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Dealing with European foreign fighters in Syria: Governance challenges and legal implications

Bakker, E.; Paulussen, C.; Entenmann, E.

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Dealing with European Foreign Fighters in Syria: Governance Challenges & Legal Implications

Edwin Bakker, Christophe Paulussen and Eva Entenmann

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The number of European foreign fighters with a jihadist political agenda participating in the Syrian civil war has increased exponentially over the past months and has become an ever-growing concern for European policymakers. It is particularly the possibility that returned foreign fighters have radicalised that makes them a potential threat – if only to themselves and their direct surroundings. In this ICCT Research Paper, Edwin Bakker, Christophe Paulussen and Eva Entenmann examine some of the challenges, as well as possible strategies and legal mechanisms available for European policymakers to address the foreign fighters phenomenon. It first assesses the complex threat (potentially) posed by returning mujahidin to Europe's security. The Paper then outlines some of the risk assessment and governance challenges that European policymakers, governments and legal practitioners face in relation to (potential) foreign jihadi fighters and returnees. Prosecution via international crimes will be analysed before turning to specific national practices. Here, the Paper focuses on a few European states that have a considerable number of departing foreign fighters as estimated by their own intelligence services: Austria, Belgium, France, Germany, Italy, Spain, the Netherlands and the UK. The Paper concludes with a series of recommendations.

About the Authors

Prof. Dr. Edwin Bakker is Professor of (Counter-)Terrorism Studies at Leiden University, Director of the Centre for Terrorism and Counterterrorism (CTC) of that same university, and Fellow at ICCT. He studied Economic Geography (Netherlands) and Political Geography (Netherlands and Germany). In 1997, he defended his PhD thesis on minority conflicts in Slovakia and Hungary. He taught classes in international policies on preventing and managing separatism and intra-state war in the Balkans at the Centre for International Conflict Analysis and Management (CICAM), Nijmegen University. Between 2003 and 2010 he was a fellow at the Netherlands Institute of International Relations 'Clingendael' where he headed the Clingendael Security and Conflict Programme (since 2007). His research interests at Leiden University and the ICCT are, amongst other, radicalisation processes, jihadi terrorism, unconventional threats to security and crisis impact management.

Dr. Christophe Paulussen is an ICCT Research Fellow and a senior researcher international humanitarian law/international criminal law at the T.M.C. Asser Instituut, coordinator of the inter-faculty research platform "International Humanitarian and Criminal Law Platform" and Research Fellow at ICCT. After a propeduse Dutch law (cum laude), a doctoraal International and European Law (with distinction) and a research master (cum laude), he started working as a PhD candidate at the Department of European and International Public Law of Tilburg University in 2005. On 24 September 2010, Christophe defended his PhD thesis "Male captus bene detentus? Surrendering suspects to the International Criminal Court". Inspiration for the subject of his PhD thesis was drawn from the (more or less homonymic) thesis of his doctoraal studies which won not only the Tilburg University Thesis Prize 2004 but also the first prize for master's theses in the framework of the Max Van Der Stoel Human Rights Award 2004. After his PhD defence, and before moving to The Hague, Christophe worked as an assistant professor at Tilburg University.

Eva Entenmann is Programme Assistant at ICCT. Prior to her arrival at the Centre, she undertook a Research Assistantship at the Vrije Universiteit Amsterdam. She was also a Research Associate at the Public International Law and Policy Group (PILPG), supported an environmental initiative as project officer, and completed internships at the International Bar Association (IBA) as well as the Australian Institute of International Affairs (AIIA). She studied international relations and media at The University of Adelaide in Australia and graduated with a Master of Laws (cum laude) specialising in Law and Politics of International Security from the Vrije Universiteit Amsterdam.

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Contact

ICCT – The Hague
Koningin Julianaplein 10
P.O. Box 13228
2501 EE, The Hague
The Netherlands

T +31 (0)70 800 9531

E info@icct.nl

*All papers can be downloaded free of charge at www.icct.nl
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1. The Foreign Fighter Phenomenon¹

The phenomenon of European foreign fighters is not a new one. There are many examples of groups and individuals that, for a variety of reasons and with different (ideological) backgrounds, have joined a violent struggle abroad. These include for example tens of thousands of anarchists, communists and socialists headed for Spain to join the international brigades in the Spanish civil war. And in more recent years, at least a few hundred Muslims from across Europe took part in the civil conflict in Bosnia or went to fight in Afghanistan, Iraq and other Muslim-majority countries.

In the case of Syria, the phenomenon of foreign fighters emerged after non-violent protests in March 2011 turned into a full-blown civil war. The conflict already drew fighters from other parts of the world at an early stage. This group of foreign fighters includes a wide range of individuals and groups, including foreigners who joined the Free Syrian Army, Iranian troops, Hezbollah militias, and those who joined various jihadi groups, of which the Islamist al-Nusra Front and the Islamic State in Iraq and Syria are arguably the most prominent ones. This ICCT Research Paper focuses on the latter category and only on those persons from Europe – both residents and citizens. We define these “jihadi foreign fighters”, also called mujahidin, as those who regard it their duty to participate in what they believe to be a jihad of the sword, a holy war against the regime of Syrian President Bashar al-Assad and its Shiite allies, and who join local or foreign groups with a jihadist political agenda.²

The first signs of the presence of large numbers of foreign jihadi fighters in Syria date from late 2011. According to a report by the Washington Institute for Near East Policy, in the first half of 2012, 700 to 1,400 fighters had entered Syria.³ The report states that the percentage of foreign fighters – back then between 4 and 7 percent of the total number of fighters – is comparable to situations in other Islamic jihad-areas such as Bosnia, Chechnya, Afghanistan and Iraq, where they made up between 1 and 15 percent of the fighters. In August 2013, however, their numbers had grown to more than 6,000 foreign fighters according to the New York Times.⁴ Thus, in less than two years, Syria seems to have become the number one jihadist destination and most prominent jihadist battlefield in the world, providing both a rallying point and a training ground for radical Islamists from other nations.⁵

While the largest contingent of foreign fighters in Syria hails from neighbouring countries and North Africa,⁶ the war has also attracted people who live in European Union (EU) Member States. In April 2013, the International Centre for the Study of Radicalisation assessed more than 450 sources in the Western and Arab media as well as martyrdom notices that have been posted in jihadist online forums. Based on this analysis, between 140 and 600 Europeans are estimated to have gone to Syria since early 2011.⁷ By winter of 2013, most experts were estimating between 1,100 and 1,700 individuals from Europe.⁸ Most of these fighters are from Western European countries, such as Belgium, the Netherlands, Germany, the United Kingdom (UK) and France. In addition there are perhaps as many as 300 to 400 Russian citizens fighting in Syria, most of them from Russia's North Caucasus region, including Chechnya.⁹

¹ The authors would like to thank Fenna van Kempen (T.M.C. Asser Institute) for her assistance in the preparation of this Research Paper.

² In this Paper, the term jihad refers to the so-called violent or lesser jihad. A person who engages in this type of jihad is called a mujahid (in plural mujahidin), a jihadi or jihadi terrorist – the latter depending on the kind of activities in which they are involved. Their actions are claimed to be in furtherance of the goals of Islam. These goals may include the establishment of a (pan) Islamic theocracy and their restoration of the caliphate. See, E. Bakker, “Characteristics of Jihadi Terrorists in Europe (2001-2009)”, in Rik Coolsaet, ed. *Jihadi Terrorism and the Radicalisation Challenge: European and American Experiences* (Surrey: Ashgate Publishing Limited, 2011), p. 2.

³ A. Y. Zelin, “Foreign Fighters Trickle into the Syrian Rebellion”, *The Washington Institute for Near East Policy*, 11 June 2012, <http://www.washingtoninstitute.org/policy-analysis/view/foreign-fighters-trickle-into-the-syrian-rebellion>.

⁴ A. Barnard and E. Schmitt, “As Foreign Fighters Flood Syria, Fears of a New Extremist Haven”, *New York Times*, 8 August 2013, http://www.nytimes.com/2013/08/09/world/middleeast/as-foreign-fighters-flood-syria-fears-of-a-new-extremist-haven.html?_r=0.

⁵ T. Atlas, “Foreign Fighters Flocking to Syria Stirs Terror Concerns”, *Bloomberg*, 20 July 2013, <http://www.bloomberg.com/news/2013-07-19/u-s-stakes-in-syria-grow-as-radicals-rally-to-the-fight.html>.

⁶ A. Y. Zelin, “Foreign Fighters Trickle into the Syrian Rebellion” (2012).

⁷ A. Y. Zelin, “European Foreign Fighters in Syria”, *ICSR Insight*, 2 April 2013, <http://icsr.info/2013/04/icsr-insight-european-foreign-fighters-in-syria-2/>.

