

# **Addressing Europe's Foreign Fighter Issue**

## **Legal Avenues at the International and National Level**

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## Abstract

Since its beginning, the Syrian civil war has been marked by atrocities on both sides of the conflict and as diplomatic efforts fail to bring the various fighting factions to one table, there seems to be no end in sight for the increasingly sectarian conflict. The Syrian crisis has drawn in a range of outside factions and there are reports of some 11,000 non-Syrians fighting alongside government troops, opposition forces and other, often religiously-inspired groups. While most of these so-called foreign fighters come from neighbouring states, around 20 percent of them are estimated to come from Europe. Authorities at the national and international level try to counter these worrying developments via a plethora of means. This article focusses on the question of what legal tools and measures legislators can and should utilise to prevent potential fighters from travelling to Syria and/or prosecuting individuals upon their return, for example for acts committed while abroad or the possible preparation of terrorism-related acts. It analyses the legal avenues available on the international and domestic levels for addressing the issue of foreign fighters. As concerns the national level, the article focuses on the European states that appear to have the highest percentage of departed foreign fighters: Belgium, France, Germany, the Netherlands and the United Kingdom (UK). The authors conclude, among other things, that rule of law responses to the foreign fighter phenomenon in the countries investigated remains fragmented. Although at the European level, the attacks in Belgium in May 2014 have meant that calls for a comprehensive approach to the foreign fighter phenomenon have become more urgent, it is doubtful whether Europe will soon have a Union-wide response to this increasingly challenging problem.

## Keywords

Syria – ISIS – foreign fighters – legal tools – international crimes – war crimes – genocide – crimes against humanity – genocide – terrorism – national practices – arrests – prosecutions – Belgium – France – Germany – the Netherlands – the United Kingdom – the European Union – counter-terrorism

## 1. The Foreign Fighter Phenomenon

Since its beginning, the Syrian civil war has been marked by atrocities on both sides of the conflict and as diplomatic efforts fail to bring the various fighting factions to one table, there seems to be no end in sight for the increasingly sectarian conflict. The Syrian crisis has drawn in a range of outside factions and there are reports of some 11,000 non-Syrians fighting alongside government troops, opposition forces and other, often religiously-inspired groups. While most of these so-called foreign fighters come from neighbouring states, around 20 percent of them are estimated to come from Europe.<sup>1</sup>

The majority of these European fighters have joined Syrian or international jihadi groups. The most important groups include the Jabhat al-Nusra or al-Nusra Front and the Islamic State of Iraq and al Sham (ISIS), both jihadist groups fighting against Assad's regime with the aim of establishing an Islamist state in Syria and beyond. Until last year, al-Nusra was described as the most effective rebel fighting group in Syria;<sup>2</sup> a title now undoubtedly claimed by ISIS. The two groups' core members include veteran Syrian jihadists who have fought in Iraq under the al Qaeda-affiliated Islamic State of Iraq,<sup>3</sup> which was formerly known as al Qaeda in Iraq. Reportedly, the

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1 House of Commons Home Affairs Committee, "Counter-Terrorism", Seventeenth Report of Session 2013–14, 30 April 2014, <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmhaff/231/231.pdf>, p. 15.

2 "Syria Crisis: Guide to Armed and Political Opposition", BBC News Online Middle East, 17 October 2013, <http://www.bbc.co.uk/news/world-middle-east-24403003>.

3 Quilliam Foundation, Jabhat al-Nusra. A Strategic Briefing, 8 January 2013, <http://www.quilliamfoundation.org/wp/wp-content/uploads/publications/free/jabhat-al-nusra-a-strategic-briefing.pdf>.

majority of ISIS's leadership consists of foreigners,<sup>4</sup> whereas less than 20 percent of al-Nusra's leadership are foreign.<sup>5</sup> Another group said to almost exclusively consist of foreigners including Europeans is Jaish al Muhajireen wal-Ansar or the Army Emigrants and Helpers.<sup>6</sup> This group is led by Abu Omar al-Shesheni<sup>7</sup> and was responsible for the capture of a military airbase in Aleppo in August 2013.<sup>8</sup> One of the more well-known smaller groups is Sukur al-Sham, the Falcons of the Levant, a prominent home-grown group that claims to have recruited Arabic, French and Belgian fighters.<sup>9</sup> This development and a seemingly uninterrupted flow of Europeans travelling to the war-torn country through the Schengen zone to Turkey and into Syria has presented a difficult challenge for European policymakers. Not only are families and communities worried about their youths being physically and emotionally harmed while abroad, authorities are increasingly concerned about the potential security threat returnees could pose to themselves and others. The 24 May 2014 attack by an alleged foreign fighter and French citizen Mehdi Nemmouche in a Jewish museum in Brussels only confirms these concerns. This fear is compounded by the momentum that extremist groups such as ISIS – which is listed as a terrorist organisation by various countries and subject to UN sanctions<sup>10</sup> – are gaining in Syria and beyond. Following the ISIS's violent advances into Iraq and the proclamation of an Islamic caliphate stretching over parts of Iraq and Syria in the summer of 2014, authorities worry that more and more fighters will heed the group's call to take up arms and join the Islamic State (as the group has renamed itself). Domestically, authorities are also concerned; in late June this year, the Dutch secret service even cautioned in the context of religious extremism that the threat of a terrorist attack in the Netherlands is “bigger than ever before”.<sup>11</sup> This warning comes at a time when the Dutch National Coordinator for Counter-Terrorism continued to keep the country's terrorism threat level at “substantial” due to concerns over Dutch foreign fighters returning from Syria.<sup>12</sup>

Authorities at the national and international level try to counter these worrying developments via a plethora of means. This article focusses on the question of what legal tools and measures legislators can and should utilise to prevent potential fighters from travelling to Syria and/or prosecuting individuals upon their return, for example for acts committed while abroad or the possible preparation of terrorism-related acts. It analyses the legal avenues

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4 A. Jawad Al-Tamimi, “The Syrian rebel groups pulling in foreign fighters”, BBC Middle East News, 24 December 2013, <http://www.bbc.com/news/world-middle-east-25460397>.

5 K. Wong, “Foreign Jihadists Surpass Afghan-Soviet War, Storm Syria in Record Numbers”, The Washington Times, 20 October 2012, <http://www.washingtontimes.com/news/2013/oct/20/foreign-jihadists-surpass-afghan-soviet-war-storm/>.

6 “Syria Crisis: Guide to Armed and Political Opposition” (2013).

7 Ibid.

8 D. McElroy, “Syria: Foreign jihadists behind the rebel capture of Aleppo airport”, The Telegraph Online, 7 August 2013, <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/10228171/SyriaForeign-jihadists-behind-the-rebel-capture-of-Aleppo-airport.html>.

9 N. Benotman and E. Naseraldin, “The Jihadist Network in the Syrian Revolution: A Strategic Briefing”, Quilliam Foundation, <http://www.quilliamfoundation.org/wp/wp-content/uploads/publications/free/the-jihadist-network-in-the-syrian-revolution.pdf>.

10 For example, the UK seeks to ban ISIS alongside four other organisations, see A. Travis, “ISIS terror group to be banned in Britain”, The Guardian, 16 June 2014, <http://www.theguardian.com/uk-news/2014/jun/16/isis-syrian-terrorist-groups-banned-britain-iraq>; Australia listed the group under its current name in December 2013, see “Australian National Security: Listed Terrorist Organisations”, Australian Government, 19 June 2014, <http://www.nationalsecurity.gov.au/Listedterroristorganisations/Pages/default.aspx>; the US listed the group in 2004 under its previous name, see Bureau of Counterterrorism, “Foreign Terrorist Organizations”, US Department of State, 19 June 2014, <http://www.state.gov/j/ct/rls/other/des/123085.htm>; and “List established and maintained by the Committee pursuant to resolutions 1267 (1999) and 1989 (2011) with respect to individuals, groups, undertakings and other entities associated with Al-Qaida”, UN Security Council Sanctions Committee, 2 June 2014, <http://www.UN.org/sc/committees/1267/pdf/AQList.pdf>.

11 M. Zech, “Dutch Warned of Posb. Terrorist Attacks”, NL Times, 30 June 2014, <http://www.nltimes.nl/2014/06/30/dutch-warned-posb-terrorist-attacks/>.

12 National Coordinator for Counter-Terrorism, “Summary of the 36th edition of the Terrorist Threat Assessment for the Netherlands”, DTN 36, June 2014, file://vuwnas02/entenmanec/My%20Documents/kamerbrief-dtn36-english-translation\_tcm92-555414.pdf.

available on the international and domestic levels for addressing the issue of foreign fighters. Section 2 is brief and addresses whether and how foreign fighters can be held criminally responsible with regard to their participation in the Syrian conflict, specifically looking at whether or not these persons could be prosecuted by national authorities upon their return because they committed a crime under international law. The subsequent section is more elaborate and turns to specific national practices (section 3). Here, the article focuses on the European states that appear to have the highest percentage of departed foreign fighters: Belgium, France, Germany, the Netherlands and the United Kingdom (UK).<sup>13</sup> As such this article presents an updated and more focused version of a Research Paper by the same authors, written in cooperation with Prof. Dr. Edwin Bakker and published by the International Centre for Counter-Terrorism – The Hague (ICCT) in December 2013, entitled “Dealing with European Foreign Fighters in Syria: Governance Challenges and Legal Implications”.<sup>14</sup> This update reflects the rapid developments and changes in the law to combat what many experts and authorities perceive to be a growing security threat.

## 2. Prosecution via International Crimes

Although the presence of foreign fighters in foreign conflicts is not a new one, little precedent exists for the prosecution of individuals who have taken part or are planning to participate in combat in a third country. Although the United Nations (UN) Security Council demanded in a 22 February 2014 Resolution that all foreign fighters immediately withdraw from Syria, possible legal mechanisms to counter the potential threat that foreign fighters pose to society are not addressed at the international level.

Possibilities for charging foreign fighters include, but are not limited to, war crimes including acts of terrorism, crimes against humanity, genocide and terrorism (as such). Before elaborating on the possibilities of charging individuals under each of these crimes, it should be underlined that given the volatile situation in Syria, it is extremely difficult to prove that somebody has committed a crime. However, labelled as “the first YouTube war”, the extensive (social) media coverage of the conflict has meant that many perpetrators have filmed their attacks,<sup>15</sup> which in turn can provide evidence and lead to the start of criminal investigations.<sup>16</sup> One such example is footage posted on *Instagram* in May 2014, which shows a man believed to be from London killing a prisoner near Raqqa in May 2014.<sup>17</sup> Information collected by non-governmental organisations and bodies such as the Commission of Inquiry (CoI), mandated by the UN Human Rights Council to investigate and record all allegations of crimes against

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13 T. Hegghammer, “Number of Foreign Fighters from Europe in Syria is historically unprecedented. Who Should be Worried?”, *The Washington Post*, 27 November 2013, <http://www.washingtonpost.com/blogs/monkey-cage/wp/2013/11/27/number-of-foreign-fighters-from-europe-in-syria-is-historically-unprecedented-who-should-be-worried/>.

