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THE PROSECUTION OF FOREIGN FIGHTERS IN WESTERN EUROPE: THE DIFFICULT RELATIONSHIP BETWEEN COUNTER-TERRORISM AND INTERNATIONAL HUMANITARIAN LAW

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Abstract

The collapse of the Caliphate, including the resulting surrender of hundreds of fighters to the Syrian Democratic Forces, as well as the tweets from President Trump threatening his allies to release 800 Islamic State fighters if they would not take back their own citizens, has led to an intense debate on what to do with these so-called foreign fighters. Many counter-terrorism experts and international lawyers have argued that these fighters should be brought home and brought to justice before national courts, for moral, legal and long-term security reasons. In the context of national prosecutions, the aim should be to not have a one-size fits all, but rather a tailored approach, ensuring that perpetrators are prosecuted, as much as possible, for the actual crimes they have committed. If we consider foreign fighters to be individuals joining a non-state armed group in an armed conflict, there is by definition an important nexus between foreign fighters and armed conflict. Hence due regard should also be paid to international humanitarian law in the framework of their prosecution. This article will analyse and assess the first cases where the relationship between counter-terrorism and international humanitarian law played a role and aims to provide, based on the direction this discussion is heading, the necessary guidance.

Keywords

Foreign fighters, counter-terrorism, international humanitarian law, war crimes, prosecution

The prosecution of foreign fighters in Western Europe: the difficult relationship between counter-terrorism and international humanitarian law

Hanne Cuyckens and Christophe Paulussen

1. Introduction

The Caliphate of the so-called Islamic State (IS) has fallen, albeit only in the physical sense. The collapse of the Caliphate, including the resulting surrender of hundreds of fighters to the Syrian Democratic Forces (SDF), as well as the tweets from President Trump threatening his allies to release 800 IS fighters if they would not take back their own citizens, has led to an intense debate on what to do with these so-called foreign fighters (FFs). It has become clear that many states are not enthusiast to (actively) repatriate these FFs and bring them to justice in their countries of origin, indicating that it was these people's choice to leave in the first place and thus that they have to face the consequences. Other countries have tried to avoid this problem by revoking the citizenship of FFs, by denying in technical terms that there was citizenship in the first place, or by suggesting the establishment of an international 'IS' tribunal.[1] It can be argued that all these arguments are in essence a dodging of the responsibility of the home state.[2] Indeed, many counter-terrorism experts and international lawyers have argued that these fighters should be brought home and brought to justice before national courts, for moral, legal and long-term security reasons.[3] Although this will not be the easiest or cheapest option, as will also become clear in this article, it is definitely the preferred option.

Moreover, in the context of national prosecutions, the aim should be to not have a one-size fits all, but rather a *tailored* approach, ensuring that perpetrators are prosecuted, as much as possible, for the *actual* crimes they have committed.[4] In view of the difficulties in gathering evidence in war-torn countries like Syria and Iraq, it is understandable from a practical point of view that prosecutors until recently have focused on charges such as membership of a terrorist organisation – as the evidentiary threshold is much lower here.[5] Indeed, in that way, prosecutors do not need to prove the actual crimes, such as war crimes, but 'merely' that these individuals joined a terrorist organisation.

However, this has at least two disadvantages: the first is that all persons who have joined IS will get more or less the same sentence (in Western Europe usually around six years), whether they were forced to join IS and served the Caliphate not by fighting but by

[1] See also T. Mehra and C. Paulussen, 'The Repatriation of Foreign Fighters and Their Families: Options, Obligations, Morality and Long-Term Thinking', *ICCT Perspective*, 6 March 2019, available at: https://icct.nl/publication/the-repatriation-of-foreign-fighters-and-their-families-options-obligations-morality-and-long-term-thinking/.

[2] *Ibid*.

[3] *Ibid*. And see also, e.g., D. Malet, 'ISIS Foreign Fighters: Keep Your Enemies Closer', *Australian Outlook*, 28 February 2019, available at: https://www.internationalaffairs.org.au/australianoutlook/isis-foreign-fighters-keep-enemies-closer/; R. van der Veer and E. Bakker, 'The Need to Maintain Control over Militant Jihadists', *ICCT Perspective*, 10 April 2019, available at: https://icct.nl/publication/the-need-to-maintain-control-over-militant-jihadists/ and The Soufan Group, The Dilemma of Repatriation, *IntelBrief*, 1 July 2019, available at: http://www.soufangroup.com/intelbrief-the-dilemma-of-repatriation/.

[4] See also C. Paulussen and K. Pitcher, 'Prosecuting (Potential) Foreign Fighters: Legislative and Practical Challenges', *ICCT Research Paper*, 2018, available at: https://icct.nl/wp-content/uploads/2018/01/ICCT-Paulussen-Pitcher-Prosecuting-Potential-Foreign-Fighters-Legislative-Practical-Challenges-Jan2018.pdf.

[5] *Ibid*.

preparing meals (in which case the sentence may be on the high side) or whether they were leaders of this death cult in charge of the implementation of international crimes such as war crimes, crimes against humanity and genocide (in which case the sentence would be very low). Of course, it is to be avoided that a mass murderer walks the streets again after a few years in prison. It can be argued that if prosecutors were able to ensure that such people are put behind bars for a much longer time, politicians would also have fewer problems in actually taking responsibility for their own citizens – by taking them back and letting them be prosecuted at the national level.

The second, and more fundamental, problem is that the extensive use of counter-terrorism legislation has arguably overshadowed another relevant but often forgotten field of law in this discussion: international humanitarian law. There is a risk that this will lead to conflation of both legal regimes. Indeed, the first cases analysed in this article are not promising in that respect. And this problem will probably become more pertinent in the years to come: now that the Caliphate has collapsed, more evidence of actual crimes – think of the discovery of mass graves – will, sometimes literally, come to the surface.[6] This will lead to more cases where people may not only be prosecuted for membership of a terrorist organisation, but also for, for example, war crimes. While this development, again, is to be welcomed in principle, it is crucial to know how the *distinct* fields of counter-terrorism law and international humanitarian law correlate. This article will analyse and assess the first cases where the relationship between counter-terrorism (CT) and international humanitarian law (IHL) played a role and aims to provide, based on the direction this discussion is heading, the necessary guidance.

This article will first assess the FFs phenomenon from an IHL perspective and expose the reasons why it is crucial to also take this perspective into account when assessing FFs conduct (Section 2). Through the assessment of case law (Section 3), it will then show that there is no consistency in dealing with the prosecution of FFs in Western Europe and that more generally the focus lies on the CT perspective. In the final Section 4, a few suggestions on how the difficult relationship between CT and IHL should be best considered will be provided, including why it is important to give due regard to the IHL framework as well.

2. Foreign fighters under international law

In order to be able to assess how courts have been dealing with the prosecution of FFs, it is first of all important to clearly lay out the legal parameters under which the FF phenomenon is to be considered.

Consequently, in this part, first the notion of FFs will be explained. After that, the phenomenon will be assessed more specifically from an IHL perspective. Finally, the tension that exists between CT and IHL and how this potentially affects FFs and their prosecution will be demonstrated.

[6] See United Nations Iraq, 'UNITAD working with Government of Iraq to commence exhumation of mass grave site at Kojo, Sinjar Region', 14 March 2019, available at: http://www.uniraq.org/index.php?option=com_k2&view=item&id=10591:unitad-working-with-government-of-iraq-to-commence-exhumation-of-mass-grave-site-at-kojo-sinjar-region&Itemid=605&lang=en.

2.1. Definition of foreign fighters

There is no uniform definition of FFs in international law. The most authoritative definition stems from United Nations (UN) Security Council Resolution 2178 but that one does not speak of FFs as such, but rather of foreign *terrorist* fighters (FTFs). It defines FTFs as "individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict".[7] It shows immediately that for the UN Security Council, the problem of FFs is mainly viewed from a CT perspective.[8] However, since all UN Member States are obliged to implement this legally-binding resolution, this limited view of the more broader FFs problem has trickled down to the national plane. The case law analysed in this article can be seen as evidence for that statement.

In literature, FFs have been defined in different ways. One definition speaks of "individuals, driven mainly by ideology, religion and/or kinship, who leave their country of origin or their country of habitual residence to join a party engaged in an armed conflict".[9] This is a broad definition that hence allows for an equally broad and comprehensive discussion of all aspects of the phenomenon, whether FFs joined non-state armed groups (NSAGs) or governmental forces. For the purpose of this article, however, a more focused definition will be used, which, in fact, inspired the one just-mentioned. According to this more narrow definition, suggested by Sandra Krähenmann, FFs are "individual[s] who [leave] [their] country of origin or habitual residence to join a non-state armed group in an armed conflict abroad and who [are] primarily motivated by ideology, religion, and/or kinship".[10] The more narrow definition is adopted here given that the FFs concerned in this article have joined NSAGs rather than governmental ones. It is thus the definition that most accurately fits the ambit of this article.

Although the phenomenon of FFs is not a new one, the scope of the problem has increased significantly over the last few years, especially in the context of the conflict in Syria and Iraq, which attracted thousands of fighters from around the world. At the time most FFs joined the conflict, a complex mixture of non-international armed conflicts (NIACs) were taking place both in Syria and Iraq. In Syria, a NIAC was ongoing between the Syrian government (and its allies) and a wide array of rebel groups, including the Free Syrian Army, IS and Kurdish militia.[11] In addition, these different armed groups were also

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[7] UN Security Council Resolution 2178 of 24 September 2014, Preamble.

