

Terrorists on the Move:

A legitimacy test of the criminal law approach on foreign fighters in Western-Europe

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The conflict in Syria and Iraq has raised the debate on foreign fighters to unprecedented levels. The international community expressed grave concern over this acute and growing threat and addressed the problem by, *inter alia*, obliging States to criminalize conduct related to travel for terrorist purposes, including acts of facilitating and funding such travel. Member States are free to choose the manner of implementation, leading to different approaches on a domestic level. This contribution aims to subject the criminal law approach regarding foreign fighters in four Western-European countries (i.e. Belgium, the Netherlands, France and the United Kingdom) to a legitimacy test. The longstanding principles of subsidiarity, proportionality and legality constitute the backbone of this legitimacy test. A critical-legal analysis demonstrates the expansion of the scope of criminal liability to a pre-crime era and examines whether this expansion conflicts with the *ultima ratio* premise of criminal law and the freedom of movement as a fundamental human right.

Keywords: foreign (terrorist) fighter; travelling for terrorist purposes; designated area offence; criminalization; legitimacy; subsidiarity; *ultima ratio*; harm; proportionality; human rights; freedom of movement; legality

I. INTRODUCTION

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Although the phenomenon of foreign fighters can hardly be considered a new trend,¹ its unprecedented heights related to the conflict in Syria and Iraq have been of major concern in the European Union and the rest of the world. From the summer of 2012, the news of individuals leaving to join the Syrian uprising has entered both political and societal debate.² In the years to follow, the numbers of foreign fighters increased significantly and reached its peak in 2014 and 2015 with up to 5000 foreign fighters leaving the European Union.³ Since then, the numbers of leaving individuals declined starkly,⁴ raising more concern for the number of returning foreign fighters.⁵ Not only do these ‘returnees’ pose a risk for the actual commission of a terrorist attack, they could also engage in other activities, such as facilitation, fundraising, recruitment or even serving as a role model for others.⁶ As a consequence, the phenomenon of travelling for terrorist purposes has led to multiple potential security threats, ranging from (1) those individuals who leave a country to become a foreign fighter in a conflict zone, to (2) those who return from the conflict to the EU, (3) those who are prevented

¹ *A.S. Frias*, The EU Directive on Combating Terrorism and the Criminalisation of Travelling, *European Criminal Law Review* 2018, p. 203; *C. Kopitzke*, Security Council Resolution 2178 (2014): An Ineffective Response to the Foreign Terrorist Fighter Phenomenon, *Indiana Journal of Global Legal Studies* 2017, p. 313; *S. Krahenmann*, Foreign Fighters under International Law and National Law, *Recueils de la Société Internationale de Droit Penal Militaire et de Droit de la Guerre* 2015, p. 250; *B. Van Ginkel* and *E. Entenmann*, The Foreign Fighters Phenomenon in the European Union: Profiles, Threats & Policies, 2016, p. 9. As *Van Ginkel* and *Entenmann* (fn. 1, p. 9) state, it is the sheer size and widespread origins that has given the phenomenon a whole new dimension. However, *Malet* (2018) states that “in many ways the evidence demonstrates that there is little that is different between contemporary and historical foreign fighters in their recruitment, motivation or conduct”. See *D. Malet*, The European Experience with Foreign Fighters and Returnees, in: T. Renard/R. 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*, 2018, p. 16.

² *Van Ginkel* and *Entenmann* (fn. 1), p. 9.

³ Europol, *European Union Terrorism Situation and Trend Report, 2017*, <https://www.europol.europa.eu/tesat-report>.

⁴ Europol, *2017-2019* (fn. 3).

⁵ See *Van Ginkel* and *Entenmann* (fn. 1), p. 3. It has been estimated that around thirty percent have returned to their home countries. See also Europol, *2019* (fn. 3), p.42.

⁶ *B. Van Ginkel* and *S. Minks*, Addressing the Challenge of Returnees: Threat Perceptions, Policies and Practices in the Netherland, in: T. Renard/R. 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*, 2018, p. 58.

from travelling (so-called ‘would-be foreign fighters’),⁷ and eventually also to (4) the impact of the foreign fighter phenomenon on society as a whole, and social cohesion in particular.⁸

These security threats have been materialized into a number of terrorist attacks on European soil, involving returned foreign fighters. As a result, policy-makers have introduced multiple measures to strengthen the legislative arsenal.⁹ The term ‘fighter’ may be misleading in this context, in the sense that individuals with non-combat functions are also often targeted by these measures.¹⁰ Some measures focus on preventing the departure or return, in terms of immigration control, use of advanced passenger information, deprivation of citizenship, seizure of passports, expulsion orders, travel bans etc. Other measures are related to law enforcement through enhancing international cooperation, improving information and intelligence sharing and focusing on the training of the different actors involved. Yet others are of a more ‘soft’ nature, ranging from social interventions to rehabilitation projects. *De Guttry* (2016) is convinced that the phenomenon can only be thwarted by using all available means, resulting in a holistic approach as a *conditio sine qua non* of any effective counter-terrorism agenda.¹¹ Notwithstanding the highly interesting debates on each of these aspects, this contribution will solely focus on the legitimacy of the criminal law approach concerning travelling for terrorist purposes.

The international and regional instruments addressing the criminalization of travelling for terrorist purposes have been widely criticized in legal scholarship. *Gherbaoui* (2020) has warned that “the lack of clarity in the legal drafting of the offence will foreshadow its

⁷ *Malet* (fn. 1, p. 17) warns that “there may be more danger to Europe from those who failed to become foreign fighters than those who returned successfully”.

⁸ *A. Reed, J. Pohl, and M. Jegerings*, *The Four Dimensions of the Foreign Fighter Threat: Making Sense of an Evolving Phenomenon*, 2017; *Van Ginkel and Entenmann* (fn. 1), p. 4; *M. van Noorloos*, *De Strafrechtelijke Aanpak van Terrorisme en Syriëgangers vanaf 2014*, *Delikt en Delinkwent* 2015.

⁹ *G. Stessens*, *Terroristen Op Reis*, in: S. Dewulf (ed.), *Liber Amicorum Chris Van Den Wyngaert*, 2017, p. 442; *Van Ginkel and Entenmann* (fn. 1), p. 6; *S. Wittendorp, R. de Bont, E. Bakker, & J. De Roy van Zuijdewijn*, *Persoonsgerichte aanpak Syrië/Irak-gangers: Een vergelijking tussen Nederland, België, Denemarken, Duitsland, Frankrijk, het VK en de VS*, 2017.

¹⁰ *Krahenmann* (fn. 1), p. 250.

¹¹ *A. de Guttry*, *The Role Played by the UN in Countering the Phenomenon of Foreign Terrorist Fighters*, in: A. de Guttry/F. Capone/C. Paulussen (eds.), *Foreign Fighters under International Law and Beyond*, 2016, p. 280.

implementation by the Member States” on an EU level.¹² However, a comparative perspective of the criminal law approaches on a domestic level in terms of their *legitimacy* is still lacking.¹³ Hence, a thorough critical-legal analysis of the criminal law approach on foreign fighters in four Western-European countries (i.e. Belgium, the Netherlands, France and the United Kingdom) is highly needed. As *Paulussen* (2016) recalls: “while realising that the threat of terrorism and the issue of foreign fighters is very serious and real (...), the greater danger lies in the approaches states take to respond to these threats”.¹⁴ This contribution, therefore, subjects these criminal law interventions to a legitimacy test, in terms of the principles of subsidiarity, proportionality and legality. The central research question (i.e. to what extent is the criminal law approach concerning foreign fighters in Belgium, the Netherlands, France and the United Kingdom legitimate?) is divided into multiple sub-questions according to the normative, conceptual framework: (a) to what extent is criminal law of added value in curtailing the foreign fighters’ phenomenon?; (b) to what extent is the conduct worthy of punishment?; and (c) to what extent does a criminalization of travel infringe the fundamental freedom of movement? Sub-questions (a) and (b) relate to the issue of subsidiarity, whereas the human rights assessment under (c) will focus on proportionality and legality. Before turning to the actual legitimacy test (part 3), a brief overview of the legal framework on the international, regional and domestic level will be given through the lens of preventive justice (part 2).

II. CRIMINALIZING FOREIGN FIGHTERS AS A PRIMARY EXAMPLE OF PREVENTIVE JUSTICE

¹² *T. Gherbaoui*, Criminalising Foreign Fighter Travel in Order to Prevent Terrorism in Europe: An Illegitimate Assault on Human Dignity?, in: M. Scheinin/C. Paulussen (eds.), *Human Dignity and Human Security in Times of Terrorism*, 2020, p. 256.

¹³ There are multiple existing studies that dedicate attention to the genesis and legislative procedure of all foreign fighter-related instruments, studies that have identified all measures related to foreign fighters, or have mapped the magnitude of the phenomenon in each country. See e.g. *Van Ginkel* and *Entenmann* (fn. 1); *Wittendorp, de Bont, Bakker, & De Roy van Zuijdewijn* (fn. 9). However, a legitimacy assessment is absent in scholarly literature. Moreover, many articles state that a criminalization infringes the fundamental freedom of movement, but a thorough assessment is mainly absent.

¹⁴ *C. Paulussen*, *Repressing the Foreign Fighters Phenomenon and Terrorism in Western Europe: Towards an Effective Response Based on Human Rights*, 2016, p. 27.

The inherent transnational character of the phenomenon has led to a prompt response on the international and regional level. The widely discussed¹⁵ **Resolution 2178 (2014) of the United Nation’s Security Council** (*further*: UNSCR 2178) has been the first international instrument that obliges States to criminalize three different types of conduct, namely (a) *travel and attempt to travel* for terrorist purposes; (b) the *funding* of these travels; and (c) the *wilful organization or other facilitation*, including acts of recruitment, of these travels.¹⁶ Correspondingly, paragraph 6 of UNSCR 2178 orders States to ensure that the respective conduct is prosecuted and penalized.¹⁷ Having regard to UNSCR 2178, the Council of Europe drafted an **Additional Protocol to the Convention on the Prevention of Terrorism**,¹⁸ and also the EU replaced Framework Decision 2002/475/JHA by **Directive 2017/541 on combating terrorism**¹⁹. Both instruments have introduced similar provisions.²⁰ Despite the slightly different wording within the CoE Additional Protocol, the instrument does not intend to add to, or subtract from, the meaning of UNSCR 2178.²¹ EU Directive 2017/541, on the other hand, goes deliberately beyond some of the requirements of UNSCR 2178. Especially

¹⁵ The Resolution has encountered quite some criticism, mostly due to the broad interpretation of the powers of the Security Council, the lack of a definition of the term “terrorism”, the difficulties with regard to the enforcement of paragraph 6 and its potential abuse, and the fear that it might infringe international humanitarian law. See for more information and commentary on UNSCR 2017, among others, *M. Scheinin*, Back to Post-9/11 Panic? Security Council Resolution on Foreign Terrorist Fighters, 2014, available on <https://www.justsecurity.org/15407/post-911-panic-security-council-resolution-foreign-terrorist-fighters-scheinin>; *A. Conte*, States’ Prevention and Responses to the Phenomenon of Foreign Fighters against the Backdrop of International Human Rights Obligations, in: *A. de Guttry/F. Capone/C. Paulussen* (eds.), *Foreign Fighters under International Law and Beyond*, 2016; *S. Krahenmann*, The Obligations under International Law of the Foreign Fighter’s State of Nationality or Habitual Residence, State of Transit and State of Destination, in: *A. de Guttry/F. Capone/C. Paulussen* (eds.), *Foreign Fighters under International Law and Beyond*, 2016; *L. Tayler*, Foreign Terrorist Fighter Laws: Human Rights Rollbacks under UN Security Council Resolution 2178, *International Community Law Review* 2016; *Kopitzke* (fn. 1); *Frias* (fn. 1); *Gherbaoui* (fn. 12). For a more positive evaluation, see *de Guttry* (fn. 11).

¹⁶ UN Security Council Resolution 2178 (24 September 2014), UN Doc. S/RES/2178 (2014), para. 6 (*further*: UNSCR 2178).

¹⁷ *C. Walker*, *Foreign Terrorist Fighters and UK Counter Terrorism Laws*, 2016, p. 109.

¹⁸ Additional protocol to the Council of Europe Convention on the Prevention of Terrorism, opened for signature 22 October 2015, CETS 217 (entered into force 1 July 2017). Given that the content of the Riga Protocol is quite similar to UNSCR 2178, its criticisms also follow the same pathway, as stated by *Frias* (fn. 1). *Scheinin* (fn. 15) even criticized the Draft Additional protocol as “fundamentally flawed” and stated that the “sloppy drafting of implementing legislation at the European level will only aggravate the problems inherent in the resolution itself”.