⁸ See e.g. T. Hegghammer, “Number of Foreign Fighters from Europe in Syria is historically unprecedented. Who Should be Worried?”, *The Washington Post – The Monkey Cage*, 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/>.

⁹ “Hundreds of Russians Fighting as Mercenaries in Syria – FSB”, *Ria Novosti*, 20 September 2013, <http://en.ria.ru/world/20130920/183614084/Hundreds-of-Russians-Fighting-as-Mercenaries-in-Syria--FSB.htm>.

The majority of European fighters have joined Syrian or international jihadi groups. The most important groups include the Jabhat al-Nusra or al-Nusra Front, a Syrian jihadist group fighting against Assad's regime with the aim of establishing an Islamist state in Syria. This group has been described as the most effective rebel fighting group in Syria.¹⁰ Its core members include veteran Syrian jihadis who have fought in Iraq under the al Qaeda-affiliated Islamic State of Iraq,¹¹ which was formerly known as al Qaeda in Iraq. Reportedly, as much as 20 percent of al-Nusra's leadership is made up of foreigners.¹² Another group said to almost exclusively consist of foreigners including Europeans, is Jaish al Muhajireen wal-Ansar or the Army Emigrants and Helpers.¹³ This group is led by Abu Omar al-Shesheni¹⁴ and was responsible for the capture of a military airbase in Aleppo in August 2013.¹⁵ 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.¹⁶ Another group, al-Dawla al-Islamiyya, or the Islamic State in Iraq and Syria, is believed to consist of up to 40 percent of foreigners,¹⁷ some of whom were said to have been involved in the kidnapping of two western journalists in July 2012 (see also subsection 6.8).¹⁸

The presence of foreign jihadi fighters in the Syrian war in general, and of Europeans in particular, has raised concerns in many western countries. It is not only families and communities that worry about losing their youth to Syria's increasingly bloody civil war; European governments and security services are particularly concerned about the potential threat returning fighters could pose.

This Research Paper examines the challenges, as well as possible strategies and legal mechanisms available for European policymakers to address the foreign fighter phenomenon. It first assesses the complex threat (potentially) posed by returning mujahidin to Europe's security (section 2). The Paper then outlines some of the risk assessment (section 3) and governance (section 4) challenges that European policymakers, governments and legal practitioners face in relation to (potential) foreign jihadi fighters and returnees. Prosecution via international crimes will be analysed before turning to specific national practices (sections 5 and 6). Here, the Paper focuses on a few European states that have a considerable number of departing foreign fighters as estimated by their own intelligence services: Austria, Belgium, France, Germany, Italy, Spain, the Netherlands and the UK.¹⁹ The Paper concludes with a series of recommendations (section 7).

2. The Potential Threat

The risk that returning foreign fighters may pose to society has not yet been addressed at length by international organisations. Although the "intervention of foreign combatants fighting on behalf of the Syrian regime in Al Qusayr"²⁰ was condemned in a resolution of the United Nations (UN) Human Rights Council, no mention was made of the risk posed by those foreign fighters returning. Instead, the Council noted "that their [foreign fighters] involvement further exacerbates the deteriorating human rights and humanitarian situation, which has a serious negative impact on the region".²¹

¹⁰ "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>.

¹¹ 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>.

¹² 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-/>.

¹³ "Syria Crisis: Guide to Armed and Political Opposition" (2013).

¹⁴ *Ibid.*

¹⁵ 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/Syria-Foreign-jihadists-behind-the-rebel-capture-of-Aleppo-airport.html>.

¹⁶ 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>.

¹⁷ K. Wong, "Foreign Jihadists Surpass Afghan-Soviet War, Storm Syria in Record Numbers" (2012).

¹⁸ N. Benotman and E. Naseraldin, "The Jihadist Network in the Syrian Revolution: A Strategic Briefing".

¹⁹ T. Hegghammer, "Number of Foreign Fighters from Europe in Syria is historically unprecedented. Who Should be Worried?" (2013).

²⁰ UN Human Rights Council, Resolution 23/1, "The deteriorating situation of human rights in the Syrian Arab Republic, and the recent killings in Al-Qusayr", 29 May 2013, A/HRC/RES/23/1, 19 June 2013, http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/23/1, para. 5.

²¹ *Ibid.*

Governments and key representatives of counter-terrorism agencies on domestic and regional levels, however, have expressed concerns over the possibility of individuals traveling to Syria becoming further radicalised and receiving combat training. They might return to Western Europe and potentially to the United States (US) as part of a global jihadist movement, according to Matthew Olsen, director of the US government's National Counterterrorism Center.²² Europol warned in its 2012 Terrorism Situation and Trend Report that returning fighters "have the potential to utilize their training, combat experience, knowledge and contacts for terrorist activities inside the EU".²³ The Netherlands even raised its terrorism threat level due to concerns over radicalisation of Dutch foreign fighters returning from Syria.²⁴ Germany's Minister of the Interior, Hans-Peter Friedrich, fears that Syrian jihadi veterans returning to Europe, after being trained in "deadly handwork", will be "ticking time bombs".²⁵ And, according to the President of Germany's domestic intelligence service Hans-Georg Maaßen, such individuals would appear in Germany's militant Muslim scene as heroes and would be emotionally charged to engage in terrorism or incitement to terrorism. Maaßen added: "In the worst case they are coming back with a direct fighting mission".²⁶

How probable is this? Past experiences with mujahidin have showed that the war of a jihadi fighter is indeed not a one-way street. Although a number die in combat and others move on to other jihadi battlefields,²⁷ some, if not many, do return. Exact numbers or good estimates are not available, but we do know of those "returnees" from foreign battlefields who were involved in terrorist plots and successful attacks back home. Of all of those who have been convicted of jihadi terrorism related activities in Europe between 2001 and 2009, about twelve percent had been abroad prior to their attack, either for ideological training, military training or participation in foreign conflicts.²⁸ The data are often not very specific and most seem to have been abroad for the first two above-mentioned reasons. Nonetheless, these data show that those who have visited foreign ideological schools, training camps and battlefields outside Europe do compose a sizeable part of the total amount of jihadi terrorists in Europe, a finding supported by several other studies.²⁹

Moreover, according to Thomas Hegghammer, there is evidence of a "veteran effect" that makes returnees more lethal operatives.³⁰ However, he also stresses that one could not say that "*outgoing* foreign fighters are more dangerous as a group, because as we know, most foreign fighters do not return for domestic attacks [emphasis in original]".³¹ Richard Barrett, former coordinator of the UN al Qaeda Taliban Monitoring Team, likewise emphasises that not all who return home will be inclined to conduct terrorism.³² Hence, those who do return and pose a terrorist threat might be only a very small minority among the possible hundreds of jihadi veterans who have returned or migrated to Europe after having "served" in Bosnia, Chechnya, Afghanistan or

²² T. Atlas, "Foreign Fighters Flocking to Syria Stirs Terror Concerns" (2013).

²³ Europol, *Te-Sat 2013: EU Terrorism Situation and Trend Report*, 25 April 2013, <https://www.europol.europa.eu/content/te-sat-2013-eu-terrorism-situation-and-trend-report>.

²⁴ I. Opstelten, "Letter of 13 March 2013 from the Minister of Security and Justice to the House of Representatives of the States General Containing a Summary of the March, 2013 Edition of the Terrorist Threat Assessment for the Netherlands (DTN32)", National Coordinator for Security and Counterterrorism – Ministry of Security and Justice, 13 March 2013, <http://english.nctv.nl/publications-products/Terrorist-Threat-Assessment-Netherlands/index.aspx>.

²⁵ N. Busse, "Diese Leute sind tickende Zeitbomben in Europa", *Frankfurter Allgemeine Zeitung*, 7 June 2013, <http://www.faz.net/aktuell/politik/inland/im-gespraech-hans-peter-friedrich-csu-diese-leute-sind-tickende-zeitbomben-in-europa-12213789.html>.

²⁶ A.E. Harrod, "European Jihad in Syria", *The Investigative Project on Terrorism*, 6 September 2013, <http://www.investigativeproject.org/4153/european-jihad-in-syria>.

²⁷ In fact, as Abu Fidaa, the leader and spokesperson of Dutch fighters in Syria explained, many foreign jihadis in the Dutch and Belgian context do not even intend to return to their European countries, but instead, intend to help their Palestinian counterparts after the fall of the Assad regime. See S. Batrawi on Abu Fidaa, "The Dutch Foreign Fighter Contingent in Syria", *CTC Sentinel* 6, no. 10 (October 2013), p. 9, <http://www.ctc.usma.edu/wp-content/uploads/2013/10/CTCSentinel-Vol6Iss10.pdf>.