[8] C. Paulussen and K. Pitcher, op. cit. note 4, p. 5. Moreover, the lack of clarity regarding the Resolution's impact on IHL has been criticised, see Council of Europe, Parliamentary Assembly, Doc. 13937, 8 January 2016, 'Foreign fighters in Syria and Iraq', C. Explanatory memorandum by Mr Van der Maelen, rapporteur, paras. 19-22, referring to the statement by S. Krähenmann who noted in 2014 that "[t]he reference to 'including in connection with an armed conflict' plainly calls acts governed by IHL 'terrorist acts', without confining the term to acts prohibited by IHL, such as attacks against civilians or execution of persons *hors de combat*." See S. Krähenmann, 'Foreign Fighters under International Law', Geneva Academy of International Humanitarian Law and Human Rights, Academy Briefing No. 7, October 2014, available at: https://www.geneva-academy.ch/joomlatools-files/docman-files/Publications/Academy%20Briefings/Foreign%20Fighters_2015_WEB.pdf, p. 42.

[9] A. de Guttry, F. Capone and C. Paulussen, 'Introduction', in: A. de Guttry, F. Capone and C. Paulussen (eds.), *Foreign Fighters under International Law and Beyond*, T.M.C. Asser Press/Springer Verlag: The Hague 2016, p. 2.

[10] See S. Krähenmann, op. cit. note 8, p. 6.

[11] http://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-syria. On this point see also T. Gill, 'Classifying the Conflict in Syria', *International Law Studies*, Vol. 92, 2016, available at: http://stockton.usnwc.edu/ils/vol92/iss1/11/.

fighting each other.[12] Foreign involvement (US, Turkey) furthermore did not change the classification of the conflict in Syria.[13] The situation in Iraq was rather similar. The Iraqi government, supported by an international coalition led by the US, Kurdish Peshmerga forces and various militia groups, was involved in a NIAC against IS and associated groups.[14]

Whereas the problem of FFs in the first years was focused on travellers *to* the Levant, the collapse of the Caliphate has ensured that the discussion has shifted to the question on what to do with people who want to return or who have already returned, including the possible security risk they could pose in their home countries, as well people relocating to other conflicts ("relocators").

Indeed, the discussion very much focuses on national security considerations and CT parlage. However, merely qualifying these FFs as (potential) terrorists does not make the law of armed conflict inapplicable. Indeed, in the presence of a proven nexus with an ongoing armed conflict, their conduct should (also) be assessed in the framework of the relevant rules of IHL, applicable to them in the same way as to other belligerent parties.

2.2. The status of foreign fighters under international humanitarian law

If we consider FFs to be basically individuals joining a NSAG in an armed conflict abroad (see the previous subsection), there is by definition a nexus between FFs and armed conflict. Taking into account that they join a party to an armed conflict, it is important to assess their status from an IHL perspective given that this is the legal framework under which they operate when they are participating in the hostilities. As the term FF is not a legal concept as such under IHL, this assessment has to be made applying the general rules of IHL applicable to those participating in hostilities.

IHL operates on the basis of two main premises: it attempts to protect those who are not or no longer participating in hostilities and regulates means and methods of warfare. One of the main rules on the basis of which the system operates is the principle of distinction. Indeed, in order to assess who benefits from protection, a clear distinction needs to be made between those who are participating in hostilities – and hence can be the object of attack – and those who are not and thus need to be protected. The principle of distinction is quite straightforward when considering international armed conflicts (IACs). In such conflicts the distinction is between a combatant and a civilian. Formal combatant status is attributed to "[m]embers of the armed forces of a Party to a conflict (other than medical personnel and chaplains)".[15] Civilians are defined negatively under IHL as all those who do not qualify as combatants. They lose their protection status only in case of direct participation in hostilities. The application of the principle of distinction in NIACs is slightly more complex given the absence of formal combatant status in such conflicts. Members of NSAGs operating in such conflicts have consequently been qualified as 'unlawful/unprivileged/irregular combatants/belligerents' (and many other linguistic variations of the same idea).[16] In this article, the term 'unprivileged' combatants rather

[12] http://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-syria.
[13] *Ibid*.
[14] http://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-iraq.
[15] Art. 43(2) Additional Protocol I.
[16] K. Dörmann, 'The legal situation of "unlawful/unprivileged combatants"', *International Review of the Red Cross*, Vol. 85, No. 849, March 2003, p. 46. See also J. Pejic, ''Unlawful/Enemy Combatants': Interpretations and Consequences', in M.N. Schmitt and J. Pejic (eds.), *International law and armed conflict: exploring the*

than 'unlawful' or 'irregular' will be used since this term has a slightly less negative connotation. Unprivileged combatants are all persons directly participating in hostilities but without having a formal combatant status.[17] The FFs concerned in this article, as explained, are those having joined a NSAG and thus consequently fall under the category of 'unprivileged combatants'. Of importance for this article is the fact that 'unprivileged combatants' do not benefit from combatant immunity and can thus be prosecuted for mere participation in hostilities.[18] Concretely this means that besides the possibility of being prosecuted for violations of IHL, they might also be prosecuted for merely having taken up arms, even if the fighting itself is in compliance with IHL. The very existence of the possibility to prosecute members of NSAGs for mere participation in hostilities is however not without controversy. It above all creates potential issues of compliance. Why should members of NSAGs abide by the rules regulating armed conflict if they can be prosecuted for lawful acts of war anyway?[19] This is also why one can identify a call in IHL, and the authors of this article support this, to grant the broadest possible amnesty to persons who have participated in the armed conflict and hence not to prosecute those unprivileged combatants for lawful acts of war.[20]

2.3 The difficult relationship between counter-terrorism and international humanitarian law

As was highlighted in the previous part of this article, FFs when joining an armed group engaged in an armed conflict abroad fall under IHL. However, when it comes to regulating FF conduct "much of the concern appears to turn not on what they go abroad to do, but what they might do on their return"[21], and consequently their conduct is mainly assessed from a CT and national security perspective. It is important though to mention, from the outset, that one does not necessarily exclude the other. In other words, one can be a member of a terrorist group and simultaneously be a member of a group that is also a party to an armed conflict.[22] The important point here is to not conflate the two situations.

2.3.1 The existence of international humanitarian law exclusion clauses in international treaties dealing with terrorism

The relationship between CT and IHL has always been a complicated one. The prosecution of FFs is an illustration of that tension but the difficulties are much broader than this specific question alone. The relationship between CT and IHL is for example one of the

faultlines: essays in honour of Yoram Dinstein, Leiden, Brill Nijhoff, 2007, p. 335 and K. Watkin, 'Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy', *HPCR Occasional Paper Series*, Winter 2005, pp. 5-6.

[17] K. Dörmann, op. cit. note 16, p. 46.

[18] On this point see e.g. more particularly J.K. Kleffner, 'From "belligerents" to "fighters" and civilians directly participating in hostilities – on the principle of distinction in non-international armed conflicts one hundred years after the Second Hague Peace Conference', *Netherlands International Law Review*, Vol. 54, 2007, pp. 321-323.

[19] S. Krähenmann, op. cit. note 8, p. 20. On this point, see also more particularly, H. Højfeldt, 'Prohibiting Participation in Armed Conflict', *The Military Law and the Law of War Review*, Vol. 54, 2015-2016, p. 31.

[20] See Art. 6(5) Additional Protocol I, stating that "at the end of the hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict". This amnesty is of course only valid for acts that are valid under IHL and is aimed at encouraging reconciliation and "reestablishing normal relations in the life of a nation which has been divided"; Commentaries to Additional Protocol I, §4168.

[21] S. Chesterman, 'Dogs of War or Jackals of Terror? Foreign Fighters and Mercenaries in International Law', *International Community Law Review*, Vol. 18 (5), 2016, p. 395.

[22] S. Krähenmann, op. cit. note 8, p. 23. See also S. Ojeda, 'Global counter-terrorism must not overlook the rules of war', *Humanitarian Law & Policy*, 13 December 2016.

main stumbling blocks in the negotiations of a UN Draft Comprehensive Convention on International Terrorism.[23] The difficulties more particularly relate to the inclusion of what has been more commonly referred to as an 'exclusion clause' in said Convention. An 'exclusion clause' is a clause contained in a CT treaty excluding the activities of armed forces during an armed conflict, governed by IHL, from the scope of application of such a treaty, precisely to avoid the distinction between these two different areas of law from becoming blurred. Such a clause already exists in some of the UN CT conventions such as the 1979 Hostages Convention, the 1997 Terrorist Bombings Convention, the 1999 Terrorist Financing Convention and the 2005 Nuclear Terrorism Convention. Typically these clauses state something along these lines:

> The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.[24]

The existence of such clauses, however, have not fully managed to disentangle the relationship between CT and IHL. First, there has been some controversy on the meaning of the term 'armed forces' and whether this would include NSAGs or not.[25] This point will be addressed later during the assessment of the case law specifically dealing with exclusion clauses. Second, the relationship is further complicated by the fact that there is no single, universally accepted definition of terrorism.[26] Thirdly, even if some of the UN CT conventions seem to exclude acts falling under IHL from their scope of application and hence contribute to increased clarity as to the boundaries between those two areas of law, this is far from being the case when considering measures adopted by the UN Security Council in the CT sphere as was already pointed out in relation to UN Security Council Resolution 2178 and its use of the term FTF.