14 E. Bakker, C. Paulussen and E. Entenmann, “Dealing with European Foreign Fighters in Syria: Governance Challenges and Legal Implications”, ICCT Research Paper, 16 December 2013, <http://www.icct.nl/publications/icct-papers/dealing-with-european-foreign-fighters-in-syria-governance-challenges-and-legal-implications>.

15 See A. Erkul, M. Oeyen and K. Vidal, “Syriëstrijders begaan oorlogsmisdaden”, *De Morgen*,

8 June 2013, <http://www.demorgen.be/dm/nl/990/Buitenland/article/detail/1648206/2013/06/08/Syriestrijders-begaan-oorlogsmisdaden.dhtml>.

16 See “Ook Nederlands onderzoek naar video van onthoofding”, *De Morgen*, 7 June 2013, <http://www.demorgen.be/dm/nl/990/Buitenland/article/detail/1647974/2013/06/07/Ook-Nederlands-onderzoek-naar-video-van-onthoofding.dhtml>. See also “UN human rights chief urges Syrian rebels to end abuses after gruesome video hits Internet”, *UN NewsCentre*, 14 May 2013, <http://www.UN.org/apps/news/story.asp?NewsID=44907#.UnGVv51gVox>: “The mutilation of a Syrian soldier purportedly shown in an internet video is a ‘truly atrocious act’ which should be investigated as a potential war crime, the United Nations human rights chief said today, urging the armed opposition to stop such gross crimes”.

17 The footage was discovered by researchers from ICSR. T. Rayner, “British Fighter Filmed in Syria ‘War Crime’”, *Sky News*, 2 May 2014, <http://news.sky.com/story/1253567/british-fighters-filmed-in-syria-war-crime>.

humanity and war crimes, may also be of evidentiary value for investigations and prosecutions.<sup>18</sup>

## 2.1. War Crimes

The Syrian conflict is a non-international armed conflict where international humanitarian law applies.<sup>19</sup> It is now generally agreed that war crimes, which are serious violations of international humanitarian law, can be committed not only in international armed conflicts, but also in conflicts of a non-international nature.<sup>20</sup> For instance, in the Rome Statute of the International Criminal Court (ICC), now ratified by 122 states, the definition of war crimes includes, in the case of an armed conflict not of an international character, “[s]erious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely [...] acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause”.<sup>21</sup> It also includes “[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law”.<sup>22</sup> In October 2013, Human Rights Watch (HRW) reported that it had evidence, “collected through interviews, on-site investigation, and a review of opposition statements and videos”, linking five opposition groups “to specific incidents that amount to war crimes”.<sup>23</sup> Similarly, the Col in its February 2014 report found through interviews and other evidence collected between July 2013 and January 2014 that war crimes were committed by non-state armed groups, including ISIS; according to the Commission, these acts include, but are not limited to, murder, torture, rape and using children below the age of 15 as soldiers.<sup>24</sup>

18 UN Human Rights Council, The Independent International Commission of Inquiry on the Syrian Arab Republic, Office of the High Commissioner for Human Rights, <http://www.ohchr.org/EN/HRBodies/HRC/IIICISyria/Pages/IndependentInternationalCommission.aspx>.

19 See “Syria: Applicable International Law”, Rule of Law in Armed Conflicts Project, 13 July 2012, [http://www.geneva-academy.ch/RULAC/applicable\\_international\\_law.php?id\\_state=211](http://www.geneva-academy.ch/RULAC/applicable_international_law.php?id_state=211).

20 See J.M. Henckaerts and L. Doswald-Beck, Customary International Humanitarian Law, Volume I: Rules, Cambridge University Press: Cambridge 2005, <http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>, Rule 156 (p. 568).

21 Art. 8, para. 2 (c) of the ICC Statute. The acts specified include: (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment; (iii) Taking of hostages; (iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

22 Art. 8, para. 2 (e) of the ICC Statute. This includes any of the following acts: (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; (ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law; (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict; (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives; (v) Pillaging a town or place, even when taken by assault; (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions; (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities; (viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand; (ix) Killing or wounding treacherously a combatant adversary; (x) Declaring that no quarter will be given; (xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons; (xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict.

23 Human Rights Watch, “You Can Still See Their Blood”. Executions, Indiscriminate Shootings, and Hostage Taking by Opposition Forces in Latakia Countryside, 2013, [http://www.hrw.org/sites/default/files/reports/syria1013\\_ForUpload.pdf](http://www.hrw.org/sites/default/files/reports/syria1013_ForUpload.pdf), p. 5. The five opposition groups are Ahrar al-Sham, ISIS, Jabhat al-Nusra, Jaish al-Muhajireen wal-Ansar and Suqor al-Izz.

24 UN Human Rights Council, “Report of the independent international commission of inquiry on the Syrian Arab Republic”, A/HRC/25/65 (12 February 2014), <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session25/Pages/ListReports.aspx>.

However, as the ICC is not (yet) involved in the situation in Syria,<sup>25</sup> it would depend on national states, which have implemented comparable war crimes applicable in non-international armed conflicts within their domestic legal system, to prosecute foreign fighters in their own courts. The International Committee of the Red Cross (ICRC) Study on Customary International Humanitarian Law states that there is a customary international law rule, applicable in both international and non-international armed conflicts, which requires states to “investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects”.<sup>26</sup> This would mean that courts could base their jurisdiction on the principles of territoriality or active personality. If there is no such jurisdiction, universality (which is obligatory in cases of grave breaches, but that concept is only applicable in international armed conflicts)<sup>27</sup> may oblige states to also investigate those war crimes, and, if appropriate, prosecute the suspects.<sup>28</sup>

It must be stressed that serious violations of international humanitarian law (war crimes) can also include acts of terrorism. For instance, looking at the war crimes list of the ICC (see fnns. 22-23), acts of terrorism could be prosecuted as the taking of hostages or as intentionally directing attacks against the civilian population or against individual civilians not taking direct part in hostilities.<sup>29</sup>

## 2.2. Crimes against Humanity

Moreover, certain acts by foreign fighters could also be prosecuted as crimes against humanity (which can be committed in both peacetime and wartime situations). One could for instance think of acts such as murder, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture and other inhumane acts of a similar character intentionally causing great suffering or serious injury to mental or physical health, when these acts are “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”.<sup>30</sup> In the HRW report mentioned above, the authors note that:

The evidence gathered by Human Rights Watch suggests that the killings, hostage taking, and other abuses committed by the opposition forces on and after August 4 rise to the level of crimes against humanity. The scale and organization of these crimes strongly suggests that they were systematic and part of a policy to commit these crimes.<sup>31</sup>

## 2.3. Genocide

Given the sectarian nature of the conflict, some acts might even be qualified as acts of genocide, namely any

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25 For this to occur, the UNSC would have to decide to refer the situation to the ICC. (Not taking into account the possibility for now that Syria would accept, on an ad hoc basis, the jurisdiction of the Court, or that a national of a State Party to the ICC is being prosecuted for crimes committed in Syria.) However, on 22 May 2014, Russia and China blocked a Security Council resolution that would have referred the situation in Syria to the ICC, see UN News Centre, “Russia, China block Security Council referral of Syria to International Criminal Court”, 22 May 2014, <http://www.UN.org/apps/news/story.asp?NewsID=47860#.U5YitChkz5M>.

26 J.M. Henckaerts and L. Doswald-Beck, Customary International Humanitarian Law, Volume I: Rules (2005), Rule 158 (p. 607).

27 Ibid., Rule 157 (p. 606) and Rule 158 (p. 607).

28 Ibid., Rule 158 (p. 607).

29 See also J.D. van der Vyver, “Prosecuting terrorism in international tribunals”, *Emory International Law Review*, Vol. 24, Issue 2 (2010), pp. 540–541.

30 Art. 7, para. 1 of the ICC Statute.

31 HRW, “You Can Still See Their Blood” (2013), p. 95.

of the following acts when committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group, and other acts.<sup>32</sup> For instance, it has been reported that:

[a]s arms and fighters have been flooding into Syria from neighbouring countries to support the sectarian Sunni insurgency [...] [m]aterial from Youtube and Facebook channels suggests a genocide of Alawite, Christian, Kurdish and secular communities may already be underway in rebel-held areas of Syria. This material includes statements of genocidal intent by rebels, the filming of genocidal propaganda aimed at young people and children and footage of the shooting of civilians on the basis of their cultural identity or just failure to prove they share the religious ideology of their murderers.<sup>33</sup>

#### 2.4. Terrorism

Despite the lack of an internationally-recognised definition of terrorism, certain international documents may be of relevance when it comes to prosecuting individual foreign fighters on the basis of terrorism charges. For instance, on 30 May 2013 the UN Security Council (UNSC) Committee approved the addition of al-Nusra Front on its al Qaeda Sanctions List of individuals and entities subject to the assets freeze, travel ban and arms embargo.<sup>34</sup> Although adding al-Nusra Front to the Sanctions List is an administrative decision and does not determine a person's individual criminal status, for those foreign fighters who do join al-Nusra, the link with al Qaeda – and terrorism – can more easily be established. Once the terrorism label comes in sight, it has been argued that states in fact *must* prosecute (or extradite) a suspect. For instance, in UNSC Resolution 1373 (2011), the Council decided:

that all States shall: [...] (c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens; [...] (e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts [...].<sup>35</sup>

According to the UNSC's Counter-Terrorism Committee, this Resolution "obliges States to prosecute and try all those responsible for acts of terrorism, wherever they are committed. This measure is designed to ensure that

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32 Art. 6 of the ICC Statute. "Other acts" are probably less likely to happen in the Syrian context, such as imposing measures intended to prevent births within the group.

33 See Human Rights Investigations, "Is Obama supporting genocide in Syria?", 3 September 2013, <http://humanrightsinvestigations.org/2013/09/03/obama-supporting-genocide-in-syria/>.

34 As set out in paragraph 1 of UNSC Resolution 2083 (2012). See UN Security Council, "Security Council Al-Qaida Sanctions Committee Amends Entry of One Entity on Its Sanctions List", SC/11019, 30 May 2013, <http://www.un.org/News/Press/docs/2013/sc11019.doc.htm>. This is pursuant to Resolutions 1267 (1999) and 1989 (2011) concerning al Qaeda and associated individuals and entities.

35 UNSC Resolution 1373 (2011) of 28 September, paras 2(c) and (e).

terrorists have no place of refuge, since each State will be competent to try them or extradite them”.<sup>36</sup>

Hence, for charging suspects with terrorism as such, and in the absence of an internationally recognised definition of terrorism, one will have to look at the domestic level.

