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### Thinking war in the 21st century: Introducing non-state actors in Just war theory

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# 6

## Civilians Associated with Non-State Collectives\*

This chapter is an adapted version of: Hadassa Noorda. 2015. "Preventive Deprivations of Liberty: Asset Freezes and Travel Bans." *Criminal Law and Philosophy* 9 (3): 521-535.

### 6.1 Introduction

Most individuals do not meet the requirements of combatancy as detailed in this thesis. Such individuals should be subjected to deontological principles as ideally reflected by criminal law. However, under our current legal rules, not all civilian individuals

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enjoy the rights of criminal law. For example, individuals blacklisted on the suspicion that they are engaged in the facilitation or financing of terrorism are treated as somewhere in-between combatants and civilians. Here, I focus on one specific group of such individuals: individuals blacklisted by the EU or UN on the basis of that they are engaged in the facilitation or financing of terrorism and subsequently subjected to preventive measures such as asset freezes and travel bans.

The United Nations Security Council 1267 sanctions list, the United States Office of Foreign Asset Control list, and the EU sanctions list are the most important blacklists in operation today. These lists share constraints imposed on targeted persons before a potential crime has been committed. The sanctions include asset freezes and travel bans. Constraints, such as asset freezes and travel bans, imperil the free and autonomous life of the targeted person. Comprehensive forms of such constraints may lead to what I term, ‘*exprisonment*’: detention outside the prison cell. The usages of these preventive constraints will likely increase as present technologies make it easier to control individuals without using prison cells.

Such practices call for appropriate limitations on the use of these methods. While preventive imprisonment has been widely discussed, other preventive constraints are often seen as acceptable alternatives. However, as the debate regarding these constraints among human rights lawyers indicates, the impact on the target can be enormous.<sup>169</sup> These preventive constraints may infringe on the freedom of the target in two ways. First, the constraints may harm the negative freedom (which is the absence of constraints on action) of the targeted person because she is, for

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<sup>169</sup> Many human rights lawyers argue that these constraints infringe on individual rights of subjected persons. See, among other works, Eckes 2009; Cameron 2004.

instance, not allowed to travel. Therefore, some have expressed concerns about these constraints, as they deem these constraints as punitive.<sup>170</sup> Second, although these constraints do not actually lock someone up, restraining a person in such a way may deprive the target of her liberty in a way similar to actual imprisonment.<sup>171</sup> I address these concerns and argue that some preventive constraints are similar to illegitimate imprisonment because these constraints unjustifiably infringe on the free life of the target. Second, the preventive character of these constraints may disrespect the target's autonomy by presuming that she will commit a terrorist act.<sup>172</sup> The main problem is such an assumption cannot be disproved, since one cannot prove that one will not commit a crime in the future.

Given that constraints alternative to imprisonment can similarly infringe on leading a free and autonomous life, in this chapter, I argue that those subjected to these constraints require protections similar to those afforded to people facing actual imprisonment.<sup>173</sup> Thus, I do not argue that such constraints are prohibited but, instead, that they should be applied with

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<sup>170</sup> The General Court of the European Union in *Kadi* has raised the question of the punitive nature of blacklisting. Based on the duration of the measure, the General Court has held that, "the objectives of the recommended asset freezing measures are not only preventative but also punitive." *Yassin Abdullah Kadi versus European Commission*. Case T-85/09. General Court of the European Union. September 30, 2010, par. 163.

<sup>171</sup> As Lord David Hope, Judge of the United Kingdom Supreme Court, puts it: "It is no exaggeration to say [...] that designated persons are effectively prisoners of the state." Cited in Sullivan and Hayes, 92.

<sup>172</sup> As I explain in the last section of this chapter, I do not intend to argue that every constraint is problematic with respect to individual autonomy.

<sup>173</sup> Travel bans and asset freezes are just some examples of the many preventive liberty constraints that do not actually imprison the target, such as house arrest. Here, I focus on travel bans and asset freezes compared to imprisonment because imprisonment is the exemplary deprivation of liberty.

appropriate safeguards for subjected individuals. Moreover, I do not argue that these constraints should be part of the war paradigm. Instead, I presuppose the non-combatant status of these individuals and treat them under the peacetime paradigm. At least some blacklisted individuals will not meet the requirements for being treated as a (non-state) combatant. In this fashion, I argue that comprehensive forms of preventive constraints are similar to actual imprisonment, and should be dealt with as such. The sanction regimes of asset freezes and travel bans are taken as examples of preventive measures that resemble imprisonment to some degree.<sup>174</sup> I take the cases of *Nada*, *Kadi*, and *The Hofstadgroep* as examples of deprivations of liberty outside the prison cell. This does not imply that the subjects of these cases may not be categorized under the war paradigm. I have set out the requirements for combatants in this thesis and some individuals subjected to preventive constraints may meet these requirements as well. In this chapter, the *Nada*, *Kadi* and *The Hofstadgroep* cases are illustrative of how certain constraints affect a person's liberty and autonomy.