2.3.2. The regulation of acts of terror in armed conflict

It is also important to emphasise in the context of this article that the concept of terrorism is actually not estranged from IHL regulation. Indeed, IHL prohibits a certain number of specific acts, such as executions of civilians and persons *hors de combat*, hostage taking and deliberate attacks against civilians and civilian objects, which, outside of the context of armed conflict, would be qualified as terrorist.[27]

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[23] T. Ferraro, 'Interaction and overlap between counter-terrorism legislation and international humanitarian law', Proceedings of the Bruges Colloquium: Terrorism, Counter-terrorism and International Humanitarian Law, 20-21 October 2016, *Collegium*, No. 47, Autumn 2017, p. 30. On this point see also S. Krähenmann, 'Legal Framework addressing Terrorism and Counter-terrorism', Proceedings of the Bruges Colloquium: Terrorism, Counter-terrorism and International Humanitarian Law, 20-21 October 2016, *Collegium*, No. 47, Autumn 2017, p. 21.

[24] See e.g. Art. 19 of the 1997 Terrorist Bombings Convention and Art. 4 of the 2005 Nuclear Terrorism Convention.

[25] S. Krähenmann, op. cit. note 8, p. 35.

[26] S. Krähenmann, op. cit. note 23, p. 19.

[27] S. Krähenmann, op. cit. note 8, p. 24. And see also C. Paulussen, 'Testing the Adequacy of the International Legal Framework in Countering Terrorism: The War Paradigm', *ICCT Research Paper*, August 2012, available at: https://www.icct.nl/download/file/ICCT-Paulussen-Legal-Framework-for-Counter-Terrorism-August-2012.pdf pp. 7-8, footnotes 61 and 62.

In addition, next to the more general prohibitions presenting similarities with terrorism, there is a more specific rule under IHL prohibiting "acts or threats of violence the primary purpose of which is *to spread terror* among the civilian population [emphasis added]".[28]

There is thus an equivalent under IHL, applying specifically in the context of ongoing hostilities, of what would be considered terrorism in peacetime.[29] Both the more general prohibitions and the more specific prohibition of acts designed to spread terror are generally considered to be grave violations of IHL and would hence fall under the category of war crimes.[30]

2.3.3 The framing of the potential conflation in practice

CT norms may interfere with IHL by prohibiting conduct that is not unlawful under IHL. As was pointed out by Stephane Ojeda, Deputy Head & Legal Advisor at the International Committee of the Red Cross (ICRC), "[t]here is a growing tendency at the international and state level to consider that any act carried out in an armed conflict by a non-state armed group is terrorist in nature and therefore necessarily unlawful, even when such acts are not prohibited under IHL (e.g. attacks against military objectives)"[31]. This is even more so the case when considering groups such as IS which, next to being a NSAG, are also considered terrorist organisations in their own right. As a result, this aspect also plays an important role in the context of FFs joining such groups. Based on the fact that those FFs have been qualified as "one of the biggest terrorist threats to Western states since 9/11"[32] and that there is definitely a potential correlation between serving as an FF in one of those groups and perpetrating terrorist acts upon return,[33] the conduct of FFs, as was already explained above, is mainly, if not exclusively, assessed from a CT perspective.

The focus on CT generates a number of risks, one of them being in line with what Sandra Krähenmann has argued, namely that the lines between IHL and CT law are being blurred because F(T)Fs might be prosecuted for terrorist offenses even if they only engaged in acts that are lawful under IHL.[34] Even more importantly, it might lead to a situation in which there is a perception that all FFs are terrorists, which is far from being the case.

On this point the ICRC highlighted the following in its challenges report of 2015:

> [A]cts that are not prohibited by IHL – such as attacks against military objectives or against individuals not entitled to protection against direct attacks – should not be labelled "terrorist" at the international or domestic levels (although they remain subject to ordinary domestic criminalization where a NIAC is involved). Attacks against lawful targets constitute the very essence of an armed conflict and should not be legally defined as "terrorist" under another

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[28] ICRC, Customary IHL database, Rule 2 (applicable in both IACs and NIACs); https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule2. And see also C. Paulussen, op cit. note 27, p. 8, footnote 63.

[29] Council of Europe - Committee of Experts on Terrorism, 'Application of International Humanitarian Law and Criminal Law to Terrorism Cases in Connection with Armed Conflicts', Discussion Paper, Strasbourg, 13 March 2017 (CODEXTER discussion paper), p. 8.

[30] Even though acts of terror as understood under IHL are not expressly included in the list of war crimes established by the Rome Statute of the International Criminal Court, they are generally considered to be grave breaches of IHL; H.-P. Gasser, 'Acts of terror, "terrorism" and international humanitarian law', *International Review of the Red* Cross, Vol. 84, No. 147, 2002, p. 565. See also S. Krähenmann, op. cit. note 8, p. 24, referring to the *Prosecutor v. Galic* Judgment at the International Criminal Tribunal for the former Yugoslavia (ICTY) also further confirming this statement.

[31] S. Ojeda, op. cit. note 22.

[32] S. Krähenmann, op. cit. note 8, p. 3.

[33] S. Chesterman, op. cit. note 21, p. 397.

[34] See S. Krähenmann, op. cit. note 8, p. 20.

> regime of law. To do so would imply that such acts must be subject to criminalization under that legal framework, therefore creating conflicting obligations of States at the international level. This would be contrary to the reality of armed conflicts and the rationale of IHL, which does not prohibit attacks against lawful targets.[35]

It is in any case clear, as was highlighted by Stephane Ojeda, that "[b]randing an armed group as 'terrorist' cannot alone cancel the applicability of international humanitarian law (IHL)".[36]

3. Assessing the case law

It appears that the authorities at the national level were quite overwhelmed with the extent and speed of the FFs problem. Much of the responses to the phenomenon have thus been of a reactive nature. In order to prevent them from leaving in the first place, and to adjudicate some of the first cases, prosecutors and judges turned to existing (criminal) law at first.[37] The legislator then stepped in in order to develop news laws establishing a plethora of new crimes in relation to terrorism, partly based on supranational legal instruments such as the already-discussed UN Security Council Resolution 2178.[38] Given that this article focuses on EU case law, it is important to also have a look at EU Directive 2017/541 on combating terrorism adopted on 15 March 2017. This Directive is of particular importance given that it establishes specific terrorist offences, offences related to a terrorist group and offences related to terrorist activities. The terrorist offences include a number of more common crimes (attacks upon a person's life, kidnapping and hostage taking, causing extensive destruction of both public and private property) but with a specific terrorist aim, for example with the aim of seriously intimidating a population.[39] Under the category of offences relating to a terrorist group one can find (a) directing a terrorist group and (b) participating in the activities of a terrorist group.[40] Finally, offences related to terrorist activities include provocation, recruitment, training, financing and travelling for the purpose of terrorism.[41] Important for the specific question at hand is that, as already explained above, most FFs seem to have been condemned for preparatory offences as well as membership charges,[42] and that charges mainly dealt with terrorist-related offences rather than war crimes. There are however some cases in which the relationship with IHL has come up or in which returning FFs were actually convicted (also) for war crimes. These will be evaluated below in more detail. The assessment will more specifically be centred around three main points, which were identified in the case law. First, the question whether the absence of combatant privilege for members of NSAGs involved in a NIAC is to have any effect on the prosecution of FFs will be discussed. After that, an assessment of the role of the IHL exclusion clauses on cases involving the

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[35] ICRC, 'International humanitarian law and the challenges of contemporary armed conflict', Report prepared for the 32nd International Conference of the Red Cross and Red Crescent, Geneva, 8-10 December 2015, p. 18 (ICRC challenges report 2015).
[36] S. Ojeda, op. cit. note 22.
[37] C. Paulussen and K. Pitcher, op. cit. note 4, p. 12.
[38] *Ibid*.
[39] Directive 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, *Official Journal of the European Union*, L 88/6, 31 March 2017 (Directive 2017/541), Art. 3.
[40] *Ibid*., Art. 4.
[41] *Ibid*., Art. 5.
[42] C. Paulussen and K. Pitcher, op. cit. note 4, p. 16.

prosecution of FFs will be looked at. Finally, examples of cases in which war crimes have been assessed in relation to returning FFs will be provided.

Before moving to the actual assessment of the relevant case law two remarks still need to be made. First, this article only looks at cases specifically dealing with returning FFs, i.e. those having the nationality of or habitual residence in the state in which their case is being adjudicated, and hence not at cases in which Iraqi or Syrian asylum seekers are indicted for similar actions occurring in the same armed conflict.[43] Second, we should stress that only a more general overview of how the issue is being dealt with in some European countries will be provided. A systematic and in-depth overview is impossible due to the fact that many cases are inaccessible. For the same reason, for some jurisdictions reference is made to reports or secondary sources rather than the case law itself. These final remarks already lead to this article's first recommendation, namely the call for better access to and more transparency in relation to these cases.

