

Unfolding the case of returnees: How the European Union and its member States are addressing the return of foreign fighters and their families

Carlota Rigotti and Júlia Zomignani Barboza*

Carlotta Rigotti is a PhD Researcher in law at the Vrije Universiteit Brussel. Although her main research interest is in gender issues, she has been involved in an EU-funded project dealing with countering and reducing violent extremism. Additionally, she has worked as an intern in a criminal law firm in Italy, while also joining the Human Rights and Migration Law Clinic run by the University College of Turin.

Júlia Zomignani Barboza holds an LLM in international humanitarian law and human rights from the Geneva Academy. After concluding her LLM, she worked in the not-for-profit sector in Geneva, Bangkok and Sydney, before moving to Brussels, where she is currently developing her PhD research on undesirable but unreturnable migrants at the Vrije Universiteit Brussel. At the same time, she contributes to

* Both authors contributed equally to the Introduction and Conclusion, as well as the section entitled “The Case of Repatriation”. The section “The EU Case of Returnees: A Counterterrorism Perspective on Foreign Fighters” is attributed to Carlotta Rigotti, while the section “The EU Member States’ Response to Foreign Fighters and Returnees” is attributed to Júlia Zomignani Barboza, with the exception of the subsection on “Exit Interventions”.

university research projects such as the Brussels Privacy Hub's Data Protection in Humanitarian Action project, together with the International Committee of the Red Cross.

Abstract

The return of foreign fighters and their families to the European Union has mostly been considered a security threat by member States, which consequently adopt repressive measures aimed at providing an immediate, short-term response to this perceived threat. In addition to this strong-arm approach, reintegration strategies have also been used to prevent returnees from falling back into terrorism and to break down barriers of hostility between citizens in the long term. Amidst these different strategies, this paper seeks to identify which methods are most desirable for handling returnees.

Keywords: foreign fighters, returnees, counterterrorism, international humanitarian law, prosecution, reintegration, deradicalization.

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Introduction

The phenomenon of foreign fighters is far from being a novelty. Throughout history, there have been many cases of individuals and groups that, for various reasons and with divergent backgrounds, have joined conflict overseas. In the European scene, the English poet Lord Byron and the American writer Ernest Hemingway are well-known examples, given their respective involvement in the Greek War of Independence (1821–32) and the Spanish Civil War (1936–39). More recently, several European citizens and residents have travelled to Iraq and Syria in order to join jihadist groups, such as Da'esh (also known as the so-called Islamic State (IS)) and the Islamist Al-Nusra Front.

Unlike in the past, however, the current travel of foreign fighters to the Middle East has raised several concerns in Western countries. More specifically, the member States of the European Union (EU) have been worried about the threat that some returnees may pose to their internal security, inasmuch as they can be fully fledged fighters, often radicalized and with relationships to terrorist networks. In response to this menace, these States have adopted divergent strategies concerning the potential repatriation of foreign fighters, as well as the consequences of their (even voluntary) return. These action plans go beyond the male returnees, also including the so-called “jihadist wives” and their children, whose involvement in the conflict might differ and so require a different legal treatment upon return.

Against this background, this paper aims to identify a tailor-made approach to handling these returning fighters and their family members that addresses not only EU member States' concerns over national security but also the reintegration of those who have travelled to (or were even born in) conflict zones, depending on the individual's identity, experiences and needs. To identify which

methods are most desirable from a security and human rights angle, we will examine how the EU and its member States are framing and facing this issue, while critically assessing it. This article will not cover the numerous definitions and legal qualifications of foreign fighters that have been proposed within the legal realm of counterterrorism and international humanitarian law (IHL), nor will it discuss the nebulous notion of terrorism. These matters are addressed in other articles in this issue of the *Review*. Instead, the article will begin with an overview of the EU framework dealing with foreign fighters. The article will then examine how EU member States regulate the return of foreign fighters and their families onto their soil; in particular, national responses are seen in the context of repatriation, prosecution and reintegration. Later, the article will discuss exit interventions and transitional justice as an alternative and/or complementary member States' policy to mitigate the perceived security threat posed by returnees. In this context, special emphasis will be put on the best interests of the child. Conclusions will be provided in the final section of the article.

The EU case of returnees: A counterterrorism perspective on foreign fighters

Back in 2013, the EU counterterrorism coordinator started emphasizing the security threat posed by the unprecedented numbers of foreign fighters travelling from the Union to Syria and other hotspots.¹ Considering that Da'esh was allegedly “the Islamist-extremist export[er] of terrorism”,² returnees were deemed to constitute a menace to the internal security of the Union, inasmuch as they were often radicalized (or, at the very least, had been exposed to extremist ideas) and trained to fight and, upon return, had links with an international jihadist network.³ This perceived threat was soon exemplified by the terrorist attacks that were committed by male returnees, such as the Charlie Hebdo and Bataclan shootings in France in 2015;⁴ these attacks paved the way for a whole range of EU policies that aim to ensure the security of EU citizens, prevent radicalization and foster cooperation with third countries to curb terrorism.⁵ Although these cases relate

- 1 EU Counterterrorism Coordinator, in close consultation with the services of the European Commission and the EEAS, *Foreign Fighters and Returnees from a Counter-Terrorism Perspective, in Particular with Regard to Syria: Stocktaking*, EU Doc. 16768/13, 2013.
- 2 European Council, *Special Meeting of the European Council: Conclusions*, EUCO 163/14, 30 August 2014, p. 6.
- 3 Gilles de Kerchove and Christiane Höhn, *The Regional Answers and Governance Structure for Dealing with Foreign Fighters: The Case of the EU*, in Andrea De Guttry, Francesca Capone and Christophe Paulussen (eds), *Foreign Fighters under International Law and Beyond*, Springer, Berlin, 2016, p. 304.
- 4 Wim Wensink et al., *The European Union's Policies on Counter-Terrorism: Relevance, Coherence and Effectiveness*, European Parliament, Directorate-General for Internal Policies, 2017, p. 35, available at: [www.europarl.europa.eu/RegData/etudes/STUD/2017/583124/IPOL_STU\(2017\)583124_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583124/IPOL_STU(2017)583124_EN.pdf) (all internet references were accessed in July 2021).
- 5 European Council, “Informal Meeting of the Heads of State or Government Brussels, 12 February 2015 – Statement by the Members of the European Council”, 12 February 2015, available at: www.consilium.europa.eu/en/press/press-releases/2015/02/12/european-council-statement-fight-against-terrorism/.

to male adult foreign fighters, the idea that returnees present a menace is often extended to their family members, including children. In this regard, the European Parliament noted in 2018 that

[i]t is widely claimed that children recruited into groups like IS in Iraq and Syria may perpetrate criminal acts, including serious violent offences. This stems from longstanding insights into the use of children by armed groups, but also the understanding that IS recruits boys into combat roles from the age of nine and the emergence of IS video footage that appears to show children being used in the commission of violence. As a result, the counter-terrorism lens through which adult returnees are viewed is often extended to children, with minors being classed as “foreign [terrorist] fighters” as young as 9 (Netherlands) or 12 (Belgium).⁶

While children’s role as victims of terrorist groups is also recognized and a case-by-case approach is often called for (as every child’s experiences are different), the security concern is always present.⁷

In view of the above and in order to guarantee the security of its citizens, the EU legislator first developed a policy based on reinforced checks at the Union’s external borders and enhanced information exchange amongst member States. The enactment of two pieces of legislation at the EU level inserts itself in this context, namely Directive (EU) 2016/681 on the use of passenger name record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crimes, and Regulation (EU) 2017/458 of the European Parliament and of the Council of 15 March 2017, amending Regulation (EU) 2016/399 as regards the reinforcement of or checks against relevant databases at external borders.

