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.

All websites were last accessed on 1 November 2017. The authors would like to thank Bart Schuurman, Marjolein Cupido and Mirjam Ekkart for their helpful comments to earlier drafts of this research paper. Christophe Paulussen is a research fellow at the ICCT and a senior researcher at the T.M.C. Asser Instituut. Kate Pitcher is a former research assistant at the T.M.C. Asser Instituut who contributed to this paper between 24 March 2016 and 26 February 2017.
# Table of Contents

Prosecuting (Potential) Foreign Fighters: Legislative and Practical Challenges 1

Table of Contents 2

1. Introduction 3

2. Supranational Legal Instruments 5
   2.1. International Legal Instruments 5
   2.2. Regional Legal Instruments 6
      2.2.2. EU Directive on Combating Terrorism 8

3. Prosecuting Foreign Fighters at the Domestic Level 12
   3.1. Introduction 12
   3.2. A Closer Look 16

4. Challenges 23
   4.1. Introduction 23
   4.2. Role of the Prosecutor 23
   4.3. Evidentiary Issues 26
   4.4. Broader Concerns 30
      4.4.1. Moving Further into the Pre-Crime Space 30
      4.4.2. Effectiveness 31

5. Final Observations and Recommendations 32
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

---

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 crimes\(^5\) 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

\(^2\) 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.

\(^3\) The ICD team can be contacted via: editors@internationalcrimesdatabase.org.
\(^4\) See http://www.internationalcrimesdatabase.org/foreignfighters.
Prosecuting (Potential) Foreign Fighters: Legislative and Practical Challenges

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 greater 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, 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”.

The most important resolution on FTFs is without a doubt (the also legally binding) UNSC Resolution 2178 of 24 September 2014, which defines 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”. 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. “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.” 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. 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

---

10 UNSC Res. 2170, para. 8.
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.  

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, it’s blurring of the lines between terrorism and international humanitarian law, and its general lack of clarity in drafting. The UN High Commissioner for Human Rights expressed similar criticisms. Some of these points will also come back later in this paper.

2.2. Regional Legal Instruments


The Additional (‘Riga’) Protocol to the Council of Europe (CoE) Convention on the Prevention of Terrorism 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. 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).  

16 Ibid., para. 5.
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”, 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 Appendix 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 acts and for that purpose, criminalises participating in an association or group for the purpose of terrorism (Article 2 of the Additional Protocol), receiving training for terrorism (Article 3), travelling abroad for the purpose of terrorism including attempting to do so (Article 4), funding travelling abroad for the purpose of terrorism (Article 5) and finally organising or otherwise facilitating travelling abroad for the purpose of terrorism (Article 6). 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), must be carried out by States ensuring 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. 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.”

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. These related, among other things, to the “excessively broad” potential scope of application of the Protocol “due to the wide and uncertain definition of “terrorist offence” in Article 1.1 of the Convention”, its focus on ancillary offences distant from the principal offence – hence “rais[ing] serious concerns as to compliance with the principle of legality” and its lack of clarity as regards its application to situations of armed conflict. 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” 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”. The

32 Art. 8, para. 1 of the Additional Protocol.
33 Art. 8, para. 2 of the Additional Protocol.
36 Ibid., p. 1.
37 Ibid., pp. 1-2.
38 Ibid., pp. 2-3.
Prosecuting (Potential) Foreign Fighters: Legislative and Practical Challenges

[The 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

---

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

---

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

On 11 March 2016, the Council agreed its negotiating position\textsuperscript{56} and on 12 July 2016, the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE) issued its report,\textsuperscript{57} in which a number of modifications to the text were suggested.\textsuperscript{58} Nonetheless, human rights organisations remained critical.\textsuperscript{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)\textsuperscript{60} and the LIBE Committee,\textsuperscript{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.\textsuperscript{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”,\textsuperscript{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 \textit{Official Journal of the European Union} on 31 March 2017,\textsuperscript{64} obligeing EU Member States\textsuperscript{65} to bring into force all the rules necessary to comply with the Directive by 8 September 2018.\textsuperscript{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

\textsuperscript{55} Ibid., pp. 8-10.
\textsuperscript{63} Ibid.
\textsuperscript{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: \url{https://www.irishtimes.com/news/crime-and-law/new-anti-terror-laws-to-be-introduced-1.3116059}.
\textsuperscript{66} See Art. 28 of the EU Directive on Combating Terrorism.
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.

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.
Prosecuting (Potential) Foreign Fighters: Legislative and Practical Challenges

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. 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. 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. 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 indictment in the case of Nicholas Teausant, a US citizen and converted Muslim, who attempted to travel to the Middle-East to join ISIS. He was arrested and indicted on one count of attempting to provide material support or resources to a foreign terrorist organisation, pursuant to 18 US Code § 2339B(a)(1). He pleaded guilty without a plea agreement and was sentenced, in June 2016, to 12 years’ imprisonment. 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. Bush in 2001.
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. 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”.

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). 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.

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”, 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.” 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.

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). 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...
human rights system], putting hard won rights at risk”. 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].

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. 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, inviting support for a terrorist organisation, terrorist training, assisting others to travel, financing others to fight, recruiting, (attempting to) travel(ling) to join a terrorist organisation, preparing to commit murder and other regular crimes such as arson, preparing to commit terrorist
crimes, and membership/having participated in the activities of a terrorist organisation.

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, ‘terror crimes’, and war crimes. 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. Part of this comes from the fact that these obligations are inherently (and purposefully) flexible, 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 charge is the one of ‘providing material support or resources to designated foreign terrorist organisations’. This term, ‘material support or resources’, is very broad, meaning

---


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-E-B), both from Germany.


