

Prosecuting (Potential) Foreign Fighters: Legislative and Practical Challenges

Authors: Christophe Paulussen, Kate Pitcher

This research paper is the first publication based partly on the foreign fighter cases incorporated and analysed in the International Crimes Database (ICD). This is a comprehensive and free database on international crimes (broadly defined), which is maintained by the T.M.C. Asser Instituut and supported by, among others, the International Centre for Counter-Terrorism – The Hague (ICCT). The aim of this research paper is to provide a critical assessment of both the underlying legal frameworks and the concrete prosecutions of (potential) foreign fighters at the national level. To that end, the supranational legal instruments will be analysed first (Section 2), starting with the international level (Subsection 2.1) and the regional level (Subsection 2.2). After that, this paper will examine how the national level has dealt and is still dealing with the issue of (potential) foreign fighters (Section 3), both in terms of legal bases and prosecutorial approaches. After that, and a brief introduction (Subsection 4.1), two specific and major challenges pertaining to prosecutions will be addressed in Subsections 4.2 (the role of the prosecutor) and 4.3 (evidentiary issues). Subsequently, the authors will present two broader concerns in Subsection 4.4, related to the further move into the pre-crime space (4.4.1) and the issue of effectiveness (4.4.2). In the last section of the paper, Section 5, the authors will present their final observations and recommendations. Besides offering a number of concrete suggestions to (somewhat) address prosecutorial, and especially evidentiary, challenges, the main point they will make is now that international, regional and national legislators have adopted the (oftentimes troublesome) laws that enable the prosecution of (potential) foreign fighters, magistrates and especially prosecutors should have a great(er) role in assessing whether actual prosecution or adjudication is appropriate in a specific case.

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1. Introduction

This research paper is the first publication based partly on the foreign fighter cases incorporated and analysed in the International Crimes Database (ICD). This is a comprehensive and free database on international crimes (broadly defined), which is maintained by the T.M.C. Asser Instituut and supported by, among others, the International Centre for Counter-Terrorism – The Hague (ICCT).

The rationale behind uploading cases on (potential) foreign fighters, whether these persons are charged with terrorism-related crimes, war crimes or other crimes, and the production of publications like the present one, distilling the main observations stemming from the uploaded cases and other sources, is that the authors seek to clarify how legislators, prosecutors and judges are dealing with the phenomenon of foreign fighters, a topic that has caught the world by surprise and that has now been firmly on the radar for a few years.

It appears that international organisations and governments alike have been overwhelmed by the sheer number of these foreign fighters, which have been defined as “individuals, driven mainly by ideology, religion and/or kinship, who leave their country of origin or their country of habitual residence to join a party engaged in an armed conflict.”¹ As a result, authorities have been testing a variety of measures, in the hope of countering this phenomenon in the most comprehensive way possible.

A comprehensive approach obviously includes truly preventive measures, which aim to ensure that people have no desire to go to distant battlefields in the first place. Arguably, this is the long-term approach policy makers should invest in most, as these are the only ones targeting the underlying issues. Preventive measures may consist of counter-narratives, investments in community police officers, inter-religious dialogue and the like. However, even though prevention is often mentioned in countries’ counter-terrorism strategies, practice shows that repression is still dominant.² While policy makers should focus less on repression, as it only targets the symptoms of the disease and not the underlying causes, it is still of importance, especially in the short term.

One important method of repression for States is prosecution. For example, in the UK, it has been stated that “[c]onviction in court is the most effective way to stop terrorists”³ and in February 2017, the Netherlands Public Prosecution Service indicated that it would investigate and prosecute each and every known case of a Dutch person who travelled to Syria/Iraq to have a criminal file and a judgement ready if they return.⁴

¹ A. de Guttry, F. Capone and C. Paulussen, ‘Introduction’, in: A. de Guttry, F. Capone and C. Paulussen (eds.), *Foreign Fighters under International Law and Beyond*, T.M.C. Asser Press/Springer Verlag: The Hague 2016 (hereinafter: de Guttry et al.), p. 2.

² B. van Ginkel and E. Entenmann (eds.), ‘The Foreign Fighters Phenomenon in the European Union. Profiles, Threats & Policies’, *ICCT Research Paper*, April 2016, available at: <https://www.icct.nl/wp-content/uploads/2016/03/ICCT-Report-Foreign-Fighters-Phenomenon-in-the-EU-1-April-2016-including-AnnexesLinks.pdf>, pp. 6 and 65.

³ See ‘CONTEST. The United Kingdom’s Strategy for Countering Terrorism: Annual Report for 2015’, July 2016, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/539683/55469_Cm_9310_Web_Accessible_v0.11.pdf, p. 10.

⁴ See Public Prosecution Service, ‘OM pakt IS-terugkeerders met een missie aan’, 15 February 2017, available at: <https://www.om.nl/vaste-onderdelen/zoeken/@98010/pakt-terugkeerders/>. See also J. Pieters, ‘Prosecute Dutch

This research paper is a first assessment into how cases involving (potential) foreign fighters have been prosecuted and adjudicated at the national level. Not only the prosecutorial trends and (evidentiary) tactics and challenges are discussed, also the underlying legal frameworks will be analysed, stemming from both the national and supranational level. Moreover, individuals circling the group of (potential) foreign fighters, such as facilitators and recruiters, may be addressed.

While obviously very interesting as well, this specific paper will not examine cases involving Syrian/Iraqi nationals before foreign courts who have been prosecuted for alleged crimes committed in their own countries, as such persons cannot be qualified as foreign fighters under the definition presented above. Nonetheless, such cases do often involve the commission of international crimes⁵ and may thus find their way into the ICD. The paper will moreover focus on a *select* set of issues pertaining to prosecuting (potential) foreign fighters, including prosecutorial discretion and certain evidentiary issues. Of course, prosecutors are struggling with many more issues, such as the role of international humanitarian law and its interaction with regular criminal law,⁶ but this paper cannot be comprehensive in scope. Also, the main focus of this paper is on Western countries, as it is easier to find (original court) information about cases from these regions. Nonetheless, even in Western countries, such as Belgium and France, it sometimes remains hard to find judgments. The ICD team hopes that more decisions will become available, not only from Western countries but from countries around the globe, and therefore calls upon readers to send in interesting cases, so that summaries can be prepared and uploaded.⁷

In terms of methodology, the observations that can be found on the following pages were derived from the case analysis sheets that can be found on the ICD,⁸ as well as from secondary sources, including reports from relevant international organisations, and news articles.

As stated, the aim of this research paper is to provide a critical assessment of both the underlying legal frameworks and the concrete prosecutions of (potential) foreign fighters at the national level. To that end, the supranational legal instruments will be analysed first (Section 2), starting with the international level (Subsection 2.1) and the regional level (Subsection 2.2). After that, how the national level has dealt and is still dealing with the issue of (potential) foreign fighters will be examined (Section 3), both in terms of legal bases and prosecutorial approaches. After that, and a brief introduction (Subsection 4.1), two specific and major challenges pertaining to

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 jihadists still in Syria, Iraq: Public Prosecutor', *NL Times*, 16 February 2017, available at:

<http://nltimes.nl/2017/02/16/prosecute-dutch-jihadists-still-syria-iraq-public-prosecutor>.

⁵ See e.g. the Swedish cases of Syrian nationals Droubi, Sakhanh and Mohammed Abdullah, see

<http://www.internationalcrimesdatabase.org/Case/3296/Prosecutor-v-Mouhannad-Droubi/>; 'Swedish court hands life sentence to Syrian for war crimes', *The Local*, 16 February 2017, available at:

<http://www.thelocal.se/20170216/swedish-court-hands-life-sentence-to-syrian-for-war-crimes>; H. Habib and L.

Loveluck, 'A Syrian soldier has been sentenced for battlefield crimes. Why did it take so long?', *The Washington Post*,

1 October 2017, available at: https://www.washingtonpost.com/world/middle-east/a-syrian-soldier-has-been-sentenced-for-battlefield-crimes-why-did-it-take-so-long/2017/09/30/d4ab28d6-a362-11e7-8c37-e1d99ad6aa22_story.html?utm_term=.c0a311515fee and the German cases of Syrian nationals Ibrahim Al F. and

Suliman Al-S., see 'Ibrahim al F', *Trial International*, available at: <https://trialinternational.org/latest-post/ibrahim-al-f/>

and 'Suliman Al-S', *Trial International*, available at: <https://trialinternational.org/latest-post/suliman-al-s/>. See

generally: Human Rights Watch, "These are the Crimes we are Fleeing". Justice for Syria in Swedish and German

Courts', October 2017, available at: https://www.hrw.org/sites/default/files/report_pdf/ijsyria1017_web.pdf.

⁶ The next publication based on the ICD foreign fighters case law will look specifically at international humanitarian

law challenges, including the interaction between and blurring of regular criminal law and international

humanitarian law.

⁷ The ICD team can be contacted via: editors@internationalcrimesdatabase.org.

⁸ See <http://www.internationalcrimesdatabase.org/foreignfighters>.

prosecutions will be addressed in Subsections 4.2 (the role of the prosecutor) and 4.3 (evidentiary issues). Subsequently, the authors will present two broader concerns in Subsection 4.4, related to the further move into the pre-crime space (4.4.1) and the issue of effectiveness (4.4.2). In the last section of the paper, Section 5, the authors will present their final observations and recommendations. Besides offering a number of concrete suggestions to (somewhat) address prosecutorial, and especially evidentiary, challenges, the main point they will make is now that international, regional and national legislators have adopted the (oftentimes troublesome) laws that enable the prosecution of (potential) foreign fighters, magistrates and especially prosecutors should have a great(er) role in assessing whether actual prosecution or adjudication is appropriate *in this specific case*.

2. Supranational Legal Instruments

2.1. International Legal Instruments

Whereas not all foreign fighters (FFs) are foreign *terrorist* fighters (FTFs), the United Nations Security Council (UNSC) does not make use of the term FFs, but of the term FTFs. This shows that for the UN, the problem of FFs is mainly viewed from a counter-terrorism (CT) perspective. The very first reference to FTFs was made in UNSC Resolution 2170 of 15 August 2014,⁹ without defining them (or terrorism). The (legally binding) Resolution called upon all UN Member States “to take national measures to suppress the flow of foreign terrorist fighters [...] and bring [them] to justice”.¹⁰

The most important resolution on FTFs is without a doubt (the also legally binding) UNSC Resolution 2178 of 24 September 2014,¹¹ which *does* define FTFs (although – again – not terrorism as such). According to this Resolution, FTFs are “individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict”.¹² As noted by Krähenmann, the intent aspect of the definition of a FTF is problematic as one has to prove that a person is travelling abroad to join an armed group with the purpose of committing terrorist attacks.¹³ “Instead, the decisive criterion seems to be which groups foreign fighters are joining or intending to join: joining or attempting to join groups that are labelled as ‘terrorist’ becomes an offence in itself.”¹⁴ The Resolution requires in its paragraph 6 that States criminalise in their national laws and regulations, as serious criminal offences, the following conduct relevant to FTFs, namely (attempted) travel, fundraising and the organisation (or other facilitation, including recruitment) of the travel of FTFs.¹⁵ This resolution arguably provides the impetus and international legal basis for how States react to FTFs and focuses on tackling the early stages of possible FTF activity. For example, it requires that

⁹ UNSC Res. 2170 of 15 August 2014, available at:

[http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2170\(2014\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2170(2014)).

¹⁰ UNSC Res. 2170, para. 8.

¹¹ UNSC Res. 2178 of 24 September 2014, available at:

[http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2178\(2014\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2178(2014)).

¹² UNSC Res. 2178, Preamble.

¹³ S. Krähenmann, ‘The Obligations under International Law of the Foreign Fighter’s State of Nationality or Habitual Residence, State of Transit and State of Destination’, in: de Guttry et al., p. 239.

¹⁴ *Ibid.*

¹⁵ UNSC Res. 2178, para. 6.

States “prevent and suppress the recruiting, organizing, transporting or equipping of” FTFs.¹⁶

The Resolution received criticism from commentators concerning, among other things, its failure to define terrorism, its consequences for human rights and the rule of law, its legislative character, its lack of an oversight mechanism, its blurring of the lines between terrorism and international humanitarian law, and its general lack of clarity in drafting.¹⁷ The UN High Commissioner for Human Rights expressed similar criticisms.¹⁸ Some of these points will also come back later in this paper.

2.2. Regional Legal Instruments

2.2.1. Council of Europe Convention on the Prevention of Terrorism – Additional Protocol (‘Riga Protocol’)

The Additional (‘Riga’) Protocol¹⁹ to the Council of Europe (CoE) Convention on the Prevention of Terrorism²⁰ was adopted by the CoE Committee of Ministers at its 125th Session in Brussels on 19 May 2015 and was opened for signing on 22 October 2015.²¹ On 1 July 2017, it entered into force. It is the only supranational instrument, besides the already-discussed UNSC Resolution 2178, that the European Parliament explicitly referred to in its press release when approving the text of the new EU Directive on Combating Terrorism (see Subsection 2.2.2).²²

¹⁶ *Ibid.*, para. 5.

¹⁷ See, e.g.: M. Scheinin, ‘Back to post-9/11 panic? Security Council resolution on foreign terrorist fighters’, *Just Security*, 23 September 2014, available at: <https://www.justsecurity.org/15407/post-911-panic-security-council-resolution-foreign-terrorist-fighters-scheinin/>; S. Krähenmann, ‘The Obligations under International Law of the Foreign Fighter’s State of Nationality or Habitual Residence, State of Transit and State of Destination’, in: de Guttry et al. pp. 233-241; A. de Guttry, ‘The Role Played by the UN in Countering the Phenomenon of Foreign Terrorist Fighters’, in: de Guttry et al., pp. 259-280; A. Conte, ‘States’ Prevention and Responses to the Phenomenon of Foreign Fighters against the Backdrop of International Human Rights Law Obligations’, in: de Guttry et al., pp. 283-298; B. van Ginkel, ‘The New Security Council Resolution 2178 on Foreign Terrorist Fighters: A Missed Opportunity for a Holistic Approach’, *ICCT Perspective*, 4 November 2014, available at: <https://icct.nl/publication/the-new-security-council-resolution-2178-on-foreign-terrorist-fighters-a-missed-opportunity-for-a-holistic-approach/>; J. Iverson, ‘Guest Post: What is happening here? Notes of caution on the UNSC resolution on facilitating travel of “foreign terrorist fighters”’, *Spreading the Jam*, 29 September 2014, available at: <https://dovjacobs.com/2014/09/29/guest-post-what-is-happening-here-notes-of-caution-on-the-uns-council-resolution-on-facilitating-travel-of-foreign-terrorist-fighters/>; K. Ambos, ‘Our terrorists, your terrorists? The United Nations Security Council urges states to combat “foreign terrorist fighters”, but does not define “terrorism”’, *EJIL: Talk!*, 2 October 2014, available at: <http://www.ejiltalk.org/our-terrorists-your-terrorists-the-united-nations-security-council-urges-states-to-combat-foreign-terrorist-fighters-but-does-not-define-terrorism/>; M. Milanovic, ‘UN Security Council Adopts Resolution 2178 on Foreign Terrorist Fighters’, *EJIL: Talk!*, 24 September 2014, available at: <http://www.ejiltalk.org/un-security-council-adopts-resolution-2178-on-foreign-terrorist-fighters/> and GCCS, HSC and ICCT, ‘Addressing the Foreign Terrorist Fighters Phenomenon from a European Union Perspective. UN Security Council Resolution 2178, Legal Issues, and Challenges and Opportunities for EU Foreign Security and Development Policy’, December 2014, available at: https://www.icct.nl/download/file/Dec2014_EU-FTFS_GCCS_HSC_ICCT.pdf.

¹⁸ See Human Rights Council, ‘Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism’, UN Doc. A/HRC/28/28, 19 December 2014, available at: http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Documents/A_HRC_28_28_ENG.doc, paras. 46-47.

¹⁹ Council of Europe, Treaty Office, Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, Riga, 22 October 2015, CETS No. 217, available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/217> (hereinafter: Additional Protocol).

²⁰ Council of Europe, Treaty Office, Council of Europe Convention on the Prevention of Terrorism, Warsaw, 16 May 2005, CETS No. 196, available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/196>.

²¹ ‘The “Riga Protocol” signed during high level conference on foreign terrorist fighters’, *Ministry of Foreign Affairs of the Republic of Latvia*, 22 October 2015, available at: <http://www.mfa.gov.lv/en/news/latest-news/48356-the-riga-protocol-signed-during-high-level-conference-on-foreign-terrorist-fighters>.

²² See European Parliament, ‘Preventing terrorism: clampdown on foreign fighters and lone wolves’, Press release, 16 February 2017, available at: <http://www.europarl.europa.eu/news/en/news-room/20170210IPR61803/preventing-terrorism-clampdown-on-foreign-fighters-and-lone-wolves>: “The new directive on combatting terrorism will replace the 2002 Council framework decision (2002/475/JHA), updated in 2008, to keep pace with new developments and

The Additional Protocol expresses grave concern about FTFs, which it defines as “persons travelling abroad for the purpose of committing, contributing to or participating in terrorist offences, or the providing or receiving of training for terrorism in the territory of another State”,²³ while having regard to UNSC Resolution 2178 (even though the UNSC definition of FTFs differs from that of the CoE). The Additional Protocol itself does not define terrorism, but it refers, via its Article 9, to the CoE Convention on the Prevention of Terrorism. This Convention explains, in its Article 1, paragraph 1 that “[f]or the purposes of this Convention, “terrorist offence” means any of the offences within the scope of and as defined in one of the treaties listed in the Appendix”, with the Appendix²⁴ presenting eleven international treaties and protocols, including the International Convention Against the Taking of Hostages and the International Convention for the Suppression of Terrorist Bombings. Comparable to UNSC Resolution 2178, the Additional Protocol is very much focused on trying to prevent terrorist acts²⁵ and for that purpose, criminalises participating in an association or group for the purpose of terrorism (Article 2 of the Additional Protocol),²⁶ receiving training for terrorism (Article 3),²⁷ travelling abroad for the purpose of terrorism,²⁸ including attempting to do so (Article 4), funding travelling abroad for the purpose of terrorism (Article 5)²⁹ and finally organising or otherwise facilitating travelling abroad for the purpose of terrorism (Article 6).³⁰ Importantly, the Additional Protocol requires States to ensure that the implementation of the Additional Protocol, including the establishment, implementation and application of the criminalisation under the just-mentioned offences (and this is in contrast to UNSC Resolution 2178),³¹ must be carried

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 emerging threats such as foreign fighters and lone wolves, and also ensure that member states comply with international obligations and standards such as UN Security Council Resolution 2178 and the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism.”