Furthermore, in the same context of favouring repressive measures and strong-arm approaches and so providing an immediate policy response to foreign fighters and returnees, the European Commission adopted Directive (EU) 2017/541 on combating terrorism (EU Counterterrorism Directive), thereby including the act of travelling (or attempting to travel) for the purpose of terrorism as a new criminal offence (Article 9). More generally, this legal instrument outlaws several conducts ranging from attacks upon the physical integrity of a person (Article 3(1)(b)) to the manufacture, possession, acquisition, transport, supply or use of explosives or weapons; such conducts also include research into, and development of, chemical, biological, radiological or nuclear weapons (Article 3(1)(f)), public provocation to commit a terrorist offence (Article 5), providing and

6 Amandine Scherrer (ed.), *The Return of Foreign Fighters to EU Soil: Ex-Post Evaluation*, European Parliament Research Service, May 2018, p. 58, available at: [www.europarl.europa.eu/RegData/etudes/STUD/2018/621811/EPRS_STU\(2018\)621811_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/621811/EPRS_STU(2018)621811_EN.pdf).

7 For example, in a report of the Dutch National Coordinator for Security and Counterterrorism (Nationaal Coördinator Terrorismebestrijding en Veiligheid, NCTV) and General Intelligence and Security Service (Algemene Inlichtingen- en Veiligheidsdienst, AIVD), the conclusion stated that “[i]t should be clearly kept in mind that minors are chiefly victims of ISIS, without ignoring the potential risks for society”. NCTV and AIVD, *The Children of ISIS: The Indoctrination of Minors in ISIS-Held Territory*, The Hague, 2017, p. 18.

receiving training for terrorism (Articles 7–8), and the financing of terrorism (Article 10). Additionally, Article 13 provides that “it shall not be necessary that a terrorist offence be actually committed” for these acts to be punished, clearly showing the preventive nature underpinning the EU response to terrorism; in other words, the EU legislator intends to criminalize conducts relating to terrorism prior to the causation of any tangible and direct harm. Yet, although criminalization used for preventive purposes is far from being a novelty across the Union, such use has been adversely considered by scholars concerned about the change in purpose of this branch of law, and the potential breach of human rights and due process;⁸ similar concerns will be raised in this article with regard to the prosecution of foreign fighters.

Considering that not all returnees (meaning both foreign fighters and their families) pose a security threat and acknowledging that the root causes of terrorist radicalization range from socio-economic conditions to religious or political ideologies, also including identification and cultural processes,⁹ the EU legal framework on counterterrorism has also been based on preventive measures,¹⁰ outside the realm of criminal law. In this context, the EU has promoted good governance, democracy, education and economic prosperity across the Union; has addressed incitement and recruitment in key environments (such as prisons and places of worship); has developed inter-cultural dialogues and a non-emotive lexicon for discussing the issue; and has advanced a communication strategy to better explain existing policies. Furthermore, it has tried to foster the sharing and dissemination of knowledge and experiences, while establishing a High-Level Commission Expert Group on Radicalisation, several EU Cooperation Mechanisms (including the Steering Board on Union Actions on Radicalisation), and countless networks for collaboration and exchange (such as the Radicalisation Awareness Network (RAN)). Ultimately, it has financed projects and initiatives aimed at comprehending and curbing radicalization by identifying key influencing factors, extremist ideologies, and recruitment mechanisms, as well as by developing good practices and concrete guidance.

Lastly, the Union has expressed the need “to engage more with third countries on security issues and counter-terrorism, particularly in the Middle East and North Africa and in the Sahel, but also in the Western Balkans”.¹¹ Similar to the aforementioned approaches to internal security, the EU cooperation approach puts emphasis on areas such as law enforcement and criminalization, the prevention of radicalization, and the development of systems for information exchange and border security.¹²

8 See, for instance, Andrew Ashworth, Lucia Zedner and Patrick Tomlin, *Prevention and the Limits of Criminal Law*, Oxford University Press, Oxford, 2013.

9 Edwin Bakker, “EU Counter-Radicalisation Policies: A Comprehensive and Consistent Approach?”, *Intelligence and National Security*, Vol. 20, No. 2, 2015, pp. 298–302.

10 See, for instance, European Commission, “Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee and the Committee of the Regions Supporting the Prevention of Radicalisation Leading to Violent Extremism”, COM(2016)379 final, 2016.

11 European Council, above note 5.

12 G. de Kerchove and C. Höhn, above note 3, pp. 325–326.

In summary, the EU has mostly conflated the return of foreign fighters and their families with the security threat they are considered to pose, and thus has adopted multiple counterterrorism measures. As will emerge below, the EU approach risks overshadowing the subjecthood of such individuals within IHL and therefore unfairly prosecuting people for acts that are legal in times of war in compliance with IHL, as well as for their association with fighters alone. Given that counterterrorism falls within the shared competence of the Union and member States on the basis of Article 4 of the Treaty on the Functioning of the European Union, the next section of this article will focus on how the latter have responded to the repatriation and voluntary return of foreign fighters and their families in their territory. The divergent approaches derive from the legal gap in the EU Counterterrorism Directive, which requires member States to criminalize terrorism-related activities and, more specifically, the phenomenon of foreign fighters, without harmonizing the practicalities of their return and possible prosecution. This leeway given to States may also be explained by the understanding that counterterrorism relates to the security of citizens, which since the emergence of the modern State has been inherently linked to the national interest.¹³ In this regard, the transfer of this competence to the EU has remained sensitive and to some extent minimal, as shown by the crisis-driven nature of the Union's counterterrorism policy.¹⁴

The EU member States' response to foreign fighters and returnees

Although precise data on the phenomenon of foreign fighters in Europe are scarce, a study by the European Parliament shows that the majority of returnees came back from Syria and Iraq in two waves: one in 2013–14, prior to the June 2014 self-declaration of a Da'esh caliphate, and one in early 2015. Since 2016, and albeit the collapse of the caliphate, the number of voluntary returns of foreign fighters has significantly decreased, and major concerns have arisen from their potential repatriation.¹⁵ The reason behind the decrease remains unsettled in the literature. For instance, Amandine Scherrer *et al.* suggest that “[v]ast numbers of Europe's departees are adjudged to have died in Iraq and Syria ... [,] while many are thought to have been arrested or may relocate to neighbouring countries”.¹⁶

In any event, far from being a homogeneous group, the profile of foreign fighters and returnees varies according to gender, age, background, experiences in

13 Jörg Monar, “EU Internal Security Governance: The Case of Counter-Terrorism”, *European Security*, Vol. 23, No. 2, 2014, p. 195.

14 See, *inter alia*, Christian Kaunert and Sarah Léonard, “The Collective Securitisation of Terrorism in the European Union”, *Western European Politics*, Vol. 42, No. 2, 2019; Javier Argomaniz, “Post-9/11 Institutionalisation of European Union Counter-Terrorism: Emergence, Acceleration and Inertia”, *European Security*, Vol. 18, No. 2, 2009.