### 3. Specific National Practices in Europe

Having addressed the charging of (potential) foreign fighters via international crimes more generally, this article now turns to the European level. There is no European Union-wide response to the foreign fighter issue. Last year, the EU Counter-Terrorism Coordinator Gilles de Kerchove compiled an extensive list of possible measures to address the foreign fighter issue, which also mentioned the need for criminal sanctions. De Kerchove invited Eurojust to carry out work on foreign fighters with the view to presenting concrete proposals for criminal policy related to foreign fighters.<sup>37</sup> Specifically, he asked Eurojust to present by November 2013 a report detailing the “outcome of its ongoing work on foreign fighters, in particular the adequacy of the legal framework in the Member States, the criminal policy response, the use of administrative sanctions and strengthening information exchange in the context of investigations and prosecutions, and present specific recommendations”.<sup>38</sup> While this report was presented, it has been classified “EU Restricted” and is therefore not publicly available.<sup>39</sup>

This leaves us with the specific national practices of selected Western European countries. The following subsections will provide examples as to how a number of European states have dealt with the foreign fighter issue, with a particular focus on, but not limited to, criminal prosecution.

#### 3.1. Belgium

The problem of foreign fighters in Belgium is considerable, with dozens of young men from especially Antwerp, Vilvoorde and Mechelen fighting in Syria.<sup>40</sup> In fact, by the end of last year Belgium had the highest per capita number of Syrian fighters of any European country,<sup>41</sup> with an estimated 226 individuals who had travelled to the country by February 2014, including 26 who had died there and 47 returnees.<sup>42</sup> Out of those, only seven persons were arrested.<sup>43</sup>

On 16 April 2013, after a year-long investigation pertaining to 33 inhabitants of Antwerp and Vilvoorde, the Belgian

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36 Report by the Chair of the Counter-Terrorism Committee on the problems encountered in the implementation of Security Council Resolution 1373 (2001) (Annex of UN Doc. S/2004/70 of 26 January 2004), p. 6. For more information on the (dubious status of the) “prosecute or extradite” concept in the context of terrorism, see C. Paulussen, “Impunity for international terrorists? Key legal questions and practical considerations”, ICCT Research Paper, April 2012, <http://www.icct.nl/download/file/ICCT-Paulussen-Impunity-April-2012.pdf>.

37 G. De Kerchove, EU Counter-Terrorism Coordinator Statement on Foreign Fighters, Brussels: Council of the European Union, 30 May 2013, <http://tvnewsroom.consilium.europa.eu/event/justice-and-home-affairs-council-june-2013/eu-counter-terrorism-coordinator-statement-on-foreign-fighters>, as from 00:03:45.

38 EU Counter-Terrorism Coordinator in close consultation with the services of the Commission and the EEAS, “Note” (on foreign fighters and returnees from a counterterrorism perspective, in particular with regard to Syria), 9946/13, Brussels, 28 May 2013, <http://www.statewatch.org/news/2013/jul/eu-council-terr-coordinator-syria-9946-13.pdf>, para. 14.

39 See the email communication with the Eurojust Press Office, 16 June 2014 (on file with the authors).

40 See A. De Becker, “Tientallen Vlaamse jongeren vechten in Syrië tegen Assad”, *Het Laatste Nieuws*, 7 March 2013, <http://www.hln.be/hln/nl/960/Buitenland/article/detail/1592532/2013/03/07/Tientallen-Vlaamse-jongeren-vechten-in-Syrie-tegen-Assad.dhtml>.

41 See US Department of State, “Country Reports on Terrorism 2013 – Belgium”, 30 April 2014, <http://www.refworld.org/docid/53622a01e.html>.

42 L. Vidino, “Foreign Fighters: An Overview of Responses in Eleven Countries”, Centre for Security Studies: Zurich, March 2014, [http://www.css.ethz.ch/publications/pdfs/Foreign\\_Fighters\\_2014.pdf](http://www.css.ethz.ch/publications/pdfs/Foreign_Fighters_2014.pdf), p. 6.

43 Ibid.



police raided almost 50 homes and arrested six men, among whom was a wounded returnee from Syria and Fouad Belkacem, the leader of the (dismantled) extremist group Sharia4Belgium. A spokesperson for Belgium's federal prosecutors explained: "We have indications that Sharia4Belgium was sending people to Syria to join terrorist groups there".<sup>44</sup> During the press conference the same afternoon, Prosecutor Eric vander Sypt stated: "In fact, the purpose of this was to detect who in Belgium is guilty of participating in a terrorist organisation. I cannot repeat it enough. In this case, it appears that Sharia4Belgium actively participated in such an organisation by sending particularly young people to combat zones".<sup>45</sup>

Recently, Joelle Milquet, the Belgian Minister of the Interior, established a Task Force to look into the problem of Belgian youths joining the Syrian civil war<sup>46</sup> and suggested both a preventive and repressive approach to counter travel to Syria's battlefields. The repressive approach consisted of ten points. Two of them were rejected by the core cabinet straightaway and eight measures, such as increased border controls in Belgium and Turkey, and the reinforcement of the terrorism unit of the Brussels federal police to collect more information on Syria fighters, were sent to a working group of experts for consideration.<sup>47</sup> It is enlightening to go into more detail regarding the two points that were immediately rejected.

The first was the criminalisation of leaving for Syria to fight there, which could be achieved through extending, with a royal decree, the 2003 Belgian law implementing the provisions of the 1989 *International Convention against the recruitment, use, financing and training of mercenaries*.<sup>48</sup> Milquet argued, among other things, that the criminalisation of travel would have a dissuasive effect and that it would be much easier to prove this crime than terrorism crimes. That would especially be the case if crimes committed in Syria could be qualified as e.g. war crimes (see subsection 2.1). She also noted that such a regulation already exists in the Netherlands (see subsection 3.4).<sup>49</sup>

However, the core cabinet was of the opinion that the counter-arguments prevailed, namely:<sup>50</sup>

- 1 the families of the youngsters wanting to leave would be discouraged to report radicalisation. A prison sentence would deter the youngsters from returning, forcing them into hiding and making it difficult to detect them;
- 2 such a prohibition could be understood as a signal that opposing the regime of Syrian President Assad is not

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44 "Belgian police raid homes in search for Syria recruiters", Reuters, 16 April 2013, <http://uk.reuters.com/article/2013/04/16/uk-syria-crisis-belgium-idUKBRE93F0CE20130416>.

45 See "Belgium holds six suspects over Syria war recruitment", ITN Source, 16 April 2013, <http://www.itnsource.com/en/shotlist//RTV/2013/04/16/RTV010196307/?v=1>.

46 See M. Torfs, "Task Force to investigate Belgian participation in Syrian war", FlandersNews, 24 March 2013, <http://www.deredactie.be/cm/vrtnieuws.english/News/1.1583534>.

47 See J. De Wit, "Milquet en de Syriëgangers, deel 2", *Gazet van Antwerpen*, 7 May 2013, [deel-2.aspx](http://www.deredactie.be/cm/vrtnieuws.english/News/1.1583534).

48 Ibid. Professor Coolsaet from the University of Ghent remarked that clearly one cannot punish those who are going to Syria on the basis of the mercenary law. After all, they are not going for financial reasons. Ibid.

49 Ibid.

50 All the following points are taken directly from the same and detailed (Dutch) article by J. De Wit, "Milquet en de Syriëgangers, deel 2" (2013).

justified, which is not in conformity with the Belgian and European position;<sup>51</sup>

- 3 such a royal decree would only have a limited deterrent effect;
- 4 there are evidentiary problems: it is not always possible to establish a link with an armed resistance group in Syria as some claim they are in Syria for humanitarian reasons;
- 5 the question also arose whether it had to be a general decision (“it is prohibited for every Belgian citizen to fight on foreign territory if he is not in the army or with a security firm”) or a temporary decision for Syria alone. And if one opted for the latter case: would it then have to be a ban on fighting in Syria as such, or on fighting in Syria alongside radical, terrorist groups?; and
- 6 finally, questions arose about the people who had already left: could they still return and within which period of time?

As a result, the core cabinet decided that a royal decree was not necessary and that the new terrorism provisions, which took effect on 14 March 2013, should be sufficient.<sup>52</sup> These provisions include: the criminalisation of public incitement to commit a terrorist crime (the new Art. 140bis of the Belgium Criminal Code), recruitment to commit a terrorist crime (the new Art. 140ter), providing training to commit a terrorist crime (the new Art. 140quater); and following training to commit a terrorist crime (the new Art. 140quinquies).<sup>53</sup>

The second point that was immediately rejected by the cabinet was the plan to withdraw the identity card of those who want to go to Syria.<sup>54</sup> The objection against this point was the idea that such measures would increase the market for false and stolen identity cards, and lead to more abuse.<sup>55</sup> Instead, the core cabinet opined that reinforcing and being able to make use of the “Schengen signalling” more quickly would in fact suffice.<sup>56</sup>

In the meantime, the Belgian police arrested several individuals suspected of recruiting fighters, as well as Syria fighters (to be), and people allegedly providing logistical and financial support. For instance, on 11 February 2014, yet another person was arrested in the context of the terrorism investigation involving alleged recruiter Jean-Louis Denis, also known as ‘Le Soumis’, who was arrested in December 2013, together with another person.<sup>57</sup>

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51 Also the Belgian newspaper De Standaard reported “that it has been difficult to prosecute jihadists in Belgian courts, as the uprising against Assad is “generally regarded as legitimate.” See S. Kern, “European Jihadists: The Latest Export”, Gatestone Institute, 21 March 2013, <http://www.gatestoneinstitute.org/3634/european-jihadists>.

52 J. De Wit, “Milquet en de Syriëgangers, deel 2” (2013).

53 See Belgisch Staatsblad, 4 March 2013, Federale Overheidsdienst Justitie, C-2013/09097, 18 February 2013, “Wet tot wijziging van boek II, titel I ter van het Strafwetboek”, <http://reflex.raadvst-consetat.be/reflex/pdf/Mbbs/2013/03/04/123588.pdf>.

54 See “Nieuw kb over jonge Syriëstrijders komt er niet”, Het Laatste Nieuws, 19 April 2013, <http://www.hln.be/hln/nl/957/Binnenland/article/detail/1617977/2013/04/19/Nieuw-kb-over-jonge-Syriestrijders-komt-er-niet.dhtml>.

55 J. De Wit, “Milquet en de Syriëgangers, deel 2” (2013).

56 See “Nieuw kb over jonge Syriëstrijders komt er niet” (2013).

57 See “Nieuwe wending in terrorisme-onderzoek rond ronselaar Syrië-strijders”, Nieuwsblad, 13 February 2014, [http://www.nieuwsblad.be/article/detail.aspx?articleid=DMF20140213\\_00978064](http://www.nieuwsblad.be/article/detail.aspx?articleid=DMF20140213_00978064).

