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Foreign fighters: a new challenge for the EU counterterrorism strategy

How to tackle effectively foreign fighters.

Existing and innovative legal tools



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ABSTRACT

The present project defines the notion of “foreign fighters” first, in order to understand the specific features of this peculiar form of terrorism. An historical insight shows how such a phenomenon is not new, though deep differences characterise its current evolution. Once defined the topic, the project analyses the existing legal framework to counter foreign fighters at international, EU and national level. Both substantive and cooperation tools have been taken into consideration, highlighting the impact they may have on human rights. The last part focuses on legislative and operational proposals capable of enhancing the counterterrorism legal framework in EU.

1. INTRODUCTION

According to the Lisbon Treaty, “the Union shall constitute an area of freedom, security and justice” (Article 67 of the TFUE). This objective is of the greatest importance, since it represents a prerequisite for the complete enjoyment of the EU four traditional freedoms.

However, recently the European space of liberty has been seriously threatened by terrorist attacks from a new subject, called “ISIS” (Islamic State of Iraq and Syria).

What is unprecedented in this group lies in its internal structure: there are not only small cells, like Al Qaeda, but also single individuals that affirm to be part of the Islamic State, known as “foreign fighters”.

The foreign fighters issue has become the top-priority in EU counterterrorism strategy since 2013: such an international threat to EU security needs to be addressed and tackled by means of a common European strategy, on both sides of EU binding acts and reinforced cooperation between Member States.

2. DEFINITION OF THE PHENOMENON

It is essential to give preliminarily a legal definition to “foreign fighters”, in order to understand the specific features of this recent form of terrorism and consequently to adopt the best countermeasures against it.

Generally speaking, under international law a foreign fighter is an agent who operates within an insurgency and is neither a citizen of the conflict State, nor a soldier of any official



army. With regard to the ISIS, foreign fighters from Western countries¹, after having battled in Iraq or Syria, often **return to Europe and stay prepared to carry out terrorist attacks** against civil targets. The threat posed by foreign fighters is a major issue for international security. As the Global Counterterrorism Forum warns, “*subsequent to their return, whether operating independently or as a part of a group, there is a risk that foreign fighters can commit terrorist acts or promote violence in their State of residence or in other States*”².

ISIS foreign fighters, then, are deemed to be not simply terrorists: they are at the same time combatants, fundamentalists and criminals. ISIS provides them with military training and religious radicalism, but it has not established a hierarchical organisation. Every foreign fighter could put into practice within the European borders all the paramilitary techniques he learnt in ISIS training camps, even without waiting for any order.

This innovative aspect in the *modus operandi* of foreign fighters helps us to comprehend how unpredictable is this new terrorist threat to European countries. The absence of a clear pattern behind the attacks, in connection with the transnational dimension of ISIS network, makes evident the need for an update of the European counterterrorism strategy.

3. HISTORICAL ROOTS AND EVOLUTION

The phenomenon of foreign fighters is not recent, indeed; since the beginning of the 1970’s many Muslim volunteers, mostly from Arab countries, went abroad to combat in the name of solidarity with Muslim brothers in danger.

There are plenty of examples: the most important is the mobilization for Afghanistan in favour to the Mujahedeen in 1978-1992 and to the Taliban since 1992; passing to the current century, it is relevant the support of foreign militants to Al-Fatah in Lebanon, to Al-Shabab in Somalia and to the Sunnis in Iraq³. The first problem is to understand the reason why these people want to fight someone else’s war. Economic incentives are low, given that these combatants are not mercenary; thus, the main explanation is ideological: Islamist foreign

¹ C. Lister, *Returning Foreign Fighters: Criminalization or Reintegration?*, August 2015.

² Global Counterterrorism Forum, *The “Foreign Terrorism Fighters” (FTF) Initiative. The Hague – Marrakech Memorandum on Good Practices for a More Effective Response to the FTF Phenomenon*, September 2014.

³ International Centre for Counter-Terrorism (ICCT) – The Hague, *Foreign (Terrorist) Fighter Estimates: Conceptual and Data Issues*, October 2015.



fighters are moved by the idea that is a religious duty for every good Muslim to protect the *Ummah* from the enemy outside, mainly from Israel and the Western countries⁴.

