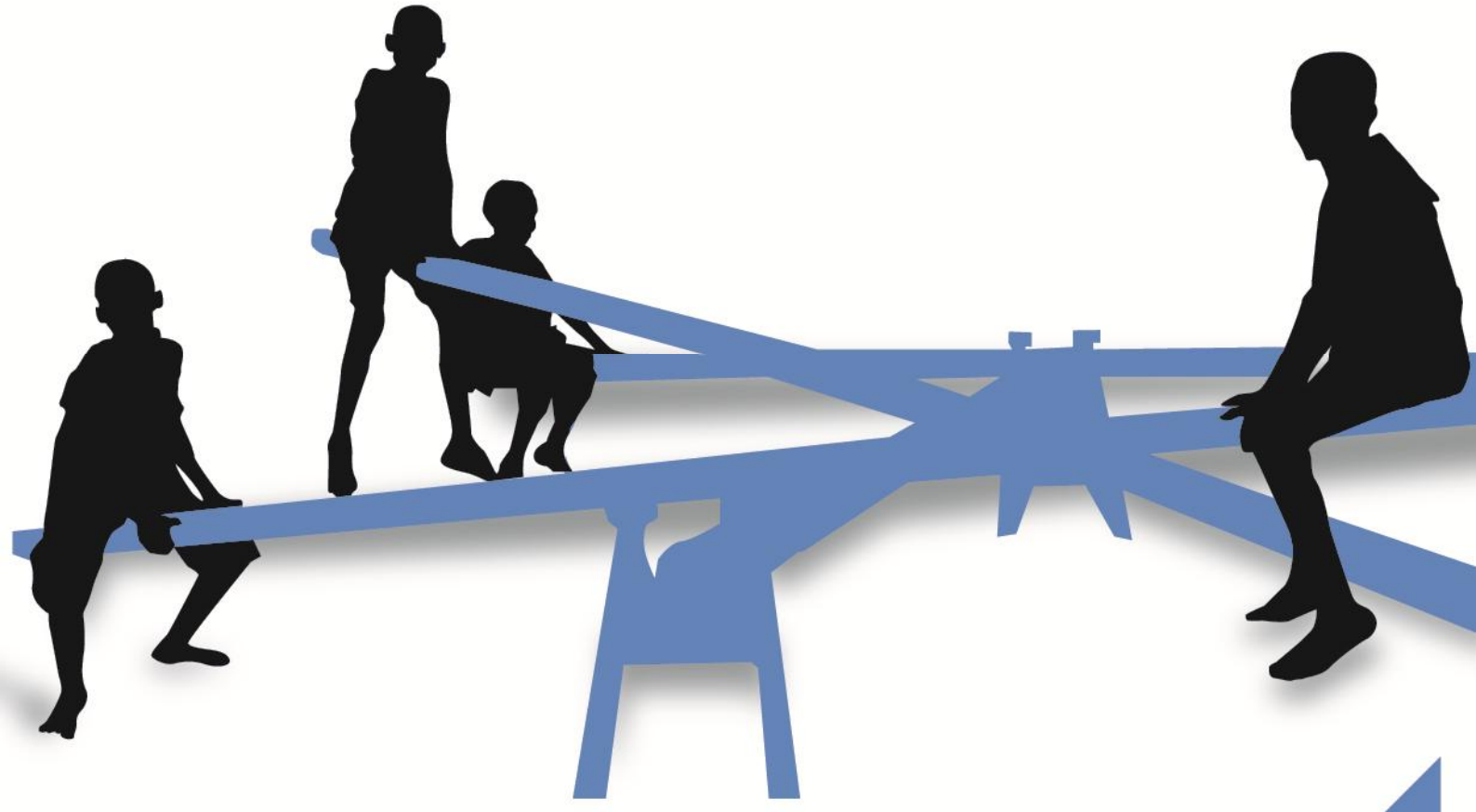
United Nations
Interregional Crime and Justice
Research Institute

CHILDREN AND COUNTER-TERRORISM



Preface

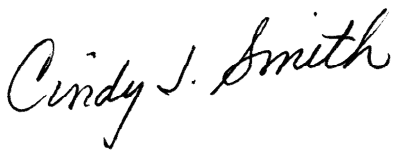
Today children are increasingly exposed to violent extremism; they are forced or manipulated into becoming terrorists. The reasons behind victimization and children and juveniles engagement in violent extremism are many, complex and vary depending on local contexts and personal push factors. Furthermore, the use of social media has increased young people's vulnerability to indoctrination.

Armed groups and terrorist groups are responsible for recruitment, mass abductions, rape, forced marriage and sexual slavery of children. Children are widely used for all kinds of terrorist purposes, including human shields, or to commit suicide attacks. While we are familiar with the male face of terror, extremist groups consider children the ideal operatives as they can move undetected, they may be better able at killing civilians because they blend in with the target.

With this study UNICRI aims to shed the light on these increasing phenomena providing to policy makers some guidance in their effort to integrate international juvenile justice child protection standards into their national counter-terrorism legislation. Indeed, enhancing the protection of children rights, addressing young people and children vulnerabilities while investing in education and social integration remains the most effective weapons to prevent and counter violent extremism.

We have the responsibility to ensure that human rights are respected globally by producing clear and concrete responses to promote the improvement of national legislations in strengthening juvenile justice and enforcing international principles on children's protection.

Cindy J. Smith



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Acknowledgments

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CHILDREN AND COUNTER –TERRORISM

PART1: INTRODUCTION

1.1 Introduction

Terrorism is not a new phenomenon. However, it has acquired new dimensions in the twenty-first century. Terrorist groups have become more structured, and are now often transnational; the majority of the latest terrorist attacks are religiously motivated; and terrorist acts have become increasingly brutal, particularly in terms of civilian casualties.[1]

While the international community has yet to agree on a shared definition of the phenomenon, what is uncontested is that terrorism does not just consist of a deadly act, it is a *modus operandi*.[2] Terrorism is a means through which violence is turned into a tool to achieve political goals, and it has "evolved over the years, with each stage emerging more dangerous and lethal than the preceding stage".[3] The ever-evolving character of terrorism, together with the sense of anxiety that such a phenomenon creates in the community, has prompted States to adopt counter-terrorism policies and measures to tackle the issue.

Children are increasingly affected and victimised by terrorism, but at the same time, the last few years have shown them to be increasingly engaged in terrorist related activity. International policy and law-making has struggled to keep up with the rapid changes, and the rights of children affected by terrorism and counter-terrorism have not entered into mainstream discourse, and have been largely overlooked.[4]

[1] Ganor B., Terrorism in the Twenty-First Century, in Shapira S., Hammond J., Cole L., Essentials of Terror Medicine (2009), Springer Science + Business Media pp. 3-4.
[2] Ganor B., Terrorism in the Twenty-First Century, in Shapira S., Hammond J., Cole L., Essentials of Terror Medicine (2009), Springer Science + Business Media; p. 13.
[3] Ganor B., Terrorism in the Twenty-First Century, in Shapira S., Hammond J., Cole L., Essentials of Terror Medicine (2009), Springer Science + Business Mediap. 14.
[4] For an exception, see Brett, R. 2002.Juvenile justice, counter-terrorism and children. Quaker United Nations Office. Available at: http://www.quno.org/resource/2002/11/juvenile-justice-counter-terrorism-and-children

1.2 Purpose of the study

The overall objective of this report is to shed light on the particular vulnerability of children and juveniles in the context of counter-terrorism, and to increase the capacity of governments to integrate existing international juvenile justice and child protection standards into their national counter-terrorism frameworks.

The report examines the position of children in international law as perpetrators and victims of terrorism. It also explores radicalisation, de-radicalisation and counter-radicalisation by analysing the counter-terrorism laws and practices of two case study countries: England and Germany, and seeks to analyse the extent to which they comply with international juvenile justice and child protection standards. Finally, the report provides a number of generally applicable recommendations that will allow governments to strengthen their capacity to integrate international child rights standards into domestic counter-terrorism frameworks.

1.3 Definitions and terms

This section briefly defines the main concepts and terms that relate to the issue of juvenile justice in the context of counter-terrorism. Many of the key terms used in this report (e.g. "terrorism" or "radicalisation") are highly contested and politicised. It is beyond the scope of this report to provide a comprehensive account of the academic debates around each of these terms.

Child: Throughout this report, the term "child" is used to refer to individuals below the age of 18 years. This definition is based on Article 1 of the Convention on the Rights of the Child (CRC), which states that a child is "*every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.*"[5] It is recognised that social, cultural and religious norms, as well as some national laws may define the end of childhood earlier or later than 18 years of age. However, for the sake of clarity and consistency, this report uses the strict definitional threshold of 18 years that is advocated by the UN Committee on the Rights of the Child (CRC Committee).[6]

Juvenile: There is no generally accepted definition of the term 'juvenile', however it is often used to signify a child who is over the minimum age of criminal responsibility and is alleged to, accused of, or convicted of a criminal offence. The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the 'Havana Rules')

[5] Convention on the Rights of the Child. Article 1. Available at: http://www.unicef.org.uk/Documents/Publication-pdfs/UNCRC_PRESS200910web.pdf

[6] See Page 3.UNICEF. (2007) Implementation Handbook for The Convention On The Rights Of The Child. Available at: http://www.unicef.org/publications/files/Implementation_Handbook_for_the_Convention_on_the_Rights_of_the_Child_Part_1_of_3.pdf

simply define a juvenile as "every person under the age of 18."[7] The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) provides the following definition: "A juvenile is a child or young person who under the respective legal system may be dealt with for an offence in a manner which is different from an adult". The CRC committee avoid the use of the term juvenile, referring instead to "children in conflict with the law".

Minimum age of criminal responsibility: The CRC, Article 40(3)(a) provides that States Parties shall establish a minimum age below which children shall be presumed not to have the capacity to deliberately and wilfully infringe on the criminal law. The age set by States however varies from the age of 7 up to 18. Neither the CRC nor the UN Minimum Standards and Norms of Juvenile Justice set a minimum age of criminal responsibility, but the CRC Committee has recommended that the minimum age of criminal responsibility should not be below 12 years of age.[8]

Juvenile Justice: Juvenile justice (or children's justice, as it is sometimes referred to[9]) is a general term used to describe the policies, strategies, laws, procedures and practices applied to children over the minimum age of criminal responsibility who have come into conflict with the law.[10] The term 'juvenile justice' needs to be distinguished from the broader concept of 'justice for children', which covers children in conflict with the law (i.e. alleged as, accused of, or recognised as having infringed the penal law), children who are victims or witnesses of crime, and children who may be in contact with the justice system for other reasons such as custody, protection or inheritance.[11]

Terrorism: Terrorism is a contested term and there are many different definitions to be found in national anti-terrorism laws, government statements and academic publications.[12] Nevertheless, scholars of terrorism have endeavoured to reach a consensus definition. According to the so-called 'Academic Consensus Definition' the term terrorism refers to:

> "on the one hand a *doctrine* about the presumed effectiveness of a special form or tactic of fear-generating, coercive political violence and, on the other hand, a conspiratorial *practice* of calculated, demonstrative, direct violent

[7] Paragraph 11 (a). United Nations Rules for the Protection of Juveniles Deprived of their Liberty. 1990. Resolution 45/113. Available at: http://www.ohchr.org/Documents/ProfessionalInterest/res45_113.pdf

8 General Comment No 10 (CRC/C/GC/10) para. 32

[9] Save the Children UK. 2006. Juvenile Justice: Modern concepts of Working with Children in Conflict with the Law. http://resourcecentre.savethechildren.se/library/juvenile-justice-modern-concepts-working-children-conflict-law

[10] Hamilton, C. 2011. Guidance for Legislative Reform on Juvenile Justice. UNICEF. Available at: http://www.unicef.org/policyanalysis/files/Juvenile_justice_16052011_final.pdfp.3.

[11] Penal Reform International. 2013. Protecting children's rights in criminal justice systems: A training manual and reference point for professionals and policymakers. Available at: http://www.penalreform.org/wp-content/uploads/2013/11/Childrens-rights-training-manual-Final%C2%ADHR.pdf

[12] Weinberg, L. et al. (2004) The Challenges of Conceptualizing Terrorism, Terrorism and Political Violence, 16:4, 777-794. See also Lord Carlisle of Berriew Q.C, the UK's Independent Reviewer of Terrorism Legislation. 2007. The Definition of Terrorism. Available at:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228856/7052.pdf

> action without legal or moral restraints, targeting mainly civilians and non-combatants, performed for its propagandistic and psychological effects on various audiences and conflict parties."[13]

The Academic Consensus Definition is broad enough to capture a whole range of potential types of terrorism, including regime terrorism, vigilante terrorism, insurgent terrorism, left-wing terrorism, right-wing terrorism, ethno-nationalist terrorism, religiously motivated terrorism, 'lone-wolf' terrorism, single-issue terrorism as well as cyber-terrorism.

Instead of trying to come up with a *general* definition of terrorism, governments have typically approached the subject of terrorism by defining and prohibiting *specific* actions such as hijacking or kidnapping that are frequently associated with terrorism.[14] The utility of this specific approach has been questioned and criticised by a number of legal scholars, who argue that it is preferable to adopt a general approach to defining terrorism, given that governments would otherwise need to constantly "*revisit the issue of what constitutes terrorism in order to respond to fast-developing instances of bio-terrorism, cyber-terrorism and the like*."[15] Further, they point out that any *general* legal definition of terrorism needs to make a specific exclusion for advocacy, dissent and industrial action.[16] Unless these legitimate forms of political contestation are explicitly excluded from the definitional ambit of anti-terrorism legislation, the general approach may provide repressive governments with a 'free licence' to crack down on domestic opposition.[17]

Another way in which governments have tried to define terrorism is by incorporating international conventions related to terrorism into their domestic anti-terrorism legislation.[18] However, it has been argued that such an 'incorporation approach' adds to definitional confusion rather than providing much-needed clarity. International conventions are not usually drafted in a manner that permits them to be simply referred to in this way. In other words, the Conventions are not specific enough or detailed enough to form the basis of criminal charges.[19]

[13] Schmid, A. (2013). Radicalisation, De-Radicalisation, Counter-Radicalisation: A Conceptual Discussion and Literature Review. ICCT Working Paper. p.16

[14] For a comprehensive list of international legal instruments related to terrorism, see United Nations Action To Counter Terrorism. International Legal Instruments. Available at: http://www.un.org/en/terrorism/instruments.shtml. International humanitarian law does not define terrorism as such, but it does prohibit measures of terrorism and acts of terrorism or acts that are aimed at spreading terror among the civilian population. See, for example, Art. 33 of GCIV; Art. 51(2) of API and Art.4 and 13(2) of APII.

[15] Golder, B. & Williams, G. 2004. "What is 'Terrorism'? Problems of Legal Definition" UNSW Law Jl 22; 27(2) University of New South Wales Law Journal 270.

[16] Ibid.

[17] Ibid.

[18] One example of this 'incorporation approach' is found in found in New Zealand's *Terrorism Suppression Act of 2002*. Article 5(1)(b) of the *Act* defines terrorism by reference to certain acts 'against' specified terrorism conventions. See http://www.legislation.govt.nz/act/public/2002/0034/latest/DLM151491.html

[19] Golder, B. & Williams, G. 2004. "What is 'Terrorism'? Problems of Legal Definition" UNSWLawJl 22; 27(2) University of New South Wales Law Journal 270 at Part III.

Counter-terrorism: By implication, there are as many definitions of 'counter-terrorism' as there are of 'terrorism'. For example, the US Army takes a very narrow approach and defines 'counter-terrorism' as the *"actions and activities to neutralize terrorists, their organizations, and networks*."[20] However, the term 'counter-terrorism' also can be used to refer to the whole array of practices, tactics, techniques, and strategies that governments can adopt in response to the threats or acts of terrorist groups. Counter-terrorism, understood in this broader sense, can include preventative measures such as counter-radicalisation programmes (see below). The broad approach is in line with the UN's Global Counter-Terrorism Strategy, which does not define the term directly, but rather includes a wide array of practical measures structured along the following four pillars: I. Measures to address the conditions conducive to the spread of terrorism; II. Measures to prevent and combat terrorism; III. Measures to build States' capacity to prevent and combat terrorism and to strengthen the role of the United Nations system in this regards; IV. Measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism.[21] This report uses this broad definition of counter-terrorism.

Radicalisation: The term radicalisation is generally used to describe ''what goes on before the bomb goes off.''[22] However, as with the concepts of 'terrorism', there is little agreement amongst scholars and policy-makers about what the term 'radicalisation' actually entails. The EU defines radicalisation as the "*phenomenon of people embracing opinions, views and ideas which could lead to acts of terrorism*."[23] However, this definition is problematic given its focus on ideology as the main driver of radicalisation. Briggs and Strugnell define radicalisation as the "process through which an individual changes from passiveness or activism to become more revolutionary, militant or extremist, especially where there is intent towards or support for violence."[24]

Counter-radicalisation: According to the United Nations Counter-Terrorism Implementation Task Force (the UN Task Force), the term counter-radicalisation is used to refer to "*a package of social, political, legal and educational and economic programmes specifically designed to deter disaffected individuals from crossing the line and becoming terrorists."*[25] In contrast to de-radicalisation, the concept of counter-radicalisation is 'prevention-focused' rather than 'response-focused.'

[20] See Chairman of the Joint Chiefs of Staff. Joint Publication 3-26. Counterterrorism. Available at: http://www.dtic.mil/doctrine/new_pubs/jp3_26.pdf
[21] A/RES/60/288. Available at: http://www.un.org/en/terrorism/strategy-counter-terrorism.shtml
[22] Mark Sedgwick. 2010. The Concept of Radicalization as a Source of Confusion, Terrorism and Political Violence, 22:4, p.479.
[23] Schmid, A.P. (2012), "*Radicalisation, De-Radicalisation, Counter-Radicalisation: A Conceptual Discussion and Literature Review*", ICCT, p.12.
[24] Briggs, R. &Strugnell, A. (2010), "*The Role of Civil Society in Counter-radicalisation and De-radicalisation*", Institute for Strategic Dialogue, p.1.
[25] United Nations (2008), *"First Report of the Working Group on Radicalisation and Extremism that Lead to Terrorism: Inventory of State Programmes".* Available at: http://www.un.org/terrorism/pdfs/radicalization.pdf

De-radicalisation: The UN Task Force uses the term de-radicalisation to refer to "*programmes that are generally directed against individuals who have become radical with the aim of re-integrating them into society or at least dissuading them from violence.*" [26] In contrast to counter-radicalisation, de-radicalisation is a responsive rather than a preventive approach to counter-terrorism.

Countering violent extremism: The phrase "countering violent extremism" is often used by UN bodies,[27] other inter-governmental organisations[28] as well as national governments [29] in relation to community-level counter-terrorism strategies and programmes. For example, in its 'Foreign Fighters Resolution' of September 2014, the UN Security Council encourages all Member States "*to engage relevant local communities and non-governmental actors in developing strategies to counter the violent extremist narrative that can incite terrorist acts, address the conditions conducive to the spread of violent extremism, which can be conducive to terrorism, […] and adopt tailored approaches to countering recruitment to this kind of violent extremism.*"[30] In this instance, "violent extremism" is understood as a precondition (or breeding-ground) for potential "terrorists". In the same vein, the Australian Government defines "violent extremists" as individuals who support the threat or use of violence to achieve ideological, religious or political goals, but do not necessarily commit terrorist acts themselves.[31]

The phrase 'countering violent extremism' is also often used to refer to a specific field of policy and practice that promotes "*cooperative and trust-based relationships between civil society and local police and the practice now known ubiquitously as community-led policing."*[32] As a field of policy and practice, countering violent extremism is therefore closely related to the above-mentioned concept of counter-radicalisation. There is disagreement as to whether countering violent extremism should be treated as a sub-set or rather an evolution of the policy field of counter-terrorism.[33] The origin of countering violent extremism as a field of policy and practice goes back to the year 2005, when US policy-makers sought to replace the 'Global War on Terror' with lower-key concepts.[34]

[26] United Nations (2008), *"First Report of the Working Group on Radicalisation and Extremism that Lead to Terrorism: Inventory of State Programmes"*. Available at: http://www.un.org/terrorism/pdfs/radicalization.pdf.
[27] See e.g. Human Rights Council Resolution A/HRC/30/L.25. 2015. Available at: http://daccess-dds-ny.un.org/doc/UNDOC/LTD/G15/220/99/PDF/G1522099.pdf?OpenElement
[28] See e.g. OSCE. 2014. Preventing Terrorism and Countering Violent Extremism and Radicalization that Lead to Terrorism: A Community-Policing Approach. Available at: http://www.osce.org/atu/111438. See also Human Rights Council, UN Doc. A/HRC/30.L.25 29 September 2015.
[29] See e.g. Public Safety Canada. Countering Violent Extremism. Available at: http://www.publicsafety.gc.ca/cnt/ntnl-scrt/cntr-trrrsm/cntrng-vlnt-xtrmsm/index-eng.aspx .
[30] The 'Foreign Fighters' Resolution. Paragraph 16.S/RES/2178 (2014). Available at: http://www.un.org/en/sc/ctc/docs/2015/SCR%202178_2014_EN.pdf
[31] Australian Government. Living Safe Together. What is violent extremism? Available at: https://www.livingsafetogether.gov.au/aboutus/Documents/what-is-violent-extremism.pdf
[32] See Holmer, G. 2013. Countering Violent Extremism: A Peacebuilding Perspective. United States Institute of Peace. Available at: http://www.usip.org/sites/default/files/SR336-Countering%20Violent%20Extremism-A%20Peacebuilding%20Perspective.pdf p.4.
[33] Ibid.
[34] Schmid, A.P. (2012), "*Radicalisation, De-Radicalisation, Counter-Radicalisation: A Conceptual Discussion and Literature Review*", ICCT.

Soft law: The term 'soft law' is used to refer to "*rules of conduct which in principle have no legally binding force but which nevertheless may have practical effects*"[35]. This definition identifies the border between soft law and hard law (which creates legally binding obligations on States), but it remains vague with respect to the distinction between 'soft law' and the absence of any obligation.[36] The concept of 'soft law' is thus best understood as a continuum that runs between fully binding treaties and purely political positions.[37] Soft law guidelines may, for example, be developed through inter-state agreements on the interpretation of existing legal norms or by drawing upon expert opinions and recommendations.[38] It is also used to describe UN instruments, which do not have the status of treaties, such as the UN Minimum Standards and Norms of Juvenile Justice.

Common law: The common-law system prevails in England, Canada, the United States, and other countries that were previously colonised by England. Common-law courts base their decisions on prior judicial pronouncements rather than, or as well as, legislative enactments.[39]

Civil law*:* The civil law system is derived from the Roman Corpus Iuris Civilis.[40] It differs from the common-law system in that it is based primarily on legislative enactments. Most European and South American countries, as well as parts of Africa (especially francophone Africa) have civil law systems.[41]

Islamic law: The term Islamic law (sometimes referred to as Sharia)[42] generally describes a code of law derived from the Quran and from the teachings of the Prophet Mohammed. There is no agreement about exactly which rules fall within the remit of the term 'Islamic law' and many Muslim countries have developed their own idiosyncratic Islamic law systems.[43]

1.4 Methods and limitations

This report uses international child rights standards, and in particular the Convention on the Rights of the Child (CRC), the UN Minimum Standards and Norms of Juvenile

[35] Trubek, D et al. 2005. "Soft Law," "Hard Law," and European Integration: Toward a Theory of Hybridity. No 2, Jean Monnet Working Papers. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=855447
[36] Guzman, A. & Meyer, T. 2010. International Soft Law, 2 J. Legal Analysis 171. Available at: http://scholarship.law.berkeley.edu/facpubs/695 p.173.
[37] Ibid.
[38] See e.g. Betts, A. 2008. Towards a 'soft law' framework for the protection of vulnerable migrants. UNHCR. Research Paper No. 162. Available at: http://www.unhcr.org/48b7f9642.pdf
[39] The Free Dictionary. Available at: http://legal-dictionary.thefreedictionary.com/Common+Law
[40] See the Robbins Collection. Roman Legal Tradition and the Compilation of Justinian. UC Berkeley. Available at: https://www.law.berkeley.edu/library/robbins/RomanLegalTradition.html
[41] The Free Dictionary. Available at: http://legal-dictionary.thefreedictionary.com/civil+Law
[42] The term *Sharia* means 'divine rules' and does not neatly equate with the term 'Islamic law', as the latter refers to man-made rules and norms. See Otto, J. M. (ed.) 2010. Sharia Incorporated. A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present. Leiden University Press.
[43] Ibid.