²³ Additional Protocol, Preamble. See also the Additional Protocol’s Explanatory Rapport (available at: <https://rm.coe.int/168047c5ec>), para. 15.

²⁴ Available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168008371b>.

²⁵ See Art. 1 of the Additional Protocol: “The purpose of this Protocol is to supplement the provisions of the Council of Europe Convention on the Prevention of Terrorism [...] as regards the criminalisation of the acts described in Articles 2 to 6 of this Protocol, thereby enhancing the efforts of Parties in preventing terrorism and its negative effects on the full enjoyment of human rights”.

²⁶ Which means “to participate in the activities of an association or group for the purpose of committing or contributing to the commission of one or more terrorist offences by the association or the group.” (Art. 2, para. 1 of the Additional Protocol.)

²⁷ Which means “to receive instruction, including obtaining knowledge or practical skills, from another person in the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or in other specific methods or techniques, for the purpose of carrying out or contributing to the commission of a terrorist offence.” (Art. 3, para. 1 of the Additional Protocol.)

²⁸ Which means “travelling to a State, which is not that of the traveller’s nationality or residence, for the purpose of the commission of, contribution to or participation in a terrorist offence, or the providing or receiving of training for terrorism.” (Art. 4, para. 1 of the Additional Protocol.)

²⁹ Which means “providing or collecting, by any means, directly or indirectly, funds fully or partially enabling any person to travel abroad for the purpose of terrorism [...], knowing that the funds are fully or partially intended to be used for this purpose.” (Art. 5, para. 1 of the Additional Protocol.)

³⁰ Which means “any act of organisation or facilitation that assists any person in travelling abroad for the purpose of terrorism [...] knowing that the assistance thus rendered is for the purpose of terrorism.” (Art. 6, para. 1 of the Additional Protocol.)

³¹ In the Preamble of UNSC Res. 2178, more general references to human rights compliance are made, including the important excerpt: “*Reaffirming* that Member States must ensure that any measures taken to counter terrorism comply with all their obligations under international law, in particular international human rights law, international refugee law, and international humanitarian law, *underscoring* that respect for human rights, fundamental freedoms and the rule of law are complementary and mutually reinforcing with effective counter-terrorism measures, and are an essential part of a successful counter-terrorism effort and notes the importance of respect for the rule of law so as to effectively prevent and combat terrorism, and *noting* that failure to comply with these and other international obligations, including under the Charter of the United Nations, is one of the factors contributing to increased radicalization and fosters a sense of impunity”. Moreover, certain paragraphs of the Resolution (namely 5, 11 and 17) explicitly require compliance with human rights. But others do not, including the important and already-discussed paragraph 6, requiring the criminalisation of certain FTFs conduct. On this, see also A. Conte, ‘States’ Prevention and Responses to the Phenomenon of Foreign Fighters against the Backdrop of International Human Rights Law Obligations’, in: de Guttry et al., pp. 293-298.

out while respecting human rights obligations.³² Moreover, the Additional Protocol clarifies explicitly that the establishment, implementation and application of the criminalisation of these offences “should furthermore be subject to the principle of proportionality, with respect to the legitimate aims pursued and to their necessity in a democratic society, and should exclude any form of arbitrariness or discriminatory or racist treatment.”³³

In March and April 2015, hence prior to adoption of the Additional Protocol by the CoE Committee of Ministers on 19 May 2015, Amnesty International, the International Commission of Jurists and the Open Society Justice Initiative published a number of submissions expressing concern about the drafting process and the (texts leading up to the) Additional Protocol.³⁴ These related, among other things, to the “excessively broad”³⁵ potential scope of application of the Protocol “due to the wide and uncertain definition of “terrorist offence” in Article 1.1 of the Convention”,³⁶ its focus on ancillary offences distant from the principal offence – hence “rais[ing] serious concerns as to compliance with the principle of legality”³⁷ and its lack of clarity as regards its application to situations of armed conflict.³⁸ Martin Scheinin, the former UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, even qualified the draft Protocol “fundamentally flawed”³⁹ for these and other reasons.

2.2.2. EU Directive on Combating Terrorism

The origin of the new EU Directive on Combating Terrorism can be found in the wish to respond in a less fragmented way to the F(T)F phenomenon in the EU. Less than a month after the adoption of UNSC Resolution 2178, the Council of the EU invited the Commission “to further monitor the effectiveness of the responses provided under the Framework Decision, and explore ways to address possible shortcomings”.⁴⁰ The

³² Art. 8, para. 1 of the Additional Protocol.

³³ Art. 8, para. 2 of the Additional Protocol.

³⁴ See Amnesty International, the International Commission of Jurists and the Open Society Justice Initiative, Joint Letter ‘Re: Access to information in the proceedings of the Committee on Foreign Terrorist Fighters and Related Issues (COD-CTE)’, 20 February 2015, available at: http://www.amnesty.eu/content/assets/Letters2015/Joint_Letter_to_CODCTE_20_02_15.pdf; Amnesty International and the International Commission of Jurists, ‘Preliminary public observations on the terms of reference to draft an Additional Protocol supplementing the Council of Europe Convention on the Prevention of Terrorism. Joint Submission by Amnesty International and the International Commission of Jurists’, 6 March 2015, available at: <https://www.amnesty.org/download/Documents/IOR6011722015ENGLISH.pdf>; Amnesty International and the International Commission of Jurists, ‘Draft Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism. Joint Submission by Amnesty International and the International Commission of Jurists to the Committee on Foreign Fighters and Related Issues (COD-CTE)’, 19 March 2015, available at: <https://www.amnesty.org/download/Documents/IOR6012812015ENGLISH.pdf>; Open Society Justice Initiative, ‘Comments on the Draft Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism’, 24 March 2015, available at: <https://www.opensocietyfoundations.org/sites/default/files/comments-coe-terrorism-protocol-20160217.pdf> and Amnesty International and the International Commission of Jurists, ‘Submission of Amnesty International and the International Commission of Jurists to the Council of Europe Committee of Experts on Terrorism (CODEXTER). Draft Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism’, 7 April 2015, available at: <https://www.amnesty.org/download/Documents/IOR6013932015ENGLISH.pdf>.

³⁵ Amnesty International and the International Commission of Jurists, ‘Submission of Amnesty International and the International Commission of Jurists to the Council of Europe Committee of Experts on Terrorism (CODEXTER). Draft Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism’, 7 April 2015, available at: <https://www.amnesty.org/download/Documents/IOR6013932015ENGLISH.pdf>, p. 1.

³⁶ *Ibid.*, pp. 1-2.

³⁷ *Ibid.*, p. 2.

³⁸ *Ibid.*, pp. 2-3.

³⁹ M. Scheinin, ‘The Council of Europe’s Draft Protocol on Foreign Terrorist Fighters is Fundamentally Flawed’, *Just Security*, 18 March 2015, available at: <https://www.justsecurity.org/21207/council-europe-draft-protocol-foreign-terrorist-fighters-fundamentally-flawed/>.

⁴⁰ Council of the European Union, ‘Outcome of proceedings. Foreign fighters: follow-up on the Conclusions of the European Council of 30 August 2014’, Brussels, 13 October 2014, available at: <http://www.statewatch.org/news/2014/oct/eu-council-conclusions-foreign-fighters-follow-up-14160-14.pdf>, p. 3.

reference here is to Framework Decision 2008/919/JHA of 28 November 2008,⁴¹ which constitutes – in turn – a revision of Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism.⁴² This latter Framework Decision was adopted after 9/11 and constituted “the basis of the counter-terrorist policy” of the EU.⁴³ The importance “to consider further legislative developments with regard to the common understanding of criminal activities related to terrorism”⁴⁴ in view of UNSC Resolution 2178 was agreed upon by EU Justice and Home Affairs (JHA) Ministers in their Riga Joint Statement in January 2015 and in its Resolution of 11 February 2015, also the European Parliament stressed the need to update the Framework Decision from 2008 “to harmonise criminalisation of foreign-fighter-related offences across the EU to provide a legal framework and to facilitate cross-border cooperation, to avoid prosecution gaps and to address the practical and legal challenges in the gathering and admissibility of evidence in terrorism cases”.⁴⁵ In its European Agenda on Security of April 2015, the Commission, referring to both UNSC Resolution 2178 and the negotiations on the CoE’s Additional Protocol as discussed in the previous two Subsections, noted as well that

[t]he EU needs a solid criminal justice response to terrorism, covering investigation and prosecution of those who plan terrorist acts or are suspected of recruitment, training, and financing of terrorism as well as incitement to commit a terrorist offence. Many Member States already have or plan laws to criminalise these acts. More coherent laws against foreign terrorist fighters-related offences across the EU would address the cross-border practical and legal challenges in the gathering and admissibility of evidence in terrorism cases, and to deter departures to conflict zones. The Commission will launch an impact assessment in 2015 with a view to updating the 2008 Framework Decision on Terrorism in 2016 [original footnote omitted].⁴⁶

In the end, a legislative proposal was announced by the Commission in its Work Programme 2016 ‘No time for business as usual’.⁴⁷ A week after the Paris attacks in November 2015, the JHA Council “welcome[d] the intention of the Commission to present a proposal for a directive updating the Framework Decision on Combating Terrorism before the end of 2015 with a view to collectively implementing into EU law UNSC Resolution 2178 (2014) and the [A]dditional Protocol to the Council of Europe

⁴¹ 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/LexUriServ/LexUriServ.do?uri=OJ:L:2008:330:0021:0023:EN:PDF>.

⁴² Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA), available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002F0475&from=en>.

⁴³ 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/LexUriServ/LexUriServ.do?uri=OJ:L:2008:330:0021:0023:EN:PDF>.

⁴⁴ See Council of the European Union, ‘Informal meeting of Justice and Home Affairs Ministers in Riga on 29 and 30 January 2015’, 2 February 2015, Annex: ‘Riga Joint Statement following the informal meeting of Justice and Home Affairs Ministers in Riga on 29 and 30 January’, available at: <http://data.consilium.europa.eu/doc/document/ST-5855-2015-INIT/en/pdf>, p. 7.

⁴⁵ European Parliament, ‘European Parliament resolution of 11 February 2015 on anti-terrorism measures (2015/2530(RSP))’ available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2015-0032+0+DOC+PDF+V0//EN>, para. 26.

⁴⁶ European Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. The European Agenda on Security’, Strasbourg, 28 April 2015, COM(2015) 185 final, available at: <https://www.cepol.europa.eu/sites/default/files/european-agenda-security.pdf>, p. 14.

⁴⁷ European Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Commission Work Programme 2016. No time for business as usual’, Strasbourg, 27 October 2015, COM(2015) 610 final, available at: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52015DC0610>.

Convention.”⁴⁸ In December 2015, the Commission published its actual proposal.⁴⁹ Contrary to its promise from April 2015 (prior to the Paris attacks), the proposal was exceptionally presented *without* an impact assessment, “[g]iven the urgent need to improve the EU framework to increase security in the light of recent terrorist attacks including by incorporating international obligations and standards”.⁵⁰ In its proposal, the Commission defended the need for the new Directive as follows:

*The existing rules need to be aligned taking into account the changing terrorist threat Europe is facing. This includes adequate criminal law provisions addressing the foreign terrorist fighter phenomenon and risks related to the travel to third countries to engage in terrorist activities but also the increased threats from perpetrators who remain within Europe. More coherent, comprehensive and aligned national criminal law provisions are necessary across the EU to be able to effectively prevent and prosecute foreign terrorist fighters-related offences and to respond in an appropriate manner to the increased cross-border practical and legal challenges.*⁵¹

To that end, the Commission proposed, among other things, the criminalisation of new offences, namely receiving training for terrorism, travelling abroad for terrorist purposes and the organising or otherwise facilitating such travel, as well as financing such travel.⁵² The latter new offence, together with the general provision on ‘relationship to terrorist offences’, implements Recommendation No. 5 of the Financial Action Task Force (FATF), stating that countries “should criminalise not only the financing of terrorist acts but also the financing of terrorist organisations and individual terrorists even in the absence of a link to a specific terrorist act or acts.”⁵³ The criminalisation of the attempt is also extended to all offences, with the exception of receiving training and facilitating travel abroad.⁵⁴

This proposal was also heavily criticised. It goes beyond the scope of this research paper to delve into all the points in detail, but a good (although not exhaustive) overview has been provided by the European Parliamentary Research Service, which noted criticism from, amongst others, the European Economic and Social Committee and several human rights groups, as well as practitioners and other expert organisations. Concerns related to, among other things, vague and over-broad definitions and resulting human rights risks such as arbitrary or discriminatory application of the law, the criminalisation

⁴⁸ Council of the European Union, Outcome of the Council Meeting, 3432nd Council meeting, Justice and Home Affairs, Brussels, 20 November 2015, 14382/15 (OR.en), available at:

[http://www.consilium.europa.eu/en/meetings/jha/2015/11/st14382_en15_pdf\(1\), para. 9](http://www.consilium.europa.eu/en/meetings/jha/2015/11/st14382_en15_pdf(1), para. 9).

⁴⁹ European Commission, ‘Proposal for a Directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism’, Brussels, 2 December 2015, COM(2015) 625 final, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015PC0625&from=EN>.

⁵⁰ *Ibid.*, p. 12. Remarkably, under the heading ‘Stakeholder consultations’, the Commission noted that draft texts were made publicly available for comments during the negotiations in the CoE on the Additional Protocol and that written comments were received by several fundamental rights organisations, but no mention was made about consultations in the context of this proposed Directive. (*Ibid.*)

⁵¹ *Ibid.*, p. 3.

⁵² *Ibid.*, pp. 17-18. For all the main changes that the proposal would bring (including specific provisions on the protection of victims of terrorism), see S. Voronova, European Parliamentary Research Service, ‘Combating terrorism’, Briefing, EU Legislation in Progress, September 2017, available at:

[http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608682/EPRS_BRI\(2017\)608682_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608682/EPRS_BRI(2017)608682_EN.pdf), pp. 6-8.

⁵³ Financial Action Task Force, ‘The FATF Recommendations: International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation’, February 2002 (Updated October 2016), available at: http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf, p. 13.

⁵⁴ S. Voronova, European Parliamentary Research Service, ‘Combating terrorism’, Briefing, EU Legislation in Progress, September 2017, available at:

[http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608682/EPRS_BRI\(2017\)608682_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608682/EPRS_BRI(2017)608682_EN.pdf), p. 7.

of conduct without any direct link to specific terrorist offences, and the (non-involvement of civil society organisations in the) process leading up to the proposal.⁵⁵

On 11 March 2016, the Council agreed its negotiating position⁵⁶ and on 12 July 2016, the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) issued its report,⁵⁷ in which a number of modifications to the text were suggested.⁵⁸ Nonetheless, human rights organisations remained critical.⁵⁹ On 17 November 2016, an informal compromise agreement was reached between the European Parliament, the Council and the Commission and on 30 November and 5 December, the Council's Permanent Representatives Committee (Coreper)⁶⁰ and the LIBE Committee,⁶¹ respectively, approved the compromise agreement. A few months later, on 16 February 2017, the European Parliament as a whole approved the text by 498 votes to 114, with 29 abstentions.⁶² During the debate prior to the vote, LIBE Rapporteur Monika Hohlmeier stated that "[w]e need to stop the perpetrators before they commit these acts rather than regretting the fact that there have been attacks",⁶³ again stressing the preventive dimension of the new legislation. The new Directive was signed by the Presidents of the Council of the EU and the European Parliament on 15 March 2017 and published in the *Official Journal of the European Union* on 31 March 2017,⁶⁴ obliging EU Member States⁶⁵ to bring into force all the rules necessary to comply with the Directive by 8 September 2018.⁶⁶

It is also beyond the scope of this paper to address in full all the elements of the new EU Directive on Combating Terrorism. But some points worth mentioning are the fact that the Directive criminalises, among other things: receiving training for terrorism

⁵⁵ *Ibid.*, pp. 8-10.

⁵⁶ See Council of the EU, 'Directive on combatting terrorism: Council ready to start negotiations with Parliament', 11 March 2016, available at: <http://www.consilium.europa.eu/en/press/press-releases/2016/03/11-directive-on-combatting-terrorism/>.

⁵⁷ See European Parliament, 'Report on the proposal for a directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism (COM(2015)0625 – C8-0386/2015 – 2015/0281(COD))', Committee on Civil Liberties, Justice and Home Affairs, Rapporteur: Monika Hohlmeier, A8-0228/2016, 12 July 2016, available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2016-0228+0+DOC+PDF+V0//EN>.

⁵⁸ For more information, see C. Paulussen, 'Repressing the Foreign Fighters Phenomenon and Terrorism in Western Europe. Towards an Effective Response Based on Human Rights', *ICCT Research Paper*, November 2016, available at: <https://icct.nl/wp-content/uploads/2016/11/ICCT-Paulussen-Rule-of-Law-Nov2016-1.pdf>, p. 22.