3.1. The effect of the absence of formal combatant status in non-international armed conflicts

As was clarified above, members of NSAGs do not have formal combatant status meaning that they can actually be prosecuted for merely participating in the hostilities. This includes prosecution for acts that might actually be lawful under IHL. In this section a certain number of Dutch cases having explicitly dealt with the question of the effect of the absence of formal combatant status on the prosecution of FFs will be assessed. Two cases are of particular relevance here: the *Maher* case[44] and the *Context* case.[45]

The *Maher* case is the first conviction of a Dutch returning FF in the Netherlands. He was sentenced by the District Court of The Hague to three years of imprisonment for preparatory acts with a view of committing murder and manslaughter with a terrorist intent as well as for disseminating inciting materials such as videos and photos.[46] Interestingly, in appeal, he was also found guilty of training for terrorism, thus receiving a higher punishment (of four years).[47] Regardless of the exact punishment, it is in any case very clear that he was convicted only for terrorist-related offences. The question whether the applicability of IHL would conflict with the prosecution of the defendant for the above-mentioned terrorist-related offences was raised as a preliminary issue before the District Court. On this point, the District Court stated that the conflict in Syria was of a non-international character and that in contrast to members of governmental forces, in the absence of formal combatant status, members of NSAGs are not allowed to use force and can thus consequently be prosecuted for mere participation in hostilities.[48] This is furthermore the case for persons other than those joining jihadi groups.[49] It would hence be wrong, the Court continued, to argue that IHL would be the only body of law applicable

[43] There are different examples in which asylum seekers have been convicted for war crimes in the country dealing with their asylum application. On this point see e.g. Eurojust, Network for investigation and prosecution of genocide, crimes against humanity and war crimes (the 'Genocide Network'), 'Prosecuting war crimes of outrage upon personal dignity based on evidence from open sources – Legal framework and recent developments in the Member States of the European Union', The Hague, February 2018 (Eurojust Genocide Network report).
[44] Prosecutor v. Maher H. (District Court of The Hague, 1 December 2014).
[45] Prosecutor v. Imane B et al. (District Court of The Hague, 10 December 2015).
[46] Prosecutor v. Maher H. (District Court of The Hague, 1 December 2014), §8.3.
[47] Prosecutor v. Maher H. (Court of Appeal of The Hague, 7 July 2016).
[48] Prosecutor v. Maher H. (District Court of The Hague, 1 December 2014), §3.
[49] *Ibid*., §3.3.8.

during a NIAC, cancelling the application of common criminal law.[50] The criminalisation of violations of IHL in a NIAC does not mean that these acts and other acts committed in relation to a NIAC cannot be prosecuted under common criminal law.[51] The District Court concluded by stating that during armed conflict different legal regimes are hence applicable among which Dutch criminal law, including the provision relating to terrorist offences.[52] This was confirmed by the Court of Appeal, which stated that

> in so far as the defence has tried to argue that the defendant should be granted immunity from prosecution given that he was entitled as a combatant against the regime of Assad to participate in the hostilities, the Court holds that given that the defendant was allegedly fighting with or alongside IS or any of the allied terrorist groups not only is it a fact that IHL does not grant him combatant privilege but in addition the terrorist acts committed by him are contrary to IHL and as such are prosecutable under national law. [53]

A similar reasoning was adopted in the *Context* case. The *Context* case is an important case in the Netherlands, if only because of its scope. Indeed a total of nine people, including several individuals who had travelled to Syria, were found guilty of various terrorist-related offences. The question of the relationship between CT and IHL also arose in this case and the reasoning for discarding IHL was very much similar to the reasoning already outlined above. It is however still interesting to have a closer look at the exact reasoning of the Court given that the different steps of the reasoning are far more developed in this case compared to the previous one. The Court again started by showing that the conflict in Syria is non-international in character.[54] It then stated that this entails that acts of violence committed in the framework of such a conflict may be punishable both under IHL and domestic criminal law. [55] It explained: "However in order to determine the punishability of concrete acts of violence during a non-international armed conflict, what has to be established first is whether the perpetrator enjoys a certain status under international humanitarian law that allows him to conduct hostilities legitimately".[56] The Court continued stating that given the absence of combatant status, the participation in the armed conflict in Syria is punishable under Dutch law. [57] The question remained whether this means that Dutch law in its entirety, including the provisions with regard to terrorist crimes, is applicable to the case at hand.[58] The exact reasoning on this point concerns the applicability of the IHL exclusion clause and will hence be relayed in the following part of this assessment. It is however already important to state here that the Court answered this question in the affirmative and in fact convicted the defendants on the basis of provisions relating to terrorist crimes.

In the cases above, the absence of combatant privilege is used to argue that the mere fact that IHL is applicable does not mean that other bodies of law might not be applicable at the same time. The fact that members of NSAGs do not have combatant immunity allows the Dutch prosecutor to bring in other criminal provisions, *in casu*, provisions embedded

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[50] *Ibid*., §3.3.7.
[51] *Ibid*., §3.3.8.
[52] *Ibid*., §3.3.8.
[53] Prosecutor v. Maher H. (Court of Appeal of The Hague, 7 July 2016). §14 (translated from Dutch by the authors).
[54] Prosecutor v. Imane B et al. (District Court of The Hague, 10 December 2015). § 7.13.
[55] *Ibid*., §7.18.
[56] *Ibid*., §7.18. (This case has been translated and is available at: http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2015:16102).
[57] *Ibid*., §7.29.
[58] *Ibid*., §7.29.

in CT legislation. From a mere technical legal perspective, the reasoning of the Court is correct. Indeed, in the absence of formal combatant status in NIACs, members of a NSAG (whether this NSAG is also at the same time a terrorist organisation or not) do not benefit from combatant immunity. Concretely, this means that members of NSAGs, besides incurring potential liability under IHL, might also be prosecuted for merely participating in the hostilities. Given that in most national jurisdictions there is no separate crime for 'mere participation in hostilities'[59], such prosecution might be based on crimes that are already included in the criminal code, such as murder for example. As was highlighted already above, the authors of the current article would actually prefer prosecution for 'mere participation in hostilities', i.e; for lawful acts of war in the absence of formal combatant status, to not be pursued by national jurisdictions in light of the issues of compliance such an approach might generate. However, in any case, using this path to bring in CT legislation (rather than crimes with less political connotation such as murder or manslaughter for example), albeit again not necessarily wrong from a technical legal perspective, should be avoided. Indeed, it might contribute to further blurring the already difficult relationship between IHL and CT given that it might suggest that 'merely participating in hostilities' as a member of a NSAG is actually a terrorist offence. Moreover, this whole debate surrounding combatant immunity could be avoided given that similar results to what the Court actually wants to achieve, namely that the existence of an armed conflict does not necessarily discard rules other than IHL, can arguably be achieved without embarking on a reasoning that might contribute to the blurring of the relevant legal regimes.

3.2. Assessment of the international humanitarian law exclusion clause in case law

Moreover, it is important to assess the potential effect of IHL exclusion clauses on the prosecution of returning FFs. As was highlighted above a certain number of international treaties dealing with terrorism encompass an IHL exclusion clause, i.e. a clause the ambit of which is to exclude acts of armed forces during armed conflict from the realm of CT legislation. These clauses do not only exist at the international level but also at the level of the EU. Indeed Recital 37 of EU Directive 2017/541 on combating terrorism adopted on 15 March 2017 specifies that

> [t]his Directive does not govern the activities of armed forces during periods of armed conflict, which are governed by international humanitarian law within the meaning of those terms under that law, and, inasmuch as they are governed by other rules of international law, activities of the military forces of a State in the exercise of their official duties….[60]

The phrasing of this clause is very similar to the exclusion clause found at the UN level. Hence similar restrictions have also been raised in this regard, namely that it would not

[59] But see Section 145 of the Norwegian General Civil Penal Code, entitled 'Participation in military activity in an armed conflict abroad': "Any person who illegally participates in military activities in an armed conflict abroad shall be subject to a penalty of imprisonment for a term not exceeding 6 years, unless such person participates on behalf of a government force." See T.W. Christensen and T. Bjørgo, 'How to manage returned foreign fighters and other Syria travellers? Measures for safeguarding and follow-up', Center for Research on Extremism, University of Oslo, 2017, available at: https://www.sv.uio.no/c-rex/english/publications/c-rex-reports/how-to-manage-foreign-fighters-c-rex-research-report.pdf, p. 16. The authors would like to thank Anna Andersson for pointing this out.

[60] Directive 2017/541, op. cit. note 39.

be applicable to NSAGs.[61] In addition, some have argued in relation more particularly to the EU clause that it would not be legally binding given that it is only included in the Preamble and not in the actual operative part of the Directive.[62] In order to get some more clarity on these issues, it is informative to look at the case law in both the Netherlands and Belgium. The case law in the Netherlands is interesting given the fact that it adopts a rather restrictive view on the applicability of the exclusion clause. Belgium, on the other hand, is the only EU country besides Ireland that has expressly transposed this clause in its national criminal code and adopts a broader view in relation to its applicability.

3.2.1. Dutch case law: a restrictive view on the applicability of the exclusion clause

As was announced in the introduction to this part, two questions remain open when it comes to the applicability of the EU exclusion clause. First, the question whether the clause is applicable to NSAGs in the first place and second, whether it is legally binding given that it is only included in the Preamble of the Directive and not in the operative part. For the purpose of clarity, EU Directive 2017/541 on combating terrorism replaces Council Framework Decision 2005/671/JHA[63] and hence it could be that in the relevant case law reference is made to the Framework Decision rather than the Directive, depending on the time frame when the concerned judgment was issued. The debate however remains the same. Indeed, also in the Framework Decision the exclusion clause is only contained in Recital 11 and not in the operative part.