In section 6.2, I detail sanctions against supposed terrorists as examples of preventive constraints that control subjected individuals without using the prison cell. In section 6.3, I examine why preventive constraints raise concerns regarding individual liberty and autonomy of targeted persons. Subsequently, in section 6.4, I recommend ways to regulate forms of preventive 'exprisonments' that control individuals. Some of the constraints should be dealt with in a similar way as their counterparts who

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<sup>174</sup> Marieke de Goede provides a more detailed study of practices of asset freezes. The work of De Goede has been important in shaping my ideas about the effects of preventive constraints on the lives of individual persons. See De Goede 2012 (describing recent practices of preventive data-mining, asset-freezing, and transnational regulation that focus on transactions that are legal but that may support terrorism.)

physically imprison the target as these constraints similarly infringe on individual liberty.

## 6.2 Current Practices of Preventive Constraints

The use of preventive constraints that restrict people's freedom in ways other than imprisonment has increased recently. Due to technological innovation, it is now easier to constrain people without a prison cell.<sup>175</sup> The increased availability of alternatives has led to an increase in the use of these methods. This development goes hand-in-hand with a shift to prevention. Criminal law systems increasingly emphasize risk instead of focusing on crimes committed in the past.<sup>176</sup> Preventively blacklisting individuals, restraining them from travelling, and freezing their assets, is illustrative of preventive constraints that do not actually imprison the targeted person but significantly limit her mobility. The UN, the EU, and some states keep lists of individuals and groups they suspect support terrorism. These subjects are then targeted with preventive constraints that usually do not actually imprison them.

Sanctions against individuals adopted under EU law reflect UN sanction regimes: the first consists of Resolutions 1267, 1333, and 1390, targeting individuals related to Al Qaeda and the Taliban. Under this regime, the EU adopts measures against those on UN lists. The second regime follows Resolution 1373,

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<sup>175</sup> New technologies, e.g., GPS bracelets, enable the possibility of controlling persons without locking them up. Here, I focus on travel bans and asset freezes.

<sup>176</sup> See Garland 2001; Ericson 2007; Zedner 2009; Klaus 2013; Ashworth and Zedner 2014.

calling for a fight against terrorism and—in particular—for a fight against the financing of terrorism by freezing assets. In Resolution 1373 (2001), the Security Council decided that all states should ensure that any person who participates in the financing, planning, or perpetration of terrorist acts is brought to justice and that domestic laws and regulations define such terrorist acts as serious criminal offences. Under this second regime, the EU developed its own blacklist wherein individuals can be subjected to preventive constraints.<sup>177</sup>

Sanctions against supposed terrorists show a tendency to subject individuals to preventive ‘exproprisonments,’ or constraints that control individuals without actually imprisoning them. Such preventive exproprisonments are based on a prediction that subjected individuals are likely to commit wrongs in the future.<sup>178</sup>

I distinguish two opposing kinds of constraints that are based on opposing approaches to public security, and individual liberty and autonomy: constraints that respect individual liberty and autonomy and constraints that take security as a starting point. The distinction between these two types of constraints is analytical; useful for the purpose of understanding the various forms of constraints. After setting out a framework that should be helpful for heuristic purposes, I illustrate how actual practices can be described in terms and combinations of these types of constraints. Here it is important to note that as prevention is the concern of this chapter, both types of constraints are future-oriented in that the purpose is to prevent future wrongdoing.

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<sup>177</sup> The counterterrorism policy of the EU is a complex system. Methods are imposed from different procedures in which the institutes of the EU play different roles. See, for an overview of EU sanctions against individuals, Eckes 2009.

<sup>178</sup> Another example of a preventive ‘exproprisonment’ are restrictions imposed on mentally ill persons who are a danger to themselves or to others (these restrictions enable individuals to receive treatment and prevent them from harming themselves or others).

The first type of constraints allows security-based preventive measures only so long as they respect individual autonomy. Such a constraint is based on the idea that human beings possess the capability to change their behavior and require individual risk assessments. This type of constraints considers the subject as someone who can change her mind and understand that changing circumstances may lower or totally eliminate the risk that the targeted person will commit a crime. Therefore, it is subject to court oversight and/or to regular assessments of risk, and based on an individual and fact-specific assessment of risk. This type of preventive constraints is often defended on retributive grounds. To retributivists, the question is whether the actor's conduct is blameworthy. The aim of preventive restraints is to prevent certain wrongdoing, but these restraints are not necessarily contradictory with this approach. Such a restraint is not necessarily forward-looking because a substantial step towards a particular action can be defined as criminal conduct in the same way as an attempt<sup>179</sup> In addition, the constraints should also be proportionate in their stringency to the seriousness of the expressed intention to commit a future crime or of the wrong committed. To verify these conditions and to uphold the opportunity for targeted persons to make a choice regarding conforming or non-conforming behavior with respect to the prediction that she will commit a future crime, this type of constraints requires that preventive constraints are temporarily imposed and subject to regular assessments.