⁵⁹ See Amnesty International, International Commission of Jurists, Open Society European Policy Institute and Open Society Justice Initiative, 'After a Fast-Track Process the European Parliament Takes a Troubling Position on Counter-Terrorism in Europe', 13 July 2016, available at:

http://www.amnesty.eu/content/assets/Joint_Statement_on_Counter-Terrorism_Directive_after_LIBE_vote_July_2016.pdf.

⁶⁰ See Council of the EU, 'Directive on combatting terrorism: Council confirms agreement with Parliament', Press release, 5 December 2016, available at: <http://www.consilium.europa.eu/en/press/press-releases/2016/12/05-combatting-terrorism/>.

⁶¹ See European Parliament, 'Clampdown on terrorism - new counter-terrorism law backed by civil liberties MEPs', Press release, 5 December 2016, available at: <http://www.europarl.europa.eu/news/en/press-room/20161205IPR54601/clampdown-on-terrorism-new-counter-terrorism-law-backed-by-civil-liberties-meps>.

⁶² See European Parliament, 'Preventing terrorism: clampdown on foreign fighters and lone wolves', Press release, 16 February 2017, available at: <http://www.europarl.europa.eu/news/en/press-room/20170210IPR61803/preventing-terrorism-clampdown-on-foreign-fighters-and-lone-wolves>.

⁶³ *Ibid.*

⁶⁴ Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2017.088.01.0006.01.ENG (hereinafter: EU Directive on Combating Terrorism).

⁶⁵ Note though that Denmark will not be covered by the Directive and that the UK and Ireland will not be bound by it, unless they 'opt in'. Ireland has already indicated it will opt in, see C. Gallagher, 'New anti-terror laws to be introduced', *The Irish Times*, 12 June 2017, available at: <https://www.irishtimes.com/news/crime-and-law/new-anti-terror-laws-to-be-introduced-1.3116059>.

⁶⁶ See Art. 28 of the EU Directive on Combating Terrorism.

(Article 8);⁶⁷ travelling for the purpose of terrorism (Article 9), both outbound travel (from an EU Member State) and inbound travel (to an EU Member State), which given the fact that the Islamic State’s so-called Caliphate is crumbling is seen as an increasing threat;⁶⁸ organising or otherwise facilitating travelling for the purpose of terrorism (Article 10) and terrorist financing (Article 11).⁶⁹ In Article 13, it is explained that for all the above offences (and more) to be punishable, “it shall not be necessary that a terrorist offence be actually committed, nor shall it be necessary, insofar as the offences referred to in Articles 5 to 10 and 12 are concerned, to establish a link to another specific offence laid down in this Directive.”

In the context of human rights compliance, Article 23 should be mentioned, indicating that the Directive “shall not have the effect of modifying the obligations to respect fundamental rights and fundamental legal principles, as enshrined in Article 6 TEU”, as well as Article 29, paragraph 2, which states that the Commission, by 8 September 2021, shall submit a report assessing not only the added value of the Directive, but also its impact “on fundamental rights and freedoms, including on non-discrimination, on the rule of law, and on the level of protection and assistance provided to victims of terrorism.” Finally, the EU Directive introduces, stressing “the increasing links between organised crime and terrorist groups”,⁷⁰ an article obliging Member States to ensure that effective investigative tools – such as those which are used in organised crime or other serious crime cases – are also available to counter-terrorism persons, units or services (Article 20, paragraph 1), as well as an article obliging Member States to exchange information gathered in terrorism-related criminal proceedings (Article 22, paragraph 2).

3. Prosecuting Foreign Fighters at the Domestic Level

3.1. Introduction

Having examined the supranational level, it is time to zoom in on the domestic level. At the national level, authorities were seemingly overwhelmed by the sheer number of their citizens and residents deciding to leave for Syria and Iraq. To prevent people from going in the first place, prosecutors and judges turned to existing, familiar law, while the legislator started developing new laws, partly based on the supranational legal instruments just discussed.

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⁶⁷ See Recital 11 of the EU Directive on Combating Terrorism’s Preamble for more information: “Receiving training for terrorism includes obtaining knowledge, documentation or practical skills. Self-study, including through the internet or consulting other teaching material, should also be considered to be receiving training for terrorism when resulting from active conduct and done with the intent to commit or contribute to the commission of a terrorist offence. In the context of all of the specific circumstances of the case, this intention can for instance be inferred from the type of materials and the frequency of reference. Thus, downloading a manual to make explosives for the purpose of committing a terrorist offence could be considered to be receiving training for terrorism. By contrast, merely visiting websites or collecting materials for legitimate purposes, such as academic or research purposes, is not considered to be receiving training for terrorism under this Directive.”

⁶⁸ See Recital 12 of the EU Directive on Combating Terrorism’s Preamble for more information. ‘For the purpose of terrorism’ not only covers “the commission of terrorist offences and providing or receiving training but also the participation in the activities of a terrorist group.” As to inbound travel, Member States may also decide to criminalise “preparatory acts, which may include planning or conspiracy, with a view to committing or contributing to a terrorist offence. Any act of facilitation of such travel should also be criminalised.”

⁶⁹ Which covers not only the criminalisation of financing of terrorist acts, but also the financing of a terrorist group, see Recital 14 of the EU Directive on Combating Terrorism’s Preamble.

⁷⁰ Recital 13 of the EU Directive on Combating Terrorism’s Preamble.

One example stems from the Dutch case of Mohammed G. and Omar H., which has been labelled as likely the first of its kind in Western Europe.⁷¹ The two men wanted to leave for Syria to join the jihad and were convicted by the District Court of Rotterdam on 23 October 2013.⁷² The Public Prosecution Service tried to use a relatively new terrorism provision (entered into force on 1 April 2010), namely Article 134a of the Dutch Criminal Code (DCC), which implements Article 7 of the 2005 CoE Convention on the Prevention of Terrorism and which criminalises participating and cooperating in training for terrorism. At first instance, the judges refused to enter a conviction for Article 134a of the DCC, as they were not convinced the defendants' actions amounted to training for terrorism. By contrast, the judges based the convictions on regular crimes, such as preparatory acts for murder.⁷³ Even though in appeal, in 2015, and in cassation, in 2016, a conviction for Article 134a was entered against Omar H., this case shows that 'regular' criminal law provisions may also be sufficient to secure a conviction.

Another example stems from federal prosecutions in the US. In March 2014, the Federal Government secured its first ISIS-related indictment⁷⁴ in the case of Nicholas Teasant,⁷⁵ a US citizen and converted Muslim, who attempted to travel to the Middle-East to join ISIS.⁷⁶ He was arrested and indicted on one count of attempting to provide material support or resources to a foreign terrorist organisation,⁷⁷ pursuant to 18 US Code § 2339B(a)(1).⁷⁸ He pleaded guilty without a plea agreement and was sentenced, in June 2016, to 12 years' imprisonment.⁷⁹ His conduct – (attempting to) provide material support or resources to a foreign terrorist organisation – was already criminalised by the US Patriot Act, which was signed into law by President George W.

⁷¹ L. De Bode, 'Dutch court sentences would-be Syrian rebel fighters', *Al Jazeera*, 23 October 2013, available at: <http://america.aljazeera.com/articles/2013/10/23/dutch-court-sentenceswouldbesyrianrebelfighters.html>.

⁷² For more information, see C. Paulussen, 'The Syrian Foreign Fighters Problem: A Test Case from The Netherlands', *ICCT Perspective*, 2 December 2013, available at: <https://icct.nl/publication/the-syrian-foreign-fighters-problem-a-test-case-from-the-netherlands/>.

⁷³ Mohammed G. was found guilty of making preparations for murder and Omar H. was found guilty of preparing arson and/or an explosion and of spreading, showing publicly or having in stock to spread or show publicly a text and/or a picture which incites to committing a (terrorist) crime. The 2013 decision against Mohammed G. is available at: <http://www.internationalcrimesdatabase.org/Case/3294/Prosecutor-v-Mohammed-G/>. The decisions against Omar H. are available at: <http://www.internationalcrimesdatabase.org/Case/3292> (first instance), <http://www.internationalcrimesdatabase.org/Case/3293> (appeal) and <http://www.internationalcrimesdatabase.org/Case/3274> (cassation). Note that there is no appeal (or cassation) of Mohammed G. as regards the 2013 decision. However, in April 2015, he was arrested again (and released after two weeks) and yet again in October 2015, which led, in 2016, to a verdict of three years and a hospital order (tbs). See G. Ritzen, 'Drie jaar cel en tbs voor plannen jihad-reis', *NRC*, 29 August 2016, available at: <https://www.nrc.nl/nieuws/2016/08/29/drie-jaar-cel-en-tbs-voor-maastrichtenaar-mohammed-g-a1518461>. In September 2017, in appeal, four years' imprisonment was asked by the Public Prosecution Service, see C. Van Dyck, 'Vier jaar cel geëist tegen jihadist Mohammed G. uit Maastricht', *De Limburger*, 18 September 2017, available at: https://www.limburger.nl/cnt/dmf20170922_00046812/vier-jaar-cel-geëist-tegen-jihadist-mohammed-g-uit-maastricht.

⁷⁴ See K.J. Greenberg and S. Weiner, Center on National Security, Fordham University School of Law, 'The American Exception. Terrorism Prosecutions in the United States – The ISIS Cases. March 2014 – August 2017', 2017, available at: <https://news.law.fordham.edu/wp-content/uploads/2017/09/TheAmericanException9-17.pdf>, p. 3.

⁷⁵ See A. Goldman, J.L. Yang and J. Muyskens, 'The Islamic State's suspected inroads into America', *The Washington Post*, 16 August 2017, available at: <https://www.washingtonpost.com/graphics/national/isis-suspects/>.

⁷⁶ See 'Nicholas Teasant', Counter Extremism Project, available at: <https://www.counterextremism.com/extremists/nicholas-teasant>. Of course, there are earlier cases of Americans who can be qualified as FFs prior to the Syrian civil war and even prior to 9/11, such as John Walker Lindh, who travelled to Afghanistan to join the Taliban.

⁷⁷ See US Department of Justice, Office of Public Affairs, Press release, 'California Man Pleads Guilty to Attempting to Provide Material Support to ISIL', 1 December 2015, available at: <https://www.justice.gov/opa/pr/california-man-pleads-guilty-attempting-provide-material-support-isil>.

⁷⁸ See US District Court for the Eastern District of California, United States of America v. Nicholas Michael Teasant, Criminal Complaint, 17 March 2014, available at: <https://www.justice.gov/sites/default/files/usao-edca/legacy/2014/03/17/Teasant%20Complaint%20.pdf>.

⁷⁹ See US Department of Justice, Office of Public Affairs, Press release, 'California Man Sentenced to 12 Years in Prison for Attempting to Join ISIL', 7 June 2016, available at: <https://www.justice.gov/opa/pr/california-man-sentenced-12-years-prison-attempting-join-isil>.

Bush on 26 October 2001, just after the 9/11 attacks. It is, incidentally, also by far the most commonly-used statute to prosecute ISIS-related cases in US federal courts.⁸⁰ During a 2014 UN seminar on challenges in prosecutions related to FTFs, it was therefore also concluded that US legislation can address the FTF phenomenon “without any major changes”.⁸¹

Other countries turned to existing legislation in quite innovative ways to prosecute FTF-related conduct, such as legislation dealing with organised crime (Turkey), offences prohibiting the change of the constitutional system by non-democratic means (Indonesia), immigration laws (China), and threats to national security (Egypt).⁸² However, it was noted that such reliance on non-terrorism offences can also create its own problems: courts may not accept such innovativeness, it may endanger international cooperation (dual criminality problems) and punishments may be very light, not reflecting the full severity of the case.⁸³

Hence, and even though it has also been argued (in March 2014) that “[m]ost countries feel that current laws are adequate and legislative improvements are not needed”,⁸⁴ several States started to adopt new or amend existing laws “in order to craft specific legal tools to address the phenomenon of foreign terrorist fighters.”⁸⁵ In fact, in December 2016, Human Rights Watch reported that since 2013, at least 47 countries have enacted FTF measures, and at least two-thirds of these were adopted in anticipation of, or to comply with, UNSC Resolution 2178.⁸⁶

Before taking a closer look at the national level, it should be noted that not only UNSC Resolution 2178 itself (see Subsection 2.1), but also the national measures implementing the Resolution have received considerable criticism. Human Rights Watch noted such measures have led to, among other things, expanded security and intelligence powers, control orders, emergency laws and dubious citizenship stripping possibilities. They also warned about – focusing especially on criminal law prosecutions – overly-broad definitions of terrorism (since UNSC Resolution 2178 itself does not define terrorism), secret evidence, lengthy pre-charge and pre-trial detention, as well as tougher penalties (including death).⁸⁷ Amnesty International, in a report focusing on Europe, also expressed its concern in January 2017 that CT measures adopted in the aftermath of UNSC Resolution 2178 “have been steadily dismantling [the European

⁸⁰ See K.J. Greenberg and S. Weiner, Center on National Security, Fordham University School of Law, ‘The American Exception. Terrorism Prosecutions in the United States – The ISIS Cases. March 2014 – August 2017’, 2017, available at: <https://news.law.fordham.edu/wp-content/uploads/2017/09/TheAmericanException9-17.pdf>, pp. 27-28. For two examples, see the US cases of Elhuzayel and Badawi (available at: <http://www.internationalcrimesdatabase.org/Case/3272>) and of Elfgeeh (available at: <http://www.internationalcrimesdatabase.org/Case/3271>).

⁸¹ UN Security Council, ‘Letter dated 18 February 2015 from the Chair of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council. Annex: Bringing terrorists to justice: challenges in prosecutions related to foreign terrorist fighters’, S/2015/123, 23 February 2015, available at: https://www.un.org/sc/ctc/wp-content/uploads/2015/09/S_2015_123_EN.pdf, para. 16.

⁸² *Ibid.*, para. 18.

⁸³ *Ibid.*, para. 19.

⁸⁴ L. Vidino, A. Snetkov and L. Pigoni, ‘Foreign Fighters: An Overview of Responses in Eleven Countries’, Center for Security Studies (CSS), ETH Zürich, March 2014, available at: http://www.css.ethz.ch/content/dam/ethz/special-interest/gess/cis/center-for-security-studies/pdfs/Foreign_Fighters_2014.pdf, p. 6.

⁸⁵ UN Security Council, ‘Letter dated 18 February 2015 from the Chair of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council. Annex: Bringing terrorists to justice: challenges in prosecutions related to foreign terrorist fighters’, S/2015/123, 23 February 2015, available at: https://www.un.org/sc/ctc/wp-content/uploads/2015/09/S_2015_123_EN.pdf, para. 20.

⁸⁶ L. Taylor, ‘“Foreign Terrorist Fighter” Laws. Human Rights Rollbacks Under UN Security Council Resolution 2178’, Human Rights Watch, December 2016, available at: https://www.hrw.org/sites/default/files/supporting_resources/ftf_essay_03feb2017_final_pdf.pdf, p. 9.

⁸⁷ *Ibid.*, pp. 9-28.

human rights system], putting hard won rights at risk”.⁸⁸ According to Amnesty International, examples from the criminal justice context include:

imprecise and overly broad definitions of “terrorism” in laws, in violation of the principle of legality and leading to numerous abuses; standards of proof reduced from the traditional criminal standard of “reasonable suspicion” to mere “suspicion,” and in some states to no formal requirement of suspicion at all; tenuous, and sometimes no, link between so-called preparatory acts or inchoate offences and the actual criminal offence; [...] criminalization of various forms of expression that fall short of incitement to violence and threaten legitimate protest, freedom of expression, and artistic freedom; fewer possibilities to challenge counter-terrorism measures and operations, in particular due to the state’s use of secret evidence typically not disclosed to a person affected by the measures or their lawyer[.]⁸⁹

The adoption of UNSC Resolution 2178, regional instruments and domestic legislation (implementing such supranational legal instruments) has led to more prosecutions and convictions of F(T)Fs, which concerned not only the (potential) travellers themselves (those prior to travel, those still in Syria/Iraq, and those coming back), but also the recruiters and facilitators.⁹⁰ Accordingly, the range of offences being used to prosecute F(T)Fs and associated behaviour is broad. Prosecutions have focused on the dissemination of inciting material,⁹¹ inviting support for a terrorist organisation,⁹² terrorist training,⁹³ assisting others to travel,⁹⁴ financing others to fight,⁹⁵ recruiting,⁹⁶ (attempting to) travel(ling) to join a terrorist organisation,⁹⁷ preparing to commit murder⁹⁸ and other regular crimes such as arson,⁹⁹ preparing to commit terrorist

⁸⁸ Amnesty International, ‘Dangerously Disproportionate: The Ever-Expanding National Security State in Europe’, 2017, available at: <https://www.amnesty.org/en/documents/eur01/5342/2017/en/>, p. 7.

⁸⁹ *Ibid.*

⁹⁰ See Europol, European Union Terrorism Situation and Trend Report (TE-SAT) 2016, available at: https://www.europol.europa.eu/sites/default/files/documents/europol_tesat_2016.pdf, p. 18.

⁹¹ E.g. the Context case in the Netherlands (available at: <http://www.internationalcrimesdatabase.org/Case/3270>) or the Maher H. case, also from the Netherlands (available at: <http://www.internationalcrimesdatabase.org/Case/3278> (District Court) and <http://www.internationalcrimesdatabase.org/Case/3279> (Court of Appeal)).

⁹² E.g. the Choudary and Rahman case from the UK (available at: <http://www.internationalcrimesdatabase.org/Case/3273>).

