aim:

Suitability. The function of filtering out ineffective measures is primarily performed by the requirement of 'rational connection' or 'suitability'. It allows for rights-infringing measures only insofar as their "implementation can

reasonably be expected to contribute towards the achievement"¹⁸⁴ of the objective pursued. This subtest is often missing in the adjudicative practices of international human rights bodies, as discussed further below.

Necessity. This analytical step follows suitability and is similarly concerned with the measure's effectiveness as it must establish whether a 'less intrusive measure' could have been employed for the goal's achievement: a measure's effectiveness must then be compared to that of the alternative ones.¹⁸⁵

Stricto sensu proportionality. This concluding subtest engages the issue of the measure's effectiveness by requiring a proportional relation "between the benefits gained by fulfilling the purpose and the harm caused to the [...] right from obtaining that purpose".¹⁸⁶ For such 'balancing' between the benefits and the harms to be carried out, such benefits must be gained by the measure in question. The more effective a measure is in achieving these benefits, the more justifiable the associated harms it imposes on the enjoyment of rights become.

The effectiveness of the rights' limiting measure in achieving its aims must then be of at least some importance.¹⁸⁷ The scrutiny of effectiveness should not be minimised for restrictions imposed in counterterrorism.¹⁸⁸ As Waldron notes in discussing "the image of balance" between security and liberty in the wake of the 9/11 attacks,

[t]he fact that a certain degree of liberty is associated in the public mind with a certain degree of risk is not itself a ground for diminishing the liberty given a concern for the risk. *We must also be sure that the diminution of liberty will in fact have the desired consequence.* Or, if the desired reduction in risk is only probable not certain, then we must be as clear as we can about the extent of the probability. In particular, it is never enough for government to show that reducing a given liberty is *necessary* for com-

180 Niels Petersen, *Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, Germany and South Africa* (Cambridge University Press 2017) 38; Borowski (n 178) 203–204

181 For a recent overview of such practice, see contributions in Mordechai Kremnitzer, Talya Steiner and Andrej Lang (eds), *Proportionality in Action: Comparative and Empirical Perspectives on the Judicial Practice* (Cambridge University Press 2020)

182 Barak (n 178) 460–65; Sweet and Mathews (n 179) 76; Talya Steiner, Andrej Lang and Mordechai Kremnitzer, 'Comparative and Empirical Insights into Judicial Practice. Towards an Integrative Model of Proportionality' in Kremnitzer, Steiner and Lang (n 181) 547

183 *Bank Mellat v Her Majesty's Treasury* [2013] UKSC 38, 20 (Lord Sumption), 74 (Lord Reed); more recently, see *Pwr v Director of Public Prosecutions* [2022] UKSC 2, 69

184 *Bank Mellat* (n 183) 92 (Lord Sumption)

185 David Bilchitz, 'Necessity and Proportionality: Towards A Balanced Approach?' in Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing 2014)

186 Barak (n 178) 340; also see Human Rights Committee, General Comment No. 37, CCPR/C/GC/37 (27 July 2020), 40 and Martin Scheinin, 'U.N. Human Rights Committee General Comment No. 37 on Freedom of Assembly: An Excellent and Timely Contribution' (*Just Security*, 30 July 2020) at <https://www.justsecurity.org/71754/u-n-human-rights-committee-general-comment-no-37-on-freedom-of-assembly-an-excellent-and-timely-contribution/>

187 Also see Martin Scheinin, 'Human Dignity, Human Security, Terrorism and Counter-Terrorism' in Christophe Paulussen and Martin Scheinin (eds), *Human Dignity and Human Security in Times of Terrorism* (TMC Asser Press 2020) 18–19 (dissuing the proportionality test as asking the questions of whether "[...] the legitimate aim invoked actually served by the proposed restriction? Can that actual benefit towards the legitimate aim be proven, quantified or measured? If so, is it proportionate when compared against the negative impact upon human rights?')

188 M  d  ric Martin-Maz   and J Peter Burgess, 'The Societal Impact of European Counter-Terrorism' in de Londras and Doody (n 5) 107–12

bating terrorism effectively. It may be a necessary condition, and yet—because sufficient conditions are unavailable—the terrorist threat may continue unabated. In other words, the case must be based on the actual prospect that security will be enhanced if liberty is reduced. It may be said—quite reasonably—that we cannot know what the prospect is. Fair enough: then what has to be inferred is that *we cannot know whether it is worth giving up this liberty*, and thus we cannot legitimately talk with any confidence about an adjustment in the balance.¹⁸⁹ (emphasis in original)

In the structure of the proportionality test, it is the ‘suitability’ prong that bears the responsibility for ensuring that the restriction of rights brings the desired outcome. However, the view predominant in the literature maintains that the courts employing proportionality analysis treat the suitability requirement as a low threshold test. As such, it demands only *some* contribution to the aim pursued and is only intended to capture practices that are acutely *mismatched* to their goals.¹⁹⁰ Recent empirical scholarship sheds more light on this issue. In their study of the application of proportionality in decisions of six apex courts,¹⁹¹ Steiner, Lang and Kremnitzer found that the number of cases where the measures failed at the suitability stage represents a significant part of all measures found by the courts to be disproportionate.¹⁹² In four out of six jurisdictions, failure at the suitability stage was responsible for more than 30% of all ‘failure cases’.¹⁹³ They also find that ‘failures’ at the suitability stage often do not stop the courts from continuing their analysis.¹⁹⁴ The latter is explained by their finding that the purported sequential division of labour between the subtests is not typically maintained in practice. Courts exercise flexibility in moving from one stage

to another.¹⁹⁵ Yet, such a high rate of ‘failures’ attributable to the suitability stage would be *prima facie* inconsistent with a low threshold account of suitability.¹⁹⁶ Indeed, one would not expect almost a third of all measures reviewed by several apex courts to be completely mismatched to their declared goals. The authors explain it by a broader account of the suitability test that exists in practice.¹⁹⁷ In addition to the function of filtering out measures unsuitable to their goals, it also includes overinclusive policies – those that go beyond what is needed for the achievement of their goals: “[i]ncorporating the idea of overbreadth in the suitability stage stresses that part of the policy is not rationally connected to the policy goal and therefore the policy fails to meet the basic standard of rationality”.¹⁹⁸ Finally, they found that some of the ‘failures’ at the suitability stage in the courts’ analysis were ‘spillovers’ from the preceding stage that focuses on the legitimacy of the aims pursued. Where the courts are unwilling to scrutinise it, they rely on the suitability stage instead “as a way of indirectly exposing the insincerity of the goal presented or proving its illegitimacy”.¹⁹⁹

The authors conclude that this status of an ‘intermediate’ stage of the suitability test functioning as a catch for “cases that ‘fell through’ the worthy purpose test, as well as cases that are so grossly overbroad that they fail even before reaching the more refined [necessity] test”²⁰⁰ implies that courts rarely meaningfully scrutinise whether the measures can achieve their stated aims.²⁰¹ They suggest for the suitability stage to be invigorated:

[...] the suitability stage should inquire into the extent to which the measure is capable of promoting the specific concrete goal or goals, and the factors upon which this is dependent. Even if the findings that emerge from these

189 Jeremy Waldron, ‘Security and Liberty: The Image of Balance’ (2003) 11 *Journal of Political Philosophy* 191, 208–209

190 Kai Möller, *The Global Model of Constitutional Rights* (Oxford University Press 2012) 193; Dieter Grimm, ‘Proportionality in Canadian and German Constitutional Jurisprudence’ (2007) 57 *The University of Toronto Law Journal* 389; Barak (n 178) 303–316; Julian Rivers, ‘The Presumption of Proportionality’ (2014) 77 *The Modern Law Review* 409, 421; Jud Mathews and Sweet Alec Stone, ‘All Things in Proportion? American Rights Review and the Problem of Balancing’ (2010) 60 *Emory Law Journal* 805; Kai Möller, ‘Proportionality: Challenging the Critics’ (2012) 10 *International Journal of Constitutional Law* 709, 713; Robert Alexy, ‘Constitutional Rights and Proportionality’ (2014) *Revue* 5165, 52–53; Anne Carter, *Proportionality and Facts in Constitutional Adjudication* (Hart 2021) 23–25

191 India, Germany, Poland, South Africa, Israel and Canada

192 Steiner, Lang and Kremnitzer (n 182) 568

193 61% in India, 5% in Germany, 17% in Poland, 30% in South Africa, 32% in Israel and Canada, see *ibid* 569; also see Petersen (n 180) ch 5

194 Steiner, Lang and Kremnitzer (n 182) 569

195 *ibid* 544

196 *ibid* 571

197 *ibid*

198 *ibid* 572

199 *ibid*; for another empirical account of the multi-functionality of the suitability test, see Petersen (n 180) ch 5

200 Steiner, Lang and Kremnitzer (n 182) 572

201 *ibid* 573

inquiries are not themselves a basis for independent failure at the suitability stage, they contribute significantly to the subsequent analysis, including the evaluation of alternative measures and the weighing of the actual benefit of the policy relative to the harm. Importantly, we believe that the burden of proof should be placed on the government to establish its expectations of effectiveness [...] As a general rule, therefore, a more demanding standard is warranted, [...] requiring that the rational connection or nexus be not 'slim and strictly theoretical' but 'real and significant', or 'direct and proximate, not remote or illusory (footnotes omitted)²⁰²

The concern about the decision-makers' rationality in devising rights' limiting measures capable of achieving their stated aims is perhaps even more significant in the context of counterterrorism. Terrorist violence invokes strong emotions that are not necessarily conducive to accurately assessing risk, benefits and harms, especially when imposed on out-group members.²⁰³ Following acts of violence, democratic governments are likely to be pressured to react, often by legislating further or utilising already extensive executive powers.²⁰⁴ The process is reinforced by a lack of meaningful scrutiny over the effectiveness of measures already available, maintaining "the ability of security agencies to ensure their neat reproduction over time".²⁰⁵

The effects of deferential attitudes by international human rights bodies can carry further significance.²⁰⁶ For an adjudicatory method not to incorporate at least a basic notion of the measure's suitability to its aims is not only to fail to filter out those that are unsuitable but also to signal that no such review is needed for a measure to pass the scrutiny of that body. This is inadequate for measures known to be adopted and utilised primarily in contexts of (often irrationally) heightened panic and fear.