This aspect helps to distinguish between “traditional” foreign fighters and international terrorists, despite the clear similarities in the fundamentalist ideology behind: the former combat to defend Muslim brothers from an external military invasion or aggression, while the latter attack Western civilian targets, without any intent of self-defence.

However, **the fundamentalist terrorism evolved itself in parallel with the foreign fighters phenomenon** in the Arab world; at the beginning of the 1970’s, in fact, a real galaxy of Islamist terrorist groups started to operate from the Middle East to the Western countries.

Those organisations perpetrated terrorist acts in numerous forms, like hostage taking, hijacking, bombing, suicide attacks; just to name few examples of attacks in Europe, we might recall the operation of “*Black September*” group at the Munich Olympic games in 1972 and the *Achille Lauro* ship seizure by the *Palestinian Liberation Front* in 1985.

The expansion of Islamist terrorist groups from 1970’s to the 2000 must be separated from the mobilisation of foreign fighters to Muslim countries at war; that is, during those thirty years, the distinction between terrorists and combatants remained always clear, even when the radicalism was a common *milieu* of both⁵.

It was only with the appearance of Al Qaeda that the two sides of the violent *jihād* were combined in one organisation: Al Qaeda, in fact, is made of foreign fighters combating in Afghanistan *and* is a worldwide terrorist group, universally known after the 9/11 attacks.

Al Qaeda has innovated the model of international terrorism: while Hezbollah, PLF, Black September *et coetera* have a paramilitary and strictly hierarchical structure, Al Qaeda has just a high command, on one side, and globally spread “cells”, on the other side. Every terrorist cell is autonomous and does not know the other ones, being in contact exclusively and directly with the head of the organisation.

The shift of global terrorism towards a flexible structure is much more significant with regard to ISIS foreign fighters, which operate outside of the Al-Qaeda independent cells-scheme. Their internal organisation is comparable to the so-called “leaderless resistance”⁶.

⁴ Geneva Academy of International Humanitarian Law and Human Rights, *Foreign Fighters under International Law*, Academy Briefing no. 7, October 2014.

⁵ T. Hegghammer, *The Rise of Muslim Foreign Fighters: Islam and the Globalization of Jihad*, *International Security*, Vol. 35, No. 3 (Winter 2010/11), pp. 53–70.

⁶ R. Pantucci, *A Typology of Lone Wolves: Preliminary Analysis of Lone Islamist Terrorists*, ICSR, March 2011.



Foreign terrorist fighters not only ignore the identity of other affiliates, but also can attack individually once returned to Europe, without any support from pre-existing local cells and even without an order from the supreme leaders. They are, hence, “lone-wolves terrorists”, who plan and act alone, but being influenced or motivated by the ideology of ISIS.

Online propaganda is indeed what keeps together such a non-hierarchical terrorist group, because it calls for spontaneous action whoever shares the same ideological background in any part of the world⁷.

The **historical roots of present foreign fighters threat**, then, are to be found in two different evolutionary processes: firstly, the mass mobilisation of foreign fighters for solidarity to Muslim brothers at war; secondly, and more importantly, the expansion of the global terrorism, making use of new communication technologies instead of the traditional military apparatus and chain of command of the former terrorist organisations.

4. LEGAL FRAMEWORK

a. *International law applicable to foreign fighters*

There are several international conventions related to terrorism, signed and ratified by a number of countries under the auspices of the United Nations and the Council of Europe. The approach of international legal instruments in this matter is necessarily twofold: on one side, multilateral conventions obligate States Parties to criminalise specific terrorist conducts under national criminal law; on the other side, they **strengthen mutual legal assistance** for criminal investigations and proceedings.

Unfortunately, most treaties lack a legal definition of “terrorism”, as it is extremely controversial, although the distinction between international terrorism and non-conventional war is now crucial for the qualification of foreign fighters under criminal law. These conventions, in fact, were rather intended to respond to international emergencies or diplomatic crisis occurred few months before. In other words, they have been concluded on a **case-to-case basis** and they prescribe, thus, to make a criminal offence selected terrorist acts, expressly listed and determined⁸.