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


108 18 US Code § 2339B.
Prosecuting (Potential) Foreign Fighters: Legislative and Practical Challenges

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

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).
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 Juned Khan case (available at: http://www.internationalcrimesdatabase.org/Case/3281) and the Shazib Khan case (available at: http://www.internationalcrimesdatabase.org/Case/3282).
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

119 Available at: https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1217
121 Available at: http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1217
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/.
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. 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. 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), to engage in a hostile activity in a foreign country (maximum penalty: imprisonment for life), to prepare to enter (maximum penalty: imprisonment for life), or to prepare another person – for instance through providing training (maximum penalty: imprisonment for life) or through giving goods and services (maximum penalty: imprisonment for life) – 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). 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:

---


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: (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.”
Moreover, it is an offence to enter or remain in a declared area (maximum penalty: 10 years’ imprisonment), unless that person is entering or remaining there solely for legitimate purposes, such as providing aid of a humanitarian nature, or making a news report of events in the area. 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. 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.

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. 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 abroad, whose purpose would be “reliably incarcerating returned foreign fighters, reducing the short-term threat that they pose.” Although there are also concerns about such a scheme, 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 as advocating, protesting, defying or engaging in activities associated with terrorist organizations.

---

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 117.1(1) of the Criminal Code Act.

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

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


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.\textsuperscript{149} This may prolong and exacerbate fighting.\textsuperscript{150} Outside common law countries, such as in Germany, there are no plea agreements, but defendants who instead confess to the charges.\textsuperscript{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”.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{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-idUSKBNDU040620150519, 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."

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


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”, 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 years and 5,5 years. 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. 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 “the average post-trial sentence [being] 32.5 years—triple the average sentence for defendants convicted pursuant to a guilty-plea agreement.” 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. 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), and life imprisonment for Hassan al-Mandlawi and Al-Amin Sultan (in Sweden).

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 Belgium and the

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.
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.
Prosecuting (Potential) Foreign Fighters: Legislative and Practical Challenges

Netherlands, 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.” 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.” The first case based on this new policy started in March 2017, involving ten (absent) defendants.

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. 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).


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,\textsuperscript{168} the mentally ill\textsuperscript{169} 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,\textsuperscript{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?\textsuperscript{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.\textsuperscript{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 involved in the actual terrorist intervention.

This 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, 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,\textsuperscript{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?\textsuperscript{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.

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?\textsuperscript{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, 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,\textsuperscript{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?\textsuperscript{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, 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,\textsuperscript{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?\textsuperscript{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, 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,\textsuperscript{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?\textsuperscript{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, 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,\textsuperscript{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?\textsuperscript{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.
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” and that “[o]n this particular occasion, the Attorney-General did not consent to the prosecution. It would be inappropriate to comment further.” Other Australian returnees who had links with the YPG, such as Ashley Dyball and Matthew Gardiner, were not charged either. The same can be said of Australian national George Khamis, who joined Dwekh Nawsha, a Christian militia fighting IS in Northern Iraq, or of Canadian national Shaelynn Jabs, who joined the YPG. 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.” 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.” 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. 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. In the end, the case was dropped for lack of evidence.

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. 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

174 Ibid.
175 Ibid.
178 Ibid.
179 Ibid.
181 Available at: https://www.petities24.com/steun_jitse_akte.
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.”

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.”

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, 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.

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

---

evidence". 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".

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. 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. 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", 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.

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. Nonetheless, much work remains to be done in this field. In its Fourth (November 2016) Report on FTFs, Eurojust concluded:

---

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".
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

---


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.


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.
Prosecuting (Potential) Foreign Fighters: Legislative and Practical Challenges

-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

\(^{205}\) 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.


\(^{216}\) 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. 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.

-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. Europol explained that:

> [t]he form offered the possibility to indicate one’s role for IS and was made available by foreign authorities. 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.

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”. Mr. Mohamed had applied for a passport, booked flights and obtained the contact details of an intermediary. 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

---

218 See http://www.internationalcrimesdatabase.org/Case/3285.
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.
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, but this can create, in turn, new criticism from politicians, hence showing again the enormous pressure under which criminal justice professionals have to work these days. 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. 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. On the other, one can wonder whether prosecutions and convictions will...
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/](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.”


232 Ibid., p. 22.


235 Ibid.

236 Ibid.

237 Ibid., p. 7.

238 Ibid., p. 8.
Prosecuting (Potential) Foreign Fighters: Legislative and Practical Challenges

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.


This not only means that more resources should be invested in criminal justice sector professionals. 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. 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? 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 sober 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 ultima ratio. A way that a government can choose to treat its citizens would be to use military force to prevent them from returning 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:


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. 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. While recognising such prosecutions will be challenging as well, such international crimes should not be forgotten either.

Bibliography


Prosecuting (Potential) Foreign Fighters: Legislative and Practical Challenges


Prosecuting (Potential) Foreign Fighters: Legislative and Practical Challenges


Van der Heide, L. and E. Entenmann. “Juvenile Violent Extremist Offenders: Peer Pressure or Seasoned Soldiers?”. ICCT Perspective, 12 September 2016,


Weddady, N. “Why Westerners who joined Islamic State don’t deserve an automatic death sentence”. *The Washington Post*, 26 October 2017,
Prosecuting (Potential) Foreign Fighters: Legislative and Practical Challenges


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 Stoel 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.
Prosecuting (Potential) Foreign Fighters: Legislative and Practical Challenges

Christophe Paulussen, Kate Pitcher
January 2018


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.

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