Moreover, during a huge operation between 21 and 28 February 2014, the Belgian police raided 55 houses, apprehending 74 people for questioning. Of those 74, 25 were brought before two investigative judges, who arrested 13 of them.<sup>58</sup> On 17 March 2014, it was decided they had to remain in detention.

Further, four days later, it was reported that the file on the Syria fighters of Sharia4Belgium, containing some 40,000 pages and involving 50 persons, of whom several have probably already died, was concluded.<sup>59</sup>

And finally, as mentioned above and as will be mentioned below again in the section on France, Belgium was of course the scene of the attack that so many European officials had been afraid of, when on 24 May, a shooting took place in the Jewish Museum in Brussels, killing four persons.

### 3.2. France

In March 2012 Mohammed Merah, a young Frenchman who made two journeys to Afghanistan and Pakistan where he was allegedly trained by al Qaeda,<sup>60</sup> killed seven people before he was shot and killed in his apartment after a 30-hour siege by the police.<sup>61</sup> In the aftermath of the attacks, President Nicolas Sarkozy immediately sought to expand France's terrorism laws including provisions to make it illegal to travel abroad for purposes of "indoctrination and weapons-training camps for terrorist ends"<sup>62</sup> and to recruit terrorists, even if the recruitment fails.<sup>63</sup> On top of that, and less than one month after an attack involving an individual throwing a Molotov cocktail into a kosher supermarket in Sarcelles on 19 September 2012, the French authorities dismantled a suspected Islamic terrorist cell in Strasbourg, Cannes and the Paris suburb of Torcy, killing one suspect and arresting twelve others, of whom five were released after a few days without charge.<sup>64</sup> A senior French counter-terrorism official stated: "We learned they were planning a campaign of attacks, including car bombs. [...] They wanted to launch the attacks, then flee to Syria and fight there. Three of them were able to escape to Syria".<sup>65</sup> The French authorities opened a judicial investigation concerning "attempted murder, notably on the basis of the potential victims' religion and in connection with a terrorist organization"<sup>66</sup> and related potential charges including "the illegal possession of explosive devices, theft, use of stolen property, and illegal possession and transport of firearms".<sup>67</sup> In the context of this

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58 See "13 verdachten in onderzoek naar Syriëronseleers blijven aangehouden", De Morgen, 17 March 2014, <http://www.demorgen.be/dm/nl/989/Binnenland/article/detail/1820969/2014/03/17/13-verdachten-in-onderzoek-naar-Syriëronseleers-blijven-aangehouden.dhtml>.

59 See "Ook 'dode' Syriëstrijders allicht voor de rechter", HLN, 21 March 2014, <http://www.hln.be/hln/nl/957/Binnenland/article/detail/1824980/2014/03/21/Ook-dode-Syriëstrijders-allicht-voor-de-rechter.dhtml>.

60 See R. Crilly, "Toulouse shooting: 80 French nationals 'training with Pakistan Taliban'", The Telegraph, 21 March 2012, <http://www.telegraph.co.uk/news/worldnews/europe/france/9158336/Toulouse-shooting-80-French-nationals-training-with-Pakistan-Taliban.html>.

61 D. Magnay and S. Vandoorne, "French Killings Suspect Dies Shooting at Police, Authorities Say", CNN, 22 March 2012, <http://www.cnn.com/2012/03/22/14219458757.html>; "No contact' with French Shooting Suspect", Al Jazeera, 22 March 2012, <http://www.aljazeera.com/news/europe/2012/03/20123214219458757.html>; France 2, "Mohammed Merah and Abdelkader Merah (Shootings in Toulouse, France)", New York Times, 2012, [http://topics.nytimes.com/top/reference/timestopics/people/m/mohammed\\_merah/index.html](http://topics.nytimes.com/top/reference/timestopics/people/m/mohammed_merah/index.html).

62 See "France plans to expand terrorism laws after Toulouse shootings", The Guardian, 11 April 2012, <http://www.guardian.co.uk/world/2012/apr/11/france-terrorism-laws-toulouse-shootings>.

63 Ibid.

64 See US Department of State, Bureau of Counterterrorism, Country Reports on Terrorism 2012, May 2013, <http://www.state.gov/documents/organization/210204.pdf>, pp. 69–70.

65 See S. Rotella, "Syria's Jihadi Migration Emerges as Top Terror Threat in Europe, Beyond", ProPublica, 24 July 2013, <http://www.propublica.org/article/syrias-jihadi-migration-emerges-as-top-terror-threat-in-europe-beyond>.

66 See J. Keaten, "Prosecutor: French terror cell planned Syria trip", Yahoo! News, 11 October 2012, <http://news.yahoo.com/prosecutor-french-terror-cell-planned-syria-trip-090039310.html>.

67 Ibid.

investigation, four new suspects were apprehended in July 2013<sup>68</sup> and in October 2013, three more persons were arrested.<sup>69</sup>

On 21 December 2012, the French government indeed adopted a new counter-terrorism law, allowing the authorities, among other things, “to prosecute French citizens who return to the country after having committed an act of terrorism abroad, or after training in terrorist camps (notably in the Afghanistan-Pakistan region) with the intention of returning to France to commit terrorist attacks”.<sup>70</sup>

Nevertheless, the prosecution of French foreign fighters remains difficult. As France’s leading investigating judge in terrorism cases, Marc Trévidic, noted: “[i]t’s particularly complicated to qualify their adventures in Syria as acts of terrorism”.<sup>71</sup> This is because “merely” participating in a war is not a crime pursuant to French law.<sup>72</sup>

The French situation is complicated by the fact that France was the first Western country to recognise the Syrian National Council as the legitimate Syrian interlocutor with which it would continue to work. A French security official explained in this respect:

In Syria, you don’t have Islamists shooting American or NATO troops, so charging fighters returning to France as enemy combatants doesn’t stick [...]. So far, attacks by radicals in Syria haven’t clearly crossed the line between ruthless strikes against the regime and terrorism per se. Legally speaking, then, we can’t file charges against someone going to fight a bloody regime whose ouster most Westerners support — no matter how notorious or dangerous their allies are in that effort.<sup>73</sup>

As a result, while France has enacted legislation to prosecute citizens who return to the country after having committed an act of terrorism abroad, there is currently no legal basis in French law to arrest individuals simply for leaving to or returning from combat in Syria, or to prohibit travel.

However, there might be other possibilities for prosecuting foreign fighters: In addition to the UNSC’s addition of al-Nusra on its al Qaeda sanctions list, France is reportedly “weighing draft legislation that would criminalize French citizens’ links to terrorist groups like al Qaeda and the affiliated al-Nusra Front, which have both been

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68 See C. Cornevin, “L’inquiétante cellule islamiste ‘Cannes-Torcy’ passée au crible”, *Le Figaro*, 5 July 2013, FIG00750-l-inquietante-cellule-islamiste-cannes-torcy-passee-au-crible.php.

69 See “Cellule jihadiste à Cannes: 3 nouvelles interpellations”, *La Depeche*, 15 October 2013, <http://www.ladepeche.fr/article/2013/10/15/1731630-cellule-jihadiste-a-cannes-3-nouvelles-interpellations.html>.

70 US Department of State, Bureau of Counterterrorism (2013), p. 69. See also “La France et la lutte contre le terrorisme”, *France Diplomatie*, <http://www.diplomatie.gouv.fr/fr/politique-etrangere-de-la-france/defense-et-securite/terrorisme/>.

71 See “At least 50 French citizens ‘waging jihad in Syria’”, *France 24*, 13 March 2013, <http://www.france24.com/en/20130313-syria-french-citizens-jihad-assad>.

72 See C. Lynch, “Europe’s New ‘Time Bomb’ Is Ticking in Syria”, *Foreign Policy*, 9 July 2013, [http://www.foreignpolicy.com/articles/2013/07/09/european\\_fighters\\_jihadists\\_syria?page=0,1](http://www.foreignpolicy.com/articles/2013/07/09/european_fighters_jihadists_syria?page=0,1). See also S. Kern, “European Jihadists: The Latest Export” (2013): “Leading French anti-terrorism Judge Marc Trévidic told *Le Figaro* that the presence of so many French jihadists in Syria presents French authorities with an uncomfortable paradox. Because France officially supports the effort to overthrow the Assad regime – France was the first Western country to recognize Syria’s rebel council as the country’s legitimate interlocutors – it is difficult for the French government now to come out and say that it does not support those who are fighting the war”.

73 Ibid.

named on U.N. terrorist lists”.<sup>74</sup> Also, in later statements, French authorities emphasised that the sending/travel of fighters to Syria is connected to terrorism. For instance, in June 2013, it was announced that the French police “had arrested three suspected Jihadists whom a security expert said were part of a group sending Islamist fighters to Syria”.<sup>75</sup> A little later in the report, the French Interior Minister Valls – now Prime Minister of France – stated: “We need very powerful action to attack the phenomenon linked to terrorism and to these channels that prepare individuals to fight in Syria in Jihadist groups that call themselves al Qaeda and are particularly dangerous”.<sup>76</sup> And on 23 July, a “man suspected of wanting to fight alongside radical Islamist rebels in Syria was detained in France as part of an anti-terrorist operation”,<sup>77</sup> according to a source close to the case. However, reflecting the difficulty of charging alleged foreign fighters, he was already released two days later, because nothing corroborated his imminent departure.<sup>78</sup> The investigation is continuing.

According to Mathieu Guidère, an expert on Islamic terrorism, currently some 30 French fighters have returned to France from Syria and most of them have been stopped and questioned on the basis of the 21 December 2012 law mentioned above.<sup>79</sup> Almost 700 French citizens or residents are estimated to have gone to Syria since the conflict began.<sup>80</sup>

On 7 March 2014, a Paris court “sentenced three men to prison terms of up to five years for trying to join the rebellion in Syria, the first such convictions in France”.<sup>81</sup> The men were apprehended at the airport in St.-Etienne in May 2012 and were charged under the 2012 law discussed above with “criminal association with the intent to commit terrorist acts”.<sup>82</sup>

Also in March 2014, it was reported that “French police believe they prevented an ‘imminent’ terrorist attack that was planned to hit the French Riviera. According to French newspaper *Le Figaro*, authorities are convinced that a jihadist who had returned from Syria was planning to bomb the Riviera using almost a kilo of homemade explosives, which were discovered during a raid earlier this year”.<sup>83</sup> Reporting on the same case, ICCT’s Orla Hennessy noted that even though “French media have since been more cautious in their reporting of the incident with *Le Monde* arguing that there was no trace of a formalised [terrorist] project [...] the fact remains that this person had returned from Syria, with AFP’s sources in the security sector admitting that this is the scenario they most feared: foreign fighters

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74 Ibid.