Dutch judges have addressed both of the questions raised above. The case that is of most relevance here is again the *Context* case already mentioned above. In line with the specification made earlier, this case looked at the Council Framework Decision and not at the Directive that was later adopted to replace it but the debate is the same. The specific question raised here by the Defence was whether the clause would prevent the provisions of Dutch criminal law that relate to terrorist crimes and implement the Framework Decision from applying during armed conflict.[64] The first point raised in this regard by the Court was that the Preamble of a Union law such as a Framework Decision has no binding force and only provides for an important source of interpretation.[65] In addition it was questioned whether the term 'armed forces' included in the clause actually would also concern members of NSAGs or would be applicable only to state armed forces.[66] On this point, the Court held that when interpreting the concept of 'armed forces' in a literal sense, it would refer to the armed forces of a state.[67] "Organized armed groups are usually not referred to as 'armed forces' but as 'organized armed groups' instead".[68] Consequently, "with the concept of 'armed forces' the actions of the armed forces of a state are excluded from the scope of the terrorism provisions in the Framework Decision".[69] The Court again brought in the concept of combatant privilege already assessed above to further justify

[61] This issue is e.g. relayed in V. Koutroulis, 'The balance between criminal law and international humanitarian law in terrorism cases', Intervention at the 10th ECLAN conference, 26 April 2016 in Brussels, available at: https://free-group.eu/2016/05/05/the-balance-between-criminal-law-and-international-humanitarian-law-in-terrorism-cases/.
[62] Prosecutor v. Imane B et al. (District Court of The Hague, 10 December 2015), §7.36.
[63] Council framework decision of 13 June 2002 on combating terrorism, *Official Journal of the European Union*, L 164/3, 22 June 2002.
[64] Prosecutor v. Imane B et al. (District Court of The Hague, 10 December 2015), §7.32.
[65] *Ibid.*, §7.36.
[66] *Ibid.*, §7.37.
[67] *Ibid.*, §7.38.
[68] *Ibid.*, §7.40.
[69] *Ibid.*, §7.39.

limiting the exclusion clause to state armed forces. Indeed, in the judges' opinion, it was only logical to limit the exclusion clause to state armed forces given that on the basis of their formal combatant status, contrary to members of NSAGs, they have the right to participate in hostilities and hence "can only be prosecuted for violations of international humanitarian law, and not for violations of general law, including the terrorism provisions of the Framework Decision"[70].

Besides the main criticism relating to using the absence of combatant status to bring in CT legislation as highlighted above, to further use combatant privilege to justify that the exclusion clause is only applicable to state armed forces is arguably rather circular. If this exclusion of CT legislation were so clearly to be the consequence of having combatant privilege why would one need a specific clause to further emphasise this point? Even more so, combatant privilege merely grants combatants the right to participate in hostilities without being prosecuted for that specific participation. It is not directly relevant for CT regulation. Finally, the confusion between participating in hostilities and terrorism mainly materialises in relation to NSAGs so it would be rather logical to assume that this is in fact the situation the exclusion clause would want to clarify. The Court on that last point actually stated that in the case of a NIAC, "no conflict exists between the standards of the various legal regimes" and that it would furthermore "be inconsistent to, contrary to punishable acts of war committed in peacetime, exclude these same acts of war committed during armed conflict from terrorism provisions [original footnote omitted]".[71] This last sentence is, at the very least, confusing. First, technically one cannot commit acts of war during peacetime and second, acts of war during armed conflict should not fall under terrorism provisions. This is precisely the situation one should avoid.

Ultimately, the Court in the *Context* case concluded that "members of organized armed groups cannot invoke the exclusion clause, and that the terrorism provisions in the Framework Decision and the Dutch legislation implementing that Decision are applicable to them in their entirety. The accused can be prosecuted for terrorist crimes as penalized in Dutch terrorism legislation"[72].

3.2.2. Belgian case law: a broader view on the applicability of the exclusion clause

It is particularly interesting to look at Belgian case law here given that there is an explicit exclusion clause for armed groups integrated within Belgian CT legislation.[73] Since the EU clause has been explicitly transposed into Belgian national legislation, the question concerning the legally binding character of the clause does not arise in Belgian case law. The focus of the Belgian case law is thus merely on the potential applicability of the clause as a defence in CT cases.

The clause is formulated similarly to those established internationally and at the level of the EU given that it constitutes a translation into Belgian legislation of Recital 11 of the

[70] *Ibid*., §7.39.
[71] *Ibid*., §7.41.
[72] *Ibid*., §7.43.
[73] This is particularly relevant to mention given that few states have actually implemented the exclusion clause derived from international or EU legislation into their national criminal law. Apart from Belgium, the only other EU Member State that seems to have also integrated such a clause in its national legislation is Ireland; See T. Van Poecke, 'The IHL Exclusion Clause, and why Belgian Courts Refuse to Convict PKK Members for Terrorist Offences', *EJIL: Talk!*, 20 March 2019, available at: https://www.ejiltalk.org/author/thomasvanpoecke/.

EU Framework Decision 2002/475/JHA of 13 June 2002[74] (now replaced by EU Directive 2017/541), which in turn is directly inspired by Article 19(2) of the UN 1997 Terrorist Bombings Convention[75] highlighted previously in this article as well.

Article 141*bis* of the Belgian Criminal Code states that Title I*ter* of the same Code dealing with terrorist offences

> shall not apply to acts of armed forces during periods of armed conflict, as defined by, and subject to, international humanitarian law, nor to acts of armed forces of a State in the exercise of their official functions, in so far as those acts are governed by other rules of international law.[76]

Just like in the EU clause, reference is made here to the concept of armed forces. In Belgian literature, contrary to the above-mentioned Dutch case law, it has been generally accepted that the term armed forces, as contained in the clause, refers both to governmental and non-governmental armed forces.[77] Indeed when looking at documents of the Belgian Parliament relating to the adoption of the law implementing this EU clause into Belgian criminal legislation, it is clear that its application was not meant to be limited to IACs. The explanation of the article containing the exclusion clause clearly refers to situations falling under the law regulating IACs (reference to the first Additional Protocol to the Geneva Conventions) but also to "acts committed during armed conflicts covered by the second additional protocol to the Geneva Conventions" which actually deals with NIACs.[78] This interpretation of the clause as applying to both IACs and NIACs has furthermore been confirmed by the Belgian Courts.[79]

Two cases are worth looking at in more detail here: the *Sharia4Belgium* case and the reasoning of the Brussels Chamber of Indictment in relation to the *PKK* case. In both cases it was argued that since the concerned groups were also to be considered armed forces in the sense of the exclusion clause, their actions could not be assessed under CT rules. In order to assess whether the clause was to be activated, the Belgian Courts adopted a two pronged test: (1) whether the concerned group was involved in an armed conflict; and (2) whether it met the definition of armed forces as defined by IHL. The latter question is different from the more general question of applicability of the clause to NSAGs. The Belgian Courts accept that the clause is *in se* applicable to both state armed groups and

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[74] O. Venet, 'Infractions terroristes et droit humanitaire: l'article 141bis du Code pénal', *Journal des tribunaux*, No. 6387, Mars 2010, p. 169O. See also T. Van Poecke, op. cit. note 73.

[75] D. Flore, 'La loi du 19 décembre 2003 relative aux infractions terroristes: genèse, principes et conséquences', *Questions d'actualités de droit pénal et de procédure pénale*, 2005, p. 16. See also J. Wouters and T. Van Poecke, 'Van strijdkrachten, terroristen en het Belgisch strafrecht (noot onder Brussel, 14 september 2017)', *Rechtskundig Weekblad*, 2018-19, nr. 14, p. 1617.

[76] Unofficial translation of Art. 141*bis* of the Belgian Criminal Code: "Deze titel is niet van toepassing op handelingen van strijdkrachten tijdens een gewapend conflict als gedefinieerd in en onderworpen aan het internationaal humanitair recht".

[77] O. Venet, op. cit. note 74, p. 169. See also V. Koutroulis, 'Le jugement du Tribunal correctionnel d'Anvers dans l'affaire dite « *Sharia4Belgium* » et l'article 141*bis* du Code pénal belge', in A. Jacobs and D. Flore (eds.), *Les Combattants étrangers en Syrie*, Paris, L'Harmattan, 2005, p. 88; T. Ruys and S. Van Severen, 'Art. 141*bis* Sw. – Vervolging tussen hamer en aambeeld van terreurbestrijding in internationaal humanitair recht', *Rechtskundig Weekblad*, 2018-19, nr. 14, p. 531 and J. Wouters and T. Van Poucke, op. cit. note 75, p. 1617.

[78] Chambre des représentants, Project de loi relatif aux infractions terroristes, Exposé des motifs, 6-10-2003, DOC 51 0258/001, p. 16.

[79] Rechtbank van eerste aanleg (Antwerpen), Vonnis, 11 February 2015, p. 31 (*Sharia4Belgium* case); Hof van Beroep (Brussel), Beslissing van de Kamer van Inbeschuldigingstelling, 14 September 2017 (*PKK* indictment).