⁹³ E.g. the Nawaz brothers case in the UK (available at: <http://www.internationalcrimesdatabase.org/Case/3285>) and the (appeal in the) Maher H. case (available at: <http://www.internationalcrimesdatabase.org/Case/3279>), as well as the Omar H. case (in appeal (available at: <http://www.internationalcrimesdatabase.org/Case/3293>) and in cassation (available at: <http://www.internationalcrimesdatabase.org/Case/3274>)) in the Netherlands.

⁹⁴ E.g. the Alqudsi case from Australia (available at: <http://www.internationalcrimesdatabase.org/Case/3280>).

⁹⁵ E.g. the Succarieh case from Australia, see ‘Omar Succarieh given four and a half years’ jail on foreign incursion charges’, *The Guardian*, 2 November 2016, available at: <https://www.theguardian.com/australia-news/2016/nov/02/omar-succarieh-given-four-and-a-half-years-jail-on-foreign-incursion-charges>, the Elfgeeh case from the US (available at: <http://www.internationalcrimesdatabase.org/Case/3271>) or the Karolina R. case from Germany, see R. Machnikowski and A. Legieć, ‘The Favored Conflicts of Foreign Fighters From Central Europe’, *Terrorism Monitor*, 12 October 2017, available at: <https://jamestown.org/program/favored-conflicts-foreign-fighters-central-europe/>.

⁹⁶ E.g. the Elfgeeh case from the US (available at: <http://www.internationalcrimesdatabase.org/Case/3271>).

⁹⁷ E.g. the Habib case from Canada (available at: http://www.internationalcrimesdatabase.org/Case/3289/R-c-Habib_-2017-QCCQ-6948/).

⁹⁸ E.g. the Mohammed G. case from the Netherlands (available at: <http://www.internationalcrimesdatabase.org/Case/3294/Prosecutor-v-Mohammed-G/>).

⁹⁹ E.g. the Omar H. case from the Netherlands (available at: <http://www.internationalcrimesdatabase.org/Case/3292>, <http://www.internationalcrimesdatabase.org/Case/3293> and <http://www.internationalcrimesdatabase.org/Case/3274>).

crimes,¹⁰⁰ and membership/having participated in the activities of a terrorist organisation.¹⁰¹

More often than not, preliminary or preparatory offences – as well as membership charges – are being used in the place of principal offences (such as actual terrorist crimes or war crimes). This arises partly from UNSC Resolution 2178, with its focus on preparatory or supportive acts. Indeed, there is great pressure on the criminal justice sector to prevent attacks. However, it is also reflective of the particular challenges pertaining to prosecuting specific acts allegedly committed in such chaotic places as Syria and Iraq (this will be discussed below in more detail).

Despite this, there are some cases emerging that concern principal offences, such as murder,¹⁰² ‘terror crimes’,¹⁰³ and war crimes.¹⁰⁴ This is made possible through the use of evidence gathered in or coming out of combat zones or from persons fleeing these areas, the return home of injured FFs, as well as the use of “digital” evidence (including social media accounts, electronic devices, telecommunications intercepts and other online activity). Now that the Caliphate is crumbling, it is quite likely that more ‘inside information’ will become available and that more cases involving principal offences can and will be prosecuted.

3.2. A Closer Look

When examining the national level more closely, it is clear that, despite the common international and regional obligations, States have diverse approaches to FFs.¹⁰⁵ Part of this comes from the fact that these obligations are inherently (and purposefully) flexible,¹⁰⁶ the fact that States are impacted by FFs to varying degrees, and the different legal systems and histories of States. This inevitably leads to a variety of approaches to legislating, prosecuting, charging and sentencing, where relevant, FFs in practice. A couple of country analyses will now be presented in more detail.

In the US, and as explained earlier, by far the most often used charge¹⁰⁷ is the one of ‘providing material support or resources to designated foreign terrorist organisations’.¹⁰⁸ This term, ‘material support or resources’, is very broad, meaning

¹⁰⁰ E.g. the Maher H. case from the Netherlands (available at: <http://www.internationalcrimesdatabase.org/Case/3278> and <http://www.internationalcrimesdatabase.org/Case/3279>).

¹⁰¹ E.g. the Kreshnik B. case from Germany, see S. Behr, ‘Haft für Syrien-Heimkehrer’, *Frankfurter Rundschau*, 5 December 2014, available at: <http://www.fr.de/rhein-main/kriminalitaet/kreshnik-b-haft-fuer-syrien-heimkehrer-a-523545>, the Hamza B. et al. (available at: <http://www.internationalcrimesdatabase.org/Case/3288>) and Sharia4Belgium cases from Belgium (see C. Paulussen and E. Entenmann, ‘National Responses in Select Western European Countries to the Foreign Fighter Phenomenon’, in: de Guttry et al., pp. 396-399) and the Harun case from Germany (available at: <http://www.internationalcrimesdatabase.org/Case/3283>).

¹⁰² E.g. the Elouassaki case from Belgium, see ‘Belgian foreign fighter sentenced to 28 years for murder in Syria’, *Reuters*, 13 February 2017, available at: <http://uk.reuters.com/article/uk-mideast-crisis-belgium/belgian-foreign-fighter-sentenced-to-28-years-for-murder-in-syria-idUKKBN15S19Y>.

¹⁰³ E.g. the al-Mandlawi and Sultan case from Sweden, see ‘Sweden ‘terror crimes’: Pair jailed for life over Syria murders’, *BBC*, 14 December 2015, available at: <http://www.bbc.com/news/world-europe-35092014>.

¹⁰⁴ E.g. the Aria Ladjedvardi case (available at: <http://www.internationalcrimesdatabase.org/Case/3276>) and the Abdelkarim El B. case (available at: <http://www.internationalcrimesdatabase.org/Case/3297/Prosecutor-v-Abdelkarim-El-B/>), both from Germany.

¹⁰⁵ For an early overview of 73 national responses in dealing with the FFs phenomenon, see The Law Library of Congress, ‘Treatment of Foreign Fighters in Selected Jurisdictions’, December 2014, available at: <https://www.loc.gov/law/help/foreign-fighters/treatment-of-foreign-fighters.pdf>.

¹⁰⁶ Among other things because of UNSC Resolution 2178’s lack of a clear definition, see Subsection 2.1.

¹⁰⁷ But note that other charges are of course also used, see K.J. Greenberg and S. Weiner, Center on National Security, Fordham University School of Law, ‘The American Exception. Terrorism Prosecutions in the United States – The ISIS Cases. March 2014 – August 2017’, 2017, available at: <https://news.law.fordham.edu/wp-content/uploads/2017/09/TheAmericanException9-17.pdf>, pp. 28-33.

¹⁰⁸ 18 US Code § 2339B.

*any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials[.]*¹⁰⁹

Other concepts are broad as well, with the term ‘training’ meaning “instruction or teaching designed to impart a specific skill, as opposed to general knowledge”¹¹⁰ and with the term ‘expert advice or assistance’ meaning “advice or assistance derived from scientific, technical or other specialized knowledge.”¹¹¹ Under this provision, “[w]hoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 20 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.”¹¹² More information about punishments will be provided below.

In the UK, however, one can identify the use of specific offences for different actions related to F(T)Fs, such as ‘preparation of terrorist acts’ (Section 5(1) of the Terrorism Act 2006),¹¹³ ‘attendance at a place used for terrorist training’ (Section 8(1) of the Terrorism Act 2006),¹¹⁴ ‘support’ (Section 12 of the Terrorism Act 2000),¹¹⁵ ‘encouragement of terrorism’ (Section 1 of the Terrorism Act 2006)¹¹⁶ and ‘membership’ (Section 11 of the Terrorism Act 2000).¹¹⁷ As has become clear, these offences are not new; they all existed prior to 2007 and have not been altered via

¹⁰⁹ 18 US Code § 2339B(g)(4) and 18 US Code § 2339A(b)(1).

¹¹⁰ 18 US Code § 2339B(g)(4) and 18 US Code § 2339A(b)(2).

¹¹¹ 18 US Code § 2339B(g)(4) and 18 US Code § 2339A(b)(3).

¹¹² 18 US Code § 2339B(a)(1).

¹¹³ Available at: <http://www.legislation.gov.uk/ukpga/2006/11/section/5>. Examples include the Choudhury case – the first UK national to be convicted of a Syria-related terror offence since the conflict began (available at: <http://www.internationalcrimesdatabase.org/Case/3286>), the Junead Khan case (available at: <http://www.internationalcrimesdatabase.org/Case/3281>) and the Shazib Khan case (available at: <http://www.internationalcrimesdatabase.org/Case/3282>). Other examples can be found in this database: ‘Who are Britain’s jihadists?’, *BBC*, 12 October 2017, available at: <http://www.bbc.com/news/uk-32026985> and at *TheLawPages.com*, available at: <http://www.thelawpages.com/criminal-offence/Engaging-in-conduct-in-preparation-for-acts-of-terrorism-367-17.law>.

¹¹⁴ Available at: <http://www.legislation.gov.uk/ukpga/2006/11/section/8>. An example includes the case of the Nawaz brothers (available at: <http://www.internationalcrimesdatabase.org/Case/3285>). Other examples can be found in the BBC’s database (see n. 113) and at *TheLawPages.com*, available at: <http://www.thelawpages.com/criminal-offence/Conspiracy-to-attend-or-Attendance-at-a-place-used-for-terrorist-training.-482-17.law>.

¹¹⁵ Available at: <http://www.legislation.gov.uk/ukpga/2000/11/section/12>. An example includes the case of Choudary and Rahman (available at: <http://www.internationalcrimesdatabase.org/Case/3273>). Other examples can be found in the BBC’s database (see n. 113) and at *TheLawPages.com*, available at: [http://www.thelawpages.com/criminal-offence/Inviting-support-for-a-proscribed-organisation-\(s.12,-Terrorism-Act-2000\)-99518-17.law](http://www.thelawpages.com/criminal-offence/Inviting-support-for-a-proscribed-organisation-(s.12,-Terrorism-Act-2000)-99518-17.law).

¹¹⁶ Available at: <http://www.legislation.gov.uk/ukpga/2006/11/section/1>. Examples can be found in the BBC’s database (see n. 113) and at *TheLawPages.com*, available at: <http://www.thelawpages.com/criminal-offence/Encouragement-of-terrorism,-directly-or-indirectly,-inciting-or-encouraging-others-to-commit-acts-of-terrorism-346-17.law>. For a few examples from this list, see, among others, E. Palmer, ‘Isis: Dagenham man Mohammed Mohsin Ameen jailed for sending 8,000 pro-Daesh tweets’, *International Business Times*, 28 April 2016, available at: <http://www.ibtimes.co.uk/isis-dagenham-man-mohammed-mohsin-ameen-jailed-sending-8000-pro-daesh-tweets-1557332>; S. O’Neill, ‘Three years in jail for the Twitter terrorist’, *The Times*, 12 June 2015, available at: <https://www.thetimes.co.uk/article/three-years-in-jail-for-the-twitter-terrorist-wz988kz0tmc>; and T. Whitehead, ‘Friend of Lee Rigby’s killer jailed for distributing terrorism material’, *The Telegraph*, 6 June 2014, available at: <http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/10882441/Friend-of-Lee-Rigbys-killer-jailed-for-distributing-terrorism-material.html>.

¹¹⁷ Available at: <http://www.legislation.gov.uk/ukpga/2000/11/section/11>. Examples can be found in the BBC’s database (see n. 113) and at *TheLawPages.com*, available at: <http://www.thelawpages.com/criminal-offence/Belonging-to,-or-membership-of-a-proscribed-organisation-99517-17.law>. An example is the case of Tareena Shakil, see Crown Prosecution Service, ‘The Counter Terrorism Division of the Crown Prosecution Service (CPS) - cases concluded in 2016’, 10 February 2017, available at: https://www.cps.gov.uk/publications/prosecution/ctd_2016.html. See also ‘Tareena Shakil jailed for six years for joining IS’, *BBC*, 1 February 2016, available at: <http://www.bbc.com/news/uk-england-35460697>.

legislation since.¹¹⁸ The specific requirements designed to fit each type of offending act gives the judiciary less leeway, or seen in another light, more specific guidance, in terms of sentencing than the US.

In Germany, one can see the use of crimes such as ‘forming terrorist organisations’ (or providing support to such organisations), which is punishable pursuant to Section 129a of the German Criminal Code¹¹⁹ and which is also applicable to organisations abroad (Section 129b).¹²⁰ Increasingly, however, the Code of Crimes against International Law¹²¹ is used, which reflects the Rome Statute of the International Criminal Court (ICC) and which covers war crimes and other international crimes.¹²²

Also in the Netherlands, a wide range of crimes (although war crimes are still absent)¹²³ is used to address FF conduct: examples are training for terrorism (Article 134a of the DCC);¹²⁴ dissemination of material inciting to commit a (terrorist) crime (Article 132 of the DCC),¹²⁵ preparation (Article 46 of the DCC) to commit crimes such as arson or an explosion (Article 157 of the DCC),¹²⁶ participation in a terrorist organisation (Articles

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¹¹⁸ However, “terrorism” is defined in Section 1 of the Terrorism Act 2000, available at: <http://www.legislation.gov.uk/ukpga/2000/11/section/1?timeline=true>, and this has been updated twice, in 2006 and 2009. This definition also applies to the Terrorism Act 2006 via Section 20 of the Terrorism Act 2006, available at: <http://www.legislation.gov.uk/ukpga/2006/11/section/20>.

¹¹⁹ Available at: https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1217.

¹²⁰ An example is the case of Harun P. (available at: <http://www.internationalcrimesdatabase.org/Case/3283>). Other examples include the case of Mohammad Sobhan Ayubi (see US Department of State, Country Reports on Terrorism 2014, June 2015, available at: <https://www.state.gov/documents/organization/239631.pdf>, p. 110 and Oberlandesgericht Stuttgart, ‘Urteil des Staatsschutzsenats in der Strafsache gegen zwei libanesische Staatsangehörige und einen deutschen Staatsangehörigen wegen Mitgliedschaft bzw. Unterstützung in einer terroristischen Vereinigung im Ausland nach § 129b StGB’, 27 March 2015, available at: <http://www.olg-stuttgart.de/pb/Lde/Startseite/Medien/Urteil+des+Staatsschutzsenats+in+der+Strafsache+gegen+zwei+libanesisc+he+Staatsangehoerige+und+einen+deutschen+Staatsangehoerigen+wegen+Mitgliedschaft+bzw.+Unterstuetzung+in+einer+terroristischen+Vereinigung+im+Ausland+nach+ +129b+StGB/?LISTPAGE=3789218>) and the case of Karolina R. and Ahmed-Sadiq M., see Oberlandesgericht Düsseldorf, ‘Nr. 10/2015 Haftstrafen im Verfahren gegen „Karolina R. u. a.“ wegen Unterstützung der ausländischen terroristischen Vereinigung “Islamischer Staat Irak und Großsyrien (ISIG)“’, 24 June 2015, available at: http://www.olg-duesseldorf.nrw.de/behoerde/presse/archiv/Pressemitteilungen_aus_2015/20150624_PM_Urteil_Karolina-R_/index.php.

¹²¹ Available at: <http://www.gesetze-im-internet.de/vstgb/VStGB.pdf> (in German) and <https://www.mpicc.de/files/pdf1/vstgbleng2.pdf> (in English).

¹²² An example is the Aria Ladjedvardi case (available at: <http://www.internationalcrimesdatabase.org/Case/3276>) and the Abdelkarim El B. case (available at: <http://www.internationalcrimesdatabase.org/Case/3297/Prosecutor-v-Abdelkarim-El-B/>).

¹²³ Also alleged war crimes committed by asylum seekers have not been prosecuted yet, see J. Visser, ‘Twintig Syrische asielzoekers verdacht van oorlogsmisdaden’, *de Volkskrant*, 29 February 2016, available at: <https://www.volkskrant.nl/buitenland/twintig-syrische-asielzoekers-verdacht-van-oorlogsmisdaden~a4254165/>.

¹²⁴ Examples are the Omar H. case (in appeal, available at: <http://www.internationalcrimesdatabase.org/Case/3293>) and in cassation, available at: <http://www.internationalcrimesdatabase.org/Case/3274>) and the Maher H. case (in appeal, available at: <http://www.internationalcrimesdatabase.org/Case/3279>). Moreover, three defendants from the Context case (available at: <http://www.internationalcrimesdatabase.org/Case/3270>), namely Jordi de J., Hicham el O. and Anis Z., were convicted on the basis of, among other things, Article 134a of the DCC as well. The same goes for the later cases of Nouredin B., available at: <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2016:8464>, and Thijs B., available at: <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2016:8465>.

¹²⁵ Examples are the cases of Omar H. (first instance, available at: <http://www.internationalcrimesdatabase.org/Case/3292>), Maher H. (first instance, available at: <http://www.internationalcrimesdatabase.org/Case/3278>) and in appeal, available at: <http://www.internationalcrimesdatabase.org/Case/3279>) and the Context case, available at: <http://www.internationalcrimesdatabase.org/Case/3270>.

¹²⁶ An example is the Omar H. case in first instance, available at: <http://www.internationalcrimesdatabase.org/Case/3292>, in appeal, available at: <http://www.internationalcrimesdatabase.org/Case/3278> and in cassation, available at: <http://www.internationalcrimesdatabase.org/Case/3274>. Note that Article 96, para. 2 of the DCC is also often used to criminalise preparation.

140a of the DCC),¹²⁷ and recruitment (Article 205 of the DCC).¹²⁸ An interesting feature of the Dutch context is the reliance on ordinary crimes with ‘terrorist intent’ (Articles 83 and 83a of the DCC) added, such that prosecutors have an additional element in the crime to prove rather than a completely different offence. Where crimes can be proven with ‘terrorist intent’, they attract higher penalties.