75 See M. Pennetier and A. Sage, “French police arrest cell with possible Syria link”, Reuters, 25 June 2013, <http://www.reuters.com/article/2013/06/25/us-france-islamists-idUSBRE95011920130625>.

76 Ibid.

77 See “France detains man suspected of wanting to join Syria radicals”, *The Daily Star*, 24 July 2013, <http://www.dailystar.com.lb/News/Middle-East/2013/Jul-24/224898-france-detains-man-suspected-of-wanting-to-join-syria-radicals.ashx#axzz2gy3Hv69b>.

78 See “Belfort/Jihad: l’homme soupçonné relâché”, *Le Figaro*, 26 July 2013, <http://www.lefigaro.fr/flash-actu/2013/07/26/97001-20130726FILWWW00305-belfortjihadl-homme-soupconne-relache.php>.

79 See E. Schmitt, “Worries Mount as Syria Lures West’s Muslims”, *The New York Times*, 27 July 2013, [http://www.nytimes.com/2013/07/28/world/middleeast/worries-mount-as-syria-lures-west-muslims.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/07/28/world/middleeast/worries-mount-as-syria-lures-west-muslims.html?pagewanted=all&_r=0).

80 See “New anti-radicalisation plans aimed at fighting jihadism”, *France 24*, 23 April 2014, <http://www.france24.com/en/20140422-france-syria-anti-radicalisation-jihad/>.

81 See M. De la Baume, “French Court Convicts 3 Who Tried to Join Militants in Syria”, *The New York Times*, 7 March 2014, [http://www.nytimes.com/2014/03/08/world/europe/french-court-convicts-3-who-tried-to-join-militants-in-syria.html?\\_r=0](http://www.nytimes.com/2014/03/08/world/europe/french-court-convicts-3-who-tried-to-join-militants-in-syria.html?_r=0).

82 Ibid.

83 See C. Tanti, “Terror strike planned for French Riviera”, *The Riviera Times*, 27 March 2014, <http://www.rivieratimes.com/index.php/provence-cote-dazur-article/items/terror-strike-planned-for-french-riviera.html>.

leaving for Syria and returning as radicalised, trained and seasoned jihadists”.<sup>84</sup> And this is indeed what might have happened a few weeks later: on 30 May 2014, Mehdi Nemmouche was arrested in Marseilles during a routine drug control. However, he was quickly seen as the suspect of the shooting in the Brussels Jewish Museum on 24 May, which left four dead. Although it was initially reported that he allegedly claimed responsibility for the attack,<sup>85</sup> news came out later that he had stated he did not commit the attack.<sup>86</sup> It was also revealed that he challenged his extradition, via an European arrest warrant, to Belgium, which had asked for his extradition.<sup>87</sup> Although the French security services knew that Nemmouche had travelled to and had fought in Syria, this information was not known to their Belgian colleagues, painfully revealing a lack of crucial information sharing between countries which are confronted with the same problem.

After Nemmouche’s arrest, four other persons were arrested for recruiting Syrian fighters, although there is no suggestion of any connection between these arrests and the arrest of Nemmouche.<sup>88</sup>

Finally, it should also be noted that eleven days before the attack in Brussels, French police arrested seven men in Strasbourg on suspicion of having fought alongside rebels with Syria.<sup>89</sup> The operation came a few days after the presentation, on 23 April, of a new plan by the Minister of the Interior, Bernard Cazeneuve, to fight jihadist networks: “The provision includes the re-introduction of legal authorisation for minors to leave the country. One of the key policy changes is aimed at enabling families to alert the authorities if they fear a relative has been attending fundamentalist mosques or frequenting radical websites. The plan will also provide families with help and professional advice on how to handle radicalised youth, according to French media reports”.<sup>90</sup>

### 3.3. Germany

Like other European countries, foreign fighters are also an area of increasing concern for the German authorities. According to officials, at least 320 persons – more than half of them with German passports – had travelled to the war-torn country by the end of April 2014,<sup>91</sup> compared to around 210 by the end of the last year.<sup>92</sup> German news media have reported on a number of German men and women who travelled to Syria especially from the states of

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84 See O. Hennessy, “The Return of Europe’s Foreign Fighters”, ICCT Commentary, 2 April 2014, <http://www.icct.nl/publications/icct-commentaries/the-return-of-europes-foreign-fighters>.

85 See “Brussels Jewish Museum killings: Suspect ‘admitted attack’”, BBC, 1 June 2014, <http://www.bbc.com/news/world-europe-27654505>.

86 See “Nemmouche ontkent nog steeds dader te zijn van aanslag Joods museum”, DeStandaard, 4 June 2014, [http://www.standaard.be/cnt/dmf20140604\\_01129483](http://www.standaard.be/cnt/dmf20140604_01129483).

87 Ibid.

88 See “France arrests Syria jihad suspects as Nemmouche held”, BBC, 2 June 2014, <http://www.bbc.com/news/world-europe-27660683>.

89 See “Aucune arme ou explosif retrouvé après UN raid antidjihadiste à Strasbourg”, Le Monde, 13 May 2014, [http://www.lemonde.fr/societe/article/2014/05/13/plusieurs-interpellations-a-strasbourg-lors-d-une-operation-antidjihadiste\\_4415694\\_3224.html](http://www.lemonde.fr/societe/article/2014/05/13/plusieurs-interpellations-a-strasbourg-lors-d-une-operation-antidjihadiste_4415694_3224.html).

90 See “New anti-radicalisation plans aimed at fighting jihadism” (2014).

91 See BfV, “Focus vom 28.04.2014: “Gefahr für unser Land””, <http://www.verfassungsschutz.de/de/oeffentlichkeitsarbeit/interviews/int-20140428-focus>.

92 See “Über 210 Islamisten aus Deutschland nach Syrien gereist”, N24, 27 October 2013, <http://www.n24.de/n24/Nachrichten/Politik/d/3739332/ueber-210-islamisten-aus-deutschland-nach-syrien-gereist.html>; I. Traynor, “Germany fears return of European jihadists in Syria”, The Guardian, 16 May 2013, <http://www.theguardian.com/world/2013/may/16/germany-fears-european-jihadists-syria-return>; V. Siefert, “Salafisten mit Ziel Syrien ausgereist”, HR-info, 12 July 2013, [http://www.hr-info.de/richten/indexhessen34938.jsp?rubrik=36082&key=standard\\_document\\_48958275](http://www.hr-info.de/richten/indexhessen34938.jsp?rubrik=36082&key=standard_document_48958275); and H.-G. Maaßen, “Islamisten sind die größte Gefahr”, RP, 24 June 2013, <http://www.rp-online.de/politik/nrw/islamisten-sind-die-groesste-gefahr-1.3488609>.

North Rhine-Westphalia, Hesse and Berlin,<sup>93</sup> including the high-profile case of a German-born rapper.<sup>94</sup>

Although German laws do not criminalise foreign fighter travel as such, a number of individuals alleged to have committed offences in connection with Syria have been arrested over the past few months, including people upon their return from and on their way to Syria. These are, for example, the 24-year-old Lebanese citizen Ismail I.<sup>95</sup> and the 37-year-old German citizen Mohammad Sobhan A.,<sup>96</sup> who were stopped in November 2013 on a German highway with money and equipment allegedly destined for ISIS. Initially alleged to be preparing a serious violent offence endangering the state (para. 89a of the German Criminal Code), the Federal Prosecutor in the spring of 2014 added support for and membership in as well as training with a foreign terrorist organisation to the charges (para. 129a in connection with para. 129b of the same Code).<sup>97</sup> This comes at a time when the Federal Court of Justice (*Bundesgerichtshof*) handed down an important decision making conviction under para. 89a more difficult.<sup>98</sup> Thus, the main legal basis for charging foreign fighters remains membership of and/or support for (foreign) terrorist organisations, which is similar to the past prosecution of those joining and/or supporting al Qaeda-linked groups in Afghanistan and Pakistan.<sup>99</sup> This was also the case for the arrests of various other individuals, such as three persons apprehended during the largest raid connected to foreign fighters in Germany to date in March 2014, who had reportedly joined and supported terrorist groups in Syria including ISIS and Junual al-Sham.<sup>100</sup> It is noteworthy that photos distributed over social media, such as that of Mustafa K. holding the head of a decapitated fighter in his hand next to a mutilated body,<sup>101</sup> could possibly also facilitate the prosecution of individuals for other

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93 See V. Siefert, "Salafisten mit Ziel Syrien ausgerüst" (2013); and F. Flade, "Radikaler Salafist aus Düsseldorf kämpft in Syrien", *Die Welt*, 27 May 2013, <http://www.welt.de/politik/deutschland/article116529524/Radikaler-Salafist-aus-Duesseldorf-kaempft-in-Syrien.html>.

94 F. Jansen, "Ex-Rapper Deso Dogg angeblich bei Anschlag getötet", *Der Tagesspiegel*, 22 April 2014, <http://www.tagesspiegel.de/weltspiegel/berliner-dschihadist-in-syrien-ex-rapper-deso-dogg-angeblich-bei-anschlag-getoetet/9789924.html>.

95 Ismail I. was arrested for membership of ISIS pursuant to para. 129b(1) in connection with para. 129a(1) of the German Criminal Code. He is alleged to have already travelled to Syria to join ISIS in August 2013, and to have returned to Germany in October with the order to collect money, medication and other supplies to support the Syrian conflict. This reportedly occurred after he joined ISIS and received combat training as well as combat experience in at least one battle in Syria. See "Haftbefehle gegen ein mutmaßliches Mitglied und zwei mutmaßliche Unterstützer der ausländischen terroristischen Vereinigung 'Islamischer Staat Irak und Großsyrien (istigs)' erlassen", Generalbundesanwalt beim Bundesgerichtshof, 17 April 2014, [sanwalt.de/txt/showpress.php?themenid=16&newsid=500](http://www.generalbundesanwalt.de/txt/showpress.php?themenid=16&newsid=500).

96 Mohammad Sobhan A. is alleged to have supported Ismail I. along with Ismail's brother Ezzeddine I., by arranging money and a means of transportation for supplies. They are accused under para. 129b(a) in connection with para. 129a(1) and (5) of the German Criminal Code to have supported a foreign terrorist organisation; "Haftbefehle gegen ein mutmaßliches Mitglied", Generalbundesanwalt beim Bundesgerichtshof, 17 April 2014, <http://www.generalbundesanwalt.de/txt/showpress.php?themenid=16&newsid=500>.

97 See for more information on the individual charges notes 96 and 97 and "Anklage gegen ein mutmaßliches Mitglied und zwei mutmaßliche Unterstützer der ausländischen terroristischen Vereinigung 'Islamischer Staat Irak und Großsyrien' (ISIG)", Generalbundesanwalt beim Bundesgerichtshof, 4 June 2014, <http://www.presseportal.de/polizeipresse/pm/14981/2753550/gba-anklage-gegen-ein-mutmassliches-mitglied-und-zwei-mutmassliche-unterstuetzer-der-auslaendischen>.