Relatedly, Gross suggests that various cognitive biases

are likely to skew the public and its leaders' ability to accurately 'balance' between 'security and liberty' in situations of violence.²⁰⁷ Then, it would be beneficial to examine "whether any changes should be [...] made in the utilisation of balancing tests in order to achieve results out of the balancing process that are less affected by distortions".²⁰⁸ In the following discussion, it will be suggested that such improvement can be achieved by a more robust engagement with the suitability prong of the proportionality test.

3.2. SUITABILITY TEST IN THE CONTEXT OF NATIONAL SECURITY

To demonstrate the benefits of engagement with the suitability prong of the proportionality test in rights-based judicial review, we begin with a brief descriptive account that illustrates how the test can be employed in cases concerning issues of national security.

One instructive example is the 2013 decision of the UK Supreme Court in *Bank Mellat*. The case concerned an Iranian bank targeted under a counter-terrorist power of the Treasury.²⁰⁹ The statutory power allows the Treasury to "act against terrorist financing, money laundering and certain other activities"²¹⁰ by imposing various restrictions and requirements for transactions with targeted entities.²¹¹ The Treasury is allowed to employ the power where the development or production of nuclear weapons is concerned. Believing the bank to be involved in the "provision of services for Iran's ballistic missile and nuclear programmes", an order was imposed to require "all persons operating in the financial sector not to enter into or to continue to participate in any transaction or business relationship" with the bank.²¹² The order sought to address "the risk to the UK national interests posed by Iran's proliferation activities" and to "reduce the risk of the UK financial sector being used, unknow-

202 Ibid 574–5; also see Mathen Carissima, 'Rational Connections: Oakes, Section 1 and the Charter's Legal Rights' 43 *Ottawa Law Review* 491; Aharon Barak, 'A Research Agenda for the Future' in Vicki C Jackson and Mark Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (Cambridge University Press 2017) 330

203 Oren Gross, 'Security vs. Liberty: An Imbalanced Balancing' (2009) *Minnesota Law School Legal Studies Research Paper Series*, Research Paper No. 09-42; Cass R Sunstein, 'Terrorism and Probability Neglect' (2003) 26 *Journal of Risk and Uncertainty* 121; also see Cass R Sunstein, 'On the Divergent American Reactions to Terrorism and Climate Change' (2007) 107 *Columbia Law Review* 503

204 On panic and counterterrorism law-making, see e.g., Fiona de Londras, *Detention in the 'War on Terror': Can Human Rights Fight Back?* (Cambridge University Press 2011) ch 1; but see Eric A Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* (Oxford University Press 2007) ch 2; also see Andrej Lang, 'Non-Judicial Rights Review of Counterterrorism Policies: The Role of Fundamental Rights in the Making of the Counterterrorism Database and the Data Retention Legislation in Germany' (2021) 19 *International Journal of Constitutional Law* 634, 640–641

205 Martin-Mazé and Burgess (n 188) 109

206 We return to the question of deference in Section 4 below

207 Gross (n 203)

208 Gross (n 203) 21; also see Stuart Macdonald, 'Why We Should Abandon the Balance Metaphor: A New Approach to Counterterrorism Policy' (2008) 15 *ILSA J. Int'l & Comp. L.* 95

209 *Bank Mellat* (n 183) 1–9 (Lord Sumption)

210 Counter-Terrorism Act 2008, s 62

211 Counter-Terrorism Act 2008, sch 7

212 *Bank Mellat* (n 183) 7–12 (Lord Sumption)

ingly or otherwise, to facilitate Iran's proliferation sensitive activities".²¹³ The key issue concerned the justifiability of this specific bank being targeted. The Treasury's initial assertion that the bank was knowingly engaging in transactions related to the Iranian programmes, "or at least turning a blind eye to them", was rejected by the lower courts as unsupported by facts.²¹⁴ As the proceedings continued, the Treasury's argument changed to justify the restrictions on a different ground, based on the bank's risk of being an "unwitting and unwilling" channel used by entities involved in the weapons programmes.²¹⁵ This argument was accepted, the court finding that "the justification for the [order] was to be found not in any problem specific to Bank Mellat but in the general problem for the banking industry of preventing their facilities from being used for purposes connected with the Iranian weapons programmes".²¹⁶ That is, restrictions on one specific entity were upheld even though the underlying problem equally concerned other Iranian banks that were not sanctioned.

This informed the analysis of the measure's proportionality, centring around its suitability to the aims sought. Lord Sumption, writing for the majority, addressed the issue in the following way:

I would not go so far as to say that the [power to prohibit all operations with designated entities] in this case had no rational connection with the objective of frustrating as far as possible Iran's weapons programmes. On the footing that a precautionary approach is justified, the elimination of any Iranian bank from the United Kingdom's financial markets *may well have added something* to Iran's practical problem in financing transactions associated with those programmes [...]. But I think that the distinction between Bank Mellat and other Iranian banks which was at the heart of the case put to Parliament by ministers was an arbitrary and irrational distinction and that the measure as a whole was disproportionate. *This is because once it is found that the problem is not specific to Bank Mellat but an inherent risk of banking, the risk posed by Bank Mellat's access to those markets is no dif-*

ferent from that posed by the access which comparable banks continued to enjoy. Moreover, the discriminatory character of the direction must drastically reduce its effectiveness as a means of impeding the Iranian weapons programmes. [...] Nothing in the Treasury's case explains why we should accept that it is necessary to eliminate Bank Mellat's business in London in order to achieve the objective of the statute, if the same objective can be sufficiently achieved in the case of comparable banks by requiring them to observe financial sanctions and relevant risk warnings. It may well be that other Iranian banks have not been found to number among their clients entities involved in Iran's nuclear and ballistic missile programmes. But it follows from the fact that this is a problem inherent in the conduct of international banking business that they are as likely to do so as Bank Mellat. The direction [to prohibit all operations with the bank] was *irrational in its incidence and disproportionate to any contribution which it could rationally be expected to make to its objective.* I conclude that [...] it was unlawful.²¹⁷ (emphasis added)

As the decision demonstrates, judicial scrutiny of the suitability of measures employed in national security contexts must not necessarily be either excessively deferential or unreasonably demanding. Nor are the conditions allowing for such scrutiny necessarily difficult to obtain. In some cases, such assessment can be made possible simply by specifying the goal and the problems it seeks to address. Once the initial assertion that the targeted entity in *Bank Mellat* was somehow different from the other ones was refuted, the conclusion about the inconsistency of the government's actions and their questionable effectiveness no longer required one to make "an experienced judgment of the international implications of a wide range of information, some of which may be secret".²¹⁸

Another instructive example of judicial engagement with the suitability test is provided by the treatment of house demolitions by the Israeli Supreme Court.²¹⁹ Statutory power grants military commanders broad authority to demolish houses. This has long been used against houses in the Occu-

213 *ibid* 12

214 *ibid* 23

215 *ibid* 23

216 *ibid* 24

217 *ibid* 27

218 *ibid* 21

219 The following discussion is only a snippet of the Court's practice on the matter; it seeks to illustrate the workings of the suitability test and not present the complete picture of the Court's engagement with the practice. For broader coverage, see the references below and e.g., David Scharia, *Judicial Review of National Security* (Oxford University Press 2014) ch 3

pied Palestinian Territories where a resident participated (or is suspected of participating) in acts of terrorist violence.²²⁰ In terms of the measure's proportionality under the Israeli constitutional law, the Supreme Court has been deferentially accepting the government's claim regarding the effectiveness of the measure in deterring future violence on account of it being a matter for the executive to evaluate, and not for the court to "step into the shoes of the security forces, which are vested with the discretion to determine which measure is effective and should be used for the purpose of achieving deterrence".²²¹ However, in a 2014 decision, one justice²²² indicated that the claims of the measure's effectiveness should not be unconditionally accepted in perpetuity:

[...] looking to the future, as extensive as the discretion of the military commander may be, [...] I believe that the principle of proportionality does not allow us to continue to assume forever that choosing the drastic option of house demolition, or even of house sealing, achieves the desired purpose of deterrence, *unless all of the data that properly confirms that hypothesis is presented to us for our review*. We accept the premise that it is hard to assess this matter [...]. However, as aforesaid, I believe that *using means that have considerable consequences on a person's property justifies an ongoing review of the question of whether or not it bears fruit*, especially in view of the fact that claims have been raised in this regard even among IDF officials, and see, for example, the presentation of the [IDF Committee that recommended ending the policy in 2005], which, on the one hand, presents a consensus among intelligence agencies regarding the benefits thereof, and on the other hand states, under the title "Major Insights" that "within the context of deterrence, the measure of demolition is 'eroded'" [...]. Thus, I believe that *State authorities must examine the measure and its utility from time to time,*

including conducting follow-up research on the matter, and insofar as possible, should, as may be necessary in the future, present this Court with the data demonstrating the effectiveness of house demolition as a means of deterrence that justifies the infliction of damage to parties who are not suspected nor accused [...]. We are not setting hard-and-fast rules as to the nature of the research and the data required. That will be clarified, to the extent necessary, at the appropriate time (emphasis added).²²³

The court returned to the issue in 2015. In a decision involving several petitions, "mindful that several months have elapsed" since the court's request for further evidence, it asked the authorities "if there had been any examination of the matter".²²⁴

In answer to our question, the Respondents insisted that they were in possession of classified material that supported their argument concerning the benefit derived from demolition of the homes of terrorists [...]. With the consent of counsel for the Petitioners, we examined the classified material *ex parte*. I will emphasize that the material that was presented to us does not fall into the category of "research", but rather, it is a collation of information. This information attests to a not insignificant number of cases in which potential terrorists refrained from carrying out attacks due to their fear of the consequences for their homes and those of their family.²²⁵

Based on that evidence, the court decided to abstain from questioning the authorities' claim regarding the measure's effectiveness at the time.²²⁶ Yet, it refused to uphold one of the demolition orders as the apartment was leased by the family of the person suspected of terrorist violence. The court accepted the petitioner's claim about the lack of 'rational connection' between the demolition and deterrence in such circumstances.²²⁷

These decisions of the Israeli Supreme Court illustrate

220 Mordechai Kremnitzer and Lina Saba-Habesch, 'House Demolitions' (2015) 4 *Laws* 216

221 *HaMoked: Center for the Defense of the Individual v. Minister of Defense* HCJ 8091/14 (December 3, 2014) 17 (Justice E. Rubinstein); *Hamed v. Military Commander in the West Bank* HCJ 7040/15 (November 12, 2015) 27 (President M. Naor); Talya Steiner, 'Proportionality Analysis by the Israeli Supreme Court' in Kremnitzer, Steiner and Lang (n 181) 345-346

222 On the lack of unanimity between the justices on the policy, see Amichai Cohen and Yuval Shany, 'House Demolition at the Israeli Supreme Court: Recent Developments' (*Lawfare*, 14 January 2019) at <https://www.lawfareblog.com/house-demolition-israeli-supreme-court-recent-developments>; also see Elena Chachko, 'The Israeli Supreme Court Debates Counterterrorism Home Demolitions' (*Lawfare*, 24 March 2016) at <https://www.lawfareblog.com/israeli-supreme-court-debates-counterterrorism-home-demolitions>

223 *HaMoked: Center for the Defense of the Individual v. Minister of Defense* (n 221) 27 (Justice E. Rubinstein); also see *ibid* 5-6 (Justice E. Hayut), but see *ibid* 5-14 (Justice Noam Sohlberg)

224 *Hamed v. Military Commander in the West Bank* (n 221) 28 (President M. Naor)

225 *ibid*; also see *ibid* 1 (Justice N. Sohlberg)

226 *ibid* 29

227 *ibid* 41-49 (President M. Naor); for more recent decisions, see Hamoked, 'The HCJ approved the punitive demolition of a duplex in the West Bank, making two families homeless, including one minor' (Hamoked, 21 February 2022) at <https://hamoked.org/document.php?dID=Updates2284>; 'The judgment [...] unreservedly adopted the [state's] position regarding the measure's effectiveness as a deterrent, ruling that "once a substantiated foundation regarding the deterring potential of the Regulation has been presented by the Respondents, there is no call to assume otherwise" [...] despite HaMoked's objection to the ex parte presentation of classified material and its demand that the material concerning the accused man's residency tie to the second-story apartment be presented openly'; Chen Maanit, 'Newly Appointed Supreme Court Justice Says Home Demolitions Contradict 'Israel's Values' (*Haaretz*, 7 July 2022) at <https://www.haaretz.com/israel-news/2022-07-07/ty-article/premium-justice-says-home-demolitions-contradict-israels-values/00000181-d94a-d9a3-a3e1-fdfaeb90000>

both the limitations and merits of the suitability test. First, it is important to note that the function of the test is to expose and filter out the measures that are incapable of producing the results sought rather than invalidate those that are extreme, disproportionate, or otherwise objectionable. The latter is within the purview of the other subtests of proportionality and potentially other rules of international law. Conversely, for a measure to be suitable to its aim is not necessarily to be acceptable or desirable on its own. Importantly, as this brief account of the court's approach toward house demolitions demonstrates, it is the suitability test that allowed the justices to insist on the production of evidence, examine the (however imperfect) information provided, and rely on it to refuse the demolition order against the leased apartment since nothing in the evidence provided spoke to the possibility of exerting deterrence in such circumstances.²²⁸ For a court to condition the permissibility of a practice on its effectiveness would, by itself, be a significant contribution to much of the judicial review of counterterrorism.

Finally, all of these decisions concern the legality of measures adopted on the basis of a statute rather than that statute's constitutionality. The narrower focus of such ex-post review of the exercise of powers allows for greater scrutiny by permitting a court to scrutinise the rationality of the decision-maker against the relevant facts. Admittedly, an abstract, constitutional review style of inquiry into the suitability of a legislative instrument (e.g., a criminal prohibition of certain conduct) or of a power granted to the executive (e.g., to designate financial entities to be preventively sanctioned) to their purported aims would pose challenges. For one, it might be difficult to meaningfully examine the policy's effectiveness before its actual effects are produced.²²⁹ Yet, the possibility of such a review should not be discarded. One example is the prominent decision in *A and others v Secretary of State for the Home Department* by the UK House of Lords. Here, it was ruled that a detention scheme allowing for the indefinite detention of foreign terrorist suspects was

incompatible with the European Convention on Human Rights.²³⁰ Another is the Polish Constitutional Tribunal's finding that a power enabling the executive to shoot down a hijacked aircraft was unconstitutional, in part because of its unsuitability to the intended purpose. Hypothetical calculations of the duration of the flight and the response time of the air defence forces showed that it was impossible to make a correct decision on most approaches to Polish airports, and even less so if the aircraft was to take off from a Polish airport.²³¹ Similarly, a blanket ban on forming and joining trade unions,²³² and a prohibition on exercising freedom of expression and assembly in their private capacity in respect of "any matter related to the Department of Defence"²³³ – imposed on members of the armed forces to maintain strict discipline – were ruled unconstitutional by the South African Supreme Court on account of their unsuitability to that goal.

3.3. EFFECTIVENESS AND LIMITABLE RIGHTS IN COUNTERTERRORISM AND CRIME PREVENTION IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

The preceding discussion sought to demonstrate that the analysis of the effectiveness of rights' limiting measures is both valuable and possible, including in national security contexts. Due to its authority across Europe, this section will focus on how counterterrorism effectiveness and, more broadly, crime prevention measures that engage limitable rights is dealt with by the European Court of Human Rights.²³⁴ We begin with a selective overview of the decisions that demonstrate some of the adjudicative techniques and then provide some preliminary analysis.