NSAGs. This question more specifically assesses whether the specific group concerned in the actual situation that is brought before the court meets the definition of armed forces under IHL. Whilst the clause in itself is defined more broadly in the Belgian context, there are however some serious issues relating to the way in which the Belgian judiciary has actually applied the clause.

In relation to the first element, the Court in the *Sharia4Belgium* case held that there was indeed an armed conflict going on in Syria during the period of incrimination and that this armed conflict was non-international in character and regulated solely by Common Article 3 to the Geneva Conventions given that Syria is not a party to the second Additional Protocol.[80] It did however also clarify that the armed conflict did not extend to the territory of Belgium and that in any case the exclusion clause could not be invoked for those acts that took place in Belgium.[81] This is an important point that will be addressed later in this article. The Court then moved to the question whether the groups the defendants joined, that fell under the organisation of Jahbat Al Nusra and Majlis Shar al-Mudjahideen, could be considered armed forces as defined by IHL.[82] On this point the Court held that they did not meet the necessary requirements for the exclusion clause to be activated on the basis of two grounds: (1) the degree of organisation was not sufficient; and (2) the concerned organisations did not provide the conditions necessary for their members to abide by IHL and hence they could not be considered armed forces under IHL.[83] The decision of the Court has however been received with much criticism. Most authors, and the authors of the current article would agree with such a position, have argued that the Court applied a very restrictive definition of armed forces.[84] First, concerning the conclusion that these groups were not sufficiently organised, this is difficult to square with the finding of the Court that a NIAC existed at the time of incrimination.[85] Indeed, for there to be a NIAC, one of the points to be proven, besides intensity, is the existence of groups with a certain degree of organisation, criteria to which the Court actually explicitly referred in the judgment.[86] In addition, the Court seemed to require the NSAG to be organised similarly to a state army, which is not the way in which IHL actually addresses this issue, and the mere transposition of these requirements existing under IACs to NIACs is not in order.[87] Even more problematic though is the part focusing on the inability of the concerned groups to abide by IHL. The Court indeed seemed to focus more on the *unwillingness* than on the *inability* of the concerned groups to abide by IHL,[88] whereas it is clear that the determining factor for the assessment of

[80] *Sharia4Belgium* case, op. cit. note 79, pp. 31-32.
[81] *Ibid*., p. 31.
[82] *Ibid*., p. 33.
[83] *Ibid*.
[84] On this point see, amongst others, V. Koutroulis, op. cit. note 77, p. 87; R. Bartels, 'Terrorist groups as parties to an armed conflict', Proceedings of the Bruges Colloquium: Terrorism, Counter-terrorism and International Humanitarian Law, 20-21 October 2016, *Collegium*, No. 47, Autumn 2017, p. 65; J. Wouters and T. Van Poecke, op. cit. note 75, p. 1618.
[85] On this point see also V. Koutroulis, op. cit. note 77, p. 98.
[86] *Sharia4Belgium* case, op. cit. note 79, p. 32.
[87] V. Koutroulis, op. cit. note 77, p. 100.
[88] The Court indeed stated that "in that respect it seems unambiguous that the members of these groups are not able and also do not want to be able to observe IHL which they, in fact, reject [emphasis in original]", translated from *Sharia4Belgium* case, op. cit. note 79, p. 36. On this point see also, C. Paulussen and E. Entenmann, 'National Responses in Select Western Countries to the Foreign Fighter Phenomenon', in A. de Guttry, F. Capone and C. Paulussen (eds.), *Foreign Fighters under International Law and Beyond*, The Hague, T.M.C. Asser Press/Springer Verlag 2016, p. 398, footnote 35.

whether the required degree of organisation is met is not whether the members of the concerned group actually abide by IHL but whether they have the capacity to do so and have structures in place to potentially deal with violations.[89] In addition, the Court seemed to extensively refer to the motives on the basis of which the concerned groups were fighting. It for example stated that "their fight against the Syrian regime is a fight against all infidels (including Shiite Muslims), against democracy, human rights and humanitarian law".[90] The reasons why a group is actually fighting are however not relevant, neither for the determination of the existence of an armed conflict, nor for the assessment of the degree of organisation of such group.[91] Not only is the reasoning of the Court thus not in line with the way IHL is to be applied, it is also not conform to what has been generally held in practice in relation to these two specific groups. Indeed, both Jahbat Al Nusra and Majlis Shar al-Mudjahideen have generally been held to be a party to the armed conflict in Syria and hence should be considered armed forces as defined by IHL.[92] The Court of Appeal nevertheless upheld the judgment of the Court of First Instance in this case.[93] A similar reasoning seems to have furthermore been adopted by the Belgian Courts in relation to IS and hence the exclusion clause was also not applied to that group.[94] This has led some to argue that the Belgian Court explained Article 141*bis* in a way that deviates from IHL in order to avoid these groups, considered as being illegitimate, from falling outside of the scope of CT prosecution.[95]

This feeling, that the interpretation and application of Article 141*bis* is being politically motivated, seems to be reinforced by the fact that the exclusion clause has been upheld in relation to an indictment against the PKK. Indeed, in a decision taken by the Chamber of Indictment of Brussels on 3 November 2016 and later confirmed in appeal on 14 September 2017, the exclusion clause was activated in favour of the PKK given that the Chamber deemed that an armed conflict existed between the PKK and Turkey and that the PKK was an armed force as defined under IHL.[96] Whereas in this case the Chamber actually reached the correct conclusion by stating that the PKK meets the criteria of armed forces as defined by IHL, the reasoning still shows that the question was being addressed in a wrong manner. Indeed, from the outset, the Chamber affirmed that the question it was concerned with is "whether the PKK is a terrorist organization or an armed force

[89] V. Koutroulis, op. cit. note 77, p. 101.
[90] *Sharia4Belgium* case, op. cit. note 79, p. 36.
[91] This has been very consistently held by jurisprudence. On this point see e.g. the *Limaj* case before the ICTY as referred to in V. Koutroulis, op. cit. note 77, p. 101 (footnote 51): "The determination of the existence of an armed conflict is based solely on two criteria: the intensity of the conflict and organisation of the parties, the purpose of the armed forces to engage in acts of violence (...) is, therefore, irrelevant" (§170).
[92] In relation to Al Nusra see e.g. T. Gill, 'Classifying the Conflict in Syria', *International Law Studies (Naval War College)*, Vol. 92, 2016, p. 374.
[93] See Hof van beroep (Antwerpen), Arrest, 26 January 2016.
[94] As was already mentioned it is very difficult to obtain access to all judgments in this field. This information is relayed through a parliamentary question raised by S. van Hecke, who asked how many times Art. 141*bis* had been activated and if so in relation to which groups, to which the Belgian Minister of Justice, K. Geens, answered that "in all instances in which it had been raised, the judiciary had held that it was not applicable" and that "even though they have never contested that the conflict in Syria was a non-international one, the classification of terrorist organization IS and its predecessors and of the terrorist organization Jabhat al-Nosra [as armed forces] has always been refuted", see Chambre des représentants, Compte rendu integral des interventions, 29-06-1016, DOC CRIV 54 COM 459, p. 34.
[95] T. Ruys and S. Van Severen, op. cit. note 77, p. 535.
[96] This decision by the Brussels Chamber of Indictment of 3 November 2016 has not been officially released. The appeal of 14 September 2017 confirming that decision has however been released and an abstract can be found (in Dutch) in *Rechtskundig Weekblad*, 2018-19, nr. 14, pp. 1611-1616.

involved in an armed conflict".[97] As was already mentioned above as a criticism to the reasoning of the Court in the S*haria4Belgium* case, the motives of the group under consideration do not matter for classification under IHL. It could thus well be that the same group is actually at the same time a terrorist organisation and an armed force as defined under IHL. It is thus not an 'either or' story as the Chamber seemed to suggest in this indictment.[98] The Chamber did however seem to slightly nuance this point by recognising that acts of terror can also be committed during war and that these fall under the IHL framework.[99] This led the Chamber to also, and arguably correctly, recognise that when armed forces that are party to an armed conflict commit acts of terrorism outside of the area of conflict, these should not be considered acts of armed forces in the framework of an armed conflict but should fall under CT legislation.[100] It is thus less of a black and white story than the initial question may suggest but there are nevertheless still some issues in relation to its framing. One of the elements that is explicitly raised by the Chamber in reference to the question whether the PKK can be considered an armed force in the sense of IHL or not is that "the aim of the PKK is not to inflict terror upon the population but to establish an independent state".[101] As Jan Wouters and Thomas Van Poecke correctly point out: by including the assessment whether the PKK is a terrorist organisation or not in the determination of the status of the PKK as a party to the conflict, the Chamber creates a circular reasoning.[102] Indeed by stating that when the group in question is not terrorist it could be an armed force it renders Article 141*bis* meaningless: "if you are not acting on the basis of a terrorist intention, you cannot commit terrorist offences in the first place"[103] and you will not be prosecuted under the Title of the Belgian Criminal Code that Article 141*bis* is trying to discard.[104] In order to avoid it from becoming void, Article 141*bis* of the Belgian Criminal Code should be interpreted in conformity with IHL rather than based on legitimacy grounds and on whether the group concerned actually abides by IHL.[105]