¹⁹ 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, OJ L 88/6 (entered into force 20 April 2017) (*further*: Directive 2017/541).

²⁰ See Directive 2017/541 (fn. 19), art. 9-11 and CoE Additional Protocol (fn. 18), art. 3-5.

²¹ Explanatory Report to the Additional protocol to the Council of Europe Convention on the Prevention of Terrorism, opened for signature 22 October 2015, CETS 217 (entered into force 1 July 2017), para. 52.

the expansion of the scope of the travelling offence for the purpose of participating in the activities of a terrorist group (in addition to the purpose of committing, or contributing to the commission of a terrorist offence and for the purpose of the providing or receiving of training for terrorism) is a main concern of critics, given the “particularly unclear scope” which gives way for the criminalization of “relatively minor involvement”.²² By broadening the scope of the terrorist purpose, more actors who do not themselves envisage to commit or directly contribute to a terrorist attack become prone to criminal charges. A second expansive element is the fact that the EU Directive also obliges States to criminalize inbound travel (i.e. travel to a MS). However, a compromise was sought, resulting in the possibility for Member States to choose between two alternatives for punishing inbound travel, namely (1) the mirror provision of outbound travel, and (2) as “preparatory acts undertaken by a person entering that Member State with the intention to commit, or contribute to the commission of a terrorist offence”.²³ This evolution shows that countries of origin are no longer solely concerned about the negative influence of foreign fighters on the armed conflict, but increasingly about their terrorist involvement upon return.²⁴ Although it seems that only the EU Directive has focused its attention on returning foreign fighters, the UN Security Council has provided an update of UNSCR 2178 by highlighting the phenomenon of returning and relocating foreign fighters in **UNSCR 2396**.²⁵ Other initiatives that should be mentioned in this context are the “The Hague – Marrakech Memorandum on Good Practices for a More Effective Response to the FTF

²² Amnesty International, the International Commission of Jurists and the Open Society Justice Initiative, Joint Submission on the European Commission’s Proposal for a Directive of the European Parliament and of the Council on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA, p. 12-13; Meijers Committee, Note on a Proposal for a Directive on Combating Terrorism, p. 7.

²³ In other words, MS are free to require a more strict connection with the principal terrorist offence, in comparison to outbound travel. *Stessens* (fn. 9, p. 447-448) argues that this seemingly odd policy choice can be explained from a practical point of view, since it is more difficult to prove that mere travel to an MS constitutes a preparatory act. He claims that the intention of the individual is harder to determine, whereas in the case of outbound travel, the destination of travel contributes to the proof. Moreover, the added value in comparison to the existing criminal law provisions is debatable and the impact on the right to freedom of movement is larger (*infra*).

²⁴ *Krahenmann* (fn. 1), p. 254.

²⁵ UN Security Council Resolution 2396 (21 December 2017), UN Doc. S/RES/2396 (2017) (*further*: UNSCR 2396).

Phenomenon”, and its Addendum that focuses on returning foreign terrorist fighters, both developed by the **Global Counterterrorism Forum**²⁶.

It must be clear, however, that these international and regional instruments do not stand for a blanket ban on, or criminalization of, *all* travels to certain destinations, but only a selected kind of travel under “very particular conditions”.²⁷ Nevertheless, *Paulussen* and *Pitcher* (2018) emphasize that these instruments clearly focus on “tackling the early stages of possible FTF” and move hereby further into the “pre-crime space”.²⁸ *Vavoula* (2018) refers to this approach as a form of preventive justice, namely “the exercise of state power in order to prevent future acts deemed as constituting security threats”.²⁹ The expansion of criminal liability to acts that are far removed from the actual terrorist attack, such as travelling, is a primary example of the emerging trend of preventive justice. The ultimate goal is no longer the reaction to past harm, but the prevention of future harm.³⁰ Although the preventive role of criminal law is not an entirely new phenomenon, there are limits to this preventive application from a principle-based perspective.³¹ The key question within this article is, therefore, whether the clear shift in criminal liability is a legitimate shift in terms of subsidiarity, proportionality and legality.

None of the three international and regional instruments imposes an obligation on States to introduce new autonomous offences. The Explanatory Report to the CoE Convention explicitly states that “the wording of Operative Paragraph 6 (a) of UNSCR 2178 does not contain an obligation for States to criminalise the act of travelling [...] as a separate criminal offence; nor does the wording [...] preclude States from treating this activity under their

²⁶ The Global Counterterrorism Forum (GCTF) is “an international forum of 29 countries and the European Union with an overarching mission of reducing the vulnerability of people worldwide to terrorism by preventing, combating, and prosecuting terrorist acts and countering incitement and recruitment to terrorism”. See <https://www.thegctf.org>.

²⁷ Explanatory Report Additional Protocol (fn. 21), para. 47.

²⁸ *C. Paulussen* and *K. Pitcher*, *Prosecuting (Potential) Foreign Fighters: Legislative and Practical Challenges*, 2018, p. 5 and 30. See also *Krähenmann* (fn. 15), p. 241.

²⁹ *N. Vavoula*, *Prevention, Surveillance, and the Transformation Of citizenship in the ‘Security Union’: The Case of Foreign Terrorist Fighters*, in: U. Sieber (ed.), *Alternative Systems of Crime Control: National, Transnational, and International Dimensions*, 2018, p. 307.

³⁰ *Gherbaoui* (fn. 12), p. 261.

³¹ OSCE (ODIHR), *Guidelines for Addressing the Threats and Challenges of “Foreign Terrorist Fighters” within a Human Rights Framework*, 2018, p. 35.

domestic laws as a preparatory act to a terrorist offence or an attempt to commit a terrorist offence”.³² Concerning the offences of funding travel and organising or otherwise facilitating travel, the Explanatory Report notes likewise that the offences “can be criminalized as a preparatory act or as aiding or abetting to the main offence”.³³ Recital 12 of EU Directive 2017/541 states that “Member States may also decide to address terrorist threats arising from travel for the purpose of terrorism to the Member State concerned by criminalising preparatory acts, which may include planning or conspiracy”.³⁴ Consequently, the national legal systems that are under review in this contribution (i.e. Belgium, the Netherlands, France and the United Kingdom) demonstrate the wide and diverse variety of possible criminal law responses to the foreign fighters’ phenomenon.

The legislative possibilities in all countries are, in general, sufficiently broad in order to prosecute foreign fighters and associated behaviour through a range of offences, especially existing terrorism-related offences of preparation and membership.³⁵ As to the choice of charge, there is a substantial amount of prosecutorial discretion.³⁶ In the UK, section 5 Terrorism Act 2006 (*further*: TACT 2006) on preparation is systematically used for both “would-be travellers” who did not actually depart and returnees who did manage to leave the

³² Explanatory Report Additional Protocol (fn. 21), para. 51. For an analysis of the necessity of an autonomous offence versus the doctrine of attempt, see *W. De Bondt and N. Audenaert, Waar Gaan We Heen? De Weg Van De Terroristische Poging vs De Weg Van Het Zelfstandige Terroristische Reismisdrijf*, in: A. Verhage/G. Vermeulen (eds.), *Mensenrechten en Opsporing, Terrorisme en Migratie*, 2017.

³³ Explanatory Report Additional Protocol (fn. 21), paras. 58 and 61.

³⁴ Directive 2017/541 (fn. 19), recital 12. Read together with art. 14(3) and art. 13 of the Directive, criminalizing travel on the basis of attempt to the core offence does not suffice.

³⁵ It is difficult to put an exact figure on the number of court cases in each country regarding foreign fighters, considering the fact that statistical information often does not distinguish between the different terrorism-related provisions. The Terrorism Situation and Trend Report of Europol, for example, shows the number of individuals in concluding court proceeding, verdicts, convictions and acquittals per EU Member State in a given year, but does not indicate whether the court cases relate to travelling for terrorist purposes or other criminal behaviour. A study of *Wittendorp and Bakker* (2017) has inventoried (on the basis of open sources) court cases regarding foreign fighters between 2013 and July 2017. Although these figures do not represent official figures, it gives an indication. Belgium ranks first with 97 court cases, followed by France (40), the UK (32) and the Netherlands (29). This ranking does not entirely correspond to the figures on the number of foreign fighters from each country (France 1910; the UK: 850; Belgium: 478; the Netherlands: 280). The average effective prison sentences vary between 86,2 months in France and 35,7 months in the Netherlands. The average effective prison sentence in the UK and Belgium are, respectively, 77,6 and 53 months. In general, combatants are most severely punished, in comparison to intercepted individuals and returnees. See *S. Wittendorp and E. Bakker, Inventarisatie Rechtszaken tegen Jihadistische Buitenlandse Strijders: Een Vergelijking tussen Nederland, België, Denemarken, Duitsland, Frankrijk, het VK en de VS*, 2017.

³⁶ In the UK context, *Walker* (fn. 17, p.111) suggests that “clear advice as to the prospects and consequences of prosecution is recommended”.

UK.³⁷ Other charges in the UK might relate, *inter alia*, to attendance at a place used for terrorist training,³⁸ training for terrorism,³⁹ encouragement of terrorism,⁴⁰ membership of a proscribed organization,⁴¹ funding activities,⁴² possession for terrorist purposes,⁴³ and collection of information⁴⁴. The Counter-Terrorism and Border Security Act 2019 extended the extra-territorial jurisdiction to a number of offences⁴⁵ and introduced a new criminal offence related to the foreign fighters' phenomenon (*infra*). In the Netherlands, a similar evolution can be witnessed. The main charges are based upon specific preparatory offences,⁴⁶ training for terrorist purposes,⁴⁷ recruitment,⁴⁸ membership of a terrorist organization,⁴⁹ and incitement offences⁵⁰. In France, individuals who travel or attempt to travel are mainly prosecuted and convicted on the basis of participation in a terrorist group (with the purpose of preparing a terrorist offence, i.e. '*une association de malfaiteurs*')⁵¹ or of conspiracy.⁵² Even though Belgium has introduced an autonomous offence, a similar approach (of using membership offences) has been undertaken in case law. Art. 140sexies Sw.⁵³ on travelling for terrorist purposes has not yet been used as an exclusive ground for conviction, but only in connection to art. 140 Sw. on participation in the activities of a terrorist group (or the attempt

³⁷ Walker (fn. 17); Wittendorp and Bakker (fn. 35).

³⁸ United Kingdom, TACT 2006, s.8.

³⁹ United Kingdom, TACT 2006, s.6.

⁴⁰ United Kingdom, TACT 2006, s.1.

⁴¹ United Kingdom, TACT 2000, s.11.

⁴² United Kingdom, TACT 2000, s.17.

⁴³ United Kingdom, TACT 2000, s.57.

⁴⁴ United Kingdom, TACT 2000, s.58.

⁴⁵ United Kingdom, Counter-Terrorism and Border Security Act 2019, Part 1, Chapter 1, s.6.

⁴⁶ The Netherlands, 'Wetboek van Strafrecht' (Dutch Criminal Code) (Sr.), art. 96.2 and art. 134a.

⁴⁷ The Netherlands, 'Wetboek van Strafrecht' (Dutch Criminal Code) (Sr.), art. 134a.

⁴⁸ The Netherlands, 'Wetboek van Strafrecht' (Dutch Criminal Code) (Sr.), art. 205.

⁴⁹ The Netherlands, 'Wetboek van Strafrecht' (Dutch Criminal Code) (Sr.), art. 140a.

⁵⁰ The Netherlands, 'Wetboek van Strafrecht' (Dutch Criminal Code) (Sr.), art. 131/132.

⁵¹ France, 'Code Pénal' (French Criminal Code) (CP), art. 421-2-1.

⁵² H. Decoeur, The Criminalisation of Armed Jihad under French Law: Guilt by Association in the Age of Enemy Criminal Law, European journal of crime, criminal law and criminal justice 2017.