In a recent case of *Breyer v. Germany*, the applicants complained against legislation that required telecommunication providers to store the personal details of all customers, thus expanding to include the users of pre-paid SIM cards.²³⁵ One of the arguments advanced by the claimants related directly to the effectiveness of the new requirement "since there

228 It seems to have played a similar role in the Supreme Court's review of Covid-19 measures, see Ittai Bar-Siman-Tov, Itay Cohen and Chani Koth, 'The Changing Role of Judicial Review during Prolonged Emergencies: The Israeli Supreme Court during COVID-19' (2021) Bar Ilan University Faculty of Law Research Paper No. 21-27 at <https://ssrn.com/abstract=3892273>

229 Janneke Gerards, 'How to Improve the Necessity Test of the European Court of Human Rights' (2013) 11 International Journal of Constitutional Law 466, 476–78; Barak (n 178) 312–15

230 *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent) & X (FC) and another (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)* [2004] UKHL 56; also see *A. and others v. the United Kingdom* App no 3455/05 (ECtHR, 19 February 2009)

231 Judgment of 30 September 2008, Case No. K 44/07, 75; Anna Śledzińska-Simon, 'Proportionality Analysis by the Polish Constitutional Tribunal' in Kremnitzer, Steiner and Lang (n 181) 439; for an English-language summary of the decision, see 'Judgement of 30th September 2008, K 44/07. Permissibility of shooting down a passenger aircraft in the event of a danger that it has been used for unlawful acts, and where state security is threatened' at https://trybunal.gov.pl/fileadmin/content/omowienia/K_44_07_GB.pdf

232 *South African National Defence Union v Minister of Defence & Another* [1999] ZACC 7, 28–36; Richard Stacey, 'Proportionality Analysis by the South African Constitutional Court' in Kremnitzer, Steiner and Lang (n 181) 257–8

233 *South African National Defence Union v Minister of Defence and Others* [2007] ZACC 10 (30 May 2007) 77

234 Also see Mathias Vermeulen, 'Assessing Counter-Terrorism as a Matter of Human Rights: Perspectives from the European Court of Human Rights' in de Londras and Doody (n 5)

235 *Breyer v. Germany* App no 50001/12 (ECtHR, 30 January 2020)

had been no empirical evidence that mandatory registration had led to a reduction in crime” and that the sought “identification could be easily circumvented by submitting false names or using stolen, second-hand or foreign SIM cards”.²³⁶ The Court did not address the first claim directly but found the measure effective in simplifying and accelerating investigation by lawenforcement agencies. It considered that such measures could “thereby contribute to effective law enforcement and prevention of disorder or crime”.²³⁷ This conclusion was a restatement of the argument made by the government in a seemingly assumptive, ‘common sense’ manner.²³⁸ Further, the Court noted that “the existence of possibilities to circumvent legal obligations cannot be a reason to call into question the overall utility and effectiveness of a legal provision”.²³⁹ Finally, the Court deemed the measure “a suitable response to changes in communication behaviour and in the means of telecommunications” and found no violation of the right to privacy.²⁴⁰ This finding was made on the basis of “a certain margin of appreciation” that authorities enjoy in a national security context, and by noting a comparative law report showing no consensus on the issue of collection and storage of information on pre-paid SIM-card owners among the Council of Europe member States.

The case of *Gillan and Quinton v. the UK* offers a different approach towards effectiveness in human rights analysis.²⁴¹ The case concerned the powers of ‘stop and search’ given to the police by the UK’s Terrorism Act of 2000. It allowed for searches of vehicles (including drivers and passengers) and pedestrians for “articles of a kind which could be used in connection with terrorism” that could be exercised “whether or not the constable has grounds for suspecting the presence of articles of that kind”.²⁴² Unlike in *Breyer*, some empirical evidence on the effectiveness of the practice was available, and the Court was

struck by the statistical and other evidence showing the extent to which resort is had by police officers to the

powers of stop and search [...]. The Ministry of Justice recorded a total of 33,177 searches in 2004/5, 44,545 in 2005/6, 37,000 in 2006/7 and 117,278 in 2007/8 [...]. In his Report into the operation of the Act in 2007, [the Independent Reviewer of Terrorism Legislation] Lord Carlile noted that while arrests for other crimes had followed searches under section 44, none of the many thousands of searches had ever related to a terrorism offence; in his 2008 Report Lord Carlile noted that examples of poor and unnecessary use of section 44 abounded, there being evidence of cases where the person stopped was so obviously far from any known terrorism profile that, realistically, there was not the slightest possibility of him/her being a terrorist, and no other feature to justify the stop.²⁴³

This evidence did not become a subject of the Court’s analysis as such. Rather, the Court relied on it as one of the indicators that the police powers were “neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse”.²⁴⁴ It found that the power to stop and search individuals without reasonable suspicion of wrongdoing entailed a risk of arbitrariness and discriminatory use, finding a violation of the right to private life as such deficiencies in the legal regime rendered it not ‘in accordance with the law’.

In *Uzun v. Germany*, the analysis of effectiveness also played a part in ECtHR’s reasoning. The decision concerned, in part, an imposition of surveillance measures against the applicant and his presumed accomplice, then suspected of participating in bombings committed by the Red Army Faction.²⁴⁵ Initially, they were subject to irregular visual surveillance, but following the institution of investigatory proceedings, the authorities imposed further surveillance measures, including constant visual surveillance and surveillance via transmitters that were installed in the car they used.²⁴⁶ The applicant and his suspected accomplice detected the transmitters, destroyed them, and successfully evaded other visual surveillance measures.²⁴⁷ As a result, the authorities

236 *ibid* 89

237 *ibid* 90

238 *ibid* 69

239 *ibid* 90

240 *ibid*

241 *Gillan and Quinton v. The United Kingdom* App no 4158/05 (ECtHR, 12 January 2010)

242 For a detailed description of the regime see *ibid* 25–48

243 *ibid* 84

244 *ibid* 87; cf *Beghal v. The United Kingdom* App no 4755/16 (ECtHR, 28 February 2019) 95–99

245 *Uzun v. Germany* App no. 35623/05 (ECtHR, 2 September 2010) 6

246 *ibid* 7–10

247 *ibid* 11

built a GPS receiver into the car, allowing them to determine its location and speed; this information was recovered every other day.²⁴⁸ Of most relevance here is the Court's discussion of whether such GPS surveillance was 'necessary in a democratic society':

In examining whether, in the light of the case as a whole, the measure taken was proportionate to the legitimate aims pursued, the Court notes that the applicant's surveillance via GPS was not ordered from the outset. The investigation authorities had first attempted to determine whether the applicant was involved in the bomb attacks at issue by measures which interfered less with his right to respect for his private life. They had notably tried to determine the applicant's whereabouts by installing transmitters in [the] car, the use of which (other than with the GPS) necessitated the knowledge of where approximately the person to be located could be found. However, the applicant and his accomplice had detected and destroyed the transmitters and had also successfully evaded their visual surveillance by State agents on many occasions. *Therefore, it is clear that other methods of investigation, which were less intrusive than the applicant's surveillance by GPS, had proved to be less effective* (emphasis added).²⁴⁹

The case-specific effectiveness of GPS surveillance was one of the factors deemed by the Court to indicate the necessity of the measure. In particular, the Court first stated that GPS surveillance resulted in "a quite extensive observation"²⁵⁰ of the applicant's conduct by two different State authorities and "thus necessitated more compelling reasons if it was to be justified".²⁵¹ Such reasons included the short-term and occasional nature of the surveillance, the seriousness of the crimes in question, and, finally, the effectiveness of GPS surveillance compared to less intrusive methods.²⁵²

The decision in *Digital Rights Ireland* by a different court, the Grand Chamber of the European Court of Justice, offers an example of a potentially effective measure found to be

disproportionate.²⁵³ The applicants challenged the *2006 EU Data Retention Directive* that mandated States to adopt legislation requiring telecom companies to retain communications metadata for a period from six months to two years and to provide the authorities with access. Two lines of the ECJ's reasoning are of interest. The first relates to the Court's analysis of whether the limitation of rights engaged by the Directive "satisfies an objective general interest".²⁵⁴ The Court first establishes the objective sought by the Directive – "to contribute to the fight against serious crime and thus, ultimately, to public security",²⁵⁵ finding that it is indeed an "objective of general interest".²⁵⁶ It then finds that the measures genuinely satisfy this objective. This conclusion is reached by relying on the claim of the Justice and Home Affairs Council "that data relating to the use of electronic communications are particularly important and therefore a valuable tool in the prevention of offences and the fight against crime, in particular organised crime".²⁵⁷

The second relevant aspect is the Court's finding of interference not being strictly necessary since it sought to retain data of "all persons and all means of electronic communication as well as all traffic data without any differentiation, limitation or exception being made in the light of the objective of fighting against serious crime".²⁵⁸

It therefore applies even to persons for whom there is no evidence capable of suggesting that their conduct might have a link, even an indirect or remote one, with serious crime. Furthermore, it does not provide for any exception, with the result that it applies even to persons whose communications are subject, according to rules of national law, to the obligation of professional secrecy.[...] [It] does not require any relationship between the data whose retention is provided for and a threat to public security and, in particular, it is not restricted to a retention in relation (i) to data pertaining to a particular time period and/or a particular geographical zone and/or to a circle of particular persons likely to be involved, in one

248 *ibid* 12

249 *ibid* 78

250 *ibid* 80

251 *ibid*

252 *ibid*; also see *cf Beghal* (n 244) 95

253 *Joined Cases C-293/12 and C-594/12 Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others* [2014] ECR I-238

254 *ibid* 41

255 *ibid*

256 *ibid* 42

257 *ibid* 43-44

258 *ibid* 57

way or another, in a serious crime, or (ii) to persons who could, for other reasons, contribute, by the retention of their data, to the prevention, detection or prosecution of serious offences.²⁵⁹

In other words, while deemed an effective instrument in “the prevention of offences and the fight against crime,” the Directive cast too wide of a net.

