

Prosecuting Foreign Terrorist Fighters:

What Role for the Military?

Foreign Terrorist Fighters undermine international peace and security by joining terrorist organisations and by contributing to the conflict and to the execution of terrorist acts, both in the conflict theatres and their home countries. Policies to counteract this phenomenon have been adopted at both the international and national levels, including security, administrative and preventative measures. This policy brief will focus on the legal measures, specifically the prosecutorial approach, and the difficulties that prosecutions of those who have travelled to the destination countries where the conflict takes place bring along. Given those difficulties, the main question this policy brief seeks to answer is whether there is a role for the military to play in assisting prosecutors in collecting evidence and arresting suspects in countries of destination in order to try them in a criminal court under a civilian jurisdiction. After elaborating on several future scenarios in Syria and Iraq, the policy brief concludes by giving recommendations for cooperation between the military and civilian prosecutors.

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About ICCT

The International Centre for Counter-Terrorism – The Hague (ICCT) is an independent think and do tank providing multidisciplinary policy advice and practical, solution-oriented implementation support on prevention and the rule of law, two vital pillars of effective counter-terrorism. ICCT's work focuses on themes at the intersection of countering violent extremism and criminal justice sector responses, as well as human rights related aspects of counter-terrorism. The major project areas concern countering violent extremism, rule of law, foreign fighters, country and regional analysis, rehabilitation, civil society engagement and victims' voices. Functioning as a nucleus within the international counter-terrorism network, ICCT connects experts, policymakers, civil society actors and practitioners from different fields by providing a platform for productive collaboration, practical analysis, and exchange of experiences and expertise, with the ultimate aim of identifying innovative and comprehensive approaches to preventing and countering terrorism.

1. Introduction¹

The conflict in Syria and Iraq has motivated thousands of young Muslim men (and some women too) from practically all corners of the world to travel to the conflict zone to join Syrian opposition troops, as well as terrorist organisations, such as Al Nusra and the organisation that calls itself the Islamic State (IS). The category of people that travel to other countries in order to fight in a conflict there are often referred to as Foreign Fighters (FFs) or Foreign Terrorist Fighters (FTFs)² if the further delimitation is made that they join a terrorist organisation.³ Although the phenomenon of FTFs travelling to join a terrorist organisation in another country is not new,⁴ the sheer numbers of individuals who decided to do so since 2013 is unprecedented. Precise data is not available, but the estimates vary around 30.000 who travelled to Syria and Iraq.⁵ Recent research of ICCT shows that between 3,922 and 4294 FFs have travelled from member states of the European Union (EU) to Syria or Iraq.⁶

¹ This policy brief is based on the ICCT Research Paper written by B. van Ginkel and C. Paulussen, entitled "The Role of the Military in Securing Suspects and Evidence in the Prosecution of Terrorism Cases before Civilian Courts: Legal and Practical Challenges", May 2015, <http://icct.nl/wp-content/uploads/2015/05/ICCT-Van-Ginkel-Paulussen-The-Role-Of-The-Military-In-Securing-Suspects-And-Evidence-In-The-Prosecution-Of-Terrorism-Cases-Before-Civilian-Courts.pdf>.

² Different organisations use different terminology and definitions. The United Nations and the Global Counterterrorism Forum (GCTF) for instance refer to FTFs, whereas the EU rather uses the term FFs. The UN in Security Council Resolution 2178 (2014) describe this category as "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". The GCTF uses a different definition and refers to "individuals who travel abroad to a State other than their States of residence or nationality to engage in, undertake, plan, prepare, carry out or otherwise support terrorist activity or to provide or receive training to do so". In the Riga Protocol to the Council of Europe's Convention on the Prevention of Terrorism, a definition is not given, but the focus is clearly on FTFs, as becomes clear from the description of the criminal offence of *travelling abroad for the purpose of terrorism*, 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". Although the EU has formulated policy objectives in relation to the threat of foreign fighters, it has not provided a clear definition incorporated in a measure or directive instructing the member states to take particular action, yet. It is clear however, that the EU rather speaks of FFs instead of FTFs.

³ In this paper, I will use the term foreign terrorist fighters (FTFs), unless in reference to an organisation or state that uses the term foreign fighters (FFs) instead.

⁴ See more elaborate on this issue: E. Bakker, C. Paulussen and E. Entenmann, "Dealing with European Foreign Fighters in Syria: Governance Challenges & Legal Implications", *The International Centre for Counter Terrorism – The Hague* 4, no.8 (2013), <http://icct.nl/wp-content/uploads/2013/12/ICCT-Bakker-Paulussen-Entenmann-Dealing-With-European-Foreign-Fighters-in-Syria.pdf>; J. de Roy van Zuijdewijn and E. Bakker, "Returning Western Foreign Fighters: The Case of Afghanistan, Bosnia and Somalia", *The International Centre for Counter-Terrorism – The Hague* 5, no. 2 (2014), <http://icct.nl/publication/returning-western-foreign-fighters-the-case-of-afghanistan-bosnia-and-somalia/>; A. Reed, J. de Roy van Zuijdewijn and E. Bakker "Pathways of Foreign Fighters: Policy Options and Their (Un)Intended Consequences", *The International Centre for Counter-Terrorism- The Hague* 6, no. 1 (2015), <http://icct.nl/wp-content/uploads/2015/05/ICCT-Reed-De-Roy-Van-Zuijdewijn-Bakker-Pathways-Of-Foreign-Fighters-Policy-Options-And-Their-Un-Intended-Consequences-April2015.pdf>; I. Duyvesteyn and B. Peeters "Fickle Foreign Fighters? A Cross-Case Analysis of Seven Muslim Foreign Fighter Mobilisations (1980-2015)", *The International Centre for Counter-Terrorism – The Hague* 6, no. 8 (2015), <http://icct.nl/wp-content/uploads/2015/10/ICCT-Duyvesteyn-Peeters-Fickle-Foreign-Fighters-October2015.pdf>.