15 A. Scherrer (ed.), above note 6, p. 31.

16 *Ibid.*

hostilities and motivations,¹⁷ with the consequence of posing diverse challenges to policy-makers. At first glance, returnees (be they foreign fighters or their family members) are perceived as a security threat, inasmuch as they are likely to have acquainted themselves with extremist ideologies, to have become radicalized, to have received training for terrorism and/or to have gained experience in conflict. Consequently, they may come back to their own country to commit terrorist attacks themselves, as well as to facilitate logistical, financial and recruitment activities at home.¹⁸ For children, more specifically, although their role as victims of violations by terrorist groups is not questioned, States such as the Netherlands also deem that they may have received combat training and weapons from a young age¹⁹ and are potentially susceptible to radicalization and recruitment due to negative experiences in camps in Syria.²⁰ Yet, considering that motivations for returning can also derive from disillusionment with Da'esh or other armed groups they may have joined, as well as from the psychological and physical trauma caused by involvement in warfare, many returnees will also need assistance in reintegrating into society, returning to normal life and dealing with potential mental illnesses (such as post-traumatic stress disorder).²¹ For example, regarding the reintegration of children who have been recruited and exploited by extremist violent groups, it has been claimed that a multidimensional process is needed, which should include measures related to health and psychosocial recovery and support, educational and vocational opportunities, and return to family and community life.²² Similarly, family members who have not engaged in hostilities but have been exposed to and have potentially been victims of violence may also require special assistance from multiple sectors in their reintegration. As a result, EU member States have adopted a multidisciplinary and cross-sector approach, ranging from repressive to rehabilitative and socio-preventive policies, and involving law enforcement and civil society-based organizations. Added salience, however, has always been given to repressive measures, as these are considered able to provide immediate and short-term policy solutions to the issue under scrutiny.

On such premises, the next subsections will examine policy trends in regulating the repatriation of foreign fighters and their families, namely prosecution and reintegration on EU soil. Before proceeding to specifically examine the legal responses to the phenomenon of returnees, however, we will critically assess to what extent member States are likely to accept the repatriation of foreign fighters, and whether they seek instead to hinder their return.

17 *Ibid.*, pp. 33–38.

18 Alastair Reed and Johanna Pohl, “Disentangling the EU Foreign Fighter Threat: The Case for a Comprehensive Approach”, *RUSI Newsbrief*, Vol. 37, No. 1, 2017, pp. 1–2.

19 AIVD, *Focus on Returnees*, The Hague, 2017.

20 NCTV, *Terrorist Threat Assessment for the Netherlands 53: October 2020*, The Hague, 2020.

21 A. Reed and J. Pohl, above note 18, p. 3.

22 United Nations (UN) Office on Drugs and Crime, *Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups: The Role of the Justice System*, Vienna, 2017, p. 106.

The case of repatriation

In response to counterterrorism measures taken at the international and regional level (such as United Nations (UN) Security Council Resolution 2178 (2014) and the 2015 Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism), EU member States have deployed a preventive strategy aimed at hindering the travel of foreign fighters. Nevertheless, the reported waves of returnees and the apparent fall of the Da'esh caliphate lead us to primarily focus on how member States have responded to the return of foreign fighters and their families, by either rejecting, restricting or favouring this scenario. Following Tanya Mehra and Christophe Paulussen's classification,²³ we identify four policy trends: locally prosecuting foreign fighters in Syria and Iraq; establishing either an international or a hybrid tribunal to conduct criminal proceedings against them; preventing foreign fighters from coming back to Europe; and repatriating foreign fighters and prosecuting them within the Union's borders. An overview of these approaches is provided below.

Locally prosecuting foreign fighters

Considering that it is likely that alleged crimes committed by foreign fighters take place in the conflict areas to which they travel, investigation and prosecution by national courts of the countries where the conflict takes place is apparently the most obvious option for dealing with foreign fighters, as long as criminal proceedings are conducted in accordance with the rule of law and human rights. In this regard, EU member States such as France²⁴ have asked the national authorities of such countries to bring foreign fighters before their courts and prosecute them locally for the crimes they have committed during hostilities. However, research points to a frequent lack of transparency in judicial proceedings, the use of the death penalty, the extensive practice of torture, limited or non-existent access to defence counsel in courts, and sentencing in lack of proper evidence, as well as the collapse of a properly functioning judiciary system in both Syria and Iraq.²⁵ Consequently, since in these circumstances it is unlikely that foreign fighters and their families would receive a fair trial in compliance with the fundamental right of due process, local prosecution in these countries should be avoided.

23 Tanya Mehra and Christophe Paulussen, "The Repatriation of Foreign Fighters and Their Families: Options, Obligations, Morality and Long-Term Thinking", International Centre for Counter-Terrorism (ICCT), 2019, available at: <https://icct.nl/publication/the-repatriation-of-foreign-fighters-and-their-families-options-obligations-morality-and-long-term-thinking/>.

24 Matteo Pugliese, "France and Foreign Fighters: The Controversial Outsourcing of Prosecution", Italian Institute for International Political Studies, 2020, available at: www.ispionline.it/it/publicazione/france-and-foreign-fighters-controversial-outsourcing-prosecution-24666.

25 Tanya Mehra, "Bringing (Foreign) Terrorist Fighters to Justice in a Post-ISIS Landscape. Part I: Prosecution by Iraqi and Syrian Courts", ICCT, 2017, available at: <https://icct.nl/publication/bringing-foreign-terrorist-fighters-to-justice-in-a-post-isis-landscape-part-i-prosecution-by-iraqi-and-syrian-courts/>; Anthony Dworkin, *Beyond Good and Evil: Why Europe Should Bring ISIS Foreign Fighters Home*, European Council on Foreign Relations Policy Brief, 2019, available at: www.ecfr.eu/publications/summary/beyond_good_and_evil_why_europe_should_bring_isis_foreign_fighters_home.

Prosecuting foreign fighters in international or hybrid tribunals

The second approach proposes that foreign fighters could be prosecuted by an international or hybrid tribunal established under Chapter VII of the UN Charter.²⁶ Several EU member States, including Sweden and the Netherlands, have supported this policy option because it would avoid some of the difficulties deriving from locally prosecuting foreign fighters in Syria and Iraq (as outlined above), and it would address the security threat currently affecting countries of origin and transit; additionally, it would accommodate the need to prosecute foreign fighters for atrocities that may have been committed on a massive scale under IHL.²⁷ The establishment of such a court, however, is generally recognized as having political and legal complexities, considering also the time, resources and cooperation required.²⁸ In particular, in order to establish an international or hybrid tribunal, a UN Security Council resolution must be accepted without a veto from the Council's permanent members, namely the United States, the United Kingdom, France, China and Russia; yet, the latter two governments are known to be strong allies of the Assad regime that rules in Syria and are therefore expected to dismiss such a vote.²⁹ The state of affairs has so far been limited to UN Security Council Resolution 2379 (2017) requesting the creation of an investigative team to collect and preserve evidence for use in national courts of international crimes carried out by IS;³⁰ and UN General Assembly Resolution 71/248 (2016) establishing the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011.

Preventing the return of foreign fighters

As a third alternative, some member States, such as Austria, the Netherlands and Belgium, as well as the United Kingdom,³¹ have devised counterterrorism

26 Briefly, Chapter VII of the UN Charter provides the framework within which the Security Council may identify threats to the peace, breaches of the peace and acts of aggression, and therefore take military and non-military actions (such as establishing international tribunals) aimed at peace and security restoration. For further reading, see UN Security Council, "Actions with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression", available at: www.un.org/securitycouncil/content/repertoire/actions.

27 Anthony Dworkin, "A Tribunal for ISIS Fighters?", European Council on Foreign Relations, 31 May 2019, available at: www.ecfr.eu/article/commentary_a_tribunal_for_isis_fighters.

28 T. Mehra and C. Paulussen, above note 23, p. 2.

29 This outcome, after all, already occurred when the Security Council sought to refer the Syrian case to the International Criminal Court, which has jurisdiction to prosecute individuals for international crimes, including war crimes and crimes against humanity. With regard to the Russia and Chinese veto, see Ian Black, "Russia and China Veto UN Move to Refer Syria to International Criminal Court", *The Guardian*, 22 May 2014, available at: www.theguardian.com/world/2014/may/22/russia-china-veto-undraft-resolution-refer-syria-international-criminal-court.