⁷ International Centre for Counter-Terrorism (ICCT) – The Hague, “*Lone Wolves How to Prevent This Phenomenon?*”, November 2010.

⁸ See the 1970 *Convention for the Suppression of Unlawful Seizure of Aircraft*, the 1979 *International Convention against the Taking of Hostages*, the 1997 *International Convention for the Suppression of Terrorist*



A change of perspective came out in the last decade against Al Qaeda thanks to the 2005 *Council of Europe Convention on the Prevention of Terrorism*, signed in Warsaw. The new approach consists of a balanced combination of **preventive and repressive countermeasures** and could be the key solution against foreign terrorist fighters. It should be noticed that the Warsaw Convention is prior to the advent of ISIS: criminal conducts, in reality, have been designed keeping in mind the “cellular structure” of Al Qaeda, with small independent units, which operate in more than one country. Such situation was ordinary then, but not now with ISIS, which on the contrary even approves terrorist acts committed by “lone wolves”.

Given the **need for an update of the existing legal framework against international terrorism**, the Security Council of the United Nations and the Committee of Ministers of the Council of Europe have moved, in rapid succession, two important steps forward.

Both the international organisations have eventually taken effective countermeasures to the new terrorism threat and have adopted **two fundamental legal documents**, which for the first time explicitly address the question of a legal response to foreign fighters. They are the *UN Security Council Resolution 2178 (2014)* on “Threats to international peace and security caused by terrorist acts” and **the 2015 Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism**.

The former is a Resolution that has been unanimously adopted by the Security Council under Chapter VII of the UN Charter. This means that the Resolution 2178 (2014) is legally binding for Member States. It establishes that all States *shall* criminalise travel for terrorism or related training, as well as the financing, organising or recruiting for such activities.

The latter is a Protocol approved within the Council of Europe in less than one year after the UN Resolution 2178 (2014). The advent of foreign fighters has made necessary to supplement the abovementioned 2005 Convention with new obligations to incriminate, directly referred to the phenomenon of ISIS⁹. The 2015 Additional Protocol is not yet entered into force.

Bombings, the 1999 *International Convention for the Suppression of the Financing of Terrorism*. At regional level, see the 1977 *European Convention on the Suppression of Terrorism*.

⁹ The illicit conducts are “receiving training for terrorism” (Article 3), “travelling abroad for the purpose of terrorism” (Article 4), funding and facilitating international travels to ISIS training camps (Articles 5 and 6).



b. EU legislative acts

At regional level, beside the efforts made by the Council of Europe, the European Union is currently discussing further legal documents aimed at fostering judicial and police cooperation against international terrorism and foreign fighters.

The principal EU legal acts regarding the fight to international terrorism are the **Framework Decision 2002/475/JHA** and the Framework Decision 2008/919/JHA amending the previous one. *Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism* defines terrorist offences and requires EU countries to introduce minimum rules in their substantial criminal law; the Framework Decision has been adopted after the 9/11 attack, with the objective of tackling more effectively international terrorism.

The 2002 Decision finally defines **terrorist offences**: while the objective elements are set forth by reference to previous treaties, the “added value” is the specification of **terrorist purposes**¹⁰ that is a legal definition of terrorism, relevant both to international and criminal law¹¹. International terrorism is combated by the Framework Decision 2002/475/JHA at every stage, **from the initial preparation to the execution of attacks**, with particular attention to the participation *in se* to a terrorist group, which is literally “*a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist offences.*” The expression “**structured group**” shall mean “*a group not randomly formed for the immediate commission of an offence*”, while it is not necessary a developed organisation, nor a formal distribution of roles. The definition of terrorist group has been influenced by Al Qaeda internal structure and became out-dated in the following years, especially since mid 2013, because of the appearance of ISIS on the international scene.