⁵³ Belgium, 'Strafwetboek' (Belgian Criminal Code) (Sw.)

thereto).⁵⁴ Nevertheless, the legislator considered it necessary to introduce an autonomous offence, arguing that moving abroad with a view to committing a terrorist offence does not necessarily involve the stage of training, nor being a part of a particular terrorist group.⁵⁵ Although the Belgian *Raad van State* has raised the issue of overlap, it decided that “this does not prevent the designed article from being legally valid, based on the wish of the author of the bill to have absolute certainty that the behavior in question is (also) punishable”.⁵⁶

Although Belgium is the only country out of four that has introduced an autonomous criminal offence in similar terms as the international and regional instruments,⁵⁷ other countries have also introduced criminal law provisions that are more tailored to the foreign fighters’ phenomenon. France primarily uses the offence of participation in a terrorist group,⁵⁸ but, in the context of ‘*une entreprise individuelle*’, also makes the stay in an area controlled by a terrorist organization a criminal offence under the general offence of preparatory acts (when combined with possessing, procuring or manufacturing objects or substances likely to create a danger for others).⁵⁹ In the United Kingdom, the entering or remaining in a designated area was made a punishable offence in 2019 (*further*: designated area offence).⁶⁰ In the Netherlands, a similar debate for an autonomous criminalization of the mere stay in an area

⁵⁴ A. Franssen and J. Kerkhofs, *Het Materieel Terrorismedrafrecht*, in: J. Kerkhofs/A. Schotsaert/P. Van Linthout, *Contra-Terrorisme: De Gerechdelijke Aanpak van Terrorisme in België*, 2018, p. 74.

⁵⁵ See Belgium, ‘Wetsontwerp tot versterking van de strijd tegen het terrorisme’, *Parl.St.* 2014-2015, 54 1198 001, p.6; ‘Advies Raad van State’.

⁵⁶ See Belgium, ‘Wetsontwerp tot versterking van de strijd tegen het terrorisme’, *Parl.St.* 2014-2015, 54 1198 001, ‘Advies Raad van State’, p.20. The Belgian Constitutional Court has ruled in the same manner (Belgium, *Constitutional Court, Ligue des Droits de l’Homme*, Judgment No. 8/2018, 18 January 2018, Application No. 6351).

⁵⁷ Belgium, ‘Strafwetboek’ (Belgian Criminal Code) (Sw.), art. 140sexies.

⁵⁸ France, ‘Code Pénal’ (French Criminal Code) (CP), art. 421-2-1.

⁵⁹ France, ‘Code Pénal’ (French Criminal Code) (CP), art. 421-2-6, I 1° j. 2°d. The mere stay is not autonomously criminalized, but dependent upon the presence of other objective conduct. Moreover, the prosecuting authority must prove that this preparatory conduct is “intentionally related to an individual enterprise whose purpose is to seriously disturb public order by intimidation or terror”. This French example is unique in its approach in terms of required *actus reus* and *mens rea*, compared to its neighbouring countries.

⁶⁰ United Kingdom, Terrorism Act 2000 (TACT 2000), s. 58B and 58C. Part 1, chapter 1, clause 4 of the Counter-Terrorism and Border Security Act 2019 has inserted section 58B and 58C in the Terrorism Act 2000.

controlled by a terrorist organization has surfaced multiple times,⁶¹ but has not resulted in a final Act due to multiple barriers and considerations on the level of criminal law, human right law and international law.⁶²

It is pressing to assess these different routes of criminalization in terms of their legitimacy. The *actus reus* of existing terrorism-related provisions is linked to preparatory or participatory acts, but is used to cover the conduct of travelling. In an autonomous travelling offence, the *actus reus* is travelling itself, when it is done with a terrorist purpose. In general, the destination is irrelevant. This is opposed to a designated area offence, which restricts travel to a certain destination. However, the designated area offence may target a much broader category of people. As will be demonstrated below, these various approaches have an influence on the legitimacy assessment.

III. A NORMATIVE LEGITIMACY ASSESSMENT

1. Subsidiarity: Criminal law as the *ultima ratio*

For the purposes of this contribution, subsidiarity is understood as the *ultima ratio* principle.⁶³ The *ultima ratio* principle imposes limits to the scope of criminal law and contributes to its quality.⁶⁴ As the Council of the European Union has concluded, “criminal law provisions should be introduced when they are considered essential in order for the interests to be

⁶¹ The Netherlands, Kamerstukken II 2014-2015, 34 000 VI, nr. 30 (Motion Dijkhoff/Oskam); The Netherlands, ‘Wetsvoorstel tot wijziging van het Wetboek van Strafrecht, het Wetboek van Strafvordering en enkele andere wetten tot versterking van de strafrechtelijke en strafvorderlijke maatregelen om terrorisme te bestrijden (wetsvoorstel versterking strafrechtelijke aanpak terrorisme)’, 34746. Also the Dutch ‘Raad van State’ has advised against the criminalization of the mere stay in an area controlled by a terrorist organization (see The Netherlands, ‘Advies Raad van State omtrent het wetsvoorstel tot wijziging van het Wetboek van Strafrecht, het Wetboek van Strafvordering en enkele andere wetten tot versterking van de strafrechtelijke en strafvorderlijke maatregelen om terrorisme te bestrijden (versterking strafrechtelijke aanpak terrorisme)’, 1 May 2017, No.W03.17.0064/II).

⁶² See study *P.H.P.H.M.C. van Kempen and M.I. Fedorova*, ‘Foreign Terrorist Fighters’: Strafbearstelling Van Verblijf Op Een Terroristisch Grondgebied? Een Toetsing Aan Materieel Strafrechtelijke, Mensenrechtelijke En Volkenrechtelijke Parameters, 2015.

⁶³ This interpretation differs from its EU meaning, which relates to a matter of competence. See EU Glossary: <https://eur-lex.europa.eu/summary/glossary/subsidiarity.html>.

⁶⁴ *S. Melander*, *Ultima Ratio in European Criminal Law*, Onati Socio-legal Series 2013, p. 45.

protected and, as a rule, be used only as a last resort”.⁶⁵ For the purposes of this contribution, it will be assessed (1) whether the criminal law is of added value in curtailing the foreign fighters’ phenomenon, and (2) to what extent the conduct is worthy of punishment.

a) The added value of criminal law

The Global Counterterrorism Forum has emphasized that comprehensive counter-terrorism legal regimes must be developed and implemented, entailing both criminal law measures as well as administrative procedures.⁶⁶ The enormous variety of measures aims to monitor, prevent and punish foreign fighters; functions which can often be hardly distinguished from one another.⁶⁷ Moreover, these measures are often imposed in combination with one another. As *Wittendorp, de Bont, Bakker, et al.* (2017) observe, non-criminal means can precede criminal prosecution, supplement criminal law, or serve as an alternative for criminal law.⁶⁸

Given that criminal law should be seen as an *ultimum remedium*, the question arises on the extent a criminal law approach is actually necessary (or of added value) in the context of foreign fighters.⁶⁹ Although measures connected to mobility and travel documents are in general relatively broad to counter the departure or return of foreign fighters,⁷⁰ criminal law pursues multiple penal objectives that are not always present in other types of measures (i.e. deterrence, denunciation, incapacitation, retribution and rehabilitation). In light of the various threats presented by the foreign fighters’ phenomenon, it is not unexpected that authorities make use of criminal law. Even more so, the Organization for Security and Co-operation in

⁶⁵ Council Conclusions on model provisions, guiding the Council's criminal law deliberations (30 November 2009), conclusion 1. See also The Stockholm Programme – An open and secure Europe serving and protecting the citizens (CO EUR-PREP 3 JAI 896 POLGEN 229) (2 December 2009), p. 29; European Parliament resolution on an EU approach to criminal law (2010/2310(INI)) (22 May 2012).

⁶⁶ The Hague – Marrakech Memorandum on Good Practices for a More Effective Response to the FTF Phenomenon, good practice #11 and #17.

⁶⁷ *Wittendorp, de Bont, Bakker, & De Roy van Zuijdewijn* (fn. 9), p. 46.

⁶⁸ *Wittendorp, de Bont, Bakker, & De Roy van Zuijdewijn* (fn. 9), p. 46.

⁶⁹ The EU Counter-Terrorism Coordinator has stressed the need for an adaptation of the legal framework, anno 2016. See *G. de Kerchove* and *C. Höhn*, The Regional Answers and Governance Structure for Dealing with Foreign Fighters: The Case of the EU, in: *A. de Guttry/F. Capone/C. Paulussen* (eds.), *Foreign Fighters under International Law and Beyond*, 2016.

⁷⁰ See for example a critical analysis in Belgium: *L. Reyntjens* and *W. Yperman*, *Terrorisme en Internationale Mobiliteit: Een Coherent Beleid of Nattevingerwerk?*, Politie & Recht 2019.

Europe has recommended that States should recognize the *crucial role* of criminal law in countering terrorism and threats related to foreign terrorist fighter.⁷¹ However, *Gherbaoui* (2020) claims that the traditional ends of punishment are not pursued by criminalizing travel, with the exception of incapacitation.⁷² Research has demonstrated that “the threat of prosecution or more severe punishment does not appear to work as deterrence”.⁷³ Excessive and indiscriminate offences may even lead to counterproductive results, in the sense that they contribute to further radicalization.⁷⁴ According to *ten Voorde* (2014), the level of deterrence depends on the level of clarity of the definition of the criminal offence.⁷⁵ He argues that “the more vaguely a criminal offence is described, the less deterrent it will be”.⁷⁶ The same goes for the retributive aspects of a provision, although in this case it depends upon the over-inclusiveness of the offence and the vagueness of a reference to harm (*infra*).⁷⁷ Concerning the rehabilitating objectives of criminalization, it must be acknowledged that “prisons can serve as potential incubators for radicalization to terrorism and terrorist recruitment, and that proper assessment and monitoring of imprisoned foreign terrorist fighters is critical to mitigate opportunities for terrorists to attract new recruits”.⁷⁸

However, other policy reasons may be at the root of criminalization, and the absence of the traditional objectives must be nuanced. Classifying certain conduct as terrorism-related allows the access to more far-reaching investigative measures, and enables to investigate in an earlier stage. As a result, criminal law is increasingly used in an instrumental manner,⁷⁹ in addition to its traditional penal objectives. The risk of premature discovery (and the decrease of likelihood of successful travel), as a consequence of the early-staged investigative

⁷¹ OSCE (ODIHR) (fn. 31), p. 34.

⁷² *Gherbaoui* (fn. 12).

⁷³ *B. van Ginkel*, The (in-)Effectiveness of “Deterrence” as an Instrument against Jihadist Terrorist Threats, 2015.

⁷⁴ *Gherbaoui* (fn. 12), p. 258.

⁷⁵ *J. ten Voorde*, Prohibiting Remote Harms: On Endangerment, Citizenship and Control, *Utrecht Law Review* 2014, p. 170.

⁷⁶ *Ten Voorde* (fn. 75), p. 170.

⁷⁷ *Ten Voorde* (fn. 75), p. 170.

⁷⁸ UNSCR 2396 (fn. 25).

⁷⁹ *Van Kempen and Fedorova* (fn. 61), p. 86.

possibilities, might enhance the deterrent nature of the offence.⁸⁰ Targeting the support group by criminalizing organizing – or otherwise facilitating – travel and the funding of travel, might also contribute to the purpose of deterrence, albeit in an indirect manner.⁸¹ Moreover, when the deterrent aims should fail, criminalizing travel enables authorities to immediately arrest, interrogate, prosecute and imprison foreign fighters upon return (leading to the objective of incapacitation in order to prevent that individual from committing further crimes). In addition, the denunciatory nature of criminal law sends a message to the public that all conduct related to terrorism is denounced and that the offence is of a serious nature. At the very least, it serves as a signal to the general public that politicians are responding to the terrorist threat – regardless of the effectiveness of the measures. However, this symbolic or expressive function alone cannot justify a criminal law intervention.

Policymakers, therefore, should be aware of the objectives that criminalizing travel might or might not achieve. Aiming attention at clearly defined and sufficiently precise formulations might enhance the pursuance of these objectives, together with the development of a broader comprehensive policy framework (e.g. social interventions and continued engagement with offenders after release from prison)⁸². Taking these issues into consideration, a well-balanced criminal law approach could offer a more solid response to foreign fighters, in comparison to other measures such as the deprivation of citizenship.⁸³ Notwithstanding the advantages and objectives of a criminal law approach, thorough considerations must always precede the expansion of the scope of existing criminal law provisions, or the introduction of new incriminations.

b) Harm as the substantive principle underpinning criminalization

The criminal law should only be used when it is necessary to protect a fundamental interest. Normative criminalization theory clarifies “what sort of human conduct, and for what reasons

⁸⁰ *Van Ginkel* (fn. 73).

⁸¹ *Van Ginkel* (fn. 73).

⁸² UNSCR 2396 (fn. 25). See also The Hague – Marrakech Memorandum on Good Practices for a More Effective Response to the FTF Phenomenon, good practice #19; Addendum to The Hague-Marrakech Memorandum on Good Practices for a More Effective Response to the FTF Phenomenon, with a focus on Returning FTFs, recommendation #6.