Justice and Committee on the Rights of the Child (CRC Committee) General Comments, as well as other human rights instruments and documents as a yardstick against which national counter-terrorism laws and practices are analysed and assessed. This allows the report to identify 'gaps' in current counter-terrorism frameworks, which are defined as areas in which national counter-terrorism laws and practices are *not consistent* with international child rights standards.

Case study selection criteria: This report relies on the case study approach in order to analyse the issue of juvenile justice in the context of counter-terrorism. The case study approach enables the report to provide detailed, empirical examples of how international standards related to counter-terrorism and juvenile justice are translated into domestic laws and state practice. One major limitation of the case study approach is that the findings on specific countries cannot be readily generalised. However, it does allow the report to extract common problems and shortcomings amongst the case studies.

The two case studies selected for this report are:

1) **England**

2) **The Federal Republic of Germany**

These two countries were chosen based on four pre-specified criteria:

1) **Diversity of legal traditions:** In order to capture the potential differences in approaches to counter-terrorism and juvenile justice taken by countries, it was decided to include at least one country with a common law system and one country with a civil law system. There are of course other legal traditions that could have been included in the analysis, as well as important differences between (and within) countries with the same legal tradition. However, it would have been beyond the scope of this report to provide an exhaustive analysis that does justice to the diversity of legal traditions across the world.

2) **Diversity of practice:** The two case study countries were selected based on their different approaches to counter-terrorism and juvenile justice. These differences can perhaps be regarded, on the one hand, as reflective of each country's attitude towards children's rights and human rights generally, and on the other, as the result of different levels of threat posed by terrorism.

3) **Availability of sources:** In addition to the above reasons, ease of access to relevant legislation and the availability of literature on law and practice in the fields of counter-terrorism and juvenile justice for the country was a factor taken into account. While some countries would have been

interesting to examine, the paucity of publicly available material on counter-terrorism and juvenile justice in these countries did not allow for their inclusion in the report.

4) **Language:** Lastly, the case study countries were selected based on the language skills of the researchers involved in this study as well as the languages in which the respective national laws and the relevant literature were written.

1.5 Structure of the report

Part 1 (Introduction) provides a brief overview of the background and purpose of this report. In addition, this chapter defines the key terms used throughout the report and lays out the methods and case study selection criteria.

Part 2 (International Standards) sets out the international standards related to counter-terrorism, child rights, juvenile justice, international humanitarian law and administrative detention as it affects children. The first section of this chapter provides an overview of international standards on counter-terrorism, with a focus on the counter-terrorism frameworks developed by the United Nations (UN) and the European Union (EU). The sections on child rights and juvenile justice provide an overview of the international legal standards and best practices that pertain to juvenile justice in the context of counter-terrorism. In particular, the section on juvenile justice develops a normative framework based on the provisions in the Convention on the Rights of the Child (CRC) and sources of 'soft law' such as the General Comments of the Committee on the Rights of the Child. The chapter also addresses international humanitarian law and the protections that it offers children, and the use of administrative detention.

Part 3 (Case studies overview) provides a brief overview of the child rights framework in England and Germany. In addition, this chapter describes the juvenile justice systems in each of two case study countries and assesses the extent to which they comply with international child rights standards.

Part 4 (Children as perpetrators: Terrorism offences) addresses the question of how States deal with juvenile terrorists. Furthermore, this chapter provides an overview of the anti-terror laws in each case study country and examines the extent to which they take into account the particular vulnerabilities of children.

Part 5 (Children as victims) deals with the question of how States treat children who are victimised by terrorism and to what extent these practices uphold or violate international child rights standards.

Part 6 (Counter-terrorism measures) examines de-radicalisation and counter-radicalisation programmes in the UK and Germany. In particular, this chapter asks how States deal with the radicalisation of children and how to address this problem most appropriately.

Part 7 (Conclusion and Recommendations) summarises the key findings from the two case studies and provides recommendations in support of the future elaboration of Guidelines on Juvenile Justice in a Counterterrorism Context.

PART 2: INTERNATIONAL STANDARDS

2.1 International standards on terrorism

Terrorism has been on the international agenda since 1934, when the League of Nations initiated a draft Convention for the Prevention and Punishment of Terrorism. Although this Convention was eventually adopted in 1937, it never came into force. Since the attacks on the World Trade Centre in September 2001, the United Nations has passed a number of resolutions and conventions, developed guidelines and published reports related to counter-terrorism. The following sections provide an overview of international counter-terrorism standards, with a focus on standards developed by the UN.

2.2 UN Treaties on Counter-terrorism

Rather than prohibiting terrorism as such, the UN has approached the subject by prohibiting specific actions, such as hijacking or the taking of hostages, which are frequently associated with terrorism. This approach has allowed UN member states to side step the difficult and politically charged issue of defining terrorism. Since 1963, the UN has developed fourteen conventions and four protocols related to terrorism and counter-terrorism.[44] In 2005, the international community introduced substantive changes to three of these universal instruments specifically to account for the threat of terrorism.[45] Two more legal instruments were added in 2010.[46] These further treaties criminalise acts related to civil aviation as well as the use of chemical, biological and nuclear weapons.

Currently, UN Member States are negotiating a comprehensive convention on international terrorism. This convention would complement the existing framework of international anti-terrorism instruments and would build on key guiding principles already present in recent anti-terrorist treaties. However, it is unlikely that such a comprehensive convention on international terrorism will become a reality anytime soon, given the fundamental difference in understanding between UN member states as to what the term “terrorism” entails.[47]

[44] The full list of Conventions can be obtained at: http://www.un.org/en/terrorism/instruments.shtml
[45] Amendments to the Convention on the Physical Protection of Nuclear Material, Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf.
[46] The 2010 Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation, the 2010 Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft.
[47] Golder, B. & Williams, G. 2004. "What is 'Terrorism'? Problems of Legal Definition" UNSW Law Jl 22; 27(2) University of New South Wales Law Journal 270.

2.3 UN Strategy on Counter-terrorism

Building on the Secretary General's report, the UN General Assembly adopted a ***Global Counter-Terrorism Strategy*** ("UN Strategy") in September 2006, which takes the form of a resolution and an annexed Plan of Action containing the above mentioned four pillars.[48]

In this Plan of Action, UN member States agree to:

- Consider ratifying all fourteen relevant international treaties related to counter-terrorism;
- Implement all General Assembly resolutions on measures to eliminate international terrorism, and relevant General Assembly resolutions on the protection of human rights and fundamental freedoms while countering terrorism; and
- Implement all Security Council resolutions related to international terrorism.

In contrast to the Secretary General's report, the UN Strategy is only made up of four 'pillars'. However, the last pillar ("defending human rights in the context of terrorism and counter-terrorism") of the Secretary General's report remains an essential part of the UN Strategy. In Section IV (1) of the Plan of Action, member states also reaffirm their commitment to General Assembly Resolution 60/158 of 2005, which provides the UN framework for the 'Protection of human rights and fundamental freedoms while countering terrorism.' In addition, in Section IV (4), member states promise to ensure that *"any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in support of terrorist acts is brought to justice, on the basis of* ***the principle to extradite or prosecute****, with due respect for human rights and fundamental freedoms, and that such* ***terrorist acts are established as serious criminal offences*** *in domestic laws and regulations.*"

Since its inception in 2006, the UN Strategy has been updated and reviewed a number of times to account for changes in international counter-terrorism practice.[49] In its latest review, in 2014, the UN General Assembly added sections that:

- Urge all States to respect and protect **the right to privacy**, as set out in Article 12 of the Universal Declaration of Human Rights and Article 17 of the International Covenant on Civil and Political Rights (ICCPR);
- Encourage all States to prevent and tackle the phenomenon of 'foreign fighters' through information-sharing, border management to detect travel,

[48] UN Doc. A/RES/60/288.
[49] See UN Doc. A/RES/62/272 (2008); A/RES/64/297 (2010); A/RES/66/282 (2012); A/RES/68/276 (2014).

and appropriate criminal justice response, and to consider the use of the UN sanctions regime;

- Call upon all States to prohibit by law **incitement to commit** a terrorist act or acts.[50]

Like the UN Secretary General's report, the UN Strategy, and its updates and reviews make no mention of the particular vulnerabilities of children and how these could most appropriately be addressed in national counter-terrorism strategies.

2.4 Other international guidelines on counter-terrorism

a) General Assembly Resolution 60/158 (2006)

Resolution 60/158 lays out the official UN framework for the protection of human rights while countering terrorism. Again, this resolution does not specifically mention UN Member States' obligations under the CRC or other child rights standards. However, it includes two paragraphs that go into more detail about Member States' obligations under the ICCPR and international refugee law while countering terrorism, which in a general manner also apply to children.

- **Paragraph 3, Page 2,** of the Resolution *reaffirms the obligation of States, in accordance with Article 4 of the ICCPR to respect certain rights as non-derogable in any circumstances, recalls, in regard to all other Covenant rights, that any measures derogating from the provisions of the Covenant must be in accordance with that article in all cases, and underlines the exceptional and temporary nature of any such derogations.*

- **Paragraph 5, Page 3,** of the Resolution urges *States to fully respect non-refoulement obligations under international refugee and human rights law and, at the same time, to review, with full respect for these obligations and other legal safeguards, the validity of a refugee status decision in an individual case if credible and relevant evidence comes to light that indicates that the person in question has committed any criminal acts, including terrorist acts, falling under the exclusion clauses under international refugee law.*

b) Other UN guidelines

The UN Working Group on Protecting Human Rights while Countering Terrorism has to date produced two basic human rights reference guides for States to apply in their counter-terrorism efforts. One of them, the ***Basic Human Rights Reference Guide: The Stopping and Searching of Persons in the Context of Countering***

[50] UN Doc. A/RES/68/276.

Terrorism,[51] includes a few guidelines related to the rights and particular situation of children.

- *"The search of children also requires special measures; and the presence of a trusted adult or a medical doctor is seen as good practice".*[52]
- *"It shall not be considered unlawfully discriminatory for the police to enforce certain special measures designed to address the special status and needs of women (including pregnant women and new mothers), juveniles, the sick, the elderly and others requiring special treatment in accordance with international human rights standards*".[53]

Other UN Working Group guides and publications only mention the rights and particular vulnerabilities of children in a very cursory manner, often in combination with other vulnerable groups such as women, elderly and disabled persons.[54] In particular, there is no mention of the non-derogable nature of the rights contained in the CRC.

The 2009 Report of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism also encourages UN Member States "*to repeal all counter-terrorism measures that sanction the unlawful detention and ill-treatment of women and children to produce information concerning male family members suspected of terrorism*."[55]

c) EU Counter-terrorism framework [56]

After the terrorist attack of September 2001, counter-terrorism moved rapidly to the forefront of the EU's policy agenda, with the result that the 28 members of the European Union today are now obliged to implement a vast body of legislation and policy. This includes a common legal definition of "terrorism" and terrorist offences, and a host of substantive criminal and procedural laws, as well as supplementary "security" and "preventative" measures. In addition, numerous EU bodies and agencies have been given a mandate to implement or coordinate EU counter-

[51] UN Working Group on Protecting Human Rights while Countering Terrorism. March 2014. Basic Human Rights Reference Guide: The Stopping and Searching of Persons in the Context of Countering Terrorism. Available at: http://www.un.org/en/terrorism/ctitf/pdfs/Basic%20Human%20Rights%20Reference%20Guide%20-%20The%20Stopping%20and%20Searching%20of%20Persons2014.pdf.
[52] Ibid. p. 11.
[53] Ibid. p. 11.
[54] See e.g. UN Working Group on Protecting Human Rights while Countering Terrorism. March 2014. Basic Human Rights Reference Guide: Security Infrastructure. Available at: http://www.un.org/en/terrorism/ctitf/pdfs/Basic%20Human%20Rights%20Reference%20-%20Security%20Infrastructure2014.pdf or UN Working Group on Protecting Human Rights while Countering Terrorism. November 2008. Expert Seminar on 'The impact of terrorism and counter-terrorism measures on the enjoyment of economic, social and cultural rights (ESCR). Available at: http://www.un.org/en/terrorism/ctitf/pdfs/wg_protecting_human_rights.pdf.
[55] UN doc. A/64/211 Available at: http://www2.ohchr.org/english/issues/terrorism/rapporteur/docs/A-64-211.pdf
[56] It would go beyond the scope of this report to consider all existing regional counter-terrorism strategies and frameworks. The EU framework is the most relevant in this respect, given that two of our case studies are EU member states.

terrorism policies.[57] If both legislative and non-legislative instruments are taken into account, the EU adopted at least 239 separate counter-terrorism measures between the 11th September 2001 and 2013,[58] and continues to issue new instruments.

The EU's overall counter-terrorism framework is based on the ***Framework Decision 2002/475/JHA*** on combating terrorism of 2002 and its amending decision ***2008/919/JHA of 2008***. [59] These framework decisions introduce an EU-wide common definition of terrorist offences, require EU countries to align their legislation and also introduce minimum penalties for terrorist offences.[60] They also require EU member-states to criminalise 'preparatory' terrorist acts[61] as well as the acts of inciting, aiding or abetting terrorist offences. A recent report by the EU Commission notes that all EU member-states (except Ireland and Greece) have adopted measures to criminalise the offences of public provocation, recruitment and training for terrorism.[62] Neither the original Framework Decision of 2002 nor the amending decision of 2008 make any mention of the rights and particular vulnerabilities of children, and how EU member-states can address these most appropriately in their national counter-terrorism strategies.

The only official EU strategy paper on counter-terrorism that specifically points to EU member-states' obligations under the CRC is the **"*Outline of the counter-terrorism strategy for Syria and Iraq, with particular focus on foreign fighters*"** of January 2015. In this draft strategy paper, EU member-states are reminded that *"all measures taken to counter terrorism must comply with international law, including human rights law (including the Convention on the Rights of the Child, where appropriate), refugee law, and international humanitarian law*."[63] However, this very cursory mention of EU member states' obligations under the CRC does not amount to a specific child rights guideline on how the rights and vulnerabilities of children are most appropriately addressed in national counter-terrorism efforts.

In summary, it must be concluded that the international standards on counter-terrorism, as developed by the UN and the EU, have so far failed to address the rights and vulnerabilities of children.

[57] State Watch (2013). "Taking stock of EU Counter-terrorism policy and review mechanisms: Summary of State watch's findings for SECILE project". Available at: http://www.statewatch.org/news/2013/dec/SECILE-sw-summary.pdf .
[58] Hayes, B. & Jones, C. (2013). "Catalogue of EU Counter-Terrorism Measures Adopted since 11 September 2001". Available at: http://www.statewatch.org/news/2013/dec/secile-catalogue-of-EU-counter-terrorism-measures.pdf.
[59] Framework Decision 2002/475/JHA and 2008/919/JHA. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:l33168.
[60] Ibid.
[61] Examples include public provocation to commit a terrorist offence, recruitment and training for terrorism and theft, extortion or forgery with the aim of committing terrorist offences.
[62] Report From The Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52014DC0554.
[63] General Secretariat of the Council. 16 January 2015. "Outline of the counter-terrorism strategy for Syria and Iraq, with particular focus on foreign fighters". Available at: http://data.consilium.europa.eu/doc/document/ST-5369-2015-INIT/en/pdf.

2.5 Child rights standards

The concept that children have rights, and the recognition of those rights is very much a twentieth century concept. The first international instrument on children's rights, the ***Declaration of Children's Rights*** was adopted by the League of Nations in 1924. Its inspiration was the treatment of children in the First World War and the lack of protection given to children. The Declaration of Children's Rights focuses heavily on the right of the child to protection and the responsibility of adults to provide it. The impetus for a further, more encompassing instrument came as a result of the Second World War and the treatment of children, particularly in Europe. This led to a second ***Declaration of Children's Rights*** by the UN in 1959. Again, this was a limited instrument and, as a Declaration, did not have the same status as a treaty. The ***Convention on the Rights of the Child*** took 10 years to draft, and opened for ratification on 20th November 1989. It came into force on 2nd September 1990. It is the most ratified of all human rights treaties. All countries of the world have ratified the Convention with the exception of the USA. As there is virtually universal ratification, many have argued that the CRC now has the status of customary law.

2.6 Juvenile justice standards

The most important international instruments for the administration of juvenile justice are the CRC and the International Covenant on Civil and Political Rights (ICCPR). Article 40(3) of the CRC requires States to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognised as having infringed the penal law. In other words, a State is required to establish a juvenile justice system. Children over the State's minimum age of criminal responsibility[64] and under the age of 18 who are charged with a criminal offence should be dealt with in the juvenile justice system, regardless of the nature of the charge. This applies just as much to terrorist offences as it applies to any other criminal offence.

Apart from the CRC and the ICCPR, there are four main juvenile justice instruments, known collectively as the UN Minimum Standards and Norms of Juvenile Justice: the United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines);[65] the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules);[66] the United Nations Rules for the Protection of

[64] The CRC, Article 40(3)(a) provides that States Parties shall establish a minimum age below which children shall be presumed not to have the capacity to infringe the criminal law. The age set by States varies from 7 – 18, but the CRC Committee recommended in General Comment No 10 (CRC/C/GC/10) para. 32, that the minimum age of criminal responsibility should not be below 12 years of age.
[65] The Riyadh Guidelines set standards aimed at preventing juvenile delinquency.
[66] The Beijing Rules provide guidelines on how juveniles should be treated while part of the justice system addressing issues such as privacy, special training for the police and due process guarantees. In addition, the Rules set out guidelines for the diversion of juveniles from judicial proceedings.

Juveniles Deprived of their Liberty (Havana Rules);[67] and the Guidelines for Action on Children in the Criminal Justice System (Vienna Guidelines).[68]

Regional instruments also address juvenile justice, including: the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention);[69] the African Charter on Human and Peoples' Rights (Banjul Charter);[70] the African Charter on the Rights and Welfare of the Child;[71] the Arab Charter on Human Rights (Arab Charter);[72] the American Convention on Human Rights (American Convention);[73] and the American Declaration on the Rights and Duties of Man[74] as well as the jurisprudence developed by the European Court of Human Rights (ECHR), the Inter-American Court of Human Rights, the Inter-American Commission on Human Rights and the African Commission on Human and Peoples' Rights. In addition, there are a number of detailed international and regional standards and norms governing criminal justice generally [75] but also applicable to juvenile justice.

Assistance on interpreting the CRC and the UN Minimum Standards and Norms on Juvenile Justice has been provided by the CRC Committee in General Comment No. 10.[76]

Article 40 of the CRC sets out the legal framework of juvenile justice and the rights to be afforded to a child by a juvenile justice system, as well as specific due process

[67] The Havana Rules provide detailed minimum standards for the care and treatment of juveniles deprived of their liberty.

[68] Guidelines for Action on Children in the Criminal Justice System, Recommended by Economic and Social Council resolution 1997/30 of 21 July 1997

[69] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 5.Hereinafter the European Convention. See also Recommendation CM/Rec (2008) 11 on the European Rules for juvenile offenders subject to sanctions or measures (5 November 2008).

[70]African Charter on Human and Peoples' Rights, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).Hereinafter the Banjul Charter.

[71] Organization of African Unity, African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990).

[72] League of Arab States, Arab Charter on Human Rights, 15 September 1994, entered into force 15 March 2008. Hereinafter the Arab Charter. This Charter should not be regarded as complying fully with the CRC as Article 10 permits the imposition of the death penalty for serious crimes and does not specifically exempt children, even though this is a sentence which is prohibited by the CRC.

[73] Organization of American States, American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969, OAS, Treaty Series, No. 36, entered into force18 July 1978. Hereinafter the American Convention.

[74] Organization of American States), American Declaration of the Rights and Duties of Man, 2 May 1948, OAS Resolution XXX, adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948.

[75] Universal Declaration of Human Rights, adopted by United Nations General Assembly on 10 December 1948 in Paris [Hereinafter the UDHR.]; International Covenant on Civil and Political Rights, adopted by United Nations General Assembly Resolution 2200A (XXI) of 16 December 1966 and entered into force 23 March 1976 [Hereinafter the ICCPR.]; United Nations Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977 [Hereinafter the Standard Minimum Rules for the Treatment of Prisoners.]; Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment, UN GAOR A/RES/43/173, 9 December 1988, which sets out a comprehensive list of protections for persons who are subject to administrative detention [Hereinafter the Body of Principles.]; United Nations Declaration of Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly, UN GAOR 40/32 (29 November 1985) and UN GAOR 40/146 (13 December 1985); United Nations Standard Minimum Rules for Non-Custodial Measures, adopted by the United Nations General Assembly 14 December 1990, UN GAOR A/RES/45/110 [Hereinafter the Tokyo Rules.]; United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 7 September 1990, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1.

[76] Committee on the Rights of the Child, General Comment No. 10 (2007).

guarantees.[77] Many of these provisions mirror the provisions of Articles 9 and 14 of the ICCPR.

Article 40(2):

> (a) No child shall be alleged as, be accused of, or recognised as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;
>
> (b) Every child alleged as or accused of having infringed the penal law has at the least the following guarantees:
>
> > (i) To be presumed innocent until proven guilty according to the law;
> >
> > (ii) To be informed promptly and directly of the charges against him or her and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his defence;
> >
> > (iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interests of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians.
> >
> > (iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;
> >
> > (v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher, competent, independent and impartial authority or body, according to law;
> >
> > (vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used.

There are, however some notable differences between a juvenile justice system and the criminal justice system applicable to adults. One major difference relates to the purpose of juvenile justice. Article 40(1) provides "*States Parties recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the child's sense of dignity and worth,*

[77] See Articles 37 and 40.

which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child assuming a constructive role in society."