98 Specifically, the court required the prosecution to show that the accused had clear intentions of committing an offence endangering the state. See Bundesgerichtshof, "Verurteilung wegen Vorbereitung einer schweren staatsgefährdenden Gewalttat aufgehoben", Mitteilung der Pressestelle 79, 8 May 2014, [bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=12288&Seite=10&nr=67638&linked=pm&Blank=1](http://www.bun.de/verteilung/verteilung.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=12288&Seite=10&nr=67638&linked=pm&Blank=1).

99 L. Vidino, "Foreign Fighters: An Overview of Responses in Eleven Countries" (2014), p. 11.

100 These are the German citizen Fatih K. in Berlin, the Turkish citizen Fatih I. and the German/Polish citizen Karolina R. See Generalbundesanwalt beim Bundesgerichtshof, "Bundesweite Festnahme und Durchsuchungsaktion gegen mutmaßliche Mitglieder und Unterstützer der ausländischen terroristischen Vereinigung 'Islamischer Staat im Irak und Großsyrien' (istigs)", Mitteilung der Pressestelle 10, 31 March 2014, <http://www.generalbundesanwalt.de/txt/showpress.php?themenid=16&newsid=499>; C. Erhardt and K. Iskandar, "Schlag gegen deutsche Islamistszene", *Frankfurter Allgemeine Zeitung*, 31 March 2014, <http://www.faz.net/aktuell/politik/inland/terrorgefahr-schlag-gegen-deutsche-islamisten-12872505.html>.

101 J. Diehl and F. Schmid, "Deutscher Salafist in Syrien: Vom Niederrhein in den Heiligen Krieg", *SpiegelOnline*, 27 February 2014, <http://www.spiegel.de/politik/ausland/syrien-gotteskrieger-aus-dinslaken-posiert-mit-abgehackten-koepfen-a-955915.html>.

crimes such as murder or war crimes.

In addition to prosecution, other legal tools are available to combat the foreign fighter phenomenon in Germany. The domestic intelligence service *Bundesamt für Verfassungsschutz* (BfV) is the primary organ/authority responsible for collecting and analysing information about extremism, terrorism and other national security activities. Together with the police, the BfV has a reported twenty suspected jihadists from mainly the western German state of North Rhine-Westphalia under close scrutiny.<sup>102</sup> Upon suspicion of possible travel plans to participate in the Syrian civil war, the security services approach suspects directly to issue warnings and to inform them that the authorities are aware of their plans.<sup>103</sup>

Additionally, the German passport law allows for the confiscation of travel identification documents (Art. 8 and 13(1)(2)) and a prohibition on leaving Germany (Art. 10) when an individual constitutes a threat to internal or external security, or to other significant interests of Germany (Art. 7(1)). According to the BfV office in a west German state, seven suspected foreign fighters were stopped from travelling due to the confiscation of passports.<sup>104</sup> However, cases such as the one of Ibrahim Munir, who travelled through Turkey to Syria although the authorities had confiscated his passport during an earlier attempt to travel to the conflict-ridden country,<sup>105</sup> demonstrate the limitations of the law: the German national identification card, which is available to citizens above the age of sixteen, is sufficient to travel through the Schengen area to Turkey, where subsequently the border to Syria can be crossed.<sup>106</sup> Others have also managed to leave Germany without being stopped by the authorities.<sup>107</sup>

All of this demonstrates the increased need for German authorities to monitor those returning from Syria. Government officials reportedly work closely with Turkish border officials to exchange information about alleged travellers.<sup>108</sup> The Federal police and other relevant authorities are notified when a fighter returns and the individual is placed under increased surveillance.<sup>109</sup>

### 3.4. The Netherlands<sup>110</sup>

In the Netherlands, the issue of foreign fighters has been a prominent one, with up to 107 individuals having travelled to

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102 See "Verfassungsschutz-Chef Maaßen: 20 kampferfahrene Islamisten aus Syrien nach Deutschland zurückgekehrt 'Schlimmstenfalls mit einem direkten Kampfauftrag'", Rheinische Post, 24 June 2013, <http://www.presseportal.de/pm/30621/2499313/rheinische-post-verfassungsschutz-chef-maassen-20-kampferfahrene-islamisten-aus-syrien-nach>; and an Interview with Burkhard Freier, head of the constitutional protection authority of the German state North Rhine-Westphalia, "Salafist an Hinrichtung beteiligt: Aktuelle Stunde", West-Deutscher Rundfunk WDR, 25 February 2014 <https://www.youtube.com/watch?v=FNmIlgAbsss>.

103 See "Innenminister Andreas Breitner besorgt über 'Reisepläne'", O2elf Abendblatt, 1 July 2013, <http://www.o2elf.net/national/deutschland/schleswig-holstein/innenminister-andreas-breitner-besorgt-ueber-reiseplaene-von-islamisten-157933>.

104 See "Verfassungsschutzbericht Nordrhein-Westfalen 2012 – Pressefassung", June 2013, [chutzberichte/publikationen-landesbehoerden-verfassungsschutzbericht/vsbericht-nw-2012-pressefassung](http://www.verfassungsschutz.nrw.de/verfassungsschutz/landesbehoerden-verfassungsschutzbericht/vsbericht-nw-2012-pressefassung).

105 See F. Feyder, "Gotteskrieger aus Pforzheim kämpft in Syrien", Stuttgarter Nachrichten, 27 June 2013, <http://m.stuttgarter-nachrichten.de/inhalt/krieg-in-syrien-gotteskrieger-aus-pforzheim-kaempft-in-syrien.58bb8319-4149-4bf7-b384-cf651d7ee42d.html>.

106 See I. Traynor, "Germany fears return of European jihadists in Syria" (2013).

107 See "Innenminister Andreas Breitner besorgt über 'Reisepläne'" (2013).

108 See V. Siefert, "Salafisten mit Ziel Syrien ausgereist" (2013).

109 See "Innenminister Andreas Breitner besorgt über 'Reisepläne'" (2013).

110 For more detailed information on the Netherlands, please see the ICCT commentary by C. Paulussen, "The Syrian Foreign Fighters Problem: A Test Case from The Netherlands", ICCT Commentary, 2 December 2013, <http://www.icct.nl/publications/icct-commentaries/the-syrian-foreign-fighters-problem-a-test-case-from-the-netherlands>.



Syria as of the spring of 2013.<sup>111</sup> In March 2013, the Dutch Minister of Security and Justice, Ivo Opstelten, stated that “[p]articipating in armed jihad or jihadist training abroad is a criminal offence under Art. 134a of the Criminal Code [assisting (preparing) a terrorist crime]. Returnees can also be charged with offences under other terrorism legislation”.<sup>112</sup>

The Minister’s letter also outlines interesting legal measures other than prosecution against (potential) Syria fighters, such as 1) intelligence and investigation; 2) immigration law measures; 3) local measures and 4) other measures. Regarding immigration law measures, the letter states that:

[i]f there are concrete indications that a foreign national poses a threat to national security, it is possible to rescind his or her residence permit. [...] Once a person’s right of residence has been revoked, the IND [Immigration and Naturalisation Service] will generally issue an exclusion order against the foreign national or impose an entry ban. This means that he or she is flagged for refusal of entry. If the person in question manages to enter the Netherlands anyway, he or she is guilty of a serious offence and subject to prosecution.<sup>113</sup>

While this is not applicable to the many suspected Dutch foreign fighters with Dutch nationality, “Dutch nationals can be stripped of their citizenship if they have been convicted of a terrorist offence, provided they also hold another nationality. Citizenship cannot be revoked if this would render an individual stateless”.<sup>114</sup> In fact, the Minister can also revoke a person’s nationality in other cases, such as when that person has been convicted irrevocably of a crime as described in Arts. 6 (genocide), 7 (crimes against humanity) and 8 (war crimes) of the Rome Statute and of the crime of recruiting somebody to serve in the armed forces of a foreign state or to take part in an armed conflict.<sup>115</sup> This last provision, Art. 205 Dutch Criminal Code, has also been mentioned explicitly as a tool against recruiters of jihadists.<sup>116</sup> Local measures can include various forms of pressure and disruption by the police<sup>117</sup> as well as the freezing of financial assets under the Anti-Terrorist Sanctions Order 2007-II.<sup>118</sup> This will be done “if there are sufficient indications that an individual intends to leave the country or has left the country for the purpose of engaging in or facilitating terrorist activity”.<sup>119</sup> Finally, an example of “other measures” are the efforts to establish a comprehensive registration system for passenger data, which is still lacking in the Schengen zone.<sup>120</sup>

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111 A. Y. Zelin, “European Foreign Fighters in Syria”, The International Centre for the Study of Radicalisation, 2 April 2013, <http://icsr.info/2013/04/icsr-insight-european-foreign-fighters-in-syria-2/>.

112 “Letter to Parliament from Ivo Opstelten, the Minister of Security and Justice, on the policy implications of the current edition of the Terrorist Threat Assessment for the Netherlands (dtn32)”, 13 March 2013, [http://english.nctv.nl/Images/policy-implications-dtn32-uk\\_tcm92-491331.pdf](http://english.nctv.nl/Images/policy-implications-dtn32-uk_tcm92-491331.pdf), p. 3.

113 Ibid., p. 4.

114 Ibid.

115 See Art. 14, para. 2 (b) and (d) of the Dutch Rijkswet op het Nederlanderschap.

116 See for instance the letter of the Minister of Security and Justice of 21 May 2013 (29 754, no.227), <https://zoek.officielebekendmakingen.nl/kst-29754-227.pdf>.

117 See “Letter to Parliament from Ivo Opstelten” (13 March 2013), p. 4.

118 Pursuant to the already discussed UNSC Resolution 1373 of 2001; Ibid., p. 5.

119 Ibid., p. 5.

120 Ibid., p. 6.

Importantly, on 23 October 2013, the District Court of Rotterdam for the first time convicted two Dutch men of preparing crimes in the context of jihad travel to Syria. It is interesting to note that the court did *not* base the convictions on the newly enacted terrorism provision Art. 134a of the Dutch Criminal Code, a provision which is based on the Council of Europe 2005 *Convention on the Prevention of Terrorism*,<sup>121</sup> but on “normal” provisions in the criminal code. In the first of the two judgments, against Mohammed G.,<sup>122</sup> the court held that the suspect had made certain preparatory acts for murder,<sup>123</sup> such as making flight reservations to Turkey, with the aim to travel to Syria to participate in the armed jihad against the regime of President Assad and to found an Islamic state. The judges explained that this latter part – participation in the armed jihad and the foundation of an Islamic state – constituted the terrorist context in which the intended crime had to be seen.<sup>124</sup> Hence, even though Mohammed G. was not convicted of a terrorist crime but “only” of preparatory acts to commit murder, the judges felt it necessary nonetheless to explain that this intended crime had to be seen in the terrorist context of the armed jihad.