⁵ See more elaborate on the estimates of numbers of FTFs, A. Schmid, "Foreign (Terrorist) Fighter Estimates: Conceptual and Data Issues", *The International Centre for Counter-Terrorism – The Hague*, October 2015, <http://icct.nl/wp-content/uploads/2015/10/ICCT-Schmid-Foreign-Terrorist-Fighter-Estimates-Conceptual-and-Data-Issues-October20152.pdf>.

⁶ B. van Ginkel and E. Entenmann (eds.), "The Foreign Fighters Phenomenon in the European Union; Profiles, Threats & Policies", *The International Centre for Counter-Terrorism – The Hague* 7, no. 2 (2016), http://icct.nl/wp-content/uploads/2016/03/ICCT-Report_Foreign-Fighters-Phenomenon-in-the-EU_1-April-2016_including-AnnexesLinks.pdf.

FTFs undermine international peace and security by joining the terrorist organisations and by contributing to the conflict and to the execution of terrorist acts. The individual's activities fall under the description of various criminal acts as described in national criminal codes or international documents. FTFs are also considered to be a security risk in case they decide to return to their countries of residence. In the words of the United Nations (UN) Counter-Terrorism Committee Executive Directorate (CTED):

Many fighters leave their homes with no intention of returning, and instead do so with the intention of starting a new life, building a new "State", or dying as martyrs. Not all return as terrorists, and many return precisely because they have become disillusioned and no longer wish to participate in armed conflict.

However, those who do return may have been exposed to extreme violence, sophisticated training and battlefield experience. A small number of returning foreign terrorist fighters therefore pose a very significant threat to international peace and security.⁷

With recent attacks in Brussels,⁸ Beirut,⁹ Paris,¹⁰ Tunis¹¹ and London,¹² the urgency to take effective action is highly felt among policy-makers and security actors worldwide. This action intends to focus both on external and internal aspects of the threat, namely on the conflict situation in Syria and Iraq in order to stop the main source of the problem, and also on internal issues in countries of departure, such as preventing

⁷ Counter-Terrorism Committee Executive Directorate (CTED), "Guiding principles on foreign terrorist fighters", Detailed outcome of the special meeting of the Counter-Terrorism Committee with Member States and relevant international and regional organisations on "Stemming the Flow of Foreign Terrorist Fighters", Madrid, 27-28 July 2015, S/2015/939, 23 December 2015, Annex II, p. 6, http://www.un.org/en/sc/ctc/docs/2015/N1544885_EN.pdf.

⁸ On 24 May 2014, Mehdi Nemmouche shot dead two men and a woman at the Brussels Jewish Museum. A few days later he was arrested in Marseille by the French authorities. The French counter-terrorism police claimed that Nemmouche had returned from Syria in 2013, and that they since then had him under surveillance. See "Brussels fatal gun attack at Jewish museum", *BBC*, 24 May 2014, <http://www.bbc.com/news/world-europe-27558918>; and A. Penketh, "Brussels Jewish Museum shooting: suspect with Islamist links arrested", *The Guardian*, 1 June 2014, <http://www.theguardian.com/world/2014/jun/01/suspect-arrest-brussels-jewish-museum-shooting>.

⁹ On 12 November 2015, a would-be suicide-bomber committed a terrorist attack on behalf of IS in Beirut, killing 43 people, and leaving 239 wounded. See "Beirut suicide bombings kill 43; suspect claims ISIS sent attackers", *CNN*, 16 November 2015, <http://edition.cnn.com/2015/11/12/middleeast/beirut-explosions/>.

¹⁰ On 13 November 2015, seven coordinated terrorist attacks were executed in Paris targeting a football stadium where an international match took place between France and Germany, people in restaurants and on terraces, and a concert hall. The 10 attackers killed 130 people and wounded 368. IS claimed responsibility for the attack. Many of the perpetrators had previously been in Syria. See more elaborate on the Paris attack: G. Chauzal, K. Colijn, B. van Ginkel, C. Paulussen, and S. Zavagli, "Paris 11/13/15: Analysis and Policy Options", *Clingendael Policy Brief*, November 2015, http://www.clingendael.nl/sites/default/files/Policy_Brief_Clingendael_ICCT-Paris111315Analysis_and_Policy_Options_November%202015_final.pdf.

¹¹ On 18 March 2015, a terrorist attack was committed at the Bardo Museum in Tunis, killing 22 people. IS claimed responsibility for the attack. See "Tunis museum attack: 20 people killed after hostage drama at tourist site", *The Guardian*, 18 March 2015, <http://www.theguardian.com/world/2015/mar/18/eight-people-killed-in-attack-on-tunisia-bardo-museum>. On 24 November 2015, a bomb exploded in a bus transporting the Tunisian presidential guard in Tunis, killing 12 people. The attack was claimed by IS. See "Deadly explosion hits presidential guard bus in Tunisia", *Al Jazeera*, 25 November 2015, <http://www.aljazeera.com/news/2015/11/explosion-tunisia-151124164711388.html>.

¹² On 6 December 2015, a man with a knife attacked several people in the London underground, shooting "[T]his is for Syria". Several people were injured. The police described the attack as a terrorist incident. See "Leytonstone Tube station stabbing a 'terrorist incident'", *BBC*, 6 December 2015, <http://www.bbc.com/news/uk-35018789>.

people from travel to the conflict areas, from preparing of terrorist activities, or recruiting of others. These attacks were after all committed by individuals who either travelled to the conflict area in Syria and Iraq earlier and/or received terrorist training (elsewhere),¹³ or who were inspired by the ideology of the terrorist organisations in the region and responded to the repeatedly communicated general call from IS to all Muslims who are not able to travel to commit attacks or to act on their own as lone wolves.¹⁴

On the international policy level, the issue of F(T)Fs was therefore raised, calling upon states through the adoption of different documents to criminalise inter alia (attempt to) travel, provision or receipt of terrorist training, financing of terrorism, recruitment and incitement.

The policies adopted at the international level and implemented on national levels are in many cases multidisciplinary, and consist of security measures, administrative measures and preventive measures, aimed at avoiding young Muslims and recent converts to Islam from radicalising in the first place, stopping them from travelling, and reintegrating those who return. However, in addition to these measures, great emphasis is placed on legal measures, and on the prosecution of those who are suspected of recruitment, incitement to terrorism, financing of terrorism, preparatory acts for committing terrorism, membership of a terrorist organisation, and the actual participation in (conspiracy to commit) terrorist acts.

