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Foreign fighters and the tension between counterterrorism and international humanitarian law: A case for cumulative prosecution where possible

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Abstract

Contemporary foreign fighters (FFs) often join so-called dual-nature groups, i.e. groups that can at the same time be qualified as a non-State armed group involved in a non-international armed conflict and a terrorist organization. Both international humanitarian law and counterterrorism (CT) legislation may hence be of relevance when assessing the legality of FF conduct. The CT perspective tends to remain predominant, however. This paper argues that, especially in terms of prosecution, due regard must be paid to both legal frameworks where possible. It also argues that national prosecution in the country of origin seems to offer the best prospects for realizing such cumulative prosecution.

Keywords: foreign fighters, counterterrorism, international humanitarian law, cumulative prosecution.

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Introduction: The multidimensional nature of the foreign fighter phenomenon

In 2014, an estimated 12,000 people from more than 80 countries had travelled to Syria in order to join groups, such as Jabhat Al-Nusra and Islamic State of Iraq and Syria (ISIS), and engaged in the civil conflict there.¹ At the height of the conflict, in 2015, that number is thought to have gone up to almost 30,000 from more than 100 countries.² The total number of men, women and children that have travelled from Western Europe to Syria and Iraq has been estimated at around 5000.³ Around 30 percent of the European foreign fighters (FFs) are believed to have returned to their home country in the meantime.⁴ Since the defeat of Islamic State (IS), those who have not returned are either believed to be dead or imprisoned in Syria or Iraq.⁵ The latter are still considered an important security threat and States seem to be doing everything possible to prevent these so-called FFs as well as their families from returning to their country of origin.⁶ Aside from the question whether such a position is actually the most efficient in terms of national security,⁷ the consequence of such an approach is that many of these FFs, especially in the camps in Syria, are just left there and no action is taken in their regard.⁸ It is the position of the present author, however, that it is of utmost importance for these FFs to be brought to justice, preferably in their State of origin.⁹ The question of the prosecution of (returning) FFs is, however,

- 1 Richard Barrett, "Foreign Fighters in Syria", Soufan Group, June 2014, available at: www.jstor.org/stable/resrep10783, p. 9 (all internet references were accessed in August 2021).
- 2 Soufan Group, "Foreign Fighters: An Updated Assessment of the Flow of Foreign Fighters into Syria and Iraq", Report, December 2015, available at: <http://www.jstor.org/stable/resrep10784.3>, p. 5.
- 3 *Ibid.*, p. 5. See also Thomas Renard and Rik Coolsaet (eds), "Returnees: Who Are They, Why Are They (Not) Coming Back and How Should We Deal with Them: Assessing Policies on Returning Foreign Terrorist Fighters in Belgium, Germany and the Netherlands", *Egmont Royal Institute for International Relations*, 2018, available at: https://www.egmontinstitute.be/content/uploads/2018/02/egmont.papers.101_online_v1-3.pdf?type=pdf, p. 3.
- 4 Amandine Scherrer, "The Return of Foreign Fighters to EU Soil: Ex Post Evaluation", *European Parliamentary Research Service Study*, available at: [www.europarl.europa.eu/RegData/etudes/STUD/2018/621811/EPRS_STU\(2018\)621811_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/621811/EPRS_STU(2018)621811_EN.pdf), Part I, p. 5.
- 5 Trudy Govier and David Boutland, "Dilemmas Regarding Returning ISIS Fighters", *Ethics & Global Politics*, Vol. 13, No. 2, 2020, p. 93.
- 6 "ISIS Foreign Fighters After the Fall of the Caliphate", *Armed Conflict Survey*, Vol. 6, 2020, p. 26.
- 7 There are indications that some of these FFs have managed to escape and are making their way back home. See, for example, Frank Gardner, "IS Prisoner Issue a Ticking Timebomb for the West", *BBC News*, available at: <https://www.bbc.com/news/world-middle-east-53428928>. It is the opinion of the present author that a controlled return would be better in terms of national security, especially in the longer term. On this point, see also Tanya Mehra and Christophe Paulussen, "The Repatriation of Foreign Fighters and Their Families: Options, Obligations, Morality and Long-term Thinking", *ICCT Perspective*, 6 March 2019, available at: <https://icct.nl/publication/the-repatriation-of-foreign-fighters-and-their-families-options-obligations-morality-and-long-term-thinking/>; and "ISIS Foreign Fighters After the Fall of the Caliphate", above note 6, p. 23.
- 8 The situation is slightly different for the FFs held in prison in Iraq given that some of them are actually being prosecuted in Iraq for the acts that they have committed during their time with IS, albeit not without issues. See, for example, Margaret Coker and Falih Hassan, "A 10-Minute Trial, a Death Sentence: Iraqi Justice for ISIS Suspects", *The New York Times*, 17 April 2018, available at: <https://www.nytimes.com/2018/04/17/world/middleeast/iraq-isis-trials.html>.
- 9 On this point see also, for example, T. Mehra and C. Paulussen, above note 7.

not an easy one. One of the main complicating factors in this regard is to be found in the difficult relationship between international humanitarian law (IHL) and counterterrorism (CT).

There is no uniform definition of FFs under international law. For the purpose of this paper, the following definition, as suggested by Sandra Krähenmann, will be used, namely that FFs are “individual[s] who [leave] [their] country of origin or habitual residence to join a non-state armed group in an armed conflict abroad and who [are] primarily motivated by ideology, religion, and/or kinship”.¹⁰ This definition is chosen here given that it, in the present author’s opinion, reflects the current reality of the FF phenomenon in the most adequate manner.

If FFs are considered to be basically individuals joining a non-State armed group (NSAG) in an armed conflict abroad, it is by definition important to also assess their conduct from an IHL perspective. IHL applicability is especially straightforward for those having a continuous combatant function within the NSAG, i.e. concerning individuals “recruited, trained and equipped by such a group to continuously and directly participate in hostilities on its behalf”.¹¹ It is slightly more complicated for those merely associated with the armed group, without having a combatant function. In order to assess whether their conduct could potentially be assessed under IHL, more specifically in terms of criminal accountability, a nexus with the armed conflict needs to be proven (see below).

Even if there is increasing consideration for the relevance of IHL in relation to the FF phenomenon, FFs are still mainly being assessed from a CT perspective. The term “Foreign Terrorist Fighter” used by the United Nations (UN) and the European Union (EU) in their policy documents on the matter represents a clear illustration of the underlying CT focus.¹² As Krähenmann argues, the use of the term “foreign terrorist fighters” in UN Security Council (UNSC) Resolution 2178 (2014) definitely “blurs the lines [between CT and IHL] rhetorically”.¹³ The EU is not doing a much better job, as it appears “to use the terms FF, foreign terrorist fighters (FTF), and terrorists almost inter-changeably”.¹⁴ As was clearly highlighted by the International Committee of the Red Cross (ICRC) on more than one occasion, this robust CT

10 Sandra Krähenmann, “Foreign Fighters under International Law”, Geneva Academy of International Humanitarian Law and Human Rights, Academy Briefing No. 7, 2014, p. 6.

11 Nils Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, May 2009, available at: <https://www.icrc.org/en/doc/assets/files/other/icrc-002-0990.pdf>, p. 35. For a more in-depth assessment of the question of membership determination see, for example, R. E. Vanlandingham, “Meaningful Membership: Making War a Bit More Criminal”, *Cardozo Law Review*, Vol. 35, No. 1, 2013, pp. 120–128.

12 See, for example, respectively, UN Security Council (UNSC) Resolution 2178 of 24 September 2014, adopted 24 September 2014; and “Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA and Amending Council Decision 2005/671/JHA”, *Official Journal of the European Union*, L 88/6, 31 March 2017.

13 Sandra Krähenmann, “The Interplay Between International Humanitarian Law, Terrorism and the ‘Foreign Terrorist Fighter’ Regime”, *Proceedings of the ASIL Annual Meeting*, Vol. 112, 2018, p. 309.

14 Bibi van Ginkel and Eva Entenmann (eds), “The Foreign Fighters Phenomenon in the European Union: Profiles, Threats & Policies”, *ICCT Research Paper*, April 2016, available at: https://icct.nl/app/uploads/2016/03/ICCT-Report_Foreign-Fighters-Phenomenon-in-the-EU_1-April-2016_including-AnnexesLinks.pdf, p. 13.

discourse has significantly contributed to blurring the lines between armed conflict and terrorism and may potentially have important adverse effects on IHL.¹⁵

In this paper, a brief overview of the difficult relationship between IHL and CT will first be provided as well as its impact on the qualification of the activities of the FFs. Then, the question of prosecution of the (returning) FFs, central to this analysis, will be assessed. The assessment of the question of prosecution will start with a brief note on the opportunities for international prosecution as well as the avenues for domestic prosecution in the region, i.e. in Syria and Iraq. The further focus of the second section will be on prosecution by States of origin, and more particularly in an EU context. This focus is justified on the basis of two main grounds. First, the EU presents an interesting context because it allows for comparison between different States within a system which is striving towards more harmonization when it comes to criminalization more in general, but also with regard to the criminalization of FFs more in particular.¹⁶ Second, this is also the context the present author is most aware of, given that this has been at the centre of her previous research.¹⁷ Ultimately, it will be concluded that effectively prosecuting the FFs for the wrongful acts they may have committed is of utmost importance and that, when doing so, due regard must be paid to all relevant legal frameworks.