A further major difference is that the best interests of the child remain a primary consideration, even in criminal cases.[78] Children also are provided with a greater level of procedural protection by the CRC. A child alleged to have committed an offence should only be interviewed in the presence of a parent or other appropriate adult;[79] a child who is apprehended or arrested should not be detained for longer than 24 hours without being brought before a court;[80] and whenever appropriate and desirable, measures for dealing with children without resorting to judicial proceedings should be used, providing that human rights and legal safeguards are fully respected.[81]

If a child is charged with a criminal offence, he or she should be tried in a children's court or juvenile court, and the privacy of the child should be respected throughout the proceedings, with a trial taking place in a closed courtroom and no identification of the child in the media.[82] The procedures used must be such that the child is able to participate effectively in the trial.[83] This requires an arrangement of the Court that allows the child to sit near his or her parents and close to the lawyer providing representation, in a non-intimidating atmosphere.[84] The UN Committee on the Rights of the Child has recommended that both the prosecutor and the defence lawyer should be trained to take cases involving children and that the language used by the Court and the prosecutor must be such that the child is able to understand what is happening.[85] The procedures should take into account a child's attention span and provide regular breaks.[86] If a child is convicted of a criminal offence, any sentence passed should be rehabilitative and not punitive, taking into account the requirement of Article 40(1) of the CRC: the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

The passing of a sentence of capital punishment or life imprisonment without a possibility of release is forbidden by the CRC,[87] and corporal punishment is regarded by the CRC Committee in General Comment No 10 as amounting to cruel, inhuman and degrading treatment.[88] Deprivation of liberty is only to be used as a matter of

[78] UN Convention on the Rights of the Child, Article 2.
[79] UN Committee on the Rights of the Child General Comment No 10 (2007) CRC/C/GC/10 para.83.
[80] UN Committee on the Rights of the Child General Comment No 10 (2007) CRC/C/GC/10 para.58.
[81] UN Convention on the Rights of the Child, Article 40(3)(b).
[82] UN Convention on the Rights of the Child, Article 40(2)(b)(vi).
[83] UN Convention on the Rights of the Child, Article 40(2)(b)(iv).
[84] For further information on the required court environment necessary to ensure a child a fair trial, see CASE OF T. v. THE UNITED KINGDOM (Application no.24724/94), European Court of Human Rights 1999.
[85] UN Committee on the Rights of the Child, General Comment No 10 (2007) CRC/C/GC/10, para. 92,
[86] Ibid.
[87] UN Convention on the Rights of the Child, Article 37(a).
[88] UN Committee on the Rights of the Child, General Comment No 10 (2007) CRC/C/GC/10 para. 71

last resort and for the shortest appropriate period of time.[89] Children must be kept separately from adults when deprived of liberty and have the right to maintain contact with their family save in exceptional circumstances.[90]

2.7 International humanitarian law standards

Many children who are alleged to commit, or are accused of terrorist offences are living in areas of armed conflicts. As CRC rights are non-derogable, provisions relating to juvenile justice continue to apply during an armed conflict. International humanitarian law provisions also apply in situations of armed conflicts.

The main legal framework of international humanitarian law is contained in the four Geneva Conventions (1949) and the two Additional Protocols (1977).The four Geneva Conventions have been universally ratified, but Additional Protocol 1 (applicable to international armed conflicts) has only been ratified by 174 States, while Additional Protocol 2 (applicable to non-international armed conflicts) has 168 ratifications.

Both the CRC and the two first Additional Protocols to the Geneva Conventions prohibit the recruitment of children under the age of 15 in armed conflict, both as part of State forces and non-State armed groups,[91] while the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict,[92] provides that armed groups should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years[93] and that, States should "take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 do not take a direct part in hostilities."[94] Despite the prohibition on the recruitment and use of children by armed forces and groups,[95] thousands of children are currently involved in armed conflicts around the world.[96] When these children surrender or are captured, they may face criminal charges, including terrorism related charges, or be placed in administrative detention by the State in whose power they find themselves, despite the fact that many are below the minimum age of recruitment.

[89] UN Convention on the Rights of the Child, Article 37(b).
[90] UN Convention on the Rights of the Child, Article 37(c).
[91] Article 38 of the CRC prohibits the recruitment of children under the age of 15 years into State armed forces, and requires States to '*take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities*'. International humanitarian law also contains provisions prohibiting the recruitment or use of children under the age of 15 years in armed conflict: Article 77 of Additional Protocol I; Article 4(3) (c) of Additional Protocol II.
[92] United Nations, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 25 May 2005, adopted and opened for signature, ratification and accession by General Assembly Resolution UN GAOR A/RES/54/263 of 25 May 2000. Hereinafter the Optional Protocol.
[93] Article 4(1) of Optional Protocol
[94] Ibid. Article 1.
[95] Articles 2 and 3 of the Optional Protocol prohibit forced recruitment of children under the age of 18 by State forces but permit voluntary recruitment under certain circumstances.
[96] Coalition to Stop the Use of Child Soldiers, 'Questions and Answers':<www.child-soldiers.org/childsoldiers/ questions-and-answers> [accessed 15 November 2015].

The legal protections offered to children differ under international humanitarian law depending on whether the armed conflict is an international armed conflict or a non-international (or internal) armed conflict. An international armed conflict refers to situations where two or more States are engaged in armed conflict, while non-international armed conflict exists whenever there is protracted armed violence between Government forces and non-State armed groups, or between non-State armed groups. Two criteria must be met before a conflict can be deemed a non-international armed conflict: a certain intensity of hostilities and the requisite organisation of the parties to the conflict. The International Criminal Tribunal for former-Yugoslavia addressed the definition of non-international conflicts in the case of Dusko Tadic.[97]

> "...an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there."[98]

Where conflicts do not reach the qualification of either an international or non-international armed conflict, they are generally referred to as 'internal tensions' or 'disturbances'. These can include riots, demonstrations or sporadic acts of violence. Even if the State uses force to restore public order, this may be insufficient to trigger the application of international humanitarian law. In such instances, national laws and human rights conventions continue to apply, though some provisions, such as certain provisions of the ICCPR may be derogated from.

(a) International armed conflicts

In international armed conflicts, international humanitarian law permits the internment of prisoners of war. A prisoner of war is defined mainly as a combatant who is a member of the armed forces of a party to an international armed conflict.[99] A prisoner of war may not be prosecuted by his or her captor for lawful acts of violence committed during the hostilities, but can be charged and tried for serious violations of international humanitarian law or other serious international crimes.[100]

[97] The Prosecutor v Dusko Tadic; No.IT-94-1-AR72, Appeal on Jurisdiction, paras.66-70 (October 2, 1995), 35 I.L.M. 32 (1996).
[98] Appeals Chamber Decision para. 70
[99] See Article 4 GC3 and 43 and 44 AP1.
[100] The International Criminal Court does not have jurisdiction in relation to charges against children under the age of 18. For the accountability of children who commit war crimes, see the Third Working Paper on Children and Justice During and in the Aftermath of Armed Conflict, SRSG for Children and Armed Conflict, 2011 (Hamilton and Dutordoir).

Under Geneva Convention III (relative to prisoners of war), internment in regular prisons is forbidden[101] and prisoners of war must be released and repatriated "without delay following the cessation of hostilities."[102] Children who have been detained as prisoners of war must be held in quarters separate from adult detainees, except where accommodated with adult family members.[103] In practice, child prisoners of war are very rare and there have been no registered child prisoners of war since the Second World War.

Civilian children also may be subject to administrative detention or 'internment' in an international armed conflict but 'only if the security of the Detaining Power makes it absolutely necessary. Internment should only be used in exceptional circumstances, where there is an imperative reason of security.[104] There is no minimum age limit at which a child may be the subject of internment. The child has a right to challenge the internment and for the decision to intern to be reviewed as soon as possible and at least twice yearly by an appropriate court or administrative board designated by the Detaining Power for that purpose.[105]

(b) Non-international armed conflicts

Although many of the armed conflicts taking place at the current time are non-international conflicts, children caught up in such conflicts whether as members of an armed group or civilians can only benefit from the protections offered by the Geneva Conventions and Optional Protocol II if: 1) the State in which the conflict is taking place has ratified Optional Protocol II; and 2) the State has recognised that there is a non-international conflict taking place. States have been reluctant to concede that a Protocol II conflict is taking place, and there have been few instances where it has been recognised as applying.[106]

Where Additional Protocol II does not apply to an internal armed conflict, Common Article 3 of the Geneva Conventions remains applicable for both children and adults. This Article sets out the minimum protections to be applied to "[p]ersons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed *'hors de combat'* by sickness, wounds, detention or any other cause." It requires that they shall, in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. It also prohibits murder, mutilation, cruel and inhuman

[101] Article 22 Geneva Convention III.
[102] Article 18 Geneva Convention III.
[103] Additional Protocol I to the Geneva Conventions 1977, Article 77(4).
[104] Fourth Geneva Convention, article 42(1), article 78(1). The wording on the standard of grounds for internment varies between detention on the States's own territory or in occupied territory. This difference in wording may imply that internment in occupied territory should be even more exceptional: see Geneva Convention IV, Commentary, J. Pictet (ed.), ICRC, Geneva, 1958, p. 367.In addition, Optional Protocol II requires two additional criteria: 1) control over the territory by the armed group, 2) exclusion of non-international armed conflict between armed groups only.
[105] Article 43 Geneva Convention IV.
[106] For instance, the San Jose Agreement on Human Rights concluded between the Government of El Salvador and the Frente Farabando Marti para la Liberacion Nacional (FLMN) in 1990, included commitments to comply with Additional Protocol 2 as did the Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law concluded between the Government of the Philippines and the National Democratic Front of the Philippines (NDFP) in 1998.

treatment and torture, the taking of hostages, outrages against personal dignity and the passing of sentences and the carrying out of executions without previous judgments pronounced by a regularly constituted court and affording all the judicial guarantees recognised as indispensable.

Given that there is no prisoner of war status in non-international armed conflicts, children who are recruited into, or who have become involved with armed forces or groups engaged in non-international armed conflicts will not be classified as prisoners of war and will not, therefore, benefit from the protection against domestic criminal prosecution offered to combatants in international armed conflicts.[107] Rather, they are likely to be subjected to national law, and potentially charged with terrorist-related offences.

(c) Prosecution of children associated with armed forces or groups

International humanitarian law does not establish a minimum age of criminal responsibility for international crimes. However, it has been argued that children who are under the minimum age of recruitment, which is set at the age of fifteen by Article 77(2) of Additional Protocol 1 to the Geneva Conventions and Article 38(2) of the CRC should be treated as the minimum age.[108] In making a decision on whether to prosecute children, States should take into account the Paris Principles and Guidelines on Children associated with Armed Forces and Armed Groups,[109] which provide that "children who are accused of crimes under international law allegedly committed while they were associated with armed forces or armed groups, should be considered primarily as victims and not as perpetrators." The Paris Principles are 'soft law' and therefore not legally binding but reflect current good practice and the view that alternative forms of accountability, which promote reintegration into civilian life should be used.

2.8 The use of administrative detention

While threats to national security, such as terrorist related activities, are generally regarded as matters to be dealt with under the State's criminal justice laws, some States have chosen to use administrative detention rather than the judicial system to respond to threats, citing the "unprecedented nature of the contemporary terrorist threat" to justify their departure from previously accepted legal norms.[110]According to States who use administrative detention as a counter-terrorist measure, the aim is to incapacitate suspected terrorists or enemy combatants, disrupt terrorist

[107] See the ICRC's Initiative on Strengthening Legal Protection for Persons Deprived of their Liberty in Non-International Armed Conflict (DP/JT 15/017 28Oct15.
[108] For further information on this point see below at page 34 and Justice During and in the Aftermath of Armed Conflict, the Third Working Paper of the SRSG for Children and Armed Conflict, 2011 (Hamilton and Dutordoir).
[109] United Nations Children's Fund, Principles and Guidelines on Children associated with Armed Forces or Armed Groups (2007).
[110] International Commission of Jurists, *Assessing Damage, Urging Action,* 2009.p.12.

organisations and specific plots and gather information from detainees about terrorist organisations or enemy combatants and plots.

Administrative detention is defined as the deprivation of liberty of a person, initiated or ordered by the executive branch of government, not the judiciary, without criminal charges being brought.[111] Children may be administratively detained in the same way as adults, most frequently by the army or by the police, and may be held in military facilities, prisons or juvenile facilities. There is no minimum age at which a child can be administratively detained in international law. Administrative detention may be used both in relation to children who have actively participated in hostilities in a non-international conflict, and also in relation to children who are considered to pose a security threat to the State as a result of engagement in alleged terrorist activities or involvement with anti-State groups.[112]

States who use administrative detention for counter-terrorism purposes have argued that the potential damage caused by terrorist attacks is so great, that it justifies placing individuals present in the State who are suspected of being capable and willing to carry out such attacks in administrative detention. In addition, such States maintain that the criminal justice system cannot contain such threats. States give various reasons for this: there may not be an adequately functioning criminal justice system in States involved in an armed conflict; or it may not be possible to gather sufficient evidence for a successful prosecution, as much of the evidence comes from abroad and is secret intelligence information which the State has not been able to produce in court. The International Commission of Jurists has dismissed these arguments, stating that conventional criminal justice systems have a long history of tackling terrorists and other organised criminal networks and has recommended that with adequate resources, criminal justice systems, rather than administrative detention, should be the measure used to tackle terrorism.[113]

It also has been suggested that some States are using administrative detention of children to "side-step" the procedural safeguards and strict evidentiary standards afforded to children in the State's criminal justice systems.[114] However, children who are administratively detained are still entitled to the rights contained in the CRC and ICCPR. Deprivation of liberty should be used only as a matter of last resort and for the shortest appropriate period of time[115] and the best interests of the child should remain a primary consideration.[116] In addition, the child retains the right to be

[111] J. Pejic, Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence in International Review of the Red Cross , Vol 87, No. 858, 375-391, at 375.
[112] For further information on the use of administrative detention for security purposes, see Hamilton et al, *Administrative Detention of Children: A global Report,* UNICEF NYC and Coram Children's Legal Centre, chapter 1, 2011.
[113] International Commission of Jurists, "*Assessing Damage, Urging Action*," 2009 p.12.
[114] See Davidson, T. and Gibson, K., 'Experts Meeting on Security Detention Report', *Case Western Reserve Journal of International Law*, 40: 323, 340, 2009.
[115] CRC, Article 37(b).
[116] CRC, Article 3.

informed of the reasons for detention;[117] the right to be brought promptly before a judge and to judicial review of the legality of the detention;[118] the right to periodic review of the legality of the detention; the right to release or a trial within a 'reasonable time' if accused of a crime; [119] the right to have the detention acknowledged;[120] to communicate with relatives and friends[121] and the right to legal assistance. [122]

The United Nations Working Group on Arbitrary Detention has expressed concern about the frequent use of various forms of administrative detention, entailing restrictions on fundamental rights. It also has noted a further expansion of States' recourse to emergency legislation diluting the right of *habeas corpus* or *amparo* and limiting the fundamental rights of persons detained in the context of the fight against terrorism.[123] In addition, although the United Nations Security Council has declared that States must ensure that any measures taken to combat terrorism must comply with their obligations under international law, in particular, international human rights, refugee and humanitarian law,[124] the International Commission of Jurists maintains that measures introduced by some States have failed to protect basic legal and human rights, resulting in serious violations.[125]

[117] ICCPR, Article 9(2). See also Human Rights Committee, General Comment No 8 (1982). The Human Rights Committee noted that while this requirement appears only to apply to persons charged with a criminal offence, it also applies to persons held in administrative detention.
[118] CRC, Article 37(d); ICCPR, Article 9(4).
[119] ICCPR, Article 9(3).
[120] International Convention for the Protection of All Persons from Enforced Disappearance, Article 1 (2006); Human Rights Committee General Comment No 29 (2001), UN Doc. CCPR/C/21/Rev.1/Add.11, para.13(b)).
[121] CRC, Article 37(d) and ICCPR, Article 9(4).
[122] A v Australia, Communication No. 560/1993, U.N Doc. CCPR/c/59/D/560/1993 (30 April 1997), para.9.4; C v Australia Communication No 900/1999 U.N. Doc. CCPR/C/76/D/900/1999 (2002), para 8.2.
[123] Commission on Human Rights, WG on Arbitrary Detention (2004), U.N. Doc. E/CN.4/2005/6, para. 61.
[124] Since the United Nations Security Council Resolution 1456 (2003).
[125] See International Commission of Jurists, 'Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights', 2009, p.12. See also United Nations Office for the High Commissioner for Human Rights, Terrorism and Counter-Terrorism, Fact Sheet No. 32, p. 19–20: *'There has been a proliferation of security and counter-terrorism legislation and policy throughout the world since…2001, much of which has an impact on the enjoyment of human rights*.'

PART 3: CASE STUDY OVERVIEW

3.1 Children's rights: the legal framework in the case-study countries

a) England

The UK ratified the UN Convention on the Rights of the Child (CRC) in December 1991, with two main reservations: the first reserved "*the right to apply such legislation, in so far as it relates to the entry into, stay in and departure from the United Kingdom of those who do not have the right under the law of the United Kingdom to enter and remain in the United Kingdom, and to the acquisition and possession of citizenship, as it may deem necessary from time to time*." The second reservation provided that: "*Where at any time there is a lack of suitable accommodation or adequate facilities for a particular individual in any institution in which young offenders are detained or where the mixing of adults and children is deemed to be mutually beneficial, the United Kingdom reserves the right not to apply article 37 (c) in so far as those provisions require children who are detained to be accommodated separately from adults*." Both of these reservations have since been withdrawn.

The UK has not incorporated the Convention into its domestic law. Thus, the Convention is not justiciable as it stands, and is only of persuasive status in the Courts. However, the underpinning principles of the CRC, including the requirement to treat the best interests of the child as a primary consideration (CRC, Article 3); the right of the child not to be discriminated against in application of rights (CRC, Article 2); and the right of the child to be heard and their views taken into account (CRC, Article 12), as well as the other articles of the CRC are to be found in various domestic laws relating to children. These include the Children Act 1989, the Human Rights Act 1998, the Police and Criminal Evidence Act 1984, and in Codes of Practice applying to police and prosecution procedures, the Courts and sentencing. In addition, the Children Act 2004, section 11, places a statutory duty on a range of organisations and individuals to ensure that in undertaking their functions (including any that are contracted out), they have regard to the need to safeguard and promote the welfare of children. The police, the Probation Service, Governors/Directors of Prisons and Young Offenders Institutions, Directors of Secure Training Centres, Youth Offending Teams and Immigration Removal Centres are all covered by this section of the Children Act 2004.

b) Germany

In Germany's Basic Law (Grundgesetz) children are not recognised as distinct right-holders. However, Article 6 Paragraph 2 of the Basic Law states that parents have a duty to ensure the wellbeing ("Pflege und Erziehung") of their children[126]. In addition, the Constitutional Court ruled in 1968 that children are entitled to the same basic rights ("Grundrechte") as those accorded to adults in the German Basic Law.[127] Most sub-national states (Länder) have explicitly incorporated children's rights into their constitutions.[128] However, there are some exceptions. For example, children's rights have not yet been recognised in the constitutions of Hamburg and Hessen.[129]

Germany ratified the CRC in 1992, but has not incorporated the CRC into its own constitution (Grundgesetz) and has instead only placed it at the level of an ordinary federal law.[130] This shortcoming has been repeatedly highlighted by the Committee on the Rights of the Child.[131] The Committee is concerned about the fact that ordinary federal laws do not have the same 'status' as provisions in the Basic Law and can more easily be overturned and amended.[132]

In 2010, Germany withdrew a reservation it had placed upon ratification of the CRC, which stated that "*nothing in the Convention may be interpreted as implying that unlawful entry by an alien into the territory of the Federal Republic of Germany or his unlawful stay there is permitted; nor may any provision be interpreted to mean that it restricts the right of the Federal Republic of Germany to pass laws and regulations concerning the entry of aliens and the conditions of their stay or to make a distinction between nationals and aliens."*[133] This reservation was criticised for effectively denying asylum-seeking and migrant children the special protection afforded by the CRC.[134]

3.2 Juvenile justice: the legal framework in the case-study countries

a) England

In accordance with Article 40 of the CRC, England has a juvenile justice system that applies to children up to the age of 18. This includes specialist juvenile units within the police; a Code of Practice for police on arrest, interrogation, treatment and bail of children; specialist prosecutors; and a separate court, the Youth Court, to hear

[126] http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0034.
[127] Peschel-Gutzeit, L. (2008).Warummüssen die Kinderrechte ins Grundgesetzaufgenommenwerden? http://www.kinderpolitik.de/kinderrechte/kinderrechte-ins-grundgesetz/21-kinderrechte/kinderrechte-ins-grundgesetz/65-dr-lore-maria-peschel-gutzeit.
[128] Ibid.
[129] Committee on the Rights of the Child. (2014). Concluding observations on the combined third and fourth periodic reports of Germany. CRC/C/DEU/CO/3-4.
[130] Ibid.
[131] Ibid. p.2.
[132] See Article 79 (2) Basic Law http://www.gesetze-im-internet.de/gg/art_79.html
[133] See https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-11&chapter=4&lang=en-title=UNTC-publisher=#31
[134] http://en.kindernothilfe.org/multimedia/KNH/Downloads/Fremdsprache_+Englisch/Joint+NGO+Submission+Child+Rights.pdf

criminal charges against children. Children must be kept separately from adults at the police station and must not be transported to, or from Court with an adult charged with an offence. Children must be detained separately from adults if they are on remand or receive a custodial sentence. A girl child who is detained, or is being conveyed or waiting at court must be under the care of a woman.[135]

Inter-disciplinary Youth Offending Teams provide pre-sentence reports to the Court when a child is convicted, and work with the child to prevent re-offending. The juvenile justice system provides for pre-trial diversion and for a range of non-custodial community based sentences. Where a child is sentenced to a custodial sentence, there are juvenile detention facilities and children are held separately from adults. While all the elements of a juvenile justice system are in place, it should be noted that the system does not apply to all children who are alleged to have committed, or who have been accused of criminal charges, at all times. In particular, not all criminal charges relating to children are tried in the Youth Court. Those charged with certain terrorism offences, or charged jointly with adults, will be tried on indictment in the adult Crown Court.

Section 50 of the Children and Young Persons Act 1933 sets the minimum age of criminal responsibility in England as 10 years of age: *"It shall be conclusively presumed that no child under the age of 10 years can be guilty of any offence*". The low minimum age of criminal responsibility has been the subject of adverse comment by the UN Committee on the Rights of the Child, who have recommended that the minimum age of criminal responsibility should be no lower than 12 years of age as this is not "internationally acceptable".[136] Children aged 10-18 are treated as juveniles, though section 107 of the Children and Young Persons Act 1933 divides the age group. A person aged 10-14 is defined as a 'child' while a 14-18 year old is defined as a 'young person'. For the sake of ease, all are referred to as 'children' in this report.

Part III of the Children and Young Persons Act 1933 establishes the Youth Court. Most children charged with a criminal offence are tried in a Youth Court, presided over by a district judge or by three lay magistrates, all of whom have received specialist training in juvenile justice.[137] The Youth Court is a court of summary jurisdiction (i.e. it deals with the more minor offences), and is specially constituted for the purpose of hearing any charge against a child (10-14) or young person (14-17).[138] The Youth Court is a closed court and members of the public are not allowed to be present in the court.[139] Reporting restrictions apply, prohibiting the publication of any details or pictures, which are likely to lead to identification of the child.

[135] Section 31 of the Children and Young Persons Act 1933.
[136] UN Committee on the Rights of the Child, General Comment No 10, para.32 CRC/C/GC/10 (2007).
[137] Children and Young Persons Act 1933, section 45.
[138] Children and Young Persons Act 1933, section 46.
[139] Children and Young Persons Act 1933, section 47.

Restrictions may be lifted though in respect of a child who has been convicted of an offence, if in the opinion of the district judge or magistrates, it is in the public interest.[140] This provision is contrary to CRC Article 40(2)(b)(vii) which requires that the child be granted privacy throughout the juvenile justice process.

The only custodial sentence that can be passed by a Youth Court on a 10-17 year old is a detention and training order, which can last from 4 months to 2 years. The Youth Court does not have the power to pass a sentence lasting longer than two years.