In this paper, the focus will be on the legal measures and the prosecutorial approach, and the difficulties that in particular prosecutions of those who have travelled to the destination countries where the conflict takes place brings along. In these countries, investigations on site into the activities of FTFs are practically impossible, and cooperation with local prosecutors is also hardly possible. Henceforth prosecutors are facing multiple challenges in successfully building their cases. Given those difficulties, the main question in this policy paper is whether there is a role for the military to play in assisting prosecutors in collecting evidence and arresting FTF suspects in countries of destination in order to try them in a criminal court under a civilian jurisdiction. There are several situations in which military can find themselves in the position to fulfil such

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¹³ The threat posed by these returnees was acknowledged in for instance Europol, *European Union Terrorism Situation and Trend Report 2015*, to be accessed at <https://www.europol.europa.eu/content/european-union-terrorism-situation-and-trend-report-2015>; in March 2013 the EU Counter-Terrorism Coordinator presented a package of 22 measures to the Justice and Home Affairs Council in which he included measures related to the problem of returnees. See G. de Kerchove and C. Höhn, "The Regional Answers and Governance Structure for Dealing with the Foreign Fighters: The Case of the EU", 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, p. 300; The Dutch Intelligence and Security Service (AIVD), *The transformation of jihadism in the Netherlands; Swarm dynamics and new strength*, June 2014, <https://www.aivd.nl/publicaties/publicaties/2014/06/30/the-transformation-of-jihadism-in-the-netherlands>; The UN Counter-Terrorism Executive Directorate, 'Preliminary analysis of the principal gaps in Member States' capacities to implement Security Council resolutions 1373 (2001) and 1624 (2005) that may hinder their abilities to stem the flow of foreign terrorist fighters pursuant to Security Council resolution 2178 (2014), November 2014, http://www.un.org/en/sc/ctc/docs/2015/S2014807_EN.pdf; and the Global Counterterrorism Forum adopted in September 2014 the 'The Hague-Marrakesh Memorandum on Good Practices for a more effective response to the FTF Phenomenon', https://www.thegctf.org/documents/10162/159879/14Sept19_The+Hague-Marrakech+FTF+Memorandum.pdf.

¹⁴ See for instance the call by the spokesperson of IS, al-Adnani, in a video and a written account of September 2014, "Islamic State's call to kill westerners has terrorism experts divided", *The Guardian*, 23 September 2014, <http://www.theguardian.com/world/2014/sep/23/islamic-states-call-to-kill-westerners-has-terrorism-experts-divided>.

a task, because civilian authorities are simply not able to execute their task due to a chaotic or insecure situation, and a more robust solution should be found in order to make investigation and prosecution possible at all. This is more than a theoretical possibility as there are some scenarios foreseeable in the future of Syria and Iraq that would indeed make this a viable option. But even though it might be a desirable possibility, several practical and legal challenges will need to be addressed when military fulfil this task, before both evidence and suspects are handed over to civil authorities for prosecution before a criminal court.

In this policy brief, I will elaborate on the international policies developed in the recent years on the issue of F(T)Fs (Section 2), followed by an elaboration on the challenges the prosecution is facing when investigating these kinds of cases (Section 3). Next, I will elaborate on the possible role the military can play in collecting evidence and arresting suspects (Section 4). Whether this is merely a theoretical exercise, or whether in the near future specific scenarios might unfold that makes this a likely possibility in Syria/Iraq, will be discussed in the section that follows (Section 5). In the next section (Section 6), the specific legal and practical challenges that might arise will be discussed, as well as the normative question on whether military should not rather concentrate on military tasks. And finally, some policy recommendations will be provided in Section 7.

2. A Snapshot on International Policies on Foreign (Terrorist) Fighters

In September 2014, the UN Security Council (SC) unanimously adopted Resolution 2178 (2014) in order to oblige states to adopt measures to deal with the problem of FTFs. These include the criminalisation of travel or attempt to travel for the purpose of the planning or perpetration of terrorist acts, or the wilful provision or receipt of terrorist training, the provision or collection of funds to finance the travel of individuals to participate in these acts, and the wilful organisation or facilitation (including acts of recruitment) of the travel of individuals to participate in these activities.

At the European level, the issue of FFs was introduced in 2013. From the 22 proposals made by the EU Counter-Terrorism Coordinator, the Justice and Home Affairs Council of the EU decided, in December 2013, to prioritise four areas, among which the investigation and prosecution of foreign fighters. In January 2015, Eurojust also focused on the legal responses, analysing various measures implemented in line with UN SC Resolution 2178.

And with an unprecedented speed, and also in view of the implementation of UN SC Resolution 2178, the Council of Europe in May 2015 adopted the Riga Protocol to the Convention on the Prevention of Terrorism, in which deliberate involvement in a terrorist group, receiving training for the purposes of terrorism, travelling abroad for the purposes of terrorism and financing or organising these trips become criminal acts.

3. The Prosecutor's Challenge

Prosecutors are faced with a challenge when prosecuting FTFs suspects due to the difficulties in collecting enough evidence to pass the thresholds for criminal behaviour in order to secure a conviction. The current chaotic and insecure situation in Syria and Iraq in particular makes it difficult for foreign prosecutors to operate in the area to collect evidence or arrest suspects for their FTF cases. Besides these practical issues, there are also political challenges that make cooperation with the local law enforcement authorities problematic, especially since many governments no longer recognise Assad's government in Syria to be the legitimate authority, while at the same time the Syrian opposition is still not in the position to organise itself in a way that it can perform law enforcement activities, let alone cooperate on these issues with foreign prosecutors.