The second type of constraints discussed here allows security to be given more weight against the goods of individual freedom

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<sup>179</sup> See Walen 2010. Walen's approach could be problematic from a retributive point of view because our future choices are subject to our will—we may choose not to commit the crime. See Kimberley Kessler Ferzan's critique on Walen. Ferzan 2011, 1290 (providing an alternative to broadening of the criminal law: a liability based prevention system).



and autonomy. Typically, such a constraint is imposed on a category of persons defined by certain characteristics, premised on the probability that a member of this category will behave in a certain way irrespective of individual risk assessments. The likelihood that some persons meeting certain characteristics will commit a future crime justifies restraining all persons with similar characteristics. Often, individuals subjected to such a constraint are not safeguarded by judicial oversight. There is no regular assessment of risk because the question of whether an individual might change is irrelevant.

Some preventive constraints that do not actually detain the targeted person reflect only one of these types of constraints. For example, restrictions on the mentally ill in The Netherlands take as its starting point the protection of individual freedom and autonomy. As a consequence, these restrictions are typically based on individual assessment of risk and are subject to court oversight.<sup>180</sup> However, most preventive constraints concern both security and individual liberty and autonomy, showing features of both types of constraints.

The first type of constraints treats autonomy as a capacity that should be respected, while the second treats autonomy merely as one more virtue to balance with security.<sup>181</sup> As discussed in more detail in section 6.3, approaching autonomy this way may be inconsistent with respect for autonomy. Therefore, I agree with the retributivists in relying on the first type of constraints.

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<sup>180</sup> See, for example, the Dutch Act on Compulsory Admission to Psychiatric Hospitals (BOPZ).

<sup>181</sup> See Kamm 1992, 382-383.

## 6.2.1 Preventive Sanctions against Supposed Terrorists

Travel bans are a form of preventive constraint to which blacklisted persons may be subjected. They ban the ability to enter a particular country or prevent a certain individual from transiting through or entering any other country. Thus, a travel ban requires that states not admit the targeted persons into their territory. As a consequence, the targeted person is usually what I have termed ‘exprisoned’ and only free to move within the borders of her ‘exprisonment.’

Asset freezes are another form of preventive constraint to which blacklisted persons may be subject. This is a prioritized method in the fight against terrorism by the EU because, like travel bans, asset freezes are deemed to be less violent than killing, imprisoning, or waging war.<sup>182</sup> Hence, the EU has been active in freezing the assets of supposed terrorists. The Third Money Laundering Directive, under which the EU tries to prevent terrorism by requiring banks to investigate and report the usage of cash in excess, begins from the premise that tracking the financing of terrorism can have a preventive effect.<sup>183</sup> The goal of these constraints is to cut off money flows to supposed terrorists to enable preventive intervention. Designed to protect against future acts and to pursue those responsible for acts already occurring, these constraints look forward instead of backward to criminal acts. Thus, the timeframe in which these sanctions can be applied is broadened.

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<sup>182</sup> See, e.g., Dworkin 2009. More violent forms of countering terrorism include, for example, targeted killings.

<sup>183</sup> Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing. Accessed: January 2, 2013. Eur-lex.europa.eu.

What is at issue when applying travel bans and asset freezes? The first case I choose, describes an exceptional situation, illustrating how such measures can affect a person's liberty. Youssef Nada was placed on the UN Security Council 1267 terror list by the United States without disclosure of evidence of his guilt.<sup>184</sup> The procedure of listing does not require publishing details of the reasons that led to a blacklisting. State parties to the UN nominate entities or persons based on intelligence reports, and the person or entity will be blacklisted if no state sitting on the UN Sanctions Committee challenges the nomination.<sup>185</sup> The sanctions by the UN Security Council that followed the blacklisting of Nada prevented him from leaving the 1.6 square kilometer town of Campione d'Italia, an Italian exclave within Swiss territory. Because the Security Council sanctions required states to prevent Nada from crossing borders, since he could not enter Switzerland, he was unable to travel to any other part of Italy either. In this case, the prohibition on crossing borders led to a situation where the targeted person was unable to travel at all—he was unable to receive health care and to maintain intimate relationships, it affected his employment, and he was prevented from worshipping at a mosque. The judgment of the European Court of Human Rights (ECtHR) of September 12, 2012 set out Nada's rights under the current legal framework. In short, the ECtHR found that Switzerland could have done more to alleviate the applicant's situation within the scope of the relevant United Nation Security Council (UNSC) resolutions. However, regarding

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<sup>184</sup> United Nations Security Council Resolution S-RES-1267. 1999.