The only instances where a child cannot be tried by the Youth Court, but only on indictment in the Crown Court is where:

- the offence charged is homicide;
- a child aged 16 or 17 is charged under the Firearms Act 1968[141] with possession or distribution of certain prohibited weapons or ammunition or distributing a firearm disguised as another object; or
- the magistrates decline jurisdiction[142] because the offence is a grave crime as defined in Section 91 of the Powers of Criminal Courts (Sentencing) Act 2000 (i.e. it is punishable in the case of a person over the age of 21 with imprisonment for 14 years of more); or
- the child is charged with a "*specified offence*" as defined in section 224 Criminal Justice Act 2003 (which includes offences under section 54, 56, 57 and 59 of the Terrorism Act 2000, an offence under sections 47, 50 and 113 of the Anti-Terrorism, Crime and Security Act 2001 and sections 5, 6, 9 10 and 11 of the Terrorism Act 2006 and any offence of aiding, abetting, procuring or inciting the commission of any of these offences, or conspiring or attempting to commit any of these offences), and it appears to the magistrates that if he is convicted, the criteria for imposing a sentence of detention for life (s226 Criminal Justice Act 2003) or an extended sentence (s226B Criminal Justice Act 2003) would be met (section 51A Crime and Disorder Act 1998).

In these exceptional cases, the child will be tried on indictment in the Crown Court: an adult court, without the same level of safeguards and degree of 'child friendliness' as provided by the youth court.

In addition to summary offences and indictable offences, there is a third category of offences. These offences are referred to as offences 'triable either way' (i.e. they may be tried in a court of summary jurisdiction or on indictment). Offences under

[140] Children and Young Persons Act 1933, section 49.
[141] Under section 5 or 51A.
[142] Under section 24 Magistrates Court Act 1980.

sections 11, 12 and 13 of the Terrorism Act 2000, for instance, are offences triable either way. The policy of the legislature, however, is that those who are under 18 should, wherever possible, be tried summarily in a Youth Court, which is best designed for their specific needs.[143] The first terrorist case to be tried in the Youth Court, rather than in the Crown Court, was heard in September 2015, involving a child, charged with two terror offences including possessing 'recipes for explosives' and a bomb-making guide.

Whichever court a child is tried in, the Court is under a statutory duty to require the parent or guardian of the child to attend the court during all stages of the proceedings where the child is under the age of 16, unless it would be unreasonable to require such attendance. If the child is aged 16 or 17, the court has the power but not a duty to require the parent or guardian to attend.[144]

b) Germany

Articles 10 and 19 of the German Penal Code set out how the ordinary criminal justice system relates to children, juveniles and young adults. Article 10 of the German Penal Code sets out special provisions for juveniles and young adults: and provides that*"[t]his law [i.e. the Penal Code] shall apply to offences committed by juveniles and young adults unless the Juvenile Courts Act provides otherwise*." A juvenile is defined as a child over the age of 14, a higher minimum age of criminal responsibility than England.

Article 1(1) of the Juvenile Court Act (JCA) of 1953 determines that the special provisions of the JCA shall apply whenever a juvenile or - upon certain conditions – a 'young adult' commits an offense that punishable by German law.[145] Article 1(2) in turn establishes that a juvenile ("Jugendlicher") is someone who is 14 but not yet 18 years old at the time of the offence. A young adult ("Heranwachsender") is someone who is 18 but not yet 21 years old at the time of the offence."[146] This, together with Article 10 and 19 of the German Penal Code, creates three categories of non-adults in the German criminal justice system:

1) **Children:** 0-14 years (no criminal responsibility)
2) **Juveniles:** 14-17 years (Juvenile Court Act)
3) **Young adults:** 18-20 years (Juvenile Court Act/Penal Code)

[143] See *R (on the application of H, A and O) v Southampton Youth Court [2004] EWHC 2912 Admin* per Levenson J., approved by the Divisional Court in *R (on the application of the CPS) v Redbridge Youth Court [2005] EWHC 1390 Admin*.
[144] Children and Young Persons Act 1933 section 34A.
[145] Article 105 makes the application of the JCA to cases involving 'young adults' conditional on the mental development of the accused as well as the severity of the offense. In cases involving 'young adults' it is thus up to the Courts to determine whether to apply juvenile justice. See https://dejure.org/gesetze/JGG/105.html
[146] See https://dejure.org/gesetze/JGG/2.html

In Germany, juvenile delinquency refers to criminal offences committed by young people aged 14 to 20 years. The currently applied definition is based on the age-range specified by the Juvenile Court Act, which applies to juveniles from 14 to under 18 years and – upon certain conditions – to young adults aged 18 to less than 21 years.[147]

The Juvenile Court Act does not set out any criminal offences, as these are already defined in the general Penal Code. The provisions of the Juvenile Court Act deal solely with the consequences of committing an offence as a juvenile as well as the justice process to be accorded to these non-adults. The Juvenile Court Act focuses on educational responses and the prevention of recidivism and therefore offers (in contrast to the general Penal Code) a more differentiated system of sanctions ranging from educational measures to disciplinary measures all the way to youth custody.[148] The court can only impose juvenile detention however, if as a result of the harmful behaviour demonstrated by the child, supervisory or disciplinary measures are deemed insufficient, or if juvenile detention is deemed necessary given the seriousness of the juvenile's guilt.[149]

The minimum duration of juvenile detention is six months and its maximum duration is five years.[150] If the criminal act constitutes a serious offence for which general criminal law prescribes a maximum sentence of more than ten years deprivation of liberty (e.g. "murder under specific aggravating circumstances"),[151] the maximum duration of juvenile detention (for those above the age of 14 but under 18) is 10 years. 'Juvenile terrorists' who have committed murder or other serious crimes can therefore theoretically be detained for up to 10 years.

Preventive detention ("Sicherungsverwahrung") may be applied to juveniles (Article 7, JCA)[152] in addition to the penalty. This measure is primarily aimed at individuals who are likely to recommit serious offences such as murder and who are deemed a danger to the general public.[153] A recent ruling by the European Court of Human Rights established that this type of 'preventive detention' ("Sicherungsverwahrung") violates European human rights law unless it "*differs significantly from the execution of a normal prison sentence*" and the detainee is kept in a dedicated detention facility.[154] Although preventive detention remains an option, as the provision has not been repealed and could, therefore, be applied to 'juvenile terrorists,' there is no evidence that this has happened in practice.[155]

[147] See https://www.destatis.de/EN/Publications/STATmagazin/Justice/2008_1/2008_1YouthCustody.html
[148] See Duenkel (2006) "Juvenile Justice in Germany: between Justice and Welfare".
[149] See Article 17(2) JCA http://dejure.org/gesetze/JGG/17.html
[150] Penal Code Section 18, Paragraph 1.
[151] Penal Code Section 211http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html
[152] https://dejure.org/gesetze/JGG/7.html
[153] Ibid.
[154] Glien v. Germany - 7345/12 Judgment 28.11.2013. See http://www.echr.coe.int/Documents/CLIN_2013_11_168_ENG.pdf p. 12.
[155] See e.g. Fachserie 10 Reihe 4.1 StatistischesBundesamt 2013. p. 12.

Children (i.e. juveniles aged 14-17) sentenced under the Juvenile Courts Act must be detained separately from adults in juvenile detention centres ("Jugendstrafanstalt"). [156] Although juvenile detention centres are reserved for juveniles, 'young adults' as well as convicted persons under the age of 24 also may be placed in such facilities according to the Penal Code.[157] Admitting young adults over the age of 18 into the juvenile detention centres is contrary to Article 37 of the CRC and Article 10 of the ICCPR, which require separate detention facilities for children and adults. Article 37 (c) of the CRC creates a caveat, which states that joint detention with adults is allowed if it is "considered in the child's best interest". However, the Committee on the Rights of the Child recommends in General Comment No. 10 that this phrase should be interpreted narrowly: the child's best interests does not mean "for the convenience of the State."[158] Thus, on the face of it, this practice would appear to violate the CRC.

Female juveniles are often detained together with female adult convicts, as the number of cases is small, and there is limited detention capacity for girls in Germany.[159] This gender-specific discrimination is a clear violation of Germany's obligations under the Juvenile Courts Act (Article 17) as well as its international obligations under Article 37 of the CRC and Article 10 of the ICCPR, which, as mentioned earlier, require separate detention facilities for children and adults. The CRC Committee does not accept the argument of 'economic necessity' and has recommended that even where States have low rates of female juvenile offending, they should nevertheless ensure that there are appropriate facilities.[160]

Juvenile justice process: Trials involving juveniles are in principle not open to the public. This includes the announcement and justification of the judgment. [161] However, according to Article 48 Paragraph 3 of the Juvenile Court Act, this privacy clause does not apply if the trial of juveniles also involves 'young adults' (aged 18-21) or adults as co-accused. However, this provision can in turn be overridden, if it is in the interest of the juvenile's educational development ("Erziehung") to have the proceedings closed to the public.

One feature that sets the German juvenile justice process apart from the adult justice process is the involvement of a Juvenile Court Supporter ("Jugendgerichtshilfe"). This person, who is often a representative of the local child protection service

[156] https://dejure.org/gesetze/JStVollzG/3.html
[157] Juvenile Courts Act, Article 114.https://dejure.org/gesetze/JGG/114.html
[158] Committee on the Rights of the Child, General Comment No. 10 (2007), Para. 85. Available at: http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf
[159] See Section 2 http://www.dvjj.de/nachrichten-aktuell/eckpunktepapier-anforderungen-ein-zuk%C3%BCnftiges-jugendstrafvollzugsgesetz
[160] See CRC States Parties Reports: Canada (1994), U.N. Doc. CRC/C/11/Add.3; Iceland (1995), U.N. Doc. CRC/C/11/Add.6; New Zealand (1995); United Kingdom (1994), U.N. Doc. CRC/C/11/Add.1; and Concluding Observations: Canada (1995), U.N. Doc. CRC/C/15/Add.37; Iceland (1996), U.N. Doc. CRC/C/15/Add.50; New Zealand (1997), U.N. Doc. CRC/C/15/Add.71, respectively.
[161] Juvenile Court Act, Article 48 https://dejure.org/gesetze/JGG/48.html

("Jugendamt"), is responsible for assisting the accused and his or her family and informing the court about educational and socio-pedagogical alternatives to detention. The Juvenile Court Support is also responsible for overseeing any non-custodial measures taken against juveniles and 'young adults' (see Article 38 JCA).[162]

The condition of detention in Germany's juvenile detention centres is regulated at the state-level (Länder) in the Juvenile Correction Laws ("Jugendstrafvollzugsgesetze").[163] Contrary to the recommendations of the CRC Committee that **solitary confinement** for juveniles and 'young adults' amounts to cruel, inhuman and degrading treatment and possibly even torture, placement of a juvenile in solitary confinement is not prohibited under German law.[164]

[162] http://www.gesetze-im-internet.de/jgg/__38.html
[163] See http://www.dvjj.de/themenschwerpunkte/jugendstrafvollzug/jugendstrafvollzugsgesetz-iv-jugend-strafvollzugsgesetze-der-l
[164] See e.g. Article 80 ofthe "Gesetz zurRegelung des Jugendstrafvollzuges in Nordrhein-Westfalen" https://recht.nrw.de/lmi/owa/br_text_anzeigen?v_id=2220101104163559722

PART 4: TERRORISM OFFENCES AND CHILD PERPETRATORS

4.1. England[165]

Terrorism first became a major issue for the UK during the process of decolonisation following World War 2 and, rather closer to home, in Northern Ireland in the 1970s. Bombings and shootings in Northern Ireland and in England caused around 3,500 deaths before the Good Friday Agreement bringing peace to the province was reached. However, it is estimated that as many as 50,000 people were physically maimed or injured, with countless others psychologically damaged by the conflict. Despite the peace agreement in Northern Ireland, domestic 'extremists,' including dissident Irish Republican groups, violent Scottish and Welsh nationalist, right and left wing extremists, animal rights extremists and other militant single-issue protesters continue to pose a risk. Two hundred twenty-seven people were arrested for terrorist related activity in Northern Ireland in 2014/5, the highest number since 2005-06.[166]

In addition to domestic terrorism, international terrorism in the form of jihadist extremism, has made its mark in England. On 7th July 2005 a series of coordinated suicide bombings attacks on public transport killed 52 people. All four bombers were British citizens. Although there has not been a similarly serious incident with such loss of life since that date, jihadist extremism is seen as continuing to present a serious and sustained threat to the UK and its interests abroad. The risk from international terrorism, mainly in the guise of jihadist extremist groups, is seen as including not only possible attacks on UK soil, but also radicalisation of UK citizens and residents, who may leave the country to join terrorist groups and pose a threat of attack in England when they return.

Home Office statistics on police powers of arrest under the terrorism legislation show that in the year up to March 2015, there were 299 arrests for terrorism-related offences, an increase of 31% compared with the previous year and the highest number since data collection started in September 2001.[167] Previously, the highest number of terrorism-related arrests recorded in a year was the year ending 31st March 2006, the year in which the 7th July bombings in London took place, which saw 284 arrests.

Since 2011 there has been a marked increase in the number of people arrested for terrorist offences who consider themselves to be British or of British dual nationality.

[165] England, Scotland and Wales make up Great Britain. England, Scotland, Wales and Northern Ireland make up the United Kingdom. The jurisdictional issues are complex. While some areas of jurisdiction remain with the UK, others are devolved. The degree to which powers are devolved differs between Scotland, Wales and Northern Ireland. Given the limitations of space and the different context of terrorism in Northern Ireland, as well as different laws and policies, this case study focuses on England.
[166] PSNI, Police Recorded Security Situation Statistics, 12 May 2015, Table 3.
[167] Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes, and stop and search, Great Britain, financial year ending 31 March 2015, Statistical Bulletin 04/14, Home Office, September 2015.

In the year ending March 2015, they accounted for 78% of all those arrested for terrorism related offences, compared with only 52% in the year ending March 2011.[168] Of those who were arrested for terrorism related offences up to March 2015, 85% were charged with a terrorist offence, the highest proportion on record and an increase of 64% on the previous year.[169]

Up until very recently, those involved in terrorism have been almost entirely adult men, but over the last few years, the numbers of children and women who have engaged in terrorist related activities and in particular, the number of children who have become radicalised has increased. Ninety-six children have been arrested for terrorism related offences since figures started to be kept in September 2001, but only 13 were recorded as having been convicted of terrorist offences by March 2015. These figures do not, of course, include convictions where a child was charged with an ordinary criminal offence rather than a terrorist offence following arrest, or cases that are still in the court system. The numbers of children convicted of terrorist offences is likely to rise over the next year, as the number of children and young people arrested for terrorism-related offences increases. The number of 18-20 year olds arrested more than doubled from 2014 to 2015, and formed 14% of all arrests for terrorism related offences. In addition, two children were convicted in September 2015: a 15 year old boy (14 years old at the time of the offence) became Britain's youngest terrorist when he was sentenced to life imprisonment in October 2015 for inciting a man to behead police officers in Australia, and a 15 year old girl, who pleaded guilty to two terror offences including possessing "recipes for explosives" and a bomb-making guide.

It is thought that by the end of 2014, nearly 600 people had travelled to Syria and the region to join proscribed organisations and about 300 had returned.[170] In October 2015, of 800 people referred to Channel, the government's de-radicalisation programme in the UK, one-third were under the age of 18.[171]

The rise in radicalisation and involvement in Islamic extremism has prompted a range of responses in the UK, including the introduction and regular amendment of laws criminalising terrorism and a range of counter-terrorism measures, de-radicalisation and counter-radicalisation measures and even guidance from the President of the Family Division of the High Court to prevent children leaving the country to take part in terrorist activities or being placed at risk of radicalisation.

[168] Ibid.
[169] Ibid.
[170] See Explanatory Notes, Counter-Terrorism and Security Act 2015 para 3, obtainable from legislation.gov.uk.
[171] National Police Chiefs Council Report 2015, available from npcc.police.uk.

a) Legislation on Terrorism: England

The ***Terrorism Act 2000*** is the major piece of legislation setting out terrorist offences. There is no reference to 'age' within the various sections of the 2000 Act that set out a list of offences, and thus they apply to any child over the age of criminal responsibility in England, which is 10 years of age.

Terrorism is defined in the Act as the use of threat of action where an action[172]

(a) Involves serious violence against a person;
(b) Involves serious damage to property;
(c) Endangers a person's life, other than that of the person committing the action;
(d) Creates a serious risk to the health or safety of the public or section of the public;
(e) Is designed seriously to interfere with or seriously to disrupt an electronic system **and** the use of threat is designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public and the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause. Where firearms or explosives are used in (a) to (e) there is no need to show that there was an intention to influence the government or intimidate the public.

There are a number of offences that fall under the Terrorism Acts.

a) Offences relating to a proscribed organisation: A list of proscribed organisations is contained in the ***Terrorism Act 2000,*** Schedule 2. The list includes a range of organisations, including a number of Irish organisations, International Sikh Youth Federation, the Liberation Tigers of Tamil Eelam (LTTE) and a number of Islamist and Jihad organisations. The list can be amended by the Secretary of State through secondary legislation, so that further organisations can be added or organisations removed.[173]

The offences include: being a member of, or inviting support for a proscribed organisation; [174] arranging, managing or assisting in arranging or managing a meeting to support a proscribed organisation;[175] addressing a meeting of more than 3 people if the purpose is to encourage support for a proscribed organisation;[176] and wearing an item of clothing or wearing, carrying or displaying an article in such a way

[172] There has been considerable debate about the definition of terrorism: see the Report on the Definition of Terrorism, Cm 7052, March 2007 (the Carlisle Report).
[173] See Home Officer: List of Proscribed Organisations 27th March 2015.
[174] Section 11 Terrorism Act 2000.An updated list of proscribed organisations can be found in Proscribed terror groups or organisations, Home Office, 27 March 2015.
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/417888/Proscription-20150327.pdf
[175] Terrorist Act 2000, section 12(2).
[176] Terrorism Act 2000), section 12(3).

or in such circumstances as to arouse reasonable suspicion that he is a member or a supporter of a proscribed organisation.[177]

These offences are all triable as summary or indictable offences, depending on the seriousness of the offence. The penalties for proscription offences are a maximum of 10 years in prison and/or a fine (or 6 months imprisonment on summary conviction). An offence under the Terrorism Act 2000, section 13 (i.e. the wearing of clothing etc.) is a summary offence with a maximum of 6 months in prison and/or a fine.

b) Fund raising: A person commits an offence if he fundraises for the purposes of terrorism. In addition, it is an offence to use money or other property for the purposes of terrorism. Once again, there are no provisions reducing the sentence for children: a maximum of 14 years imprisonment if the conviction follows an indictment, or 6 months if it is a summary conviction.

c) Information about acts of terrorism: It is an offence for an individual *not* to disclose information about acts of terrorism;[178] as well as an offence to disclose to another anything which might prejudice a police investigation into suspected terrorism;[179] or which might prejudice an investigation or interfere with the material that is likely to be relevant to the investigation.[180]

d) Other terrorist offences: Other offences under the Terrorism Act 2000 include:

- Providing instruction or training in the making or use of firearms, explosives or chemical, biological or nuclear weapons;[181]
- Directing the activities of an organisation which is concerned in the commission of acts of terrorism;[182]
- Possession of articles for the purpose of the commission, preparation or instigation of an act of terrorism;[183]
- Collection or possession of information that it likely to be useful to a person committing or preparing an act of terrorism;[184]

[177] Terrorism Act, section 13.
[178] Terrorism Act 2000, section 38B
[179] Terrorism Act 2000 section 36
[180] These provisions do not apply to a disclosure which is made by a professional legal adviser to his client or his client's representative in connection with the provision of legal advice by the adviser to the client or to any other person for the purpose of actual or contemplated legal proceedings, provided its not with a view to furthering a criminal purpose.
[181] Section 54 Terrorism Act 2000. A person guilty of an offence under section 54 is liable on conviction on indictment to a term of imprisonment not exceeding ten years and on summary conviction to a term not exceeding 6 months.
[182] Section 56 Terrorism Act 2000. A person guilty of an offence under section 56 is liable on conviction on indictment to imprisonment for life.
[183] Section 57 Terrorism Act 2000. The maximum sentence of imprisonment is 15 years on conviction on indictment or a term not exceeding 6 months on summary conviction.
[184] Section 58 Terrorism Act 2000. A person guilty of an offence under section 58 is liable on conviction on indictment to a term of imprisonment not exceeding ten years and on summary conviction to a term not exceeding 6 months.

- Eliciting, publishing or communicating information about the armed forces useful for committing or preparing an act of terrorism;[185]
- Inciting an act of terrorism overseas;[186]
- Acts outside the UK, which would constitute acts of terrorism under the Terrorism Act 2000 if they were committed in the UK.[187]

A further Act was passed in 2001, the ***Anti-terrorism, Crime and Security Act***, which made it an offence to use noxious substances, or substances which people are led to believe are noxious, with the intention of seeking to influence the government or an international government organisation or to intimidate the public.[188]

The Terrorism Act of 2006 introduces more offences including encouraging terrorism; disseminating terrorist publications;[189] engaging in preparation of terrorist acts; training for terrorism; attendance at a place used for terrorist training, whether in the UK or elsewhere (regardless of whether or not the individual actually receives any training); making, possessing or misusing radioactive devices or materials, or making terrorist threats relating to the use of radioactive devices or materials and doing anything outside the UK which if done in the United Kingdom, would constitute an offence under the Terrorism Act 2006 or certain provisions of the Terrorism Act 2000.[190]

As with the Terrorism Act, there is no reference in the Act to children, and thus all offences apply to children over the age of 10.

The ***Counter-terrorism and Security Act 2015*** was passed in an attempt to reduce the terrorist threat, arising largely from ISIS (jihadist extremists also referred to as ISIL or Da'esh or Islamic State) and the conflict in Syria and Iraq. The provisions are intended to stop people from travelling overseas to fight for terrorist organisations or to engage in terrorism related activity; and to deal with those who subsequently return to the UK or who are already in the UK and who pose a threat to the public. In particular, the 2015 Act strengthens powers to place temporary restrictions on travel where a person is suspected of involvement in terrorism. It also enhances the powers to monitor and control the acts of persons in the UK who pose a threat to the public. The provisions in the Act apply equally to children as they do to adults.

[185] Section 58A Terrorism Act A person guilty of an offence under section 58A is liable on conviction on indictment to a term of imprisonment not exceeding ten years and on summary conviction to a term not exceeding 12 months.
[186] Section 59 Terrorism Act 2000. The offences include murder, wounding with intent, the use of poison, explosions and endangering life by damaging property. The sentence will depend upon the penalty the individual would be liable to depends upon the sentence for the particular method used.
[187] Section 62 Terrorism Act 2000.
[188] Anti-terrorism, Crime and Security Act 201, sections 113 and 114.
[189] Terrorism Act 2006, section 2(2).
[190] Terrorism Act 2006, section 17.

Schedule 1 to the Act allows a police constable or immigration officer at any port, who has reasonable cause to suspect a person is leaving the country to engage in terrorist related activity, to ask for and to retain that person's travel documents (i.e. a passport).[191] Travel documents may be retained for 14 days, though a senior police officer must review the retention if the documents are retained beyond 72 hours.[192] An application may be made to a judicial authority seeking an extension of the period of retention up to 30 days.[193] If such an application is made, the defendant has a right to make oral or written representations and a right to legal representation at the hearing.[194] There is provision, however, for information to be withheld from the defendant, and for the defendant and his or her legal representative to be excluded from the hearing while the information is considered by the court.[195] In that time, the Secretary of State has the power to cancel the passport; and the prosecuting authorities to consider whether to charge the person with an offence, or to whether to apply for a measure to protect the public from the risk of terrorism. Obviously, a person who has had their passport taken and retained is not free to leave the country (see Part 6 below). The confiscation of a parent's or child's passport, on the face of it, breaches the right to free movement under Article 12 of the ICCPR and, in particular, the right under Article 12(2): 'everyone shall be free to leave the country'. However, Article 12(3) provides an exception where this is needed in the interests of public security.