⁸³ *Gherbaoui* (fn. 12), p. 263; OSCE (ODIHR) (fn. 31), p. 35.

or under which conditions, it is legitimate to criminalize [...] within a certain normative [...] orientation of a given society”.⁸⁴ As modern criminalization principles, four main “liberty-limiting principles” should be distinguished, namely the harm principle, the offence principle, legal paternalism and legal moralism.⁸⁵ In all policy documents, the principal argument for criminalization is the growing security threat.⁸⁶ Given that the underlying ratio in each instrument is clearly motivated by considerations to prevent a potential harmful outcome, the harm principle⁸⁷ is at the heart of the counter-terrorism policy.

The issue raised in this context relates to a “remote harm”, and more in particular to “intervening choices or mediating interventions”, in which the conduct “has no ill consequences in itself, but which is thought to induce or lead to further acts (by the defendant or a third person) that create or risk harm”.⁸⁸ Given the extremely early intervention on the *iter criminis*, the criminalization of remote harms must be as limited as possible. Scholars have developed various guidelines to shape the boundaries of remote harms. In this contribution, the following rules of thumb are derived from the literature (with *Ashworth* and

⁸⁴ *N. Persak*, Norms, Harms and Disorder at the Border: Legitimacy of Criminal Law Intervention through the Lens of Criminalisation Theory, in: *N. Persak* (ed.), *Legitimacy and trust in criminal Law, policy and Justice: Norms, Procedures and Outcomes*, 2014, p. 13.

⁸⁵ These four principles are covered in the well-known tetralogy of *Feinberg* (1984, 1985, 1986, 1988).

⁸⁶ EU Directive 2017/541 (fn. 19), recital 12: “considering the seriousness of the threat and the need to stem the flow of foreign terrorist fighters” and “presents a growing security threat”; Additional Protocol CoE (fn. 18): “expressing their grave concern about the threat posed by persons travelling abroad (...)”; UNSCR 2178 (fn. 16): “expressing grave concern over the acute and growing threat”.

⁸⁷ The origin of the existence of the harm principle goes back to Mill (1859), who introduced the principle first as the Principle of Liberty (*J.S. Mill*, *On Liberty*, 1859). The harm principle is considered the most widely recognized among the grounds of criminalization (*N. Persak*, *Criminalising Harmful Conduct: The Harm principle, its Limits and Continental Counterparts*, 2007).

⁸⁸ *A.P. Simester* and *A. von Hirsch*, *Crimes, Harms and Wrongs. On the Principles of Criminalisation*, 2011, p. 57.

Zedner (2012);⁸⁹ *Baker* (2007);⁹⁰ *Feinberg* (1984);⁹¹ *Husak* (2008);⁹² *Peršak* (2007);⁹³ *Simester* and *von Hirsch* (2011);⁹⁴ *ten Voorde* (2014)⁹⁵ as leading scholars):

- Decisive factors are the *gravity* and *probability* (or: ‘likelihood’) of the harm (combined leading up to the magnitude of the risk) on the one hand, and the *value* of the conduct on the other hand. The graver and more probable the harm, the more legitimate it is for the government to criminalize the conduct. Criminalization, however, must be designed to effectively reduce the risk and actually decrease the likelihood of the ultimate harm. The more valuable the conduct, the less legitimate it is for the government to restrict it. Conduct is all the more valuable when it amounts to a fundamental right (e.g. freedom of expression, or, in this case, freedom of movement).
- The more tenuous the link between the conduct and the harm, the more important the issue of *fair imputation*. Fair imputation relates to the level a defendant can be fairly held accountable. In *Baker’s* (2007) analysis, fair imputation is translated as the empirical connection or normative involvement of the remote harmer in the primary harm.⁹⁶ He argues that the remote harmer must underwrite the final harm in order to legitimately be criminalized, unless there are exceptional circumstances that would override the fair imputation requirement. *Ashworth* and *Zedner* (2012) contend that one must have a sufficient normative involvement (e.g., that he or she has encouraged, assisted, or facilitated the actions of others in committing or contributing to the final harm), or, in case the acts of the other were sufficiently foreseeable, one must prevent the causation of the harm.⁹⁷ They further argue that “a person may be held liable for acts he or she has done, simply on the basis of what he or she may do at some time in

⁸⁹ *A. Ashworth* and *L. Zedner*, *Prevention and Criminalization: Justifications and Limits*, *New Criminal Law Review* 2012.

⁹⁰ *D.J. Baker*, *The Moral Limits of Criminalizing Remote Harms*, *New Criminal Law Review* 2007.

⁹¹ *J. Feinberg*, *Harm to Others*, 1984.

⁹² *D. Husak*, *Overcriminalization: The Limits of the Criminal Law*, 2008.

⁹³ *Persak* (fn. 87).

⁹⁴ *Simester* and *von Hirsch* (fn. 88).

⁹⁵ *Ten Voorde* (fn. 75).

⁹⁶ *Baker* (fn. 90).

⁹⁷ *Ashworth* and *Zedner* (fn. 89).

the future, only if the person has declared an intent to perform those acts in a form that satisfies the requirements of an attempt, conspiracy, or solicitation”. *High-level fault requirements* (e.g. intent, knowledge) could, therefore, balance the criminalization of remote harms. The risk of targeting people who actually present no danger must be minimized at all times.

This section of the paper focuses on the nature of the remote harm and the characteristics of the remote harmer, dealing with issues of gravity, likelihood, and fair imputation. A distinction is made between the harm in offences that require a terrorist purpose and designated area offences. The social value of the conduct and related to this, the degree of intrusion upon actors’ choices that criminalization would involve is addressed under the proportionality and legality section (i.e. the section on human rights compliance).

aa) The harm in travelling for terrorist purposes

It has already been established that the reason behind criminalization is the growing security threat of terrorism. However, it is not always clear whether the rationale is based upon national security interests of the home state, or on the protection of the state of destination and its population against armed violence.⁹⁸ One thing is clear, the existing instruments are all framed within a counter-terrorism perspective. The principal harm of a terrorist act is of a serious and grave nature and is not at all disputed in this contribution. The act of travelling, however, is a common activity undertaken by law-abiding people all over the world. In order to legitimately criminalize travel, it is therefore important to ensure that the elements of likelihood and fair imputation are present.

The probability of harm is disputed in the literature. A study of *Hegghammer* (2013), based upon data of Western Jihadists between 1990 and 2010, shows that “prosecuting all aspiring foreign fighters as prospective domestic terrorists has limited preventive benefits, because so few of them, statistically speaking, will go on to attack the homeland”.⁹⁹ His data

⁹⁸ *Krähenmann* (fn. 1), p. 263.

⁹⁹ *T. Hegghammer*, Should I Stay or Should I Go? Explaining Variation in Western Jihadists’ Choice between Domestic and Foreign Fighting, *American Political Science Review* 2013, p. 13. It must be taken into account that the data set is limited to 2010, whereas the current foreign fighters’ wave is situated in the second decade of the twenty-first century.

demonstrates that most foreign fighters do not return for domestic terrorist operations. However, one out of nine fighters does return with a view to perpetrate a terrorist attack, which makes the “foreign fighter experience one of the strongest predictors of individual involvement in domestic operations that we know”.¹⁰⁰ Moreover, those who return turn out to be “more effective operatives than nonveterans”.¹⁰¹ *Van Ginkel and Minks (2018)* have identified the higher risk that comes from returnees as well, “due to the longer amount of time they spent in the conflict area, the arms training they probably received and the experience they have had with violent acts, the level of radicalisation and commitment to the violent cause, the network of worldwide jihadist extremists they have at their disposal and the frustration they might have experienced about the failure of the caliphate project and/or the traumas they suffer”.¹⁰² *Reed, de Roy van Zuijdewijn, and Bakker (2015)* argue that there are many pathways a foreign fighter can follow, of which engaging in terrorist activity upon return is only one possible path.¹⁰³ From these studies, it can be concluded that although the majority of returning fighters do not show signs of re-engagement, the effectiveness and gravity of an offence actually committed by them is greater. From this perspective, it may be legitimate to criminalize travelling, although only when the offence description ensures a close enough nexus between the prohibited conduct and the underlying risk of harm (and thus a clearly formulated and strictly interpreted *mens rea* requirement).

The Belgian autonomous offence states clearly that the prohibited conduct (i.e. the *actus reus*) of crossing a border (i.e. the leaving or entering of the territory of a state)¹⁰⁴ must be committed with a view to committing or contributing to the commission of a terrorist crime (i.e. the *mens rea*). In Belgium, this terrorist purpose is much broader than its international and regional counterparts, and includes not only core terrorist offences (art. 137 Sw.), membership offences (art. 140 Sw.), and training offences (art. 140quater and quinquies Sw.),

¹⁰⁰ *Hegghammer* (fn. 99), p. 10.

¹⁰¹ *Hegghammer* (fn. 99), p. 1. *Contra* Holman (2015, p. 14).

¹⁰² *Van Ginkel and Minks* (fn. 6), 58.

¹⁰³ *A. Reed, J. de Roy van Zuijdewijn, and E. Bakker, Pathways of Foreign Fighters: Policy Options and Their (Un)Intended Consequences, 2015.*

¹⁰⁴ The Belgian legislature has specified that it is up to the judge to assess the materiality of the facts and to interpret the concept according to the type of transport used. As an example, the Belgian legislator states that in the context of air travel, the offence will be committed as soon as the person concerned starts the boarding procedures at the airport. See Belgium, ‘Wetsontwerp tot versterking van de strijd tegen het terrorisme’, *Parl.St.* 2014-2015, 54 1198 001, ‘Advies Raad van State’, p. 16.

but also incitement (art. 140bis Sw.), recruitment (art. 140ter Sw.) and material support offences (art. 141 Sw.).¹⁰⁵ In short, this provision targets preparatory conduct (i.e. travel) of other preparatory acts (e.g. training), on the basis of the intent of the perpetrator. The Belgian ‘Raad van State’, however, has stressed that proof of this intent must be based upon “sufficiently concrete, materialised and objectifiable indications, which show a certain degree of seriousness”.¹⁰⁶ Given the difficulties that go along with proving this level of intent, art. 140sexies Sw. might rather be a manifestation of symbolic legislation instead of an effective tool in the fight against terrorism. However, recent case law has made clear that the judiciary does not attach great importance to the level of concreteness,¹⁰⁷ rendering the offence open to a wide use in court.

Countries that make use of existing terrorism-related offences also require a terrorism-related purpose (e.g. UK section 5 TACT 2006 on preparation of terrorist acts,¹⁰⁸ and art. 134a Sr. in the Netherlands¹⁰⁹). However, when a membership offence is used, there is no need to demonstrate a terrorist purpose on behalf of the defendant. In those cases, it is sufficient that he/she wilfully participated in the group while he/she (ought to) had knowledge of (a) the terrorist purpose of the group and (b) the fact that such participation will contribute to the criminal activities of the terrorist group. In France, *Decoeur* (2017) criticizes the fact that, in contrast to the international and regional minimum standards, the membership offence does

¹⁰⁵ The preparatory offence of art. 140septies Sw. is the only terrorism-related offence that is not covered within art. 140sexies Sw. Although art. 140septies Sw. was only more than a year later introduced, it is remarkable that the scope of art. 140sexies Sw. was not broadened, given the preventive outlook of the legislator.

¹⁰⁶ Belgium, ‘Wetsontwerp tot versterking van de strijd tegen het terrorisme’, *Parl.St.* 2014-2015, 54 1198 001, ‘Advies Raad van State’, p. 17.

¹⁰⁷ *Fransen and Kerkhofs* (fn. 54), p. 72-74.

¹⁰⁸ United Kingdom, TACT 2006, s.5(1): “with the intention of (a) committing acts of terrorism, or (b) assisting another to commit such acts”. The second paragraph, however, makes clear that “[i]t is irrelevant for the purposes of subsection (1) whether the intention and preparations relate to one or more particular acts of terrorism, acts of terrorism of a particular description or acts of terrorism generally.”