In the second judgment, against Omar H.,<sup>125</sup> the judges repeated that the crime of preparing arson and/or an explosion had to be seen in a terrorist context, namely the armed jihad in Syria. For instance, the suspect, who adheres to jihadist ideas, told the police that he wanted to go to Syria to exterminate the army of President Assad. Regarding the second crime (the spreading, showing publicly or having in stock to spread or show publicly a text and/or a picture which incites the committing of a (terrorist) crime), the judges explained that Omar H. had placed film clips and a text on internet sites, and started discussions online, which could incite people to join the armed jihad.

Prosecution spokesperson Paul van der Zanden was reported as saying: “This is the first time that the Netherlands hands down such a judgment and this helps to clarify the fact that it’s illegal to go to Syria to fight [...]. Which means that we now have a legal precedent and can prosecute other people wanting to go to Syria or coming back”.<sup>126</sup> However, even though this is an important case in that it is the first conviction of Syria travellers, it should be stressed that the judges did *not* state that it is illegal to go to Syria to fight. They only stated that it is a crime to prepare for acts such as murder and arson. That such acts are illegal is, of course, nothing new. Aside from the fact that this is the first case to deal with foreign fighters, it is also particularly noteworthy because the judges remarked that these crimes were committed in a terrorist context, namely of persons who wanted to join the armed jihad in Syria and crush the army of

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121 Council of Europe, *Convention on the Prevention of Terrorism*, Warsaw, 16 May 2005, <http://conventions.coe.int/Treaty/en/Treaties/Html/196.htm>. This convention calls upon states to criminalise basically three offences, namely public provocation to commit a terrorist offence (Art. 5), recruitment for terrorism (Art. 6) and training for terrorism (Art. 7).

122 See *Rechtbank Rotterdam, Anonimiseren uitspraak 10/960233-12*, 23 October 2013, <http://www.rechtspraak.nl/Organisatie/Rechtbanken/Rotterdam/Nieuws/Documents/ECLI-NL-RBROT-2013-8265>.

123 The judges referred in this context for instance to his remark that all those fighting there/ in Syria are worthy of decapitation.

124 In Dutch criminal law, a terrorist crime (which, it should again be stressed, was not applicable here) is understood to mean, among other things, a crime committed with a terrorist objective, and with a terrorist objective meaning “[t]he objective to cause serious fear in (part) of the population in a country and/or to unlawfully force a government or international organisation to do something, not to do something, or to tolerate certain actions and/or to seriously disrupt or destroy the fundamental political, constitutional, economic or social structures of a country or an international organisation”. (See <https://www.unodc.org/tldb/showDocument.do?documentUid=7600>.) Hence, it appears that if fighters want to seriously disrupt or destroy the fundamental political, constitutional, economic or social structures of Syria (by bringing it down and replacing it with an Islamic state), that would constitute a terrorist crime.

125 See *Rechtbank Rotterdam, Anonimiseren uitspraak 10/960019-12*, 23 October 2013, <http://www.rechtspraak.nl/Organisatie/Rechtbanken/Rotterdam/Nieuws/Documents/ECLI-NL-RBROT-2013-8266>.

126 See *Rechtbank Rotterdam, Anonimiseren uitspraak 10/960019-12*, 23 October 2013, <http://www.rechtspraak.nl/Organisatie/Rechtbanken/Rotterdam/Nieuws/Documents/ECLI-NL-RBROT-2013-8266>.

Assad. In early November 2013, the Prosecutor's Office filed an appeal in the case against Omar H.<sup>127</sup>

The Dutch authorities also tried to prosecute persons allegedly responsible for the recruitment of foreign fighters for Syria. For instance, in July 2013, a young woman from Zoetermeer, Oum Usama, was arrested for recruiting young people for the armed jihad in Syria, but on 2 August, she was released, while remaining a suspect in the case. However, she has reportedly since left for Syria.<sup>128</sup> Another person allegedly connected to the recruitment of jihadists, Murat Öfkeli, also known as "Ibrahim the Turk", was known with the Dutch authorities and had been arrested on several occasions, but was never convicted. In June 2013, he was reportedly killed in Syria.<sup>129</sup>

On 4 February 2014, it was reported that two suspects, who had been apprehended in Germany in August 2013 – according to the Prosecution, they were on their way to Syria to join an al Qaeda-linked group – could await their trial in liberty, but under strict conditions.<sup>130</sup>

Also in February, the National Coordinator for Security and Counterterrorism announced several developments in the context of the threat stemming from Dutch Syria travellers, about whom it was stated incidentally that almost all of them end up with armed groups such as ISIS and al-Nusra.<sup>131</sup> For instance, of 11<sup>132</sup> persons, their passport was revoked, a measure which should be discerned from withdrawing one's nationality (see above) and which can be taken pursuant to Art. 23 of the Dutch Passport Act if there are good reasons to suspect that, when abroad, an individual will act in a way that poses a threat to the security or other weighty interests of (one or more countries of) the Kingdom of the Netherlands, or the security of friendly nations.<sup>133</sup> Moreover, Dutch authorities froze the bank accounts of four individuals for Syria-related matters pursuant to Anti-Terrorist Sanctions Order 2007-II (see again above).<sup>134</sup> In addition, a number of minors have been prevented from leaving the country under provisions of juvenile law and placed under supervision or in secure juvenile institutions.<sup>135</sup>

In mid-March, gruesome images were discovered on the internet, showing a man posing with five severed heads in front of him.<sup>136</sup> The man was Khalid K., alias Abdurahman, an Iraqi who had lived for more than ten

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127 "om in beroep in strafzaak 'Syriëganger'", Nu.nl, 6 November 2013, <http://www.nu.nl/binnenland/3621741/in-beroep-in-strafzaak-syrieganger.html>. Note that the appeal hearing has not yet taken place.

128 See S. Batrawi, "The Dutch Foreign Fighter Contingent in Syria", CTC Sentinel 6, no. 10 (October 2013), <http://www.ctc.usma.edu/wp-content/uploads/2013/10/CTCSentinel-Vol6Iss10.pdf>, p. 8.

129 Ibid., pp. 8–9.

130 See "Rechtbank laat Syriëgangers vrij", NOS, 4 February 2014, <http://nos.nl/artikel/606079-rechtbank-laait-syriegangers-vrij.html>.

131 See Nationaal Coördinator Terrorismebestrijding en Veiligheid, "Dreigingsniveau gehandhaafd op substantieel; interventies blijven onverminderd noodzakelijk", 24 February 2014, [antiradicaliseringsbeleid.aspx?cp=126&cs=60005](http://www.nctv.nl/interactief/antiradicaliseringsbeleid/antiradicaliseringsbeleid.aspx?cp=126&cs=60005).

132 During an interview two months later, the National Coordinator indicated that the passports of 14 persons had been revoked. See Nieuwsuur, "Hoe effectief is het antiradicaliseringsbeleid?", 27 April 2014, <http://nieuwsuur.nl/video/641115-hoe-effectief-is-het-antiradicaliseringsbeleid.html>.

133 See Nationaal Coördinator Terrorismebestrijding en Veiligheid, "Dreigingsniveau gehandhaafd op substantieel; interventies blijven onverminderd noodzakelijk" (2014).

134 Ibid.

135 Ibid.

136 See "Nederlandse Syriëganger op de foto met vijf afgehakte hoofden", De Volkskrant, 17 March 2014, <http://m.volkskrant.nl/vk/m/nl/13828/Burgeroorlog-in-Syrie/article/detail/3615123/2014/03/17/Nederlandse-Syriëganger-op-de-foto-met-vijf-afgehakte-hoofden.dhtml>.

years in Almere, the Netherlands.<sup>137</sup> In mid-February, he was also shown in a picture with a severed head and in October 2012, in a picture next to a dead body, reading the Koran.<sup>138</sup> Khalid had already been arrested on 26 July 2011 on suspicion of terrorist crimes but on 9 August 2011, his provisional detention was not extended.<sup>139</sup> After his release, he went to Syria.<sup>140</sup> His residence permit was subsequently revoked and the Dutch Immigration and Naturalisation Service banned him from entering the Netherlands for twenty years.<sup>141</sup> At the end of 2013, the Prosecution decided to dismiss the case, but if he returns to the Netherlands, the Prosecution will see whether there are reasons to prosecute him, perhaps for war crimes.<sup>142</sup> This is interesting, because there are indeed other possibilities to try persons (see above). (Sometimes, it seems that the discussion on Syria travellers is framed within a terrorism-framework only.)

On 23 April 2014, the Dutch General Intelligence and Security Service released its Annual Report 2013.<sup>143</sup> At the presentation, the Dutch Minister of the Interior and Kingdom Relations Plasterk revealed that “[t]wo of the suicide attacks in Syria and Iraq have been committed by Dutch individuals who had travelled to Syria”,<sup>144</sup> which “emphasizes the risk of jihad fighters travelling abroad and returning to our country”.<sup>145</sup>

On the same day, the police in The Hague arrested a 20-year old man from Amsterdam.<sup>146</sup> He had already been to Syria and is suspected of preparatory acts aimed at participating in the fight in Syria within the context of a terrorist organisation.<sup>147</sup> In addition, he is suspected of being in possession of terror-inciting texts that were meant to be disseminated.<sup>148</sup> It is the first time that a man who had already been to Syria was arrested.<sup>149</sup>

### 3.5. United Kingdom

Recently, foreign fighters have become a highly publicised issue in the UK with a reported 500 British men and women from a range of ethnic backgrounds having travelled to Syria over the course of the conflict, and as many as 250 having returned to the UK.<sup>150</sup> The Director General of the UK Office for Security and Counter-Terrorism, Charles Farr, already warned in July 2013 that “[g]roups in Syria aspire to attack Europe and have both the capability and means to do so, including returning foreign fighters coming back to Europe. I think it is the most profound

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137 Ibid.

138 Ibid.

139 See Tweede Kamer der Staten-Generaal, Vergaderjaar 2013-2014, 29 754, Terrorismebestrijding, Nr. 244, Verslag van een algemeen overleg, 27 May 2014 (report of the meeting of 10 April 2014), <https://zoek.officielebekendmakingen.nl/kst-29754-244.html>.

140 Ibid.

141 Ibid.

142 Ibid.

143 Which is available here: [https://www.aivd.nl/publish/pages/2616/annual\\_report\\_aivd\\_2013.pdf](https://www.aivd.nl/publish/pages/2616/annual_report_aivd_2013.pdf).

144 See AIVD, Annual Report 2013, <https://www.aivd.nl/publicaties?ActLbl=annual-report-2013&ActItdt=3096>.

145 Ibid.

146 See Arrondissementsparket Den Haag, “Teruggekeerde Syriëganger (20 jaar) aangehouden en in bewaring”, 29 April 2014, [ten/@162634/teruggekeerde/](https://www.aivd.nl/ten/@162634/teruggekeerde/).