<sup>185</sup> Security Council Committee Pursuant to resolutions 1267 (1999) and 1989 (2011) Concerning Al-Qaida and Associated Individuals and Entities. April 15, 2013. Guidelines of the Committee for the Conduct of its Work. Accessed: February 18, 2014. [http://www.un.org/sc/committees/1267/pdf/1267\\_guidelines.pdf](http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf); Cameron 2003, 166, 168.

his right to liberty, the ECtHR found that the applicant's restriction on leaving the 1.6 square kilometer of Campione d'Italia did not constitute a deprivation of the right to liberty under Article 5 of the European Convention on Human Rights (ECHR). The ECtHR was of this opinion because the applicant was not prevented from freely living and moving within Campione d'Italia.<sup>186</sup>

Blacklisting and subsequently banning the target from travelling is typically less controversial than Nada's case, but travel bans always deprive targeted persons of freedom of movement and often without accusing the target of criminal acts. The aim of targeting individuals is to protect security interests by coercing subjects into changing their behavior to preserve international peace and security.<sup>187</sup> Thus, the aim of travel bans is not to pursue those responsible for acts that have already occurred but to enable preventive intervention against future acts of blacklisted individuals by reducing access to international contacts for these persons.

Moreover, Nada's liberty was affected because his assets were frozen. His situation can be best described in his own words:

My children, my wife, they give me food. Money I don't have, food I have, they give me food. That is all. But money, I don't have any money.<sup>188</sup>

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<sup>186</sup> Youssef Moustafa Nada versus Switzerland. Appl. No. 10593/08. European Court of Human Rights. Judgment. Grand Chamber. September 12, 2012.

<sup>187</sup> Basic Principles on the Use of Restrictive Measures (Sanctions), Council of the European Union. June 7, 2004. Accessed: December 3, 2012. <http://register.consilium.europa.eu/pdf/en/04/st10/st10198-re01.en04.pdf>.

<sup>188</sup> See, interview with Nada by Hosenball and Isikoff, 19 November 2006 (cited in De Goede 2012, 161).

Nada was subjected to full funds freezing. He is a wealthy businessperson but did not have access to his money. His family was not allowed to give him any money, only food. Subjected to full funds freezing actions, Nada could not receive social security, buy his own groceries, or engage in financial transactions. The freezing of his assets cumulated with a ban on traveling, preventing him from living a normal life by freely engaging in the society in which he lived. However, the ECtHR did not seem to consider asset freezes and travel bans as deprivations of liberty similar to imprisonment.<sup>189</sup>

A second example sheds light on the procedural problems regarding blacklisting and subjecting listed individuals to liberty-depriving methods, such as asset freezes and travel bans. Yassin Abdullah Kadi was blacklisted first in the United States and then by the UN and the EU. What exactly he was accused of, and the evidence against him was classified information. At that time, the UN Security Council Sanctions Committee did not have a procedure for targeted persons to apply for removal from the list or to receive information about their cases. Kadi turned to the Court of First Instance to deny his involvement with terrorism and argue that his human rights were violated.<sup>190</sup> The Court of First Instance rejected Kadi's plea and upheld the legitimacy of the sanctions. Next, the ECJ overruled the Court of First Instance and Kadi won the right to be notified of his listing and to be provided with a statement of reasons for his listing.<sup>191</sup> However,

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<sup>189</sup> See, Youssef Moustafa Nada versus Switzerland. Appl. No. 10593/08. European Court of Human Rights. Judgment. Grand Chamber. September 12, 2012.

<sup>190</sup> See, Yassin Abdullah Kadi versus Council of the European Union and Commission of European Communities. Case T-315/01. Court of First Instance. September 21, 2005.

<sup>191</sup> International Foundation versus Council of the EU & Commission of the European Communities, Kadi and Al Barakaat, European Court of Justice, T-315/01.

neither the EU courts nor the targeted individual was provided with the necessary information to examine the evidence against Kadi and to review whether or not the allegation was well founded.<sup>192</sup>

The third case chronicles the duration of the measures listed individuals are subjected to: the case of the *Hofstadgroep*—a group of Dutch individuals affiliated with Mouhammed Bouyeri, the murderer of the Dutch filmmaker Theo van Gogh. This is another example of a group of individuals who are blacklisted and subject to asset freezing. One of the targeted persons contested his blacklisting at the ECJ on the grounds that his presumption of innocence was violated. According to the targeted person, definitive conviction was lacking. However, the ECJ's judgment held that blacklisting does not violate the presumption of innocence because it is a temporary measure that does not require a conviction and does not lead to imprisonment.<sup>193</sup> This is contestable because, as I argue in this chapter, some constraints that follow blacklisting similarly infringe on leading a free and autonomous life as actual imprisonment. Moreover, the temporary nature is dubious, as some assets are frozen for decades and, often, regular assessments are lacking.<sup>194</sup>

Blacklisted individuals are usually not accused of criminal acts, nor can they look forward to a criminal trial in which their rights are respected. Their lives, however, can be controlled for a long time by, for example, the freezing of their assets by taking the security interests of society over individual liberty and autonomy. Therefore, such constraints bring forth concerns

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<sup>192</sup> Eckes 2009, Chapters 6, 7.