The reason why the Belgian Courts are struggling is actually clear: what if we were to consistently apply this exclusion clause in relation to armed groups that at the same time might also be considered a terrorist organisation? Would that mean that members of, for example, IS could never be prosecuted under CT legislation in Belgium? In the authors' view, the existence of such an exclusion clause does not mean that they *per se* cannot be prosecuted under CT legislation for certain acts. As the Chamber actually correctly pointed out, if there is no armed conflict going on back home, acts committed outside of the actual armed conflict cannot fall under the exclusion clause.[106] This would be the case for example of a terrorist act by an IS member on Belgian soil given that that there is no armed conflict taking place on Belgian territory. It would also not exclude prosecution for membership of a terrorist organisation given that this is a fact that also exists outside of the existence of the concerned armed conflict. Ultimately, this is in line with the general point advocated in this article. A different assessment can be made depending on the

[97] *PKK* indictment, op. cit. note 79, as cited in *Rechtskundig Weekblad*, 2018-19, nr. 14, p. 1612.
[98] On this point see also J. Wouters and T. Van Poecke, op. cit. note 75, p. 1619.
[99] *PKK* indictment, op. cit. note 79, as cited in *Rechtskundig Weekblad*, 2018-19, nr. 14, p. 1614.
[100] *Ibid*.
[101] *Ibid*. On this point see also T. Van Poecke, op. cit. note 73.
[102] J. Wouters and T. Van Poecke, op. cit. note 75, p. 1620.
[103] *Ibid*.
[104] J. Wouters and T. Van Poecke, op. cit. note 75, p. 1620.
[105] T. Ruys and S. Van Severen, op. cit. note 77, p. 538.
[106] *PKK* indictment, op. cit. note 79, as cited in *Rechtskundig Weekblad*, 2018-19, nr. 14, p. 1614.

actual act concerned: an act not committed during the actual conduct of hostilities might still fall under CT legislation. The acts committed during the actual conduct of hostilities, however, will be exempt from prosecution under CT legislation, simply because there is a more adequate body of law capable of dealing with the prosecution of such acts, namely IHL.

3.3. Cases in which foreign fighters have (also) been prosecuted for war crimes

As was already mentioned, whereas most returning FFs have been prosecuted for terrorist-related offences, there are nevertheless some exceptions. There are instances in which returning FFs have been prosecuted (also) for war crimes. The German and Swedish practices are of particular relevance here given that they were the two first countries in which individuals were prosecuted for serious crimes committed in Syria during the conflict.[107] This article's focus will be on the practice of Germany though given that most of the convictions for war crimes in Sweden actually concerned Iraqi and Syrian asylum seekers rather than returning FFs.

The two German cases worth looking at more particularly in the interest of this research are the *Aria L.* and *Abdelkarim El. B.* cases.[108] The *Aria L.* case[109] concerned a German national, who became radicalised and decided to travel to Syria. At the basis of his prosecution were pictures of him posing with heads of enemy combatants impaled on sticks. It could not be proven that he had actually decapitated those enemy combatants himself so he was ultimately charged with the war crime of treating a person who is protected under IHL in a gravely humiliating and degrading manner and sentenced to two years of imprisonment. He was not indicted for membership of a terrorist organisation given that there was not enough proof about which particular terrorist organisation he had actually joined. In the *Abdelkarim El. B.* case,[110] the defendant was also a German national. Just like Aria L. he was convicted of war crimes because he treated a protected person in a gravely humiliating or degrading manner, having filmed and encouraged his fellow IS fighters to cut the nose and ears of a dead body, to step on it and to shoot it in the face. He was on top of that convicted for membership of a terrorist organisation abroad given that, contrary to Aria L., membership of IS was proven in this particular case. The fact that Germany tries to prosecute returning FFs for both membership of a terrorist organisation and war crimes whenever possible is also illustrated by the latest pending case against Jennifer W. before the District Court in Munich.[111] Jennifer W, a German national who joined IS, is facing war crimes charges for letting a five year old Yazidi girl,

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[107] Human Rights Watch, '"These are the Crimes we are Fleeing": Justice for Syria in Swedish and German Courts', October 2017, p. 22 (HRW report).

[108] Relevant passages of these judgments translated into English can be found in the T.M.C. Asser Instituut's International Crimes Database, respectively here http://www.internationalcrimesdatabase.org/Case/3276 and here http://www.internationalcrimesdatabase.org/Case/3297 - most of the factual information relayed in this section comes from the translation provided in the database.

[109] *Prosecutor v. Aria L.*, Higher Regional Court (Frankfurt am Main), Judgment, 12 July 2016, Case number 5-3 StE 2/16-4-1/16.

[110] *Prosecutor v. Abdelkarim EL. B.*, Higher Regional Court (Frankfurt am Main), Judgment, 8 November 2016, Case number 5-3 StE 4/16-4-3/16.

[111] A. Shubert and N. Schmidt, 'German ISIS member faces war crime trial over Yazidi girl's murder', *CNN*, 9 April 2019, available at: https://edition.cnn.com/2019/04/09/europe/germany-isis-bride-yazidi-murder-trial-grm-intl/index.html.

whom she had enslaved together with her husband, die of thirst.[112] She is furthermore accused of being a member of a terrorist organisation.[113]

The German Courts thus seem to correctly take the dual nature of FFs into account, i.e. the fact that they can be simultaneously member of a terrorist organisation and of a party to an armed conflict, and hence assess their conduct both from a CT and an IHL perspective. That this solution could and most probably will also be applied more frequently in other countries is for example illustrated by a recent case adjudicated in the Netherlands. It is the first case in which a Dutch FF, Oussama A., who allegedly joined IS, was charged not only with membership of a terrorist organisation (and terrorist-related preparatory acts), but also with war crimes.[114] According to the Prosecution, Oussama violated the personal dignity of war victims, when he posed smiling next to a crucified man and subsequently posted this picture on Facebook.[115] The judges agreed and he was convicted to almost eight years of imprisonment.[116] In contrast, another Dutch FF convicted on the same day, Reda N., and who was only convicted for terrorist-related offences, was sentenced to an imprisonment of a bit more than four and a half years.[117] The case of Oussama A. seems to deviate from the rest of the Dutch case law discussed in this article, in the sense that next to prosecution on the basis of CT legislation, the Prosecution also asked for this one conduct, the posing with a crucified person, to be assessed under IHL. It is however not in contradiction as such with the Dutch cases discussed earlier given that Courts have clearly stated that multiple different legal frameworks might be applicable in cases concerning FFs.[118] The Court should be praised for taking due account of the IHL framework and for offering an IHL-consistent analysis of the nature of the armed conflict. The Court correctly stated that for IHL to be applicable there needs to be an armed conflict.[119] On this point, the Court concluded that there was a NIAC going on in Syria at the time of the committed offence.[120] It furthermore also confirmed that IS was sufficiently organised in order to be considered an armed group.[121] Given that there was a NIAC at the time the offence was committed, the Court could apply the relevant rules of IHL to the conduct in question.[122] *In casu*, the Court applied Common Article 3 to the Geneva Conventions. Regardless of the fact that this case was still mainly framed in CT terms, and still allows looking at terrorist-related crimes through the prohibition of merely participating in hostilities – which should preferably not be prosecuted, it does however suggest that when there is evidence of a war crime, Dutch Courts seem willing to prosecute FFs for war crimes alongside terrorist-related offences.

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[112] *Ibid*.
[113] *Ibid*.
[114] Prosecutor v. Oussama A. (District Court of The Hague, 23 July 2019). The English translation is available at: http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2019:10647.
[115] *Ibid.*, § 5.4.
[116] Prosecutor v. Oussama A. (District Court of The Hague, 23 July 2019). § 8.3.
[117] Prosecutor v Reda N. (District Court of The Hague, 23 July 2019), § 8.3.
[118] Prosecutor v. Maher H. (District Court of The Hague, 1 December 2014), §3.3.8.
[119] *Ibid.*, §5.3.1.
[120] *Ibid.*, §5.3.3.2.
[121] *Ibid.*, §5.3.3.2.
[122] *Ibid.*, §5.3.3.2.

3.4. Concluding remarks on the assessment of the case law: differentiated approaches

It is clear from the assessment of the limited case law concerning FFs in which the interaction between CT and IHL has been discussed that there is no single approach in dealing with this question. Not only is there no single approach between the different jurisdictions but differential approaches are also noticeable *within* the same jurisdiction. As was highlighted in a CODEXTER discussion paper: "The varied responses from counter-terrorism entities and the surrounding discourse, at both domestic and international levels, has contributed to a significant blurring of the relationship between the legal regimes governing acts of terrorism and armed conflict".[123]

There is thus no single and consistent approach through which this issue is currently being addressed. In addition, there is generally a weak recourse to IHL by domestic judges when dealing with terrorism cases.[124] Arguably, the absence of a single approach and the disregard for IHL in relation to the prosecution of FFs is something that should be urgently remedied.