¹⁰⁹ The Netherlands, ‘Wetboek van Strafrecht’ (Dutch Criminal Code) (Sr.), art. 134a: “Hij die zich of een ander opzettelijk gelegenheid, middelen of inlichtingen verschaft of tracht te verschaffen tot het plegen van een terroristisch misdrijf dan wel een misdrijf ter voorbereiding of vergemakkelijking van een terroristisch misdrijf, dan wel zich kennis of vaardigheden daartoe verwerft of een ander bijbrengt” (translation: “He or she who intentionally provides or seeks to provide himself or herself or another person with an opportunity, means or intelligence to commit a terrorist offence or an offence in preparation for or facilitation of a terrorist offence, or acquires knowledge or skills to do so, or provides another person with such knowledge or skills”).

not even require an expected contribution to the terrorist activities of the group – resulting in a significant lower threshold of the required intent.¹¹⁰

Overall, the legal frameworks of all studied countries require a terrorist purpose. However, by broadening the scope of the requirement, a larger scale of travellers is targeted. Not only does this lower the probability of actual harm, it can also be argued that this raises issues concerning fair imputation. Women are the prime example in this context, although their role may differ from case to case.¹¹¹ The criminal liability of women who unambiguously and voluntarily take part in the activities of a terrorist group or a terrorist crime is beyond dispute, but what with the women who choose to stand alongside their husbands or travel to marry in the combat zone? Their conduct may, in some cases, consist of taking an airplane, cooking meals and taking care of the household and the children. However, it is generally accepted in case law that joining a husband on the field, embracing the cause and providing support, in whatever form, can be regarded as an act of participation in the activities of a terrorist group.¹¹² The Netherlands is the only exception in this context by systematically confirming that “citizenship under the control of a terrorist organisation does not automatically imply membership of that organisation”.¹¹³ Although the Dutch judiciary does not convict on the basis of participation in a terrorist organization, criminal liability is derived from other terrorism-related preparatory acts (and thus falling under the scope of the international standards).¹¹⁴ It can be questioned whether criminalization in these cases actually decreases the likelihood of the ultimate harm. Moreover, criminal law provisions should entail sufficient safeguards so to only punish those individuals that have knowledge of the terrorist activities

¹¹⁰ *Decoeur* (fn. 52), p. 307.

¹¹¹ Although the phenomenon of foreign fighters has predominantly been a male phenomenon, the focus on the role of women has recently increased. See *E. Bakker and S. de Leede*, *European Female Jihadists in Syria: Exploring an under-Researched Topic*, 2015; *E. Buner*, *Doing Our Part: Acknowledging and Addressing Women’s Contributions to Isis*, *William & Mary Journal of Race, Gender, and Social Justice* 2016; *T. Renard and R. Coolsaet*, *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*, 2018, p. 25. UNSCR 2396 has also emphasized the different roles woman may have served (fn. 25, para. 31).

¹¹² For Belgium, see the references in *Fransen and Kerkhofs* (fn. 54, p. 90-97) In the UK, the Shamima Begum case has caused a great deal of controversy. The Tareena Shakil case is an important precedent in this regard: United Kingdom, *Birmingham Crown Court* 1 February 2016.

¹¹³ The Netherlands, *Rb. Rotterdam*, 13 November 2017, ECLI:NL:RBROT:2017:8858. This decision has been confirmed in all *Pride*-cases: see The Netherlands, *Rb. Rotterdam*, 17-19 July 2018.

¹¹⁴ In The Netherlands, *Rb. Rotterdam*, 13 November 2017, ECLI:NL:RBROT:2017:8858, a woman was convicted on the basis of art. 96.2 of the Dutch Penal Code.

and underwrite the final harm. Given the many threats emanating from the phenomenon (e.g. setting an example as role model for other women), and the fact that even mere “citizenship” leads to legitimizing the terrorist organization, it is not unexpected that the conduct gives rise to retribution. Nonetheless, some scholars argue that extending the material and moral¹¹⁵ scope of existing incriminations might lead to overly punitive situations, given that the perpetrators would rather benefit from a different approach focused on prevention and deradicalization.¹¹⁶ A case-by-case approach is the only just response, in which an individual risk assessment is conducted and tailored prosecution, rehabilitation and reintegration strategies are developed.¹¹⁷

Further points to discuss are the preparatory and ancillary conduct to travelling for terrorist purposes, including financing, organizing and otherwise facilitating travel. In the past, Belgian judges have designated (the combination of) conduct, such as the transfer to the airport or merely accompanying a traveller, delivering letters of departing travellers to the family left behind, helping to carry luggage, and giving moral support, as passive forms of membership of a terrorist organization.¹¹⁸ Also in the UK, the Netherlands and France, multiple examples of convictions of parents and siblings who transfer money, often in the hope to aid an escape or to pay for food or healthcare, demonstrate the rigidity of the mere knowledge or “ought to know” requirement.¹¹⁹ The stretch of the knowledge requirement into

¹¹⁵ For example, the *mens rea* requirement is often not only limited to knowingly providing assistance, but is extended to an “ought to know” threshold.

¹¹⁶ *Walker* (fn. 17), p. 117; *W. Yperman and S. Royer*, *Correctionele Rechtbank Veroordeelt Jihadibruide: Not All Is Fair in Love*, *Juristenkrant* 2017.

¹¹⁷ See also The Hague Marrakech Memorandum Addendum, recommendation 3 and UNSCR 2396 (fn. 25), para. 29.

¹¹⁸ See Belgium, *Corr. Antwerpen* 18 May 2015, *Corr. Brussel* 25 November 2015, *Corr. Oost-Vlaanderen* (Dendermonde) 26 February 2018 (*contra Corr. Brussel* 9 March 2016 where the family context was taken into account).

¹¹⁹ See United Kingdom, *R v Sally Lane & John Letts (AB & CD)* [2018] UKSC 36; United Kingdom, *R v Salim Wakil*, unpublished. These convictions are based on s. 17 TACT 2000 on funding arrangements, where the required *mens rea* is satisfied when “he knows or has reasonable cause to suspect that it will or may be used for the purposes of terrorism”. In the latter case, the accused is a mentally ill brother who, the Court admitted, had “a genuine desire” to get his sister away from danger (X., *Brother Jailed for Funding Sister Who Joined Islamic State Group*, *BBC News* 2019). In the Netherlands, convictions are often based on the “Wet ter voorkoming van witwassen en financieren van terrorisme”. See X., *Broer Van Terrorist Vervolgd Om Sturen Van Geld*, *NOS* 2016. For examples in France, see X., *La Mère D’un Djihadiste Condamnée À Deux Ans De Prison Pour Financement Du Terrorisme*, *Le Monde* 2017; X., *Deux Soeurs Dont Toute La Famille Est Partie En Syrie Condamnées À 4 Et 5 Ans De Prison Ferme En France*, *Sudinfo.be* 2019. In France, article 421-2-2 of the Penal Code is primarily used. See for a critique: *B. Boutin*, *Has Countering the Financing of Terrorism Gone Wrong? Prosecuting the Parents of Foreign Terrorist Fighters*, 2017.

a potential knowing, or an “ought to know” requirement, further lowers the *mens rea* requirement. According to case law of the European Court of Human Rights, States are free to formulate their crime descriptions and define the constituent elements, as long as the use of presumptions “remain within certain limits”.¹²⁰ The Court adds that States should “take into account the importance of what is at stake and maintain the rights of the defence”.¹²¹ Whether this formulation implies that presumptions might not be acceptable for more severe offences (e.g. terrorism-related offences) remains to be seen.¹²² From a defendant’s perspective, lawyers argue such a conviction “runs the risk of undermining the fight against terrorism because it runs the risk of bringing the law into disrepute”.¹²³ The counterargument holds that this conduct contributes to the combatant’s abilities, and thus equally supports terrorism. From a harm perspective, it appears that the underlying ratio of criminal law intervention is not only aimed at the actual preventing of the commission of a terrorist attack, but also of the entire underlying support system. This support system is considered harmful, in the sense that it creates an environment conducive to terrorism. The question remains whether the potential harm can be attributed to those who perform acts as helping to carry luggage. The gravity of the action is clearly not taken into account, and neither is the question whether the defendant underwrites the final harm (i.e. shares the same ideology or cause). However, in case the intentions of the traveller were sufficiently foreseeable, it can be argued that one has an obligation to prevent the causation of the harm – and, when acting otherwise, one is therefore sufficiently normatively involved.

bb. The harm in entering or remaining in a designated area?

Whereas the offences that do include a certain *mens rea* requirement (i.e. the presence of a terrorist purpose, or at least the knowledge that the assistance is rendered for a terrorist

¹²⁰ *Salabiaku v France*, Application No. 10519/83, Judgment 7 October 1988, paras. 27 and 28. See also Van Den Wyngaert and Vandromme (2019, p. 312). These authors derive from *Salabiaku v France* that a crime description cannot comprise irrebutable presumptions of guilt.

¹²¹ ECtHR, *Salabiaku v France* (fn. 120), margin no. 28; ECtHR, *Janosevic v Sweden*, Application No. 34619/97, Judgment 23 July 2002, margin no. 101.

¹²² C. Van Den Wyngaert and S. Vandromme, *Strafrecht En Strafprocesrecht: In Hoofdlijnen. Boek 1: Strafrecht*, 2019, p. 312.

¹²³ Barrister Henry Blaxland QC, as cited in *D. Casciani*, Jack Letts: Why Jihadi's Parents Are Guilty of Funding Terrorism, BBC News 2019.

purpose) already have far-reaching consequences, an *a fortiori* reasoning applies for the UK offence on entering or remaining in a designated area. Criminalizing the mere entering or stay in a certain area, without having to establish that the defendant has a terrorist purpose or encourages the terrorist cause runs contrary to the rationale of the harm principle, since there is no(t even a remote) harm included in the material and moral elements of the crime description. Section 58C TACT 2000 only clarifies that the Secretary of State may designate an area outside the UK by regulations, if he is “satisfied that it is necessary for the purpose of protecting members of the public from a risk of terrorism”.¹²⁴ The Explanatory Notes to the Act explain that “[s]uch a risk may arise, in particular, if a conflict in a foreign country, potentially involving a proscribed terrorist organisation, acted as a draw to UK nationals or residents to travel to that country to take part in the conflict or otherwise support those engaged in the conflict.” The individual liability does not depend on a terrorist purpose in the mind of the defendant, but solely on the specific destination. UK nationals and residents who enter, or remain in, a designated area are punished,¹²⁵ unless (a) they can prove they have a reasonable excuse,¹²⁶ (b) they already travelled to, or are already in, the area on the day on which it becomes a designated area, and they leave within one month,¹²⁷ (c) the entering or remaining is involuntarily,¹²⁸ or (d) they enter or remain for or in connection with a certain, listed purpose.¹²⁹ These defence possibilities are welcomed,¹³⁰ but do not yet fully make up for the lack of an intent requirement. The reasonable excuse defence is a general category, of which the defendant himself must “adduce evidence which is sufficient to raise an issue with

¹²⁴ TACT 2000, s.58C (1) *juncto* (2).

¹²⁵ TACT 2000, s.58B (1)(a) and (b). The sentence amounts to imprisonment for a term of maximum ten years, or to a fine, or to both (TACT 2000, s.58B (9)).

¹²⁶ TACT 2000, s.58B (2).

¹²⁷ TACT 2000, s.58B (3)(a) and (b).

¹²⁸ TACT 2000, s.58B (4)(a).

¹²⁹ TACT 2000, s.58B (4)(b) *juncto* (5)(a-g) *juncto* (6), (7), (8).

¹³⁰ The UK offence is inspired by the Australian ‘declared area offence’, introduced by the Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014. *Gomez Marcos* (2019) has critically analyzed this offence and criticized the lack of “a general defence for an individual who has travelled to the area for an innocent purpose not included in the list” (*E. Gomez Marcos*, The ‘Declared Areas’ Offence: To What Extent Does Australia’s Policy Response to Foreign Fighters Undermine Freedom of Movement?, *International Journal of Global Community* 2019, p. 134). From that perspective, it is at least a step in the right direction to include a clause on reasonable defence in the UK offence.

respect to the matter”¹³¹ and the prosecution subsequently will have to prove beyond reasonable doubt that the defence is not satisfied. Although this mechanism definitely has an impact on the presumption of innocence, it will in general not be considered an infringement, given its rebuttable nature.¹³² However, the satisfactory nature of the reasonable defence has to be considered on a case by case basis. Given that there are no guarantees of what will be considered a reasonable defence, persons may be convicted even if they do not have a terrorist purpose in mind, or do not support the terrorist cause. In the context of another provision in the TACT 2000 concerning the collecting, making, possessing, viewing or otherwise accessing by means of the internet certain documents or records,¹³³ the stance has been taken by the Crown Prosecution Service that mere curiosity, for example, will not always constitute a reasonable excuse.¹³⁴ This example demonstrates that not all non-terrorism related grounds suffice as a reasonable excuse. Attending financial affairs and visiting relatives, for example, are not listed as legitimate purposes under TACT 2000, s.58B (5),¹³⁵ and will not necessarily be considered a satisfactory reasonable excuse. Imposing criminal liability on the basis of mere attendance, without the need to prove any other terrorism-related involvement or endorsement (and thus no sufficient normative involvement),¹³⁶ simply lacks a *raison d'être* in terms of a legitimate ground of criminalization, and especially the harm principle.