In Australia, relevant FFs provisions can be found in Part 5.3 (‘Terrorism’) and 5.5 (‘Foreign incursions and recruitment’) of the Criminal Code Act 1995.¹²⁹ Part 5.5 stems from the Crimes (Foreign Incursions and Recruitment) Act 1978 and has been incorporated, in December 2014, in the Criminal Code Act 1995.¹³⁰ Under this Part, it is an offence, among other things, to enter foreign countries with the intention of engaging in hostile activities (maximum penalty: imprisonment for life),¹³¹ to engage in a hostile activity in a foreign country (maximum penalty: imprisonment for life),¹³² to prepare to enter (maximum penalty: imprisonment for life),¹³³ or to prepare another person – for instance through providing training (maximum penalty: imprisonment for life)¹³⁴ or through giving goods and services (maximum penalty: imprisonment for life)¹³⁵ – to enter a foreign country with the intention of engaging in hostile activities, and to recruit persons to join organisations engaged in hostile activities against foreign governments (maximum penalty: 25 years’ imprisonment).¹³⁶ In all these provisions, the term ‘engage in a hostile activity’ is defined as

conduct in that country with the intention of achieving one or more of the following objectives (whether or not such an objective is achieved): (a) the overthrow by force or violence of the government of that or any other foreign country (or of a part of that or any other foreign country); (b) the engagement, by that or any other person, in action that: (i) falls within subsection 100.1(2)[¹³⁷] but does not

¹²⁷ Examples are defendants Oussama C., Azzedine C., Rudolph H., Hicham El O., Hatim R. and Anis Z. in the Context case, available at: <http://www.internationalcrimesdatabase.org/Case/3270>, as well as defendants Nouredin B., available at: <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2016:8464>, Abdallah R., available at: <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2016:8412>, Thijs B., available at: <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2016:8465> and Driss D., available at: <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2016:8411>.

¹²⁸ An example is defendant Oussama C. in the Context case, available at: <http://www.internationalcrimesdatabase.org/Case/3270>. Recruitment was also charged in the case of Shukri F., available at: <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2014:14648>, but she was acquitted of that charge. See C. Paulussen and E. Entenmann, ‘National Responses in Select Western European Countries to the Foreign Fighter Phenomenon’, in: de Guttery et al., p. 413 for more information.

¹²⁹ See Australian Government, Attorney-General’s Department, ‘Australia’s counter-terrorism laws’, available at: <https://www.ag.gov.au/NationalSecurity/CounterterrorismLaw/Pages/AustraliasCounterTerrorismLaws.aspx>. The Act itself is available at: <https://www.legislation.gov.au/Details/C2017C00235>.

¹³⁰ See Australian Government, Attorney-General’s Department, ‘Foreign incursions and recruitment offences’, available at: <https://www.ag.gov.au/NationalSecurity/CounterterrorismLaw/Pages/ForeignIncursionsAndRecruitmentOffences.aspx>.

¹³¹ Section 119.1(1) of the Criminal Code Act.

¹³² Section 119.1(2) of the Criminal Code Act.

¹³³ Section 119.4(1) of the Criminal Code Act. For an example, see the Mohamed case (who was then still tried on the basis of Section 7(1(a) of the Crimes (Foreign Incursions and Recruitment) Act 1978), available at: <http://www.internationalcrimesdatabase.org/Case/3287>.

¹³⁴ Section 119.4(3) of the Criminal Code Act.

¹³⁵ Section 119.4(5) of the Criminal Code Act. For an example, see the Alqudsi case (who was then still tried on the basis of Section 7(1(e) of the Crimes (Foreign Incursions and Recruitment) Act 1978), available at: <http://www.internationalcrimesdatabase.org/Case/3280>.

¹³⁶ Section 119.6 of the Criminal Code Act.

¹³⁷ “Action falls within this subsection if it: (a) causes serious harm that is physical harm to a person; or (b) causes serious damage to property; or (c) causes a person’s death; or (d) endangers a person’s life, other than the life of the person taking the action; or (e) creates a serious risk to the health or safety of the public or a section of the public; or (f) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to: (i) an information system; or (ii) a telecommunications system; or (iii) a financial system; or (iv) a system used for the delivery of essential government services; or (v) a system used for, or by, an essential public utility; or (vi) a system used for, or by, a transport system.”

fall within subsection 100.1(3)[¹³⁸]; and (ii) if engaged in in Australia, would constitute a serious offence; (c) intimidating the public or a section of the public of that or any other foreign country; (d) causing the death of, or bodily injury to, a person who is the head of state of that or any other foreign country, or holds, or performs any of the duties of, a public office of that or any other foreign country (or of a part of that or any other foreign country); (e) unlawfully destroying or damaging any real or personal property belonging to the government of that or any other foreign country (or of a part of that or any other foreign country).¹³⁹

Moreover, it is an offence to enter or remain in a declared area (maximum penalty: 10 years' imprisonment),¹⁴⁰ unless that person is entering or remaining there solely for legitimate purposes, such as providing aid of a humanitarian nature,¹⁴¹ or making a news report of events in the area.¹⁴² The Minister of Foreign Affairs may declare such an area if he or she is satisfied that a listed terrorist organisation is engaging in a hostile activity in that area of the foreign country.¹⁴³ At the time of writing this paper, two such areas had been declared, namely Mosul district, Ninewa province in Iraq, and Al-Raqqa province in Syria.¹⁴⁴

More generally, the case analyses reveal that certain countries, generally those with a common law legal system, are also relying upon guilty pleas and plea bargaining in relation to FF conduct.¹⁴⁵ The plea-bargaining system allows for reduced sentences for offenders as well as reducing the costs for the State by avoiding lengthy criminal proceedings. This may also lead to certain choices in policing. For example, in Australia and the US, suspects are often only arrested upon their arrival at the airport to travel to the conflict zone, putting the authorities in a firm bargaining position.¹⁴⁶ In his *ICCT Perspective*, David Wells also proposes to consider a plea bargain scheme for FFs abroad, whose purpose would be "reliably incarcerating returned foreign fighters, reducing the short-term threat that they pose."¹⁴⁷ Although there are also concerns about such a scheme,¹⁴⁸ the current overview has shown, and will show below, that in many countries, the sentences for FFs conduct are quite high. The prospect of significant prison sentences may lead to individuals who want to return think twice. Of course, this is not saying that policy makers and criminal justice professionals should enact or issue lower sentences for people who have committed principal crimes such

¹³⁸ "Action falls within this subsection if it: (a) is advocacy, protest, dissent or industrial action; and (b) is not intended: (i) to cause serious harm that is physical harm to a person; or (ii) to cause a person's death; or (iii) to endanger the life of a person, other than the person taking the action; or (iv) to create a serious risk to the health or safety of the public or a section of the public."

¹³⁹ Section 117.1(1) of the Criminal Code Act.

¹⁴⁰ Section 119.2(1) of the Criminal Code Act.

¹⁴¹ Section 119.2(3)(a) of the Criminal Code Act.

¹⁴² Section 119.2(3)(f) of the Criminal Code Act.

¹⁴³ Section 119.3(1) of the Criminal Code Act.

¹⁴⁴ See Australian Government, Australian National Security, 'Declared area offence', available at: <https://www.nationalsecurity.gov.au/WhatAustraliaIsDoing/Pages/DeclaredAreaOffence.aspx>.

¹⁴⁵ Examples include the Conley case, available at: <http://www.internationalcrimesdatabase.org/Case/3284>, and the Elfgeeh case, available at: <http://www.internationalcrimesdatabase.org/Case/3271> from the US, the Succarieh case from Australia, see A. Kos and J. Bavas, 'Omar Succarieh, Islamic bookstore owner, gets 4.5 years in jail for foreign incursion offences', *ABC News*, 2 November 2016, available at: <http://www.abc.net.au/news/2016-11-02/omar-succarieh-logan-islamic-bookstore-owner-4-years-jail/7987348>, the case of the Nawaz brothers from the UK, available at: <http://www.internationalcrimesdatabase.org/Case/3285>, and the Larmond brothers and friend case from Canada, available at: <http://www.internationalcrimesdatabase.org/Case/3277>.

¹⁴⁶ Examples are the Mohamed case from Australia, available at: <http://www.internationalcrimesdatabase.org/Case/3287>, and the Conley case, available at: <http://www.internationalcrimesdatabase.org/Case/3284>, and Elhuzayel & Badawi case, available at: <http://www.internationalcrimesdatabase.org/Case/3272>, from the US.

¹⁴⁷ See D. Wells, 'Could Repatriating Foreign Fighters Make Europe Safer?', *ICCT Perspective*, 25 November 2016, available at: <https://icct.nl/publication/could-repatriating-foreign-fighters-make-europe-safer/>.

¹⁴⁸ See E. Entenmann, 'Why "Amnesty" Should Not Be Considered for Returning Foreign Fighters: A Response to Wells and Gurski', *ICCT Perspective*, 20 January 2017, available at: <https://icct.nl/publication/why-amnesty-should-not-be-considered-for-returning-foreign-fighters-a-response-to-wells-and-gurski/>.

as war crimes, even if that has the effect that people will stay in the region. But it may be an interesting option for certain FFs who are ‘only’ guilty of having joined an armed group, although the specific group they have joined will also have an impact here, see below. Issuing long sentences for lesser crimes may have as a consequence that more people than necessary will stay in the conflict zone, because possible returnees will see no other viable options.¹⁴⁹ This may prolong and exacerbate fighting.¹⁵⁰ Outside common law countries, such as in Germany, there are no plea agreements, but defendants who instead confess to the charges.¹⁵¹

The issue of amnesty should also be discussed in this context. Article 6, paragraph 5 of Additional Protocol II to the Geneva Conventions states that “[a]t the end of hostilities, the authorities shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict”. That would obviously not be the case for persons who have committed war crimes or in fact other international crimes. For example, the Rome Statute of the ICC, which now has 123 States Parties, affirms “that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation” and recalls “that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”. However, it would mean that “the act of taking up arms should preferably not itself be punished”.¹⁵² Even though Syria is not a party to Additional Protocol II, one can wonder more generally (and also in view of the fact that 168 States in the world are party to this protocol): if authorities directly involved in the conflict are basically requested not to prosecute persons for fighting as such, then perhaps a country far more distant from the conflict should also follow that request.¹⁵³ Nonetheless, also in such cases – cf. the just-discussed plea-bargaining system – all the specifics of the case should be taken into account; even if the following two fighters may not have been involved in crimes themselves, there is a difference of course between someone who has supported (by fighting) a group which throughout the war has respected international humanitarian law and someone who has supported (by fighting) an abhorrent group such as ISIS which throughout war has nothing but shown utter disdain to international humanitarian law.

¹⁴⁹ See, for instance, M. Siegel, ‘Australian PM Abbott closes door on foreign fighters coming home’, *Reuters*, 19 May 2015, available at: <https://www.reuters.com/article/us-australia-islamic-state/australian-pm-abbott-closes-door-on-foreign-fighters-coming-home-idUSKBN0O406U20150519>, S. Lauder, ‘Islamic State: Australian IS fighters negotiate with Government over return, fear jail sentences’, *ABC News*, 19 May 2015, available at: <http://www.abc.net.au/news/2015-05-19/australian-is-fighters-fear-punishments-on-return-to-australia/6479938> and A. Speri, ‘Syria’s Foreign Fighters Are There to Stay’, *Vice News*, 18 April 2014, available at: <https://news.vice.com/article/syrias-foreign-fighters-are-there-to-stay>: “For many of them, even if they wanted to return home, doing so wouldn’t be easy. Neighboring Jordan, for instance — the single largest contributor of foreign fighters to Syria’s war — has been cracking down on returnees. The government — a US ally that also needs to keep up diplomatic and commercial relationships with Assad’s regime, just in case it doesn’t fall — has turned a blind eye to Jordanian citizens going to fight in Syria, but its posture is different when those same fighters have tried to come back, either for short visits or because they got sick of the war. Jordanian returnees have been increasingly picked up, charged with “acts not authorized by the state that sour relations with legitimate Syrian authorities,” tried quickly by military courts, and thrown in jail with two to five year sentences — which is not exactly an incentive to return home.”

¹⁵⁰ See the Preamble to UNSC Resolution 2178 (2014), which states: “Concerned that foreign terrorist fighters increase the intensity, duration and intractability of conflicts”.

¹⁵¹ Examples are the Harun P. case, available at: <http://www.internationalcrimesdatabase.org/Case/3283> and the Kreshnik B. case, see ‘Young man confesses in Germany’s first IS terror trial’, *Deutsche Welle*, 10 October 2014, available at: <http://www.dw.com/en/young-man-confesses-in-germanys-first-is-terror-trial/a-17986893>.

¹⁵² See T.M.C. Asser Instituut, ‘International Humanitarian Law Applicable In Non-International Armed Conflicts’, available at: <http://www.asser.nl/media/4092/asser-ihl-13463b.pdf>.

¹⁵³ See C. Paulussen, ‘The Syrian Foreign Fighters Problem: A Test Case from The Netherlands’, *ICCT Perspective*, 2 December 2013, available at: <https://icct.nl/publication/the-syrian-foreign-fighters-problem-a-test-case-from-the-netherlands/>.

Another trend that can be identified is that the penalties for crimes are not standardised and thus the sentences for crimes are not uniform across States, even where conduct is arguably similar. Indeed, UNSC Resolution 2178 only requires that States “establish serious criminal offences sufficient to provide the ability to prosecute and to penalize in a manner duly reflecting the seriousness of the offense”,¹⁵⁴ thus leaving the actual penalties entirely to the discretion of States.

Some of the penalties are quite severe. As explained earlier, the maximum penalty for most of the provisions from Australia is life imprisonment, but so far (and based on earlier legislation), cases have led to punishments of ‘only’ 8 years¹⁵⁵ and 5,5 years.¹⁵⁶ In the US, the length of prison sentences for federal ISIS cases has increased, among other things because the maximum sentence for the ‘material support’ crime has also increased, from 15 to 20 years for violations after June 2015.¹⁵⁷ In a recent report from Fordham University School of Law, it was concluded that approximately ten per cent of the cases have led to an actual trial (the other cases led to plea agreements) and that of the 12 cases that have gone to trial, all of them have resulted in convictions, with “[t]he average post-trial sentence [being] 32.5 years—triple the average sentence for defendants convicted pursuant to a guilty-plea agreement.”¹⁵⁸ By contrast, in the Netherlands, the highest sentence delivered so far is 6 years, including for two persons who actually went to Syria and joined the jihad.¹⁵⁹ However, it appears that when an actual, specific crime has been proven, such as murder, higher sentences are given, such as 28 years for Hakim Elouassaki (in Belgium),¹⁶⁰ and life imprisonment for Hassan al-Mandlawi and Al-Amin Sultan (in Sweden).¹⁶¹

Finally, it is noteworthy that trials *in absentia*, in the absence of the defendant, are used in certain jurisdictions. Hence, in major terrorism trials in Belgium¹⁶² and the

¹⁵⁴ UNSC Resolution 2178 (2014), para. 6.

¹⁵⁵ For assisting others to travel to the conflict in Syria, see the Alqudsi case, available at: <http://www.internationalcrimesdatabase.org/Case/3280>.

¹⁵⁶ For attempting to travel to Syria and fight there, see the Mohamed case, available at: <http://www.internationalcrimesdatabase.org/Case/3287>.

¹⁵⁷ See K.J. Greenberg and S. Weiner, Center on National Security, Fordham University School of Law, ‘The American Exception. Terrorism Prosecutions in the United States – The ISIS Cases. March 2014 – August 2017’, 2017, available at: <https://news.law.fordham.edu/wp-content/uploads/2017/09/TheAmericanException9-17.pdf>, p. 34.

¹⁵⁸ *Ibid.*, p. 27.

¹⁵⁹ For Azzedine C., who was convicted of incitement, disseminating material, participation in a terrorist/criminal organisation, inciting hatred, making defamatory statements and libellous defamation, for Hatim R., who has been in Syria since May 2013 and participated in the armed jihadi struggle there and who was convicted of intent to murder, intent to commit manslaughter, intent to cause an explosion, intent to obtain means and opportunity to commit these crimes, acquiring knowledge to commit these crimes, incitement, disseminating material and participating in a terrorist/criminal organisation, and for Anis Z., who has also been in Syria since March 2013, took part in a training camp and participated in the armed jihadi struggle there, who was convicted of conspiracy/intent to murder, conspiracy/intent to manslaughter, conspiracy/intent to cause an explosion, intent to obtain means and opportunity to commit these crimes, acquiring information to commit a terrorist crime and participation in a terrorist/criminal organisation. These are all defendants from the Context case, available at: <http://www.internationalcrimesdatabase.org/Case/3270>.

¹⁶⁰ See ‘Belgian foreign fighter sentenced to 28 years for murder in Syria’, *Reuters*, 13 February 2017, available at: <https://www.reuters.com/article/uk-mideast-crisis-belgium/belgian-foreign-fighter-sentenced-to-28-years-for-murder-in-syria-idUKKBN15519Y>.

¹⁶¹ See ‘Swedish pair get life in jail for Syria terror crimes’, *The Local*, 14 December 2015, available at: <https://www.thelocal.se/20151214/swedish-pair-get-life-in-jail-for-syria-terror-crimes>.

¹⁶² Example are the Sharia4Belgium case from February 2015 (with 36 persons tried *in absentia*), see Europol, European Union Terrorism Situation and Trend Report (TE-SAT) 2016, available at: https://www.europol.europa.eu/sites/default/files/documents/europol_tesat_2016.pdf, p. 19, the case of people associated with Zerkani from July 2015 (with 14 persons tried *in absentia*), see P. Cruickshank and T. Lister, ‘Immense challenges remain despite arrests of terror suspects’, *CNN*, 8 April 2016, available at: <http://edition.cnn.com/2016/04/08/europe/belgium-arrests-significance/index.html> and the case involving the Verviers cell from July 2016 (with 9 persons tried *in absentia*), see Europol, European Union Terrorism Situation and Trend Report (TE-SAT) 2017, available at: https://www.europol.europa.eu/sites/default/files/documents/tesat2017_0.pdf, p. 18.