The difficult relationship between international humanitarian law and counterterrorism and how this impacts on the situation of foreign fighters

Whereas the relationship between CT and IHL has always been a difficult one, the separation between the two regimes has become further blurred after 9/11.¹⁸ The FF phenomenon has only further exacerbated these tensions in practice. Indeed, when people join a group that is generally characterized as being terrorist, such as IS for example, which is also at the same time operating in a situation of armed conflict, this increases the likelihood of IHL and CT being both relevant for the assessment of their conduct and hence complicates the question as to which specific body of rules is applicable to which facts.¹⁹ It is therefore crucial to clearly delimitate the

15 ICRC, “International Humanitarian Law and the Challenges of Contemporary Armed Conflict”, Report prepared for the 32nd International Conference of the Red Cross and Red Crescent, Geneva, 8–10 December 2015, p. 17 (hereafter ICRC Challenges Report 2015).

16 On this point, see Eurojust/the Genocide Network, “Cumulative Prosecution of Foreign Terrorist Fighters for Core International Crimes and Terrorism-Related Offences”, May 2020, p. 5 (hereafter Eurojust Genocide Network Report on Cumulative Prosecution), available at: <https://www.eurojust.europa.eu/cumulative-prosecution-foreign-terrorist-fighters-core-international-crimes-and-terrorism-related>, p. 7.

17 This paper builds further upon Hanne Cuyckens and Christophe Paulussen, “The Prosecution of Foreign Fighters in Western Europe: The Difficult Relationship Between Counter-Terrorism and International Humanitarian Law,” *Journal of Conflict and Security Law*, Vol. 24, 2019, pp. 537–565.

18 Ben Saul, “Terrorism and International Humanitarian Law”, in Ben Saul (ed.), *Research Handbook on International Law and Terrorism*, Edward Elgar, Cheltenham, 2020, p. 209.

19 David McKeever, “International Humanitarian Law and Counter-Terrorism: Fundamental Values, Conflicting Obligations”, *International & Comparative Law Quarterly*, Vol. 69, No. 1, 2020, p. 48.

relationship between IHL and CT in their regard. In order to do so, the difficulties concerning the relationship between IHL and CT more in general first need to be briefly outlined. The paper then briefly discusses how this affects FFs and the qualification of their conduct more specifically.

The difficult relationship between counterterrorism and international humanitarian law: A brief overview

Before being able to assess the specific relationship between CT and IHL it is important to start by briefly defining what is to be understood by CT. Whether CT can be considered a specific branch of international law similar to, for example, IHL is open to debate. Reference is most of the time made to the CT framework. This framework is made up of 19 international treaties as well as numerous regional treaties which are concerned with a series of acts commonly associated with terrorism such as, for example, hijacking, bombing and the taking of hostages.²⁰ A comprehensive convention on terrorism has been under negotiation for a while now but has not yet led to the adoption of such a convention. Actually, one of the main reasons why such negotiations have not yet been successful is the lack of agreement with regard to the relationship between CT and IHL.²¹ Another main issue blocking the adoption of such a convention, and challenging the CT framework more in general, is the lack of a single, generally recognized, definition of terrorism.²² There is also no specific international crime of terrorism.²³ Rather CT instruments merely “contain a list of acts that are typically linked with terrorism and must be criminalised and prosecuted by the state parties (...)”.²⁴ Also relevant to mention when assessing the CT framework is the important role that UNSC resolutions play as a source of CT rules.²⁵

20 D. McKeever, above note 19, p. 44. See also Hans-Peter Gasser, “Acts of Terror, ‘Terrorism’ and International Humanitarian Law”, *International Review of the Red Cross*, Vol. 84, No. 847, 2002, p. 550; and Daniel O’Donnell, “International Treaties Against Terrorism and the Use of Terrorism During Armed Conflict and by Armed Forces”, *International Review of the Red Cross*, Vol. 88, No. 864, 2006, pp. 853–854.

21 D. McKeever, above note 19, p. 43. On this point, see also, more particularly, Mahmoud Hmoud, “Negotiating the Draft Comprehensive Convention on International Terrorism: Major Bones of Contention”, *Journal of International Criminal Justice*, Vol. 4, No. 5, 2006, p. 1043.

22 Moira Macmillan, “The UN Foreign (Terrorist) Fighter Regime and International Criminal Law”, *American Society of International Law Proceedings*, Vol. 112, 2018, p. 311. See also Sandra Krähenmann, “Legal Framework Addressing Terrorism and Counter-Terrorism”, *Proceedings of the Bruges Colloquium*, 20–21 October 2016, *Collegium*, No. 47, Autumn 2017, p. 19; and H.-P. Gasser, above note 20, p. 552.

23 M. Macmillan, above note 22, p. 312.

24 Alejandro Sánchez Frías, “Bringing Terrorists to Justice in the Context of Armed Conflict: Interaction Between International Humanitarian Law and the UN Conventions Against Terrorism”, *Israel Law Review*, Vol. 53, No. 1, 2020, p. 80.

25 D. McKeever, above note 19, p. 46. For an assessment of the risks and benefits of UNSC resolutions imposing international legal obligations on UN Member States with respect to Foreign (Terrorist) Fighters see D. DeBartolo, “Security Council ‘legislation’ on Foreign (Terrorist) Fighters”, *American Society of International Law Proceedings*, vol. 112, 2018, pp. 303–306.

Given that both armed conflict and terrorism often involve acts of violence committed by non-state armed actors, there seems to be a “natural connection” between CT and IHL.²⁶ The difficulty in the relationship is hence mainly a consequence of the fact that they both regulate acts of violence. They do so on the basis of very different rationales, however. Consequently, there are some overlaps but also some very clear differences. In the words of Krähenmann, “[t]he superficial similarities obscure the significant conceptual differences between acts of violence in armed conflicts and these outside armed conflicts as well as the difference in the legal regimes governing them”.²⁷ The main difference is that IHL does not prohibit all acts of violence. Indeed, whereas IHL is based on a distinction between lawful and unlawful acts of violence, all acts of violence designated as terrorist are considered unlawful.²⁸ It is hence important to clearly define the relationship between both frameworks and disentangle them in order to avoid blurring and, ultimately, contradictions.

In light of this particular risk of overlap, it is important for international conventions addressing terrorism to include clauses regulating the relationship with IHL.²⁹ As Ferraro so rightfully pointed out: “[t]he formulation of such a clause will be critical in order to maintain IHL integrity and rationale, but also to avoid ambiguity and misinterpretation detrimental to IHL.” As was already highlighted above, the inclusion of such a clause is one of the main reasons why a comprehensive convention on terrorism has not yet been adopted on the international plane (see above). However, such clauses do already exist in other international and regional CT instruments. EU Directive 2017/541, for example, stipulates that:

[i]t does not govern the activities of armed forces during periods of armed conflict, which are governed by international humanitarian law within the meaning of those terms under that law, and, inasmuch as they are governed by other rules of inter-national law, activities of the military forces of a State in the exercise of their official duties.³⁰

Without going into detail into the specific issue of the so-called exclusion clauses,³¹ the discussion surrounding the exact scope of such clauses, however, is important to briefly mention here. More specifically the question as to whether the exclusion clause would also cover situations of non-international armed conflict and hence also apply to NSAGs is of particular relevance. For an illustration of this debate in case law it is interesting to contrast the Dutch view with the Belgian one: the former seems to suggest that the clause does not apply to NSAGs whereas the

26 S. Krähenmann, above note 13, p. 307.

27 *Ibid.*

28 T. Ferraro, “Interaction and Overlap Between Counter-Terrorism Legislation and International Humanitarian Law in Terrorism”, *Proceedings of the Bruges Colloquium*, 20–21 October 2016, p. 28.

29 *Ibid.*, p. 30.