2. Proportionality and legality: A human rights approach

a) Assessing human rights compliance in the context of travelling offences

The social value of the conduct of travelling must be taken into account, as well as the degree of intrusion upon actors’ choices that criminalization would involve. This leads us to the

¹³¹ TACT 2000, s.118(2).

¹³² *Supra* n. 67. See also, in the literature, *D. Hamer*, The Presumption of Innocence and Reverse Burdens: A Balancing Act, Cambridge L.J. 2007; *A. Ashworth*, Four Threats to the Presumption of Innocence, S. African L.J., no. 2006, p. 88-90. See for a critique on the reverse of the burden of proof: OSCE (ODIHR) (fn. 31, p. 42).

¹³³ TACT 2000, S.58.

¹³⁴ *D. Anderson Q.C.*, Report on the Operation in 2010 of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006, 2011, p. 89.

¹³⁵ Unless it serves the purposes of attending the funeral of a relative or visiting a relative who is terminally ill (f) or providing care for a relative who is unable to care for themselves without such assistance (g). See TACT 2000, s.58B(5)(f)-(g).

¹³⁶ See in this regard: The Netherlands, *Rb. Rotterdam*, 17 July 2018, ECLI:NL:RBROT:2018:5766.

question on the extent to which it is considered necessary in a democratic society to restrict one's freedom of movement. Freedom of movement is the main fundamental right that is restricted by the criminalization of travel, but many other fundamental rights and freedoms may be equally impacted. The right to respect for private and family life,¹³⁷ the freedom of thought, conscience and religion,¹³⁸ the freedom of expression, the freedom of assembly and association, the prohibition of discrimination, the prohibition of expulsion of nationals, the protection of property and the right to marry could, depending on the circumstances of the case, also be infringed.¹³⁹ This contribution will not delve into an assessment of all these fundamental rights and freedoms, but the main features concerning the legality-, legitimacy- and democratic necessity test under freedom of movement can be extended to some extent. This assessment is covered under the principles of proportionality and legality, given their primordial role in any assessment of human rights restrictions.

The international and regional instruments explicitly state that their provisions must be implemented in accordance with all human rights obligations under international law.¹⁴⁰ The strong language regarding human rights aims to remind Member States of their responsibilities to protect fundamental freedoms and rights.¹⁴¹ Notwithstanding these “guarantees” as laid down in the instruments, the three instruments of the UN, the CoE and the EU are criticized for the very reason of the lack of respect for certain fundamental rights and freedoms.¹⁴² On a domestic level, often a circular reasoning is made. In Belgium, for

¹³⁷ This fundamental right will be of paramount importance in case a criminal offence impedes the contact with family members who are present in a designated area. This might be the case in the UK offence, in which only very limited situations related to contact with family members might be considered a legitimate purpose (*supra*).

¹³⁸ In case an individual is hindered to travel for religious purposes, there might be an infringement of the freedom of thought, conscience and religion. However, these religious considerations must be of a legal nature; participating in an armed jihad will not be qualified as such a legitimate consideration. Travelling to a conflict zone, for example, merely for the purpose of living in the caliphate under the rules of the Shari'ah could present a more difficult case. However, the Grand Chamber of the European Court of Human Rights has ruled that “sharia is incompatible with the fundamental principles of democracy, as set forth in the Convention” (*Refah Partisi (The Welfare Party) and others v. Turkey*, Application Nos. 41340/98, 41342/98, 41343/98 and 41344/98, Grand Chamber Judgment 13 February 2003). In Belgium, a man was convicted under the travelling offence, although the purpose of travel was to teach religious courses (see Belgium, *Corr: Oost-Vlaanderen* (afd. Dendermonde) 26 February 2018).

¹³⁹ *Conte* (fn. 15), p. 286; *van Kempen and Fedorova* (fn. 62), p. 67.

¹⁴⁰ See UNSCR 2178 (fn. 16); CoE Additional Protocol (fn. 18), art. 8; Directive 2017/541 (fn. 19), recital 35 and article 23.

¹⁴¹ *Kopitzke* (fn. 1), p. 324.

¹⁴² *Frias* (fn. 1), p. 201-202.

example, the Constitutional Court has simply ruled that the travelling offence is not in violation of the freedom of movement, by referring to the relevant international obligations.¹⁴³ However, these international obligations do not exempt States from their commitments to respect fundamental rights.¹⁴⁴ A thorough assessment of the implications that far-reaching criminalizations in the context of travelling for terrorist purposes may have on fundamental rights and freedoms is, therefore, highly needed. The assessment below will be based upon case law of the European Court of Human Rights (ECtHR), the European Court of Justice (CJEU), as well as domestic constitutional courts/councils. Although the case law on criminal provisions concerning foreign fighters is small to non-existent, principles can be derived from case law on freedom of movement in the context of travel bans and other restrictions.

b) Freedom of movement

Freedom of movement is widely seen as an indispensable “condition for the free development of a person”,¹⁴⁵ on which other human rights depend for their efficacy.¹⁴⁶ Notwithstanding “the rising ‘claim’ to the exercise of free movement rights”, freedom of movement has been subjected to more restrictions than ever.¹⁴⁷ This fundamental freedom is enshrined in multiple international human rights instruments,¹⁴⁸ and comprises multiple facets, ranging from (a) the right to liberty of movement and freedom to choose residence within the territory of a State, when he/she is lawfully within that territory; (b) the right to leave any country, including

¹⁴³ Belgium, *Constitutional Court*, 18 January 2018, no. 8/2018.

¹⁴⁴ See Belgium, ‘Wetsontwerp tot versterking van de strijd tegen het terrorisme’, *Parl.St.* 2014-2015, 54 1198 001, ‘Advies Raad van State’, p.14-15. See also *Reyntjens* and *Yperman* (fn. 70, p. 106).

¹⁴⁵ Human Rights Committee, CCPR General Comment No. 27: Article 12 (Freedom of Movement), 1999, para. 1.

¹⁴⁶ *C. Harvey* and *R.P. Barnidge*, *The Right to Leave One’s Own Country under International Law*, 2005, p. 1; *S.S. Juss*, *Free Movement and the World Order*, *International Journal of Refugee Law* 2004, p. 289.

¹⁴⁷ *Juss* (fn. 146), p. 291. See also *Harvey* and *Barnidge* (fn. 146).

¹⁴⁸ Freedom of movement is confined in art. 12 ICCPR (International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976)), art. 13 Universal Declaration of Human Rights (UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III)), art. 45 EU Charter (Charter of Fundamental Rights of the European Union, opened for signature 13 December 2007, 326 OJ C 391 (entered into force 1 December 2009)), and art. 2 Protocol no. 4 ECHR (Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto, 16 September 1963, ETS 46).

one's own; and (c) the right to enter one's own country¹⁴⁹. The first two facets may be subjected to restrictions when these are in accordance with law and are necessary in a democratic society in the interests of a legitimate aim as incorporated in the human rights instruments.¹⁵⁰ A similar exception clause, however, is not attached to the right to enter one's own country. Although art. 12(4) ICCPR explicitly adds the word "arbitrarily" to the prohibition to deprive someone from the right to enter his own country, art. 3 of Protocol no. 4 to the ECHR does also prohibit non-arbitrary deprivations.¹⁵¹

aa) Incriminations as an interference with the fundamental freedom of movement

When the conduct of travelling amounts to punishable behaviour, the incrimination is a concrete obstacle for an individual to leave a country (in case of outbound travel) or to enter one's own country (in case of inbound travel by a national). Whilst the legitimacy of criminalizing outbound travel depends upon the assessment of the restriction clause (see below), curtailing inbound travel of nationals will only be legitimate when it is criminalized under certain preparatory acts (i.e. use of existing terrorism-related provisions). An autonomous offence, where the *actus reus* constitutes the crossing of a border, will – in any event – violate the prohibition to deprive someone from the right to enter his own country. As a result, art. 140sexies, second limb of the Belgian Penal Code will constitute a violation when, and only when, applied to a Belgian national.¹⁵²

Designated area offences are equally complex, given that they do not prohibit individuals to leave the country or to enter one's own country, only the entering or remaining in certain declared areas is forbidden. However, in *De Tommaso v Italy*, the ECtHR reiterated that "Article 2 of Protocol No. 4 guarantees to any person a right to liberty of movement within a given territory and the right to leave that territory, which implies the right to travel to a

¹⁴⁹ The latter component is enshrined under a different article of Protocol No. 4 to the ECHR (fn. 148), namely art. 3.2 on the prohibition of the expulsion of nationals.

¹⁵⁰ See art. 12.3 ICCPR; art. 2.3. and 2.4. Protocol no. 4 ECHR (fn. 148).

¹⁵¹ *J. Verhellen*, Artikel 3. Verbod Van Uitzetting En Recht Op Toegang Van Eigen Onderdanen, in: Y. Haeck/J. Vande Lanotte, Handboek Evrm - Deel 2: Artikelsgewijze Commentaar, 2004, p. 556.

¹⁵² Belgium followed the example of art. 9(2)(a) of Directive 2017/541 (fn. 19) (*supra*). Art. 9(2)(b) of the Directive presents the second option to criminalize inbound travel; an option which does not pose any problem in light of the right to enter one's own country.

country of the person's choice to which he or she may be admitted".¹⁵³ Therefore, it must be assessed whether this interference is in accordance with the restriction clauses.

In case of intra-EU travel by EU citizens, the EU framework on free movement of persons must be taken into account as an additional set of rules. Article 21(1) of the Treaty on the Functioning of the European Union (TFEU) and Directive 2004/38/EC deal with the right of citizens of the Union (and their family members) to move and reside freely within the territory of the Member States.¹⁵⁴ Although initially viewed as "instrumental freedoms afforded to Member State nationals for enabling them to further the economic aims of the Treaty", these provisions on the free movement of persons have developed into "sources of fundamental rights which have to be respected and protected for their own sake".¹⁵⁵ However, the right to freedom of movement for citizens of the Union is – parallel to the other international human rights standards – not unconditional.¹⁵⁶

In order to determine whether a limitation is legitimate, a multi-pronged test should be conducted. The European Court of Human Rights traditionally rules according to the three-step legality-, legitimacy- and democratic necessity test. The European Court of Justice uses proportionality as its key principle, measured on the basis of an appropriateness (or suitability) test and a necessity test.¹⁵⁷ Although seemingly different, both approaches show distinct similarities – as will be demonstrated below.

¹⁵³ *Tommaso v Italy*, Application No. 43395/09, Judgment 23 February 2017, margin no. 104. See also *Khlyustov v Russia*, Application No. 28975/05, Judgment 11 July 2013, margin no. 64; *Baumann v France*, Application No. 33592/96, Judgment 22 May 2001, margin no. 61.

¹⁵⁴ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Directive 2004/38/EC). See also art. 20.2(a) TFEU and art. 3(2) TEU.

¹⁵⁵ *A. Tryfonidou*, Free Movement of Persons through the Lenses of 'Discrimination' and 'Restriction', in: M. Andenas/T. Bekkedal/L. Pantaleo (eds.), *The Reach of Free Movement*, 2017, p. 75.

¹⁵⁶ Directive 2004/38/EC (fn. 154), art. 27 et seq.

¹⁵⁷ European Court of Justice (ECJ) 15.11.2012, Joined Cases C-539/10 P and C-550/10 P (*Stichting Al-Aqsa*), margin no. 122. A third component, namely a proportionality *sensu stricto* test, is disputed. Instead, the Court uses the 'coherence and systematicity' test. See *V. Hatzopoulos*, Justifications for Restrictions to Free Movement: Towards a Single Normative Framework?, in: M. Andenas/T. Bekkedal/L. Pantaleo (eds.), *The Reach of Free Movement*, 2017, p. 142-43; *P. Wennerås*, The Justification and Proportionality of Certain Administrative, Regulatory and Political Concerns, in: M. Andenas/T. Bekkedal/L. Pantaleo (eds.), *The Reach of Free Movement*, 2017, p. 160.

bb) A justified interference versus a violation?