Netherlands,¹⁶³ involving multiple defendants, several of them were tried in their absence. In fact, and as mentioned in the beginning of this paper, in the Netherlands, the Public Prosecution Service has announced in early 2017 that it will start criminal investigations against all 190 Dutch persons still in Syria and Iraq. National coordinating prosecutor Ferry van Veghel was quoted saying: “Given the high risk of people who come back from this area, we do not want to wait until they come back before opening criminal investigations. We want it all to start now and continue in their absence.”¹⁶⁴ In doing so, the Public Prosecution Service stated, it wants to send a strong message: “These people think they have said farewell to our legal system, but we have not said farewell to them.”¹⁶⁵ The first case based on this new policy started in March 2017, involving ten (absent) defendants.¹⁶⁶

4. Challenges

4.1. Introduction

The previous section discussed legal bases (such as possible charges, including the increased focus on preparatory crimes) and approaches to prosecution of FFs (such as the use of plea agreements and sentencing) at the national level. The authors will now focus on two specific challenges in the context of FFs prosecutions, related to the role of the prosecutor (4.2) and the issue of evidence (4.3). After that, two broader concerns will be presented, on the further move into the pre-crime space (4.4.1) and effectiveness (4.4.2).

4.2. Role of the Prosecutor

Through both new and existing laws, prosecutors have been given a wide range of offences, many of which reach very far back into conduct that some contest is not even criminal, and which must be navigated and managed in increasingly challenging situations.¹⁶⁷ Prosecutors are inevitably bound by the law they must apply, which can generally only be changed by governments. This means that, for better or for worse, the most effective tool left to prosecutors will be their discretion in terms of deciding whether to charge, who to charge, and what charges to bring. While some of these decisions will be governed by the evidence available, it may be necessary to seriously consider the value of prosecution when prospective offenders’ provable misdeeds drift further towards the minor end of the criminal spectrum or involve particularly

¹⁶³ An example is the Context case, available at: <http://www.internationalcrimesdatabase.org/Case/3270> (with two persons tried *in absentia*).

¹⁶⁴ J. Pieters, ‘Prosecute Dutch Jihadists Still in Syria, Iraq: Public Prosecutor’, *NL Times*, 16 February 2017, available at: <https://nltimes.nl/2017/02/16/prosecute-dutch-jihadists-still-syria-iraq-public-prosecutor>.

¹⁶⁵ See Public Prosecution Service, ‘OM pakt IS-terugkeerders met een missie aan’, 15 February 2017, available at: <https://www.om.nl/onderwerpen/jihad-syriegangers/@98010/pakt-terugkeerders/>.

¹⁶⁶ See Public Prosecution Service, ‘OM dagvaardt afwezige IS-strijders’, 10 March 2017, available at: https://www.om.nl/onderwerpen/jihad-syriegangers/?tabblad=373677&pager_page=1.

¹⁶⁷ In light of international and regional obligations to prosecute, attacks going on in countries that lead to inflammatory rhetoric by politicians, the refugee crisis and its purported links with terrorism, and directions from politicians with regards to using the law, including its penalties, namely using it frequently and to its fullest extent.

vulnerable persons (think of glorification, some pre-preparatory offences or cases involving children,¹⁶⁸ the mentally ill¹⁶⁹ or other vulnerable adults).

However, given UNSC Resolution 2178 and other supranational instruments, as well as national political and legal developments, there is a huge pressure on prosecutors to prevent and suppress potential FFs via criminal sanctions, including in their early stages of mobilisations. In the context of another study, to which one of the current authors contributed and for which practitioners were interviewed,¹⁷⁰ it became clear that prosecutors and judges themselves have mixed feelings about this development. Some are very wary of the fact that criminal law is increasingly used as a preventive tool, whereas some prosecutors in fact agree with Hohlmeier (see Subsection 2.2.2 above) in that they would prefer investigating conduct more removed from the actual terrorist act over investigating the results of such an act. More on moving away into the pre-crime space will be discussed in Subsection 4.4.1 below.

One can thus wonder whether there should not be greater discretion for prosecutors to decide what to do with ‘at risk individuals’. Perhaps it may be better, in a specific case, not to start a criminal trial altogether and to divert the individual into deradicalisation programmes or other ‘softer’, preventive responses? Or, if prosecution is unavoidable, for prosecutors to recommend ‘softer’ penalties that seek to rehabilitate offenders?¹⁷¹ Either way, prosecutorial discretion operates as a final safeguard of sorts given the life-altering implications of a terrorism conviction and the already-discussed substantive and procedural human rights concerns of especially early intervention.

However, if the decision is made to prosecute in principle, the question rises *who* to prosecute. In this context, it is noteworthy to mention that there appears to be some reluctance to charge or prosecute FFs who fight jihadi groups.¹⁷² In Australia, for example, the case against Jamie Williams, who reportedly admitted he wanted to fight with the Kurdish People’s Protection Units (YPG), was dropped. His defence had argued, among other things, that there was no public interest in prosecuting someone not fighting with, but *against* IS and a spokesperson for Attorney-General George Brandis

¹⁶⁸ See also L. van der Heide and E. Entenmann, ‘Juvenile Violent Extremist Offenders: Peer Pressure or Seasoned Soldiers?’, *ICCT Perspective*, 12 September 2016, available at: <https://icct.nl/publication/juvenile-violent-extremist-offenders-peer-pressure-or-seasoned-soldiers/>. An example of a FF prosecuted on the basis of the juvenile penal code is the Kreshnik B. case from Germany, see ‘Young man confesses in Germany’s first IS terror trial’, *Deutsche Welle*, 10 October 2014, available at: <http://www.dw.com/en/young-man-confesses-in-germanys-first-is-terror-trial/a-17986893>. It may be interesting to note that even the Prosecutor of the Special Court for Sierra Leone, which was established in 2002 to address serious crimes committed during the country’s civil war, many of which were perpetrated by child soldiers, stated that he would not prosecute children, even if he legally could according to the statute of the Special Court (as from the age of 15). He explained: “The children of Sierra Leone have suffered enough both as victims and perpetrators. I am not interested in prosecuting children. I want to prosecute the people who forced thousands of children to commit unspeakable crimes”. See Special Court for Sierra Leone, Public Affairs Office, ‘Special Court Prosecutor Says He Will Not Prosecute Children’, Press Release, 2 November 2002, available at: <http://www.rscsl.org/Documents/Press/OTP/prosecutor-110202.pdf>.

¹⁶⁹ See also C. Paulussen, J. Nijman and K. Lismont, ‘Mental Health and the Foreign Fighter Phenomenon: A Case Study from the Netherlands’, *ICCT Report*, March 2017, available at: <https://icct.nl/wp-content/uploads/2017/03/ICCT-Paulussen-Nijman-Lismont-Mental-Health-and-the-Foreign-Fighter-Phenomenon-March-2017.pdf>.

¹⁷⁰ European Parliament, ‘The European Union’s Policies on Counter-Terrorism. Relevance, Coherence and Effectiveness’, Study for the LIBE Committee, 2017, available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583124/IPOL_STU\(2017\)583124_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583124/IPOL_STU(2017)583124_EN.pdf).

¹⁷¹ See also European Commission, High-Level Ministerial Conference, ‘Criminal justice response to radicalisation’, Brussels, 19 October 2015, available at: http://ec.europa.eu/justice/events/response-radicalisation-2015/files/background_document.pdf, pp. 3-4.

¹⁷² See generally J. Fritz and J. Young, ‘Transnational “Volunteers”: America’s Anti-ISIS Fighters’, *War on the Rocks*, 13 September 2016, available at: <https://warontherocks.com/2016/09/transnational-volunteers-americas-anti-isil-fighters/> and H. Tuck, T. Silverman and C. Smalley, ‘“Shooting in the right direction”: Anti-ISIS Foreign Fighters in Syria & Iraq’, Institute for Strategic Dialogue, Horizons Series No. 1, 2016, available at: <http://www.isdglobal.org/wp-content/uploads/2016/08/ISD-Report-Shooting-in-the-right-direction-Anti-ISIS-Fighters.pdf>.

stated that in deciding whether to consent to a prosecution the Attorney-General “has a broad discretion and is able to take into account a number of factors”¹⁷³ and that “[o]n this particular occasion, the Attorney-General did not consent to the prosecution. It would be inappropriate to comment further”.¹⁷⁴ Other Australian returnees who had links with the YPG, such as Ashley Dyball and Matthew Gardiner, were not charged either.¹⁷⁵ The same can be said of Australian national George Khamis, who joined Dwekh Nawsha, a Christian militia fighting IS in Northern Iraq,¹⁷⁶ or of Canadian national Shaelynn Jabs, who joined the YPG.¹⁷⁷ In the latter case, a spokesperson for Public Safety Canada was quoted saying that it is a criminal offence to leave Canada to participate in terrorist-related activity, but that the YPG “is not a listed terrorist entity”.¹⁷⁸ Hence, “Canadians fighting with the YPG would not be captured under this legislation unless that individual committed a terrorist act as described in Canadian law.”¹⁷⁹ This is in contrast to the Jitse Akse case in the Netherlands, who reportedly fought with the YPG as well. In this case, the prosecution actually did arrest him and started an investigation on suspicion of murder, as the Public Prosecution Service opined that it is not acceptable for civilians to join a conflict anywhere in the world, thinking they can decide over the life and death of others. In such circumstances, the right to use force – deadly if needed – is restricted to the army.¹⁸⁰ Akse’s arrest led to indignation among the general public, with more than 66,000 people signing an online petition asking that he not be punished.¹⁸¹ In the end, the case was dropped for lack of evidence.¹⁸²

Hence, possible reasons for not starting a case at all, besides evidentiary issues (on this, see the next subsection), may lie in the lack of political impetus to charge those fighting jihadi groups, or that some are not listed as ‘terrorist organisations’ or ‘proscribed organisations’ in domestic jurisdictions. Some States may even support such organisations. In fact, the international coalition against ISIS backs the YPG. Yet, the YPG is affiliated with the Kurdistan Workers’ Party or PKK, which several countries, including the US, have listed as a terrorist organisation.¹⁸³ This shows that a lack of a clear terrorism definition may lead to “unequal application of the law, in which a member state may selectively criminalize fighting by its nationals alongside parties to a conflict

¹⁷³ See M. Safi, ‘Foreign fighter case dropped against man accused of trying to fight with Kurdish rebels’, *The Guardian*, 9 February 2016, available at: <https://www.theguardian.com/australia-news/2016/feb/09/foreign-fighter-case-dropped-against-man-accused-of-trying-to-fight-with-kurdish-rebels>.

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

¹⁷⁶ See M. Knott, ‘No charges for suspected foreign fighters Matthew Gardiner and George Khamis’, *The Sydney Morning Herald*, 20 May 2015, available at: <http://www.smh.com.au/federal-politics/political-news/no-charges-for-suspected-foreign-fighters-matthew-gardiner-and-george-khamis-20150520-gh61nn.html>.

¹⁷⁷ See A. Huncar, ‘Alberta woman back in Syria to fight ISIS militants’, *CBC News*, 12 October 2016, available at: <http://www.cbc.ca/news/canada/edmonton/alberta-woman-back-in-syria-to-fight-isis-militants-1.3800770>.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*

¹⁸⁰ See Openbaar Ministerie, ‘OM seponeert strafzaak tegen verdachte van moord IS-strijders’, 21 June 2016, available at: <https://www.om.nl/actueel/nieuwsberichten/@94906/seponeert-strafzaak/>.

¹⁸¹ Available at: https://www.petities24.com/steun_jitse_akse.

¹⁸² See Openbaar Ministerie, ‘OM seponeert strafzaak tegen verdachte van moord IS-strijders’, 21 June 2016, available at: <https://www.om.nl/actueel/nieuwsberichten/@94906/seponeert-strafzaak/>.

¹⁸³ See L. Taylor, “Foreign Terrorist Fighter” Laws. Human Rights Rollbacks Under UN Security Council Resolution 2178’, Human Rights Watch, December 2016, available at: https://www.hrw.org/sites/default/files/supporting_resources/ftf_essay_03feb2017_final_pdf.pdf, p. 6. An example of a case where someone who joined the PKK has been prosecuted is the UK case of Özçelik, see C. Davies, ‘Girl becomes first Briton convicted of trying to join fight against Islamic State in Syria’, *The Guardian*, 20 November 2015, available at: <https://www.theguardian.com/uk-news/2015/nov/20/girl-becomes-first-briton-convicted-of-trying-to-join-fight-against-islamic-state-in-syria>.

whom that state opposes, but not fighting by its nationals with parties it supports, even if both sides are engaged in unlawful conduct or listed as terrorist organizations.”¹⁸⁴

4.3. Evidentiary Issues

Besides the question of whether and if so, who, and for what charges, to prosecute, collecting evidence in the context of FF cases is clearly a major challenge. In the words of Gilles de Kerchove, the EU Counter-Terrorism Coordinator:

*[E]vidence from the battlefields in Syria and Iraq is difficult to obtain, collection and use of internet based evidence is challenging, cross-border legal cooperation is often necessary to get access to evidence (foreign fighters transit through other countries, internet providers might be located abroad), some information originates from security services, hence the challenges of using intelligence information in judicial proceedings arise.*¹⁸⁵

How can these evidentiary challenges related to 1) battlefield evidence; 2) internet-based evidence; 3) cross-border legal cooperation and 4) secret information and its use in court be (somewhat) addressed?

On battlefield evidence, one interesting potential avenue is to make more use of the military. Indeed, often the evidence comes from combat zones, where many of the principal crimes will take place. However, such evidence is difficult to obtain, where it is obtainable at all, due to the breakdown of the national criminal justice system and, in some cases, the severing of diplomatic ties between States during conflict. Where evidence does arrive, some of it arrives by chance from sources coming from Syria and Iraq,¹⁸⁶ or it may come from the military, who will often be the first to be confronted with the results of a crime. As has been argued elsewhere, sufficient scope and resources should be provided in military missions to gather evidence while ensuring any evidence is handled in such a way that it is admissible in a civilian court and respects the rights of a defendant.¹⁸⁷

On internet-based evidence, and as noted in a briefing from the European Parliamentary Research Service, “the increasingly widespread use of photos and video footage by terrorist groups, and individual combatants posting self-incriminating material on social media (e.g. Facebook) provides additional paths for gathering

¹⁸⁴ See L. Taylor, “Foreign Terrorist Fighter” Laws. Human Rights Rollbacks Under UN Security Council Resolution 2178’, Human Rights Watch, December 2016, available at:

https://www.hrw.org/sites/default/files/supporting_resources/ftf_essay_03feb2017_final_pdf.pdf, p. 5.

¹⁸⁵ Council of the European Union, EU Counter-Terrorism Coordinator, ‘Foreign fighters and returnees’, 15715/14, 24 November 2014, available at: <http://statewatch.org/news/2014/nov/eu-council-foreign-fighters-discussion-paper-15715-14.pdf>, p. 3.

¹⁸⁶ For example through the testimony of refugees (see B. Knight, ‘Refugees in Germany reporting dozens of war crimes’, *Deutsche Welle*, 11 April 2016, available at: <http://www.dw.com/en/refugees-in-germany-reporting-dozens-of-war-crimes/a-19179291> and ‘Germany to start trials over Syrian war crimes, as refugee influx brings suspects into country’, *ABC News*, 1 May 2016, available at: <http://www.abc.net.au/news/2016-05-01/refugee-influx-spurs-germany-to-tackle-syrian-war-crimes/7374152>) or through evidence smuggled out (see Human Rights Watch, ‘If the Dead Could Speak. Mass Deaths and Torture in Syria’s Detention Facilities’, 16 December 2015, available at: <https://www.hrw.org/report/2015/12/16/if-dead-could-speak/mass-deaths-and-torture-syrias-detention-facilities>).

¹⁸⁷ See generally B. van Ginkel and C. Paulussen, ‘The Role of the Military in Securing Suspects and Evidence in the Prosecution of Terrorism Cases before Civilian Courts: Legal and Practical Challenges’, *ICCT Research Paper*, May 2015, available at: <https://www.icct.nl/download/file/ICCT-Van-Ginkel-Paulussen-The-Role-Of-The-Military-In-Securing-Suspects-And-Evidence-In-The-Prosecution-Of-Terrorism-Cases-Before-Civilian-Courts.pdf> and B. van Ginkel, ‘Prosecuting Foreign Terrorist Fighters: What Role for the Military?’, *ICCT Policy Brief*, May 2016, available at: <https://www.icct.nl/wp-content/uploads/2016/05/ICCT-VanGinkel-Prosecuting-Foreign-Terrorist-Fighters-May2016-2.pdf>.

evidence”.¹⁸⁸ Conversely, the Canadian Security Intelligence Service has noted that the appeal of foreign fighting is linked at least partially to social media due to, among other things, “the emergence of new social-media platforms better designed for exchanging information, the difficulties associated with policing some of these platforms, which are privately owned by large Western corporations, as well as resource constraints among Western intelligence services”.¹⁸⁹

On cross-border legal cooperation, this can indeed be challenging, and it may involve origin, transit or receiving countries, all of whom may have a piece of the evidentiary puzzle to add. Cooperation in this area is therefore essential and has been explicitly called for in UNSC Resolution 2178.¹⁹⁰ Despite these difficulties, there is indeed evidence of inter-State cooperation with regards to the prosecution of FFs. For example, in the prosecution of Adam Brookman in Australia, a witness was flown from the US in addition to FBI evidence and a request for information from Norway.¹⁹¹ Similarly, Europol’s European Counter Terrorism Centre, whose primary task is “to provide operational support to Member States in investigations, such as those following the Paris, Nice and Brussels attacks”,¹⁹² started work in January 2016 and focuses, among other things, on FFs. In addition, the FFs phenomenon has remained high on the agenda of Eurojust, the EU’s judicial cooperation unit, which has issued a number of reports on FFs and the criminal justice response.¹⁹³

And finally, on intelligence information and how it can be used in court; some countries have developed interesting avenues to cope with this issue. Useful recommendations and good practices in this context have been collected by the Global Counterterrorism Forum (GCTF), which noted, among other things, that an independent commission or a national-level terrorism prosecutor – who is not involved in the case – could be used to review the intelligence and decide whether or not it can be used in court.¹⁹⁴ Nonetheless, much work remains to be done in this field.¹⁹⁵ In its Fourth (November 2016) Report on FTFs, Eurojust concluded:

¹⁸⁸ P. Bąkowski and L. Puccio, European Parliamentary Research Service, ‘Foreign fighters – Member State responses and EU action’, Briefing, March 2016, available at: <http://www.europarl.europa.eu/EPRS/EPRS-Briefing-579080-Foreign-fighters-rev-FINAL.pdf>, p. 8.