30 EU directive 2017/541, above note 12, preambular clause 37.

31 On this point, see, more particularly, the article by Thomas Van Poecke, Frank Verbruggen and Ward Yperman, “Terrorist Offences and the International Humanitarian Law Exclusion Clause: Belgium as the Odd One Out” in the same issue of the *International Review of the Red Cross*.

latter clearly deems the clause to be applicable to NSAGs.³² The debate ultimately revolves around the interpretation of the notion of “armed forces” as included in the exclusion clause. The Dutch court in, what has been commonly referred to as the *context* case, held on this specific point, that when interpreting the concept of “armed forces” in a literal sense, it would refer to the armed forces of a State and that organized armed groups are usually not referred to as “armed forces” but as “organized armed groups”.³³ Consequently, the Dutch court concluded that by using the term “armed forces”, the activities of the armed forces of a State are excluded from the realm of CT legislation.³⁴ By contrast, the reasoning of the Belgian courts in the *Sharia4Belgium* and *PKK* cases clearly shows that Belgium accepts the clause to be applicable both to State armed forces and NSAGs.³⁵ It is important to note that Belgium has incorporated the exclusion clause into its national criminal legislation as opposed to the Netherlands, but the formulation of the Belgian clause is very similar to the EU clause, and reference therein is also made to the notion of “armed forces”, so the difference in outcome is not based on the specific wording of the Belgian clause.³⁶

The difficulty in defining the exact relationship also rests on the fact that there is no generally accepted definition of terrorism.³⁷ More generally, this lack of commonly agreed definition of terrorism leaves room for abuse as it leaves it up to States to decide which individuals they qualify as “terrorist”.³⁸ Consequently, there is nothing preventing States from abusing the legal

32 Contrast *Prosecutor v. Imane B. et al.* (District Court of The Hague, 10 December 2015), §§ 7.37–7.44 with Rechtbank van eerste aanleg (Antwerpen), Vonnis, 11 February 2015, p. 31 (*Sharia4Belgium* case) and Hof van Beroep (Brussels), Beslissing van de Kamer van Inbeschuldigingstelling, 14 September 2017 (*PKK* indictment). For a further discussion of the question whether the exclusion clause refers exclusively to State armed forces or not, see also Marten Zwanenburg, “Foreign Terrorist Fighters in Syria: Challenges of the ‘Sending’ State”, *International Law Studies*, Vol. 92, No. 1, 2016, pp. 226–227.

33 *Prosecutor v. Imane B. et al.*, above note 32, paras 7.38 and 7.40.

34 *Ibid.*, para. 7.39.

35 *Sharia4Belgium* case and *PKK* indictment, above note 32. See also O. Venet, “Infractions terroristes et droit humanitaire: l’article 141bis du Code pénal”, *Journal des tribunaux*, No. 6387, March 2010, p. 169; V. Koutroulis, “Le jugement du Tribunal correctionnel d’Anvers dans l’affaire dite « *Sharia4Belgium* » et l’article 141bis du Code pénal belge”, in A. Jacobs and D. Flore (eds), *Les Combattants étrangers en Syrie*, L’Harmattan, Paris, 2005, p. 88; T. Ruys and S. Van Severen, “Art. 141bis Sw. – Vervolging tussen hamer en aambeeld van terreurbestrijding in internationaal humanitair recht”, *Rechtskundig Weekblad*, 2018–19, no. 14, p. 531; and J. Wouters and T. Van Poucke, “Van strijdkrachten, terroristen en het Belgisch strafrecht (noot onder Brussel, 14 september 2017)”, *Rechtskundig Weekblad*, 2018–19, No. 14, p. 1617.

36 Apart from Belgium, the only other EU Member State that seems to have also integrated such a clause in its national legislation is the Republic of Ireland; see T. Van Poecke, “The IHL Exclusion Clause, and why Belgian Courts Refuse to Convict PKK Members for Terrorist Offences”, *EJIL: Talk!*, 20 March 2019, available at: <https://www.ejiltalk.org/author/thomasvanpoecke/>.

37 M. Macmillan, above note 22, p. 311. See also S. Krähenmann, above note 22, p. 19; and Julia Geneuss, “The Legal Limbo of Counter-Terrorism Criminal Law and Armed Conflict. Anti-Regime and Anti-IS (Foreign) Fighters Before European Courts”, *European Criminal Law Review*, Vol. 10, 2020, p. 342.

38 B. van Ginkel, “The New Security Council Resolution 2178 on Foreign Terrorist Fighters: A Missed Opportunity for a Holistic Approach”, *ICCT Perspectives*, 4 November 2014, available at: <https://icct.nl/publication/the-new-security-council-resolution-2178-on-foreign-terrorist-fighters-a-missed-opportunity-for-a-holistic-approach/>.

uncertainty that the failure to agree upon a single definition generates.³⁹ Having a clear and single definition would better prevent national prosecutors from using vague and overly broad national definitions of terrorism, to, for example, silence political opponents.⁴⁰ Similarly, the terms “terrorist group” and “terrorist organization” are also not adequately defined, leading here as well to a diversity in approaches.⁴¹ In order to determine whether a group can be considered terrorist or not, reference is often made to so-called national, regional or international “terrorist lists”, which raise a certain number of issues of their own, especially when it comes to the fairness of the listing process.⁴² Ultimately, in the absence of clear definitions, combined with the lack of a clear delimitation between both legal frameworks, States could just decide to qualify “any act of violence by a NSAG in an armed conflict as an act of terrorism, and therefore necessarily unlawful, even when the act in question is not in fact prohibited under IHL”.⁴³ Such an approach goes against the very nature of a system which does not prohibit attacks against lawful targets.⁴⁴ Macmillan stringently questions: if “[a]nything described as an ‘act of terrorism’ must always be unlawful. What do we mean when we refer to a foreign fighter as ‘terrorist’?”.⁴⁵

Finally, IHL itself also provides some guidance when it comes to regulating acts of terror committed in the framework of an armed conflict, international armed conflict as well as in non-international armed conflict.⁴⁶ There is both a specific prohibition concerning “acts or threats of violence the primary purpose of which is to spread terror among the civilian population”,⁴⁷ as well as a more general

39 A. De Guttry, “The Role Played by the UN in Countering the Phenomenon of Foreign Terrorist Fighters”, in A. de Guttry, F. Capone and C. Paulussen (eds), *Foreign Fighters in International Law and Beyond*, T.M. C. Asser Press, The Hague, 2016, p. 266.

40 Christophe Paulussen, “Impunity for International Terrorists? Key Legal Questions and Practical Considerations”, *ICCT Research Paper*, April 2012, p. 12, available at: <https://www.icct.nl/app/uploads/download/file/ICCT-Paulussen-Impunity-April-2012.pdf>. On this point, see also Lisa Ginsborg, “One Step Forward, Two Steps Back: The Security Council, ‘Foreign Terrorist Fighters’ and Human Rights”, in Manfred Novak and Anne Charbod (eds), *Using Human Rights to Counter Terrorism*, Edward Elgar Publishing, Cheltenham, 2018, pp. 203–204.

41 Brian J. Phillips, “What is a Terrorist Group? Conceptual Issues and Empirical Implications”, *Terrorism and Political Violence*, Vol. 27, No. 2, 2015, pp. 225–226.

42 Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism*, Cambridge University Press, Cambridge, 2012, p. 28. For a more detailed assessment and criticism of the listing system that exists at the level of the UN, see, for example, Lisa Ginsborg, “The United Nations Security Councils Counter-Terrorism ISIL (Daesh) and Al-Qaida Sanctions Regime”, in Ben Saul (ed.), *Research Handbook on International Law and Terrorism*, Edward Elgar Publishing, Cheltenham, 2020, pp. 550–563.

43 ICRC, “International Humanitarian Law and the Challenges of Contemporary Armed Conflict. Recommitting to the Protection in Armed Conflict on the 70th Anniversary of the Geneva Conventions”, October 2019, p. 58 (hereafter ICRC Challenges Report 2019). See also Stéphane Ojeda, “Global Counter-Terrorism Must not Overlook the Rules of War”, *Humanitarian Law & Policy*, 13 December 2016, available at: <https://blogs.icrc.org/law-and-policy/2016/12/13/global-counter-terrorism-rules-war/>.

44 ICRC Challenges Report 2015, above note 15, p. 18.

45 M. Macmillan, above note 22, p. 313.

46 H.-P. Gasser, above note 20, p. 562.

47 ICRC, Customary IHL Database, Rule 2 (applicable in both international armed conflicts and non-international armed conflicts), available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule2 (emphasis added). See also Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8

prohibition relating to a range of other acts of violence when committed against civilians or civilian objects.⁴⁸ As pointed out by Ojeda, “IHL already provides a strong legal framework with explicit prohibitions applicable also to NSAGs designated as terrorists whose serious violations entail individual criminal responsibility both at domestic and international level (e.g. universal jurisdiction for acts amounting to war crimes).”⁴⁹ The argument sometimes used that relying on an IHL perspective would lead to impunity is hence incorrect.⁵⁰ In addition, IHL does not prohibit members of NSAGs from being prosecuted for mere participation in hostilities under national law in the absence of combatant privilege.⁵¹ This possibility raises a certain number of challenges, notably in terms of compliance, given that it may risk disincentivizing NSAGs from abiding by IHL.⁵² Numerous calls have been made under IHL to grant the broadest possible amnesty to persons who have participated in armed conflict and hence not to prosecute those members of NSAGs for lawful acts of war.⁵³ In the framework of specifically the relationship between CT and IHL, the present author would argue that the possibility of prosecuting NSAGs for mere participation in hostilities generates an additional risk. Dutch courts have, for example, relied on the absence of combatant privilege to justify relying on national CT legislation.⁵⁴ This argument is based on the fact that the existence of an armed conflict does not necessarily discard other international law rules, including CT, but the present author believes a similar conclusion can be reached without reference to the absence of combatant privilege.⁵⁵ Albeit not wrong from a legal perspective, the reasoning provided for by the Dutch courts may further blur the relationship between CT and IHL given that it again may provide the suggestion that all acts of NSAGs are terrorist in nature.