The **ever-changing nature of terrorist groups** compels international organisations, in parallel, to adapt pertinent legal instruments unceasingly. Just ten years before the ISIS threat, terrorist attacks in 2004 and 2005 imposed an enhanced global and European counterterrorism strategy, by means of a wider harmonisation of national criminal legislations. These were the reasons behind the Framework Decision 2008/919/JHA, which keeps pace with the 2005 Warsaw Convention. Consequently, after this Framework Decision Member States are

¹⁰ According to Article 1, terrorist offences aim to seriously intimidate a population, or unduly compel a Government, or seriously destabilise the fundamental structures of a country or an international organisation.

¹¹ EU Counter-Terrorism Coordinator, *Report on the implementation of the EU Counter-Terrorism Strategy*, 24 November 2014.



required to introduce “ancillary offences” linked to terrorist activities, which are *public provocation to commit a terrorist offence, recruitment and providing training for terrorism*.

Can foreign fighters be successfully tackled with existing EU legal acts on minimum level of criminalisation? The debate is ongoing, but there is a widespread opinion that the Framework Decision 2002/475/JHA needs to be updated again, especially for a better implementation of the above-cited UN Resolution 2178 (2014)¹².

c. Domestic legislations in EU Member States

Within the EU, Member States continue updating their legal frameworks to better address the evolving nature of terrorist threat. The Member States who were directly affected by terrorist attacks in their territory have often enacted an *ad hoc* legislation, such as France and UK. Other Countries already boasted an extensive antiterrorism legislation, though in response to internal political violence, as for example Italy and Spain. Yet, they had to improve domestic legal framework to effectively counter the movement of foreign terrorist fighters to conflict zones, better pursue suspected terrorists without clear affiliation to a known criminal organization, and curtail terrorist preparatory activities online.

A brief insight into domestic jurisdictions shows their effort to counter the foreign fighters phenomenon using various tools including **criminal law, administrative measures and 'soft' counter- or de-radicalisation measures**. Most of them provide in their legislations a series of terrorism-related offence, including participation in a terrorist group, public incitement to commit a terrorist crime, recruiting terrorists and providing training to them. Some Countries, such as Belgium and Germany, have gone even further criminalizing the fact of receiving training for terrorist purpose or even self-training, as for example Italy and Spain.

Many national reforms were enacted prior to or independently of UN Resolution 2178 (2014), bearing in mind the Al Qaeda-type attacks, shaped on independent cells structure. As a consequence, legislations needed an update in order to keep the pace with the new threats.

In particular, travelling to a conflict area was normally not considered a crime *per se*, unless there were grounds to prove an attempt at committing a specific offence. For this reason, recent national policies focused on **disrupting travels** to participate in training and jihad. Most domestic legislations now criminalise travel to foreign conflict zones, as Spain

¹² International Centre for Counter-Terrorism (ICCT) – The Hague, “*Addressing the Foreign Terrorist Fighters Phenomenon from a European Union Perspective: UN Security Council Resolution 2178, Legal Issues, and Challenges and Opportunities for EU Foreign Security and Development Policy*,” December 2014.



and Italy have recently provided. It is now possible to prosecute individuals who return after having committed acts of terrorism abroad, or after training in terrorist camps with the intention of returning to commit terrorist attacks (as for example in France).

In addition, administrative arrangements were set out in order to allow **travel ban**, as for example seizure of travel documents (identity card, passport, visa) for all nationals and EU citizens suspected of interest in jihadist activity. For foreigners measures consist in expulsion, residence permit withdrawal, entry ban or prohibition to leave the Country for security reasons. Similar provisions were adopted in France, Germany, Denmark and Belgium, the latter also providing for stripping from social benefits for suspected individuals.

Some Countries have made it legally possible the **withdrawal of citizenship** for individuals with double nationality if “seriously prejudicial” activities have been proven (in the Netherlands) even if this would leave them stateless (as for example in the UK). Very recently a draft constitutional bill is now under discussion in the French Parliament allowing to strip convicted French-born terrorists of their citizenship if they have a second dual nationality.

The aforementioned measures have the effect to restricting the movement and/or transit of suspected foreign fighters but could also have **serious implications on international law**, including human rights, as for example on the respect of the principle of *non refoulement*. **They could also affect EU law** and the related freedom of movement and asylum policy within the EU borders.