Section 2 of the Counter Terrorism and Security Act, which provides for the creation of a 'temporary exclusion order' is likely to have more impact on children. A temporary exclusion order requires the individual on whom it is imposed not to return to the UK, unless their return is in accordance with a permit issued by the Secretary of State. Such an order can only be made where 5 conditions are met: (i) the Secretary of State reasonably suspects that the person has been involved in terrorism related activity outside the UK; (ii) it is necessary to protect the public; (iii) the person is outside the UK; (iv) the person has a right to live in the UK and (v) the court gives permission or the Secretary of State considers that the urgency of the case requires a temporary exclusion order without obtaining permission.

The Court's role is not to consider the merits of an application, but only whether the decision of the Secretary of State is obviously flawed. An application may be considered by the court without the suspected person being notified; being present; or given an opportunity to make representations to the court.[196] The order comes into force as soon as it is made and will last for 2 years unless revoked earlier. A further order can be made when the 2 year period expires and any British passport held by

[191] Counter-Terrorism and Security Act 2015, Schedule 1 para. 2 and Schedule 1 para 17: an immigration officer must be an 'accredited' officer.
[192] Counter-Terrorism and Security Act 2015, Schedule 1 para.6.
[193] There is a power to extend the time limit even further in exceptional cases: Counter-Terrorism and Security Act 2015, Schedule 1 para.13.
[194] Counter-Terrorism and Security Act 2015, Schedule 1 para.9.
[195] Counter-Terrorism and Security Act 2015, Schedule 1 para.10.
[196] Counter-Terrorism and Security Act 2015, s.3.

the individual is invalidated. There is no limit on the number of orders that may be obtained. This power is additional to the power in s. 66 of the ***Immigration Act 2014***, which enables the Secretary of State to strip a person of his British citizenship if (a) the citizenship status results from the person's naturalisation; (b) the deprivation is conducive to the public good because the person has conducted himself in a manner which is seriously prejudicial to the vital interests of the UK; and (c) the Secretary of State has reasonable grounds for believing that the person is able, under the law of a country outside the UK, to become a national of such a country. The order can be challenged, but not appealed on its merits, and only in limited circumstances. First, the individual who is the subject of the order can only challenge the making of the order or its renewal if he or she is present in the UK. Second, the hearing is a review, and the courts must apply the principles of judicial review. In other words, the court can only revoke the order if it was made unlawfully or unreasonably. Further, the Secretary of State has the right not to disclose material other than to the court and to a person appointed as a special advocate, and not to the individual concerned.[197] Clearly, the making of a temporary exclusion order has serious human rights implications as an individual can be left stateless, contrary to the duty imposed on the UK to avoid statelessness under the 1961 Convention on the Reduction of Statelessness.

While a child may find him or herself the subject of a temporary exclusion order, the more likely situation is that the excluded individual will have children in the UK who will, in effect, lose their parent, with all the economic, emotional, social and potential immigration status problems that may cause. In immigration and extradition cases, the Supreme Court requires that the best interests of any children of the individual involved be taken into account,[198] but there is no such requirement in the case of temporary exclusion orders, though as the orders are very new, this issue has yet to be tested in the courts.

If an individual is permitted to return following a temporary exclusion order, the Secretary of State may impose 'obligations,' including a requirement to report to the police station and attendance at a de-radicalisation programme. Failure to comply with the obligations is an offence.[199]

The Counter-Terrorism and Security Act 2015 also amends the ***Terrorism Prevention and Investigation Measures 2011*** (the TPIM Act). This Act allows the Secretary of State, where she is satisfied on the balance of probabilities that a person has been involved in terrorism to impose measures. These can include wearing a GPS tag, a curfew, restrictions on the use of the internet, on meeting certain people or going certain places or being required to live up to 200 miles away

[197] Counter-Terrorism and Security Act 2015 schedule 3.
[198] See HH v Deputy Prosecutor of the Italian Republic, Genoa et al [2011]EWHC 1145; [2012] EWHC 25 (admin); [2012] UKSC 25 and ZH (Tanzania) v secretary of State for the Home Department [2011] UKSC 4.
[199] Counter-Terrorism and Security Act 2015, sections 9(1) and 10.

from their home and local associates. The measures are usually very intrusive and even where such measures are imposed on an adult, they are likely to have an impact on any children living with the adult: they might need to change school, be separated from their friends, be unable to have a computer at home etc. The restrictions inevitably need to be weighed, however, against the risk presented by the adult.[200]

b) Arrest on a terrorism offence: England

Unlike non-terrorist offences, the police may arrest a child without warrant under section 41 of the Terrorism Act 2000 where they have reasonable grounds to suspect that the child is a '*terrorist.*'[201] This rather vague criteria differs from arrests for non-terrorist offences, where an arrest must be linked to a specific offence. Further, the procedures to be followed on arrest are contained in the Police and Criminal Evidence Act 1984 (PACE) Code of Practice H.[202] For non-terrorist offences, a different Code of Practice, PACE Code C, applies.[203]

There are, however, a number of similarities between the two Codes of Practice. A child is defined for the purposes of Code H as a person under the age of 17. However, since the case of **HC (A Child), R (on the application of) v Secretary of State for the Home Department &Anor [2013] EWHC 982 (Admin)** 17 year olds are to be treated as children,[204] thus meeting the requirements of the CRC.

Many of the safeguards guaranteed to children in the CRC and Rule 10 of the UN Standard Minimum Rules for the Administration of Justice (the Beijing Rules)[205] are to be found in legislation governing the treatment of children under arrest for terrorism offences. ***Section 34 of the Children and Young Persons Act 1933*** provides that when a child is arrested and is in police detention, the person responsible for the child's welfare must be informed of the arrest, why the child has been arrested and where the child is being detained. This will normally be the parent or guardian. This applies to any offence and is in addition to the child's right not to be held incommunicado.[206]

The CRC in General Comment No 10 on Juvenile Justice[207] requires that there must

[200] For an interesting discussion of whether TPIM measures can be regarded as a breach of Article 3 ECHR, and the impact on children, see DD v Secretary of State for the Home Department [2014] EWHC 3820 (Admin).
[201] This is defined in the Terrorism Act, section 40(1)(a) or (b) as a person who has committed an offence under any of sections 1112 15-18 54 and 56-63, or is or has been concerned in the commission, preparation or instigation of acts of terrorism.
[202] Police and Criminal Evidence Act 1984 (PACE), Code H para 5.1: Code of Practice in connection with the detention, treatment and questioning by police officers of persons in police detention under section 41 of, and Schedule 8 to, the Terrorism Act 2000.
[203] Police and Criminal Evidence Act 1984, Code C: Detention, treatment and questioning of persons by police officers 2014.
[204] The only exception to 17 year olds being treated as 18 years olds is with respect to the giving of consent to the taking of fingerprints, intimate and non-intimate samples under Schedule 8 of the Terrorism Act 2000
[205] Adopted by General Assembly Resolution 40/33 of 29 November 1985.
[206] A child retains the right to inform one named person in addition of their arrest. Further rules on communication between a suspect and other people are contained in Police and Criminal Evidence Act 1984, Code H para 5.
[207] CRC/C/GC/10 9 February 2007 para 23h.

be independent scrutiny of the methods of interrogation to assure that the evidence is voluntary and not coerced, given the totality of the circumstances, and is reliable. In accordance with this requirement, PACE Code H, applying PACE Code C, provides that children who are arrested or who attend voluntarily at the police station may only be questioned in the presence of an appropriate adult.[208] The appropriate adult is usually the parent or guardian, but in their absence could be a local authority social worker or, failing both of these, some other responsible adult over the age of 18 who is not a police employee.[209] The child must be informed about the role of an appropriate adult and that there is a right to consult privately with the appropriate adult at any time. The reason for the presence of an appropriate adult is explained in PACE Code H.[210]

If the child wants legal advice, or the appropriate adult thinks it in the child's best interests to have legal advice, no questioning or interview may take place until the solicitor arrives at the police station and has provided that advice.[211] Legal advice and representation at the police station is free.

At any time that the child is detained at the police station PACE 1984 again in accordance with the CRC and the Beijing Rules, requires that the child must be kept separately from adults.[212] The child should not be kept in a cell unless no other secure accommodation is available and the custody officer considers it is not practicable to supervise the child if he or she is not placed in a cell.

The CRC Committee in General Comment No. 10 notes that every child arrested and deprived of his liberty should be brought before a competent authority within 24 hours to test the legality of the detention. This requirement is generally met in relation to arrests of children under section 41 of PACE 1984 for a non-terrorist offence: children cannot be kept in police detention for more than 24 hours without being charged and either released on bail or taken before a court if a further period of detention is sought. However, there are some limited exceptions to this rule. A senior police officer may detain the child for a period of up to 36 hours if the detention of that person without charge is necessary to secure or preserve evidence, the offence is indictable and the investigation is being conducted diligently and expeditiously.[213] If the police wish to detain a child for longer than 36 hours, they must obtain a warrant for further detention from the court and the child must be brought to court for the hearing of the application. After a total of 72 hours from the time of arrest, the person must be charged and brought before a court or released.

[208] Police and Criminal Evidence Act 1984, Code C: Detention, treatment and questioning of persons by police officers 2014. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/364708/PaceCodeC2014Print.pdf
[209] Police and Criminal Evidence Act 1984 (PACE), Code H: Code of Practice in connection with the detention, treatment and questioning by police officers of persons in police detention under section 41 of the, and Schedule 8 to, the Terrorism Act 2000. Para 1.13
[210] Police and Criminal Evidence Act 1984 (PACE), Code H Para 11.C
[211] Further procedures relating to contacting a solicitor, and attendance before questioning starts or continues, and exceptions to this principle can be found in Police and Criminal Evidence Act 1984 (PACE), Code H Para. 6
[212] Police and Criminal Evidence Act 1984 (PACE), Code H Para 8.9.
[213] Police and Criminal Evidence Act 1984 section 42.

A child arrested under the Terrorism Act 1972 is, however, subject to different rules. Contrary to the recommendation of the CRC Committee, a child may be detained for a period of up to 48 hours. The police also may choose to apply to the court for a warrant of detention extending the period of detention for periods of 7 days at a time[214] up to a maximum period of 14 days, and the child may be detained pending the making of such an application.[215] Further, in deciding whether to extend the period of pre-charge detention, the Court may consider evidence that has not been disclosed to, or provided to, the suspect. When considering this evidence, the suspect and his legal representative may be excluded from the court, with the result that the suspect is unable to challenge the evidence.[216] This practice was challenged in the recent European Court of Human Rights case of **Sher and others v the United Kingdom**[217] on the grounds that the applicant was not given adequate information about the specific allegations against them, contrary to Article 5(2) and (4) of the ECHR and that the procedure for hearing applications for further detention was incompatible with Article 5(4) and 6(1) of the ECHR.

The European Court of Human Rights concluded that there had been no breach of Article 5(4) as the requirement of procedural fairness does not impose a uniform, unvarying standard to be applied irrespective of the context, facts and circumstances. The Court held that terrorist crime falls into a specialist category.

> "The police may frequently have to arrest a suspected terrorist on the basis of information which is reliable but which cannot, without putting in jeopardy the sources of the information, be revealed to the suspect or produced in court. Article 5.1(c) of the Convention should not be applied in such a manner as to put disproportionate difficulties in the way of the police authorities taking effective measures to counter organised terrorism /…/ Contracting States cannot be asked to establish the reasonableness of their suspicion grounding the arrest of a suspected terrorist by disclosing the confidential sources of supporting information or even facts which would be susceptible of indicating such sources or their identity /…/ It follows that Article 5(4) cannot require disclosure of such material or preclude the holding of a closed hearing to allow a court to consider confidential material".

In addition, there is no absolute requirement that the child be brought before the court. The Court may instead, on receiving the application, direct that the hearing relating to extension of the period of detention take place using video-conferencing facilities. [218] Quite clearly, the 48 hour period is double the length of time

[214] For the grounds on which an extension of the period of detention may be granted see Terrorism Act 2000 Schedule 8 para 33.
[215] Terrorism Act 2000, Schedule 8 para. 36.
[216] Terrorism Act 2000 Schedule 8 para, 34.
[217] Application No 5201/11, 20 October 2015.
[218] Terrorism Act 2000, schedule 8 para. 33(4)-(9).

recommended by the CRC Committee before a child is brought before a Court and longer than the period for a child charged with a non-terrorist offence. [219]

c) Post charge questioning: England

Under section 22 of the Counter-Terrorism Act 2008, a judge of the Crown Court may authorise the questioning of a child about an offence for which they have been charged, informed that they may be prosecuted, or sent for trial, if the offence is a terrorism offence or an offence, which appears to the judge to have a terrorist connection.[220] The criteria upon which a judge is to base his or her decision to authorise post-charge questioning, a practice that is not permitted in non-terrorist connected offences, do not include any consideration of the best interests of the child.[221]

The risk posed by this section of the 2008 Act is that of dilution or possible elimination of the right of the child's privilege against self-incrimination. **Lord Carlisle in his Report on Proposed Measures for Inclusion in a Counter-Terrorism Bill**,[222] noted that "*historically, the prohibition on post-charge questioning has existed to protect the rights of accused persons, by forcing the police to charge only where there is sufficient evidence to justify doing so, and in a timely fashion. If they are unable to do so, then the suspect must be released*."

While of course an appropriate adult must be present, and a lawyer will virtually always be present, as noted above being questioned in a police station is a stressful and disorientating experience for a child, and being detained and questioned for a second period of up to 48 hours may lead the child to make unreliable and damaging admissions which can have a negative impact on the preparation of the child's defence.

Article 40(2)(b)(iv) of the CRC provides, in line with Article 14(3)(g) of the ICCPR, that a child should not be compelled to give testimony or to confess or acknowledge guilt. The CRC Committee note that "*the term 'compelled' should be interpreted in a broad manner and should not be limited to physical force or other clear violations of human rights. The age of the child, the child's development, the length of the interrogation, the child's lack of understanding, the fear of unknown consequences or*

[219] In accordance with CRC Article 37(b) that detention shall be for the shortest appropriate period of time the Terrorism Act requires that the use of detention should be reviewed by a reviewing officer at 12 hour interviews after the child has been arrested until such time as a warrant to extend detention is obtained from the Court (Terrorism Act 2000 schedule 8 para 21 but see para 22).
[220] For the terrorism offences covered see Counter-Terrorism Act 2008 section 27.A child could be charged with murder rather than a terrorist offence but this could still be regarded as having a 'terrorist' connection. There is no requirement that a charge be laid for a terrorist offence.
[221] The criteria are contained in the Counter-Terrorism Act 2008 section 22(6): 'further questioning is necessary in the interests of justice; the investigation for the purposes of which the further questioning is being proposed is being conducted diligently and expeditiously; and the questioning would not unduly interfere with the preparation of the persons defence to the charge or any other criminal charge that they may be facing.
[222] Cm 7262 December 2007.

of a suggested possibility of imprisonment, may lead him/her to a confession that is not true."

d) Bail: England

Rule 10 of the Beijing Rules requires that a judge or other competent authority (including the police) shall, without delay, consider release of the child. The powers under Part IV of the Police and Criminal Evidence Act 1984 to release a child on police bail before charge for any offence, do not apply to persons detained under the terrorism powers following their arrest under section 41 or Schedule 7 of the Terrorism Act 2000. There is no provision for bail under the Terrorism Act before charge, and this applies as much to children as it does to adults.

e) Prosecution of offences: England

Prosecutions for offences under the Terrorism Act 2000[223] (which are dealt with by the Counter-Terrorism Division) require the consent of the Director of Public Prosecutions. As cases against those suspected of terrorism are dealt with in the same way as any other criminal cases, in accordance with the Code for Crown Prosecutors, special considerations are given to children. The Code requires that where a suspect is under the age of 18:

> "*the best interests and welfare of the child must be considered, including whether a prosecution is likely to have an adverse impact on his or her future prospects that is disproportionate to the seriousness of the offending. Prosecutors must also have regard to the obligations arising under the United Nations Convention on the Rights of the Child. As a starting point, the younger the suspect, the less likely it is that a prosecution is required. However, there may be circumstances which mean that, notwithstanding the fact that the suspect is under 18, a prosecution is in the public interest. These include where the offence committed is serious, where the suspect's past record suggests that there are no suitable alternatives to prosecution, or where the absence of an admission means that out-of-court disposals which might have addressed the offending behaviour are not available."*[224]

f) Trial of a child charged with a terrorism offence: England

In order for a child to understand and to take part in his or her trial in a meaningful manner, the child must be able to understand the trial procedure and take an active part in defending him or herself. The Committee on the Rights of the Child stated in General Comment No. 10 that *"[a] fair trial requires that the child alleged as or*

[223] This does not apply to sections 36 or 51 of the Terrorism Act, which applies to vehicles and leaving premises or a location at the request of a police officer.
[224] See 4.12(d) Code for crown Prosecutors 2013;https://www.cps.gov.uk/publications/docs/code_2013_accessible_english.pdf

accused of having infringed the penal law be able to effectively participate in the trial, and therefore needs to comprehend the charges, and possible consequences and penalties, in order to direct the legal representative, to challenge witnesses, to provide an account of events, and to make appropriate decisions about evidence, testimony and the measure(s) to be imposed."[225]

The seminal case for the UK on what constitutes a fair trial for a child is that of **R v United Kingdom and T v United Kingdom**[226] decided by the European Court of Human Rights. The issues before the Court were whether the trial of two 10 year- old boys for murder, which took place in the Crown Court in accordance with adult procedure, open to the public and press was in contravention of Article 6 of the European Convention on Human Rights (the right to a fair trial), and whether the trial itself amounted to inhuman and degrading treatment in contravention of Article 3 of the Convention.

The Court did not find that Article 3 had been contravened but held that the defendants had not received a fair trial in contravention of Article 6 for a number of reasons: first and foremost, because the boys were not sufficiently mature to be able to instruct their lawyers as to their defence. In addition, the intense media and public interest prior to the trial; the media and public presence in court during the trial; and the lack of adjustments to the Crown Court trial procedure to enable the defendants to participate fully in the trial bearing in mind their ages, level of maturity and intellectual and emotional capacity were further issues in finding a contravention of Article 6.

The European Court of Human Rights held that it is not necessary for a fair trial that the child should understand, or be capable of understanding, every point of law or evidential detail.[227] But, in order for there to be effective participation, an accused child must have a broad understanding of the nature of the trial process and of what is at stake for him or her. Ultimately, the Court declared that it was essential that a child is tried in a specialist tribunal, which is able to give full consideration to, and make proper allowance for, the handicaps under which a child labours, and adapt its procedure accordingly.[228]

As a consequence of the decision of the European Court, a Practice Direction was issued.[229] This states that the purpose of criminal proceedings is to determine guilt, if that is in issue, and decide on the appropriate sentence if the defendant pleads guilty or is convicted. All possible steps should be taken to assist a vulnerable defendant to

[225] Committee on the Rights of the Child, General Comment No. 10 (2007), para. 46. In addition, Article 14 of the Beijing Rules provides that the proceedings should be conducted in an atmosphere of understanding to allow the child to participate and to express himself/herself freely. Taking into account the child's age and maturity may also require modified courtroom procedures and practices.
[226] *T. and V. v. United Kingdom*, No. 24888/94; [1999] ECHR 2; No. 24724/94 (2000) 30 EHRR 121, Council of Europe: ECHR, 16 December 1999, para. 86.
[227] *S.C. v. United Kingdom* [2004] ECHR 263,(2005) 40 EHRR 10, para. 29, Council of Europe, European Court of Human Rights, 10 December 2004.
[228] Ibid. para. 35.
[229] See Part III: Further Practice Directions Applying in The Crown Court And Magistrates' Courts - Criminal Procedure Rules

understand and participate in those proceedings. The judge and counsel need not wear wigs and gowns and the seating arrangements are changed when a child is being tried. There is also power to limit who comes into the courtroom and to make an order preventing identification of the accused. Even though the Court has the power to control questioning and insist on the use of plain language and allow the child to give evidence through video link, the very nature of the adversarial process makes it doubtful that these measures fully address the requirements of the CRC or indeed the judgment of the European Court in **T and V v United Kingdom**.[230]

4.2 Germany

Since the end of the Second World War, Germany has been more concerned about the threat of far-right and far-left violent extremism than jihadist terrorism. Beginning in the early 1970s, the Red Army Faction (RAF), one of Europe's most notorious left-wing terrorist organisations, embarked on a series of bombings, assassinations, kidnappings and bank robberies, which lasted over three decades. The RAF terror prompted the German government to introduce counter-terrorism legislation in the mid-1970s, which made it a crime to *"form or participate in a terrorist organisation."*[231] This has been the key legislative provision through which suspected terrorists have been prosecuted in Germany since the 1970s.[232]

Whereas the threat of left-wing terrorism has waned in recent years, incidents connected to far-right extremism have been on the rise in Germany. For example, in 2011, five individuals from the National Socialist Underground, who were suspected of involvement in a series of murders and bombings between 2001 and 2007, were arrested. The case prompted an investigation into how the group could go undetected for so long and shifted the German government's counter-terrorism strategy towards far-right extremism.[233]

In addition to far-left and far-right extremist violence, Germany also has been affected by a number of incidents related to jihadist terrorism. However, the threat of jihadist terrorism is not as acute as in the United Kingdom.

Recent incidents related to jihadist terrorism in Germany included the trials of the 'Hamburg Cell', whose members helped to plan the attacks on the World Trade Centre; the attempted bombing of a Strasbourg Christmas Market in 2004; and the attempted bombing of trains in Dortmund and Koblenz in 2006. In addition, the

[230] *T. and V. v. United Kingdom*, No. 24888/94; [1999] ECHR 2; No. 24724/94 (2000) 30 EHRR 121, Council of Europe: ECHR, 16 December 1999, para. 86.
[231] See Section 129a of the Penal Code. "Strafgesetzbuch in der Fassung der Bekanntmachungvom 13. November 1998 (BGBl. I S. 3322), das durchArtikel 220 der Verordnungvom 31. August 2015 (BGBl. I S. 1474) geändertwordenist" English version: http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html
[232] See e.g. Mark A. Zöller: Terrorismusstrafrecht: EinHandbuch. C.F. Müller, Heidelberg 2009, ISBN 978-3-811-43921-4.
[233] Butt, R. and Tuck, H. (2014).European Counter-Radicalisation and De-Radicalisation: A Comparative Evaluation of Approaches in the Netherlands, Sweden, Denmark and Germany. Institute for Strategic Dialogue. Available at: http://www.strategicdialogue.org/programmes/counter-extremism/ppn.

'Sauerland Group,' were prevented from carrying out a series of attacks on US targets in Germany by the security services in 2007. The only completed attack to date on German soil occurred at Frankfurt Airport in March 2011, when gunman Arid Uka, a 21 year old native of Kosovo, killed two US soldiers.[234]

The latest figures provided by the German intelligence service suggest that there are currently 43,890 Islamic extremists in Germany who are supportive of or prepared to use violence ("gewaltorientiert").[235] Unfortunately, there are no disaggregated figures that indicate how many of these extremists are under the age of 18 years.

As in other countries mentioned in this report, there also have been concerns over the potential threat posed by returning German 'foreign fighters' who have fought, and have potentially been radicalised, in Syria and Iraq. According to the latest estimates by the German intelligence service, more than 600 individuals have travelled from Germany to Syria or Iraq in order to join ISIS and other jihadist groups.[236] As of the 22nd September 2014, at least 24 of those individuals were under-18 years of age when they left Germany, according to the President of the German Federal Office for the Protection of the Constitution ("Bundesamt für Verfassungsschutz"). There are no official figures available yet for 2015. However, the number of children leaving Germany to fight for ISIS is likely to have increased. The youngest 'foreign fighter' was 13 years old when he left Germany for Syria and at least 5 minors have since returned to Germany.[237]

Security authorities collected and analysed data on 378 of the suspected 600 who left. The majority of the travellers are men (89 percent). The average age is 26.5 years and about two-thirds are younger than 26 years. Nearly two-thirds of the travellers were born and raised in Germany. About half of them are married, and 104 have children. Women who travel to Syria are on average three years younger than their male counterparts and are also more likely to be converts. There is evidence that some families have taken their children with them to Syria.[238]

At the time of writing, no juveniles (i.e. children aged 14-18) have been charged with a terrorist offence. However the practice of applying juvenile criminal law to 'young adults' who are charged with terrorist offences (aged 18-21) indicates that German courts are generally inclined not to take a punitive approach to dealing with young violent extremists. It is therefore highly likely any terrorist charges laid against a juvenile would be tried under the juvenile criminal law, in accordance with international juvenile justice standards.