June 1977 (entered into force 7 December 1978) (AP I), Art. 51(2); Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (AP II), Art. 13(2); and Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Art. 33.

48 ICRC Challenges Report 2015, above note 15, p. 18.

49 S. Ojeda, above note 43. On this point, see also D. McKeever, above note 19, p. 52.

50 O. Venet, above note 35, p. 169. See also H.-P. Gasser, above note 20, p. 566; and *Proceedings of the Bruges Colloquium: Terrorism, Counter-Terrorism and International Humanitarian Law*, 20–21 October 2016, *Collegium*, No. 47, Autumn 2017, pp. 43–44.

51 On this point, see, more particularly, J. K. Kleffner, “From ‘Belligerents’ to ‘Fighters’ and Civilians Directly Participating in Hostilities – On the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference”, *Netherlands International Law Review*, Vol. 54, 2007, pp. 321–323.

52 S. Krähenmann, above note 22, p. 20. On this point, see also, more particularly, H. Højfeldt, “Prohibiting Participation in Armed Conflict”, *The Military Law and the Law of War Review*, Vol. 54, 2015–2016, p. 31.

53 See Art. 6(5) of AP II, stating that “at the end of the hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict”. See also ICRC, Customary IHL database, Rule 159, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule159. The granting of amnesties to those who have merely participated in hostilities has also been encouraged by various UN bodies, including the UNSC, as well as by NATO and the EU; see <https://www.icrc.org/en/document/amnesties-and-ihl-purpose-and-scope>.

54 For a more in-depth assessment of the Maher and Context cases and the relationship between combatant immunity, see. H. Cuyckens and C. Paulussen, above note 17, pp. 548–551.

55 *Ibid.*, pp. 550–551.

The qualification of the criminal acts committed by foreign fighters under counterterrorism and international humanitarian law

This part will briefly assess how the tension between CT and IHL is further manifested by the situation of FFs. This question is of particular relevance for FFs who have joined armed groups which at the same time have also generally been qualified as terrorist by the international community.⁵⁶ Nowadays the term FF is mostly used in relation to the conflict in Syria and Iraq and is particularly linked to the evolution of jihadist groups such as ISIS, for example.⁵⁷ ISIS is definitely a good example of what the present author would like to refer to as a dual-nature group, meaning a group that is at the same time a NSAG involved in a non-international armed conflict and a terrorist organization. Reference is also made in UNSC Resolution 2178 (2014) to Jabhat Al-Nusra, for example, as an entity of concern when it comes to attracting F(T)Fs. This is also a good example of a so-called dual-nature group: it is considered a terrorist organization with links to Al-Qaida as well as a party to the conflict in Syria.⁵⁸ For such groups both IHL and CT may be of relevance. Recognizing that their conduct may also fall under IHL does not exclude CT *per se*, it is important to look at each particular act committed by the FF in question and then assess whether the act in question falls under CT or IHL.⁵⁹

Acts will have to be assessed under the CT framework when they meet the definitions provided in the relevant international and regional CT instruments. As stated above, in the absence of a generally recognized definition of terrorism, international and regional instruments request States to criminalize a certain number of acts associated with terrorism.

UNSC Resolution 1566 (2004) describes terrorism as “criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism”.⁶⁰ UNSC Resolution 1373 (2001) more specifically requires States to ensure that anyone “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

56 Qualification as a terrorist organization is made here on the basis of the UNSC’s list of terrorist organizations; available at: <https://scsanctions.un.org/consolidated/#alqaedaent>.

57 A. Ali, “La risposta della comunità internazionale al fenomeno dei foreign terrorist fighters”, *La comunità internazionale*, Vol. 2, 2015, p. 181. See, also, H. Cuyckens and C. Paulussen, above note 17, p. 541.

58 It is included on the UNSC’s list of terrorist organizations. For the qualification of Jabhat Al Nusra as a party to the conflict in Syria, see, for example, T. Gill, “Classifying the Conflict in Syria”, *International Law Studies (Naval War College)*, Vol. 92, 2016, p. 374.

59 On this point, also see A. Sánchez Frías, above note 24, p. 99.

60 UNSC Resolution 1566 (2004), adopted 8 October 2004, para. 3.

established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist act”.⁶¹ Concerning more specifically F(T)Fs, UNSC Resolution 2178 (2014) calls upon States to criminalize (attempted) travel “for the purpose of perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training”, as well as the incitement and financing of such travel.⁶² “Terrorist acts” are, however, not defined.⁶³ The “terrorist” element of the crime concerned in this paragraph is linked to the conduct of the group that the individual is joining rather than based on the individual’s own conduct.⁶⁴ In other words, the travelling (or the incitement and financing of such travel) will be punishable as an act under CT on the basis of the nature of the group joined, so it will ultimately depend on whether the joined group is considered to be a terrorist group or not.

In the European context that this paper is more directly concerned with, EU directive 2017/541 provides a definition of terrorist offences and more particularly highlights a certain number of preliminary and preparatory offences that need to be criminalized.⁶⁵ Directive 2017/541 lists a certain number of intentional acts (such as attacks on a person’s life or physical integrity, kidnapping, extensive destruction of facilities, etc.) which need to be considered as terrorist offences when committed with the aim of: (a) seriously intimidating a population; (b) unduly compelling a government or an international organization to perform or abstain from performing any act; or (c) seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization.⁶⁶ As will be shown in more detail later on in this paper, most FFs have been prosecuted for preparatory acts or membership of a terrorist organization, given that this is easier to prove than the actual commission of a terrorist offence abroad. The preliminary and preparatory acts concerned by the directive relate to incitement, recruitment, providing or receiving training, travelling and financing.⁶⁷ Concerning more particularly membership, the directive states that directing or participating in the activities of a terrorist group shall be made punishable as a criminal offence.⁶⁸ A terrorist group is defined as “a structured group of more than two persons, established for a period of time and acting in concert to commit terrorist offences”.⁶⁹ This EU definition remains rather broad and vague and hence States need to rely on other means, such as, for example, the UN terrorist list or a more specific national

61 UNSC Resolution 1373 (2001), adopted 28 September 2001, para. 2(e).

62 UNSC Resolution 2178 (2014), above note 12.

63 M. Macmillan, above note 22, p. 313.

64 *Ibid.*

65 Eurojust Genocide Network Report on Cumulative Prosecution, above note 16, p. 7.

66 EU directive 2017/541, above note 12, art. 3.

67 *Ibid.*, arts 5 to 11.

68 *Ibid.*, art. 4.

69 *Ibid.*, art. 2(3).

definition if such a definition were to exist, in order to determine whether a group should be considered terrorist or not.⁷⁰ There was quite some controversy in the Netherlands surrounding Jitse Akse, a Dutch former member of the armed forces who travelled to Syria in order to join the Syrian Kurdish People's Protection Units (YPG). No charges under the CT framework were imposed upon him, which seems to be in line with the fact that the YPG is not a listed terrorist entity.⁷¹ In addition, whereas the prosecutor did first express the willingness to prosecute him for mere participation in hostilities, more specifically for the killing of IS fighters in the context of the armed conflict in Syria, this was later on abandoned.⁷² Officially this was justified on the basis of lack of evidence; however, some claimed that the prosecution was abandoned as a consequence of public uproar claiming that he should not be prosecuted because he fought against the "bad guys".⁷³ The potential risk highlighted by this case is that States might be able to decide to limit prosecution for mere participation in hostilities to members who have joined NSAGs also considered terrorist. Not only would this further blur the relationship between CT and IHL, but making the type of prosecution dependent on the (alleged) nature of the NSAG joined could lead to selected application of justice and may hence also affect the principle of foreseeability. In addition, the case of Jitse Akse also confirms that not all FFs can be considered foreign *terrorist* fighters. This further supports the point that the terms FFs and FTFs should not be used interchangeably. Albeit rather exceptional in the context of the war in Syria given that most FFs seem to have joined jihadist groups, you can be a FF without at the same time falling under the CT framework.⁷⁴

Concerning more specifically IHL, the term "foreign fighter" is not a "term of art in IHL",⁷⁵ meaning that it is not a legal term nor a legal category as such under IHL. In order to assess whether a specific conduct could qualify as a war crime, the criminal conduct must be connected to the armed conflict, meaning that the so-called nexus requirement must be met.⁷⁶ The International Criminal Tribunal for

70 For the UNSC's list of terrorist organizations, see *United Nations Security Council Consolidated List*, available at: <https://scsanctions.un.org/consolidated/#alqaedaent>.