In accordance with law (legality). Each restriction clause requires that the interference is in accordance with law. Not only does this require that the measure has a legal basis, but it also “refers to the quality of the law in question, requiring that it should be accessible to the persons concerned and foreseeable as to its effects”.¹⁵⁸ The international instruments are often criticized in this regard on the basis of their lack of a clear definition of terrorism. This criticism is exacerbated by the introduction of far-reaching terrorism-related offences based upon a core offence without a definition. As the OSCE remarks, “the burden, therefore, falls on individual states to ensure that their national legislation clearly and specifically defines the material and mental elements of FTF-related crimes”.¹⁵⁹ Although the definition of terrorism itself gives rise to much debate in the national orders,¹⁶⁰ and further complicates the already ill-defined terrorism-related provisions, an in-depth analysis goes beyond the scope of this contribution. The same goes for the critiques on other terms used in terrorism-related provisions (which are used to prosecute foreign fighters, or which are referred to in the travelling offence), such as incitement, glorification, preparation, participation, etc. It is this combination that renders the criminal law approach “extremely expansive in its potential scope of application, and [is] ridden with ambiguity”.¹⁶¹ The creative use of existing terrorism-related provisions gives the impression that the threshold of punishable behaviour is higher, but since it is used to target exactly the same conduct as an autonomous offence, this approach is less foreseeable for the individual subjected to the law. The inventory study of *Wittendorp* and *Bakker* demonstrates that even more intercepted or “would-be” foreign fighters are convicted in countries without an autonomous offence at their disposal.¹⁶² Their findings even show that Belgium, although seemingly disposed to the most far-reaching and early-stage criminal offence, convicts the least number of people intercepted during their

¹⁵⁸ ECtHR, *Tommaso v Italy* (fn. 153), margin no. 106, referring to established case law of the Court.

¹⁵⁹ OSCE (ODIHR) (fn. 31), p. 36.

¹⁶⁰ National definitions (and the European minimum standards) refer not only to serious violence against persons, but also cover damage to property. Moreover, the often included aim of seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation (e.g. in Belgium and the Netherlands) is prone to discussion. See *Gherbaoui* (fn. 12), p.254.

¹⁶¹ OSCE (ODIHR) (fn. 31), p. 36.

¹⁶² *Wittendorp* and *Bakker* (fn. 35), p.79. Their sample consists of court cases between 2013 and June 2017. It must be noted that the Belgian art. 140sexies has entered into force since August 2015.

journey (6,8% of the total number of tried types of foreign fighters). Instead, Belgian case law is primarily focused on combatants still present in the conflict zone (through trials *in absentia*; 63,6%) and returnees (27,3%). In the Netherlands, France and the United Kingdom, these numbers have a different distribution of tried foreign fighters, respectively 50%, 27,3% and 67,7% of intercepted travellers; 27,6%, 6,1% and 0% combatants; and 22,7%, 63,6% and 25,8% returnees. It is not possible to derive causal conclusions from these figures, but they at least show that existing terrorism-related offences on membership and preparation already enable to convict foreign fighters in an early stage. So, although the legal framework may appear less restrictive, the same conduct amounts to a criminal offence in practice. An autonomous travelling offence is, therefore, at least welcomed for the sake of clarity.

The judiciary, both on the national and international level, takes a permissive stance towards the legality requirements of terrorism-related provisions. The ECtHR has ruled, as a general principle, that the consequences of a given action must not be foreseeable with absolute certainty as this may lead to excessive rigidity whilst the law must be able to keep pace with changing circumstances. In addition, the ECtHR argues that “many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice”.¹⁶³ As a result, a large margin of discretion is granted to national authorities to interpret and apply domestic law.¹⁶⁴ National constitutional courts and councils, e.g. in Belgium and France, have taken this established case law into account and have, as a result, decided that the scope of criminal behaviour is sufficiently clear and foreseeable.¹⁶⁵ More in particular, the Belgian Constitutional Court decided that the fact that the contested travelling provision does not indicate the precise elements on the basis of which the court may establish the existence of the intentional element of the offence, does not impede an individual to estimate the consequences of his/her actions.¹⁶⁶ Furthermore, the fact that it may be difficult for the prosecuting authority to provide evidence of this “double”

¹⁶³ ECtHR, *Tommaso v Italy* (fn. 153), margin no. 107, referring to established case law of the Court.

¹⁶⁴ ECtHR, *Tommaso v Italy* (fn. 153), margin no. 108. See also ECtHR, *Khlyustov v Russia* (fn. 153), margin no. 68-69.

¹⁶⁵ Belgium, *Constitutional Court*, 18 January 2018, no. 8/2018. In France, the elements of the crime description on ‘une entreprise individuelle’ (art. 421-2-6 Code Pénal) were considered sufficiently precise by the ‘Conseil constitutionnel’, save the term ‘rechercher’ (French *Conseil constitutionnel*, Judgment No. 2017-625 QPC, 7 April 2017).

¹⁶⁶ Belgium, *Constitutional Court*, 18 January 2018, no. 8/2018, B.9.1.

intention (namely to leave or enter the territory with the intention of adopting a particular conduct, which itself is motivated by a more specific intention) does not render article 140sexies of the Belgian Penal Code inconsistent with the principle of legality.¹⁶⁷

The *De Tommaso v Italy* judgment of the ECtHR is an exception to the permissive stance towards the legality requirement. In *De Tommaso v Italy*,¹⁶⁸ the ECtHR ruled that a compulsory residence order on the basis of “active” criminal tendencies violated art. 2 of Protocol no. 4 to the European Convention on Human Rights on freedom of movement, because the law did not meet the requirement of foreseeability. The ECtHR stressed that it is “necessary to establish the existence of specific conduct indicating that the individual concerned posed a real and not merely theoretical danger”.¹⁶⁹ In the context of the travelling offences, it is important that proof of a terrorist purpose may not be based on mere assumptions (e.g. the mere attendance at a conflict zone), otherwise the provision is “not formulated with sufficient precision to provide protection against arbitrary interferences”.¹⁷⁰

Taking these different judgments into consideration, it can be concluded that in order for the freedom of movement to be legitimately restricted, (a) the crime description must target only those individuals that pose a real risk, instead of a theoretical danger; (b) this “real risk” can be translated as a constitutive element through the *mens rea* requirement (i.e. the terrorist purpose); but (c) the precise, concrete elements in evidence of this intent must not be made explicit in the crime description for it to be foreseeable; whilst ensuring that (d) the assessment of the intent must be based on objective indications, showing a certain degree of seriousness, instead of mere suspicions based upon stereotypes or the destination of travel¹⁷¹.

Legitimate aim. The requirement of a legitimate aim is (also) fairly easily satisfied in case law. The ECtHR, the CJEU and the HRC all provide an extensive interpretation of the already broad possible legitimate aims that a State can pursue.¹⁷² Especially in the context of counter-

¹⁶⁷ Belgium, *Constitutional Court*, 18 January 2018, no. 8/2018, B.9.3.

¹⁶⁸ ECtHR, *Tommaso v Italy* (fn. 153).

¹⁶⁹ ECtHR, *Tommaso v Italy* (fn. 153), margin no. 116.

¹⁷⁰ ECtHR, *Tommaso v Italy* (fn. 153), margin no. 118.

¹⁷¹ See in this regard: Belgium, *Constitutional Court*, 18 January 2018, no. 8/2018, B.9.1. referring to the advice of the ‘Raad van State’.

¹⁷² *Van Kempen and Fedorova* (fn. 62), p. 76.

terrorism, it is accepted that the protection of national security or public safety, the maintenance of public order, the prevention of crime, or the protection of the rights and freedoms of others could (*in abstracto*) justify a limitation of freedom of movement. The EU framework uses the terminology of public policy and public security as possible restriction grounds (in addition to public health).¹⁷³ In the past, the CJEU has ruled that measures preventing the participation in an armed and organized group fall within the maintenance of public security.¹⁷⁴ Established case law has also made it clear that “the concept of public policy presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine, present and sufficiently serious threat to one of the fundamental interests of society”.¹⁷⁵ Given the leniency toward counter-terrorism measures, there is no doubt that the judiciary would qualify the foreign fighters’ phenomenon as such a threat. In a case dealing with restrictive measures against Syria, the CJEU referred to the “general interest as fundamental to the international community as the protection of civilian populations and the maintenance of peace and international security” as the legitimate objective.¹⁷⁶ The CJEU even literally spoke of “the primordial importance of combating terrorism with a view to maintaining international peace and security”.¹⁷⁷

The ground on which a limitation is justified (*in abstracto*) is one thing, the extent to which it can actually achieve its aim (*in concreto*) is a different assessment under the third democratic necessity test (or: the actual proportionality test).

Necessary in a democratic society (proportionality). It is not sufficient for a restriction to serve a legitimate purpose, it must also be necessary to protect this purpose.¹⁷⁸ In general, this democratic necessity test is more strictly assessed and constitutes the most decisive element in

¹⁷³ See Directive 2004/38/EC (fn. 154), art. 27.

¹⁷⁴ European Court of Justice (ECJ) 5.11.2014, Joined Case T-307/12 and T-408/13 (*Adib Mayaleh/Council of the European Union*), margin no. 35.

¹⁷⁵ European Court of Justice (ECJ) 10.07.2008, Case C-33/07 (*Gheorghe Jipa*), margin no. 23.

¹⁷⁶ ECJ, *Adib Mayaleh/Council of the European Union* (fn. 175), margin no. 11 *juncto* 197.

¹⁷⁷ ECJ, *Al-Aqsa* (fn. 157), margin no. 130.

¹⁷⁸ Human Rights Committee (fn. 145), para. 14.

case law (ECtHR, CJEU and HRC).¹⁷⁹ *Andenas* (2017, p. 2) takes into account the permissive stance in the previous stages, and states that “with such a low threshold, the real review is at the justification stage, and that is a proportionality review”.¹⁸⁰

In *Khlyustov v Russia*, the ECtHR “reiterates that [an] interference will be considered ‘necessary in a democratic society’ for a legitimate aim if it answers a ‘pressing social need’ and, in particular, if it is proportionate to the legitimate aim pursued and if the reasons adduced by the national authorities to justify it are ‘relevant and sufficient’”.¹⁸¹ In this regard, “a measure is justified only so long as it furthers the pursued aim”.¹⁸² The proportionality of travel restrictions has been examined by the ECtHR in various contexts, taking into regard a variety of factors (e.g. the duration, whether the applicants had actually requested to leave the area, the relevance and sufficiency of the grounds, the existence of a common European and international standard, timely re-assessments and judicial review, etc.).¹⁸³ At this “democratic necessity” stage, the CJEU’s proportionality test comes into play and requires that measures must be “appropriate for attaining the legitimate objectives pursued by the legislation at issue and must not go beyond what is necessary to achieve them”.¹⁸⁴

Within this necessity/proportionality test, much attention is dedicated to the personal conduct of the individual concerned, and the risk he/she poses. Although the ECtHR has acknowledged that travel bans may form legitimate preventive measures that guard against the risk of future offences (e.g. when suspected Mafia members are concerned – and thus by no doubt also suspected terrorists), there must always be concrete evidence to show that there is a *real risk* that he/she would offend (otherwise the restrictions on the applicant's freedom of

¹⁷⁹ See *van Kempen and Fedorova* (fn. 61), p. 78. However, this observation is not always correct. In *Ismet Celepli v Sweden* and *Mrs Samira Karker v France*, the Human Rights Committee did not provide a detailed argumentation on the democratic necessity of the measures. See, for example HRC, *Celepli v. Sweden*, Communication No. 456/1991, U.N. Doc. CCPR/C/51/D/456/1991 (1994), margin no. 9.2: “Moreover, bearing in mind that the State party has invoked reasons of national security to justify the restrictions on the author's freedom of movement, the Committee finds that the restrictions to which the author was subjected were compatible with those allowed pursuant to article 12, paragraph 3, of the Covenant”. See also *van Kempen and Fedorova* (fn. 62), p. 93.

¹⁸⁰ *M. Andenas*, *The Reach of Free Movement and the Gradualist Approach of the CJEU: An Introduction*, in: M. Andenas/T. Bekkedal/L. Pantaleo (eds.), *The Reach of Free Movement*, 2017, p. 2.

¹⁸¹ ECtHR, *Khlyustov v Russia* (fn. 153), margin no. 84.

¹⁸² ECtHR, *Battista v Italy*, Judgment, 2 December 2014, Application No. 43978/09, para. 41.

¹⁸³ ECtHR, *Khlyustov v Russia* (fn. 153), margin no. 85-91.