[234] Ibid.
[235] Verfassungsschutzbericht 2014. Available at: http://www.verfassungsschutz.de/de/oeffentlichkeitsarbeit/publikationen/verfassungsschutzberichte/vsbericht-2014.
[236] Ibid.
[237] http://www.zeit.de/politik/ausland/2014-09/jugendliche-is-kaempfer-deutschland.
[238] See International Centre for the Study of Radicalisation and Political Violence. http://icsr.info/2015/01/icsr-insight-german-foreign-fighters-syria-iraq/

a) Legislation on terrorism: Germany

The German Parliament has passed at least nine major laws and legislative amendments that pertain to the fight against terrorism since September 11, 2001.[239] In a recent overview of recent counter-terrorism legislation in Germany, it was noted that more than 25 different measures related to counter-terrorism have been adopted since 2001.[240] The core elements of the German post-2001 counter-terrorism architecture are the Law on Counter-Terrorism ("Terrorismusbekämfungsgesetz") of January 2002 and the Complementary Law on Counter-Terrorism ("Terrorismusbekämfungsergänzungsgesetz") of January 2007, which renewed the provisions of the 2002 law and expanded the powers of the security services.[241]

Since 1976, however, under Article 129a of the German Penal Code it has been a crime punishable with up to ten years imprisonment to "form or participate in a terrorist organisation".[242] After the terrorist attacks on the World Trade Centre in September 2001, Article 129b was added to the Penal Code which included a further offence of forming and participating in a terrorist organisation abroad.[243] Simply being a sympathiser, however, is not a crime.[244]

The German criminal code does not provide a direct definition of the term terrorism. However, a "terrorist" is, by implication, someone who commits one of the offences listed under Articles 129a and 129b of the Penal Code. Neither article includes any specific provisions exempting children under the age of 18 implicated in terrorism-related crimes from liability. As a result, these provisions apply to anyone over the age of 14 years (the age of criminal responsibility in Germany). There have been no charges laid against juveniles under these provisions so far, but in a number of recent trials of 'young adults' aged 18-21 ("Heranwachsende"), who travelled to Syria or Iraq to join jihadist organisations, sentencing was in accordance with the Juvenile Court Act and not the ordinary Penal Code, making it likely that any charge against a child also would be subject to sentencing under the Juvenile Court Act. In **Ufuk C**.[245] the defendant, aged 20, went to train with the Al-Nusra Front in Syria, a local Al-Qaida affiliate. On his return, aged 21, he was arrested and charged with two

[239] http://www.mdr.de/nachrichten/anti-terror-gesetz100.html and http://www.zeit.de/politik/deutschland/2015-04/bundestag-personalausweis-entzug-islamismus.
[240] Jesse, E. and Mannewitz, T. (2012) Impact of Counter-Terrorism on Communities: Germany Background Report. Available at: http://www.strategicdialogue.org/programmes/counter-extremism/impact-of-counter-terrorism-on-communities.
[241] Ibid. and http://www.mdr.de/nachrichten/anti-terror-gesetz100.html
[242] "Strafgesetzbuch in der Fassung der Bekanntmachungvom 13. November 1998 (BGBl. I S. 3322), das durchArtikel 220 der Verordnungvom 31. August 2015 (BGBl. I S. 1474) geändertwordenist" English version: http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html
[243] https://www.tagesschau.de/ausland/terrorgesetze-101.html
[244] Ibid.
[245] See http://www.faz.net/aktuell/politik/inland/haftstrafe-fuer-islamist-wegen-terrorcamp-ausbildung-13565624.html , October 2015.

criminal offences of participating in terrorist organisation[246] and preparing a serious offence endangering the State.[247] He was found guilty on both charges and sentenced by the Higher Regional Appeal Court in Munich to three and a half years of juvenile detention.[248]

In the case of **Kreshnik B**.[249] the 20 year old had returned to Germany after joining ISIS in Syria. The court relied upon the Juvenile Court Act in setting the sentence at 3 years and 9 months.[250]

According to Sections 129a and 129b of the Penal Code, individuals accused of terrorism are to be tried at first instance before a specialised chamber of the Higher Regional Court ("Staatsschutzsenat") of the relevant State ("Land").[251] If a juvenile was charged with offences under either of these articles, he or she would also be tried before the Staatsschutzsenat instead of a dedicated youth court ("Jugendgericht"). However, the Staatsschutzsenat would need to apply the procedural and sentencing guidelines set out in the Juvenile Courts Act.[252]

Articles 129a and 129b do not apply to 'lone-wolf' terrorists (i.e. terrorists acting alone, without the support of a terrorist organisation). This is because, according to German jurisprudence, the term 'organisation' ("Vereinigung") implies the involvement of at least three individuals and a certain organisational structure.[253] However, a 'lone-wolf' terrorist (as well as terrorist groups for that matter) can be held criminally accountable for *planning* terrorist acts. In reaction to the foiled terrorist attacks of the "Suitcase Bomber" in 2006 and the "Sauerland Group" in 2007, the German Parliament introduced ***Article 89a into the Penal Code*** in 2009. This article makes it is a crime to **'**prepare a serious offence endangering the state,' *irrespective* of whether the perpetrator is part of a "terrorist organisation" according to Article 129a or 129b. The minimum sentence for adults committing this crime is six months and the maximum sentence is ten years.[254] Juveniles committing this crime would be sentenced according to the provisions of the Juvenile Court Act, which

[246] Contrary to Article 129b of the Penal Code.
[247] Article 89a of the Penal Code.
[248] See http://www.faz.net/aktuell/politik/inland/haftstrafe-fuer-islamist-wegen-terrorcamp-ausbildung-13565624.html
[249] The sentence was handed down in December 2014. See http://www.handelsblatt.com/politik/deutschland/syrien-rueckkehrer-islamistischer-terror-beschaeftigt-immer-mehr-deutsche-gerichte/12129916.html
[250] http://www.lto.de/recht/nachrichten/n/olg-frankfurt-urteil-5-2-ste-5-14-3-14-is-kaempfer-verurteilt/ and http://www.stuttgarter-zeitung.de/inhalt.prozess-gegen-einen-is-terror-helfer-gefaengnisstrafe-fuer-einen-verfuehrten.7be01e9e-9d60-49b0-8d86-9d61a5ec73aa.html
[251] Article 120 (1) 6 GVG.http://dejure.org/gesetze/GVG/120.html together with Article 102 JGG http://dejure.org/gesetze/JGG/102.html
[252] See Zieger, M. 2008. Verteidigung in Jugendstrafsachen. CF Mueller.
[253] Safferling, C. 2009. "KriterienfüreineausländischeterroristischeVereinigung" BGH, Urteilvom 14.08.2009 – 3 StR 552/08 (OLG Düsseldorf) in: NJW 2009, 3448 ff. Available at: https://www.uni-marburg.de/fb01/lehrstuehle/strafrecht/safferling/projekt_akte_recht/ordner_nat_strafrecht/mat_recht/stgb_bt/seven/129a/terr.pdf
[254] "Strafgesetzbuch in der Fassung der Bekanntmachung vom 13. November 1998 (BGBl. I S. 3322), das durch Artikel 220 der Verordnung vom 31. August 2015 (BGBl. I S. 1474) geändert worden ist". English version: http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html

specifies that the minimum duration of detention is six months and the maximum duration is five years.[255]

The term "prepare" leaves ample room for interpretation and does not necessarily imply that the commission of a terrorist act must be imminent. For example, purchasing materials to build bombs, receiving training in a terror-camp outside of Germany, or collecting money for terrorist organisations can all be "preparations" to commit serious offences endangering the state. In a landmark judgment in May 2014, the German Federal Court of Justice (Bundesgerichtshof) ruled that the accused must be 'firmly determined' ("fest entschlossen") to commit a 'serious offence endangering the state' in order to be convicted under Article 89a.[256] However, this still leaves many questions open in relation to the 'where' and 'when' of the crime, and how one can prove that a person is 'firmly determined.'[257] Again, the relevant Article makes no specific mention of children, so the minimum age of criminal responsibility (14 years) also applies to the crime of "preparing a serious offence endangering the state".

Since April 2015, it is punishable by law to leave (or even plan to leave) Germany to go to an area where a terrorist training camp is located, if the trip is aimed at committing serious seditious acts of violence.[258] This amendment was introduced in response to the UN Security Council Resolution 2178 of September 2014, which provides that all States shall ensure that their legal systems provide for the prosecution, as serious criminal offences, of travel for terrorism or related training, as well as the financing or facilitation of such activities.[259] Again, this provision applies to everyone over the age of 14 years.

b) Right to legal representation: Germany

In principle, a juvenile accused of terrorism (as any other individual accused of a crime in Germany), has the right to choose his or her defence lawyer or legal representative.[260] If the accused is under the age of 18, the relevant legal guardian also has a right to appoint a defence lawyer.[261] If the accused cannot afford a defence lawyer, the state will provide a compulsory legal representative ("Pflichtverteidiger").[262] The accused has a right to see and communicate with his or

[255] For particularly serious offences that, under the ordinary Penal Code, entail a maximum sentence that exceeds 10 years (e.g. murder under specific aggravating circumstances), the maximum duration of juvenile detention can be extended to 10 years. This is not the case when it comes to the Article 89a offence of 'preparing a serious offence endangering the State'.
[256] http://www.hrr-strafrecht.de/hrr/3/13/3-243-13-1.php
[257] See e.g. http://www.lto.de/recht/hintergruende/h/bgh-urteil-3str-243-13-89a-stgb-terrorismus-vorverlagerung-strafbarkeit/
[258] See Article 129b of the Criminal Code. "Strafgesetzbuch in der Fassung der Bekanntmachungvom 13. November 1998 (BGBl. I S. 3322), das durchArtikel 220 der Verordnungvom 31. August 2015 (BGBl. I S. 1474) geändertwordenist" Also see, https://www.tagesschau.de/inland/bundestag-anti-terror-101.html and http://www.dw.com/de/bundestag-versch%C3%A4rft-anti-terror-gesetze/a-18405381
[259] http://www.un.org/press/en/2014/sc11580.doc.htm
[260] Article 137 StPOhttp://www.gesetze-im-internet.de/stpo/__137.html
[261] Ibid.
[262] Article 140 StPOhttp://www.gesetze-im-internet.de/stpo/__140.html

her defence lawyer at in any stage of the justice process.[263] However, this right can be severely restricted in cases related to terrorism. In Germany, suspected and convicted terrorists can be cut off from the outside world in ways that go beyond the clearly specified measures of 'solitary confinement' ("Einzelhaft") that are laid out in Articles 88 and 103 of the Prison Act,[264] as well as Article 119 of the Code of Criminal Procedure. [265] According to the **Communication Ban Law** ("Kontaktsperregesetz") that was passed in 1977 as a reaction to the Red Army Faction terror, individuals who are accused of or have been sentenced for 'forming or participating in a terrorist organisation'[266] can be completely isolated from the outside world. This includes being denied communication with a defence lawyer (in writing and verbally) as well as fellow inmates and relatives.[267] This drastic measure has to be approved by the Higher Regional Courts in each State ("Land") and is renewable every 30 days. There is no limit as to how often the communication ban can be renewed.[268]

The Communication Ban Law ("Kontaktsperregesetz") does not mention children or juveniles, so these measures could theoretically apply to everyone over the age of 14 years (i.e. the age of criminal responsibility). If so applied, the provisions of the Communication Ban Law would constitute a clear violation of **Article 40 of the CRC**, which states that every child alleged as or accused of having infringed the penal law has a right to have "legal or other appropriate assistance in the preparation and presentation of his or her defence"[269] and a right to contact with his or her family.

In General Comment Number 10 on Article 37 (d) of the CRC, the Committee on the Rights of the Child recommends that "*every child arrested and deprived of his/her liberty should be brought before a competent authority to examine the legality of (the continuation of) this deprivation of liberty within 24 hours*" (Paragraph 83).[270] Article 104 Paragraph 2 of Germany's Basic Law states that *"only a judge may rule upon the permissibility or continuation of any deprivation of liberty. If such a deprivation is not based on a judicial order, a judicial decision shall be obtained without delay. The police may hold no one in custody on their own authority* ***beyond the end of the day following the arrest***". [271] Article 104 does not allow any derogation from the detainee's right to see a competent judge ("Haftrichter") within 24 hours of arrest. In this respect, Germany's criminal justice procedure is in line with international standards related to the deprivation of liberty of children.

[263] Article 137 StPOhttp://www.gesetze-im-internet.de/stpo/__137.html
[264] Prison Act, Art.88 http://www.gesetze-im-internet.de/stvollzg/__88.html and Art. 103 http://www.gesetze-im-internet.de/stvollzg/__103.html
[265] Strafprozessordung, Art. 119 http://www.gesetze-im-internet.de/stpo/__119.html
[266] Under Articles 129a and 129b of the Penal Code
[267] Einführungsgesetz GVG, Kontaktsperre, Articles 31 – 38a http://dejure.org/gesetze/EGGVG/31.html
[268] Einführungsgesetz GVG, Kontaktsperre, Article 36 http://dejure.org/gesetze/EGGVG/36.html
[269] Convention on the Rights of the Child. Article 40. Available at: http://www.unicef.org.uk/Documents/Publication-pdfs/UNCRC_PRESS200910web.pdf
[270] Committee on the Rights of the Child, General Comment No. 10 (2007), Para. 83. Available at: http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf
[271] http://www.gesetze-im-internet.de/gg/art_104.html

c) Pre-trial detention: Germany

According to Article 72 of the Juvenile Court Act, pre-trial detention should only be applied to juveniles as a 'last resort' if the purpose of detention cannot be achieved by any other means.[272] For juveniles under the age of 16, pre-trial detention to prevent absconding is only allowed if the suspect has made attempts to flee or does not have permanent residence in the jurisdiction of the court (Paragraph 2). However, this specific age limitation does not apply to the other 'grounds for detention' ("Haftgründe") listed under Articles 112 and 112a of the Code of Criminal Procedure (StPO).[273] In practice, German courts are quite willing to use the phrase 'danger of absconding' as a formulaic justification for placing juveniles in pre-trial detention.[274] The fact that German authorities can place juveniles aged 14-16 in pre-trial detention is not *per se* a violation of international child rights standards if detention is used as a measure of last resort.[275] However, the Committee on the Rights of the Child has, in the past been critical of the fact that not all Länder apply the principle of "*deprivation of liberty as a last resort*."[276] The Committee's criticism has in turn been contested by the German authorities, which point to examples of state practice and the *ultima ratio* principles enshrined in the JCA.[277]

The relevant legal guardian ("Erziehungsberechtigter"), the legal representative, as well as the Juvenile Court Support ("Jugendgerichtshilfe") have a right to see the detained juvenile at any time during the justice process.[278] This is in line with international child rights standards, in particular Paragraph 18(a) of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty.[279] However, in Germany, children in pre-trial detention do not have an unconditional right to see their parents and need to seek the approval of the relevant court.[280]

Under Article 121 of the Code of Criminal Procedure, juveniles can be placed in pre-trial detention for up to 6 months.[281] However, if the criminal investigations are particularly complex and difficult, the Higher Regional Court can prolong the pre-trial detention beyond the initial 6 months.[282] In the famous case of Fritz Teufel, for example, the adult suspect was held in pre-trial detention for over 5 years.[283] These

[272] Article 72 JCA http://dejure.org/gesetze/JGG/72.html
[273] StPO, Article 112 http://dejure.org/gesetze/StPO/112.html& 112a http://dejure.org/gesetze/StPO/112a.html
[274] http://www.faz.net/aktuell/rhein-main/region/kriminologe-arthur-kreuzer-u-haft-bei-jugendlichen-oefter-als-vorgesehen-1512354.html and http://www.anwalt.de/rechtstipps/zur-untersuchungshaft-und-fluchtgefahr-bei-jugendlichen_013746.html
[275] See Article 37(b) CRC and Committee on the Rights of the Child, General Comment No. 10 (2007), Page 21.ff. Available at: http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf
[276] Page 14.Committee on the Rights of the Child. (2014). Concluding observations on the combined third and fourth periodic reports of Germany. CRC/C/DEU/CO/3-4.
[277] See e.g. Article 17(2) JCA http://dejure.org/gesetze/JGG/17.html and Article 5 http://dejure.org/gesetze/JGG/5.html
[278] Article 67 JCA http://dejure.org/gesetze/JGG/67.html& Article72b JCA http://dejure.org/gesetze/JGG/72b.html
[279] A/RES/45/113 Available at: http://www.un.org/documents/ga/res/45/a45r113.htm
[280] See http://www.u-haft.com/besuchsrecht-in-der-untersuchungshaftanstalt/
[281] http://www.gesetze-im-internet.de/stpo/__121.html
[282] Ibid.
[283] http://www.sueddeutsche.de/politik/fritz-teufel-ist-tot-der-pudding-attentaeter-der-kommune-1.971127

provisions, and the possibility of long periods of pre-trial detention also apply to juveniles. In a particularly complex case, a suspected 'juvenile terrorist' could be held in pre-trial detention for much longer than 6 months.

Importantly, individuals suspected of having "formed or participated in a terrorist organisation" (Articles 129a and 129b Penal Code) can be placed in pre-trial detention, without there being a specific 'ground for detention' ("Haftgrund") according to Article 112(3) of the Code of Criminal Procedure (StPO).[284] The threshold for detaining suspected terrorists is thus considerably lower than for individuals suspected of other crimes. However, in 1965, the German Constitutional Court ruled that such a measure is a violation of the 'principle of proportionality' ("Verhältnismäßigkeitsprinzip") unless one of the specific 'grounds for detention' ("Haftgründe") listed in Article 112 Paragraph 2 can reasonably be assumed to apply.[285]

d) Detention pending removal: Germany

According to the Residence Act, the duration of preparatory detention ("Vorbereitungshaft") of foreigners pending expulsion and removal should not exceed 6 weeks.[286] However, foreigners can also be detained preventively ("Sicherungshaft") for 6 months in cases where it is necessary to ensure the removal and when an independent judge orders the detention. It can be extended up to 18 months if the foreigner hinders his or her removal himself.[287] In both cases, the decision has to be made by a competent and independent judge without delay ("unverzüglich").[288] The Residence Act stresses that "*minors and families with minors may be taken into custody awaiting deportation only in exceptional cases and only for as long as is reasonable taking into account the well-being of the child."*[289] Furthermore, in case of pre-removal detention of a minor, his or her special needs must be taken into account.[290] Overall, especially in terms of security, it is justified that a suspected juvenile terrorist can be detained up to the maximum of 18 months if this measure is deemed necessary to safeguard his or her removal. Nevertheless, in its concluding observations on the combined third and fourth periodic reports of Germany in 2014, the Committee also noted that this situation is *"a direct contravention of the right of the child to have his or her best interests taken as a primary consideration*".[291]

[284] http://www.gesetze-im-internet.de/stpo/__112.html
[285] BVerfGE 19, 342 Available at: https://dejure.org/dienste/vernetzung/rechtsprechung?Text=BVerfGE%2019,%20342See also http://heinrich.rewi.hu-berlin.de/doc/stpo_ss_2014/13-uhaft.pdf
[286] Aufenthaltsgesetz (Residence Act) (Section 62, Paragraph 2, Available at:http://www.gesetze-im-internet.de/aufenthg_2004/BJNR195010004.html
[287] Aufenthaltsgesetz (Residence Act) section58a, Para.1 together with section 62, Para. 3.
[288] Aufenthaltsgesetz (Residence Act) See Article 62 (5).
[289] Section 62 Paragraph 1
[290] Aufenthaltsgesetz (Residence Act)Article 62a (3)
[291] Page 13.Committee on the Rights of the Child. (2014). Concluding observations on the combined third and fourth periodic reports of Germany. CRC/C/DEU/CO/3-4.

Pending removal, foreigners (including under-18 year old foreigners) have to be detained separately from prisoners serving criminal sentences as long as such specialised detention facilities exist within German territory.[292] The Residence Act, Article 62a(3) refers to Article 17 of the European Parliament's Guidelines 2008/115/EG, which places a duty on EU member states to provide unaccompanied minors and families with minor children with dedicated detention facilities pending removal.[293]

e) Stop and search: Germany

The right to stop, search and question individuals is regulated by state-level (Länder) laws, as in most cases it is the Länderpolice ("Landespolizei") who are responsible for identity checks.[294] The 'protection of the public against potential threats' is one of the official purposes of stop and search practices in Germany (in addition to criminal prosecution).[295] A concrete suspicion concerning an individual is not a necessary requirement for the German police to stop and search individuals.[296] However, there needs to be a general and assignable reason for identity checks.[297] A recent court ruling has emphasized the strict prohibition on racial profiling in Germany.[298] However, in a number of German states the police have powers to declare 'danger zones' ("Gefahrengebiet" or "Gefahrenort") in which any individual can be stopped and searched *without* specific justifications.[299]

There is no evidence that danger zones have, as yet, been declared in relation to terrorist activities. Stop and search operations targeting Mosques and Muslims community centres were a relatively common phenomenon in Germany in the immediate aftermath of 9/11 and the bombings in London and Madrid, but[300] "*police checks of Muslims without suspicion have become rare, as they are regarded as an indication of discrimination*."[301]

f) Confiscating identity documents: Germany

Since July 2015, German state authorities have the power to confiscate identification documents as well as passports of suspected terrorists in order to stop them from travelling to locations in which there are known terrorist camps. These suspected

[292] Aufenthaltsgesetz (Residence Act) Article 62a.
[293] Article 17, European Parliament Guidelines 2008/115/EG https://www.admin.ch/ch/d/gg/pc/documents/1724/AmtsblattEU.pdf.
[294] Jesse, E. and Mannewitz, T. (2012) Impact of Counter-Terrorism on Communities: Germany Background Report. Available at: http://www.strategicdialogue.org/programmes/counter-extremism/impact-of-counter-terrorism-on-communities
[295] Ibid.
[296] See e.g. https://anwaltauskunft.de/magazin/gesellschaft/strafrecht-polizei/830/was-darf-die-polizei-bei-einer-personenkontrolle/
[297] Ibid.
[298] See http://www.dw.com/en/court-bans-police-racial-profiling/a-16347425
[299] See e.g. http://www.taz.de/!5051451/
[300] Jesse, E. and Mannewitz, T. (2012) Impact of Counter-Terrorism on Communities: Germany Background Report. Available at: http://www.strategicdialogue.org/programmes/counter-extremism/impact-of-counter-terrorism-on-communities
[301] Ibid.

terrorists are provided with a temporary identity card ("Ersatzpersonalausweis"), which does not allow them to leave Germany, and which is valid for up to 3 years (Article 6, Paragraph 4a, Personalausweisgesetz).[302] The provision makes no exception for minors. Suspected juvenile and 'young adult' terrorists could thus theoretically be barred from leaving Germany for a maximum of 3 years at a time. The CRC in Article 10(2) requires State Parties to "*respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country*". However, the same paragraph also creates a caveat, which states that *"the right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order, public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention*". In this respect, the laws aimed at preventing suspected terrorists from travelling to known terrorist camps are largely in line with international children's rights standards.