71 Christophe Paulussen and Kate Pitcher, "Prosecuting (Potential) Foreign Fighters: Legislative and Practical Challenges", *ICCT Research Paper*, 2018, p.25, available at: <https://icct.nl/app/uploads/2018/01/ICCT-Paulussen-Pitcher-Prosecuting-Potential-Foreign-Fighters-Legislative-Practical-Challenges-Jan2018.pdf>, p. 16.

72 R. J. Speerstra and M. Pennewaard, "Jitse Akse niet vervolgd voor het doden van IS-strijders", *Algemeen Dagblad*, 22 June 2016, available at: <https://www.ad.nl/nieuws/jitse-akse-niet-vervolgd-voor-het-doden-van-is-strijders~a37f487e>. On this case, see also C. Paulussen and K. Pitcher, above note 71, p. 25; and J. Geneuss, above note 37, p. 358.

73 C. Paulussen and K. Pitcher, above note 71, p. 25; and J. Geneuss, above note 37, p. 358.

74 For a historical overview in support of the point that the FF phenomenon is neither new nor uniquely Islamic, see David Malet, "Why Foreign Fighters? Historical Perspectives and Solutions", *Orbis*, Vol. 54, No. 1, 2010, pp. 97–114.

75 ICRC Challenges Report 2019, above note 43, p. 62.

76 P. Gaeta, "War Crimes and Other International 'Core' Crimes", in A. Clapham and P. Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict*, Oxford University Press, Oxford, 2014, p. 750. See also Harmen van der Wilt, "War Crimes and the Requirement of a Nexus with an Armed Conflict", *Journal of International Criminal Justice*, Vol. 10, No. 5, 2012, pp. 1113–1114; Antonio Cassese, "The

the former Yugoslavia (ICTY) has identified a certain number of facts that can be taken into account to determine whether an act is sufficiently related to the armed conflict, namely:

(...) the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator's official duties.⁷⁷

The parameters highlighted above should assist in determining whether a particular conduct falls under CT or IHL relevant for the subsequent question of prosecution.

The important question of the prosecution of (returning) foreign fighters

There are numerous allegations of serious wrongful acts having been committed by FFs in the context of the war in Syria. As already stated in the introduction, it is of crucial importance for FFs to be effectively prosecuted for those wrongful acts they may have committed. In this section the different opportunities for prosecution will be critically assessed. A brief note on international prosecution and domestic prosecution in Iraq and Syria will first be provided, after which the focus will turn to domestic prosecution in the State of origin.

A brief note on international prosecution and domestic prosecution in Iraq and Syria

Concerning first the potential avenues for international prosecution, the idea of setting up an international tribunal in the region was popular for a while, especially in Europe.⁷⁸ This is not surprising given the unwillingness of EU countries of origin to repatriate their FFs.⁷⁹

However, this option is not without constraints. First, there is the fundamental question of the need for such a tribunal in light of the existence of

Nexus Requirement for War Crimes”, *Journal of International Criminal Justice*, 2012, Vol. 10, No. 5, pp. 1395–1417; and Guénaél Mettraux, “Nexus with Armed Conflict”, in Antonio Cassese (ed.), *Oxford Companion to International Criminal Justice*, Oxford University Press, Oxford, 2009, pp. 435–436.

77 International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, *Prosecutor v. Kunarac and others*, IT-96-23, 12 June 2002, para. 59.

78 Anthony Dworkin, “A Tribunal for ISIS Fighters?”, *ECFR Commentary*, 31 May 2019, available at: https://ecfr.eu/article/commentary_a_tribunal_for_isis_fighters/.

79 Francesca Capone, “Is Trump Right? Foreign Fighters and the States’ Obligation to Repatriate Them”, *Verfassungsblog*, 10 March 2019, available at: <https://verfassungsblog.de/is-trump-right-foreign-fighters-and-the-states-obligation-to-repatriate-them/>.

the International Criminal Court (ICC).⁸⁰ There might, however, be some challenges in terms of jurisdiction for the ICC to be able to deal with this issue given that both Syria and Iraq are not parties to the Rome Statute. Even if some form of ICC jurisdiction may be asserted with regard to the FFs originating from the EU, on the basis of the fact that they are nationals of a country which is a party to the ICC, this would provide only for a limited form of accountability. Not only would this option be limited to those FFs originating from States that are a party to the Rome Statute but given that international justice is often limited to those higher up in the chains of command it may concern only “those most responsible”, hence those involved in the leadership of the group joined.⁸¹ In addition, there might also be some issues with regard to the principle of complementarity.⁸² However, the setting up of a specific international tribunal, be it *ad hoc* or in some hybrid form, raises similar issues in terms of feasibility. As Nollkaemper has pointed out in his legal advice provided to the Dutch Ministry of Foreign Affairs on this specific issue: the lack of UNSC mandate as well as the lack of consent by Syria and Iraq tremendously limit the options for establishing such a tribunal.⁸³ Second, and this is a fundamental point in the opinion of the present author, more specifically in terms of design, it would be difficult to justify setting up a tribunal merely for the prosecution of ISIS fighters as this would exclude “numerous other perpetrators who equally committed horrible crimes within the Syrian conflict”.⁸⁴ Such a tribunal might be pursuing victor’s justice and consequently be perceived as not being impartial.⁸⁵

Regardless of whether the establishment of such an international tribunal would even be feasible or desirable, the present author is of the opinion that the establishment of such a tribunal would in any case not suffice on its own and hence could only be complementary to national prosecution.⁸⁶ This is so based on three main reasons. First, such an international tribunal, in the absence of an international crime of terrorism, would only be concerned with war crimes, crimes against humanity and the crime of genocide, unless the UNSC would expressly set up an *ad hoc* tribunal that would also be competent for terrorist-related offences.⁸⁷ As will be demonstrated below, national jurisdiction has the

80 Rachel Behring, “One-Eyed Prosecution? On the Possibility to Restrict the Personal Jurisdiction of an International Ad Hoc-Tribunal for ISIS-Fighters?”, *Volkerrechtblog*, 4 February 2020, available at: <https://voelkerrechtsblog.org/de/one-eyed-prosecution/>.

81 P. A. Nollkaemper, “Advies Internationaal Tribunaal ISIS”, 22 July 2019, available at: <https://www.rijksoverheid.nl/documenten/rapporten/2019/07/24/advies-internationaal-tribunaal-isis>, p. 3.

82 *Ibid.*, p. 3. See also “Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Alleged Crimes Committed by ISIS”, 8 April 2015, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-08-04-2015-1>.

83 P. A. Nollkaemper, above note 81, p. 15.

84 R. Behring, above note 80.

85 T. Mehra and C. Paulussen, above note 7.

86 P. A. Nollkaemper, above note 81, raises a similar point in the above-mentioned legal advice.

87 This does not mean that when the act of terrorism in question also meets the definition of war crimes, crimes against humanity or genocide as defined in the Rome Statute they would not be able to still be prosecuted under the international criminal law framework. But terrorism does not constitute an international core crime as such; M. Macmillan, above note 22, p. 312. For a more in-depth assessment of this question, see, for example, R. Arnold, “Terrorism, War Crimes and the International Criminal

possibility to deal with both CT-related and core international crimes. Second, as was already mentioned above, international justice is most often limited to those higher up in the chain of command, whereas this limitation does not exist for national prosecution. Third, international criminal justice is often limited by the resources available to it obliging international criminal courts and tribunals to make choices in terms of prosecutorial scope.⁸⁸

In relation to the question of domestic prosecution in Syria and Iraq, two main questions need to be dealt with, namely the challenges that have arisen regarding the prosecution by Iraq and Syria in and out of itself, and the question as to whether NSAGs would have the authority to prosecute the FFs in their custody.

Both Syria and Iraq have the competence to prosecute the FFs in their custody on the basis of the territoriality principle, i.e. the fact that the alleged crimes were perpetrated on their territory. National prosecution in the country on the territory of which the alleged crimes took place offers some advantages, notably when it comes to collection of evidence, for example.⁸⁹ However, carrying out such trials in post-conflict areas raises important challenges in terms of resources.⁹⁰ Nonetheless, Iraq has been prosecuting FFs domestically. The way these trials have been conducted have, however, been strongly criticized. Iraq has been prosecuting the FFs on the basis of overly broad national terrorist laws.⁹¹ In addition, a major point of contention therein has been the use of the death penalty. Indeed, Iraqi CT legislation allows for the death penalty for anyone who commits, incites, plans, finances or assists in acts of terrorism, which in turn is interpreted rather broadly, amounting to a one-size-fits-all approach.⁹² Consequently, the criminal conviction is not proportionate to the culpability of the perpetrator.⁹³ Another consequence of such a one-size-fits-all approach on the basis of CT legislation alone is also that the other crimes that have been potentially committed such as war crimes, crimes against humanity and genocide

Court, in Ben Saul (ed.), *Research Handbook on International Law and Terrorism*, Edward Elgar, Cheltenham, 2020, pp. 271–284.