30 UNSC Res. 2379 (2017), UN Doc. S/RES/2379 (2017), 21 September 2017.

31 Section 33 of the Austrian Citizenship Act (1985) provides for the deprivation of citizenship whenever the individual has voluntarily joined an armed group as partaking in hostilities and such deprivation would

measures to hinder the return of foreign fighters from conflict zones. In this context, the deprivation of citizenship and the refusal to provide the necessary travel documentation to their citizens have been used as the main policy instrument. This policy choice is justified as having a punitive nature: foreign fighters could be regarded as enemies of the State, by virtue of their having worked against its vital interests and having potentially committed acts of terrorism and other atrocities.³² Simultaneously, the deprivation of citizenship is also a preventive measure able to accommodate the above-mentioned security concerns.

Although various nationality laws provide rules on the loss and deprivation of nationality,³³ the measure under scrutiny may have consequences under international law. While Article 8 of the 1961 UN Convention on the Reduction of Statelessness prohibits Contracting Parties from depriving individuals of their nationality if such a decision would render them stateless, Article 15 of the Universal Declaration of Human Rights bans the arbitrary deprivation of nationality. As laid down by the 2013 UN Secretary-General's report on *Human Rights and Arbitrary Deprivation of Nationality*, any deprivation of nationality is not arbitrary if it is provided by law, respects the due process principle, pursues a legitimate aim and is both necessary and proportionate to achieve that aim.³⁴ At present, the deprivation of nationality is regulated by each country's domestic law. However, concerns may arise whenever member States enact or amend national laws to create general clauses to justify removal of nationality, granting decision-makers a broad margin of appreciation when deciding on whether or

not make her stateless, while Article 14(4) of the Dutch Nationality Act (1985) gives the minister of justice discretionary power to strip nationality from Dutch citizens over 16 years of age who are abroad and, on grounds of their conduct, are apparently part of an organization listed as partaking in national or international armed conflict. Article 23(2) of the Code of Belgian Nationality (1984) allows for the deprivation of citizenship on the condition that the Belgian citizen is convicted for any terrorist offence and sentenced to more than five years of imprisonment. It is nonetheless the case that the deprivation of Belgian citizenship cannot be requested for individuals who hold their Belgian citizenship from one of their parents or have become a Belgian citizen at birth on grounds of the double *ius soli* principle.

While the UK is no longer a member State of the EU, Section 40 of the British Nationality Act (1981) gives the home secretary the power to deprive a person of British citizenship whenever it would be conducive to the public good, even leading to statelessness for naturalized citizens who have engaged in behaviours seriously prejudicial to the UK's vital interests. Furthermore, it is important to highlight that the British case law has also considered the deprivation of citizenship to be in compliance with the prohibition of statelessness pursuant to Article 8 of the 1961 UN Convention on the Reduction of Statelessness, where the individual is believed to be able to obtain another nationality. See Maarten P. Bolhuis and Joris van Wijk, "Citizenship Deprivation as a Counterterrorism Measure in Europe: Possible Follow-Up Scenarios, Human Rights Infringements and the Effect on Counterterrorism", *European Journal of Migration and Law*, Vol. 22, No. 3, 2020, pp. 347–349. The same article also provides interesting data concerning the number of citizenship deprivations for terrorism-related acts in Belgium, France, the Netherlands, and the UK (p. 351).

32 Laura Van Waas, "Foreign Fighters and the Deprivation of Nationality: National Practices and International Law Implications", in A. De Guttry, F. Capone and C. Paulussen (eds), above note 3, p. 475.

33 See, for instance, Article 3 of Legge 5 Febbraio 1992 No. 91 (Italian Law on Citizenship), including withdrawal of nationality from people who join a foreign army or render services to a foreign or enemy State.

34 Human Rights Council, *Human Rights and Arbitrary Deprivation of Nationality: Report of the Secretary-General*, Un Doc. A/HRC/25/28, 19 December 2013. The same legal reasoning can be applied whenever the deprivation of nationality is recognized as being in violation of freedom of movement.

not to strip someone of their nationality or citizenship.³⁵ Additionally, inasmuch as States are depriving foreign fighters of their nationality when they are overseas, this practice is in breach of due process.³⁶ As regards the legitimacy of the measure, the protection of internal security against the terrorist threat posed by returnees could be accepted as a legitimate aim at first glance. Nevertheless, this practice also shifts the State's responsibility towards the international community to other governments, given that its nationals will pose a security threat despite of their location; in such a context, Elena Pokalova shows how foreign fighters could remain in post-conflict areas and benefit from their post-conflict instability to let their networks grow, as well as how they could relocate either from conflict to conflict or to commit terrorist attacks in countries of transit.³⁷ Furthermore, it is questionable whether the deprivation of nationality is the least intrusive means able to reach the desired goal, and therefore whether it is a necessary and proportionate measure. In fact, considering other deployed practices, such as travel bans and the revocation of passports,³⁸ the necessity requirement could not be satisfied.

Ultimately, while examining the proportionate nature of depriving foreign fighters of their nationality, several human rights implications arise, given that such individuals would risk being condemned to civic death and thereby becoming unable to exercise their fundamental civil and socio-economic rights.³⁹ In addition to the complexities arising from this balancing mechanism between foreign fighters' rights and national security, Laura Van Waas outlines the risk of discrimination inherent to this counterterrorism measure, insofar as naturalized nationals are considered to enjoy less protection from deprivation of nationality, and especially from statelessness, than those who are nationals by birth.⁴⁰ At the same time, Sandra Krähenmann highlights how the attempt to prevent foreign fighters from returning runs counter to the letter and spirit of UN Security Council Resolution 2178 (2014).⁴¹ First, this legal instrument focuses on the obligations of the States of nationality or residence to impede the departure of foreign fighters. Second, States are required to develop and implement prosecution, rehabilitation and reintegration strategies for returnees, which is impossible when they are prevented from returning. Finally, the resolution emphasizes the importance of international cooperation, especially with States

35 L. Van Waas, above note 32, p. 477.

36 *Ibid.*

37 Elena Pokalova, *Returning Islamist Foreign Fighters: Threats and Challenges to the West*, Palgrave MacMillan, London, 2020, pp. 59–77.

38 *Ibid.*, pp. 111–114.

39 This human rights dimension is particularly evident in the case law of the European Court of Human Rights (ECtHR). More recently see ECtHR, *El Aroud v. Belgium*, Appl. No. 25491/18, 5 November 2018; ECtHR, *Soughir v. Belgium*, Appl. No. 27629/18, 5 November 2018; ECtHR, *Ghoumid and Others v. France*, Appl. Nos 52273/16, 52285/16, 52290/16, 52294/16, 52302/16, 23 May 2017; ECtHR, *Adam Johansen v. Denmark*, Appl. No. 27801/19, 11 November 2019.

40 L. Van Waas, above note 32, pp. 482–483.

41 Sandra Krähenmann, '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 and C. Paulussen (eds), above note 3, p. 250.

neighbouring conflict zones, to fight against the “foreign terrorist fighter” phenomenon.