<sup>193</sup> Mohamed el Morabit versus Council of the European Union. T-37/07 and T-323/07. European Court of Justice. Second Chamber Judgment of the Court of First Instance. September 2, 2009.

<sup>194</sup> Marieke de Goede analyses this case, arguing that asset freezes are often non-temporary. See De Goede 2012, 157.

regarding the rights of the targeted person—discussed in more detail in the next section.

## 6.3 The Impact on Individual Liberty and Autonomy

Often, constraints that control without the use of physical imprisonment are seen as acceptable alternatives. However, such constraints may severely restrict individual liberty. Moreover, the preventive aspect of these measures implies that constraints may be imposed on a person *before* she has even committed a criminal act.

In this section, I address the dangers associated with preventive constraints that do not physically lock the subject up. I focus both on the liberty interests on which such constraints impinge, and the dangers of preventive measures in general. Thus, the effects discussed here are twofold: first, I discuss the constraining effects that control a target without detention because, as I argue, even when a person is not literally in prison, her liberty can be restricted in a similar way as imprisonment. Second, I show that the preventive aspect of these kinds of constraints may be disrespectful to the target's autonomy.

Before going into the issue of how and to what extent preventive constraints like these infringe on the person's liberty interests, it is useful to reflect on why deprivations of liberty demand justification. The answer has implications for the topic discussed in this chapter. In criminal law, it is assumed that people are and should remain *free* in principle. This presumption, that we are all free, is part of the traditional setting within which questions of a state's political authority to exercise power over its subjects have been asked. There exists a vast body of philosophical literature on the precise meaning of the terms "liberty" and

“freedom”. In this chapter, liberty (or freedom) is understood as civil liberty: liberty within a community in which people are subject to laws.<sup>195</sup> Liberty in this sense can be distinguished from autonomy understood as self-government. A prisoner is constrained from moving freely, yet she might be imprisoned because she governed herself toward committing a criminal act. Even in prison her autonomy still might be respected while being constrained in her actions. Thus, the assumption is that we should remain able to act without constraint and that these actions should be autonomously made unless sufficient justification is given to limit these abilities.

Punishment by its nature involves those who carry out punitive acts as having domination over those being punished. There is always the risk that those who have a right to punish abuse their power, for instance, by imposing disproportionate or draconian punishments. To distinguish legitimate punishments from such abuses of power, one must rely on how punishments are connected to the justification of the punishment.<sup>196</sup> There is a large body of literature devoted to the issue of justification for limiting freedom, and I have set out some of the arguments above. Procedural rights function as a check on this justification for the deprivation of freedom.

The constraints discussed in this chapter affect the liberty, understood as the absence of constraints on action (negative freedom), of the targeted person. The preventive aspect affects the ability to control one’s behavior. The next two sections will discuss both interests.

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<sup>195</sup> See, for an overview of the various views on autonomy, Roessler 2002, 162-166.

<sup>196</sup> See, on the justification for punishment Quinn 1985, 327-373.



### 6.3.1 Individual Liberty

Human rights law identifies rights to liberty [Article 5 ECHR], to respect for private and family life (Article 8 ECHR), to liberty of movement (Article 2 ECHR), to the peaceful enjoyment of possessions (Article 1 ECHR, Protocol 1), and to freedom to manifest one's religion (Article 9 ECHR) as rights that should be protected.<sup>197</sup> What these rights have in common is that they protect negative freedom—freedom from interference by others.<sup>198</sup> Constraints that do not physically place the target in prison can endanger the negative freedom of the targeted person. In this section, liberty refers to the particular freedoms protected by European and international human rights standards.

With respect to supposed terrorists in particular, preventive constraints like travel bans and asset freezes are often seen as acceptable. The argument in favor of preventive constraints with respect to these actors asserts that those who cannot be prosecuted for crimes but are likely to commit terrorist actions should not be able to carry on certain actions. Therefore, detaining and policing them may seem justified. However, although it occurs outside a prison cell, policing can amount to something similar to imprisonment.

Imprisonment is the exemplary deprivation of liberty. Imprisonment infringes the targeted person's individual liberty. This is the rationale behind granting subjects procedural rights under most criminal law systems, such as the right to be heard. Procedural rights enable checking the legitimacy of constraints to

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<sup>197</sup> This list holds parallels to the list of protected rights under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. However, some of the corresponding articles address positive liberty interests rather than negative liberty interests.

<sup>198</sup> Some of these rights protect positive freedom as well, but, here, I focus on negative freedom.

limit the abuse of power. However, making use of a prison cell is not required to deprive a person of her liberty. Alternative constraints can deprive the target of her liberty in a similar manner.