88 On this point, see, for example, Helen Brady and Fabricio Guariglia, “An Insider’s View: Consistency and Transparency While Preserving Prosecutorial Discretion”, *International Criminal Justice Today*, 15 December 2016, available at: <https://www.international-criminal-justice-today.org/arguendo/an-insiders-view/>.

89 T. Mehra and C. Paulussen, above note 7.

90 Tanya Mehra, “Bringing (Foreign) Terrorist Fighters to Justice in a Post-ISIS Landscape. Part I: Prosecution by Iraqi and Syrian Courts”, *ICCT Perspectives*, 22 December 2017, available at: <https://icct.nl/publication/bringing-foreign-terrorist-fighters-to-justice-in-a-post-isis-landscape-part-i-prosecution-by-iraqi-and-syrian-courts/>. See also, Roger Lu Philips, “A Tribunal for ISIS Fighters – A National Security and Human Rights Emergency”, *Just Security*, available at: <https://www.justsecurity.org/75544/a-tribunal-for-isis-fighters-a-national-security-and-human-rights-emergency/>.

91 Tanya Mehra, “Bringing (Foreign) Terrorist Fighters to Justice in a Post-ISIS Landscape. Part II: Prosecution by Foreign National Courts”, *ICCT Perspectives*, 12 January 2018, available at: <https://icct.nl/publication/bringing-foreign-terrorist-fighters-to-justice-in-a-post-isis-landscape-part-ii-prosecution-by-foreign-national-courts/>.

92 M. Coker and F. Hassan, above note 8.

93 United Nations Counter-Terrorism Implementation Task Force (Working Group on Promoting and Protecting Human Rights and the Rule of Law while Countering Terrorism), “Guidance to States on Human Rights-Compliant Responses to the Threat Posed by Foreign Fighters”, New York, 2018, p. 38 (hereafter Guidance on HR-Compliant Responses to the Threat Posed by FFs).

are not being investigated.⁹⁴ The fact that Iraq has not included these international crimes into its domestic jurisdiction further exacerbates the issue.⁹⁵ Victims are hence not getting the appropriate moral reparation. Other issues that have been raised have to do with the lack of fair trial standards as well as inhumane detention conditions.⁹⁶ Concerning Syria, not much information can be found as to whether FFs have actually been successfully prosecuted by the Syrian government.⁹⁷ However, if trials were to be happening, similar issues as the ones relating to the trials in Iraq would most probably arise.

Moving onto the second question, the question has, for example, been raised with regard to the Kurdish-dominated Autonomous Administration of North and East Syria (AANES), when it announced its willingness to prosecute the FFs currently in their custody in light of the failure of the international community to come up with a solution for the FFs still left under their control.⁹⁸ These FFs (and their families) are more particularly held in camps under the control of the Syrian Democratic Forces (SDF), the unified military force of AANES.⁹⁹ This raises the question as to whether a NSAG would actually be competent to prosecute these FFs from a legal point of view.¹⁰⁰ A follow-up question is whether having them trialled by a non-State actor would actually discharge States from their obligation to do so.¹⁰¹ Focusing on the question as to whether they would actually have such competence, the question of the administration of justice by NSAGs is not a new one and there are examples of NSAGs having set up their own courts.¹⁰² IHL seems to implicitly allow NSAG to establish such courts, provided that a certain number of minimum guarantees are met.¹⁰³ On the basis of Article 3 common to the four Geneva Conventions, “the passing of sentences (...) without previous judgment pronounced by a regularly

94 Human Rights Watch (HRW) report, “‘These are the Crimes we are Fleeing’: Justice for Syria in Swedish and German Courts”, *Human Rights Watch*, 3 October 2017, available at: <https://www.hrw.org/report/2017/10/03/these-are-crimes-we-are-fleeing/justice-syria-swedish-and-german-courts>, p. 4.

95 T. Mehra, above note 90.

96 See, for example, F. Capone, above note 79; and R. L. Philips, above note 90. See also HRW report, “Flawed Justice: Accountability for ISIS crimes in Iraq”, *Human Rights Watch*, 5 December 2017, available at: <https://www.hrw.org/report/2017/12/05/flawed-justice/accountability-isis-crimes-iraq>.

97 T. Mehra, above note 90.

98 Dan Sabbagh, “Syrian Kurds to Put Isis Fighters from Dozens of Countries on Trial”, *The Guardian*, 6 February 2020, available at: <https://www.theguardian.com/world/2020/feb/06/syrian-kurds-to-put-isis-fighters-from-dozens-of-countries-on-trial>.

99 Tanya Mehra and Matthew Wentworth, “New Kid on the Block: Prosecution of ISIS Fighters by the Autonomous Administration of North and East Syria”, *ICCT Perspective*, 16 March 2021, available at: <https://icct.nl/publication/prosecution-of-isis-fighters-by-autonomous-administration-of-north-east-syria/>.

100 For the qualification of the SDF as a NSAG, see RULAC, *Non-International Armed Conflicts in Syria*, available at: <https://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-syria#collapse5accord>.

101 This question is more particularly raised in Hannes Jöbstl, “Outsourcing Justice: State Obligations and the Prosecution of Foreign Fighters by Armed Groups in Syria”, *Armed Groups and International Law Blog*, 6 April 2020, available at: <https://armedgroups-internationallaw.org/2020/04/06/outsourcing-justice-state-obligations-and-the-prosecution-of-foreign-fighters-by-armed-groups-in-syria/>.

102 Geneva Call, “Administration of Justice by Armed Non-State Actors”, Report from the 2017 Garance Talks, available at: https://genevacall.org/wp-content/uploads/dlm_uploads/2018/09/GaranceTalks_Issue02_Report_2018_web.pdf, p. 7.

103 T. Mehra and M. Wentworth, above note 99.

constituted court, affording all the judicial guarantees (...)” would, for example, be prohibited. Additional guarantees that need to be provided are included in article 6 of Protocol Additional II and further reflected in customary IHL as well (see customary law rule 100). The fact that the establishment of such courts is legally possible does not mean that it does not raise a certain number of challenges in practice. The NSAGs may lack the capacity and resources to effectively administer justice.¹⁰⁴ Meeting the judicial guarantees outlined above may prove especially challenging.¹⁰⁵ Concerning more directly the prosecution of FFs by such courts, the needed impartiality and independence of such courts may prove to be particularly problematic.¹⁰⁶ The ICRC has, however, stated that: “[a]lthough the establishment of such courts may raise issues of legitimacy, trial by such means may constitute an alternative to summary justice and a way for armed groups to maintain ‘law and order’ and to ensure respect for humanitarian law”.¹⁰⁷ Whereas the prosecution of FFs by NSAGs may not be discarded completely, the capacity to provide the needed judicial guarantees is still an important obstacle, especially without some form of State assistance in terms of resources and capacity building. In addition, whereas it would somewhat be logical to limit this capability to providing justice for violations of IHL due to its design, in practice the range of laws applied by some of these courts has not always been so clear.¹⁰⁸ Finally, it is also not certain whether States would validate and recognize the decisions taken by such courts.¹⁰⁹

Concerning the highlighted problems that may arise, in terms of prosecution by Iraq and Syria and the numerous challenges prosecution by NSAGs in the region may raise, the present author strongly believes that repatriation and prosecution of FFs by their home States should be the preferred option in terms of domestic prosecution.

Domestic prosecution in the country of origin

FFs can be prosecuted in their country of origin on the basis of the active personality principle, i.e. on the basis of the nationality of the alleged perpetrator.¹¹⁰ The examples provided here concern FFs who have joined so-called dual-nature groups, i.e. groups that both meet the requirements under IHL to be considered a NSAG and are generally considered as terrorist by the international community as well (see above). Whereas there are also examples of prosecution in countries

104 Ezequiel Heffes, “Administration of Justice by Armed Groups: Some Legal and Practical Concerns”, *Humanitarian Law & Policy*, 22 November 2018, available at: <https://blogs.icrc.org/law-and-policy/2018/11/22/administration-of-justice-armed-groups-some-legal-practical-concerns/>.

105 *Ibid.*

106 *Ibid.*

107 ICRC, *Commentary of 2016. Article 3: Conflicts not of an International Character*, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC>, para. 689.

108 E. Heffes, above note 104.

109 T. Mehra and M. Wentworth, above note 99.

110 T. Mehra, above note 91.

of “origin” of asylum seekers that were previously members of dual-nature groups, these cases, albeit raising similar issues, fall outside the ambit of the present paper. The focus will hence be on examples of prosecution of those individuals who actually left their country of origin to join such groups and have since then returned to said country of origin. In addition, as was mentioned already in the introduction, focus will be on examples emanating from EU Member States.