¹⁸⁹ Canadian Security Intelligence Service, ‘The Foreign Fighters Phenomenon and Related Security Trends in the Middle East’, January 2016, available at: <https://www.csis.gc.ca/pblctns/wrldwtch/2016/20160129-en.pdf>, p. 11.

¹⁹⁰ See UNSC Resolution 2178 (2014), para. 12: “Recalls its decision in resolution 1373 (2001) that Member States shall afford one another the greatest measure of assistance in connection with criminal investigations or proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings, and *underlines* the importance of fulfilling this obligation with respect to such investigations or proceedings involving foreign terrorist fighters”.

¹⁹¹ A. Cooper, ‘Key witness in Adam Brookman IS case to travel from US to give evidence’, *The Age*, 23 March 2016 available at: <http://www.theage.com.au/national/key-witness-in-adam-brookman-is-case-to-travel-from-us-to-give-evidence-20160323-gnncfb.html> and ‘FBI evidence to be used against alleged Isis nurse Adam Brookman’, *The Guardian*, 23 May 2016, available at: <https://www.theguardian.com/australia-news/2016/may/23/fbi-evidence-to-be-used-against-alleged-isis-nurse-adam-brookman>.

¹⁹² Europol, ‘European Counter Terrorism Centre - ECTC’, available at: <https://www.europol.europa.eu/about-europol/european-counter-terrorism-centre-ectc>.

¹⁹³ See, e.g. Eurojust, ‘Eurojust’s fourth Foreign Terrorist Fighters report presented at LIBE Committee’, 29 June 2017, available at: <http://www.eurojust.europa.eu/press/PressReleases/Pages/2017/2017-06-29.aspx>.

¹⁹⁴ See GCTF, Criminal Justice Sector and Rule of Law Working Group, ‘Recommendations for Using and Protecting Intelligence Information In Rule of Law-Based, Criminal Justice Sector-Led Investigations and Prosecutions’, available at: <https://www.thegctf.org/Portals/1/Documents/Framework%20Documents/A/GCTF-Rabat-Good-Practice-6-Recommendations-ENG.pdf>, p. 7.

¹⁹⁵ See also K. Hardy, ‘Why is it so difficult to prosecute returning fighters?’, *The Conversation*, 4 June 2017, available at: <https://theconversation.com/why-is-it-so-difficult-to-prosecute-returning-fighters-78596>: “Another obstacle is that much of the information about Australians fighting overseas comes from foreign intelligence services, including the UK’s MI6 and the US Central Intelligence Agency. Conditions imposed on the sharing of this material mean the vast majority of it cannot be used as evidence in case it is exposed in open court.”

In view of the difficulty of maintaining working MLA [Mutual Legal Assistance] relations with Syria and Iraq, information collected by intelligence services is deemed crucial to gaining insights on structures and members of terrorist organisations active in that region. The scale and widespread nature of terrorist threats require national authorities to bridge the existing gaps among intelligence, law enforcement and prosecution services. None of the latter should work in isolation and intelligence gathered in terrorism matters should eventually support investigations and prosecutions of terrorist suspects. Nonetheless, no uniformed approach exists across the Member States towards the evidentiary use of intelligence.¹⁹⁶

Despite these challenges, it should not be forgotten that prosecutors and judges have been successful as well in prosecuting and adjudicating FF cases. A few recurring evidentiary sources – taking the Belgian Sharia4Belgium case¹⁹⁷ as an example – are statements from the defendants themselves, from co-defendants,¹⁹⁸ from family members, from other witnesses, intercepted telephone and e-mail conversations, audio-visual files, letters, pictures, analyses of social media accounts, such as Facebook, house searches, police observations and intelligence, even from foreign authorities (in this case Bulgaria).

Other cases have used (and the following is not an exhaustive overview, but merely meant as a presentation of the possibilities that may be of interest to prosecutors and judges from other countries not well versed in using these kinds of evidentiary sources):

-Video/photographic evidence: an example is the already-mentioned Swedish case of Hassan al-Mandlawi and Al-Amin Sultan, who were convicted in December 2015 of terrorist crimes that had occurred while they were in Syria in 2013 and who were sentenced to life imprisonment. During the search of their homes videos were found showing the execution of two prisoners. These videos constituted “the main evidence”¹⁹⁹ against the accused and showed a group of some six men being involved in the murder.²⁰⁰ The Court concluded that al-Mandlawi and Sultan had taken such an active part in the killing that they should be regarded as perpetrators of that crime, regardless of the fact that the actual killing was perpetrated by others.²⁰¹ Even though the persons involved had hidden their faces behind veils, an analysis by the National Forensic Centre concluded that it was extremely likely that the two accused were among the men in the videos.²⁰² Other examples include the US Elhuzayel and Badawi case (featuring a video of a pledge of allegiance to IS)²⁰³ and the German Aria Ladjedvardi case (featuring photographs of the accused with the impaled heads of enemy fighters, which were found, among other things, on a computer and on his mother’s phone).²⁰⁴

¹⁹⁶ Eurojust, ‘Foreign Terrorist Fighters: Eurojust’s Views on the Phenomenon and the Criminal Justice Response’, Fourth Eurojust Report, November 2016, available at: <http://statewatch.org/news/2017/mar/eu-eurojust-foreign-fighters-legal-response-report-restricted-11-16.pdf>, p. 3. For more information on the admissibility of (foreign) intelligence as evidence for criminal proceedings, see *ibid.*, pp. 8-11 and 14.

¹⁹⁷ Available at: <https://www.scribd.com/document/255429637/Vonnis-Sharia4Belgium-proces>.

¹⁹⁸ See also C. Paulussen and E. Entenmann, ‘National Responses in Select Western European Countries to the Foreign Fighter Phenomenon’, in: de Guttry et al., p. 399.

¹⁹⁹ Europol, European Union Terrorism Situation and Trend Report (TE-SAT) 2016, available at: https://www.europol.europa.eu/sites/default/files/documents/europol_tesat_2016.pdf, p. 18.

²⁰⁰ *Ibid.*

²⁰¹ *Ibid.*

²⁰² *Ibid.*, pp. 18-19.

²⁰³ Available at: <http://www.internationalcrimesdatabase.org/Case/3272>.

²⁰⁴ Available at: <http://www.internationalcrimesdatabase.org/Case/3276>.

-*Social media evidence*: an example is the Dutch Context case, in which nine individuals were convicted in 2015 for various crimes. This case featured user profiles from Facebook, Facebook groups, Twitter, Youtube and other websites in order to show incitement/dissemination and to prove terrorist intent.²⁰⁵ Another example is the US Elfgeeh case (featuring various social media accounts, including on Facebook, Twitter and Whatsapp).²⁰⁶

-*Telecommunications intercepts*: an example is the Australian case of Alqudsi.²⁰⁷ In Alqudsi's sentencing decision, the Court noted that "[m]uch of the evidence in the Crown case at trial comprised telephone intercepts".²⁰⁸ The Court acknowledged here that these phone intercepts and their contents were at least partially used to prove his terrorist intent, and that he had used false names to obtain the phone accounts.²⁰⁹

-*Confessions or witness evidence/flow on from other cases*: an example is the German case of Harun P., who cooperated with investigators following his return to Germany, and also assisted as a witness in other investigations.²¹⁰ Another example is the Belgian case of Hamza et al. which commenced following previous investigations into one of the defendants in 2013 for different (albeit similar) crimes.²¹¹

-*Expert witnesses*: an example is again the Dutch Context case, in which nine individuals were convicted in 2015 for various crimes. In this case, the Court acknowledged the value of expert witnesses that included a cultural anthropologist, a professor in Islamic and Middle Eastern law and an Islamologist.²¹²

-*Use of informants/undercover agents*: an example is US Elfgeeh case in which he pleaded guilty, among other things, to recruiting two people who were ultimately cooperating with the FBI.²¹³ In fact, in the US, undercover operations – a controversial technique – “are used more often than not in ISIS-related investigations and prosecutions. Sixty-two percent of the cases are known to have involved the use of undercover agents or informants.”²¹⁴

-*Posts on websites*: an example is the Choudary and Rahman case in the UK, in which an oath of allegiance was posted online and certain lectures were broadcast.²¹⁵

-*Computer evidence*: an example is again the Belgian case of Hamza et al. Hamza B. was in possession of various materials, including videos and documents relating to the jihad that were found on his computer and on a USB key.²¹⁶

-*Physical searches leading to other evidence*: an example is the US case concerning Conley. During the search of her home, DVDs of Anwar al-Awlaki lectures and

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²⁰⁵ Available at: <http://www.internationalcrimesdatabase.org/Case/3270>.

²⁰⁶ Available at: <http://www.internationalcrimesdatabase.org/Case/3271>.

²⁰⁷ Available at: <http://www.internationalcrimesdatabase.org/Case/3280>. See also the Mohamed case, from Australia as well, available at: <http://www.internationalcrimesdatabase.org/Case/3287>.

²⁰⁸ See para. 16 of the decision, available via: <http://www.internationalcrimesdatabase.org/Case/3280>.

²⁰⁹ See para. 101 of the decision, available via: <http://www.internationalcrimesdatabase.org/Case/3280>.

²¹⁰ See paras. 138-143 of the decision, available via: <http://www.internationalcrimesdatabase.org/Case/3283>.

²¹¹ See pp. 3-4 and 27 of the decision, available via: <http://www.internationalcrimesdatabase.org/Case/3288>.

²¹² See paras. 4.14-4.17 of the decision, available via: <http://www.internationalcrimesdatabase.org/Case/3270>.

²¹³ See para. II.4.f of the plea agreement, available via: <http://www.internationalcrimesdatabase.org/Case/3271>.

²¹⁴ See K.J. Greenberg and S. Weiner, Center on National Security, Fordham University School of Law, 'The American Exception. Terrorism Prosecutions in the United States – The ISIS Cases. March 2014 – August 2017', 2017, available at: <https://news.law.fordham.edu/wp-content/uploads/2017/09/TheAmericanException9-17.pdf>, p. 24.

²¹⁵ See p. 2 of the sentencing remarks, available via: <http://www.internationalcrimesdatabase.org/Case/3273>.

²¹⁶ See p. 24 of the decision, available via: <http://www.internationalcrimesdatabase.org/Case/3288>.

information on Al Qaeda, its affiliates and on jihad were found.²¹⁷ Another example is the UK case concerning the Nawaz brothers. Their car was searched upon their return to the UK from Syria and authorities found, among other things, rifle ammunition and a mobile phone containing videos and pictures of their time in a training camp in Syria.²¹⁸

-Material from IS itself: an example comes from Denmark, where the District Court of Glostrup was the first in Europe to refer to a questionnaire/form used by IS.²¹⁹ Europol explained that:

[t]he form offered the possibility to indicate one's role for IS and was made available by foreign authorities.^[220] It contained information on a Danish citizen charged with terrorist offences. In the form, he had been registered as a fighter. Reference to the form was made when questioning the accused about his role within the terrorist organisation. The court held that his statement about his tasks, mainly cooking and serving food, was not reliable. Based on this and other evidence, the accused was found guilty, amongst other charges, of joining a terrorist organisation and sentenced to 6 years' imprisonment.²²¹

As mentioned before, with the Caliphate crumbling, it is expected that more of such (internal) evidence will become available, which is obviously a gift to prosecutors.

4.4. Broader Concerns

4.4.1. Moving Further into the Pre-Crime Space

Judge Lasry in the Australian case concerning Amin Mohamed noted that this was “a case where the three actions you performed are not of themselves illegal or criminal. They are made so here by your intention upon reaching Syria”.²²² Mr. Mohamed had applied for a passport, booked flights and obtained the contact details of an intermediary.²²³ However, it remains incredibly difficult to prove what someone's intentions are. The Meijers Committee, a standing committee of experts on international immigration, refugee and criminal law, warned in the context of the proposal for the new EU Directive on Combating Terrorism (see Subsection 2.2.2):

Many of the offences in the proposed directive do [...] target acts that would otherwise be considered 'normal' innocent behaviour, such as taking a chemistry course or buying fertilizer. Thus, because the actus reus cannot make the difference, a person's alleged intention (mens rea) plays an even greater role, and in the field of terrorism there is a greater risk that the authorities may derive such an intention (in part) from ideologies and/or religious beliefs. In the current

²¹⁷ See para. IV.D.12 of the plea agreement, available via: <http://www.internationalcrimesdatabase.org/Case/3284>.

²¹⁸ See <http://www.internationalcrimesdatabase.org/Case/3285>.

²¹⁹ See Europol, European Union Terrorism Situation and Trend Report (TE-SAT) 2017, available at: https://www.europol.europa.eu/sites/default/files/documents/tesat2017_0.pdf, p. 19.

²²⁰ In fact: US authorities, see Eurojust, 'Foreign Terrorist Fighters: Eurojust's Views on the Phenomenon and the Criminal Justice Response', Fourth Eurojust Report, November 2016, available at: <http://statewatch.org/news/2017/mar/eu-eurojust-foreign-fighters-legal-response-report-restricted-11-16.pdf>, p. 14.

²²¹ Europol, European Union Terrorism Situation and Trend Report (TE-SAT) 2017, available at: https://www.europol.europa.eu/sites/default/files/documents/tesat2017_0.pdf, p. 19.

²²² See para. 45 of the sentencing decision, available via: <http://www.internationalcrimesdatabase.org/Case/3287>.

²²³ See para. 2 of the sentencing decision, available via: <http://www.internationalcrimesdatabase.org/Case/3287>.

*societal context, that means that there is a genuine risk that Muslims will be disproportionately targeted in practice.*²²⁴

Therefore, prosecutors and judges alike should realise they have to be careful in such ‘constructing’ of intent, as the consequences are far-going. Some judges may for that reason also acquit potential FFs,²²⁵ but this can create, in turn, new criticism from politicians,²²⁶ hence showing again the enormous pressure under which criminal justice professionals have to work these days.²²⁷ This ‘constructing’ is especially tricky in the context of digital evidence. After all: how to show the ownership of accounts and that the owner actually posted the material in question?

In short, it can be argued that criminal law is getting further and further removed from the principal act and that concerns remain about the probative value of certain evidence. Although that does not necessarily mean that certain judgements are incorrect or troublesome, it is a development that not only the legislators have to constantly pay attention to, but also the practitioners who, in the end, have to work with and apply the law in practice.

4.4.2. Effectiveness

Of importance in this discussion is also to what extent prosecutions and long prison sentences are effective. It goes without saying that prosecution as such already has its value, namely to confirm the rule of law, that no one is above the law and that impunity will not be tolerated.²²⁸ But to what extent is it also *concretely addressing* the problem, for instance by deterring individuals from travelling or preparing an attack?

On the one hand, prosecutions can be seen as effective in the short run, as it will diminish the (online) presence of potential troublemakers and (after conviction) the criminals.²²⁹ On the other, one can wonder whether prosecutions and convictions will

²²⁴ Meijers Committee, ‘Note on a Proposal for a Directive on combating terrorism’, CM1603, 16 March 2016, available at: http://www.commissie-meijers.nl/sites/all/files/cm1603_note_on_a_proposal_for_a_directive_on_combating_terrorism_.pdf, para. 8a.

²²⁵ Cf. the Dutch case of Mohamed El A. and Hakim B., who were stopped by German authorities in Kleve. In their cars, police officers found balaclavas, combat clothing, walkie-talkies and large amounts of cash. Nevertheless, the District Court acquitted both men on 9 February 2015 (decisions available at: <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBGEL:2015:756> and <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBGEL:2015:757>).

In appeal, Hakim was again acquitted (decision available at: <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHARL:2016:2024>) and Mohamed convicted, but released in view of the time spent in pre-trial detention (decision available at: <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHARL:2016:2025>). In Mohamed’s case, the Supreme Court noted interestingly, and among other things, that the consideration of the Court of Appeal – that the application of Article 96, para. 2 of the DCC requires that “time, place and way of execution” of the crimes prepared by the suspect must be established – is incorrect. The required specification is similar to that of Article 46 of the DCC. Hence, required is only that it is clear with sufficient clarity at which crime described in Article 289a of the DCC the preparatory and encouraging acts derived from Article 96, para. 2 of the DCC were aimed (decision available at: <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2017:416>).

²²⁶ See ‘CDA en PVV: Wet jihadreizigers aanscherpen’, *Algemeen Dagblad*, 9 February 2015, available at: <https://www.ad.nl/binnenland/cda-en-pvv-wet-jihadreizigers-aanscherpen~a26a793d/>.