Irrespective of whether suspects have already returned to their home countries or are still in the conflict zone, the underlying premise on which the prosecution can be based is that the *purpose* of the travel and *intent* behind the *preparatory acts* was to participate in terrorist activities in the conflict zone. In that sense, this approach offers broader opportunities than when it could only be based on proving that a person has actually committed terrorist acts in the destination country. Still, to prove the claim, evidence needs to be presented in court, and henceforth first collected. Given the chaotic and insecure situation in the conflict zone in which authorities are either not considered to be legitimate counterparts making legal cooperation impossible or authorities are just not capable to exercise their authority because they have no control over certain areas (see below in Section 5) this provides obviously a major challenge.¹⁵ This position is shared by the EU Counter-Terrorism Coordinator, who also points to an additional challenge, which is raised when prosecutors depend on information collected on the Internet, as the providers might be located abroad as well.¹⁶

On occasion, a prosecutor might be able to base the case on testimonies of fellow FTFs or on data harvested from a confiscated mobile phone, and -when very lucky- on data files with registration forms of new IS recruits handed over by a former IS operative.¹⁷ But in most cases, the prosecutor is faced with many difficulties in collecting the necessary evidence, and might need to rely on internet-based information or social media postings to prove the involvement in terrorist activities, intent of participating in terrorist activities or joining a terrorist organisation when a suspect has decided to travel to Syria and Iraq. Using this internet-based information brings along many new

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¹⁵ Eurojust concludes: "Securing strong evidence in cases of suspected (planned) travel and participation in training and jihad may pose a particular challenge. National authorities face difficulties related to the gathering of evidence on activities that have taken place in the conflict zone, to the fact that no criminal investigations can be carried out in Syria and the impossibility to seek cooperation and legal assistance from functioning national authorities in Syria." Eurojust, 2015, p. 3.

¹⁶ The EU Counter-Terrorism Coordinator states: "(...) evidence from the battlefield in Syria and Iraq is difficult to obtain, collection and use of internet based evidence is challenging, cross-border legal assistance is often necessary to get access to evidence (foreign fighters transit through other countries, internet providers might be located abroad)". Note from the EU Counter-Terrorism Coordinator to the Council, "Foreign fighters and returnees: discussion paper", 2 December 2014, 15715/2/14 REV 2, p. 4.

¹⁷ In March 2016, a former IS operative handed over a memory stick with the files of 22,000 IS recruits to Sky news. The memory stick was stolen from the head of the Islamic State's internal security police. See "IS Documents Identify Thousands Of Jihadis", *SkyNews*, 10 March 2016, <http://news.sky.com/story/1656777/is-documents-identify-thousands-of-jihadis>.

challenges,¹⁸ which will, however, not be the focus of this paper. Alternatively, prosecutors might need to base their case on intelligence gathered,¹⁹ that subsequently needs to be eligible to be used in a civilian court case, respecting the rights of the defendant who should have the possibility to challenge the evidence for which they need to have access to the evidence first.²⁰

The challenges for the prosecution can thus be summarised as follows:

1. Proving the purpose of travel and intent behind preparatory acts committed prior to travel;
2. Collection of evidence from countries of destination;
3. The use of social media postings or other internet-based information as admissible evidence;
4. The use of intelligence as admissible evidence.

In addition to this, there is the challenge of arresting suspects if they are still in the destination countries. In 'normal' situations, the prosecutor could issue an arrest warrant, and file a request to the authorities of the country in which the suspect is residing at that moment to make an arrest or ask for submitting evidence through a mutual legal assistance request, or file an international arrest warrant. However, the current chaotic situation in Syria and Iraq prevents prosecutors to count on civil authorities for cooperation in legal matters.

Due to the challenges mentioned, a prosecutor might decide on a prosecutorial strategy that avoids or limits having to deal with these issues, yet allows for sufficient possibilities to at least secure a conviction based on 'supportive' criminal acts. When deciding on the prosecutorial strategy,²¹ the prosecutor makes a choice on which criminal acts he/she will base his/her case. When building a case on the actual involvement in terrorist acts in a destination country will indeed turn out to be very difficult, the criminal acts of recruitment, incitement or glorification of terrorist acts, financing of terrorism, membership of a terrorist organisation, and preparatory or supporting activities for terrorist acts will offer a better chance for success.

Hence, with a view to building a successful case, prosecutors might need to settle for a prosecutorial strategy merely based on proving conspiracy to commit a terrorist attack or preparatory acts to commit murder or manslaughter, which could be demonstrated through social media postings, tapped phone conversations or testimonies of fellow FTFs who have returned.²² An example is the conviction of Maher H. by a Dutch District

¹⁸ See for instance the list of challenges put together by Eurojust, 2015, p. 6.

¹⁹ See on the use of intelligence in court more elaborately ICCT paper Q. Eijkman and B. van Ginkel "Compatible or Incompatible? Intelligence and Human Rights in Terrorist Trials", *The International Centre for Counter-Terrorism – The Hague* 2, no. 3 (2011), <http://dx.doi.org/10.19165/2011.1.03>.

²⁰ The principle of equality of arms as an element of the fair trial principles is included in various international human rights documents, such as article 14 of the International Covenant on Civil and Political Rights, and article 6 of the European Convention on Human Rights.

²¹ Also in relation to rehabilitation and reintegration programmes. See E. Entenmann, L. van der Heide, D. Weggemans and J. Dorsey, "Rehabilitation for Foreign Fighters? Relevance, Challenges and Opportunities for the Criminal Justice Sector". *The International Centre for Counter-Terrorism – The Hague* 6, no. 5 (2015), <http://dx.doi.org/10.19165/2015.2.05>.

²² As part of the 'Sharia4Belgium' case against 36 suspects, the Court of First Instance of Antwerp based part of the convictions on the testimonies of Jejoen Bontinck, who returned from Syria. The judgment (in Dutch) is available at: <http://www.rechtbankeersteaanlegantwerpen.be/index.php/83-persinformatie?start=3>. See also Rechtbank van eerste aanleg Antwerpen, 'Press Release on the 'Syria Fighters Trial'', 14 January 2015, available at: <http://www.rechtbankeersteaanlegantwerpen.be/index.php/83-persinformatie/110-terro>. And

Court to three years' imprisonment.²³ Although the District Court could not prove whether he had actually committed terrorist attacks in Syria, the Court argued that merely travelling to Syria and joining jihadi groups in Syria was enough to convict him for preparatory act to commit murder and/or manslaughter.²⁴ From the perspective of the victims of the terrorist acts committed, this is an unsatisfying result, and also falls short with respect to the retributive principle allocated to the state as part of the rationale behind the adjudicatory task of the state. In case suspects can moreover not be arrested, in some states, a trial *in absentia*, without the presence of the suspect, would be the only remaining alternative.