²⁸ CTC/ICCT Database on Jihadi Terrorists in Europe; E. Bakker, "Characteristics of Jihadi Terrorists in Europe (2001-2009)", in Rik Coolsaet, ed., *Jihadi Terrorism and the Radicalisation Challenge: European and American Experiences* (Surrey: Ashgate Publishing Limited, 2011).

²⁹ See e.g. T. van Dongen, "Jihadistisch terroristische aanslagen in de EU, 2004-2011. Onderzoek naar complexiteit, daderkarakteristieken en de relatie daartussen", *The Hague Centre for Strategic Studies*, No. 11 (2012); T. Hegghammer, "Should I Stay or Should I Go? Explaining Variation in Western Jihadists' Choice between Domestic and Foreign Fighting", *American Political Science Review* (February 2013), http://hegghammer.com/files/Hegghammer_-_Should_I_stay_or_should_I_go.pdf.

³⁰ Hegghammer finds that out of all planned and executed attacks in his study, returnees are more likely to be involved in attacks that were executed "successfully" and resulted in casualties, than those home-grown terrorists who had not travelled abroad. See T. Hegghammer, "Should I Stay or Should I Go? Explaining Variation in Western Jihadists" (2013), p. 11.

³¹ *Ibid.*

³² T. Atlas, "Foreign Fighters Flocking to Syria Stirs Terror Concerns" (2013).

other jihadi battlefields. Again, the problem is lack of data on those who have returned and especially on those who have not committed terrorist crimes in Europe.

So where does this leave us? We know that a sizeable part of those convicted of jihadi terrorism in Europe have been abroad, that there is a veteran effect, but that probably most of those that do return do not necessarily get involved in domestic attacks. At the same time, even though the motives to leave for and fight in Syria are primarily related to the conflict in that country, the exposure to violence, possible combat training, new contacts, battlefield experience, and contact with radical Islam make all of these individuals a possible concern when they return – if only to themselves and their direct surroundings. Think of the various effects of post-traumatic stress disorders, including depression and the risk of (domestic) violence. This leaves us with a threat that is both real, multifaceted and very difficult to assess.

The worst case scenario includes attacks like the one by Mohammed Merah, a young Frenchman of Algerian origin who turned to Salafism in prison and who made two journeys to Afghanistan and Pakistan where he was allegedly trained by al Qaeda.³³ In March 2012, in an act of revenge and anti-Semitism, he killed seven people – French military men and Jewish fellow citizens – before he was shot and killed in his apartment after a 30-hour siege by the police.³⁴ Even worse is a scenario of one or more returning fighters capable and willing to commit a more sophisticated and more deadly attack comparable to those in Madrid (2004) and London (2005).

2.1 The Three-Fold Challenge of Addressing the Issue of Foreign Fighters

In order to prevent this tangible, complex and potentially deadly threat of returning jihadi fighters, policymakers in Europe are facing a three-fold challenge: The primary one is the challenge of making an accurate risk assessment. Or, in other words, to evaluate whether or not those returning from Syria pose a threat. The challenge that follows is one that revolves around the questions who should do what, how, with whom and with what tools? These questions are linked to the search for socio-political mechanisms and instruments to deal with potential travellers and returning mujahidin, or the interception of their attempt to travel to Syria or return to their home countries. The third challenge relates to those legal avenues available on the international and domestic levels for addressing the issue of foreign fighters.

3. The Risk Assessment Challenge

A proper risk assessment is needed for two reasons. First, of course, it is necessary to identify those returnees who could stage a terrorist attack or are likely to get involved in terrorist or extremist activities – ranging from recruiting new fighters to raising funds for the jihad. Second, we must detect those who want to and/or can be reintegrated into society. The latter is perhaps as important as the former, if only because it saves scarce resources and because European governments simply lack the capabilities to monitor all returnees around the clock.³⁵

One of the first problems for governments and security agencies is to assess who has travelled to Syria. The ease with which European jihadi fighters can travel through the Schengen area to Turkey and slip across the border into Syria makes it difficult for intelligence agencies to establish exact numbers and identities of those who have joined the combat. Often, it is immediate family members or friends who alert authorities of the absence of a foreign fighter, only after a farewell note was found or contact was made from Syria via social media or phone.

Moreover, authorities mostly do not have solid information on how many fighters will come back, and when and how they will return. According to some of the jihadi fighters themselves or their supporters, many do not plan to come back, but expect to either achieve martyrdom or to move on to other jihadi battlefields if and

³³ 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>.

³⁴ D. Magnay and S. Vandoorne, "French Killings Suspects Dies Shooting at Police, Authorities Say". *CNN*, 22 March 2012, http://edition.cnn.com/2012/03/22/world/europe/france-shooting/index.html?_s=PM:EUROPE; "'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.

³⁵ T. Altas, "Foreign Fighters Flocking to Syria Stirs Terror Concerns" (2013).

when they have achieved “victory” in Syria.³⁶ At the same time, as mentioned earlier, we know from past experience that some do come back and there are already a few cases of persons who have returned to their European home country.

Assuming that many of them, sooner or later, will return, how can the potential risk be assessed that returnees might pose, to themselves, their direct surroundings, or national security? This requires knowledge of:

- their actual presence in Syria;
- their reason(s) for going to Syria and the people they were with;
- the type of activities they undertook in Syria, the location of these activities and their accomplices;
- the reason(s) for returning from Syria; and
- the simple fact that they returned and where they returned to.

Answering these questions requires an information position that is currently not available to the various European authorities responsible for dealing with the phenomenon of foreign jihadi fighters. Despite frantic efforts to improve this information position in Syria, many government agencies (i.e. police and intelligence agencies) still poke in the dark about the whereabouts of “their” foreign fighters. They often do not even have a clear picture of how many actually went to Syria, who has died or who has returned. Many agencies also do not know exactly what unit or subgroup individuals are fighting with, if they actually fight or play a supportive role behind the front lines, whether or not they have been (further) radicalised, or if they are perhaps disillusioned and traumatised.

Thus, a proper risk assessment requires investment in eyes and ears on the ground in Syria and tools to intercept possible communication between the battlefields and support fronts back home or elsewhere in the world. Given the chaotic situation, this is not an objective that can be achieved easily. Add to that the many other pressing political and security issues with regard to Syria, for example the use of chemical weapons and risks of proliferation. Obviously, international cooperation is needed, as well as cooperation with groups in Syria that might be able and willing to share information – ranging from all kinds of actors that are opposed to the presence of jihadi fighting groups to local and international non-governmental organisations. At the same time, valuable information can be derived from (Islamist or jihadist) websites and chat rooms that are closely monitored by police and intelligence organisations back in Europe.

In European home countries and the neighbourhoods that are (or are at risk of becoming) home to (future) foreign fighters and that in most cases will be their place of return, investments have to be made in good relations between the authorities and the parents, family members and friends of (potential and returned) jihadi travellers, not only for authorities to gain information about (possible) foreign fighters, but also for preventative, supportive and reintegration purposes.

In most Western European countries, local police and social workers have established good relations with the communities that have generated these fighters, which can be of great help in identifying potential travellers, quickly detecting returnees, making accurate risk assessments, and having inroads to help returnees reintegrate when necessary. In addition, these contacts are important in discouraging individuals from travelling, lending support to the families of those fighting in Syria, monitoring the progress of the reintegration process of returnees and helping prevent some from (re)turning to extremist violence. However, in a number of countries, the possibility to work with parents and communities has been hampered by the criminalisation of joining a foreign fight and/or the politicisation of the phenomenon of foreign fighters. In both cases, the intelligence community can play an important role in assessing what is going on in the neighbourhoods from which fighters stem and return to, as well as in providing information about the possible negative role of support groups of the global jihad on the reintegration process of the returnees. Here, two general elements are crucial with regards to dealing with the foreign fighter phenomenon: building trust and fostering cooperation between authorities and those that can be of help and interact with (potential) fighters. Finally, it should be stressed – also in contacts with representatives of Muslim communities – that the foreign fighter phenomenon in itself is not *a priori* a threat to security, let alone a terrorist one.

³⁶ Author’s (EB) interviews with an alleged foreign fighter recruiter (The Hague, September and October 2013).