Repatriating foreign fighters and their families

Lastly, member States could actively repatriate foreign fighters and their families, ensuring that their return is followed by adequate prosecution, rehabilitation and reintegration processes. In this context, EU governments are expected to undertake a case-by-case evaluation of every returnee’s individual involvement in hostilities and potential responsibility for crimes. While this policy option ensures a long-term security perspective, it also addresses human rights concerns about the situation of family members of foreign fighters and of foreign fighters themselves, trapped in overcrowded and insanitary camps or detention in Syria and Iraq.⁴² Considering that all member States are Contracting Parties to the UN Convention on the Rights of the Child (2000) and that the best interests of the child should be a primary consideration, most EU governments, including France, Belgium and Germany, have already accepted the responsibility of arranging repatriation of children who were taken to the region by their parents or were born there, under the evidence of official documentation or DNA testing.⁴³ Laura Cools argues, however, that in practice this last requirement may render a right to return theoretical.⁴⁴ As an example, she presents the case of a Belgian mother who requested that she and her two children, born in Syria, be returned to Belgium. While at first instance it was deemed that the children had a *prima facie* right to consular assistance due to the dire situation in which they found themselves, the Court of Appeal overturned that decision, deeming that the request was inadmissible since the mother did not have any proof of her parental link to the children, whose births were never registered, and thus could not have made a request on their behalf. Indeed, considering that her first child was born in a territory controlled by Da’esh and that the second was born in a detention camp controlled by the Kurds, it would be unreasonable to expect that these

42 See, for example, Organization for Security and Co-operation in Europe, “Repatriation of ‘Foreign Terrorist Fighters’ and Their Families Urgently Needed to Safeguard Human Rights and Security, OSCE Human Rights Head Says”, 11 February 2020, available at: www.osce.org/odhr/445909.

43 A. Dworkin, above note 25; A. Scherrer (ed.), above note 6, p. 49. Among the many reasons in favour of the repatriation of children is the appalling conditions in which many of them are being held in Syrian camps. See, for example, “UNICEF Urges Repatriation of All Children in Syria’s Al-Hol Camp Following Deadly Fire”, *UN News*, 28 February 2021, available at: <https://news.un.org/en/story/2021/02/1085982>. Finland’s government has also committed itself to repatriating children from camps in northern Syria and has even carried out the repatriation of two adult mothers. As there is no explicit reference to the requirement to prove nationality in the Finnish guidelines on returning children, it is not clear whether this was required in practice or not. See Finnish Government, “Government Outlined Guidelines for Repatriating Finnish Nationals from Al-Hawl Camp”, 16 December 2019, available at: <https://tinyurl.com/38amtcea>; Aleksis Teivainen, “HS: Finland Repatriated Two Women and Six Children from Al-Hol Camp”, *Helsinki Times*, 21 December 2020, available at: www.helsinkitimes.fi/finland/finland-news/domestic/18443-hs-finland-repatriated-two-women-and-six-children-from-al-hol-camp.html.

44 Laura Cools, “La reconnaissance d’un droit subjectif au rapatriement dans le chef des enfants belges retenus en Syrie: Un grand pas en avant”, Centre Charles De Visscher pour le Droit International et Européen, 31 December 2020, available at: <https://tinyurl.com/s3xjd2u>.

children would have official birth certificates. Thus, although in 2017 the Belgian government committed to the repatriation of children under the age of 10,⁴⁵ in practice, proving the nationality of these children in order to effectively proceed with their repatriation can be challenging. Furthermore, as their nationality is not being recognized by EU countries without concrete proof, those born in Syria without any formal registration now risk statelessness.

Despite these challenges, in March 2021, Belgium's prime minister restated Belgium's commitment to repatriating minors under the age of 12 from Syria, claiming that leaving them there may turn them into the terrorists of tomorrow.⁴⁶ This follows the idea, presented by EU counterterrorism coordinator Gilles de Kerchove, that children in areas controlled by Da'esh are a ticking time bomb.⁴⁷ This also seems to be the position of the national coordinator for security and counterterrorism in the Netherlands, who insists that non-retrieval of children from Syria poses more risks to national security than retrieving them.⁴⁸ While this argument points to a recognized need to repatriate children, the position is not necessarily the same with regard to mothers. Belgium, for example, while committing to repatriating the children, said that for the mothers it would conduct a case-by-case assessment, taking into account that some of them had already been convicted in Belgium or were the object of international arrest warrants.⁴⁹ In this regard, Cools notes that the Court of Appeals of Brussels, in a case from 2018, decided that separating children and their mothers by repatriating only the former would violate the European Convention on Human Rights and the Convention on the Rights of the Child.⁵⁰ Similarly, a court in Germany determined in 2019 that a mother had to be repatriated with her three children as there was no evidence that the mother posed a specific danger to Germany, and her children, who were likely to be traumatized, would need the care and support of their mother upon return.⁵¹ According to Cools, however, such decisions have to be relativized, as in some cases – for example, when a mother is considered to be extremely radicalized – it may be considered that separation is in the best interests of the child and thus would not constitute

45 See, for example, Johnny Vansevenant and Rik Arnoudt, "Automatisch terugkeerrecht voor kinderen van IS-strijders die jonger dan 10 zijn", *VTR News*, 22 December 2017, available at: <https://tinyurl.com/2hr6j6kz>.

46 Jean-Pierre Stroobants, "La Belgique va rapatrier les enfants de djihadistes détenus en Syrie", *Le Monde*, 5 March 2021, available at: <https://tinyurl.com/f9rca9m8>.

47 Tom Kington, "45,000 Children of Isis 'Are Ticking Time Bomb'", *The Times*, 8 May 2019, available at: www.thetimes.co.uk/article/45-000-children-of-isis-are-ticking-time-bomb-lp0nq9q2m.

48 Supreme Court of the Netherlands, Case No. 05/19666, ECLI:NL:HR:2020:1148, 26 June 2020, para. 2.5.

49 J. P. Stroobants, above note 46.

50 In this regard, IHL also prescribes that family life and, consequently, family unity must be respected as far as possible, and it would thus also seem to advocate for mothers to be repatriated together with their children. See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005, Rule 105, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>.

51 "Bundesregierung muss Mutter und Kinder aus Syrien zurückholen", *Legal Tribune Online*, 8 November 2019, available at: <https://tinyurl.com/55y8jjda>. As mentioned above, Finland also repatriated two mothers with their children, claiming it was not possible to repatriate the children alone; see above note 43.

a violation.⁵² The position of States and courts thus may need to mature further to provide clearer guidance on this issue.

In conclusion, despite challenges, the repatriation of foreign fighters and their families can be considered the most appropriate solution, as it is able to address existing security concerns, as well as to respect human rights. In fact, besides the political unfeasibility of the establishment of an international or hybrid tribunal, all the other policy options would deflect the responsibility of the State of origin to deal with foreign fighters to other countries, where they may be faced with an unfair trial or could be sentenced to civic death by their country of origin and thus might continue to pose a security threat in countries of transit. But to what extent could repatriation be effective? To answer this question, and going beyond the above-mentioned challenges, the following subsections will examine how member States are dealing with foreign fighters and their families upon return. Special emphasis will be put on the criminalization and prevention approaches, in light of the aforementioned EU counterterrorism framework.

The case of prosecution of foreign fighters and family members on EU soil

As mentioned above, one of the reasons why many countries do not wish to repatriate foreign fighters is because they are often believed to have committed criminal acts, sometimes framed as terrorist acts under anti-terrorism laws. Not only can such suspicion make States consider such fighters a threat to their national security, due to the fear that they may repeat the criminal acts in their territory, but it may also create a challenging obligation for the State of origin, which is to prosecute the alleged criminal conduct. Indeed, both IHL and international criminal law impose on States the obligation to prosecute certain crimes, regardless of where they happened, such as the international crimes of genocide,⁵³ crimes against humanity and war crimes,⁵⁴ as well as other crimes they may be bound to prosecute by the ratification of international treaties.⁵⁵ Furthermore, States are bound by UN Resolution 2178 (2014) to criminalize the phenomenon of foreign terrorist fighters, and national anti-terrorism laws may also apply to the conduct of returnees (be they fighters or family

52 L. Cools, above note 44.

53 Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948 (entered into force 12 January 1951), Arts III–V.

54 See Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950), Arts 49, 50; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950), Arts 50, 51; Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950), Arts 129, 130; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950), Arts 146, 147.