The number of court cases against FTFs is, relatively speaking, very low in comparison to the number of FTFs that have travelled to Syria and Iraq. In practice, so far only a few court cases have been concluded within the EU.²⁵ Europol in its TE-SAT 2015 report and in reference to convictions in 2014 speaks of "several people stood trial for offences related to (intended) travel to Syria to participate in training and /or wage violent jihad. Other charges brought in cases related to the fighting in Syria included recruitment, funding of terrorism, incitement of terrorism".²⁶ The few cases available are illustrative for the difficulties prosecutors face and the strategic choices they consequently have made. In an Austrian case, a person was found guilty of membership of a terrorist organisation. He travelled to Syria in 2013 in order to join a training camp of Jabhat al-Nusra. The prosecutor only managed to prove his presence in the training camp, not the concrete activities that took place in this camp, nor his intention to commit terrorist attacks.²⁷ On 10 December 2015, a Dutch court in the so-called *Context* case against nine suspects (eight men and one woman) indicted for various terrorist related crimes, convicted four of them for *inter alia* participating in a terrorist training camp and conspiracy to commit murder or manslaughter with a terrorist motive in Syria. Conspiracy crimes are easier to prove than actual murder with terrorist intent, since one would, for instance, need to know the identity of the person who is murdered, which in many instances is not the case. The verdict was based on evidence retrieved from social media, tapped phone calls and testimonies of fellow FTFs who returned to the Netherlands and were subsequently questioned by the prosecutor.²⁸

In December 2015, a Swedish court convicted two FTFs to life for their participation in the fighting in Syria in 2013. Interestingly, the Court was able to establish that the two

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 more elaborate on the 'Sharia4Belgium' case, C. Paulussen and E. Entenmann, 'National Responses in Select Western European Countries to the Foreign Fighter Phenomenon', in: A. de Guttery, F. Capone and C. Paulussen (eds.), *Foreign Fighters under International Law and Beyond*, T.M.C. Asser Press/Springer Verlag: The Hague, 2016, pp. 391-422.

²³ Judgment of the District Court of The Hague of 1 December 2014. The judgment (in Dutch) is available at: <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2014:14652>.

²⁴ C. Paulussen and E. Entenmann, 'National Responses in Select Western European Countries to the Foreign Fighter Phenomenon', in: A. de Guttery, F. Capone and C. Paulussen (eds.), *Foreign Fighters under International Law and Beyond*, T.M.C. Asser Press/Springer Verlag: The Hague, 2016, pp. 413-414.

²⁵ According to the responses received by EU Member States on a questionnaire sent by ICCT for the purpose of a Report on Foreign Fighters in the EU, quite a number of EU states initiated court cases against FTFs. See B. van Ginkel and E. Entenmann (eds.), "The Foreign Fighters Phenomenon in the European Union; Profiles, Threats & Policies", *The International Centre for Counter-Terrorism – The Hague* 7, no. 2 (2016), http://icct.nl/wp-content/uploads/2016/03/ICCT-Report_Foreign-Fighters-Phenomenon-in-the-EU_1-April-2016_including-AnnexesLinks.pdf.

²⁶ Europol, European Union Terrorism Situation and Trends Report (Te-SAT) 2015, <https://www.europol.europa.eu/content/european-union-terrorism-situation-and-trend-report-2015>, p. 15.

²⁷ Europol, Te-SAT 2015, p. 15.

²⁸ See for more information on the case: <http://www.internationalcrimesdatabase.org/home/newsarchive>, 17 December 2015. The Judgment (in Dutch) can be found here: <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2015:14365>.

suspects were in Syria in 2013 and participated in the fighting, but was not able to prove to what group the two had pledged their allegiance. Video evidence was used featuring two killings, one of which was a beheading. The two men were seen in the two videos, but did not participate in the actual killings, but rather in the celebrations in the background. The court argued that even though there was no proof that the two had pledged allegiance to a specific terrorist group, “the purpose of the crime was to incite fear in people in Syria and other countries”, which was apparently enough to convict them for terrorist crimes.²⁹

In Belgium, several trials have taken place. The *Sharia4Belgium* case is so far considered Europe’s biggest trial against 46 suspects of Islamist violent extremism in Syria.³⁰ Of these suspects, 36 were tried *in absentia*. Some of these suspects were also convicted for terrorist activities in Syria, based on evidence collected on social media, tapped phone calls, and testimonies of returnees.

4. A Possible Role for the Military?

Ideally, investigation and prosecution of terrorist crimes should be fully dealt with by civil authorities. However, realities on the ground might on occasion render this very difficult or simply impossible. Given the circumstances on the ground civil authorities might not be capable to conduct investigations, secure evidence or even arrest suspects. These circumstances might be dictated by a full-fledged conflict situation or situations in which the security risks are too high for civilian authorities to operate in, or even situations where there is a (total) lack of local civil capacity to conduct these tasks.

The question is subsequently whether the military can play a role in these situations. First it is important to explain that there are various reasons why military can find themselves in the position to collect evidence or arrest suspects. As mentioned, this could be in a conflict situation, a non-conflict situation but with high security risks, or in a situation where the military operates because there is a lack of civilian capacity. Each situation will demand a different military contingent, ranging from a peacekeeping forces to special forces, and from soldiers to military advisers. A first scenario might occur when armed forces accidentally find themselves in the position to collect evidence or arrest suspects during the course of a military operation (irrespective of whether the main goal of the operation has a prosecutorial goal or a kinetic goal). A second scenario might occur when the military arrives after a terrorist attack has taken place, and they are the first responders. A third scenario might arise when the military operation has a deliberate operational goal to collect evidence or make an arrest, based on for instance prior intelligence information.