4. The Governance Challenge: Between Prevention and Pursuit

The second challenge when dealing with foreign jihadi fighters is being able to answer the fundamental questions of who is going to do what, how, with whom, and under whose supervision? This can also be labelled the governance challenge. The range of policy options spans from preventative measures such as counter-narrative campaigns, monitoring and legal barriers, to supporting families and communities while one of their youths is in Syria, and a variety of options relating to those who have returned, including prosecution, extradition, monitoring, providing psychological aftercare and counselling, as well as practical assistance in finding housing or dealing with possible debts. In regard to measures on the European level, EU Counter-Terrorism Coordinator Gilles de Kerchove compiled a long list of possible solutions to address the foreign fighter issue in Europe:

We have to make sure that the 27 Member States have, in their criminal book, a specific offence of going abroad for the jihad, for training purposes, how to fight, so we are working on it. Just share experience on how you start an investigation, when you start an investigation, and a prosecution. [Note that in the context of investigations, Gilles de Kerchove has also stated that he saw a great benefit from using joint investigation teams (JITs) in cases involving foreign fighters.]³⁷ Balance the use of criminal sanctions and administrative sanctions. You may decide to freeze assets. You may decide to expel radical preachers. You may decide to withdraw social benefits. So these are non-criminal sanctions, but which may have some impact. So we have to discuss all this. We have asked Eurojust, which is the EU agency for police [*sic*] cooperation, to collect the best practices, convene the prosecutors involved in concrete cases and to come back to us with concrete proposals of criminal policy.³⁸

As is clear from these examples, many different actors can play a role at all three stages (before, during and after travel) and on local, national, EU,³⁹ and international levels, but it is often not very clear who should take the lead.

Regarding preventative measures, the governance question of who should do what under whose supervision depends greatly on the approaches taken and the group(s) targeted. A targeted approach aimed at individuals deemed at risk of travelling may be taken by local authorities, intelligence, police, communities, religious leaders or families who have experienced a family member leaving for jihad in Syria. Interventions can be directed at individuals, communities, families and networks of possible foreign fighters and mujahidin themselves. These can span from hard legal measures such as confiscating passports or criminalising participation in jihad/a foreign civil war, to softer approaches such as cooperation and communication with local communities. Given the potential for groups to exploit conflicting messages to their advantage, it is particularly important that any preventative mechanisms are coordinated and it is clear who should (not) be involved and why (not). Furthermore, coordination is important also with regard to legal mechanisms: If a state has criminalised participation in jihad, for example, possible sources of information may not come forward because they fear that

³⁷ See “Interview with Gilles de Kerchove, EU Counter-Terrorism Coordinator”, *Eurojust News*, Issue No. 9, June 2013, http://eurojust.europa.eu/doclibrary/corporate/newsletter/Eurojust%20News%20Issue%209%20%28June%202013%29%20on%20joint%20investigation%20teams/EurojustNews_Issue9_2013-06-EN.pdf, p. 2.

³⁸ 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. See for the last point also EU Counter-Terrorism Coordinator in close consultation with the services of the Commission and the EEAS, “Note” (on foreign fighters and returnees from a counter-terrorism 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: “Invite Eurojust to present a report to the Council by November on 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”.

³⁹ Regarding the EU level, it is noteworthy that even though the Union is working on a more coordinated response to the foreign fighter issue, that response is still in an embryonic phase. Although the European Commission did refer to the broad measures suggested by de Kerchove as well, it appears to focus especially on the prevention side (such as the use of counter-narratives as discussed in the context of the EU Radicalisation Awareness Network) and non-criminal measures (such as monitoring the movement of foreign fighters, for instance via the (Second Generation) Schengen Information System (SIS) and the EU Passenger Name Record (PNR) Directive, and the tracking of payments related to terrorist movements, for instance via the Terrorist Finance Tracking Programme (TFTP)). See European Commission, “Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Towards a Comprehensive EU Approach to the Syrian Crisis”, Brussels, 24 June 2013, JOIN(2013) 22 final, http://eeas.europa.eu/statements/docs/2013/130624_1_comm_native_join_2013_22_communication_from_commission_to_inst_en_v1_0_p1_7332751.pdf, pp. 8-9.

their cooperation will lead to the arrest or monitoring of themselves or their contacts. In these cases, it can help that non-statutory bodies provide support, rather than government bodies, if possible.

With regard to the potential terrorists among those returning from Syria, the what and who questions are less complicated. In many European countries, those who are deemed a potential threat will be dealt with by law enforcement agencies and the public prosecution services. They will be confronted with all kinds of policies and measures that fall under what in the Council of the European Union's counter-terrorism strategy is called the "pursue" pillar. Possible measures and policies could include: investigating the potential terrorists or those who have joined a terrorist organisation in Syria; impeding planning, travel, and communications; disrupting support networks; cutting off funding and access to attack materials; and – the ultimate challenge – bringing terrorists to justice.⁴⁰ Regarding those identified as (potential) terrorists, the question of who does what under whose supervision is relatively straightforward. There are, however, many practical and legal challenges. Do the national and local authorities in Europe have the necessary tools and capacity to collect and analyse information and to pursue and investigate (potential) terrorists? The rise in the number of foreign fighters also raises the question about the funding of counter measures. In many countries, government agencies in the field of counter-terrorism are confronted with a decline of budgets.

Regarding those returnees that do not seem to pose a potential threat, the fundamental governance questions are more difficult to answer: it is not clear what actors should or could play which role. And the "what to do" question is also not easy to answer. There is a growing body of literature on reintegration of terrorists,⁴¹ but very limited knowledge about the return and reintegration of foreign fighters, particularly about those who did not pose a terrorist threat upon their return. But perhaps the authorities and relevant non-state actors could borrow from the literature on and experience with comparable cases of reintegration of another kind of former fighters: There are many studies on Disarmament, Demobilisation and Reintegration (DDR) of ex-combatants, even though most of it refers to reintegration of local fighters in countries such as Afghanistan, the Democratic Republic of Congo, Colombia, or Bosnia-Herzegovina.⁴² Some important lessons learned in the field of social-psychological and economic issues might also be relevant to the case of returning European foreign fighters. American and European studies on reintegration of soldiers that have served in recent military campaigns in Iraq, Afghanistan and other military operations might also be of use to gain increased insight into possible problems that "veterans" face or might cause after their return.⁴³ Here, it could be especially valuable to examine studies into war syndromes or post-traumatic stress disorder.

The governance problem is also influenced by the politicisation of the issue of foreign fighters in some European countries (including Belgium and the Netherlands, where the topic of foreign fighters regularly makes front-page news, and has become a politically-sensitive and divisive issue). This may make it extremely difficult for some of these actors to (openly) provide support. Another serious problem is the presence of national and local support groups of the global jihad who are likely to either frustrate the reintegration of those returnees who want to leave the violent jihad behind, or threaten them as they might be regarded as traitors. Moreover, they could provide returnees with safe houses, and use them as propaganda assets and recruiters to inspire new generations of Muslims joining the jihad in Syria.

⁴⁰ See for instance the European Counterterrorism Strategy, Presidency and CT Co-ordinator, "The European Union Counter-Terrorism Strategy: Prevent, Protect, Pursue, Respond", 14469/4/05 REV 4, Brussels: Council of the European Union, 30 November 2005, <http://register.consilium.eu.int/pdf/en/05/st14/st14469-re04.en05.pdf>.

⁴¹ See e.g. T. Veldhuis, "Designing Rehabilitation and Reintegration Programmes for Violent Extremist Offenders: A Realist Approach", *ICCT – The Hague Research Paper*, March 2012, <http://www.icct.nl/download/file/ICCT-Veldhuis-Designing-Rehabilitation-Reintegration-Programmes-March-2012.pdf>.

⁴² J. Schulhofer-Wohl and N. Sambanis, "Disarmament, Demobilization, and Reintegration Programs: An Assessment", *Research Report*. Sweden: Folke Bernadote Academy Publications, 2010, http://faculty.virginia.edu/j.sw/uploads/research/Disarmament,%20Demobilization,%20Reintegration%20Programs_%20An%20Assessment.pdf.

⁴³ See e.g. E. Kamp, "Zingeving na de missie", *Militaire Spectator* 4 (2013), pp. 198-207; N. Sayer et. al, "Reintegration Problems and Treatment Interests Among Iraq and Afghanistan Combat Veterans Receiving VA Medical Care", *Psychiatric Services* 61, No. 6 (June 2010); C.W. Hoge et. Al., "Combat Duty in Iraq and Afghanistan, Mental Health Problems, and Barriers to Care", *The New England Journal of Medicine* 351 (July 2004), pp. 13-22, <http://www.nejm.org/doi/full/10.1056/NEJMoa040603/>.

5. The Legal Challenge: Prosecution via International Crimes

A third challenge relates to the legal mechanisms available to address foreign fighter travel and return. Although the presence of mujahidin 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. This section addresses if and how foreign fighters can be held criminally responsible with regards to their participation in the Syrian conflict, specifically looking at whether or not these persons could be prosecuted by national authorities upon return because they committed a crime under international law.

The idea that returning foreign fighters may pose a risk to society is not addressed in international legal documents. Possible legal mechanisms to counter this threat are also not addressed at the international level. However, 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,⁴⁴ which in turn can provide evidence and lead to the start of criminal investigations.⁴⁵

5.1 War Crimes

The Syrian conflict is a non-international armed conflict where international humanitarian law applies.⁴⁶ 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.⁴⁷ 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”.⁴⁸ 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”.⁴⁹ In October 2013, Human Rights Watch (HRW) reported that it

⁴⁴ 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>.