¹⁸⁴ ECJ, *Al-Aqsa* (fn. 157), margin no. 122 (and the case-law cited).

movement cannot be regarded as having been necessary in a democratic society).¹⁸⁵ The provisions under review are no preventive measures (as opposed to criminal penalties),¹⁸⁶ but are equally intended to prevent the risk of a future terrorist core offence. Given the *ultima ratio* nature of criminal law and its central notion of individual liability, it is all the more important that the targeted individual presents a genuine, present and sufficiently serious threat and that punishment is based “exclusively on the personal conduct of the individual concerned”.¹⁸⁷

It is not disputed that the use of criminal law in the foreign fighters’ context is a suitable or appropriate approach in achieving the legitimate aim (*supra*). It is, however, up for discussion whether the concrete criminal law provisions of the four national legal frameworks are a necessary and proportionate reaction. It is, therefore, key to guarantee that any limitation to the freedom of movement (and thus, in this context, a criminal measure) is (a) as least restrictive as possible, but at the same time (b) as effective as possible, whilst (c) targeting solely individuals who present a real risk based upon their personal conduct. The latter risk requirement relates to the harm assessment under section 3.1.2. (*supra*).

As far as the criminal law provisions target those individuals who intend to commit or contribute to a terrorist offence, they will – most probably – be considered proportionate, necessary and effective to the legitimate aim pursued. The requirement of a terrorist purpose ensures the fact that a person presents a real risk. The same goes for prosecution on the basis of existing terrorism-related provisions, such as membership and preparation – as long as there is a sufficient terrorist link and normative involvement in terms of a terrorist intent or knowledge that participation contributes to the criminal activities of the terrorist group.

When a travelling offence is combined with a broader range of conduct (i.e. a broader terrorist purpose), as is the case in Belgium, criminal liability is extended to include minor involvement. In that regard, doubts can be expressed whether these individuals present a genuine, present and *sufficiently serious* threat. These doubts arise in the context of organizing

¹⁸⁵ See *Labita v Italy*, Application No. 26772/95, Judgment 6 April 2000, margin no. 190, 195-197.

¹⁸⁶ ECtHR, *Labita v Italy* (fn. 186), margin no. 190.

¹⁸⁷ The latter formulation can be found in article 27(2) of Directive 2004/38/EC and subsequent case law of the ECJ (ECJ, *Jipa* (fn. 176); European Court of Justice (ECJ) 26.11.2002, Case C-100/01 (*Ministre de l’Intérieur and Aitor Oteiza Olazabal*)). On the level of the ECtHR, see, amongst others, ECtHR, *Tommasso v Italy* (fn. 153), margin no. 106 and ECtHR, *Labita v Italy* (fn. 186), margin no. 196.

and funding travel as well (although in these cases, it is not the freedom of movement of the individual that is restricted). For an analysis of the level of harm caused by the conduct, the author refers to section 3.1.2. (*supra*). It will depend on the particular circumstances of each case whether the interference will amount to a breach, but – in general – it is expected that these provisions will not be found incompatible with freedom of movement *per se*.

A designated area offence, on the other hand, challenges the proportionality principle to a much greater extent.¹⁸⁸ One additional aspect in the context of a designated area offence, is the duration of the measure and the regular re-examination by a court.¹⁸⁹ Parallel to a travel ban, a designated area offence is in need of a periodic review whether the condition in relation to the area continues to be met. Safeguards in this respect are, fortunately, incorporated in the UK offence,¹⁹⁰ although the condition itself is vaguely and broadly formulated (“the Secretary of State is satisfied that it is necessary, for the purpose of protecting members of the public from a risk of terrorism”)¹⁹¹. Moreover, not only does a designated area offence exceed the requirement of the least restrictive means,¹⁹² it is not linked to the effectuation of harm (*supra*), and thus no longer *per definitionem* relevant or effective in the pursuance of the aim. Whereas a travel ban is normally imposed on an individual on the basis of personal conduct, a designated area offence is linked to the precarious nature of the destination. As a result, punishment clearly goes beyond those individuals that pose a risk. Considerations of general prevention, which stand apart from the particulars of the case, should not be accepted as a proportionate ground for criminalization.¹⁹³

¹⁸⁸ The study of *van Kempen* and *Fedorova* (fn. 62) has come to a similar conclusion.

¹⁸⁹ See *van Kempen* and *Fedorova* (fn. 62), p. 79-84; ECtHR, *Battista v Italy* (fn. 183), margin no. 41-42.

¹⁹⁰ TACT 2000, s.58C (4)-(6) safeguard the conditions of periodic review and duration.

¹⁹¹ TACT 2000, s.58C (2).

¹⁹² In the *Al-Aqsa* and *Mayaleh* cases, the CJEU argued that “[a]s regards the necessity of the measure, it should be noted that the alternative and less restrictive measures put forward by the appellant, such as a system of prior authorisation or an obligation to justify, a posteriori, how the funds transferred were used, are not as effective in achieving the goal pursued, [...], particularly given the possibility of circumventing such restrictions”. See ECJ, *Al-Aqsa* (fn. 157), margin no. 125 and ECJ, *Adib Mayaleh/Council of the European Union* (fn. 175), margin no. 178). A similar argumentation would be in the advantage of the designated area offence. However, other, less restrictive *criminal law* measures are more effective in achieving the goal pursued (e.g. a travelling offence for terrorist purposes). *Van Kempen* and *Fedorova* (fn. 62) do propose a system of prior authorisation to travel to a designated area.

¹⁹³ In the context of the freedom of movement of EU citizens, art. 27(2) Directive 2004/38/EC (fn. 154) clearly states that “justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted”. Although this article is only applicable within the territory of Member States, a similar standard should be adopted on a global scale.

IV. CONCLUSION

The prosecution of foreign fighters is a much-debated matter, anno 2020. Although it has been of great importance in the entire second decade of the twenty-first century, the fall of the caliphate and the Turkish-Syrian developments in the region forces European governments to take action.¹⁹⁴ States are called upon to retrieve their nationals from detention camps and to adjudicate these individuals domestically,¹⁹⁵ but are also faced with the same level of opposition. Although the evolutions in the conflict zone are not the subject of this contribution, it demonstrates the importance of the legal framework towards foreign fighters on the domestic level.

In curtailing the phenomenon, policy makers – motivated by preventive security considerations – have primarily focused on repressive and coercive measures. The use of criminal law plays a crucial role in this regard,¹⁹⁶ but an expansive overreach risks counter-productive results.¹⁹⁷ It is, therefore, of paramount importance that criminal law provisions are in conformity with fundamental rule of law principles. This contribution has examined whether the criminal law approach concerning foreign fighters in Belgium, France, the Netherlands and the United Kingdom corresponds to the principles of subsidiarity, proportionality and legality. These criminal law approaches range from autonomous travel

¹⁹⁴ At the moment of writing, thousands of IS prisoners are held in detention camps in north-eastern Syria. US troops withdrew from the Turkish-Syrian border area, and Turkey's military offensive against the Syrian Kurds has led to an enormous reduce in guards at the detention camps and consequently the escape of IS prisoners, and families or affiliates of IS fighters.

¹⁹⁵ The three main options for prosecution are standing trial in Iraq, establishing an international tribunal or to repatriate, investigate, and prosecute or monitor own nationals at the domestic level. Trump has repeatedly urged countries to repatriate their nationals. See, for example, *D. Sabbagh*, Britain Must Repatriate Isis Fighters, Warns US Defence Secretary, *The Guardian* 2019. See also *F. Willems*, Waarom kan het Internationaal Strafhof in Den Haag de IS-Strijders Niet Berechten?, *VRT News* 2019; *C. Kenny*, Prosecuting Crimes of International Concern: Islamic State at the ICC, *Utrecht Journal of International and European Law* 2017; *L. Reyntjens* and *W. Yperman*, *Opinie: Doodstraf Voor Belgische Is-Strijders: Vertrouwen We Iraaks Systeem Écht Meer Dan Het Belgische Gerecht?*, *VRT News* 2019; *E. Verhasselt*, Drie redenen waarom een IS-tribunaal zo moeilijk van de grond komt, *VRT News* 2019.

¹⁹⁶ The OSCE (fn. 31, p.35) has stated that it, at least, “provides a fairer vehicle for suspected FTFs to know and respond to allegations against them, compared to the application of administrative or executive measures that can have just as serious rights consequences and punitive effects”.

¹⁹⁷ *Krähenmann* (fn. 1, p. 263) points out that “returning foreign fighters may play an important role in counter-narratives to dissuade others from leaving. Yet, facing draconian punishment under terrorism legislation, there is little legal incentive for them to come forward. Moreover, an overly repressive approach risks cancelling out parallel preventive approaches. Fearing prosecution, family members and friends of suspected outgoing foreign fighters might be reluctant to contact the authorities, in particular in countries where attempted travel falls under domestic terrorism statutes.”

offences, over the use of existing terrorism-related provisions, and designated area offences. Given the highly preparatory nature of the targeted conduct, it is all the more essential to safeguard its penal value through a strict and well-defined nexus between the *actus reus* and a clear *mens rea* requirement. Only a well-balanced and well-defined criminal law approach, embedded in a broader policy framework, could provide for a fair vehicle in the fight against terrorism and enhance the pursuance of the objectives of deterrence, denunciation, incapacitation, retribution and rehabilitation.

The enormous value of the *mens rea* requirement has come forward in the remote harm analysis, as well as in the human rights assessment. It is the terrorist purpose of an individual or his/her sufficient normative involvement, evidenced by objective indications, that provide for a “meaningful proximate link between [his/her] behaviour and the ultimate wrong” and thus a sufficiently legitimate rationale for criminalization.¹⁹⁸

The human rights assessment has made clear that the right to enter one’s own country must be distinguished from the right to leave a country, given the absolute nature of the former and the relative nature of the latter. As a result, an autonomous offence of inbound travel of nationals simply violates the prohibition to deprive someone of the right to enter one’s own country. In other cases, the fundamental freedom of movement may be restricted when the interference is in accordance with law (here, a legality test enters the assessment), serves a legitimate aim and is proportionate or necessary in a democratic society. Although the permissive stance of the ECtHR and the CJEU regarding the legality and legitimacy of counter-terrorism measures has resulted in a broad margin of appreciation for domestic authorities to fight the foreign fighters’ threat, these courts have taken a unified and clear stance that all restrictions on freedom of movement must be based on the personal conduct of the individual and that he/she must present a real, and not a merely theoretical, danger. Restrictions on travelling with a terrorist intent will, therefore, be found compatible with freedom of movement. *Stessens* (2017) rightly noted that when restrictions for unilaterally and *a priori* imposed travel bans are accepted by Courts,¹⁹⁹ it remains difficult to see how an adversarial and *a posteriori* criminal conviction for travel with a terrorist intent would not be found compatible with

¹⁹⁸ OSCE (ODIHR) (fn. 31), p. 37-38.

¹⁹⁹ *Stessens* (fn. 9), p. 448. *Stessens* here refers to the *Adib Mayaleh/Council of the European Union* case (fn. 175) before the ECJ. The ECJ approved, *inter alia*, a travel ban on an individual as part of the restrictive measures against Syria and the common foreign and security policy of the EU.

freedom of movement. It is less straightforward to assess the wide arsenal of existing terrorism-related offences and their conformity with the fundamental freedom of movement in general, since it demands a more concrete case-by-case assessment. Although an autonomous offence seems to imply an expansion of criminal liability (and thus seems to constitute a harsher form of intervention), research has demonstrated that existing terrorism-related provisions enable to target the exact same type of conduct. From this point of view, an autonomous offence is at least more foreseeable for the persons concerned.

Designated area offences, however, should be less favourably assessed, given that there are less restrictive means available, there is no longer a link to the effectuation of the harm, and neither is the punishment based on the personal conduct of the individual. Since the link with the principal terrorist offence is severed, there is no cause for the conduct to amount to a punishable offence. It risks that law-abiding people, with no terrorist purpose, will no longer be inclined to travel to a certain territory. With the spirit of subsidiarity in mind, the least restrictive means must always be preferred – which is certainly not the case when criminalizing the entering or remaining in a designated area. Although the proportionality of the punishment with respect to the seriousness of the crime exceeds the scope of this paper, the fact that the UK designated area offence gives rise to a sentence up to ten years of imprisonment only adds to the questionable nature of the incrimination. The Dutch legislator has fortunately refrained from installing such a far-reaching measure, although the idea was raised multiple times.

In a society that values the rule of law, a legitimacy assessment of the criminal law approach on foreign fighters is essential. Further research should systematically analyse domestic sentencing decisions on how these provisions play out in the courtroom. Not only would it be interesting to see the disparities across the countries, but it would also shed light on the interpretation of the nexus between the conduct, the normative involvement and the ultimate harm in practice.