²⁹ See <http://www.wsmv.com/story/30751276/2-swedes-get-life-sentences-under-anti-terrorism-laws>.

³⁰ Rechtbank van eerste aanleg Antwerpen (Court of First Instance in Antwerp), ‘Press Release on the ‘Syrian fighters trial’’, 14 January 2015, available at:

<http://www.rechtbankeersteaanlegantwerpen.be/index.php/83-persinformatie>. See for a detailed analysis of this judgement, C. Paulussen and E. Entenmann, ‘National Responses in Select Western European Countries to the Foreign Fighter Phenomenon’, in: A. de Guttery, F. Capone and C. Paulussen (eds.), *Foreign Fighters under International Law and Beyond*, T.M.C. Asser Press/Springer Verlag: The Hague, 2016, pp. 396-399.

In these situations, investigation by civilian authorities is (almost) impossible, and the military might play a role as they are already engaged in a conflict on the ground, or because they are the ones best positioned to deal with the insecure situations at hand. Before going into the question what challenges the military face both legally and practically, I will first elaborate on possible future scenarios for Syria and Iraq that will illustrate that the key question of this policy paper is more than a theoretical challenge and opportunity.

5. Future Scenarios for Syria and Iraq

As mentioned before, the current situation in Syria and Iraq makes it difficult for foreign prosecutors to cooperate with the local law enforcement authorities in collecting evidence or arresting suspects for their FTF cases. The political objectives of the West with regard to cooperation with the Assad regime, however, are not applicable to states like Russia and Iran, who still maintain diplomatic relations with the Assad regime, and could therefore in theory cooperate with the regime to get assistance on collecting evidence and arresting suspects as far as the civilian authorities are able to do so under the difficult chaotic circumstances. One major concern in this case would be, however, the track record of systematic and serious violations of human rights, including the rights to a fair trial, that would undermine the legitimacy and the effectiveness of any investigation and prosecution that abides by the rule of law.

Diplomatic relations and even cooperation with the Iraqi government, on the other hand, is different, and does provide opportunities for possible legal assistance on gathering evidence and arresting suspects as much as the civilian authorities are able to operate in the chaotic circumstances of sometimes full-fledged conflict situations which render those chances very minimal. In addition, investing in the capacities of the Iraqi military to play a role in gathering evidence and arresting suspects is also an avenue that is worth exploring.

For the short and medium future, there are a number of scenarios that could unfold, and that would create entry points for strengthening military capacities in gathering evidence and arresting suspects in both countries.

Scenarios on the future of Syria and/or Iraq and the potential role for cooperation with the military:

1. Cooperation with Iraqi forces and Peshmerga forces
2. Russian/Iranian/American Special Forces on the ground
3. Transition government takes over from Assad, which makes it possible for the West to cooperate with the Syrian government, including offering assistance to the military
4. Coalition of regional countries will intervene with boots on the ground
5. UN Stabilization force will play a role

To a certain extent, scenario 1 is already present. Most western states maintain diplomatic relations with Iraq, and the International Coalition against ISIS has as one of

its tasks to cooperate, strengthen and train Iraqi and Peshmerga forces.³¹ Part of this cooperation could therefore focus on strengthening the capacity of the military to play a role in gathering evidence and arresting suspects of terrorist offences. Prosecutorial skill training could be included in the curriculum of the military training missions, and foreign prosecutors could build working relationships with local prosecutors and military commanders in order to instruct on what evidence they are looking for.

Materialising scenario 2 is a little more difficult but not impossible and it still offers potential points of entry. Special Forces of American, Russian and Iranian troops are operating in Syria and Iraq, say it on different sides. Russia and Iran are supporting the Assad regime with their troops, whereas American special forces are fighting IS.³² In theory, these forces could play a role in gathering evidence and arresting suspects. The problem with this scenario, however, is that most of these Special Forces operations are conducted in secret, which makes planned cooperation in particular a challenge, and makes the interest in a prosecutorial task in addition to the kinetic objective not very likely. Another question is whether there is an international legal mandate that also allows the military to conduct enforcement tasks on the territory of another state. In addition, many western states will probably encounter difficulties in cooperating with Russian and Iranian military forces, because of troubled diplomatic relations, and concerns for human rights abuses. Yet, if states decide to expand the mandate of the special forces to also collect evidence and arrest suspects with the intention to bring them before a civilian court,³³ it would be useful to invest for instance in prosecutorial skill training in order to ensure that the evidence collected is not 'contaminated' and the procedural rights of the suspect are respected.³⁴

International negotiations on the future of Syria are discussing the possibility of a transition government (scenario 3), which keeps President Assad's party in power, but implicates that President Assad steps down. This transition government could start cooperation with opposition parties, and by doing so regain legitimacy in the eyes of many states, re-opening the possibility for cooperation also for prosecutorial purposes. Another scenario might unfold if negotiations fail and – given the unwillingness of western states to get involved with a full-fledged 'boots on the ground' scenario - a regional military coalition decides to send in troops with 'boots on the ground', regaining territory that was under the control of ISIS or al-Nusra. If diplomatic relations are good with these regional powers and sufficient guarantees can be provided for respect for human rights, cooperation by prosecutors with the military of this regional coalition might become a possibility.

³¹ See "Who's doing what in the coalition battle against ISIS", *CNN*, 9 October 2014, <http://edition.cnn.com/2014/10/09/world/meast/isis-coalition-nations/>.

³² See "American special forces to deploy to Syria; U.S., Russia and Iran 'agree to disagree' on Assad", *The Washington Times*, 30 October 2015, <http://www.washingtontimes.com/news/2015/oct/30/us-special-forces-deploy-syria/?page=all>; "Russian special forces sweep into Syria", *AraNews*, 27 October 2015, <http://aranews.net/2015/10/russian-special-forces-sweep-into-syria/>; "Iran Special Forces Fighting ISIS Terrorists in Syria", *Global Research*, 15 October 2015, <http://www.globalresearch.ca/iran-special-forces-fighting-isis-terrorists-in-syria/5482392>.