⁴⁵ 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 News Centre*, 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”.

⁴⁶ 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.

⁴⁷ 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).

⁴⁸ 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.

⁴⁹ Art. 8, para. 2 (e) of the ICC Statute. Namely, 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

had evidence, “collected through interviews, an on-site investigation, and a review of opposition statements and videos”, linking five opposition groups “to specific incidents that amount to war crimes”.⁵⁰

However, as the ICC is not (yet) involved in the situation in Syria,⁵¹ 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”.⁵² 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)⁵³ may oblige states to also investigate those war crimes, and, if appropriate, prosecute the suspects.⁵⁴

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 fns. 48-49), 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.⁵⁵

5.2 Crimes against Humanity

Moreover, certain acts by foreign fighters could also be prosecuted as crimes against humanity (which can be committed in both peace time and war time 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”.⁵⁶ 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.⁵⁷

5.3 Genocide

Given the sectarian nature of the conflict, some acts might even be qualified as acts of genocide, namely any of the following acts when committed with intent to destroy, in whole or in part, a national, ethnical, racial or

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.

⁵⁰ 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, p. 5. The five opposition groups are Ahrar al-Sham, Islamic State of Iraq and Sham, Jabhat al-Nusra, Jaish al-Muhajireen wal-Ansar and Suqur al-Izz.

⁵¹ For this to occur, the UNSC would have to decide to refer to 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.) It is also noteworthy that the Public International Law and Policy Group has designed a blue-print for a possible Syrian tribunal to bring those most responsible for serious violations of international humanitarian law to justice; see Chautauqua Blueprint for a Statute for a Syrian Extraordinary Tribunal to Prosecute Atrocity Crimes, Public International Law and Policy Group (October 2013), <http://publicinternationallawandpolicygroup.org/wp-content/uploads/2013/09/Chautauqua-Blueprint1.pdf>.

⁵² 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 158 (p. 607).

⁵³ See *ibid.*, Rule 157 (p. 606) and Rule 158 (p. 607).

⁵⁴ See *ibid.*, Rule 158 (p. 607).

⁵⁵ See also J.D. van der Vyver, “Prosecuting terrorism in international tribunals”, *Emory International Law Review*, Vol. 24, Issue 2 (2010), pp. 540-541.

⁵⁶ Art. 7, para. 1 of the ICC Statute.

⁵⁷ HRW, “*You Can Still See Their Blood*” (2013), p. 95.

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.⁵⁸ 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.⁵⁹

5.4 Terrorism

Despite the lack of an internationally-recognised definition of terrorism, certain international documents may be of relevance of 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.⁶⁰ 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 that 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 [...].⁶¹

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 terrorists have no place of refuge, since each State will be competent to try them or extradite them".⁶²

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.

6. The Legal Challenge: Specific National Practices

Having addressed the charging of (potential) foreign fighters via international crimes more generally, we will now turn to the specific national practices. 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.

⁵⁸ Article 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.

⁵⁹ See Human Rights Investigations, "Is Obama supporting genocide in Syria?", 2 September 2013, <http://humanrightsinvestigations.org/2013/09/03/obama-supporting-genocide-in-syria/>.

⁶⁰ 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.

⁶¹ UNSC Resolution 1373 (2011) of 28 September, paras 2(c) and (e).

⁶² 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>.

6.1 Austria

The issue of foreign fighters is a worrying problem for Austrian authorities. In its *Verfassungsschutzbericht 2013*, the Austrian Federal Office for the Protection of the Constitution and Counterterrorism (*Bundesamt für Verfassungsschutz und Terrorismusbekämpfung* or BVT) reported that “[h]ome-grown’ radical Islamist extremism and terrorism in the form of travels to participate in jihadist training camps or join armed jihad continued in 2012”⁶³ and that “[t]he threat emanating from this phenomenon is considered to be real”.⁶⁴

An example is the case of Mohammed Mahmoud, also known as Abu Usama al-Gharib, an Austrian national and leader of Millatu Ibrahim, a salafist organisation that was banned in Germany in June 2012 because, in the words of German Interior Minister Hans-Peter Friedrich, “[t]he organization acts in opposition to the idea of constitutional order and multicultural understanding”⁶⁵ and promotes violence in its “fight against existing constitutional order”.⁶⁶ Mohammed Mahmoud continued his work in Germany⁶⁷ and Egypt after his release in September 2011 from an Austrian prison, where he was held for violating Art. 278b of the Austrian Criminal Code (leading of, or participating in a terrorist organisation). He was arrested by Turkish authorities in March 2013 as he allegedly tried to enter Syrian territory from Hatay.⁶⁸ German authorities reportedly sought his extradition for allegedly calling for terrorist attacks in Europe, and likewise, the Austrian authorities sought his extradition on “suspicion of forming a terrorist organization”.⁶⁹ However, in August 2013, the Austrian extradition request was rejected on formal grounds as the Turkish authorities were of the opinion that the conditions for extradition were not present,⁷⁰ a justification criticised by the Austrian authorities.⁷¹ Regardless, Mahmoud was released and is presumably now in Syria.⁷² A European Arrest Warrant has been issued against him.

In its *Verfassungsschutzbericht 2013*, the BVT also more generally discussed the potential danger of returning fighters, but did not really elaborate on possible solutions. In June of this year, the Director of the BVT, Peter Gridling, also stated that Austrian fighters in Syria constituted a “very difficult problem”⁷³ for the security agencies as they formed a “potential danger”⁷⁴ upon their return to Austria. Those returning would be put under surveillance, but to de-radicalise these persons would be “extremely difficult”.⁷⁵ It has been reported that around 60 men from Austria are fighting with the rebels in Syria, the majority being Syrian, Pakistani, Afghan and Chechen asylum seekers and refugees.⁷⁶ Nevertheless, it should be stressed that there is a lack of clarity regarding these numbers. The foreign fighter issue was also brought up in recent parliamentary discussions on fast-tracking

⁶³ Bundesamt für Verfassungsschutz und Terrorismusbekämpfung, “Verfassungsschutzbericht 2013”, 2013, http://www.bmi.gv.at/cms/BMI_Verfassungsschutz/Verfassungsschutzbericht_2013.pdf, p. 84.

⁶⁴ *Ibid.*

⁶⁵ “Major Police Raids: Salafist Organization Banned in Germany”, *Spiegel Online International*, 14 June 2012, <http://www.spiegel.de/international/germany/germany-bans-salafist-organization-and-stages-police-raids-a-838832.html>.

⁶⁶ *Ibid.*

⁶⁷ See S. Mekhennet, “Austrian Returns, Unrepentant, to Online Jihad”, *The New York Times*, 15 November 2011, http://www.nytimes.com/2011/11/16/world/europe/austrian-returns-to-online-jihad.html?_r=0.

⁶⁸ See Bundesamt für Verfassungsschutz und Terrorismusbekämpfung, “Verfassungsschutzbericht 2013”, 2013, p. 29. (Note that the BVT speaks of its release in September 2009, but it appears that this should be September 2011, see also *The New York Times* article in fn. 67 and see also D. Rising, “Turkey arrests extremist wanted by Germany”, *The Big Story*, 22 March 2012, <http://bigstory.ap.org/article/turkey-arrests-extremist-wanted-germany>. In addition, on p. 84 of the report, the BVT speaks of Mahmoud’s arrest in Turkey in 2012. This should arguably be 2013). (It is unclear if he had been in Syria before as he claimed, see J. Sommerbauer, “Telefonat aus Haft: Austro-Islamist ruft zum Kampf auf”, *Die Presse*, 7 May 2013, http://diepresse.com/home/politik/aussenpolitik/1399503/Telefonat-aus-Haft_AustroIslamist-ruft-zum-Kampf-auf-).

⁶⁹ See D. Rising, “Turkey arrests extremist wanted by Germany” (2012). Note that the charge of participation in a terrorist organisation has also been mentioned, see J. Sommerbauer, “Telefonat aus Haft: Austro-Islamist ruft zum Kampf auf” (2013), where reference is made to the charge “Beteiligung an einer terroristischen Vereinigung”.

⁷⁰ See “Türkei will Mohamed Mahmoud nicht an Österreich ausliefern”, *Die Presse*, 28 August 2013, http://diepresse.com/home/politik/aussenpolitik/1446232/Tuerkei-will-Mohamed-Mahmoud-nicht-an-Oesterreich-ausliefern?_vl_backlink=/home/politik/index.do.

⁷¹ *Ibid.*

⁷² See “Austro-Islamist: Justizministerium kritisiert Türkei”, *Die Presse*, 29 August 2013, http://diepresse.com/home/politik/innenpolitik/1446474/AustroIslamist_Justizministerium-kritisiert-Tuerkei.