55 See, for example, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984 (entered into force 26 June 1987), Art. 7.

members).⁵⁶ In practice, EU States have indeed focused on repressive measures, such as prosecution and punishment, to curb the phenomenon of foreign fighters, as prosecution provides a more immediate response to the issue of foreign fighters and the threat they are deemed to pose. The alleged crimes of foreign fighters are likely to have been committed abroad, however, and prosecuting them nationally can present many challenges to States of destination, despite their obligation and willingness to do so.

For example, it may be very costly to investigate and collect evidence regarding facts that took place far away from and outside the jurisdiction of the investigating authorities. In this regard, it has been noted that, in the context of prosecuting European foreign fighters who joined armed conflicts in Iraq in Syria,

[c]ollection of evidence with regard to foreign fighters is a challenge: evidence from the battlefields in Syria and Iraq is difficult to obtain, collection and use of internet based evidence is challenging, cross-border legal cooperation is often necessary to get access to evidence (foreign fighters transit through other countries, internet providers might be located abroad), [and] some information originates from security services, hence the challenges of using intelligence information in judicial proceedings arise.⁵⁷

This may explain the limited judicial response to the issue of foreign fighters. In 2014, for example, it was said that in Europe there had been “less than 10 convictions for around 3000 EU citizens/residents involved in the phenomenon of foreign fighters”.⁵⁸ The 2020 *Eurojust Memorandum on Battlefield Evidence* seems to suggest that these challenges may be slowly being surmounted in the EU. In comparison to the Memorandum from 2018, Eurojust noted that

[w]hile the 2018 Eurojust Memorandum on Battlefield Evidence reported limited experiences of using battlefield evidence, the 2020 report shows that, during the past few years, several countries have used such evidence in their criminal proceedings against foreign terrorist fighters and other persons suspected of criminal offences during armed conflicts.⁵⁹

56 Even though both international crimes (such as genocide, war crimes and crimes against humanity) and terrorism offences can incur a State’s obligation to prosecute under universal jurisdiction and can indeed apply to the same situation (e.g., in a situation of armed conflict involving terrorist groups), they remain two different sets of crimes. In this regard, the European Network of Contact Points for Investigation and Prosecution of Genocide, Crimes against Humanity and War Crimes (Genocide Network) “reiterated the difference between the sets of legislation on counter-terrorism offences and core international crimes, namely the crime of genocide, crimes against humanity and war crimes. As both sets of legislation can apply to a particular case, in accordance with the respective national legislations, it is important to stress that core international crimes are different in nature than counter-terrorism offences.” See Genocide Network, Austrian Presidency of the Council of the European Union, and Eurojust, *Conclusions of the 25th Meeting of the European Network of Contact Points for Investigation and Prosecution of Genocide, Crimes against Humanity and War Crimes*, 14–15 November 2018, para. 3.

57 EU Counterterrorism Coordinator, *Foreign Fighters and Returnees: Discussion Paper*, EU Doc. 15715/14, Council of the European Union, Brussels, 24 November 2014, p. 3.

58 *Ibid.*, p. 1.

59 Eurojust, *Eurojust Memorandum on Battlefield Evidence*, The Hague, September 2020, p. 2.

In cases where evidence is still lacking, an issue that derives from the difficulties in obtaining evidence to prosecute foreign fighters is that when proceedings do take place,

prosecutors until recently have focused on charges such as membership of a terrorist organisation – as the evidentiary threshold is much lower here. Indeed, in that way, prosecutors do not need to prove the actual crimes, such as war crimes, but “merely” that these individuals joined a terrorist organisation.⁶⁰

In practice, this means that all foreign fighters convicted under such offences (be they male fighters or their family members) receive a similar penalty, regardless of whether they joined such groups assuming supporting, non-fighting functions such as cooks or whether they actively committed or organized war crimes or other heinous acts.⁶¹ This goes against the idea that penalties should be proportionate to the crime committed, as well as potentially over-simplifying returnees’ experiences abroad by considering them to be a uniform group, when their individual experiences might have been quite different.

Furthermore, as discussed in other articles in this issue of the *Review*, foreign fighters and their family members may be seen under different lights – that is, as fighters or civilians in a situation of armed conflict, to which the rules of IHL apply; or as foreign terrorist fighters, to which counterterrorism law applies. The body of law that will regulate proceedings against returnees may lead to different consequences for them. In this regard, focusing on anti-terrorism crimes sometimes overshadows IHL, leading to the punishment of acts that may be lawful under IHL but that constitute offences under terrorism laws.⁶² This is because

[a] crucial difference [between acts regulated under IHL and terrorism] is that, in legal terms, armed conflict is a situation in which certain acts of violence are considered lawful and others are unlawful, while any act of violence designated as “terrorist” is always unlawful.⁶³

In this situation, punishing acts that are lawful under IHL may risk “creating a negative precedent, suggesting that all acts carried out by NSAGs [non-State armed groups] are terrorist by nature, and hence rendering the issue of compliance with IHL by such groups or other NSAGs even more difficult”.⁶⁴

60 Hanne Cuyckens and Christophe Paulussen, *The Prosecution of Foreign Fighters in Western Europe: The Difficult Relationship between Counter-Terrorism and International Humanitarian Law*, Asser Research Paper Series 2019-04, TMC Asser Institute for International & European Law, 2019, p. 1, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3471908.

61 *Ibid.*, pp. 1–2.

62 *Ibid.*, p. 2.

63 International Committee of the Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, October 2015 p. 17.

64 H. Cuyckens and C. Paulussen, above note 60, p. 21.

Prosecuting child returnees

The above-mentioned challenges to prosecution are even more numerous when the concerned foreign fighters are minors.⁶⁵ The fate of children returning from conflict areas has received media attention in recent times, as with the announced defeat of the IS caliphate, “attention is increasingly turning to the complex issues surrounding any extradition or justice proceedings for captured fighters, as well as women and children”.⁶⁶ Indeed, the UN Committee on the Rights of the Child has declared that it has been credibly established that armed forces of the State and affiliated militias in Syria have recruited and used children in hostilities.⁶⁷ In this regard, it is worth noting that besides recruiting children locally, IS “managed to attract foreign recruits, among them young men, women and children from Western countries and the USA”.⁶⁸ More specifically, research shows that over 40,000 foreign fighters joined IS, about 12% of which were children.⁶⁹ Consequently, “it is of the utmost importance to understand whether these children should be held accountable for crimes they might have committed and, if so, what are the options available to ensure appropriate accountability”.⁷⁰

Overall, there has been a tendency not to prosecute children, especially in international fora, as actors in the international arena have given emphasis to the vulnerability and victimization of child soldiers.⁷¹ For example, the *Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups* state that “[c]hildren who are accused of crimes under international law allegedly committed while they were associated with armed forces or armed groups should be considered primarily as victims of offences against international law; not only as perpetrators”.⁷² Furthermore, “[n]ational and international institutions and agencies as well as governmental and non-governmental organizations, especially those with a focus on humanitarian work, strongly propagate the passive victim image of child soldiers”.⁷³ In fact, considering the

65 On accountability for children involved in conflict, see Júlia Zomignani Barboza, “Accountability for Child Soldiers Aged From 15 to 18”, in Fernando Bandeira, João Casqueira Cardoso, Glória Jölluskin, Cláudia Ramos and Isabel Silva (eds), *Readings in Humanitarian Action and Cooperation for Development*, Vol. 1, Publicações Fundação Fernando Pessoa, Porto, 2020. Some of the ideas included in this section derive from that piece.

66 Bethen McKernan, “Isis Defeated, US-Backed Syrian Democratic Forces Announce”, *The Guardian*, 23 March 2019.

67 Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child on the Fifth Periodic Report of the Syrian Arab Republic*, UN Doc. CRC/C/SYR/CO/5, 6 March 2019.