³³ A role played by special forces in collection of evidence and arrest suspects is not new. Recent examples include the extraterritorial captures by US Special Forces of terrorism suspects Ahmed Abdulkadir Warsame (2011, Yemen); Abu Anas al-Liby (2013, Libya) and Ahmed Abu Khatallah (2014, Libya).

³⁴ See more elaborate on this issue: 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", (2015).

Finally, it is also not unlikely that after hostilities are over, a UN mandated stabilization force would be deployed to certain territories previously controlled by ISIS or al-Nusra. If the security situation still does not permit civilian authorities to operate in those territories to conduct criminal investigations, the UN troops might be better placed to collect evidence and arrest suspects of terrorist activities for the purpose of prosecution before a civilian jurisdiction, which, incidentally, might also include civilian jurisdiction at the international level through an international criminal tribunal.

6. Legal, Practical and Normative Challenges

In the previous section, the argument was made that there might be a role in the future for the military to collect evidence and arrest suspects of terrorist offences in Syria and Iraq. An inventory of potential practical and legal challenges that might occur when the military plays a role in gathering evidence and arrest terrorist suspects can be made based on past experiences in other fields. These include the experiences developed by national prosecutors when investigating the alleged criminal behaviour of military personnel of their own state in other regions due to violations of international humanitarian law or the rules of engagement (RoE), prosecution of pirates after arrests made by the various international navy vessels, military operations with a focus in their mandate on evidence-based operations, and finally the cooperation between international military forces and the international criminal tribunals.³⁵

These practical and legal challenges might include:

- Are the mandates under which the military are operating adequate for prosecutorial tasks?
- How can one preserve the integrity of the civilian prosecution/the integrity of the judicial proceedings if military evidence is brought into the court?
- How can one avoid the tendency to over-classify intelligence?
- How to deal with intelligence in court, while at the same time respecting the rights of the suspect?
- How to deal with the credibility and the security of the witnesses?
- How can one secure the chain of evidence, and the investigation of evidence?

In the previously mentioned ICCT Research Paper, the authors addressed the complicated questions as to what legal regime might apply to the activities of the military (either operating as foreign troops in a host state, or as national military forces employing emergency powers).³⁶ Would that be international human rights law (IHRL) or international humanitarian law (IHL) in addition to the application of national legal regimes? Whether the military operates as national forces with emergency powers or as foreign troops in a host state, IHRL will always apply, including to any activities

³⁵ See more elaborate on this issue: 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", (2015).

³⁶*Ibid.*, p. 9.

related to collecting evidence or arresting suspects.³⁷ Only in situations that can be qualified as an 'armed conflict' will IHL apply as well. However, IHL is less specific on issues related to the gathering of evidence, and so whether the procedural threshold is passed in a specific case will depend on what rules are set by the domestic law that eventually regulates the court case.

In case military troops are deployed in a foreign state, an international legal mandate for the intervention is first of all mandatory.³⁸ This can follow from an explicit request of the host state, it can be based on a mandate issued by the UN Security Council under Chapter VII of the UN Charter, or it can follow from the right to individual or collective self-defence, as laid down in article 51 of the UN Charter. Only after this initial mandate has been issued or established, will it be possible to establish the scope of the mandate and the mission, which will most likely be further specified in the RoE. To what extent collecting evidence and arresting suspects can be considered part of the mandate depends on what has been specified in the international mandates issued by the UN Security Council, or otherwise in the RoE. On the highest international level, it would be helpful if the UN Security Council would to the maximum extent as possible in that phase, refer to any prosecutorial tasks if applicable.

What happens if irregularities have occurred during the arrest or the detention, possibly as a result of the chaotic circumstances in Syria and Iraq in which military are operating? Would that render the case void? Irrespective of under which legal regime (IHL or IHRL) military troops are operating, a minimal legal standard of respect of the rights of the suspects should be upheld. Yet in case irregularities are established by a judge in a pre-trial stage, it depends on the domestic system and tradition whether a court would refuse to exercise jurisdiction as a result of the illegal arrest or detention. It might depend on the seriousness of the irregularity, but also on the seriousness of the crime allegedly committed. A court might also decide to reduce the sentence in order to compensate for the illegal actions committed in the earlier stage of the prosecution.³⁹ Various legal systems also have different ways of dealing with evidence that is derived from a tainted source, so called *fruits from a poisonous tree*. The US system is quite strict and the respect for the rights of the defence plays a very important role, which might lead to the exclusion of illegally obtained evidence from trial. European courts, on the other hand, will look at the seriousness of the breach in gathering the evidence and the relevance for the trial.⁴⁰ In order to avoid these possible flaws in the phase of collecting evidence, arresting and detaining suspects, it might be advisable to develop 'standard operating procedures' (SOPs), which include procedures that fully respect the right of the suspect.

Another challenge follows from the use of (military) intelligence in military operation that might occasionally lead the military to a crime scene where evidence can be

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³⁷ This would for instance include the prohibition of torture when collecting evidence (article 7 of the International Covenant on Civil and Political Rights (ICCPR)) and the right to liberty and security (article 9 ICCPR).

³⁸ See more elaborate on this issue: 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", (2015), pp. 6-8.

³⁹ See more elaborate on the issue of *male captus bene detentus*: 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", (2015), pp. 11-13.

⁴⁰ See more elaborate on the issue of *fruits of a poisonous tree*: 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", (2015), p. 10.

retrieved related to terrorist cases, or even suspects can be arrested. On the one hand, there is a general tendency to overclassify information,⁴¹ making it impossible to be used for an investigation or a prosecution, due to the fact that the information is not shared with other authorities. On the other hand, in case the intelligence is nevertheless used in a court case, there is the tension between the opposite principles on which intelligence gathering (secrecy) and prosecution in a public trial (openness and equality of arms) are based. Many countries have already developed mechanisms in order to best respect both underlying principles.⁴²

But also very practical challenges stem from the insecure environment in which armed forces operate, such as difficulties in sealing off the area, recovering bodies, immediate hearing of witnesses and so forth. Local traditions might furthermore dictate that village elders talk to authorities on behalf of the real witness. And on occasion, witnesses might feel threatened by opposing parties or others, pressuring them to abstain from stepping forward as a witness or to provide false testimonies. Given the general insecure situation, one should also take the security of the witnesses into account, even after testimonies have been given.