One group of cases where the ECtHR’s examination allows for no analysis of the measure’s effectiveness is decisions that deal with matters of citizenship.²⁶⁰ This includes instances of counterterrorism citizenship deprivation carried out for purely symbolic purposes as opposed to pursuing security gains. The decision in *Ghoumid and Others v. France* demonstrates the issue well. The case concerned five then dual-national applicants convicted of terrorist offences in 2007, released between 2009 and 2010 and stripped of their French citizenship in October 2015. They all continued to live in France on short-term residence permits, with two of them subject to pending deportation orders.²⁶¹ The Court’s substantive analysis focused on two issues – the procedural guarantees in the proceedings and the consequences of the citizenship deprivation on the applicants’ private lives.²⁶² Responding to the issue of the seemingly symbolic purpose of the measure, the Court noted:

[...] the Government’s explanation that the fact that France waited until 2015 to deprive the applicants of French nationality stemmed from the fact that it had been affected by a series of major attacks that year. It also notes the applicants’ argument that this timing had given a political connotation to the measure taken against them. The Court is able to accept, however, that in the presence of events of this nature, a State may reinforce its assessment of the bond of loyalty and solidarity existing between itself and persons previously convicted of a serious offence constituting an act of terrorism [...], and that it may therefore, subject to a strict proportionality review, decide to take measures against them with which

it had not initially proceeded. The Court accordingly considers that, in the particular circumstances of the present case, the time that elapsed between the applicants’ convictions, which under French law allowed proceedings to be brought for deprivation of nationality, and the date on which those proceedings were actually initiated, is not sufficient in itself to render arbitrary the decision to deprive them of French nationality.²⁶³

The analysis of the measure’s effects on the applicants’ private lives focused on two issues that appear to have been ‘balanced’ by the Court. One was their “undermined” ability to stay in France as non-citizens and their loss “of an element of their identity”.²⁶⁴ The second was a serious threat to human rights that terrorist violence poses and the Government’s authority “to decide, following the attacks which struck France in 2015, to show greater firmness with regard to persons” convicted of terrorism-related criminal offences.²⁶⁵

It has also taken note of the view of the public rapporteur before the Conseil d’État that the actions leading to their criminal convictions reveal certain allegiances which show that their attachment to France and its values is of little importance for them in the construction of their personal identity [...]. [...] Some of the applicants had just acquired French nationality when they committed the offences and the others acquired it while they were in the process of committing them [...]. [...] Moreover, as the Court has already noted and as the applicants’ situation illustrates, the loss of French nationality does not automatically entail deportation and if such a decision came to be taken in their cases, remedies would be available to them through which they could assert their rights.²⁶⁶

In view of these considerations, the Court found that the decision to deprive the applicants of their French citizenship did not to impose disproportionate consequences for their private lives.²⁶⁷

It is important to note that it would be imprudent to generalise on the basis of this small and selective sample of

259 *ibid* 58–59

260 Also see discussion in section 2.3. above

261 *Ghoumid* (n 137) 33, 42

262 *ibid* 44

263 *ibid* 45

264 *ibid* 49

265 *ibid* 50

266 *ibid*

267 The court continues to apply this standard—for the most recent decision at the time finalising this paper, see *Johansen v Denmark* App no 27801/19 (ECtHR, 1 February 2022) and discussion in Ahmed Almutawa and Clive Walker, ‘Citizenship as a Privilege and the Weakness of International Law: The Consequences for Citizenship Deprivation in Bahrain and the UK’ (2022) *Journal of Human Rights Practice* (forthcoming)

thematic decisions, and nor is this our aim.²⁶⁸ Indeed, the variations in the Court's overall approach to proportionality²⁶⁹ make it difficult to identify consistent adjudicative patterns.

Instead, the cases illustrate the possible dynamics that claims or evidence of effectiveness can bring into the Court's reasoning. Note, for example, the difference that the availability of at least some evidence in *Gillan* made compared to in *Breyer*. In response to the applicants' claim of unproven effectiveness of the measure in *Breyer*, the Court accepted the government's assertion that it "strongly" simplifies and accelerates investigations and "can thereby" contribute to crime prevention.²⁷⁰ Had there been no evidence on how the stop and search power was used and had the Court proceeded to analyse whether it was "necessary in a democratic society" to employ the power against the applicants in *Gillan*, the same conclusion would not have been out of reach. Compared to not having such power, a police power to stop and search, however circumscribed, accelerates police work and "can thereby" contribute to crime prevention. In the presence of the evidence discussed in *Gillan*, however, this conclusion would have been unpersuasive.²⁷¹ The Court's 'common sense' presumption of the measures' suitability or effectiveness (as in *Breyer*) is not incorrect in principle. However, *Gillan* shows that such assumptions are fallible in that the measures that are only opportune or expedient *appear* to be suitable and effective. As noted previously, it can also create a perverse incentive not to examine the measure's effectiveness.

Despite the explicit framing around the 'strict necessity' test, the European Court of Justice's key finding in *Digital Rights Ireland* is best characterised as derived from the suitability test. The findings' language points to a lacking *relationship* between the data to be retained and threats to public se-

curity,²⁷² rather than to a less restrictive measure that could have achieved the objective in question – as the necessity test would require. As discussed above, the suitability test's function includes the 'catching' of policies that go beyond what is needed to achieve the goal.²⁷³ Notably, the proportionality test adhered to by the Court of Justice of the EU explicitly includes the suitability test, and it is featured in the case law.²⁷⁴ Given the factual similarity between the measures in *Breyer* and *Digital Rights Ireland*,²⁷⁵ the two courts' diverging decisions highlight a possible contribution made by the CJEU's better familiarity with the functioning of the suitability test, even if called differently. Admittedly, such familiarity alone is insufficient to override the competing factors in the complexity of the politics of judicial review. Still, reasoning in terms familiar to a court's audience does no damage to the pronouncements' persuasiveness and legitimacy.

The decisions in *Uzun* and *Ghounid* stand in stark contrast. The escalation of surveillance methods in *Uzun* appears appropriate, and the Court is not hesitant to approve it since other methods were proven less effective. *Ghounid* is different, not in the authorities' failure to first try less intrusive methods that later proved ineffective, but in the applicants' deprivation of citizenship having no meaningful purpose in the first place. The Court's hesitancy to engage with the measure's proportionality might be explained, among others, by the citizenship per se not being protected by the material provisions of the Convention. Rigorous assessment of the proportionality of the *consequences* of citizenship deprivation as a matter of private and family life under Article 8 might be indistinguishable from assessing the *merits* of the decision to deprive. However, the Court's current approach is *outside* the spectrum of varying standards of the intensity of proportionality review. It admits that the measure engag-

268 For a more comprehensive treatment of the counterterrorism effectiveness by the ECtHR, see Vermeulen (n 234); for a broader examination of the suitability test in the court's caselaw, see Gerards (n 229)

269 See e.g., Gerards (n 141) 229–33; Aileen McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' (1999) 62 *Modern Law Review* 671; Janneke Gerards, 'Judicial Deliberations in the European Court of Human Rights' in Nicolaas Jacob Herman Huls, Maurice Adams and J Bomhoff (eds), *The Legitimacy of Highest Courts' Rulings* (TMC Asser Press; Cambridge University Press 2009)

270 *Breyer* (n 235) 90

271 See *Beghal* (n 244)

272 *Digital Rights Ireland* (n 253) 59; the same applies to the Court's reasoning in *Tele2 Sverige*, see Joined Cases C-203/15 and C-698/15 *Tele2 Sverige AB v Post-och telestyrelsen and Secretary of State for the Home Department v Tom Watson and Others* [2016] ECLI:EU:C:2016:970, 103–107, 119; for further discussion, see Lorenzo Dalla Corte, 'On Proportionality in the Data Protection Jurisprudence of the CJEU' (2022) *International Data Privacy Law* (forthcoming)

273 Further see, e.g., David Kenny, 'A Dormant Doctrine of Overbreadth: Abstract Review and *Ius Tertii* Irish Proportionality Analysis' (2010) 32 *Dublin ULJ* 24; Tom Hickman, 'Proportionality: Comparative Law Lessons' (2007) 12 *Judicial Review* 31, 38–39; 48–49

274 Dalla Corte (n 272)

275 Judge Ranzoni explains: 'Nor did the majority consider that the present case, and, in particular, the comprehensiveness of the data storage, are comparable to the cases of *Digital Rights Ireland* and *Seitlinger and Others* and *Tele2 Sverige* and *Tom Watson and Others*, decided by the [CJEU]. The applicants argued that the data storage at issue was comparable to the one decided by the CJEU, given that it was comprehensive in that it affected all persons using mobile-communication services, even though there was no evidence to suggest that their conduct might have a link to criminal or other offences. The majority dismissed this argument. However, to my mind, the present case in that regard is actually comparable to the cases decided by the CJEU. The aim of section 111 of the Telecommunications Act was to establish a comprehensive register of all users of mobile communications. This is shown *inter alia* by the fact that after having established that incorrect information was stored, the provision was amended and users had to provide proof of their identity. The purpose of the provision was indeed a comprehensive storage of subscriber data, which legislation is assessed *in abstracto* in the present case', see *Breyer* (n 235) Dissenting Opinion of Judge Ranzoni, 7

es rights under Article 8 but asks for no competing public interest to necessitate such limitation, thus collapsing the logic of the proportionality test.