⁷³ *Ibid.*

⁷⁴ See “Verfassungsschutz: Heimische Kämpfer in Syrien”, *Österreichischer Rundfunk*, 24 June 2013, <http://orf.at/stories/2188377/>.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

See “Rund 60 Männer aus Österreich kämpfen im Syrien-Krieg”, *Krone*, 25 April 2013, http://www.krone.at/Oesterreich/Rund_60_Maenner_aus_Oesterreich_kaempfen_im_Syrien-Krieg-Jihad-Tourismus-Story-359448.

Austrian citizenship. In this debate, it was argued that Austrian jihadists fighting in Syria should be excluded from this possibility.⁷⁷

6.2 Belgium

The problem of foreign fighters in Belgium is considerable, with dozens of young men from especially Antwerp, Vilvoorde and Mechelen fighting in Syria.⁷⁸ On 16 April 2013, after a year-long investigation pertaining to 33 inhabitants of Antwerp and Vilvoorde, the Belgian police raided almost 50 homes and arrested six men, among whom 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".⁷⁹ During the press conference the same afternoon, Prosecutor Eric van der Sypt stated: "In fact, the purpose of this was to detect who in Belgium is guilty of participating in a terrorist organisation. I can not repeat it enough. In this case, it appears that Sharia4Belgium actively participated in such an organisation by sending particularly young people to combat zones".⁸⁰

Recently, Joelle Milquet, the Belgian Minister of Interior, established a Task Force to look into the problem of Belgian youths joining the Syrian civil war⁸¹ 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 straight away and eight measures, such as increased border controls in Belgium and Turkey, and 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.⁸² It is enlightening to go into more detail regarding the two points that were rejected straight away.

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*.⁸³ 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 5.1). She also noted that such a regulation already exists in the Netherlands (see subsection 6.7).⁸⁴

However, the core cabinet was of the opinion that the counter-arguments prevailed, namely:⁸⁵

- 1) the families of the youngsters wanting to leave would be discouraged to report radicalisation. A prison sentence would deter the youngsters to return, 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 justified, which is not in conformity with the Belgian and European position;⁸⁶
- 3) such a royal decree would only have a limited deterrent effect;

⁷⁷ See "Erwerb der Staatsbürgerschaft wird für gut Integrierte erleichtert", *Parlamentskorrespondenz* No. 652, 4 July 2013, http://www.parlament.gv.at/PAKT/PR/JAHR_2013/PK0652/.

⁷⁸ 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>.

⁷⁹ "Belgian police raid homes in search for Syria recruiters", *Reuters*, 16 April 2013, <http://mobile.reuters.com/article/topNews/idUSBRE93FOCT20130416>.

⁸⁰ 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>.

⁸¹ See M. Torfs, "Task Force to investigate Belgian participation in Syrian war", *Flanders News*, 24 March 2013, <http://www.deredactie.be/cm/vrtnieuws.english/News/1.1583534>.

⁸² See J. De Wit, "Milquet en de Syriëgangers, deel 2", *Gazet van Antwerpen*, 7 May 2013, <http://www.gva.be/nieuws/experts/johndewit/aid1381914/milquet-en-de-syriegangers-deel-2.aspx>.

⁸³ See *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. See *ibid.*

⁸⁴ See *ibid.*

⁸⁵ All the following points are taken directly from the same and detailed (Dutch) article of J. De Wit, "Milquet en de Syriëgangers, deel 2" (2013).

⁸⁶ Also the Belgium 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>.

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 to fight in Syria as such, or to fight 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.⁸⁷ These provisions include: 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 a training to commit a terrorist crime (the new Art. 140quinquies) are also prohibited.⁸⁸

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.⁸⁹ The objection against this point was the idea that such measures would increase the market of false and stolen identity cards, and lead to more abuse.⁹⁰ Instead, the core cabinet opined that reinforcing and being able to more quickly make use of the "Schengen signalling"⁹¹ would suffice.⁹²

6.3 France

In the aftermath of the March 2012 attacks in Toulouse by Mohammed Merah (see section 2), 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"⁹³ and to recruit terrorists, even if the recruitment fails.⁹⁴ 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 charges.⁹⁵ 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".⁹⁶ The French authorities opened a judicial investigation for "attempted murder, notably on the basis of the potential victims' religion and in connection with a terrorist organization"⁹⁷ and related potential charges including "the illegal possession of explosive devices, theft, use of stolen property, and illegal possession and transport of firearms".⁹⁸ In the context of this investigation, four new suspects were apprehended in July 2013⁹⁹ and in October 2013, three more persons were arrested.¹⁰⁰

⁸⁷ J. De Wit, "Milquet en de Syriëgangers, deel 2" (2013).

⁸⁸ 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>.

⁸⁹ 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>.

⁹⁰ J. De Wit, "Milquet en de Syriëgangers, deel 2" (2013).

⁹¹ See also fn. 39 of this Research Paper.

⁹² See "Nieuw kb over jonge Syriëstrijders komt er niet" (2013).

⁹³ 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> accessed 25 June 2012.

⁹⁴ See *ibid.*

⁹⁵ 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.

⁹⁶ 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>.

⁹⁷ 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>.

⁹⁸ *Ibid.*

⁹⁹ See C. Cornevin, "L'inquiétante cellule islamiste 'Cannes-Torcy' passée au crible", *Le Figaro*, 5 July 2013, <http://www.lefigaro.fr/actualite-france/2013/07/05/01016-20130705ARTFIG00750-l-inquietante-cellule-islamiste-cannes-torcy-passee-au-crible.php>.

¹⁰⁰ 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>.

On 21 December 2012, the French government indeed adopted a new counter-terrorism law, allowing 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”.¹⁰¹

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”.¹⁰² This is because “merely” participating in a war is not a crime pursuant to French law.¹⁰³

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.¹⁰⁴

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 named on U.N. terrorist lists”.¹⁰⁵ 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”.¹⁰⁶ A bit later in the report, the French Interior Minister Valls 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”.¹⁰⁷ 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”,¹⁰⁸ 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.¹⁰⁹ The investigation is continuing.

¹⁰¹ 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/>.

¹⁰² 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>.

¹⁰³ 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. 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”.

¹⁰⁴ *Ibid.*

¹⁰⁵ See *ibid.*

¹⁰⁶ See M. Penetier and A. Sage, “French police arrest cell with possible Syria link”, *Reuters*, 25 June 2013, <http://mobile.reuters.com/article/worldNews/idUSBRE95O11920130625>.

¹⁰⁷ *Ibid.*

¹⁰⁸ 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>.

¹⁰⁹ 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>.

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.¹¹⁰

6.4 Germany

Like other European countries, foreign fighters are also an area of concern for the German authorities. According to officials, at least 210 persons – many of them with German passports – have travelled to Syria and at least around 50 have returned.¹¹¹ German news media have reported on a number of German men and women travelling to Syria from Berlin, Kassel, Pforzheim, Offenbach, Karlsruhe, Düsseldorf and Frankfurt.¹¹²

German laws do not criminalise foreign fighter travel as such and thus far, no individual has been prosecuted in Germany for their involvement in the Syrian civil war.¹¹³ However, other legal tools are available to combat the phenomenon. 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 watch.¹¹⁴ Upon suspicion of possible travel plans to participate in the Syrian civil war, security services approach suspects directly to issue warnings and inform them that authorities are aware of their plans.¹¹⁵

Additionally, the German passport law allows for the confiscation of travel identification documents (Art. 8 and 13(1)(2)) and the prohibition to leave Germany (Art. 10) when an individual constitutes a threat to the 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.¹¹⁶ However, cases such as the one of Ibrahim Munir, who travelled through Turkey to Syria although authorities had confiscated his passport during an earlier attempt to travel to the conflict-ridden country,¹¹⁷ 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.¹¹⁸ Others have also managed to leave Germany without being stopped by the authorities.¹¹⁹

In a news article on Ibrahim Munir, it is also underlined that legally speaking, it is hard to prosecute returnees. One would need to show that these individuals were involved in terrorist activities (note that already since May 2009, Germany has a provision, comparable with the 2012 French law discussed earlier, which

¹¹⁰ 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>.

¹¹¹ See "Über 210 Islamisten aus Deutschland nach Syrien gereist", *N24*, 27 October 2013, <http://www.n24.de/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-online.de/website/rubriken/nachrichten/indexhessen34938.jsp?rubrik=36082&key=standard_document_48958275; and "Hans-Georg Maaßen: 'Islamisten sind die größte Gefahr'", *RP*, 24 June 2013, <http://www.rp-online.de/politik/nrw/islamisten-sind-die-groesste-gefahr-1.3488609>.

¹¹² See V. Siefert, "Salafisten mit Ziel Syrien ausgereist" (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>.

¹¹³ Information provided by Marcus Köhler from the Generalbundesanwalt beim Bundesgerichtshof in an e-mail dated 4 July 2013.