68 Conrad Nyamutata, “Young Terrorists or Child Soldiers? ISIS Children, International Law and Victimhood”, *Journal of Conflict and Security Law*, Vol. 25, No. 2, 2020, p. 241.

69 *Ibid.*, p. 242.

70 J. Zomignani Barboza, above note 65, p. 123.

71 Mark A. Drumbl, *Reimagining Child Soldiers in International Law and Policy*, Oxford University Press, Oxford, 2012.

72 UNICEF, *Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups*, February 2007, Principle 3.6.

73 Leonie Steinl, *Child Soldiers as Agents of War and Peace: A Restorative Transitional Justice Approach to Accountability for Crimes Under International Law*, Springer, Berlin, 2017, p. 12.

likely traumatizing effect of participating in an armed group, it has been argued that child soldiers' victimhood remains even after they reach majority.⁷⁴

The above-mentioned tendency to prosecute foreign fighters under anti-terrorism laws, however, means that “[w]ith the rise of violent extremist groups like [IS], al Qaeda, al-Shabab, and Boko Haram, many countries have adopted much more aggressive counterterrorism measures, including a marked increase in the detention and prosecution of children”.⁷⁵ Indeed, as was mentioned above, as member States sometimes extend the perceived threat posed by adult returnees to children, minors may be classed as “foreign terrorist fighters” from a very young age.⁷⁶ This is a worrying development as it means that children may be charged with offences prescribed in anti-terrorism legislation. As mentioned above, the prosecution of such offences is said to sometimes violate human rights such as the rights to fair trial and due process.⁷⁷ Furthermore, terrorism-related procedures are rarely conducted in a child-friendly manner, as exemplified by the case of Omar Khadr, a child soldier who was captured at age 15 by US forces in Afghanistan and was convicted in 2010, after a lengthy procedure conducted by a US military court, for crimes he committed in 2002.⁷⁸ When it comes to the prosecution of children, it should be noted that

[t]he Convention on the Rights of the Child (CRC) requires States to establish a minimum age below which children should not be criminally prosecuted (CRC, article 40(3)), but does not set which age that should be. The Committee on the Rights of the Child affirmed that setting a minimum age below twelve is not internationally acceptable ..., but defines no further restrictions for setting the minimum age.⁷⁹

This would limit the prosecution of very young children (e.g., those considered to be foreign terrorist fighters at the age of 9 in the Netherlands⁸⁰), but would still allow children aged 12 or older to potentially face criminal proceedings. In this regard, it is worth mentioning that when it comes to vulnerable individuals, it has been said that in relation to those whose “misdeeds drift further towards the minor end of the criminal spectrum or involve particularly vulnerable persons (think of glorification, some pre-preparatory offences or cases involving children, the mentally ill or other vulnerable adults)”,⁸¹

74 C. Nyamutata, above note 68, pp. 252–257.

75 Jo Becker, “Some Child Soldiers Get Rehabilitation, Others Get Prison”, Human Rights Watch, 4 March 2019.

76 European Parliament, above note 6.

77 See also Sabine von Schorlemer, “Human Rights: Substantive and Institutional Implications of the War Against Terrorism”, *European Journal of International Law*, Vol. 14, No. 2, 2003.

78 Bo Viktor Nylund, *Child Soldiers and Transitional Justice: Protecting the Rights of Children Involved in Armed Conflict*, Intersentia, Cambridge, Antwerp and Portland, OR, 2016.

79 J. Zomignani Barboza, above note 65, p. 123.

80 A. Scherrer (ed.), above note 6.

81 Christophe Paulussen and Kate Pitcher, *Prosecuting (Potential) Foreign Fighters: Legislative and Practical Challenges*, ICCT Research Paper, The Hague, 30 January 2018, pp. 23–24.

[p]erhaps it may be better, in a specific case, not to start a criminal trial altogether and to divert the individual into deradicalisation programmes or other “softer”, preventive responses? Or, if prosecution is unavoidable, for prosecutors to recommend “softer” penalties that seek to rehabilitate offenders?⁸²

Some conclusions on prosecution

In practice, prosecuting foreign fighters can be very challenging due to the difficulty in obtaining evidence as well as the fact that procedures can be very costly and resource-consuming and, consequently, not always feasible for receiving States. Furthermore, when the concerned person is a minor, prosecuting them under anti-terrorism laws is rarely in the best interests of the child. Similarly, trials are not always considered an appropriate solution for vulnerable adults. In conclusion, although prosecution of returnees may provide an immediate response to EU internal security concerns, its implementation raises several issues with regard to the potential conflict between IHL and counterterrorism, the proportionate nature of the penalty, the complicated presentation of evidences, and respect for the child’s best interests. Ultimately, the short-term effectiveness of prosecution should also be considered; in other words, to what extent will the serving of a sentence prevent a radicalized individual from falling back into terrorism? On such premises, reintegration of former foreign fighters should therefore be favoured.

For these reasons, when dealing with returning foreign fighters, States may need to resort to means other than prosecution to handle the possible danger posed by such individuals. Indeed, such means are part of the reintegration strategies that countries are to apply to returning foreign fighters. The next subsections, therefore, will explore some of these options.

The case of reintegration

As shown in the previous section, prosecuting foreign fighters may be challenging and not always warranted. Furthermore, prosecution alone is not sufficient to address the phenomenon of foreign fighters, as reintegration is also an essential part of the strategy to deal with returnees in the long term. Since foreign fighters who have joined terrorist groups in Syria and Iraq are often radicalized (or were, at a minimum, confronted with extremist ideologies) by the teachings and trainings they followed while involved with such groups, exit interventions and transitional justice should be a key part of EU member States’ policy to mitigate the security threat posed by returnees. The same is true with their family members, especially those children who have lived under the control of terrorist groups and are therefore in need of specialized support.

82 *Ibid.*

Exit interventions

When returnees are not prosecuted (either because proceedings have not started or because prosecution is not warranted), or when foreign fighters have already served their prison sentence, they will return to society. In both scenarios, the long-term security of society is best addressed through fostering the social well-being and reintegration of returnees. Indeed, if former foreign fighters are and feel part of society, they are expected to be less likely to fall back into terrorism.⁸³

The reintegration of returnees can be pursued by exit interventions, namely processes of deradicalization and disengagement from radical ideology and violent behaviour. Because the profile of returnees varies according to gender, age, background, experiences in hostilities, and motivations, any exit intervention should be shaped according to the individual's situation, while looking both at short-term risks (such as the possible commission of terrorist attacks in the country of origin) and long-term ones (including trauma and other mental health issues deriving from participation in conflict situations).⁸⁴

Designed for both returnees and violent extremists more generally, exit intervention programmes are already under way in various member States, such as the Danish Aarhus programme⁸⁵ and the German "Live Democracy!" project.⁸⁶ Notwithstanding national peculiarities and international criticisms,⁸⁷ the above-mentioned RAN identifies some guiding principles that could be useful for understanding the importance of exit interventions in member States' policy on regulating returnees. For instance, a multidisciplinary and multi-agency approach is always required, by encompassing actors from law enforcement agencies as well as from civil society organizations and the public sector involved in secondary prevention (e.g., health care, youth, and probation services).⁸⁸ The ultimate aim of this comprehensive involvement goes beyond ensuring referrals of potential returnees, as it seeks to provide aftercare and effective options of employment, as well as to foster social cohesion and raise awareness amongst society. Indeed, given the well-known atrocities that Da'esh and other terrorist groups have committed in conflict areas, there is a high chance that foreign fighters and their families will face stigmatization and isolation in the local community to which they have returned; in this context, restoring positive

83 Marije Meines, Merel Molenkamp, Omar Ramadan and Magnus Ranstorp, *Responses to Returnees: Foreign Terrorist Fighters and Their Families*, RAN Manual, 2017, p. 53, available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/ran_br_a4_m10_en.pdf.