The variety of approaches adopted in these decisions reflects the instability in the ECtHR's accounting of the effectiveness of rights' limiting counterterrorism measures: the measures' ability to achieve their aims is neither central nor foreign to the Court's engagement with them. Various factors contribute to the current marginal status of effectiveness in the Court's adjudicatory practices. In the following section, we seek to disentangle some of those factors further.

3.4. ACCOUNTING FOR AND IMPROVING THE INADEQUATE STATUS OF CONSIDERATIONS OF EFFECTIVENESS

As the preceding discussion indicates, the approach of the European Court of Human Rights to proportionality differs from the 'standard' proportionality test described in part 3.1. Importantly, what is missing are the subtests of suitability and necessity – the most relevant ones for the analysis of effectiveness.²⁷⁶ Whether it reflects a strategic preference or an accidental omission, the absence of these elements in the Court's proportionality test limits its ability to be consistently scrutinous. In his separate opinion in *Murat Vural v. Turkey*, Judge Sajó points out that the proportionality test 'standard' to the Court, while advantageous in some ways, prevents it from levelling up to further levels of scrutiny.²⁷⁷ One such added level currently unreachable to the Court is what would typically be required in analysing the measure's suitability to its aims:

[...] when determining a measure's quality as a means to reach a (legitimate) end, the search must begin at the abstract level of the legislation. This search is particularly demanding (and therefore efficient) if and when a court

enters into a substantive analysis of the veracity of the allegation that a regulatory measure actually serves a purported end.²⁷⁸

Admittedly, the Court's lacking attention to the suitability test is not equally consequential across all cases. It has been suggested that most cases that reach the Court concern instances where questions of suitability and necessity are already analysed and answered in the affirmative by the domestic courts.²⁷⁹ However, even if true in general, it is cases involving claims of national security/counterterrorism that are most likely to avoid scrutiny domestically due to a larger degree of deference that the courts typically accord to the executive.²⁸⁰ In such cases, the Court's non-engagement with suitability often results in a rubber stamping of practices that have little to no impact on public order and safety.

For example, in a recent decision in *ZB v. France*, the Court accepted that the applicant's prosecution for glorification of terrorism pursued the legitimate aim of "prevention of disorder or crime".²⁸¹ The applicant gifted a T-shirt to his three-year-old nephew, a boy named Jihad, born on 11 September 2009, and asked that he wear it in his preschool. The text on the front of the T-shirt read "I am a bomb!" and "Jihad, born on September 11" on the back. In the proceedings that followed, the applicant explained that it was meant to be humorous. The text on the T-shirt was seen by two adults dressing the boy in the preschool – the director and another adult – otherwise invisible to others.²⁸² How strong is the connection between the incident and "prevention of disorder or crime"? How impactful was the applicant's expression on the public order?²⁸³ The Court does not address these questions; they were seemingly not discussed by the French courts either. Rather, it is issues of context that were central to the Court's finding of there being no violation of the freedom of expression under Article 10: the T-shirt was

276 Gerards (n 229); Eva Brems and Laurens Lavrysen, "'Don't Use a Sledgehammer to Crack a Nut': Less Restrictive Means in the Case Law of the European Court of Human Rights' (2015) 15 Human Rights Law Review 139

277 *Murat Vural v. Turkey* App no 9540/07 (ECtHR, 21 October 2014)

278 *ibid* Partly Concurring and Partly Dissenting Opinion of Judge Sajó

279 Steven Greer, *The European Convention on Human Rights Achievements, Problems and Prospects* (Cambridge University Press 2006) 212

280 See e.g., Kent Roach, 'Judicial Review of the State's Anti-Terrorism Activities: The Post 9/11 Experience and Normative Justifications for Judicial Review' (2009) 3 *Indian J. Const. L.* 138; Cora Chan, 'Business as Usual: Deference in Counter-Terrorism Judicial Review' in Davis and de Londras (n 63); Helen Fenwick and Gavin Phillipson, 'Covert Derogations and Judicial Deference: Redefining Liberty and Due Process Rights in Counterterrorism Law and Beyond' (2011) 56 *McGill Law Journal* 863; Aileen Kavanagh, 'Constitutionalism, Counterterrorism, and the Courts: Changes in the British Constitutional Landscape' (2011) 9 *International Journal of Constitutional Law* 172; recently, see e.g., Daniela Lock, 'The Shamima Begum Case: Difficulties with "Democratic Accountability" as a Justification for Judicial Deference in the National Security Context' (*U.K. Const. L. Blog*, 9 March 2021) at <https://ukconstitutionalaw.org/2021/03/09/daniella-lock-the-shamima-begum-case-difficulties-with-democratic-accountability-as-a-justification-for-judicial-deference-in-the-national-security-context/>

281 *Z.B. v. France* App no 46883/15 (ECtHR, 2 September 2021) 50; for further coverage, see Ignatius Jordan Nugraha, "'It's Just a Prank, Bro!'" *ZB v. France* and a Dark Humour That Turned Sour' (*Strasbourg Observers*, 12 October 2021) at <https://strasbourgobservers.com/2021/10/12/its-just-a-prank-bro-zb-v-france-and-a-dark-humour-that-turned-sour/>

282 *Z.B.* (n 281) 6, 62

283 e.g., *Stomakhin v. Russia* App no 52273/07 (ECtHR, 9 May 2018) 131; *Gerger v. Turkey* App no 24919/94 (ECtHR, 8 July 1999) 49; *Dmitriyevskiy v. Russia* App no. 42168/06 (ECtHR, 3 October 2017) 110; *Gül and others v. Turkey* App no 4870/02 (ECtHR, 8 June 2010) 44

worn only several months after terrorist attacks, including one perpetrated in a school.²⁸⁴ “In view of the terrorist ideology behind these two attacks, it cannot be considered that the passage of time was likely to diminish the scope of the message at issue in the present case. The fact that the applicant has no links with any terrorist movement, or has not subscribed to a terrorist ideology, cannot mitigate the significance of the message at issue either”.²⁸⁵

3.5. INTERMEDIARY CONCLUSION

The preceding analysis aimed to demonstrate that engagement with the rational connection subtest can be beneficial in national security contexts. Although not a perfect tool for controlling the effectiveness of rights’ limiting measures, the jurisprudence of domestic courts discussed above shows its capacity in constraining the employment of counterterrorism measures misaligned to their aims. Admittedly, the absence of the suitability analysis from the ECtHR’s adjudicative method is partly attributable to the unavailability of relevant information in the first place. Where a legislature defines no specific goal to be achieved by a counterterrorism measure and the executive attempts to collect no information on its implementation and impact, a judiciary is constrained to operate in abstract terms. However, the effects of the Court’s non-engagement with the suitability test might not be limited to the non-gaining of the test’s benefits in raising the justificatory burden. Rather, the ECtHR’s deferential attitude towards suitability can reinforce this negative feedback loop. National authorities have the primary role in addressing the proportionality of rights’ limitations, and the Court defers to the domestic courts as long as their conclusions on proportionality are justifiable. Unless a proportionality test that includes suitability is already a part of the adjudicative method of a domestic court, nothing in the Court’s current approach would suggest that such analysis must be carried out, or that a legislature should define precisely the goals to be achieved by measures adopted, or that an executive ought to monitor the successes and failures in the measure’s implementation, etc. In their vast majority,

counterterrorism practices are not unique to specific States; broadly, the same powers and prohibitions exist in various forms across many jurisdictions,²⁸⁶ and this is even more so for practices adopted by States in Europe. In this context, a decision of the ECtHR carries importance that goes beyond the State in the specific proceedings.

The following section will explicate the issue of the counterterrorism effectiveness in rights adjudication further. We first discuss the issue of deference in judicial review of counterterrorism and conclude by highlighting other avenues for improving the role of effectiveness in counterterrorism review.

4. CONCLUSION: INTEGRATING EFFECTIVENESS IN COUNTERTERRORISM REVIEW

It is important to clarify the implications of our argument. The proposal for greater attention to be paid to the effectiveness of counterterrorism measures in judicial review would be incomplete without acknowledging the issue of judicial deference. The presentation of an appropriate standard of deference is beyond the scope of this contribution, but it is necessary to spell out the main implications of the approach to the suitability prong of proportionality suggested here.