As a consequence of the transposition of UNSC 2178 Resolution and EU Directive 2017/541 the capacity of EU Member States to generate criminal prosecutions against returned FFs has expanded.¹¹¹ EU jurisprudence in this area is, however, still rather in its infancy and there are some differences across jurisdictions, notably when it comes to also taking the IHL perspective into account.¹¹² So far most returning FFs in the EU have been prosecuted for terrorist-related offences.¹¹³ More particularly, they have mainly been prosecuted for preparatory acts and/or membership.¹¹⁴ On the basis of statistics made available to it by EU Member States, Europol established that “[t]he majority of proceedings concluded in 2019 concerned terrorist offences such as participation in (the activities of) a terrorist group, financing of terrorism, (self-)indoctrination or training for terrorist purposes, recruitment, incitement to or glorification of terrorism and humiliation of victims, threatening to commit terrorist acts”.¹¹⁵ One of the reasons most often used in order to justify this focus on CT is the fact that preparatory acts and/or membership are relatively easy to prove.¹¹⁶

There are, however, also some examples of cumulative prosecution, i.e. prosecution for both terrorist-related offences and war crimes, mainly in Germany and the Netherlands.¹¹⁷ These examples seem to suggest that cumulative prosecution is in fact possible when a member of such a dual-nature group has committed both terrorist-related offences as well as war crimes (or other core international crimes). Early examples of cumulative prosecution concerned the war crime of outrages upon personal dignity.¹¹⁸ The use of photographic or video evidence in those cases allowed the assertion that protected persons had been treated in a gravely humiliating or degrading manner: in the German *Aria L.* case, the defendant filmed and encouraged his fellow IS

111 Francesco Ragazzi and Josh Walmsley, “The Return of Foreign Fighters to EU Soil: Ex-Post Evaluation”, *European Parliamentary Research Service Study*, available at: [www.europarl.europa.eu/RegData/etudes/STUD/2018/621811/EPRS_STU\(2018\)621811_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/621811/EPRS_STU(2018)621811_EN.pdf), Part II, p. 43.

112 With relation to the first point, see F. Ragazzi and J. Walmsley, above note 111, p. 43. Concerning the second claim, see, more particularly, H. Cuyckens and C. Paulussen, above note 17, p. 561.

113 Eurojust Genocide Network Report on Cumulative Prosecution, above note 16, p. 5.

114 *Ibid.*, p. 7. See also C. Paulussen and K. Pitcher, above note 71, p. 16.

115 Europol, “European Union Terrorism Situation and Trend Report (Te-Set) 2020”, available at: <https://www.europol.europa.eu/activities-services/main-reports/european-union-terrorism-situation-and-trend-report-te-sat-2020>, p. 28.

116 F. Ragazzi and J. Walmsley, above note 111, p. 44. See also “ISIS Foreign Fighters After the Fall of the Caliphate”, above note 6.

117 Europol, above note 115, p. 25.

118 For Germany, see for example, *Prosecutor v. Abdelkarim El. B.*, Higher Regional Court (Frankfurt am Main), Judgment, 8 November 2016, Case number 5-3 StE 4/16–4–3/16. For the Netherlands, see *Prosecutor v. Oussama A.* (District Court of The Hague, 23 July 2019). The English translation is available at: <http://deepink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2019:10647>.

fighters to cut off the nose and ears of a dead body, to step on it and to shoot it in the face, whereas in the Dutch *Oussama A.* case, the defendant posed smiling next to a crucified man and subsequently posted this picture on Facebook.¹¹⁹ The available evidence did not allow the courts to assess whether the death of these persons in and out of itself was the consequence of illegal acts committed by the defendants. The potential difficulties associated with evidence will be addressed later on in this section.

Interestingly, a Dutch woman was also recently prosecuted for both membership of a terrorist organization, *in casu* ISIS, and the war crime of outrages upon personal dignity in relation to the conflict in Syria, for acts that took place in the Netherlands.¹²⁰ She had shared two videos in which captured persons were killed in a gruesome manner by IS members and she had provided one of the videos with degrading comments.¹²¹ Whereas there is some confusion as to whether she had travelled to Syria or not before, the specific acts on the basis of which she was convicted for the war crime of outrages upon personal dignity took place in the Netherlands. The Dutch Court, however, held that there was a sufficient nexus with the armed conflict in Syria for her to be prosecuted for war crimes.¹²² Referring to the jurisprudence of the ICTY on the matter, the Court reiterates that it is not necessary for the conduct to have been committed in the framework of the hostilities or occur at the time when or in the place where the actual fighting is taking place, as long as the existence of the armed conflict has played a substantial part in the perpetrator's ability to commit or decide to commit the act in question, the manner in which it was committed or the purpose for which it was committed.¹²³ As was highlighted previously in this paper, and recalled by the Court in the case at hand, the factors that may be taken into account in order to determine whether an act is sufficiently related to the armed conflict are, amongst others: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator's official duties.¹²⁴ The Court is of the opinion that the nexus requirement was met in the case at hand given that the acts committed by the defendant contributed to the media strategy of ISIS and that even long after the prisoners shown in the video were actually killed, the spreading of the videos continued to affect them in their personal dignity.¹²⁵

More recently, Germany has looked more particularly at the conduct of the so-called "ISIS spouses" in their quest towards cumulative prosecution.

119 *Abdelkarim El. B.*, above note 118; and *Oussama A.*, above note 118, § 5.4.

120 District Court of the Hague, case number 09/748012-19, 29 June 2021, available in Dutch at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:6620&showbutton=true>.

121 *Ibid.*

122 Case number 09/748012-19, above note 120, § 6.4.2.

123 *Ibid.*

124 *Ibid.*

125 *Ibid.*

Investigations and prosecution practices regarding returning FFs seem to be shifting more generally towards women “in light of evolving understandings of the roles of female deportees in Iraq and Syria”.¹²⁶ The specific war crimes investigated in the German cases regard concerned pillage, recruitment of child soldiers and the killing of a person protected under IHL.¹²⁷ Whereas in the earlier cases of prosecution the defendants were clearly fighters, the status of the defendants in some of the latter cases is more ambiguous. Thus, the courts consequently spend quite some time investigating the needed nexus for prosecution on the basis of war crimes. The question of the nexus was the most salient regarding the war crime of pillage, given that there is a fine line between appropriation of property as a common crime and actual pillage. More specifically, these cases related to the fact that these women were living in houses that were seized by ISIS after their owners had left them because they had fled the war or had been killed by the latter.¹²⁸ It was argued that given that the appropriation of the houses would not have been possible without the existence of an armed conflict in the region, the nexus requirement was met and the appropriation could thus qualify as pillage as understood under IHL.¹²⁹

One of the reasons explaining this cautious approach towards IHL is the misconception that invoking IHL would lead to impunity, in the sense that IHL is sometimes seen as an obstacle to effectively combat terrorism.¹³⁰ Another reason that seems to justify why IHL is not frequently relied upon in domestic courts is the fact that domestic judges do not always seem to be well acquainted with IHL.¹³¹ The most compelling reason, however, is what has been referred to as the judicial efficiency argument, or, in other words, the fact that membership of a terrorist organization is often easier to prove than actual acts committed during their time in Syria or Iraq, including war crimes.¹³² As has been duly noted by the UN Counter-Terrorism Committee, “in most States, prosecutions of foreign terrorist fighters can be undermined by difficulties in collecting admissible evidence abroad, particularly from conflict zones, or in converting intelligence into admissible evidence from information obtained through information and

126 F. Ragazzi and J. Walmsley, above note 111, p. 45.

127 For pillage, see Higher Regional Court of Stuttgart, 5 July 2019, Case No. 5-2 StE 11/18; Higher Regional Court of Düsseldorf, 4 December 2019, Case No. 2 StS 2/19; and Federal Court of Justice (GE), Ruling on Pre-Trial Detention, 4 April 2019, Case No. BGH AK 12/19. For recruitment of child soldiers, see Federal Court of Justice (GE), 17 October 2019, Case No. AK 56/19. For the killing of person protected under IHL, see Der Generalbundesanwalt beim Bundesgerichtshof, Presse: “Anklage gegen ein mutmaßliches Mitglied der ausländischen terroristischen Vereinigung „Islamischer Staat (IS)“ wegen Mordes und der Begehung eines Kriegsverbrechens erhoben”, 28 December 2018, available at: www.generalbundesanwalt.de/SharedDocs/Pressemitteilungen/DE/2018/Pressemitteilung-vom-28-12-2018.html?nn=478298. See also, more generally, Eurojust Genocide Network Report on Cumulative Prosecution, above note 16, pp. 17–20.