84 *Ibid.*, p. 54.

85 For further reading, see Preben Bertelsen, "Danish Preventive Measures and De-Radicalisation Strategies: The Aarhus Model", *Panorama: Insights into Asian and European Affairs*, Vol. 1, No. 1, 2015.

86 For further information, see: www.demokratie-leben.de.

87 In particular, the effectiveness of exit programmes is considered to be largely unknown. Antonia Ward, "To Ensure Radicalisation Programmes Are Effective, Better Evaluation Practices Must First Be Implemented", *The Rand Blog*, 2019, available at: www.rand.org/blog/2019/03/to-ensure-deradicalisation-programmes-are-effective.html.

88 RAN Exit, "Exit Work in a Multi-Agency Setting", Ex Post Paper, 2016, available at: <https://tinyurl.com/vekywy6j>.

relationships with other family members and social networks is an essential step towards reintegration.

Looking at the performance of exit programmes,⁸⁹ these interventions are usually built on a strong relationship of trust and confidentiality with the practitioners and take place in safe environments, so that participants do not feel overheard or watched by third parties, with the potential consequence of being stigmatized amongst the local community. By being therapeutic (one-to-one) or socio-dynamic (group) processes, exit interventions primarily focus on personally lived-through experiences (e.g., biography, family, gender identity, peer relations, power struggles, recruitment, engagement), avoiding any ideological or argumentative discussion.

Last but not least, reintegration through exit programmes should be regarded as the best strategy for child returnees, in light of their vulnerability. Child returnees have usually faced violence and abuse, so that their normal social, moral, emotional and cognitive development has been interrupted and corrupted, and their return to the EU may result in further trauma, especially when member States limit repatriation procedures to minors. Consequently, in addition to potentially deconstructing the foundation of the identity of the child, exit interventions targeting minors also prioritize their personal, family and social needs while normalizing their day-to-day lives.⁹⁰

To conclude, by embracing a long-term approach and so limiting returnees' commitment to beliefs and conducts underpinning terrorism, exit interventions acknowledge returnees as legitimate and equal members of society seeking reintegration, and aim to break down barriers of distrust and hostility amongst citizens.

Transitional justice

Although they are still disregarded by EU member States, certain transitional justice mechanisms may also assist national governments in the reintegration of foreign fighters and their family members into society. Transitional justice “comprises the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation”.⁹¹ While the benefits of these mechanisms are more often associated with their use in post-conflict societies, where the affected population and perpetrators can interact to establish what happened, assign responsibility, grant forgiveness and determine steps to move forward together, the toolbox of transitional justice contains mechanisms that can help returning States to reconcile with foreign fighters and their families and promote reintegration.

89 For further reading, see RAN Exit, “Outline: Deradicalisation Interventions for Violent Extremism”, Ex Post Paper, 2016, available at: <https://tinyurl.com/fu48h7dj>.

90 M. Meines *et al.*, above note 83, pp. 70–71.

91 UN Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, UN Doc. S/2004/616, 23 August 2004, para. 8.

Regarding child soldiers, for example, it has been claimed that, unlike prosecution, which, as shown above, is rarely in the best interests of the child, some of the transitional justice forms of accountability such as truth commissions are more rehabilitative and may facilitate reintegration.⁹² These commissions may give child soldiers the opportunity to talk about their experience and ask for forgiveness,⁹³ assuming responsibility for the acts they may have committed, as a step towards becoming fully fledged members of society.⁹⁴ Similar benefits can be expected for adult fighters and other family members during their reintegration process.

While an important advantage of transitional justice mechanisms such as truth and reconciliation commissions and endogenous mechanisms (i.e., customary and traditional ceremonies and rituals) is the interaction between victims and perpetrators, which allows victims to confront those who have harmed them and permits perpetrators to repent, this advantage is more difficult to achieve when such mechanisms are applied away from the affected population in the foreign fighter's country of nationality. However, other efforts may be made to reach such benefits. For example, such commissions, ceremonies and rituals can be undertaken with the voluntary participation of refugees coming from the concerned conflict areas who may wish to understand the motivations of foreign fighters and to share their experiences with the conflict in order to find closure; members of local communities who may fear terrorist attacks and seek ways to safely live in community with foreign fighters; and, in some cases, members of a particular ethnicity or religion that has been, possibly wrongly, associated in some way with the conflict or concerned terrorist group, enabling them to express possible frustrations related to the association. As these groups of affected populations are not often directly related to the possible crimes of foreign fighters, they are unlikely to be involved in criminal proceedings. Transitional justice mechanisms thus give them a chance to be heard by fighters as well as by other members of their community. This allows foreign fighters and local communities to better understand each other and to find ways to live together upon the former's reintegration.

In post-conflict situations, transitional justice mechanisms may also further reintegration by fostering the participation of fighters in reconstruction efforts.⁹⁵ While this cannot be done as such in returning countries, former fighters and family members may also engage in community service such as reconstructing sites that were damaged by terrorist attacks or by voluntarily being involved in, for example, exit interventions to prevent the radicalization of other members of

92 Cecile Aptel, "International Criminal Justice and Child Protection", in Sharanjeet Parmar, Mindy Jane Roseman, Saudamini Siegrist and Theo Sowa (eds), *Children and Transitional Justice: Truth-Telling, Accountability and Reconciliation*, Harvard University Press, Cambridge, MA, 2010, p. 352.

93 Pacifique Manirakiza, "Les enfants face au système international de justice: À la recherche d'un modèle de justice pénale internationale pour les délinquants mineurs", *Queen's Law Journal*, Vol. 34, No. 2, 2009.

94 Ilse Derluyn, Wouter Vandenhoele, Stephan Parmentier and Cindy Mels, "Victims and/or Perpetrators? Towards an Interdisciplinary Dialogue on Child Soldiers", *BMC International Health and Human Rights*, Vol. 15, No. 1, 2015.

95 M. A. Drumbl, above note 71.

society (when and if that is deemed appropriate by the professionals working in the programme). For children, participation in reconstruction efforts as well as in civil or moral training in centres for social rehabilitation may replace criminal sanctions for their wrongdoings⁹⁶ and better prepare them for life in their returning society (or even their new society, for those born in conflict countries). While it is unlikely that such trainings could replace prosecution for adult returnees, they could be undertaken by adult returnees during or following their term of imprisonment, and could be combined with the above-mentioned transitional justice mechanisms to increase their chances of reintegration.

Conclusions

In this paper we have looked at the phenomenon of foreign fighters in light of current developments in the Middle East, mainly Syria in Iraq. More specifically, we have analyzed how EU member States define and treat these fighters and their families, especially upon their return. With their actions frequently equated to terrorist activities, foreign fighters and their families are often considered a threat to their country of origin, which is why some States may take measures to prevent their return. However, considering the potential harm that can arise from prosecuting individuals in conflict areas or from stripping them of their nationality, as well as the difficulties in prosecuting them in international fora, repatriation seems to be the most appropriate solution for foreign fighters and their families. Upon return, prosecution is sometimes required of the State of origin, but in practice there are many challenges to be overcome, and in some cases prosecution will not be warranted. Therefore, a full strategy to address the phenomenon of foreign fighters must not only be based on repatriation and prosecution but must also include and favour efforts to reintegrate both foreign fighters and their families. In this context, exit interventions and transitional justice mechanisms can and should play a key role in achieving this goal and fostering the values of democracy and pluralism on which the EU has been founded.

96 P. Manirakiza, above note 93.