I claim that—with the current techniques of controlling individuals without detention—individuals can effectively be detained outside prison. In other words, they can be ‘exprisoned.’ Even without using a prison cell, individuals can be restricted to such extent that they can be considered prisoners. The methods of liberty deprivation vary from actual imprisonment to forbidding a person from travelling outside her country of residence. In prison, the target cannot move freely and is usually unable to keep her job, maintain intimate relationships, and start new relationships. In these ways, imprisonment infringes on the individual liberty of the targeted person. The limited freedom of blacklisted persons in the context of counterterrorism policies is similar to the lives of prisoners because asset freezes and travel bans prevent them from freely engaging in society. Individuals subject to these constraints may live outside a prison cell, yet they are in effect prohibited from engaging in society and, thus, they do not live normal lives.

At times, the impact on liberty by constraints that do not literally incarcerate is only partial. A person can be like a prisoner in at least some areas of life, such as when someone is free for certain matters but restricted in visiting family and friends. The negative impact on liberty of individuals subjected to such restraints may not be as severe as imprisonment of equal duration, but in some cases, ‘exprisonment’ can be equivalent to imprisonment. Imprisonment is comprehensive if it affects an expansive variety of uses of individual liberty, and partial if it prohibits some or many uses of individual liberty. Forms of detention other than actual imprisonment are usually less comprehensive, such as a ban on travelling outside a large country of residence. However, ‘exprisonment’ can also entail more or the same constraints on individual freedom, such as a ban on

travelling outside a small territory and the freezing of all a person's assets. I briefly illustrate different degrees of 'exprisonment.'

The aforementioned case of *Nada* is an exemplary illustration of a travel ban that limited the freedom of the targeted person in a comprehensive way. Although the ECtHR did not acknowledge that the applicant's confinement to the 1.6 square kilometer of Campione d'Italia constituted a deprivation of liberty under Article 5 ECHR, I argue that prohibiting a person from traveling outside such a small territory is comparable with imprisonment because it deprives that targeted person of the ability to engage in society and infringes on individual liberty. This does not mean that every travel ban is similar to actual imprisonment. In this case, the travel ban was a comprehensive constraint. *Nada's* case amounted to a severe form of 'exprisonment.' It shows us that liberty can be infringed without making use of a prison cell.

Liberty deprivation through a travel ban can also be less comprehensive. Forbidding me, as a citizen of the Netherlands, to travel outside my country of residence does not restrict my ability to visit a hospital, and my ability to start and maintain intimate relationships is less restricted than, for example, in the case of *Nada*. However, a ban on traveling outside my country of residence prevents me from success in academia, prohibits me from presenting at conferences outside my country, and inhibits my becoming a postdoctoral researcher at a foreign university. A travel ban would restrict my individual liberty, but not to the same degree that *Nada's* individual liberty is restricted. This means that travel bans can affect a broad range of functioning of individuals or prohibit only some components of individual liberty. The scope of the deprivation depends on the method—in this case a travel ban—and on the influence of the method on the life of the targeted person. The decision of the ECtHR in the case of *Nada* is not in line with this reasoning. The ECtHR restricts the status of

prisoners under Article 5 ECHR and the corresponding rights to those who are detained.

As with travel bans, asset freezes can affect individual liberty to various degrees. If all assets are frozen, the target is subject to a comprehensive form of state control and prohibited engaging in the society she lives. The freezing of all of an individual's assets is a far-reaching form of liberty deprivation, but one can also be subject to a freezing of some assets. Moreover, single measures may result in less severe forms of liberty deprivation than accumulated ones, e.g. imposing an asset freeze *and* travel ban on a person results in a more far-reaching form of liberty deprivation than freezing of assets on its own. Less severe forms of liberty deprivations should be subjected to appropriate protections as well—as argued in section 4 of this chapter.

In short, Deprivation of liberty can have various forms and degrees, whether it takes place in prison, on the street, or in a house. Individuals who are controlled without being locked up may be physically free; yet they are often deprived of their liberty to a significant extent because they cannot live a normal life.

### 6.3.2 Individual Autonomy

A concomitant premise of the presumption of innocence is that a defendant should be tried for what she did and not for who she is or what she has not yet done. This safeguard prevents the state from disrespecting individual autonomy. Before discussing safeguards, I would like to note that the person subjected to preventive restraints is not presumed to be guilty; the ground for these restrictions is that she might become guilty. Therefore, the concept of prevention seems to be conceptually distinct from the concept of punishment. However, both practices raise the question of when a state may justifiably interfere with individual liberty, and both practices can “result in significant injustices—the punishment of the innocent or the detention of someone who

would not harm others".<sup>199</sup> A broader understanding of the presumption of innocence protects individuals against these injustices.<sup>200</sup> The imposition of preventive constraints is contradictory to this protection because preventive constraints do not address the past, but instead, the future. This reallocates focus from conduct to the features of the targeted person.<sup>201</sup>

Preventive constraints that follow the type of constraints mainly protecting security interests are usually based on a finding of certain characteristics assumed to make the targeted individual more dangerous than others.<sup>202</sup> Often this comes with restrictions that make targeted individuals subject to restrictions imposed to control their daily life and to prevent them from doing what others can do without restraints.