¹¹⁴ 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>.

¹¹⁵ See "Innenminister Andreas Breitner besorgt über 'Reisepläne'", *02elf Abendblatt*, 1 July 2013, <http://www.02elf.net/national/deutschland/schleswig-holstein/innenminister-andreas-breitner-besorgt-ueber-reiseplaene-von-islamisten-157933>.

¹¹⁶ See "Verfassungsschutzbericht Nordrhein-Westfalen 2012 – Pressefassung", June 2013, <http://www.verfassungsschutz.de/de/oeffentlichkeitsarbeit/publikationen/verfassungsschutzberichte/publikationen-landesbehoerden-verfassungsschutzbericht/vsbericht-nw-2012-pressefassung>.

¹¹⁷ 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>.

¹¹⁸ See I. Traynor, "Germany fears return of European jihadists in Syria" (2013).

¹¹⁹ See "Innenminister Andreas Breitner besorgt über 'Reisepläne'" (2013).

criminalises training in an Islamic terrorist camp),¹²⁰ war crimes or murders. An almost impossible task in the chaos of a war-torn country like Syria.¹²¹

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.¹²² Federal police and other relevant authorities are notified when a fighter returns and the individual is placed under increased surveillance.¹²³ The recent ruling by the German Federal Constitutional Court on specific elements of the “Antiterrordatei ATD” [anti-terrorism database] being unconstitutional may hinder some of these efforts.¹²⁴ (The database allows 38 different German government agencies to store and share information about suspected terrorists and potential violent extremists.)¹²⁵

6.5 Italy

Although a few dozen Italians have left for Syria, it has been maintained that the “phenomenon of jihadist recruitment is much less prevalent”¹²⁶ in Italy than in other European countries. Nevertheless, according to Italian law enforcement officials, a number of Italians are “actively seeking to recruit fellow Muslims to overthrow the democratic order in Italy”.¹²⁷ In that context, Syria is also mentioned. But not only returnees spread jihadist propaganda over the internet. For instance, in June 2013, the counter-terrorism police in Brescia arrested a Moroccan blogger, who wanted to join the jihad in Syria and who was subsequently accused of inciting Muslims to wage jihad against Italy and France.¹²⁸ Interestingly, the police in Venice arrested a radical imam and three Syrians in July 2013 who were accused of operating a human-trafficking gang which allegedly smuggled jihadists from the Middle East to Italy.¹²⁹ It would be interesting to examine in more detail to what extent recruitment of certain vulnerable persons, such as minors, for the jihad¹³⁰ could be criminalised under the crime of human trafficking.¹³¹

6.6 Spain

Like in most countries, participating in the Syrian civil war is not a criminal offence in Spain, but several arrests have been made in connection with foreign fighter travel. For instance, In June 2013, Spanish authorities arrested eight alleged members of a Spanish-Moroccan al Qaeda network in Ceuta and Fnideq “allegedly involved in training, funding, and facilitating travel for jihadist fighters to Syria”.¹³² Reportedly, some of the recruits of this network, which also has links in the Netherlands and Belgium, had already taken part in suicide attacks.¹³³ The link with terrorism was also made in the Spanish case against Belgian resident Ismail Abdelatif Al Lal, connected to the

¹²⁰ See “Paris: Französischer Senat billigt Anti-Terror-Gesetz”, *Spiegel Online*, 17 October 2012,

<http://www.spiegel.de/politik/ausland/senat-in-frankreich-billigt-anti-terror-gesetz-gegen-islamisten-a-861808.html>.

¹²¹ See F. Feyder, “Gotteskrieger aus Pforzheim kämpfen in Syrien” (2013).

¹²² See V. Siefert, “Salafisten mit Ziel Syrien ausgereist” (2013).

¹²³ See “Innenminister Andreas Breiter besorgt über ‘Reisepläne’” (2013).

¹²⁴ See K. Biermann, “Antiterrordatei verstößt gegen die Verfassung”, *Zeit Online*, 24 April 2013,

<http://www.zeit.de/digital/datenschutz/2013-04/antiterrordatei-verfassungsgericht-urteil>.

¹²⁵ See Bundesministerium des Inneren, “Die Antiterrordatei”, 6 February 2013,

http://www.bmi.bund.de/DE/Themen/Sicherheit/Terrorismusbekaempfung/Antiterrordatei/antiterrordatei_node.html.

¹²⁶ S. Kern, “Italy: ‘Fighting in the Name of Allah’”, *Gatestone Institute*, 9 July 2013, <http://www.gatestoneinstitute.org/3832/italy-jihadists>.

¹²⁷ *Ibid.*

¹²⁸ See *ibid.*

¹²⁹ See *ibid.*

¹³⁰ In a reportage by the Dutch television programmes *EenVandaag* and *Omroep West*, family members of recruited jihadists in the Netherlands also make the link with human trafficking, see “Hollandse jihadstrijders ‘slachtoffers mensenhandel’”, 6 May 2013, <http://www.eenvandaag.nl/binnenland/45761/hollandse-jihadstrijders-slachtoffers-mensenhandel>.

¹³¹ Trafficking in persons means “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”. See *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, supplementing the United Nations Convention against Transnational Organised Crime, <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCbook-e.pdf>, art. 3 (a).

¹³² L. Lundquist, “Spain uncovers al Qaeda network for Syrian jihadists”, *The Long War Journal*, 21 June 2013, <http://www.longwarjournal.org/archives/2013/06/spain-uncovers-al-qa.php>.

¹³³ See *ibid.* For an example of one such suicide jihadist, see the story of Rachid Wahbi in S. Rotella, “Syria’s Jihadi Migration Emerges as Top Terror Threat in Europe, Beyond” (2013).

same Ceuta-Fnideq network and allegedly involved in the coordination of terrorist attacks later claimed by the al Nusra front.¹³⁴

Spain's Secretary of State for Security, Francisco Martinez Vazquez, echoed the same possible solution suggested by Gilles de Kerchove mentioned earlier, when he stated that a "common approach" is needed across Europe – with new laws to help deal with the threat, as "[f]ollowing a global jihad is not yet a crime in most European countries. This means we don't have the proper tools to fight against it".¹³⁵ Vazquez even stated that it should be a "criminal offence" for people to use the internet to become "self-radicalised" as Europe was witnessing a new kind of terrorism "characterized by self-radicalization and self-training mainly through the internet".¹³⁶ While one can imagine the criminalisation of following and concretely pursuing a global jihad through acts of murder etc., the same cannot be said for using the internet to self-radicalise. It would be interesting to see how Vazquez envisages such a crime to be enforced. In other words: how can one prove that a certain use of the internet is in fact done with the aim of getting radicalised? Radicalisation is in most cases not a goal as such, but a consequence of, among other things, certain (internet) behaviour, contacts and other influences.

6.7 The Netherlands¹³⁷

In the Netherlands, the issue of foreign fighters has been a prominent one, with up to 107 individuals having travelled to Syria as of spring 2013.¹³⁸ In March 2013, the Dutch Minister for Security and Justice, Ivo Opstelten, stated that "[p]articipating in armed jihad or jihadist training abroad is a criminal offence under article 134a of the Criminal Code [assistance to (preparing) a terrorist crime]. Returnees can also be charged with offences under other terrorism legislation".¹³⁹

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.¹⁴⁰

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".¹⁴¹ 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 articles 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.¹⁴² This last provision, art. 205 Dutch Criminal Code, has also been mentioned explicitly

¹³⁴ See European Strategic Intelligence and Security Center, "Belgium/Syria: New Reports Confirm Increasing Involvement of Belgian Jihadists in Syria", *ESISC Briefing*, 1 July 2013, <http://www.esisc.org/upload/publications/briefings/belgiumsyria-new-reports-confirm-increasing-involvement-of-belgian-jihadists-in-syria/Briefing%20-%20Belgium-Syria%20-%20Jihadists.pdf>.

¹³⁵ 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>.

¹³⁶ *Ibid.*

¹³⁷ 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>.

¹³⁸ A. Y. Zelin, "European Foreign Fighters in Syria" (2013).

¹³⁹ "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, p. 3.

¹⁴⁰ *Ibid.*, p. 4.

¹⁴¹ *Ibid.*

¹⁴² See art. 14, para. 2 (b) and (d) of the Dutch *Rijkswet op het Nederlanderschap*.

as a tool against recruiters of jihadists.¹⁴³ Local measures can include various forms of pressure and disruption by the police¹⁴⁴ as well as the freezing of financial assets under the Anti-Terrorist Sanctions Order 2007-II.¹⁴⁵ 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”.¹⁴⁶ 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.¹⁴⁷

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*,¹⁴⁸ but on “normal” provisions in the criminal code.