There are two principal grounds for judicial deference. One is the superior democratic legitimacy enjoyed by the legislature and the executive in their decision-making. The other is institutional expertise, i.e. the superior epistemic position of the decision-makers in comparison to that of the judiciary.²⁸⁷ The latter is of primary relevance to the judicial inquiry into the suitability of means to ends by virtue of its empirical character.²⁸⁸ Deference on this ground is a mechanism of managing epistemic uncertainty – where knowledge underlying complex policy issues is limited, the judiciary can be justified in relying on predictions made by relevant decision-makers.²⁸⁹ Indeed, public policy is rarely designed and conducted with abundant evidence. Predictions about a policies’ impact are rarely stated with precision. They are often “the product of a mix of conjecture, fragmentary knowledge, general experience and knowledge of the needs, aspira-

284 Z.B. (n 281) 60

285 *ibid* (machine translation)

286 Most notably, see Roach (n 4)

287 For a recent contribution, see Iryna Ponomarenko, ‘Towards a Theory of Deference in Canadian Proportionality Jurisprudence’ (PhD Thesis, The University of British Columbia 2022) ch 3

288 Cf. Mark Elliott, ‘Proportionality and Deference: The Importance of a Structured Approach’ (17 September 2013) University of Cambridge Faculty of Law Research Paper No. 32/2013, 13–14 at <https://papers.ssrn.com/abstract=2326987>

289 Similarly, see Alan DP Brady, *Proportionality and Deference under the UK Human Rights Act: An Institutionally Sensitive Approach* (Cambridge University Press 2012) 20–22; Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press 2009) 171–172

tions and resources of society, and other components”.²⁹⁰ Nor would it be appropriate to require public policies to always be supported by conclusive evidence before adoption. How then can the suitability of means to ends and effectiveness in counterterrorism be approached?

The preceding sections of this paper addressed the suitability prong of the proportionality test as an underutilised instrument for scrutinising the rationality of counterterrorism practices that engage limitable rights. Like other elements of the proportionality test, it does not prescribe *how* searching one must be in asking *whether* the measure is aligned with its stated aim. The proportionality test can “be applied almost infinitely forcefully or infinitely cautiously, producing an area of discretionary judgement that can be massively broad or incredibly narrow – and anything else between”;²⁹¹ in other words, it allows for variable intensity of review.²⁹²

In line with the foregoing discussion, the suggestion here is that engagement in suitability analysis is beneficial even at a low level of review intensity. This is true as long as deference on the grounds of the superior epistemic position of the decision-makers is *demonstrated*, not assumed: the government must establish its epistemic advantage by disclosing the relevant information that allowed it to make conclusions about the measure’s suitability for its stated aims.²⁹³ In other words, the justifiability of decision-making based on imprecise or inconclusive evidence does not discharge the decision-maker’s burden to demonstrate the relevant evidence.²⁹⁴ Higher intensity review might well be warranted, yet might not be immediately required in the currently scarce landscape of counterterrorism measures based on publicly stated and falsifiable assumptions behind them.

Admittedly, the dynamics of deference in judicial review involving counterterrorism are more complex for the European Court of Human Rights. The discussion in sections 3.3 and 3.4. primarily addressed the Court’s omission to in-

clude suitability analysis in its approach to proportionality assessment. What needs to be clarified at this stage is how to address this omission appropriately. In line with our suggestion that even incremental judicial engagement with the measures’ suitability is liable to produce meaningful outcomes, the focus here is on the lowest appropriate level of necessary scrutiny.

Perhaps paradoxically, the ECtHR’s current shift from ‘substantive’ to ‘procedural’ modes of review could be advantageous for greater engagement with matters of effectiveness in counterterrorism. The Court is understood to be moving away from “its own independent assessment of the ‘Conventionality’ of the domestic measure towards an examination of whether the issue has been properly analysed by the domestic decision-maker in conformity with already embedded principles”.²⁹⁵ The discussion of the merits of this change in adjudicative methodology is well beyond the scope of this contribution,²⁹⁶ but its effects on what has been suggested so far are worth a brief clarification. The Court’s new approach is undoubtedly more deferential, and suggesting that a more deferential approach can result in greater attention to issues that have escaped scrutiny so far might appear contradictory.

This is not necessarily so. The question is twofold: whether this new adjudicatory practice can stimulate appropriate scrutiny domestically, and, if so, whether such scrutiny is to be directed at evidence underlying legislative and executive decisions in counterterrorism. For the latter, Popelier and Van De Heyning document some decisions where the Court engaged in broadly procedural review and highlighted the need for evidence underlying the legislative choices.²⁹⁷ One illustrative example is the Grand Chamber’s finding of there being “no indication that any expert study or statistical research was ever made” to substantiate the Government’s claim that the extension of parental leave entitlement to servicemen would undermine the fighting power of the armed forces in *Konstan-*

290 *RJR-MacDonald Inc. v. Canada* (Attorney General) [1995] 3 SCR 199, 67

291 Thomas Poole, ‘The Reformation of English Administrative Law’ (2009) 68 *The Cambridge Law Journal* 142, 146, further noting that ‘it is almost certainly the very flexibility of proportionality that has driven the current academic craze for discussing the notion of judicial “deference”’; Patricia Popelier and Catherine Van De Heyning, ‘Procedural Rationality: Giving Teeth to the Proportionality Analysis’ (2013) 9 *European Constitutional Law Review* 230

292 Julian Rivers, ‘Proportionality and Variable Intensity of Review’ (2006) 65 *The Cambridge Law Journal* 174

293 See Cora Chan, ‘Deference, Expertise and Information-Gathering Powers’ (2013) 33 *Legal Studies* 598; Elliott (n 288) 8; further see Ponomarenko (n 287) 177–188

294 See e.g., *Minister for Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO)* (CCT 03/04) [2004] ZACC 10, 35–36

295 Robert Spano, ‘The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law’ (2018) 18 *Human Rights Law Review* 473, 480–481

296 See e.g., Alain Zysset, ‘A Culture of Justification or a Culture of Presumption? The Turn to Procedural Review and the Normative Function of Proportionality at the European Court of Human Rights’ in Stephanie Schiedermaier, Alexander Schwarz and Dominik Steiger (eds), *Theory and Practice of the European Convention on Human Rights* (Nomos 2022); Aruna Sathanapally, ‘The Modest Promise of “Procedural Review” in Fundamental Rights Cases’ in Janneke Gerards and Eva Brems (eds), *Procedural Review in European Fundamental Rights Cases* (Cambridge University Press 2017)

297 Popelier and Van De Heyning (n 291) 252–255; Patricia Popelier and Catherine Van De Heyning, ‘Subsidiarity Post-Brighton: Procedural Rationality as Answer?’ (2017) 30 *Leiden Journal of International Law* 5, 13–20; Patricia Popelier, ‘Evidence-Based Lawmaking: Influences, Obstacles and the Role of the European Court of Human Rights’ in Gerards and Brems (n 296) 88–93; also see Janneke Gerards, ‘Procedural Review by the ECtHR: A Typology’ in Gerards and Brems (n 296)

tin Markin.²⁹⁸ In general, however, the practice is not coherent²⁹⁹ and as the overview in section 3.3. above shows, does not extend to decisions concerning counterterrorism.

Whether the Court's procedural review can stimulate appropriate scrutiny domestically is complex. One first needs to establish what is the 'cause' and what is the 'effect'. Is it the practice of evidence-based policy-making that triggers the courts' willingness to engage with the evidence underlying the policies under their review, or do the courts need to incentivise the institution of such practices? Are there external factors that influence both the courts and the decision-makers?³⁰⁰ Popelier finds that the two are likely to be reinforcing each other, in addition to the influence of external factors (legal and political culture, institutional design, etc.), and suggests that the ECtHR is unlikely to be able to directly induce the authorities to shift closer to evidence-based policymaking practices, but might be in a better position of doing so when appealing to domestic courts.³⁰¹ Admittedly, even if the practice is to develop this way, more effort would be required to extend to areas typically understood to involve national security as they are more resistant to evidence-based law-making.

Given the stakes involved in counterterrorism – both in terms of (unintended) harms it brings and the harms of terrorist violence that it seeks to constrain – it is unsatisfactory for decision-makers to continue to operate on an evidence-free basis, for the courts to not ask for such evidence, and for the international courts to give an ultimate greenlight of human rights compatibility. Indeed, the method of interrupting this process that we focus on here – robust engagement with the issue of effectiveness through the proportionality test – is not directed at courts alone. Rather, it should substantively inform and shape the policymaking process³⁰² and unite the actors in a “common democratic cause” of reinforcing review and strengthening accountability.³⁰³ Roach writes:

In particular, the government should reveal in consulta-

tions, Parliament and in committee information about the extent of the harms it is trying to prevent or reduce and explain why a law that limits rights will achieve these ends. The overall balance stage of proportionality analysis may also encourage governments to invest in research about the effectiveness of laws. Again, however, governments will have an incentive not to disclose unfavourable data. It is especially important for democracy that courts insist that governments have the burden to introduce evidence that is necessary to justify the proportionality of limitation on rights. [...] The government bears the burden to justify limits on rights and in this sense it must produce data that can then be subject to challenge not only in courts but in Parliament and other public venues for debate. Proportionality analysis in the courts can be democracy enhancing by requiring governments to place more of their thinking process and the information on which they act in the public domain.³⁰⁴