Restricting the freedom of an individual preventively is problematic with regard to the autonomy of the targeted individual. Such restrictions are based on risk assessments that may result in predictive mistakes. Moreover, once listed and subject to a preventive constraint, the target is subject to a constraint based on her characteristics as a person rather than in her criminal conduct. Even without any prediction mistakes, preventive constraint makes a successful defense against the

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<sup>199</sup> Ferzan 2012, 145.

<sup>200</sup> This broader conception is defended by, among other scholars, Antony Duff, who argues in favor of a plural understanding of the presumptions of innocence. See Duff 2013b; I applied a broad conception of the presumption of innocence in Noorda 2010.

<sup>201</sup> I do not argue that all constraints imposed on individuals operate as such. Sanctioning conduct by imposing criminal penalties does not necessarily involve sanctioning the fact that someone meets certain personal features.

<sup>202</sup> An alternative approach argues that conduct is the basis for blacklisting and subsequently restraining individuals but that the conduct cannot be proved in court because the evidence is legally impermissible. However, this too violates the rights of targeted individuals.

prediction that the targeted person—based on her characteristics—will commit a crime virtually impossible. The discourse of prevention rejects the “moral opportunity for the would-be offender.”<sup>203</sup>

Therefore, I argue that prevention shows a lack of respect for individual autonomy.

In some cases, such as severe mental illness, individuals are not capable of making autonomous decisions. In other cases, such as combatants in wartime, individuals are detained because policing is not sufficient and combatants are too dangerous to be released during war. Thus, although combatants might not be individually responsible for their actions during hostilities, they can be detained until ceasefire.<sup>204</sup> However, in general, preventive constraints are disrespectful of the autonomy of the targeted person because these constraints presume that she might not make the right choice. Based on the presumption that individuals have a choice to conform their conduct to the law, autonomy—which is the ability to control one’s behavior—can be disrespected by imposing preventive measures. States should respect individual autonomy if the individual is at least autonomous to a certain degree.

In short, preventive constraints that control without making use of the prison cell may impinge on liberty interests just as preventive imprisonment—restricting aspects of a free life and disrespecting the autonomy of the targeted person—does. However, under certain conditions, (preventive) ‘exprisonments’ are permissible as it is sometimes permissible to detain or imprison persons (preventively). Such ‘exprisonments’ are

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<sup>203</sup> Smilansky 1994, 52 (addressing preventive punishments).

<sup>204</sup> The situation of war requires a different set of principles, as discussed in Chapter 1.

permissible if there are effective procedural protections that account for the individual's interests.

## 6.4 Protections for Supposed Terrorists Subjected to Preventive 'Exprisonment'

Procedural protections function to check the legitimization of interventions in the free and autonomous lives of individuals. Likewise, such protections should control the legitimization of preventive interventions. This would enable governments to address the pressing question of security without disrespecting individual liberty and autonomy. In this section, I describe some of these protections as per degree of preventive 'exprisonment.'

The most comprehensive forms of preventive constraints lead to an almost complete deprivation of individual freedom and autonomy that should be seen as similar to imprisonment and dealt with as a form of preventive 'exprisonment.' Some preventive constraints may lie outside the crime paradigm, but it is incorrect to maintain that comprehensive forms of non-temporary deprivation of liberty should not be subject to the same constraints as imprisonment. Comprehensive forms of 'exprisonment,' based on the notion that the individual is likely to commit a wrong in the future, should be prohibited as it is also normally prohibited to imprison individuals on the exclusive basis of a future risk assessment. In contrast, such constraints could be permitted if the subjects had committed criminal offenses. In cases of comprehensive constraints, it has to be proved that the subjects committed criminal offenses, as in cases of, imprisonment of individuals. The crime of planning a terrorist act as formulated in many domestic criminal law systems could offer guidance on this matter.

Pre-trial detention is permitted under most criminal law systems, but the debate among criminal law scholars indicates that this practice is problematic because defending pre-trial detention in terms of balancing individual interests against public security undermines individual autonomy. Whether pre-trial detentions are justified on retributive grounds is beyond the scope of this thesis.<sup>205</sup> Here, I argue that if pre-trial detention is justified under certain conditions, pre-trial detentions outside the prison cell should be regulated by similar standards. This would imply that short-term ‘exprisonments’ could be applied as a last resort, but not for longer than investigations reasonably require. In addition, such ‘exprisonments’ should be subject to periodic reviews. At some point, a criminal charge should be brought or the constraints should be lifted.<sup>206</sup> Thus, these constraints should be subject to court oversight. Moreover, the extent to which preventions amounting to ‘exprisonment’ are permissible, such constraints should be based on individual assessments of risk in order to rule-out group constraints imposed on categories of persons.