[302] Personalausweisgesetz. Available at: http://www.gesetze-im-internet.de/pauswg/BJNR134610009.html

PART 5: CHILDREN AS VICTIMS

5.1 Who is a victim?

This part of the paper examines children as victims of terrorism. Children who are on the receiving end of a terrorist attack, and are injured or killed as a result of terrorist activity are clearly direct victims of terrorism. However, the situation is less clear in relation to children who are recruited into terrorist organisations. Are they to be regarded as perpetrators, as they are engaged in terrorist related activities, or as victims or indeed, as something in between perpetrator and victim?

Article 38 of the CRC and the Additional Protocols to the four Geneva Conventions of 1949[303] oblige States and armed groups to refrain from recruiting who have not attained the age of fifteen into their armed forces and ensure they do not take a direct part in hostilities. The prohibition against the use of or the recruitment of children under 15 is regarded as a matter of customary law,[304] and recruitment of such children whether by States, or by armed groups, is treated by the ICC as a war crime.[305] The ICC argued, that if children under the age of 15 are not sufficiently mature to be recruited, then children under 15 who take part in hostilities should not be held responsible for their actions,[306] and should be treated as '*victims*' of armed conflict rather than perpetrators.[307] This interpretation was reaffirmed by the Special Court for Sierra Leone, which only allowed for the prosecution of children *above* the age of fifteen.[308]

The prevailing view amongst States and international organisations, however, is that 15 is too young an age for recruitment. The Optional Protocol to the CRC on the involvement of children in armed conflict (OPAC) sets the minimum age for the compulsory recruitment and direct participation in hostilities at 18.[309] Reflecting this view, the Rome Statute, which established the International Criminal Court, does not include persons under the age of 18at the time of commission of a crime within its jurisdiction.[310]

[303] Article 77(2) of Additional Protocol 1 covering international armed conflicts and Article 4(3) of Additional Protocol II covering non-international armed conflicts.
304 Rule 136 of the Customary IHL Study of the ICRC:
https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule136
[305] See the Prosecutor v Thomas Lubanga Dyilo ICC-01/04-01/06.
[306] This applies within the context of International Courts, but will not necessarily apply at national level:
[307] Ibid.
[308] See S/2000/915. Report of the UN Secretary-General on the establishment of a Special Court for Sierra Leone http://www.rscsl.org/Documents/Establishment/S-2000-915.pdf
[309] UN Doc A/Res/54/23 of 25 May 2000. However, the Optional Protocol does not prohibit voluntary recruitment in the armed forces prior to the age of 18.
[310] Rome Statute, Article 26.

Article 4 of OPAC provides that armed groups should not, under any circumstances, recruit or use in hostilities any person under the age of 18 years. While this is not yet regarded as a matter of customary law, 147 States Parties have ratified, and a further 23 have signed the Optional Protocol, indicating a very strong support of 18 as the age of recruitment into armed forces or armed groups.

The line taken by the Special Representative of the Secretary General on Children and Armed Conflict and many INGOs, is that children under the age of 18 who are recruited into armed groups, whether they are forcibly or voluntarily recruited, whether they are active combatants or in a support role, should not be prosecuted for membership or for lawful acts as a combatant, [311] but should be reintegrated and rehabilitated through a range of different programmes and restorative justice mechanisms. The SRSG on Children and Armed Conflict, goes further than this, and has urged governments, to ensure that any children arrested under security charges are treated primarily as victims.[312] This is very much in contrast to the current view on how to deal with 'child terrorists' who are recruited into terrorist organisations and who, as with child soldiers, may be used as suicide bombers, porters, spies, messengers, look-outs or even sexual slaves.[313] In many cases it is extremely difficult to distinguish child soldiers from 'child terrorists', both conceptually, factually and legally. In fact, some children will be treated as 'terrorist suspects' simply because governments, with or without international support, designate specific armed group as 'terrorists'.[314]

The very different approach taken to child terrorists can be seen in the numerous UN resolutions that call for the strict prohibition and prosecution of 'terrorist acts' and do not make any special provisions for children suspected of involvement in such acts.[315] Neither do the EU framework decisions, which oblige Member States to incorporate the prohibition of certain 'terrorist acts' into their domestic counter-terrorism laws.[316] 'Child terrorists', it seems, are to be treated no differently than adult terrorists, i.e. they are to be treated as perpetrators.

In the *Lubanga*[317] trial before the International Criminal Court, an issue was raised as to whether a child could give informed consent to joining an armed group, given a child's "*limited understanding of the consequences of their choices*." However, the judges argued that the question of consent was irrelevant for the purposes of

[311] Justice During and in the Aftermath of Armed Conflict: See 3rd Working Paper of the SRSG on Children and Armed Conflict 2011.
[312] Children and Armed Conflict, Report of the Secretary General, UN Doc. A/69/926–S/2015/409 para 244.
[313] See e.g. http://www.bbc.co.uk/news/world-asia-27250144 or http://www.nytimes.com/2015/08/14/world/middleeast/isis-enshrines-a-theology-of-rape.html?_r=0
[314] Brett, R. 2002. Juvenile justice, counter-terrorism and children. Quaker United Nations Office. Available at: http://www.quno.org/resource/2002/11/juvenile-justice-counter-terrorism-and-children
[315] See e.g. UN Security Council Resolution S/RES/2178 (2014); S/RES/1373 (2001).
[316] See e.g. EU Framework Decision 2002/475/JHA and 2008/919/JHA.
[317] The Prosecutor v Thomas Lubanga Dyilo ICC-01/04-01/06.

conviction, given that both (voluntary) enlistment and (coerced) conscription of children under 15 were offences under **Article 8(2)(e)(vii) of the Rome Statute**.

Interestingly, the issue of whether a child is old enough to give informed consent to engaging in terrorist activity does not appear to have considered within a judicial setting in the three case-study countries covered in this report. In a recent case in England, a 14 year-old boy, based in England, recruited and mentored online by ISIS in Syria, went on to incite an 18 year old in Australia to behead a police officer at an Anzac day parade. The boy, even at his young age, was convicted of inciting terrorism, and given a life sentence with a minimum tariff of five years.

5.2 Indirect victimisation

a) The use of the family law jurisdiction: England

The CRC contains a number of 'protection' rights: Article 6 requires States Parties to ensure the child's right to life, while Article 19 requires the State to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical and mental violence, injury or abuse while in the care of the parents. In addition, CRC Article 3 requires that the best interests of the child be treated as a primary consideration. The duty of the State to protect children is contained in the Children Act 1989 in England and in common law. Section 1(3) of the Children Act also provides that in child protection cases, the best interests of the child are to be treated as the *paramount* concern.

There has been an increasing use of the family courts to address indirect victimisation of children and to put in place protective measures in England. Over the last two years, the High Court Family Division has dealt with cases involving the planned or attempted removal of children by their parents to areas of Syria under ISIS control; children who are at risk of, or who are being radicalised by their parents; children who are, or who have been at risk of being involved in terrorist activities in England and girls who plan to travel to Syria to become a 'jihadi bride'.[318] At the time of writing, the Family Division has made orders on 23 children, the youngest being one year of age.

The Family Courts, and especially the High Court Family Division, which is the specialist division of the High Court dealing with civil cases relating to children, regard themselves as being in "*the vanguard of change in life and society.*"[319] The Family Division judges not only have the powers given to them by various statutes, but also hold powers under the common law. They are able to exercise their

[318] It is reported by the Metropolitan police that 32 children in London had been made the subject of family court orders in the first 9 months of 2015 (see http://www.theguardian.com/uk-news/2015/oct/14/missing-bradford-family-one-way-tickets-turkey)
[319] London Borough of Tower Hamlets v B [2015] EWHC 2491 at paras. 57-58.

'inherent jurisdiction' to provide protection to children. Under this jurisdiction they may make a wide range of protective orders, including making the child a ward of court. Once a child is made a ward of court, parental responsibility for that child lies with the court, and no decision may be made about the child without the court's permission. As it removes the rights of a parent to make decisions about his or her child, it is only used where it is necessary for the child's protection.

It has not been possible to obtain exact figures of the number of wardship orders made in order to protect children from becoming the indirect victims of terrorism, but such applications have become more frequent over the last year, and involve a growing number of children. It has, until recently, been an infrequently made order, as it is regarded as being very much a 'last resort' order, only to be used when there is no other order that can provide the required level of protection.

The use made of the inherent jurisdiction is illustrated by the case of **Re M** in 2015.[320] The parents of 4 children, all of whom were British citizens, aged from 20 months to 7 years, left home without telling their wider family. The police and Counter-Terrorism Unit believed the parents intended to travel to Syria with their children and to join ISIS. The High Court made the children wards of court and ordered their return from Turkey justifying the order on the basis that: "*the use of jurisdiction in cases where the risk of harm to the child is of the type that would engage Articles 2 or 3 of the [European] Convention [on Human Rights and Fundamental Freedoms] – the risk to life or risk of degrading or inhuman treatment - is surely unproblematic."*[321] In exercising its jurisdiction, the Court noted that "*it has always been the principle of this court, not to risk the incurring of damage to children which it cannot repair, but rather to prevent the damage done*".[322] Interestingly the Court made no comment on the risk of radicalisation of the children from parents who were willing to take them to an area controlled by ISIS or their future protection.

Wardship is usually a short-term, emergency measure to address a specific issue, such as return of the children to the UK. It does not address the issue of what action should be taken with respect to children of radicalised parents once they have returned to the jurisdiction, and whether radicalisation causes children 'significant harm:' the threshold that must be proved before the local authority can obtain a care order and remove the child from the parents. **In Re X and Y** in July 2015,[323] two separate but similar cases came before the High Court Family Division. In the first case the mother of 4 children aged 3 – 13 together with two maternal relatives, were detained in England, as they were about to board a flight to Turkey. The local authority contended that the purpose of the trip was to cross over the border into Syria and to join and take up arms with ISIS militants; to take the children into a war

[320] [2015] EWHC 1433 (Fam).
[321] Ibid. at para. 32.
[322] Wellesey v Duke of Beaufort (1827) 2 Russ 1, at 18 per Eldon LC.
[323] [2015] EWHC 2265 (Fam).

zone and knowingly to place the children at risk of suffering significant harm. It was alleged that the mother was *"a radical fundamentalist with links and contacts with ISIS militants and those who seek to recruit others to their cause*." In the Y case, a mother, her adult son and his wife and 4 children left the country and flew to Turkey. They were detained at the border with Syria and all were returned to the UK.

In both cases, the adults were arrested and the local authorities of the areas where the children resided, made applications for care orders with respect to all the children.[324] The parents in both cases contested the interim care orders and wanted the children returned to them, pending the full hearing of the applications. The issues for the Court to decide were (a) whether the risk of radicalisation and/or (b) whether the attempt to remove the children to Syria posed a risk of significant harm such that the children should be removed from their parents.

The Court did not consider the risk of radicalisation to be anything other than modest, and not a ground for granting an interim care order. However, the possibility that the parents would seek to take the children out of the country once more if they were returned was considered a potentially great risk to the child, and one that the Court was not willing to accept. The judge was faced with the delicate balancing act: on the one hand the severe risk of death or injury should a parent remove the children to Syria, against the children being separated from their parents who, in every other sense, had been good parents. The judge ordered that the children were to be returned to the parents until the full hearing but under very stringent conditions: including that the children were to remain wards of the Court and the parents were to be subject to GPS tagging. This was met with considerable, though in the end, fruitless opposition, from the Ministry of Justice, on the basis that the use of GPS tagging was intended to be used only for a limited number of criminal cases, and that it was more than six times the cost of radio frequency tagging. The view of the High Court was that radio frequency tagging was insufficient to ensure the full protection of the children.

Wardship also has been used to prevent radicalised children from travelling abroad to ISIS countries and particularly to Syria. In such cases the High Court Family Division has been prepared to make the children wards of court and to issue a passport seizure order or an order requiring the child and their parents to hand over the children's passports to make it impossible for them to leave the country. [325]

In the light of the recent increase in the number of cases coming before the Court, the President of the Family Division has issued Guidelines on Radicalisation Cases

[324] Interim care orders are made under s. 38 Children Act 1989. The threshold criteria for the making of care orders is contained in s. 31 Children Act 1989. Interim orders are made to allow for the parties to prepare their case for a full hearing on whether a care order should be made under s.31 Children Act 1989.
[325] See London Borough of Tower Hamlets v M [2015] EWHC 869 (Fam); Re Z [2015] EWHC 2350 (Fam) and Brighton and Hove City Council v Y [2015] EWHC 2099.

in the Family Courts.[326] As can be seen from the Guidelines, these cases are taken very seriously, and may only be heard by a High Court Family Division judge who will need to consider a range of factors including:

- The need to protect the Article 6 [ECHR, right to fair trial] rights of all the parties;
- The fact that some of the information gathered by the police is highly sensitive and its disclosure may damage the public interest or even put lives at risk;
- The need to avoid disclosure of material that is subject to public interest immunity or which might compromise on-going investigations, damage the public interest etc;
- Whether there are public immunity issues and whether there is a need for a closed hearing or a special advocate.

The Guidelines draw attention to the fact that that "*in this particular process it is the interest of the individual child that is paramount. This cannot be eclipsed by wider considerations of counter terrorism policy or operations".*[327] Further, "*it is no part of the functions of the Courts to act as investigators, or otherwise on behalf of prosecuting authorities /…/ or other public bodies,"*[328] but other than this, the High Court should work in cooperation with those involved in the criminal justice proceedings, including for example, by disclosing materials from the family proceedings in the criminal proceedings.[329]

b) Immigration powers to combat terrorism: England

Immigration powers are seen by the UK's counter-terrorism strategy, CONTEST, as providing an important tool in disrupting terrorist activity, where an individual cannot be prosecuted for terrorism. The Government has the power to use immigration powers to deprive dual nationals of British citizenship on *"not conducive to the public good"* grounds. In 2014, it recorded that 15 foreign nationals were excluded from the UK on the ground of national security and 15 on the ground of 'unacceptable behaviour' including 'hate speech. 'There is no mention of whether the dual national British citizens who were deprived of their citizenship and were excluded from the UK had children. The loss of a parent as a result of such an exclusion is likely to have an emotional, financial and social impact on a child, but there is no indication in the report that any consideration was given to the best interests of children directly impacted by the decision.

[326] Radicalisation Cases in the Family Courts: Guidance issued by Sir James Munby, President of the Family Division on 8 October 2015.
[327] The London Borough of Tower Hamlets v M and others [2015] EWHC 869 (Fam) at para 18(ix) and 58.
[328] Y v Z [2014] EWHC 650 (Fam) para 30.
[329] See Re X (Children) [2007] EWHC 1719 (Fam), [2008] 1 FLR 589, para 43, and Re X (Disclosure for Purposes of Criminal Proceedings) [2008] EWHC 242, (Fam) [2008] 2 FLR 944, para 32.

The new Counter-Extremism Strategy published on 19th October 2015[330] makes it clear that these powers will be continued and the criteria for exclusion from the UK on grounds of unacceptable behaviour will include past or current extremist activity, either in England or overseas. The rules on citizenship will also be reviewed, with a strengthening of the requirement for 'good character' to include whether a person has promoted extremist views or acted in a way which undermines British values. It is unclear whether a child migrant who expresses extremist views or is referred to the Channel programme (see below) runs the potential risk of having his or her application for British citizenship refused.

[330] Cm 9145 October 2015, available at www.gov.uk/government/publications

PART 6: DE-RADICALISATION AND COUNTER-RADICALISATION

In contrast to the wealth of guidelines and standards developed in relation to juvenile justice and counter-terrorism measures, the UN does not appear to have engaged in the same level of activity with respect to counter- and de-radicalisation programmes and the question of how they can be most appropriately designed to address the vulnerabilities of children.

The first pillar of the UN Global Counter-Terrorism Strategy highlights the need to address radicalisation through de-radicalisation and counter-radicalisation programmes. Even before the Strategy was issued, the UN Secretary-General established the Counter-Terrorism Implementation Task Force in 2005 to ensure coordination and coherence in the counter-terrorism efforts of the UN System, under which nine Working Groups were formed. One of these Working Groups was 'Addressing Radicalisation and Extremism that lead to Terrorism'. The mandate of this Working Group was to identify effective policies and practices to prevent radicalisation. However, this Working Group has so far only produced one report.[331] The report provides a limited inventory of counter- and de-radicalisation programmes in 34 Member-States that volunteered to participate in the inventory. However, it does not attempt to develop best practices or common standards in relation to counter- and de-radicalisation programmes. In the conclusion, the Working Group promises to "*establish a database containing the information on counter and de-radicalisation programmes submitted by Member States.*" [332] Unfortunately, this database is not publicly available. The report does not specifically address the vulnerabilities of children, but it does refer to a number of counter- and de-radicalisation programmes and initiatives that target young people directly (e.g. the UK's Children's Plan or Norway's Exit Project). It is noticeable that the 'Addressing Radicalisation and Extremism that lead to Terrorism' Working Group is no longer listed among the Working Groups on the Counter-Terrorism Implementation Task Force website.

The lack of attention given to the issue of youth radicalisation and how to prevent and respond to it was recently highlighted by the UN Secretary-General's Envoy on Youth, Ahmad Alhendawi, who suggested that the UN needs to play a bigger role in addressing radicalisation amongst young people. Pointing to the UN's work on women, peace and security, Mr. Alhendawi has argued that the time has come for the Security Council to pass a resolution and establish a mechanism devoted to youth and peace-building efforts which treats young people as participants in the international process and not simply as 'troublemakers'.[333]

[331] Available at: http://www.un.org/en/terrorism/pdfs/radicalisation.pdf
[332] Ibid. p.22.
[333] See http://www.un.org/apps/news/story.asp?NewsID=50921#.VieqL9KrQdU

Following the terrorist attacks in Paris in November 2015, the EU issued a resolution on the 'Prevention of radicalisation and recruitment of European citizens by terrorist organisations.[334] The resolution notes the need to raise awareness amongst youth, and for education programmes on tolerance and against extremism as well as the need for Member States to provide resources to schools and other educational institutions. However, the resolution does not mention the word 'child' and does not contain any specific recommendations aimed at de-radicalisation or counter-radicalisation of children, using the terms 'youth' and 'young people' instead, which is generally taken to apply to a much wider age-group than the under-18s.

Although de-radicalisation and counter-radicalisation are defined differently (see 1.3), States do not distinguish between them in any meaningful manner, and therefore they are addressed together in this paper.

6.1 De-radicalisation and counter-radicalisation: England

Radicalisation of UK citizens and habitual residents has been a matter of growing concern for the UK government. A new version, the third, of the United Kingdom's Strategy for Countering Terrorism (known as CONTEST),[335] was published in 2011 with an admission that the terrorist threat had changed. The threat has changed once more, as is clear from the Counter-Extremism Strategy, published in October 2015.[336] While it refers to a range of extremist groups and to the racist, anti-Semitic and anti-Islamic rhetoric of right-wing groups, there is little doubt that the strategy has been developed largely to address the threat of jihadist extremism, especially the threat posed by ISIS and the radicalisation of increasing numbers of UK citizens and residents, especially young people and children.

The Counter-Extremism Strategy 2015 sets out some recent examples of extremism affecting children. A government commissioned report into the governance of Birmingham schools (a city in England with a large Muslim population), found that there was evidence of "*co-ordinated, deliberate and sustained action … to introduce an intolerant and aggressive Islamic ethos*." The report described extremists gaining positions on the governing bodies of schools and joining the staff, unequal treatment and segregation of boys and girls, extremist speakers making presentations to the children, and bullying and intimidation of staff who refused to support extremist views. In total, around 5,000 children were affected.[337] Further issues were found with 6 Muslim faith schools in London where, due to the teaching and attitudes in the

[334] P8_TA_PROV(2015)0410: European Parliament resolution of 25 November 2015 on the prevention of radicalisation and recruitment of European citizens by terrorist organisations (2015/2063(INI).
[335] The Home Department, Cm 8123, July 2011.
[336] The Home Department, Cm 9145 19th October 2015
[337] Peter Clarke, July 2014, Report into Allegations concerning Birmingham Schools arising from the 'Trojan Horse' letter. www.gov.uk/government/publications/birmingham-school-education-commissioners-report

school, children were found to be vulnerable to radicalisation and extremist influences. The Counter-Extremism strategy also expressed concern about 3,000 unregulated supplementary schools in England. Many of these provide religious education after school or at the weekend, and many are Muslim. Reports obtained for the strategy indicated that in some settings parents did not know what their children were being taught and felt unable to challenge the teaching. The Counter-Extremist Strategy takes the view that this heightens the risk for such settings to be exploited by extremists. This has been followed by the launch of a government consultation on Out of School Education Settings[338]to introduce a new system for registering and inspecting out-of-school education settings providing intensive tuition, training or instruction to children, including faith based or cultural education. This is widely regarded as aimed at controlling any potential extremism being taught to children in madrasas.

CONTEST, the 2011 Strategy, sets out a number of key objectives, which are identified as '*pursue'*: to stop terrorist attacks; '*prevent'*: to stop people becoming terrorists or supporting terrorism; '*protect'* to strengthen protection against terrorist attacks; and '*prepare'*: to mitigate the impact of a terrorist attack.

The most relevant to de-radicalisation and counter-radicalisation of children is '*prevent*'. It is noted in CONTEST that the government do not believe it is possible to resolve the threat of terrorism by arrest and prosecution of people alone. There is also a need to address radicalisation. This is done through the Prevent strategy, also published by the Home Office in 2011. It contains has three specific strategic objectives:

- Respond to the ideological challenge of terrorism and the threat faced from those who promote it;
- Prevent people from being drawn into terrorism and ensure that they are given appropriate advice and support; and
- Work with sectors and institutions where there are risks of radicalisation that need to be addressed.

The Prevent strategy starts from the premise that preventing people becoming terrorists or supporting terrorists requires challenges to extremist ideas which are used to legitimise terrorism. Extremism is defined in the Prevent strategy as "*vocal or active opposition to fundamental British values, including democracy, the rule of law, individual liberty and mutual respect and tolerance of different faiths and beliefs."*

[338] Department of Education, 26th November 2015.

Section 26 of the Counter-Terrorism and Security Act 2015 places a duty on certain bodies,[339] including local authorities, and private and voluntary agencies and organisations who provide services or exercise functions in relation to children, including schools and early and later year childcare providers, to have "*due regard to the need to prevent people from being drawn into terrorism."*

The Prevent Duty Guidance[340] requires local authorities to set up a multi-agency group. This should include the different departments of the authority as well as private and voluntary bodies under a Prevent duty. This group are required to draw up a local action plan to identify, prioritise and facilitate delivery of projects, activities or specific interventions to reduce the risk of children being drawn into terrorism in each local authority. In complying with the duty local authorities are expected to ensure that publicly owned venues and resources do not provide a platform for extremists and are not used to disseminate extremist views, and that organisations working with the local authority to do not engage in extremist activity or espouse extremist views.

Local authorities are also required to take steps to understand the range of activities offered by out-of-school settings, including supplementary schools and tuition centres, and to assure themselves that children attending such settings are not at risk of being drawn into either extremism or terrorism.

In order to assist schools and childcare providers meet their statutory duty under **s.26 Counter-Terrorism and Security Act**, the Department of Education has produced guidance.[341] It states that protecting children from radicalisation should be seen as part of schools' and childcare providers' wider safeguarding duties towards children, and is similar in nature to protecting children from other harms (e.g. drugs, gangs, neglect and sexual exploitation). Schools and childcare providers are seen as able to build the "*resilience of children to radicalisation by promoting fundamental British values and enabling them to challenge extremist views*." This is not seen by the Guidance as prohibiting the discussion of controversial issues, but rather as a way of developing knowledge and skills to challenge extremist arguments. The Guidance goes on to state that this should not be seen as a burdensome duty, but as part of their overall, already existing duty to promote the welfare of children. Since 1st September 2015, OFSTED, the school inspection body must examine the arrangements of schools for preventing radicalisation and extremism and examine how well the school promotes British values.