In the first of the two judgments, against Mohammed G.,¹⁴⁹ the court held that the suspect made certain preparatory acts for murder,¹⁵⁰ 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.¹⁵¹ Hence, even though Mohammed G. was not convicted for a terrorist crime but “only” for 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.,¹⁵² 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 to committing a (terrorist) crime), the judges explained that Omar H. put movies and a text on internet sites, and started discussions online, which could incite people to the armed jihad.

Prosecution spokesperson Paul van der Zanden was reported saying: “This is the first time that the Netherlands hands down such a judgment and this helps 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”.¹⁵³ 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.¹⁵⁴ 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

¹⁴³ See for instance the letter of the Minister of Security and Justice of 21 May 2013 (29 754, nr. 227), <https://zoek.officielebekendmakingen.nl/kst-29754-227.pdf>.

¹⁴⁴ See “Letter to Parliament from Ivo Opstelten” (13 March 2013), p. 4.

¹⁴⁵ Pursuant to the already-discussed UNSC Resolution 1373 of 2001; see *ibid.*, p. 5.

¹⁴⁶ *Ibid.*, p. 5.

¹⁴⁷ See *ibid.*, p. 6.

¹⁴⁸ 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).

¹⁴⁹ 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>.

¹⁵⁰ The judges referred in this context for instance to his remark that all those fighting there/in Syria are worth decapitation.

¹⁵¹ 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 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.

¹⁵² 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>.

the armed jihad in Syria and crush the army of Assad. In early November 2013, the Prosecutor's Office filed an appeal in the case against Omar H.¹⁵⁵

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.¹⁵⁶ Another person allegedly connected to recruitment of jihadists, Murat Öfkeli, also known as "Ibrahim the Turk", was known with the Dutch authorities and had been arrested several times, but was never convicted. In June 2013, he was reportedly killed in Syria.¹⁵⁷

6.8 United Kingdom

In July 2013, Charles Farr, Director General of the UK Office for Security and Counter-Terrorism, warned:

The blunt truth is there are more people associated with al-Qaeda and al-Qaeda associated organisations now operating in Syria than there have ever been before and are that close to Europe and operating with an intensity that is unparalleled since events in Iraq in 2006. They are much closer to us, in much greater numbers and fighting with an intensity that we have not seen before. [...] Groups 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 shift in the threat we have seen in at least five years and I think since 2003.¹⁵⁸

According to the latest reports, up to 350 British men and women from a range of ethnic background could have travelled to Syria.¹⁵⁹

Like their continental counterparts, British authorities face problems when it comes to the prosecution of fighters. Only a few returnees have been arrested. A 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.¹⁶⁰ 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 but still had to enter a plea.¹⁶¹ However, besides these arrests, which were clearly connected to a very specific offence, namely kidnapping, "others who have been taking part in the armed struggle against the Assad regime are not deemed to be doing anything illegal".¹⁶²

Currently, the UK Home Secretary Theresa May is leading 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'".¹⁶³ Already in April 2013, May "announced that the government could withdraw the passports of those suspected of involvement in terrorist activities abroad who might return with 'enhanced capabilities' to launch attacks at home".¹⁶⁴

¹⁵⁵ "OM in beroep in strafzaak 'Syriëganger'", *Nu.nl*, 6 November 2013, <http://www.nu.nl/binnenland/3621741/in-beroep-in-strafzaak-syrieganger.html>.

¹⁵⁶ See S. Batrawi, "The Dutch Foreign Fighter Contingent in Syria" (October 2013), p. 8.

¹⁵⁷ *Ibid.*, pp. 8-9. Ibrahim the Turk also played a prominent role in the documentary on human trafficking, see n. 127.

¹⁵⁸ 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>.

¹⁵⁹ N. Blanford and M. Evans, "Up to 150 Britons join rebels fighting to overthrow Assad", *The Times*, 19 August 2013, <http://www.thetimes.co.uk/tto/news/world/middleeast/article3846455.ece>; <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/10464681/Up-to-20-Britons-killed-fighting-in-Syria.html>.

¹⁶⁰ "Brothers deny kidnapping journalists in Syria", *BBC*, 21 June 2013, <http://www.bbc.co.uk/news/uk-23004079>.

¹⁶¹ *Ibid.*

¹⁶² K. Sengupta, "Conflict in Syria creates wave of British jihadists", *The Independent*, 13 March 2013, <http://www.independent.co.uk/news/world/middle-east/conflict-in-syria-creates-wave-of-british-jihadists-8533386.html>.

¹⁶³ J. Owen and B. Brady, "Theresa May urges action on 'jihad tourism'" (2013).

¹⁶⁴ "Will they come home to roost?", *The Economist*, 4 May 2013, <http://www.economist.com/news/britain/21577081-government-worried-about-british-jihadists-syriawith-reason-will-they-come-home>.

7. Concluding Remarks and Recommendations

The issue of European foreign fighters in Syria and returnees is a highly complex and dynamic one. The phenomenon has grown exponentially in the last year, and given the situation in Syria and in the home countries and communities of foreign fighters, there are no signs that travel will stop soon. This also holds, though at a much lower level, for those returning to Europe.

Despite increased calls for a comprehensive approach to the foreign fighter phenomenon on the European level, there is currently no such Union-wide response. The individual Member States analysed in this Research Paper have taken a variety of measures, ranging from some more drastic policies such as the confiscation of passports (Germany), and the suggestion to bar foreign fighters from being eligible for fast-tracked citizenship (Austria), 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. raising of terrorism threat level in The Netherlands and adopting a new counter-terrorism law in France in 2012). Others build on existing legislations and frameworks both inside and outside the counter-terrorism domain (prosecution of fighters in The Netherlands, arrests in Spain in relation to a network in Ceuta and Fnideq; prosecution in the UK connected to a kidnapping in Syria, arrests in Italy in relation to human-trafficking). Interestingly, one of the countries with a relatively large number of departed and returned fighters (Belgium), immediately rejected more repressive measures such as criminalising leaving for Syria to fight and confiscating identity cards.

This Paper has suggested that the foreign fighter phenomenon in itself is not *a priori* a threat to security, let alone a terrorist one. This is not to say that foreign fighters do not have the potential to cause trouble not only in Syria, but also in the European countries of origin. These facts require investments to deal with the risk assessment challenge, the governance challenge, and the legal challenge – at home and on the international level – to attempt to overcome the dilemmas outlined in this Paper. Against this backdrop, a number of recommendations are formulated, some of which are very general or academic in nature, and some of which are more specific.

With regard to the risk assessment challenge, countries that “provide” foreign fighters to the battlefields in Syria could:

- Strengthen their information position and intelligence capacity, amongst others, through better coordination among various agencies across countries, and other relevant actors;
- (Also with an eye on the previous recommendation) Invest in partnership and good relations based on mutual trust with Islamic communities, the families and friends of foreign fighters, and civil society organisations; and
- Further increase sharing knowledge and experience – locally, nationally and internationally – and, when possible, share and compare best practices in the areas of risk assessment, prevention, and the pursuit of foreign fighters.

With regard to the governance challenge, concerned countries should:

- Develop a cohesive and comprehensive strategy on the issue of foreign fighters and determine what organisation should take the lead to deal in different parts of the “problem”, including on the prevent and pursue front;
- Learn from past experiences with returnees and from (non-European) examples of related work, for instance in the field of DDR;
- Avoid securitisation and politicisation of the issue of foreign fighters and gather the political will needed to help returnees that can and want to be reintegrated into society;
- Develop concrete and practical proposals focussing on prevention and cooperation (including a focus on those who incite and facilitate persons to join the fighting in Syria). These should be given precedence over more symbolic proposals such as the revocation of someone’s nationality; and
- Further increase coordination at all levels to improve consistency in policies and the framing of the issue of foreign fighters and avoid conflicting mechanisms and messages.

With regard to the legal challenge, concerned countries should:

- Adapt clear legal frameworks and procedures in each country. These should be primarily based on existing laws and crimes (e.g. preparation for murder, war crimes and human trafficking, as well as European Conventions such as the Warsaw Convention on the Prevention of Terrorism);
- Carefully research and thoroughly analyse the legal bases and long-term consequences of criminalising joining the jihad before assessing if such a measure is really necessary; and
- Increase European legal cooperation, including exchange of lessons learned among prosecutors (for example in the context of Eurojust), and the use of joint investigation teams;

Lastly, it is important to keep in mind that the complex and dynamic nature of the situation requires constant monitoring from an intelligence perspective as well as from a governance and legal perspective. As scholars we are aware that some of the recommendations and assumptions outlined here can be outdated before this Paper is published, and that some might not be feasible under the current political conditions or within the current legal framework. Everyone working on this phenomenon should be aware of the constant need to check the facts and test the assumptions and tools that are available and, if needed, look for new ones, in order to gain more insight into the constantly evolving phenomenon of European jihadi foreign fighters.

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