Apart from the legal and practical challenges, discussed above, there is also a normative question that merits some attention. This relates to the issue whether it is fair to saddle the armed forces with yet another task. Military are trained to fight, and in modern scenarios might also already need to have skills of a diplomat and developer. Placing yet another task on their shoulders might be too much to ask, since this particular task requires the development of skills to conduct a criminal investigation, secure a crime scene, question witnesses and suspects, and arrest and detain suspects. On the other hand, it can be argued that conflicts are changing, just as much as the reason that states and their military forces get engaged are changing. Given that fact, and the realisation that terrorist organisations often cannot be defeated by military force alone, it is henceforth paramount that other strategies are used as well. Without arguing that the military should completely revise its priorities, it is possible to identify easy entry points for enhancing the role the military can play in assisting prosecutors. Simple skill training, the distribution of evidence kits as part of the military's standard equipment, an enhanced role of the military police or gendarmerie forces, or embedded investigators offer possibilities that do not require a complete shift in responsibilities, yet offer very useful new possibilities for successful prosecution. One might also need to keep in mind that depending on the intensity of the conflict or the level of insecurity, as well as the operational goals of the military, the order of priorities might differ. In conventional theatres of active combat, military objectives prevail over prosecutorial objectives. In counter-insurgency operations, it is not always decided from the outset of the operation whether the operational objective or the prosecutorial objective has primacy. In military operations where the aim is to capture and prosecute (as opposed to capture or kill), which was the case, for instance, in the Evidence-based operations (EVBOs) in Afghanistan,⁴³ the law enforcement goals will probably have primacy.

⁴¹ M. Caparini, "Controlling and Overseeing Intelligence Services in Democratic States", in: H. Born and M. Caparini (eds.), *Democratic Control of Intelligence Services; Containing Rogue Elephants*, Ashgate: Hampshire, 2007, p. 20.

⁴² See more elaborate on the issue of intelligence in court: Q. Eijkman and B. van Ginkel "Compatible or Incompatible? Intelligence and Human Rights in Terrorist Trials", *The International Centre for Counter-Terrorism – The Hague 2*, no. 3 (2011), <http://dx.doi.org/10.19165/2011.1.03>.

⁴³ J. Voetelink, "Evidence-Based Operations; How to remove the bad guys from the battlefield", *Militaire Spectator*, Jrg 182, no. 10, 2013, p. 434-444,

7. Conclusion & Policy Recommendations

Due to the phenomenon of FTFs the international community faces a tremendous security challenge. The policies adopted are multidisciplinary, and include a criminal justice response. However, due to the fact that investigations on site into the activities of FTFs in the countries of destinations are often practically impossible, prosecutors are facing multiple challenges in successfully building their cases. Although the rule of thumb should arguably be ‘as civilian as possible, and only as military as needed’, it is worth exploring the role the military can play in assisting civilian authorities in gathering evidence and arresting FTF suspects for the purpose of prosecution before a civilian court. To make sure that this can be done effectively and in full respect of the rule of law, there are a couple of recommendations (which are more fully elaborated upon in the earlier-mentioned research paper that is available on the ICCT website⁴⁴) that can contribute to improving the success rate of prosecutors in cases of suspects of terrorist offences who travelled to Syria and Iraq and who committed terrorist acts or other crimes there.

1. Clear definitions and specification of instructions in the mandates is necessary. Adding a law enforcement component to the mandate of the military will render it easier to cooperate with civil law enforcement authorities or even prosecutors from international criminal tribunals. This was not done in the Libya case, where the UN SC issued both a mandate to the international coalition to use all necessary measures to prevent the civilian population from becoming a target, and to the International Criminal Court (ICC) to investigate and prosecute exactly those kinds of crimes. The ICC would, however, have profited a great deal from a linkage between the two mandates, in order to facilitate data being shared by the military with the prosecutors that is now automatically classified as confidential.
2. Military need to be offered adequate training to perform investigative and prosecutorial tasks, and this should also be reflected in standard operating procedures. This instruction needs to include proper training on how international law and human rights should be respected while performing these prosecutorial tasks, in order to ensure successful prosecution afterwards. Specialised manuals and training programmes should be drafted for the military to help raise basic knowledge of evidence collection, witness questioning and respect for human rights when arresting and detaining suspects. Also, minimal evidence collection kits should be made available to the military that can be used under all circumstances.
3. Set up effective communication lines and cooperation mechanisms between the different relevant actors during the operation and for future operations. This especially includes building relations with local authorities and police forces and prosecutors to ensure that local rules regarding evidence thresholds are known and respected.

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<http://militairespectator.nl/sites/default/files/teksten/bestanden/MS%2010-2013%20Voetelink%20Evidence-Based%20Operations.pdf>

⁴⁴ 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”, (2015).

4. Investigate whether intelligence collected by the military could have a dual use and also serve as evidence in court. And avoid over-classification of intelligence.
5. Set up rapid response investigation teams, embed investigative officers in the mission, and/or make use of military police officers with law enforcement powers.
6. Set up international and regional inter-agency and inter-institutional cooperation and consultation mechanisms to improve the effectiveness and success of the cooperation between multiple stakeholders. This will also foster the sharing of good practices and could improve regional judicial cooperation through mutual legal assistance mechanisms.

In addition to these concrete recommendations, it is important to stress that various organisations and international coalitions are concerned with the threats posed by IS and al-Nusra and all those FTFs that have the intention to, or already succeeded in, joining these organisations. The strategy to fight this problem should be clear, supported by all relevant stakeholders, and multidisciplinary. It would therefore be advisable, that organisations like the EU, the UN, the GCTF and the International Coalition against ISIS consider the possibilities of the military playing a role in fighting terrorism within a rule of law paradigm, as this will surely contribute to a long-term solution of the problem.

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Prosecuting Foreign Terrorist Fighters: What Role for the Military?

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