[339] As specified in the Counter-Terrorism and Security Act 2015, schedule 6.
[340] Guidance for specified authorities in England and Wales on the duty in the Counter-Terrorism and Security Act 2015 to have due regard to the need to prevent people from being drawn into terrorism, issued under s.29 of the Counter-Terrorism and Security Act 2015 available from
www.legislation.gov.uk/udsi/2015/9780111133309/pdfs/ukdsiod-9780111133309-en.pdf
[341] The Prevent Duty: Departmental Advice for schools and child care providers, Department for Education, June 2015.

In order to put the appropriate arrangements in place, schools are expected to assess the risk of children being drawn into terrorism and the support for extremist ideology. The Guidance admits that there is no one way to identify an individual who is susceptible to a terrorist ideology, but staff are exhorted to watch for changes in behaviour and use their professional judgment to identify children at risk. At all times, however, schools and childcare providers must act 'proportionately'.

If staff is concerned about a child, the appropriate action is to refer the child to the Channel programme, which has been running since 2007. This focuses on providing support at an early stage to people, mostly 15-24, who are identified as being vulnerable to radicalisation. Although Channel remains a voluntary programme for those offered support, it was placed on a statutory footing by the **Counter-Terrorism and Security Act 2015**, and local authorities are now a required to have a programme in every area. Attendance, however, remains voluntary, and confidential, and there is no criminal or civil sanction for failure to attend at the programme. There were 2000 referrals to Channel between 2012 and the end of 2014. Between June and August 2015, 796 people were referred to Channel, of whom almost 40% (312) were children:[342] a significant increase in referrals.

The new Counter-Extremism Strategy goes a step further and introduced new de-radicalisation measures. It notes that individuals who are further down the path of radicalisation need a particularly intensive form of support and states that "*when necessary this support will be mandatory."* The Home Office will be developing a new de-radicalisation programme to provide this support by 2016, with the plan being to use it in conjunction with criminal sanctions. It is not clear, as yet, whether children will be included within this new programme.

Other de-radicalisation and counter-radicalisation measures that will be introduced by the new strategy to counter extremism include:

- A power for parents to cancel their child's passport if they are at risk from joining a terrorist group. This currently applies to children under the age of 16 but till be extended to 16 and 17 year olds in the near future.

- Changes to the role of the Disclosure and Barring Service to enable employers to identify extremists and stop them working with children. The Government intends to introduce automatic barring for anybody with a conviction or civil order for extremist activity. This would mean that the person would not be able to work with children or vulnerable people in any setting.

- A broadening of the work of the National Citizen Service to encourage greater participation amongst 16 and 17 year olds.

[342] National Police Chief's Council press release, 2015

Although the Prevent strategy is aimed at countering all forms of terrorism, including that inspired by right wing extremism, there has been considerable debate about the its effectiveness and the extent to which it focuses on and stigmatises Muslims. Criticisms of the programme include a failure to engage with communities; the lack of critical discussion and explanation of Prevent's work; why some areas of the country were chosen for the programme and not others[343] and a lack of transparency about the proportion of spending on different forms of extremism. There has also been criticism of the provisions in the **Counter-Terrorism and Security Act 2015** placing Prevent on a statutory footing. The National Union of Teachers in their annual conference were negative about the statutory duty 'to have due regard to the need to prevent people from being drawn into terrorism,' claiming they were being asked to spy on children. In addition, 280 academics signed a letter to the Home Office claiming that the new duty would divide communities, clamp down on legitimate dissent and have a chilling effect on freedom of speech. The major concern however, is that the policy is a blunt tool which could stigmatise children. The example of Ahmed Mohamed, a Texan schoolboy, who was handcuffed, arrested and suspended after a teacher said the homemade clock that he brought into school "*looked like a bomb*" could, it is argued, just as easily have happened in England. However, a referral to Channel is confidential, and is no kind of criminal or civil sanction and these issues need to be balanced against the long term potential risk to a child who is radicalised, and who goes on to engage in terrorist related activity.

The degree of emphasis on de-radicalisation and counter-radicalisation will only be clear when the Government publishes its new programme in the Spring of 2016.

6.2 De-radicalisation and counter-radicalisation: Germany

The German authorities have extensive experience in implementing counter-and de-radicalisation programmes, in particular those targeting far-right extremists and members of the neo-Nazi movement.[344] This focus is understandable given Germany's history of far-right extremism.

In contrast to the United Kingdom, which initiated nation-wide counter- and de-radicalisation programmes in response to 9/11 and the London Tube Bombings, Germany still does not have a national, inter-ministerial counter-radicalisation strategy comparable to the one in the UK. Some observers have suggested that this situation is largely due to the federal structure of Germany's political and

[343] Such criticism were addressed in the Prevent Strategy of 2011 which transparently set out a new method of prioritisation, and the introduction of the Prevent duty to all areas of the country.
[344] Butt, R. and Tuck, H. (2014).European Counter-Radicalisation and De-Radicalisation: A Comparative Evaluation of Approaches in the Netherlands, Sweden, Denmark and Germany. Institute for Strategic Dialogue. Available at: http://www.strategicdialogue.org/programmes/counter-extremism/ppn

administrative system. However, a national, inter-ministerial counter-radicalisation strategy for Germany is currently under negotiation.[345]

It has been argued that the federal system necessarily results in each German state adopting its own idiosyncratic approach to counter- and de-radicalisation. "*For example, Berlin's intelligence service uses theological arguments to counter extremist interpretations of the Qur'an, while other states will not engage in any theological debates*."[346]

Nevertheless, the federal Interior Ministry has developed its own counter-terrorism framework, in which de- and counter-radicalisation programmes feature prominently.[347] In line with the objectives of this framework, the Interior Ministry launched a "Security Partnership Initiative", in 2011, which brought together various federal and state security services as well as organisations representing Germany's Muslim population.[348] However, this initiative was not particularly successful, as four of the six participating Muslim organisations left the initiative over concerns that their views were ignored.[349] The "Security Partnership Initiative" has since ceased to exist. However, some programmes launched in the framework of this initiative, for example a hotline aimed at relatives and friends of radicalised youths ("Beratungstelle Radikalisierung"), continues to operate.[350]

There also are other examples of nation-wide counter-terrorism initiatives launched by the Interior Ministry. Since 2006, the German Islam Conference ("Deutsche Islam Konferenz") serves as an institutionalised dialogue between representatives of Germany's Muslim population and several key Ministries. The conference includes annual meetings and a number of task-group sessions that take place during the year.[351] One of these working groups is dedicated to the phenomenon of youth radicalisation and finding ways to address this issue. [352]

In 2004, the Joint Counterterrorism Centre (GTAZ) was established to coordinate federal and state counter-terrorism policies on a more tactical level.[353] In 2009 the GTAZ created a new working group that deals exclusively with counter-radicalisation.[354] This working group is specifically tasked with collecting information on federal and state counter-radicalisation initiatives, sharing best practices, and

[345] Personal correspondence with representatives from the German Interior Ministry
[346] Ibid.
[347] See Point Two: "Die Ursachen des Terrorismusbekämpfen: Prävention/Deradikalisierung" http://www.bmi.bund.de/DE/Themen/Sicherheit/Terrorismusbekaempfung/Terrorismus/terrorismus_node.html.
[348] http://www.bmi.bund.de/SharedDocs/Pressemitteilungen/DE/2012/08/sicherheitspartnerschaft.html.
[349] http://www.spiegel.de/politik/deutschland/islamische-verbaende-kuendigen-partnerschaft-mit-innenministerium-a-853255.html.
[350] See http://www.bamf.de/DE/DasBAMF/Beratung/beratung-node.html.
[351] See Jesse, E. and Mannewitz, T. (2012) Impact of Counter-Terrorism on Communities: Germany Background Report. Available at: http://www.strategicdialogue.org/programmes/counter-extremism/impact-of-counter-terrorism-on-communities.p.1.
[352] See http://www.deutsche-islam-konferenz.de/DIK/DE/DIK/6Praevention/InfoPraevention/info-praevention-node.html
[353] http://www.verfassungsschutz.de/de/arbeitsfelder/af-islamismus-und-islamistischer-terrorismus/gemeinsames-terrorismusabwehrzentrum-gtaz.
[354] https://www.bundestag.de/presse/hib/2014_12/-/348372.

developing new policies. The GTAZ and its working groups is the closest that federal and state authorities have come to coordinating their counter-terrorism programmes.

Far –right extremism: Germany

There are numerous counter- and de-radicalisation initiatives aimed at far-right extremism, both at the federal as well as the state level, e. g. the dropout programme for right-wing extremist from the Federal Office for the Protection of the Constitution. One of the most well-known of Germany's non-governmental de-radicalisation programmes is EXIT-Germany. EXIT-Germany is an initiative assisting individuals, who want to leave the extreme right-wing movement and start a new life. The organisation started working in 2000 and has since then helped more than 500 individuals leave the neo-Nazi scene, with a recidivism rate of approximately 3 percent.[355] In 2011 the initiative used music, clothing and social media to increase their impact, seeding one of the most successful online outreach strategies designed to engage right-wing audiences.[356]

While Exit-Germany's overall de-radicalisation efforts potentially target all individuals in violent right-wing circles, some initiatives, such as the highly-publicised 'Operation Trojan T-shirt', specifically aimed at raising awareness about Exit-Germany amongst right-wing children and youths.[357] Exit-Germany distributed hundreds of white power t-shirts at right-wing music festivals that, when washed, altered the logo to 'What your T-shirt can do, so can you - we'll help you break with right-wing extremism'.[358] This initiative highlights the importance of using innovative methods (e.g. music, clothing and social media) in order to reach young people in extremist circles.[359]

Religiously motivated extremism: Germany

The terrorist attacks of New York, London and Madrid in the early 2000s shifted the focus of Germany's counter- and de-radicalisation programmes more towards jihadist terrorism. The Initiative to Strengthen Democracy[360] (now called "Live Democracy")[361] was the first federal programme dedicated to the prevention of jihadist and left-wing radicalisation. It was established in 2010 by the Federal Minister for Families and ran from 2011 to 2014 with a budget of € 4.7 million. The programme aimed at reinforcing "tolerant and democratic attitudes and behaviour in order to reduce the attractiveness of left-wing extremist and Islamist ideological and

[355] https://www.counterextremism.org/resources/details/id/553/exit-germany.
[356] Butt, R. and Tuck, H. (2014).European Counter-Radicalisation and De-Radicalisation: A Comparative Evaluation of Approaches in the Netherlands, Sweden, Denmark and Germany. Institute for Strategic Dialogue. Available at: http://www.strategicdialogue.org/programmes/counter-extremism/ppn.
[357] See http://www.exit-deutschland.de/projekte/?c=trojaner-t-shirt.
[358] Butt, R. and Tuck, H. 2014.p.21.
[359] Ibid.
[360] http://www.toleranz-foerdern-kompetenz-staerken.de/index.php?id=550
[361] http://www.demokratie-leben.de//

social offers. It funded 41 projects in three fields; education, local approaches, and cooperation with actors involved in the socialisation of young people."[362]

The Initiative to Strengthen Democracy specifically targets children and young people (for which the BMFSFJ is responsible), as they are deemed to be most susceptible to being radicalised by violent jihadist and left-wing groups.[363] While some projects of the initiative were conceptualised as general anti-violence educational interventions in schools, other projects specifically targeted young Muslim boys and girls and sought to challenge radical interpretations of Islam, in particular strict interpretations of what is *halal* ("allowed") and what is *haram* ("prohibited").[364] The initiative is now called **Live Democracy** ("Demokratie Leben") and has a much broader scope than the "Initiative to Strengthen Democracy", as it targets all potential forms of anti-democratic extremism, including right-wing extremism.[365] The successor initiative **Live Democracy** ("Demokratie Leben") has been operational since early 2015 with a total budget of € 50.5 million until the end of 2019.[366] This initiative places more emphasis on the de-radicalisation of young people and the provision of support to family members and close friends of radicalised individuals.[367]

Hayat[368] was founded in 2011 and is funded by Germany's Federal Office for Migration and Refugees. The de-radicalisation programme has seen a massive increase in the number of cases - 21 in the first year, 53 in 2013, and 120 in 2014. According to one source, Hayat has so far successfully de-radicalised around 30 individuals.[369] Its methods are based on the knowledge gathered in Exit-Germany's work with neo-Nazis.[370] Rather than targeting young Muslims directly, Hayat counsellors mostly try to involve the families and friends of the radicalised individuals.[371] This indirect strategy was adopted because the initiators of Hayat acknowledged that radicalised individuals are often too hostile towards the German authorities to allow for direct contact with anyone associated with the German State. Even though Hayat targets the families of all radicalised German Muslims in general, it focuses on young girls and boys that want to travel to Syria and Iraq to fight for

[362] Butt, R. and Tuck, H. (2014).European Counter-Radicalisation and De-Radicalisation: A Comparative Evaluation of Approaches in the Netherlands, Sweden, Denmark and Germany. Institute for Strategic Dialogue. Available at: http://www.strategicdialogue.org/programmes/counter-extremism/ppn

[363] See DeutschesJugendinstitut. WissenschaftlicheBegleitung der „INITIATIVE DEMOKRATIE STÄRKEN". Available at: http://www.dji.de/index.php?id=1443

[364] See BMFSFJ. Abschlussbericht des Bundesprogramms „Initiative DemokratieStärken" Available at: http://www.dji.de/fileadmin/user_upload/bibs2014/1443_Abschlussbericht_IDS.pdf.

[365] http://www.demokratie-leben.de/bundesprogramm/ueber-demokratie-leben.html

[366] http://www.demokratie-leben.de/bundesprogramm/ueber-demokratie-leben.html

[367] See Glaser, M. DJI TOP THEMA März 2015 #SeitgesternbinichbeiAlKaida! Jugendliche, Radikalisierung und Prävention. Available at: http://www.dji.de/?id=43795

[368] Hayat is one of a number of civil society organisations cooperating with the BAMF - BeratungsstelleRadikalisierung (http://www.bamf.de/EN/DasBAMF/Beratung/beratung.html). The counselling hotline on radicalization was set up in 2012 at the Federal Office for Migration and Refugees. It is meant as a first contact point for relatives and friends of young people who already are radicalized or are radicalizing, to advise them on issues related to Islamism and radicalization. If necessary, individual personal support by civil-society experts can be offered.

[369] See Brenner, Y. "How Germany is attempting to de-radicalize Muslim Extremists. Forward. Available at: http://forward.com/articles/212268/how-germany-is-attempting-to-de-radicalize-muslim/

[370] Ibid

[371] See Hayat Deutschland. Available at: http://hayat-deutschland.de/hayat/?c=hintergrund

ISIS. [372] The Hayat programme highlights the importance of reaching out to the families and friends of radicalised youths.

One of the most comprehensive state-level de-radicalisation programmes was launched in the state of Hamburg. Hamburg's authorities "*provide tangible assistance in the form of apartment rentals, vocational training, and job placement services to those who are looking to leave extremist circles*."[373] In terms of counter-terrorist programmes, Hamburg has established a network of so-called 'contact scouts' that started meeting with imams as early as 2001 and local authorities have cultivated this network ever since.[374] Since 2014, several Federal States established advisory networks at the local level in cooperation with different local stakeholders and civil society actors.[375] These networks bring together security agencies, social workers, mosque communities, schools, youth welfare or employment counselors. The preventive measures implemented are targeted at children and youth and cover general prevention, information and awareness-raising events as well as concrete intervention measures (counselling of family members, de-radicalisation and exit programs).

The Prevention and Cooperation Clearing Point (CLS) was established in March 2008 at the Federal Office for Migration and Refugees (BAMF) to provide a comprehensive overview of past, ongoing, as well as future local projects involving state and Muslim institutions across Germany. The CLS maintains a public database of some 300 contacts representing Muslim communities and the German state. Anyone with an idea for a new project can access the database to contact relevant parties, and ask the CLS for support.[376] The CLS database allows for the tailored search of projects that specifically target children and youths.[377] In this respect, it represents a valuable tool to identify past and on-going projects. However, it is not clear how and why listed CLS projects (only some of which are related to counter- and de-radicalisation) were or are successful, so the potential for sharing insights and good practices is limited.

In July 2010, the Federal Office for the Protection of the Constitution established the nationwide HATIF phone hotline. This hotline was designed to help individuals break with their violent jihadist environment and it thus represented a national de-radicalisation initiative. HATIF is the Arabic word for phone and the German acronym stands for leaving terrorism and Islamist fanaticism. It is not clear how many people, if any, took advantage of the programme.[378] A similar programme (focusing on counter-radicalisation rather than de-radicalisation) called 'Counselling Centre

[372] See http://www.spiegel.de/politik/deutschland/is-islamischer-staat-beratungsstelle-hayat-hilft-eltern-a-997168.html
[373]Hellmuth, D. (2013) Countering Islamist Radicalisation in Germany. Combating Terrorism Centre at West Point. Available at: https://www.ctc.usma.edu/posts/countering-islamist-radicalization-in-germany
[374] Ibid.
[375] See, for example, https://hke.hessen.de//.
[376] Ibid.
[377] See http://www.bamf.de/DE/DasBAMF/Clearingstelle/Projekte/projekte-node.html
[378] Hellmuth, D. 2013

Radicalisation' was launched by the BAMF in early 2012. While HATIF had no particular child-focus, the 'Counselling Centre Radicalisation' indirectly targets children and youths believed to be in danger of radicalisation by providing support to parents, friends and teachers.[379] However, in 2014 the project HATIF came to an end as new approaches (including civil society) especially the BAMF counselling hotline on radicalization had proven to be more successful.

The Federal Agency for Civic Education ("Bundeszentrale für politische Bildung"), funded by the Interior Ministry, provides educational material aimed at countering the radicalisation of young people into violent extremism, in particular Islamic extremism.[380] The Agency tries to reach young people in danger of radicalisation through a number of different ways, including the provision of materials and training to teachers and social workers, or the creation of You Tube videos aimed at countering the phenomenon of 'online radicalisation' amongst youths.[381]

Generally-speaking, it is difficult to assess the effectiveness of Germany's various local, state, and federal counter-radicalisation measures and initiatives because many of them have only been operational for a few years, and have not been subjected to rigorous evaluation. Furthermore, it seems that Germany's federal structure complicates coordination of and information-sharing on counter- and de-radicalisation programs.[382]

[379] See http://www.bamf.de/DE/DasBAMF/Beratung/beratung-node.html
[380] See e.g. http://www.bpb.de/politik/extremismus/radikalisierungspraevention/
[381] See https://www.youtube.com/playlist?list=PLGwdaKBblDzBGN36ApO8nA4jfIat0SUZl
[382] Hellmuth, D. 2013

PART 7: CONCLUSIONS AND RECOMMENDATIONS

It is recognised that terrorism poses a major threat to the security of many States, and that UN instruments require that States take action to ensure the safety of their populations by putting legislation to address terrorism in place, by criminalising terrorist acts and by addressing the conditions conducive to terrorism. It is also recognised that children can pose a terrorist threat. Nevertheless, the CRC provides a set of non-derogable rights, including those contained in Articles 37 and 40 of the Convention, which this report concludes are not being fully vouchsafed to children who are suspected of or are arrested and tried for terrorism related activity. There are a number of reasons for this, but many hinge on the fact that up until very recently terrorism appears to have been regarded very much as an adult issue, not involving children, save to the extent that children maybe victims of terrorism.

There is, in addition, an underlying issue. The research undertaken for this paper shows a striking dissonance in the approach taken to children engaged in terrorist related activity and the approach taken to child combatants in armed conflict. Child combatants are largely treated as victims, are not subject to prosecution under international law and are recognised as needing rehabilitation and reintegration services.[383] Children who are involved or engaged in terrorism related activity are subject to prosecution and to lengthy custodial sentences. Yet, in some cases, the line between child combatant and child terrorist is a very thin line.

Overall, the underlying principles of the CRC, including the right of the child to have his or her best interests treated as a primary consideration, do not appear to be implemented in relation to children engaged in terrorist related activity, nor in relation to measures imposed on their family members. Further, it is not obvious that either Article 40(3)(b), which requires States to introduce measures for dealing with children without resorting to judicial proceedings, or Article 37(b) CRC which requires that deprivation of liberty should only be a matter of last resort for the shortest period of time, are being implemented in any meaningful manner when it comes to children engaged in terrorist related activity.

Legislation relating to terrorism in the case-study countries barely mentions children, and makes no provision for those charged with terrorism offences to be tried in juvenile courts according to juvenile procedures. The case study countries indicate that while some juvenile justice provisions are applied to terrorism charges, children charged with terrorist offences do not, on the whole, benefit from the full protection that juvenile justice has to offer. Overall, there is a lack of clarity in terrorism laws of

[383] See SRSG for Children and Armed Conflict, 3rd Working Paper: Justice for Children during and in the Aftermath of Armed Conflict, 2011.

the case study countries as to the status of children charged with terrorist related offences.

Examination of materials in the case study countries and internationally indicated that there has been very little discussion of the use of community based restorative justice programmes for children convicted of terrorist offences, even though the case study countries appear to acknowledge that criminal offences alone are unlikely to address issues of radicalisation.

Although de-radicalisation and counter-radicalisation programmes and measures have been introduced in all the case study countries, there is very little evidence from these countries or others about 'what works'. There appears to be a lack of evaluation of whether the correct target group is included in the programmes and the value and impact of the programmes.

Although this report has not had a specific focus on child witnesses to terrorism, it appears that States have yet to give careful consideration as to how child witnesses can be protected in terrorism trials.

This report has not addressed the issue of the use of social media or other interactive technology. However, it must be acknowledged that control over Internet content is a crucial weapon in preventing radicalisation of children.

Recommendations

1. UN bodies, and particularly UNHCR, UNICEF, UNODC, UNICRI, the SRSGs on Children and Armed Conflict, Children and Violence, the UN Special Rapporteur on Counter-Terrorism should give priority to addressing the rights and needs of children engaged in terrorist related activity, in much the same way as priority has been given to violence against children and children involved in armed conflict.

2. UNICRI should give consideration to conducting a wider study of State practice in relation to children and counter-terrorism.

3. A great level of scrutiny should be given by the CRC Committee to the application of terrorism provisions to children.

4. The UN Committee on the Rights of the Child should be approached to conduct a Day of General Discussion on children and counter-terrorism, to give the issue a higher profile.

5. States should be encouraged to ensure that children are specifically addressed in legislation dealing with terrorism and that the rights of children under international

treaties are assured to them. This is likely to require special legislative provisions relating to children from the point of detention to the point of, and including sentence and reintegration in domestic legislation.

6. The best interests of children should be considered when making orders in relation to parents, such as exclusion orders, or a refusal to allow a parent to return to the country, as well as extradition orders and transfer agreements. Thought needs to be given to how this could be achieved.

7. Cases involving children engaged in terrorist related activity should be tried in accordance with juvenile procedure and in juvenile courts. Terrorist offences should not be treated any differently than other criminal offences involving children.

8. Judges hearing cases involving children sitting in the juvenile courts should receive training on terrorism and radicalisation.

9. States should develop child protection measures for children who are witnesses in terrorism trials.

10. States should be encourage to put more resources and expertise into de-radicalisation programmes, building on effective programmes used in other spheres, such as successful school programmes that address violence and drug use. These should be tailored to children's needs.