The function of probing judicial review of counterterrorism is not only to check the exercise of power by the executive but to encourage the engagement of the legislature.³⁰⁵ In the context of judicial review, this collaborative engagement would require the provision of substantive reasons for their rights-engaging actions and the trade-offs they involve. In the counterterrorism context, the government is to explain what specific goals are sought to be achieved by a measure, the causal mechanism behind it, and provide at least *some* valid evidence in support of these assumptions. These minimal governance conditions are mundane to other policy areas, and counterterrorism should be no exception.³⁰⁶ As the discussion in preceding sections sought to show, in decisions reviewing both executive action (*Bank Mellat*) and legislation (*Digital Rights Ireland*), proper articulation of the aims pursued by the intervention alone can be sufficient to establish a *prima facie* suitability. Once established, further evidence should be adduced. Indeed, as discussed in Section 2 above, robust empirical evidence on effectiveness in

298 *Konstantin Markin v. Russia* App no. 30078/06 (ECtHR, 22 March 2012) 144; also see *Konstantin Markin v. Russia* App no. 30078/06 (ECtHR, 7 October 2010) 57 and Angelika Nussberger, 'Procedural Review by the ECHR: View from the Court' in Gerards and Brems (n 296)

299 Popelier (n 297) 89

300 See the discussion in Popelier (n 297)

301 *ibid* 90–94; but see e.g., Nussberger (n 298); Gerards (n 297) 131–136; Sathanapally (n 296) 72–74

302 Fiona de Londras and Jasmin Tregidga, 'Rights, Proportionality, and Process in EU Counterterrorism Lawmaking' (2021) 19 *International Journal of Constitutional Law* 665, 674f; Mordechai Kremnitzer and Raanan Sulitzeanu-Kenan, 'Protecting Rights in the Policy Process: Integrating Legal Proportionality and Policy Analysis' (2021) 3 *International Review of Public Policy* 51; also see Richard Ekins, 'Legislating Proportionately' in Grant Huscroft, Bradley W Miller and Gregoire Webber (eds), *Proportionality and the Rule of Law* (Cambridge University Press 2014)

303 Kent Roach, 'The Varied Roles of Courts and Legislatures in Rights Protection' in Murray Hunt, Hayley J Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing 2015) 416

304 *ibid*; also see Nino Guruli, 'Pro-Constitutional Engagement: Judicial Review, Legislative Avoidance and Institutional Interdependence in National Security' (2021) 12 *Harv. Nat'l Sec. J.* 1, 36–41

305 Guruli (n 303) 25–30

306 Similarly, see de Londras (n 148)

counterterrorism is scarce and difficult to obtain. Yet, there remain underutilised approaches that can yield insights into the operation of counterterrorism measures that would often suffice for the purposes of judicial review without being too resource-demanding. As discussed above, one such method is the aggregation and analysis of all outcomes brought during the exercise of a counterterrorism measure, allowing to establish whether its utilisation resulted in achieving the aims sought.

Beyond this, there is likely to be further potential in collecting and disclosing basic statistical evidence pertaining to specific counterterrorism objectives. The UK Supreme Court's decision in *UNISON*³⁰⁷ demonstrates this point well. The decision concerned the introduction of fees for bringing claims in employment tribunals, thus engaging the right of access to justice. The fees sought to achieve three aims: (1) transfer the costs of litigation to the litigants, (2) deter unmeritorious claims, and (3) encourage earlier settlements.³⁰⁸ Relevant information about the fees' effects became available only when the case reached the Supreme Court. The evidence available to the lower courts was limited to showing a decline in claims brought (and thus insufficient to show that the fees were necessarily unaffordable as other factors could explain it).³⁰⁹ In contrast, the Supreme Court was able to rely on statistics and a review report of the Ministry of Justice.³¹⁰ Beyond a decline in the number of claims – indeed an insufficient piece of information in itself – the newly available data showed that the fees failed to achieve either of their three stated aims: (1) the contribution made by the fees was much less significant than expected because the decline in applications was much higher than predicted, (2) since the fees were introduced, the proportion of unsuccessful claims has been *higher*, and the proportion of successful ones *lower*, and (3) the number of claims settled earlier has slightly *decreased*.³¹¹ The case was not decided under the proportionality test, but the logic of the suitability reasoning was present in “that even an interference with access to the courts which is not

insurmountable will be unlawful unless it can be justified as reasonably necessary to meet a legitimate objective”.³¹² The scheme's failure to achieve its stated goals made it an unnecessary limitation on the right of access to justice.³¹³

Valid parallels between the introduction of tribunal fees and counterterrorism powers might not be readily available. Still, collecting and reporting basic descriptive statistical information would often be sufficient to allow for rudimentary evaluations of effectiveness in counterterrorism-related activities.³¹⁴ For instance, counterterrorism stop and search data in the United Kingdom were previously reported using only aggregate-level data.³¹⁵ This prevented an assessment of whether particular groups were discriminatorily targeted by police. Data that could have provided evidence of effectiveness, for instance, whether the reason for search (e.g., terrorism, narcotics) was connected to its outcome (e.g., arrest), were missing from earlier datasets. The United Kingdom has since begun reporting such data,³¹⁶ which was not more burdensome to police forces.

Similar improvements can be made in reporting, evaluating, and reviewing other measures. Counterterrorism decision-making involves multiple stakeholders and complex, high-stakes issues. Unfortunately, the logic of such decision-making is rarely articulated. More transparency would benefit counterterrorism policy-making: explicating the models used to inform counterterrorism decision-making would enable experts and stakeholders to provide feedback and suggest improvements, leading to more effective and evidence-based decision-making.

It would be beneficial for human rights law researchers to examine the role that decision-making models currently play in state policymaking. This includes cost-benefit analysis, risk analysis, and multi-criteria decision analysis, which may not fully capture the range of human rights impacts or ethical dimensions of policy decisions. By incorporating input from human rights scholars, decision-making processes could more explicitly consider human rights. Although in-

307 *R (UNISON) v Lord Chancellor* [2017] UKSC 51; also see Rose, 'A Numbers Game? Statistics in Public Law Cases: ALBA Annual Lecture, 5 July 2021' (2022) *Judicial Review* 1

308 *UNISON* (n 307) 9

309 *ibid* 60–64

310 *ibid* 38

311 *ibid* 56–59

312 *ibid* 89, 107–117

313 *ibid* 99–102

314 See Sobol and Moncrieff (n 3)

315 Home Office, 'Police Powers and Procedures: Stop and Search and Arrests, England and Wales, Year Ending 31 March 2021 Second Edition' (GOV.UK, Updated 5 May 2022) <https://www.gov.uk/government/statistics/police-powers-and-procedures-stop-and-search-and-arrests-england-and-wales-year-ending-31-march-2021>

316 *ibid*

tegrating human rights into such decision-making models may be controversial, it is important to emphasise that the aim need not be to commodify or devalue human rights, but to ensure appropriate recognition of rights in decision-making processes. Explicit modelling of decision-making, particularly in counterterrorism, would enhance transparency, accountability, and participation in these processes. Further research is needed to understand how decision-making models can better consider human rights impacts. Scholars could draw inspiration from previous work exploring how human rights can be effectively integrated into decision-making models while preserving their fundamental value.³¹⁷

Finally, most of the social science research examining counterterrorism measures focuses on quantifying interventions' effects (effectiveness). On the other hand, human rights researchers primarily seek to document the human rights impacts of the measures and their side effects. This is an important and valuable lens to examine the complex issues surrounding terrorism and its impact on society. However, a wider range of social scientists, including those using quantitative methods, could help improve the empirical rigor, representativeness, and generalisability of research on human rights impacts. Rather than being an ancillary topic of concern, by focusing on the human rights implications of counterterrorism policies, social scientists could help develop a more comprehensive understanding of the impact of counterterrorism policies on human rights. Such a focus would ensure that findings are more easily incorporated into policy discussions and legal debates by enhancing the relevance and accessibility of findings for policymakers, lawyers, and other human rights stakeholders.

Enhancing the integration of effectiveness in counterterrorism review necessitates the involvement of various stakeholders. Judicial review, as previously discussed, represents just one aspect of this multifaceted process. Facilitating the courts' proper engagement with the effectiveness of measures in their rights adjudication can also foster increased transparency in counterterrorism policy-making. For policymakers, this entails three key components: (a) conducting comprehensive assessments of the impact of counterterrorism policies on human rights, including their unintended consequences; (b) developing well-defined decision-making models for counterterrorism policies that suitably account for such impacts; and (c) ensuring that counterterrorism policies undergo regular review, including through effective oversight mechanisms. Future research should concentrate

on the following crucial areas: (a) innovating quantitative and qualitative research methods to capture the full range of impacts of counterterrorism measures on human rights; (b) fostering interdisciplinary collaborations between social scientists and legal scholars to establish novel methodologies and tools for evaluating the effects of counterterrorism policies on human rights; and (c) advancing the development of human rights impact assessments.

317 For some discussions, see Eric A Posner and Cass R Sunstein, 'Moral Commitments in Cost-Benefit Analysis' (2017) 103 *Virginia Law Review* 1809; William J Aceves, 'Valuing Life: A Human Rights Perspective on the Calculus of Regulation' (2018) 36 *Law and Inequality: A Journal of Theory and Practice* 1; William J Aceves, 'Cost-Benefit Analysis and Human Rights' (2018) 92 *St. John's Law Review* 431

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