147 Ibid.

148 Ibid.

149 See “Amsterdamse Syriëganger blijft langer vastzitten”, AD, 7 May 2014, <http://www.ad.nl/ad/nl/1041/Amsterdam/article/detail/3650990/2014/05/07/Amsterdamse-Syriëganger-blijft-langer-vastzitten.dhtml>.

150 House of Commons, “Counter-Terrorism” (2014), p. 20; and L. Vidino, “Foreign Fighters: An Overview of Responses in Eleven Countries” (2014), p. 15.

shift in the threat we have seen in at least five years and I think since 2003”.<sup>151</sup> By April 2014, a House of Commons Report urged an “immediate response” to the “alarming levels” of foreign fighters. During the first two weeks of this year alone, 14 individuals were arrested over Syria-linked activities, compared to 24 over the whole of 2013.<sup>152</sup>

Like their continental counterparts, British authorities face problems when it comes to the prosecution of fighters, and distinguishing between those travelling for humanitarian reasons as opposed to those engaging in violent jihad. Nevertheless, the number of arrests of individuals in connection with jihad in Syria has increased drastically since the spring of this year, a development that coincides with the UK’s MI5 stating that more than half of its counter-terrorism investigations are connected to Syria.<sup>153</sup> As the Head of the Special Crimes and Counter Terrorism Division Sue Hemming noted in February 2014, Britons (planning on) joining the Syrian conflict can face prosecution under the UK’s Terrorism Act of 2006.<sup>154</sup> Offences include preparing a terrorist attack or assisting someone else to do so (section 5 of the Act), and participating in or providing terrorism training (sections 6 and 8). The first conviction for a Syria-related terrorism offence in the UK occurred in late May this year when Mashudur Choudhury was found guilty of the preparation of terrorist acts, in contravention of section 5(1) of the Terrorism Act 2006. Choudhury travelled with at least four other men from Portsmouth to Syria in October 2013 and was arrested upon his return at Gatwick Airport.<sup>155</sup> Although there was no proof that Mashudur Choudhury had attended a training camp while in Syria, the jury was unanimous in finding the accused guilty of preparing terrorist acts, based on emails, messages and skype conversations that he had prior to his departure. Another famous case involved the kidnapping of a British freelance photographer, John Cantlie, and a Dutch journalist, Jeroen Oerlemans, for a week in Syria in July 2012. One of the three accused, Shajul Islam, was arrested on 9 October 2012 and entered a not-guilty plea for unlawful imprisonment, which prosecutors allege was carried out as an act of terrorism.<sup>156</sup> His older brother, Najul Islam, was arrested in January of this year and denied one count of assisting the kidnap. The third person, Jubayer Chowdhury, was arrested in November 2012 and was also accused of unlawful imprisonment.<sup>157</sup> In addition to these arrests, which were clearly connected to a very specific offence, namely kidnapping, the past months have also seen the arrests and charging of other foreign fighters for offences more directly linked to terrorism. For example, in January of this year, a woman from London in her twenties was arrested at Heathrow Airport on her way to Turkey with 20,000 Euros concealed in her underwear; her alleged co-conspirator was later arrested in London.<sup>158</sup> The two were charged with “trying to make money available for another, knowing or having reason to suspect it would be used for the purposes of terrorism”.<sup>159</sup> Pleading not guilty in May, they are

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151 T. Whitehead, “Syria a ‘game changer’ for UK terror threat, warns Home Office intelligence chief”, The Telegraph, 3 July 2013, <http://www.telegraph.co.uk/news/uknews/law-and-order/10157825/Syria-a-game-changer-for-uk-terror-threat-warns-Home-Office-intelligence-chief.html>.

152 House of Commons, “Counter-Terrorism” (2014).

153 S. Jones, “mi5 focuses on British jihadists returning from Syria”, Financial Times, 14 March 2014, <http://www.ft.com/cms/s/0/79a998e0-ab69-11e3-aad9-00144feab7de.html#axzz34R0M0HwZ>.

154 M. Bentham, “Exclusive: Brits who fight in Syria face life in jail”, The London Evening Standard, 3 February 2014, <http://www.standard.co.uk/news/uk/exclusive-brits-who-fight-in-syria-face-life-in-jail-9104171.html>.

155 C. Semke, “Portsmouth man is the first person in UK convicted of Syria terror plan”, Portsmouth.co.uk, 20 May 2014, <http://www.portsmouth.co.uk/news/local/portsmouth-man-is-first-person-in-uk-convicted-of-syria-terror-plan-1-6069995>.

156 “Brothers deny kidnapping journalists in Syria”, BBC, 21 June 2013, <http://www.bbc.co.uk/news/uk-23004079>.

157 Ibid.

158 “London women charged with terror offences related to Syrian conflict”, BBC UK News, 22 January 2014, <http://www.bbc.com/news/uk-25854373>.

159 P. Walker, “Two London women charged with funding terrorists in Syria”, The Guardian, 23 January 2014, <http://www.theguardian.com/uk-news/2014/jan/23/two-london-women-charged-funding-terrorism-syria>.

currently awaiting the trial which is due to begin in July.<sup>160</sup> In February, former Guantanamo Bay detainee Moazzam Begwas arrested in Birmingham on suspicion of participation in a terrorist training camp in Syria,<sup>161</sup> and in March, four more individuals were arrested on “suspicion of being concerned in the commission, preparation or instigation of acts of terrorism”.<sup>162</sup>

The UK is also taking other measures to counter the potential threat stemming from foreign fighters. Last year, the Home Secretary Theresa May led discussions with other European countries, such as France, Denmark, Belgium, Spain, Sweden, the Netherlands and Ireland, to counter the threat of Syria travellers: “measures being considered include making it illegal to travel to take part in jihad, banning specific organisations, freezing bank accounts, deporting Muslim preachers, and even taking away ‘social benefits’”.<sup>163</sup> The Immigration and Security Minister set out some other legislative tools available to prevent travel, such as those under the Terrorism Prevention and Investigation Measures (which require a strong national security case), foreign travel restriction orders (applicable to convicted terrorist offenders), the Royal Prerogative (which could for example be used to restrict the travel of foreign fighters), deportation, exclusion and deprivation of citizenship.<sup>164</sup> Most drastically, in May this year a bill led by Ms. May was signed into law, which allows terrorism suspects to be stripped of their citizenship if such measure is “conducive to the public good”. The possibility to take away British passports had already been an option for the authorities for those with dual citizenship and a total of 20 citizenships were revoked in 2013 alone.<sup>165</sup> However, the new and highly controversial law effectively allows individuals to become stateless.<sup>166</sup>

#### 4. Conclusion

The phenomenon of European foreign fighters has taken centre stage on the European level during the last few months, with a number of arrests of alleged foreign fighters, thwarted plots by returnees and the attack at the Jewish museum in Brussels. Given the situation in Syria and in the home countries and communities of foreign fighters, there are no signs that travel will stop soon or that the issue will disappear from the policy agendas and news media. This also holds true, though at a lower level, for those returning to Europe.

Since the authors’ late-2013 investigation into this phenomenon, the number of foreign fighters, media coverage and incidents involving jihadists have notably increased. However, possibilities to address the issue on the international level have not changed. While the UNSC demanded in February that all foreign fighters immediately withdraw from Syria, and calls for an ICC referral or the creation of a hybrid tribunal to adjudicate crimes committed in relation to Syria have become louder, no other concerted action to facilitate the prosecution of foreign fighters on the international level has been taken. On the regional and supranational level, fora such as the

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160 . Soni, “Student denies smuggling money to Syria in her knickers”, Channel 4 News, 19 May 2014, <http://www.channel4.com/news/syria-knickers-euros-funding-terrorism-smuggling>.

161 M. Bentham, “Exclusive: Brits who fight in Syria face life in jail” (2014).

162 Greater Manchester Police, “Counter-terrorism arrests in Manchester”, Crime and Justice, 11 March 2014, <http://crimeandjustice.co.uk/2014/03/11/counter-terrorism-arrests-in-manchester/>.

163 J. Owen and B. Brady, “Theresa May urges action on ‘jihad tourism’”, The Independent, 7 July 2013, <http://www.independent.co.uk/news/world/politics/theresa-may-urges-action-on-jihad-tourism-8692590.html>.

164 House of Commons, “Counter-Terrorism” (2014), p. 20–1.


165 A. Ross and P. Galey, “Rise in Citizenship Stripping As Government Cracks Down on UK Fighters In Syria”, The Bureau of Investigative Journalism, 23 December 2013, <http://www.thebureauinvestigates.com/2013/12/23/rise-in-citizenship-stripping-as-government-cracks-down-on-uk-fighters-in-syria/>.

166 See for a detailed discussion about this measure: C. Paulussen and L. van Waas, “UK Measures Rendering Terror Suspects Stateless: A Punishment More Primitive Than Torture”. ICCT Commentary, 5 June 2014, <http://www.icct.nl/publications/icct-commentaries/uk-measures-rendering-terror-suspects-stateless-a-punishment-more-primitive-than-torture>.

OSCE have urged states and partners to adapt their legislation to “combat terrorism in full respect of human rights and international humanitarian law in order to take into account the specific challenges of the ‘foreign fighters’ issue”.

Parallel to the increase in individuals travelling to and returning from Syria, the number of arrests and prosecutions in connection with foreign fighters in Europe has also increased since last year. In the Netherlands, France and the UK, the first convictions were handed down against Syria travellers (to be), while Germany and Belgium have started to arrest and initiate proceedings against a number of individuals over the past few months. The individual Member States analysed in this article have taken a variety of measures, ranging from some more drastic policies such as the deprivation of citizenship, to some more soft-handed approaches, such as investments in good relationships with local communities taken in most countries. Some measures have been taken in direct response to current developments, including in response to the presence of European jihadists in Syria (e.g. the raising of the terrorism threat level in the Netherlands, and adopting a new counter-terrorism law in France in 2012). Others build on existing legislation and frameworks both inside and outside the counter-terrorism domain (the prosecution of fighters in the Netherlands; prosecution in the UK connected to a kidnapping in Syria and new legislation in the UK allowing suspects to be stripped of citizenship). Interestingly, one of the countries with a relatively large proportion of departed and returned fighters (Belgium) initially and immediately rejected more repressive measures such as criminalising leaving for Syria to fight and confiscating identity.

The only conclusion to be drawn is that rule of law responses to the foreign fighter phenomenon in the countries investigated remains fragmented. Although, at the European level, the attacks in Belgium in May 2014 have meant that calls for a comprehensive approach to the foreign fighter phenomenon have become more urgent, it is doubtful whether Europe will soon have a Union-wide response to this increasingly challenging problem.



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