4. Way forward

The interaction between CT and IHL in the prosecution of FFs presents a certain number of important challenges.[125] Indeed, groups with a dual nature, such as FFs, "complicate the relationship between terrorism and the law of armed conflict".[126] In the authors' view, the German and emerging Dutch practice currently represents the best practice for dealing with the prosecution of (returning) FFs were possible as it takes into account that they can be members of a terrorist organisation and at the same time members of a party to the conflict. They should thus be prosecuted for membership (and potentially other related acts falling outside of the conduct of hostilities) under CT law but also for specific acts committed during the conduct of the hostilities and which amount to war crimes (or other violations of IHL).[127] The important thing is for the acts committed during the conduct of hostilities, i.e. when the FFs are actually engaged in fighting in the ongoing NIAC, to be assessed under IHL rather than CT legislation in order to prevent FFs from being prosecuted for acts that might be prohibited under CT but not under IHL. Indeed, "[t]he core difference between IHL and counter-terrorism law in armed conflict situations, is that, in legal terms IHL condones certain acts of violence as lawful or unlawful, whereas any act of violence designated as 'terrorist' is always unlawful".[128] To illustrate with a concrete example: the killing of a legitimate target is not prohibited under IHL whilst it would most probably be under CT law.[129] Arguably, a differentiated approach must be chosen, based on the actual context in which the act has been committed. If the act has been committed during the actual conduct of hostilities it should be assessed

[123] CODEXTER discussion paper, op. cit. note 29, p. 3.
[124] Proceedings of the Bruges Colloquium: Terrorism, Counter-terrorism and International Humanitarian Law, 20-21 October 2016, *Collegium*, No. 47, Autumn 2017, p. 41 (discussion after the first session).
[125] CODEXTER discussion paper, op. cit. note 29 p. 3.
[126] *Ibid*., p. 6.
[127] This research focuses on the relationship between CT and IHL (hence war crimes) but a similar reasoning could also be applied to other international crimes such as crimes against humanity and genocide. Cf. also, for the combination terrorism and crimes against humanity, 'Hungary charges Syrian accused of beheading, killing for IS', *Reuters*, 3 September 2019.
[128] CODEXTER discussion paper, op. cit. note 29, p. 10.
[129] ICRC challenges report 2015, op. cit. note 35, p. 14.

under IHL. Other acts committed by the concerned group and which fall outside of the conduct of hostilities should be assessed under CT legislation. This would include membership of a terrorist organisation as well as for example training for terrorism (with the aim of committing terrorist attacks in the home country after return) (unless there would also be an armed conflict back home which is most often not the case). A same person could thus for example be prosecuted for membership of a terrorist organisation, preparation of a terrorist act back home and the killing of civilians during the conduct of hostilities. The first two acts relate to CT legislation, the latter to IHL. To further complicate the scenario, a same person could be prosecuted for membership of a terrorist organisation under CT legislation and for an act the primary purpose of which is to spread terror in the framework of the armed conflict under Rule 2 of the ICRC Customary IHL database.[130]

Prosecuting FFs for the crimes they have *actually* committed (and not merely for membership of a terrorist organisation) is of crucial importance for the victims of said crimes. However, in many cases prosecutors may determine that prosecution of mere membership of a terrorist organisation will be the best approach, regardless of the specific acts committed while part of that organisation.[131] As indicated in the introduction, a 'one-size fits all' approach must be avoided. This is clearly illustrated by the Iraqi example. Indeed, on the basis of Iraqi CT legislation allowing for the death penalty for anyone who commits, incites, plans, finances or assists in acts of terrorism. Iraqi courts "are meting out one-size-fits-all punishment for the perpetrator of crimes against humanity as well as for the wife of an Islamic State fighter who may have had little say in her husband's career".[132] Besides such a 'one-size-fits-all' approach being completely contrary to all basic guarantees under criminal law, the low bar for conviction also means that actual grave crimes are not being investigated and hence proper justice cannot be rendered.[133] Admittedly, the Iraqi example is a rather extreme one but it nevertheless clearly illustrates the potential risk associated with a mere focus on CT legislation, and membership charges more in particular. Regardless of which actual acts a person has committed he or she will, most of the time, be prosecuted in a similar manner. Furthermore, an approach focusing on CT could also generate issues of perception. In the words of Human Rights Watch: "The use of terrorism charges without significant effort to pursue prosecution for war crimes (....) (where there is an indication that such crimes have been committed) could send the message that the authorities' only focus is to combat domestic threats".[134]

Finally, adding actual violations of IHL to the prosecution of FFs where appropriate also sends out a clear message that such violations will not be tolerated.[135] By mostly focusing on CT, there is a risk of creating a negative precedent, suggesting that all acts carried out by NSAGs are terrorist by nature, and hence rendering the issue of compliance with IHL by such groups or other NSAGs even more difficult.

The authors recognise the difficulties associated with the observations and recommendations made in this article. There seem to be three reasons explaining why

[130] See n. 28 and accompanying text.
[131] CODEXTER discussion paper, op. cit. note 29, p. 3.
[132] M. Coker and F. Hassan, 'A 10-Minute Trial, a Death Sentence: Iraqi Justice for ISIS Suspects', *The New York Times*, 17 April 2018.
[133] *Ibid*.
[134] HRW report, op. cit. note 107, p. 4.
[135] Eurojust Genocide Network report, op. cit. note 43, p. 16.

IHL is not frequently relied upon in domestic courts: (1) the judicial efficiency argument; i.e. membership of a terrorist organisation is much easier to prove; (2) IHL is little known by domestic judges, and (3) the misconception that invoking IHL would lead to impunity.[136] These three elements will be addressed in turn here.

The reason why most of the time the focus has been put on prosecution for membership of a terrorist organisation is simply because this is the easiest charge to prove. Indeed, "it is often easier to prove that an individual is a member of a terrorist organization than to link such individual to any underlying serious criminal act".[137] It is true there are important difficulties associated with accumulating enough evidence in relation to conduct that has happened abroad (which is by definition the case for the potential war crimes committed by FFs).[138] Both the *Aria L.* and *Abdelkarim El. B.* cases (as well as the Dutch *Oussama A.* case) concern prosecution for war crimes on the basis of a picture of the defendant, in which the posing on the picture itself constituted enough ground for prosecution. The *Aria L.* case clearly shows the limits of such a piece of evidence given that whereas the defendant could be prosecuted for posing with the decapitated head, it could not be proven whether he had actually decapitated the person himself. One should however not underestimate the potential of new techniques, such as using Open Source Intelligence (OSINT)[139] and military/battlefield evidence[140] in the context of prosecuting such crimes.

Next to issues of evidence, it is also crucial to invest in adequate resources. Indeed, as was highlighted by a Human Rights Watch report: "efforts to pursue terrorism charges can and should go hand in hand with efforts and resources to investigate and prosecute war crimes (...)".[141] Hence, it would be important to 1) establish a specialised war crimes unit[142] and 2) encourage the cooperation and coordination, or even the integration, of such a unit with/in the CT apparatus. A call for more means and a better organisation of the judicial apparatus on this point has also been made by Tom Ruys and Sebastiaan Van Severen in relation to Belgium for example.[143] A well-functioning national prosecution system is even more important considering that the International Criminal Court (ICC) does not currently have jurisdiction over the situation in Syria[144] and that despite the calls for a specific international/hybrid tribunal for Syria, this has not yet been established. It is crucial to ensure that States "are able to bring returned or otherwise apprehended foreign terrorist fighters to justice, in the most efficient and effective manner, in

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[136] Proceedings of the Bruges Colloquium: Terrorism, Counter-terrorism and International Humanitarian Law, 20-21 October 2016, *Collegium*, No. 47, Autumn 2017, pp. 43-44 (discussion after the first session).
[137] HRW report, op. cit. note 107, p. 39.
[138] On this point, see also T. Ruys and S. Van Severen, op. cit. note 77, p. 538.
[139] On this point see more particularly Eurojust Genocide Network report, op. cit. note 43. See also 'The New Forensics: Using Open Source Information to Investigate Grave Crimes', Human Rights Center, UC Berkeley School of Law, 2018, available at: https://www.law.berkeley.edu/wp-content/uploads/2018/02/Bellagio_report_2018_9.pdf and BBC News, 'Anatomy of a Killing', 23 September 2018, available at: https://www.youtube.com/watch?v=4G9S-eoLgX4.
[140] B. van Ginkel and C. Paulussen, 'The Role of the Military in Securing Suspects and Evidence in the Prosecution of Terrorism Cases before Civilian Courts: Legal and Practical Challenges', *ICCT Research Paper*, 7 May 2015, available at: http://www.icct.nl/download/file/ICCT-Van-Ginkel-Paulussen-The-Role-Of-The-Military-In-Securing-Suspects-And-Evidence-In-The-Prosecution-Of-Terrorism-Cases-Before-Civilian-Courts.pdf.
[141] HRW report, op. cit. note 107, p. 4.
[142] *Ibid*., p. 22.
[143] T. Ruys and S. Van Severen, op. cit. note 77, pp. 538-539.
[144] P. Frank and H. Schneider-Glockzin, 'Terrorismus und Völkerstraftaten im bewaffneten Konflikt', *Neue Zeitschrift fur Strafrecht*, Vol. 37, No. 1 (2017), p. 4.

accordance with applicable and relevant law, and taking into account the need to provide for a fair trial". [145]

Finally, considering IHL when necessary does not lead to impunity[146] and hence "is not an obstacle to effectively combating terrorism".[147] In fact, adding war crimes to prosecution for membership of a terrorist organisation could even provide for more appropriate, that is: longer penalties.[148]

[145] CODEXTER discussion paper, op. cit. note 29, p. 2.
[146] O. Venet, op. cit. note 74, p. 169.
[147] H.-P. Gasser, op. cit. note 30, p. 566.
[148] Eurojust Genocide Network report, op. cit. note 43, p. 16.