128 Eurojust Genocide Network Report on Cumulative Prosecution, above note 16, pp. 17–18.

129 Higher Regional Court of Düsseldorf, above note 127, para. 251.

130 H.-P. Gasser, above note 20, p. 566. See also *Proceedings of the Bruges Colloquium*, above note 50, pp. 43–44 and O. Venet, above note 35, p. 169.

131 *Proceedings of the Bruges Colloquium*, above note 50, pp. 43–44.

132 *Ibid.*

communications technology, particularly social media”.¹³³ Whilst recognizing that this is definitely an important challenge, the present author believes that open-source intelligence and military/battlefield evidence may assist in overcoming these difficulties.¹³⁴ The value of internet evidence has, for example, been shown in the German and Dutch cases concerning the war crime of outrages upon personal dignity relayed above. More specifically concerning the potential international crimes committed by the FFs in the context relayed here, agencies such as UNITAD (UN Investigative Team to Promote Accountability for Crimes Committed by Da’esh), for example, may play an important role in securing further evidence of international crimes, including war crimes.¹³⁵ UNITAD was established with the aim “to support domestic efforts to hold ISIL (Da’esh) accountable by collecting, preserving, and storing evidence in Iraq of acts that may amount to war crimes, crimes against humanity and genocide committed by the terrorist group ISIL (Da’esh) in Iraq, to the highest possible standards (...) to ensure the broadest possible use before national courts, and complementing investigations being carried out by the Iraqi authorities, or investigations carried out by authorities in third countries at their request”.¹³⁶ The main obstacles for national prosecutors in terms of collection of evidence seem to be founded on the impossibility of travelling to the (previously) war-torn areas and the difficulties in securing cooperation with Syria and Iraq that may arise.¹³⁷ By outsourcing the evidence collection to impartial, international bodies, present in the area and working in collaboration with the local authorities, these challenges may be overcome. The Soufan Center has, for example, highlighted in its most recent report that the work of UNITAD may prove especially useful for domestic prosecutors in terms of the volume and range of the potential evidence collected, thanks to its innovative use of technologies enabling remote interactions with witnesses and victims.¹³⁸ Finally, a potential role can also be played by non-governmental organizations (NGOs) when it comes to providing the needed evidence. Indeed, the number of NGOs documenting human rights and other abuses has increased and become professionalized over recent years.¹³⁹ There are, however, some concerns as to the credibility and admissibility of such evidence in

133 Guidance on HR-Compliant Responses to the Threat Posed by FFs, above note 93, p. 38.

134 On these points, see, more particularly, Eurojust/Genocide Network, “Prosecuting War Crimes of Outrage Upon Personal Dignity Based on Evidence From Open Sources – Legal Framework and Recent Developments in the Member States of the European Union”, The Hague, February 2018; as well as B. van Ginkel and C. Paulussen, “The Role of the Military in Securing Suspects and Evidence in the Prosecution of Terrorism Cases before Civilian Courts: Legal and Practical Challenges”, *ICCT Research Paper*, 7 May 2015, available at: <http://www.icct.nl/download/file/ICCT-Van-Ginkel-Paulussen-The-Role-Of-The-Military-In-Securing-Suspects-And-Evidence-In-The-Prosecution-Of-Terrorism-Cases-Before-Civilian-Courts.pdf>.

135 Eurojust Genocide Network Report on Cumulative Prosecution, above note 16, p. 5.

136 UNSC Resolution 2379 (2017), adopted 21 September 2017, para. 2.

137 T. Mehra and C. Paulussen, above note 7.

138 The Soufan Center, “Bringing the Terrorists to Justice: Prosecuting ISIL War Crimes and Terrorism”, June 2021, available at: <https://thesoufancenter.org/research/bringing-terrorists-to-justice-prosecuting-isil-war-crimes-and-terrorism/>, p. 1.

139 T. Mehra, “Bringing (Foreign) Terrorist Fighters to Justice in a Post-ISIS Landscape. Part III: Collecting Evidence from Conflict Situations”, *ICCT Perspectives*, 12 June 2018, available at: <https://icct.nl/>

court proceedings.¹⁴⁰ That NGOs may be successful in securing the needed evidence to effectively prosecute FFs for violations of international criminal law committed abroad is, for example, proven by the work of the Commission for International Justice and Accountability (CIJA).¹⁴¹ CIJA, whose work focuses on the situation in Syria, “has provided evidence, analysis and briefings to support the law enforcement and prosecutorial authorities of 12 governments conducting numerous criminal investigation into current and former members of Da-esh”.¹⁴² Reference is, for example, made to one of its reports in the *Oussama A.* case cited above.¹⁴³ Finally, more particularly in the EU context, some mechanisms, such as the Genocide Network, are in place to assist the prosecution services of Member States to effectively prosecute the allegedly committed international crimes in Syria and/or Iraq by encouraging the sharing of information and the exchange of best practices and by facilitating law enforcement and judicial cooperation.¹⁴⁴

Conclusion

The ambit of this paper was to provide an overview of the current state of affairs concerning the relationship between IHL and CT in relation to the prosecution of FFs. After having, amongst others, highlighted that the exact relationship between CT and IHL remains one of the main stumbling blocks for the adoption of a Comprehensive Convention on Terrorism and that FFs are by definition at the confines between CT and IHL, this paper investigated the different opportunities for prosecution and how they relate to the tensions between CT and IHL.

The author of the present paper would like to advocate for FFs to be prosecuted in a system which duly recognizes their complex nature and takes all relevant legal frameworks into account. This is the only way in which effective justice can be guaranteed. Whilst duly recognizing the potential practical difficulties, focusing mainly (if not exclusively) on CT when prosecuting FFs can generate a certain number of issues. It first of all disregards the right of the victims to obtain adequate reparation. Indeed, failing to prosecute the FFs for the acts that they have actually committed – be it under CT, IHL or cumulatively – may lead to issues of accountability and fails to provide adequate justice for victims.¹⁴⁵ In addition, from the perspective of the FFs and their due process

[publication/bringing-foreign-terrorist-fighters-to-justice-in-a-post-isis-landscape-part-iii-collecting-evidence-from-conflict-situations/](#).

¹⁴⁰ *Ibid.*

¹⁴¹ See <https://cijaonline.org/key-successes>. CIJA is also listed amongst the specialized civil society organizations that may play a role in the prosecution of FFs in the Eurojust and Genocide Network report on cumulative prosecution; see Eurojust Genocide Network Report on Cumulative Prosecution, above note 16, p. 25.

¹⁴² See <https://cijaonline.org/key-successes>.

¹⁴³ See *Oussama A.*, above note 118, footnote 48.

¹⁴⁴ See also, more generally, Eurojust Genocide Network Report on Cumulative Prosecution, above note 16, p. 25. See also T. Mehra, above note 139.

¹⁴⁵ H. Cuyckens and C. Paulussen, above note 17, p. 563. See also Guidance on HR-Compliant Responses to the Threat Posed by FFs, above note 93, p. 36.

rights, adopting some form of “one-size fits all” approach by prosecuting everyone for membership regardless of the distinction in gravity of the acts that have actually been committed also does not seem fair. Indeed, it is imperative for any criminal conviction to be in proportion to the culpability of the perpetrator.¹⁴⁶ Finally, States also actually have an obligation “to investigate war crimes allegedly committed by their nationals”.¹⁴⁷ This rule applies both in international and non-international armed conflict.¹⁴⁸

As was also clearly pointed out in the Eurojust and Genocide Network report on the matter:

Some EU Member States have already demonstrated that it is possible to cumulatively prosecute and bring to justice FTFs for both sets of criminal acts – core international crimes and terrorism-related offences. Prosecuting terrorism offences combined with acts of war crimes, crimes against humanity, genocide or other criminal acts bring numerous advantages and ensures full criminal responsibility of perpetrators, delivers more justice for victims and results in higher sentences.¹⁴⁹

Up until now prosecution in the country of origin, at least when it comes to EU countries of origin, seems to provide the best opportunities for such cumulative prosecution given that both terrorist-related offences as well as core international crimes are included in the national legislation of those countries. In addition, they also seem to provide the best option when it comes to ensuring judicial guarantees. The present author would hence like to encourage EU Member States to actively repatriate their nationals and bring them to justice in their country of origin.

Finally, whilst a criminal justice response is definitely crucial, ultimately a more holistic approach should be adopted, and due attention should also be put on de-radicalization and reintegration programmes alongside effective prosecution where needed.¹⁵⁰

146 Guidance on HR-Compliant Responses to the Threat Posed by FFs, above note 93, p. 36.

147 Customary rule 158, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule158.

On this point, see also Jöbstl, above note 101.

148 *Ibid.*

149 Eurojust Genocide Network Report on Cumulative Prosecution, above note 16, p. 5.

150 On this point, see also, more particularly, Kerstin Braun, “‘Home, Sweet Home’: Managing Returning Foreign Terrorist Fighters in Germany, the United Kingdom and Australia”, *International Community Law Review*, Vol. 20, No. 3–4, 2008, pp. 311–346.