On my account, the all-inclusive constraints in engaging with financial transactions should be prohibited or subject to appropriate limitations as such constraints comprehensively restrain the free and autonomous life of an individual. Thus, these constraints should be prohibited unless proven that the subjects committed criminal offenses. Moreover, analogous to provisions in most criminal law systems, such a constraint might be justifiably imposed temporarily to prevent the targeted person from financing crimes during investigations. However, when the investigations have come to an end, the target should be convicted

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<sup>205</sup> This issue is discussed in, among other works, Duff 2013a; Duff 2013b; Contra, Weigend 2013.

<sup>206</sup> Another time frame may be needed for investigations than for criminal procedures in which the sentence is imprisonment.



and sentenced or acquitted. In addition, as is the case with seizure in most jurisdictions, these constraints should not confiscate what is necessary for a person to live, such as food and shelter.<sup>207</sup> Assessments should check whether or not the constraint is still required. Also, because of the severity of such constraints, these assessments should take place regularly.

Preventive constraints that are less comprehensive and not equivalent to imprisonment should be subject to limits as well because of the risk of error and the fact that these future-oriented constraints do not respect the person's autonomy. With respect to travel bans that do not completely deprive the target of her liberty, when there is a basis for concluding the individual who meets the criteria poses a threat to security, the question of whether interferences are proportionate to the security interests has to be addressed. As with all these constraints, less interfering alternatives should be exhausted first. Depending on the aim of the constraint, less interfering alternatives to travel bans include, for example, luggage searches.

Regarding relatively minor constraints such as, for example, luggage searches, justifications in terms of balancing interests should be permitted because minor constraints do not interfere with the individual's capability to lead a free and autonomous life. Thus, I do not argue for giving individuals the opportunity to challenge every temporary constraint. If, however, an individual was subjected to a minor constraint on a daily basis, and/or the impact of the constraint was discriminatory, I would like to propose that the targeted person should be given an opportunity to challenge the application.

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<sup>207</sup> Dutch criminal law allows seizure but does not allow for the confiscation of what is essential for a person to live her life. Netherlands Judicial Code [Gerechtelijk Wetboek], Article 1408.

As for the procedure, I argue that the fact-finding stage should be subject to protections, including post-targeting notice, transparency regarding the criteria for being targeted, an opportunity to challenge the application of the constraint if non-temporarily imposed, and regular assessments of individual risk to guarantee that the constraint remains proportionate to the security need.

In sum, I propose that the most comprehensive constraints that lead to comprehensive limits on the free and autonomous life of targeted persons require an expansive check on the legitimization of the constraint. The launch pad for these constraints should be individual liberty and autonomy. Less comprehensive constraints require fewer checks on their legitimization and relatively minor constraints may take the security interests of society as their starting point. Such minor constraints do not interfere with the targeted person's ability to live a normal life.

In this last section, I recommended specific limitations to preventive 'exprisonment.' The foundation of my proposal shows that some forms of preventive constraints impose such far-reaching restrictions on living a normal life that they should be dealt with in the way we deal with physical imprisonment. Protections similar to those applied to pre-trial detention under most criminal law systems should regulate such constraints, and less comprehensive preventions should be considered as similar to their counterparts under their criminal law system.

## 6.5 Conclusion

In this chapter, I presented protections for individuals that stand at the crossroads of combatant and civilian by mainly focusing on preventive constraints imposed on individuals outside the prison

cell. Individuals suspected of being a security threat who do not meet the requirements of combatancy are often subjected to preventive constraints, such as asset freezes and travel bans. I have addressed these constraints and argued that the effects on the lives of targeted individuals call for limitations on the use of such constraints. As I argued in this chapter, some of such constraints should be treated as similar to actual imprisonment.

I examined travel bans and asset freezes as illustrative of preventive constraints imposed on civilian individuals at the interface between war and peace. I explained two types of constraints: one taking individual liberty and autonomy as starting points; the other based on the security interests of society. Based on this analytical distinction, I illustrated how preventive constraints may disrespect the targets' autonomy and argued that some constraints are so comprehensive that they should be considered akin to imprisonment. Therefore, I proposed protections on use of constraints that lead to (partial) 'exprisonment'.

My proposal does not give the state *carte blanche* when there is a threat to security, and it does not unnecessarily obstruct the state in acting to protect vital security interests. As the state is not allowed to lock people up without a proper trial, so too should preventive constraints, such as travel bans and asset freezes, be subject to protections. Banning preventive constraints in general disregards the value of preventing threats to security within society. Pre-trial detention is permitted under most criminal law systems if meeting certain conditions. I argue that preventive 'exprisonment' should be allowed if regulated by similar standards. Additionally, my proposal aims to set limits to 'exprisonment,' instead of ruling out the use of such constraints. It does not prevent the state from dealing with individuals that may pose a risk to security. Applying the proposed requirements may slow down the process of responding to security threats, but they are crucial in guaranteeing that deprivations of liberty based on

an assessment of risk do not illegitimately infringe on the free lives of individuals.

In the next chapter, I illustrate my argument with an actual example of a conflict with a non-state actor: the Islamic State (IS).