²²⁷ See W. Feenstra, ‘OM gaat in hoger beroep tegen vrijspraak voor ‘Syriëgangers’’, *de Volkskrant*, 9 February 2015, available at: <https://www.volkskrant.nl/binnenland/om-gaat-in-hoger-beroep-tegen-vrijspraak-voor-syriegangers~a3847602/>.

²²⁸ See also the remarks from the Dutch Public Prosecution Service when it announced to start criminal investigations against all people still in Syria and Iraq. See n. 165 and accompanying text.

²²⁹ In the Dutch Context case, the Public Prosecution Service noted before the court issued its judgement that the case was already a success, even if the punishments were possibly much lower than asked for. This was because things got much calmer in the neighbourhood in which the suspected jihadists were active, the demonstrations had stopped and fewer comments on social media were made. See N. le Fever, ‘Uitspraak in Haags jihadproces: grote vissen of vrome moslims?’, *NOS*, 10 December 2015, available at: <https://nos.nl/artikel/2074179-uitspraak-in-haags-jihadproces-grote-vissen-of-vrome-moslims.html>.

have much effect on people who are willing to die for their cause and thus can “stop terrorists”, to come back to the UK statement mentioned in the introduction of this research paper.²³⁰ Again, that does not mean that prosecution and long prison sentences should not be considered, but policy makers should realise that the effectiveness of criminal law in the context of FFs conduct may be limited, as incidentally many criminal justice sector professionals admit themselves. This is especially so if prosecutions and prison time can have the *opposite* effect, and make things worse.

In this context, the possible negative side-effects of (pre-charge, pre-trial and post-trial) detention should be mentioned. One trend in FTF laws identified by Human Rights Watch was “the authorization of extensive pre-charge or pre-trial detention to periods that clearly exceed international guidelines”,²³¹ which brings with it new problems such as an increased risk of torture.²³² Also in Western States, there are concerns about ‘detention damage’, with prisons being referred to as breeding grounds for radicalisation.²³³ For instance, in a recent report about the special terrorism detention unit (*terroristenafdeling*, or TA) in the Netherlands, Amnesty International Netherlands and the Open Society Justice Initiative noted that both suspects and convicts are part of the same harsh detention regime.²³⁴ This could mean “that someone suspected, not convicted, of an entirely non-violent crime, like posting something online, could end up being detained alone for up to 22 hours a day for the duration of their stay without ever being allowed to hold their child or have other meaningful human contact with the outside world.”²³⁵ One can imagine that such practices can be counterproductive and make people ill-equipped to reintegrate into society.²³⁶ Hence, unless proper safeguards are in place, such as placement on the basis of an individualised risk assessment and not based solely on the charges or the crime for which one is convicted,²³⁷ or access to reintegration services,²³⁸ prosecution may not be efficient in the long run at all.

5. Final Observations and Recommendations

The FFs phenomenon represent a significant problem and threat that must be addressed and is, in fact, being actively addressed in a variety of ways. One of these

²³⁰ See also B. van Ginkel, ‘The (In-)Effectiveness of “Deterrence” as an Instrument Against Jihadist Terrorist Threats’, *ICCT Perspective*, 30 March 2015, available at: <https://icct.nl/publication/the-in-effectiveness-of-deterrence-as-an-instrument-against-jihadist-terrorist-threats/>: “It is important to realise that in drafting their strategy, they do not make the same kind of rational decisions in weighing the pros and the cons of an attack – including the risk they run of being killed in action – in the same manner as we do. Especially terrorists motivated by an extreme jihadist religious belief are convinced that dying for their cause will make them martyrs, and that paradise awaits them after their death, which is even better than life on earth. Under these circumstances it is hard to imagine measures that have a deterrent effect on these potential terrorists.”

²³¹ L. Taylor, “‘Foreign Terrorist Fighter’ Laws. Human Rights Rollbacks Under UN Security Council Resolution 2178”, Human Rights Watch, December 2016, available at: https://www.hrw.org/sites/default/files/supporting_resources/ftf_essay_03feb2017_final_pdf.pdf, p. 21.

²³² *Ibid.*, p. 22.

²³³ See European Commission, High-Level Ministerial Conference, ‘Criminal justice response to radicalisation’, Brussels, 19 October 2015, available at: http://ec.europa.eu/justice/events/response-radicalisation-2015/files/background_document.pdf, p. 2.

²³⁴ Amnesty International Netherlands and Open Society Foundations, ‘Inhuman and Unnecessary. Human Rights Violations in Dutch High-Security Prisons in the Context of Counterterrorism. Executive Summary and Recommendations’, 30 October 2017, available at: <https://www.amnesty.org/en/documents/eur35/7352/2017/en/>, p. 3.

²³⁵ *Ibid.*

²³⁶ *Ibid.*

²³⁷ *Ibid.*, p. 7.

²³⁸ *Ibid.*, p. 8.

options is the use of criminal prosecutions which presents many challenges and raises many questions – both legal and policy related.

On the supranational level, there are strong obligations to adopt a criminal law approach towards FFs that starts with UNSC Resolution 2178 and continues into the European context. These sources require that States criminalise a wide range of conduct and prosecute individuals involved in FTF activity. This somewhat restricts the leeway States have and diverts the focus from ‘soft’ approaches.²³⁹

Because of the obligations stemming from these international and regional instruments, stressing the importance of preventing crimes from happening, as well as the chaotic situation in Syria and Iraq and hence the difficulties in proving actual/principal crimes, there is a great focus on prosecution for either preparatory acts that are quite removed from the principal acts or membership of terrorist organisations.

In view of the open and sometimes unclear norms in the international (and regional) instrument(s), as well as the specific characteristics of national legal systems, investigations, prosecutions and punishments at the national level differ considerably, with examples being the use of undercover operations and trials *in absentia*. However, there are also similarities. Many criminal justice sector professionals are confronted with the same complex cases, often involving evidentiary challenges such as those related to battlefield evidence, internet-based/digital evidence, cross-border legal cooperation and secret information and its use in court. This underlines the importance of exchanging good (and bad) practices and strengthening the informal cooperation channels.²⁴⁰ For that purpose, the ICD case analyses and these kinds of papers can be used as well.

It is clear that the FFs phenomenon is putting an enormous pressure on the justice apparatus.²⁴¹ Not only because of the numbers, but also because of the political climate, as well as the call within much of the population to respond strongly to FFs.²⁴² In fact, sometimes it seems that even prosecutions are not considered ‘tough’ enough, taking into account recent statements on eliminating all FFs still in Syria, which may thus also include those who are *hors de combat*.²⁴³

²³⁹ Even if the preventive, long-term approach of countering violent extremism is also mentioned in UNSC Resolution 2178, see its para. 15.

²⁴⁰ European Parliament, ‘The European Union’s Policies on Counter-Terrorism. Relevance, Coherence and Effectiveness’, Study for the LIBE Committee, 2017, available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583124/IPOL_STU\(2017\)583124_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583124/IPOL_STU(2017)583124_EN.pdf), pp. 19, 80 and 82.

²⁴¹ See also F. Flade, P. Kuhn and T. Stukenberg, ‘Deutsche Justiz ist mit Terror-Verfahren überfordert’, *Die Welt*, 22 October 2017, available at: <https://www.welt.de/politik/deutschland/article169901027/Deutsche-Justiz-ist-mit-Terror-Verfahren-ueberfordert.html>.

²⁴² A recent poll by Sky Data reveals 51% of the Britons questioned think that the 10-year maximum sentence for IS members who have not committed any other crime (than being a member of IS) is not enough, see A. Joshi, ‘Sky Data poll: Britons back prosecuting returning jihadists’, *Sky News*, 2 November 2017, available at: <http://news.sky.com/story/sky-data-poll-britons-back-prosecuting-returning-jihadists-11109878>.

²⁴³ See ‘British IS fighters ‘must be killed’, minister says’, *BBC News*, 23 October 2017, available at: <http://www.bbc.com/news/uk-politics-41717394> and N. Weddady, ‘Why Westerners who joined Islamic State don’t deserve an automatic death sentence’, *The Washington Post*, 26 October 2017, available at: https://www.washingtonpost.com/news/democracy-post/wp/2017/10/26/why-westerners-who-joined-islamic-state-dont-deserve-an-automatic-death-sentence/?utm_term=.a16def89ed38, referring to statements from French Defence Minister Florence Parly and America’s envoy to the anti-ISIS coalition, Brett McGurk. See finally R. Barrett, ‘Britain can deal with its Isis returnees. But not by killing them’, *The Guardian*, 30 October 2017, available at: <https://www.theguardian.com/commentisfree/2017/oct/30/britain-isis-returnees-killingislamic-state>. It goes beyond the scope of this paper to delve into this in more detail, but for evidentiary considerations, it is clear that capture is preferred over killing. After all, prosecution can lead to a wealth of information that may not be available when the person in question is killed. See for example R. Callimachi, ‘How a Secretive Branch of ISIS Built a Global Network of Killers’, *The New York Times*, 3 August 2016, available at: <https://www.nytimes.com/2016/08/04/world/middleeast/isis-german-recruit-interview.html>. Finally, people who

This not only means that more resources should be invested in criminal justice sector professionals.²⁴⁴ It also means that it may be a wise decision to take a step back and evaluate which cases should be prosecuted and adjudicated in the first place, leading to a focused and tailored approach.

It sometimes appears that authorities want to deal with the great number of (potential) FFs in steps, by putting people away temporarily.²⁴⁵ That is understandable taking into account the pressure on criminal justice professionals to prevent attacks and effective in the short run, but what does it mean in the long run? Are policy makers sufficiently aware of the damage that may come with detention? Or that the prospect of high sentences, also for less serious acts, may lead to FFs who want to return home staying in the region, thus exacerbating the problem there?

In dealing with the FFs phenomenon, which – it should be stressed again – also includes potential FFs, as well as individuals circling the group of (potential) FFs, such as facilitators and recruiters, policy makers at the national level are recommended to assess whether legislation is needed in the first place and when they adopt new legislation – for instance in the context of the new EU Directive on Combating Terrorism – that they ensure that laws and definitions are clear and specific, thus reducing the risk of abuse. But magistrates also have an important role to play; they are recommended to assess whether the new legislation – if it is adopted in the end – needs to be applied *in this concrete case*. Moreover, if these practitioners believe that certain laws adopted may not be in compliance with their country's constitution or regional and international human rights instruments, they should challenge them – and not shy away from referring these to their constitutional court or human rights monitoring bodies. Are States not slowly but surely moving too far away from the principal act, into the pre-crime space? And will prosecutions based on such laws not possibly jeopardise substantive human rights such as freedom of speech or procedural human rights such as the right to a fair trial, which may for example be compromised by secret evidence that cannot be challenged?²⁴⁶ Practitioners have their own responsibility in this context and are called upon to use their discretion (if they have such discretion of course) in each and every case, in order to ensure that criminal law is used in a sober²⁴⁷ and tailored way, based on proper laws, and taking into account the specifics of each case, including the mental health status of the suspect as well as his/her age or other relevant factors. Criminal law should preferably be seen as an *ultimum remedium*, not as an

.....
 want to go home because they are genuinely disillusioned can be killed on the spot, but can also be brought home and become a powerful tool in terms of counter-narratives. See also European Commission, High-Level Ministerial Conference, 'Criminal justice response to radicalisation', Brussels, 19 October 2015, available at: http://ec.europa.eu/justice/events/response-radicalisation-2015/files/background_document.pdf, p. 2.

²⁴⁴ See e.g. European Commission, High-Level Ministerial Conference, 'Criminal justice response to radicalisation', Brussels, 19 October 2015, available at: http://ec.europa.eu/justice/events/response-radicalisation-2015/files/background_document.pdf, p. 2: "The current overcrowding in many EU prisons is exacerbating the problem and a lack of financial and human resources often means that prisoners are not monitored sufficiently (so crucial opportunities to detect violent extremism may be missed) and hampers the development of programmes whereby prison chaplains/imams and counsellors can provide guidance and support."

²⁴⁵ See also the remark by David Wells, see n. 147 and accompanying text.

²⁴⁶ See also the remark from Amnesty International, see n. 89 and accompanying text.

²⁴⁷ Not fitting here is thus the emotive language used by some criminal justice sector professionals. In July 2016, British Foreign Secretary Boris Johnson stated in a TV interview in the context of a meeting of the ministers of the Global Coalition to Counter ISIL that "[w]e've got to deal with the whole cancer and its ability to spread and to metastasize, to pop up all over the world in the way that we've been seeing...". ('Investigate IS war crimes, Johnson urges foreign ministers', *BBC News*, 22 July 2016, available at: <http://www.bbc.com/news/uk-politics-36863260>.) One month later, Justice Colin McKinnon, in the Canadian case against the Larmond brothers and a friend, even used stronger language when he noted: "Home grown terrorists constitute a unique threat to the safety of our community. They are part of a particularly virulent form of cancer that must be aggressively eradicated. [...] Those who embrace ISIL are embracing the Devil." (Paras. 3-4 of the comments on sentence, available via: <http://www.internationalcrimesdatabase.org/Case/3277>.)

optimum remedium.²⁴⁸ At the same time, criminal justice professionals must be careful, when exercising their discretion, that they do not fall in the trap of arbitrariness and unequal application of the law.

Finally, a lot – and probably too much – attention has been paid to terrorism-related crimes in the context of FFs. This is somewhat understandable, also in view of the non-access to Syria/Iraq and thus the problems in proving for instance war crimes, but the crumbling of the Caliphate will most probably lead to new opportunities. It is highly likely that more evidence will come out of Syria/Iraq, which should lead to new cases involving international crimes. Even though it was not the focus of this research paper, such prosecutions should not be limited to one's own national/residents – hence the 'proper' FFs – but should also include crimes committed by Syrian/Iraqi nationals, who subsequently ask for asylum in other countries. These crimes may be as serious as those of FFs, but currently have not often been the object of investigations.²⁴⁹ While recognising such prosecutions will be challenging as well,²⁵⁰ such international crimes should not be forgotten either.

²⁴⁸ See also S. Kamerman and A. Kouwenhoven, 'Zijn we niet te streng voor al die vermeende jihadisten?', *NRC*, 2 November 2015, available at: <https://www.nrc.nl/nieuws/2015/11/02/zijn-we-niet-te-streng-voor-al-die-vermeende-jihad-1552400-a519600> and L. van der Heide and J. Geenen, 'Preventing Terrorism in the Courtroom – The Criminalisation of Preparatory Acts of Terrorism in the Netherlands', *Security and Human Rights* 26, (2015), pp. 162-192, available at: https://www.shrmonitor.org/assets/uploads/2017/09/SHRS_026_02-04_Van-der-Heide_Geenen.pdf.

²⁴⁹ See J. Visser, 'Twintig Syrische asielzoekers verdacht van oorlogsmisdaden', *de Volkskrant*, 29 February 2016, available at: <https://www.volkskrant.nl/buitenland/twintig-syrische-asielzoekers-verdacht-van-oorlogsmisdaden~a4254165/>.

²⁵⁰ See H. Habib and L. Loveluck, 'A Syrian soldier has been sentenced for battlefield crimes. Why did it take so long?', *The Washington Post*, 1 October 2017, available at: https://www.washingtonpost.com/world/middle-east/a-syrian-soldier-has-been-sentenced-for-battlefield-crimes-why-did-it-take-so-long/2017/09/30/d4ab28d6-a362-11e7-8c37-e1d99ad6aa22_story.html?utm_term=.c0a311515fee. See also more generally Human Rights Watch, 'The Long Arm of Justice. Lessons from Specialized War Crimes Units in France, Germany, and the Netherlands', 16 September 2014, available at: <https://www.hrw.org/report/2014/09/16/long-arm-justice/lessons-specialized-war-crimes-units-france-germany-and>.

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About the Authors

Christophe Paulussen

Christophe Paulussen is a research fellow at ICCT, a senior researcher at the T.M.C. Asser Instituut and coordinator of its research strand ‘Human Dignity and Human Security in International and European Law’, and coordinator of the inter-faculty research platform ‘International Humanitarian and Criminal Law Platform’. Christophe is also member of the editorial boards of the *Security and Human Rights Monitor* and the *Yearbook of International Humanitarian Law*, member of the Executive Board of the Royal Netherlands Society of International Law and jury member of the J.P.A. François Prize. Before moving to The Hague, Christophe worked as an assistant professor at Tilburg University, where he defended, in 2010, his PhD thesis *Male captus bene detentus? Surrendering suspects to the International Criminal Court*. This thesis received a special mention from the Jury of the Max van der Stoep Human Rights Award 2011 and has been used in proceedings before the ICC. Christophe’s areas of interest are international humanitarian law, international criminal law, in particular the law of the international criminal(ised) tribunals, and counter-terrorism & human rights, in particular the issue of foreign fighters. He has published extensively on all these topics and has also provided expert advice to national delegations, the EU, the Council of Europe and the UN. In addition to this, Christophe has been involved as project leader in the development and implementation of numerous lectures, conferences, expert meetings, databases, including the International Crimes Database (www.internationalcrimesdatabase.org), trainings, and needs assessment & capacity building missions on public international law-related projects. Since recently, he can also be followed on Twitter @chpaulussen.

Kate Pitcher

Kate Pitcher worked as a research assistant at the T.M.C. Asser Instituut between March 2016 and February 2017. She has a Masters of Advanced Studies in Public International Law (*cum laude*) from Leiden University, where her thesis focused on UN Security Council Resolution 2178 (2014) and foreign fighters under international law. Kate previously worked on the International Crimes Database and as an editorial assistant for the *Yearbook of International Humanitarian Law* and the *Leiden Journal of International Law*.

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Christophe Paulussen, Kate Pitcher

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Contact ICCT

The International Centre for Counter-Terrorism – The Hague
Zeestraat 100
2518 AD The Hague
The Netherlands

T +31 (0)70 763 0050
E info@icct.nl