Similar measures have not been endorsed in the **Italy**, although it counts on a wide variety of tools against (mostly internal) terrorist threats. Other kinds of provisions have been adopted to keep the pace with new forms of international terrorism and Italian legislation now offers a really comprehensive response to the foreign fighters threats.

In brief, Article 270-*sexies* of the Criminal Code defines the terrorist purposes in accordance with the Framework Decision 2005/475/JHA; participation *in se* to a terrorist group or its financing is prosecuted under Article 270-*bis* of the Code; recruitment is prohibited by Article 270-*quater*, both for the recruiter and the new recruit. Article 270-*quinquies*, in turn, punishes who offers and receives terrorist training, as well as self-training for terrorist attacks, which is a distinctive behaviour of the so-called “lone wolves”. Article 302 and Article 414 of the Criminal Code are applicable to instigation, incitement and apology of terrorist offences.



In full compliance with the UN Resolution 2178 (2014), the Italian legislator also introduced the innovative criminal offence of organising and promoting travels abroad for terrorist purposes, provided by Article 270-*quater.1* of the Criminal Code. By addition, the criminal sanction of every terrorist offence is increased if the fact is committed by means of the Internet, in order to discourage online propaganda and recruitment of foreign fighters.

Prosecution powers have been strengthened as well, on the basis of previous expertise. The coordination of terrorism-related investigations has been now assigned to the National Anti-Mafia (now becoming also) Anti-Terrorism Attorney General.

5. JUDICIAL AND POLICE COOPERATION: TOOLS AND ISSUES

The approximation of national legislations about terrorist offences lays the basis for effective mutual legal assistance. However, a common standard in criminalisation is not sufficient in itself, as judicial and police authorities also need for **specific cross-border cooperation legal tools**. The following analysis outlines whether the existing EU rules in this field are able to prevent and suppress the new phenomenon of foreign fighters.

The EU law contains many provisions, which aim at strengthening judicial cooperation in criminal matters in general. They apply to a number of serious criminal offences with a cross-border dimension, including terrorism. Some other instruments establish procedural rules for mutual legal assistance with specific regard to international terrorism.

Framework Decision 2002/475/JHA represents the main EU legal instrument on combating terrorism. Its art. 9 deals with the first problem in judicial cooperation as it tries to **prevent conflict of jurisdiction and legal jeopardy**. EU Member States are thus required to **cooperate since the beginning of investigations into terrorist offences**, in order to concentrate them in only one State or coordinate different national authorities in their action. To this end Member States may recur to any body or mechanism established within the EU, in order to facilitate cooperation between judicial authorities and the coordination of their action. For example, they may ask EUROJUST to propose a fair solution in case of conflict of jurisdiction over foreign fighters prosecution.

The Council Decision 2005/671/JHA of 20 September 2005 represents the most important act on the **exchange of information** and cooperation concerning terrorist offences, in all stages of criminal proceedings. Article 4 requires Member States (hereafter MS) to give absolute priority to other MS requests for mutual legal assistance, recognition and



enforcement of judgements related to terrorist offences (dealing with them as a **matter of urgency**). Moreover, national authorities are required to collect all the relevant data resulting from investigations on terrorist offences¹³ and send them to EUROPOL and EUROJUST, as well as to requesting foreign officers and prosecutors¹⁴.

In addition, Member States shall not only exchange information and data related to investigations and convictions, but also “*any relevant information included in documents, files, items of information, objects or other means of evidence, seized or confiscated in the course of criminal investigations or criminal proceedings*”, making them accessible as soon as possible (Article 2 par. 6 of the 2005 Decision).

Great emphasis is also put on **Joint Investigation Teams** (JITs), introduced into European judicial cooperation by the Framework Decision 2002/465/JHA, in the light of combating international crime as effectively as possible.

In particular, a JIT consists in a team comprising prosecutors, magistrates and police officers from different MS that is established for a limited period and a specific purpose by way of a written agreement, with the aim of carrying out in one or more of the involved States investigations into criminal offences that necessitate coordinated and concerted action (Article 1). As a matter of priority, such teams should be set up to conduct criminal investigations into terrorist offences, as encouraged by *Considerandum* No. 7 of the Framework Decision 2002/465/JHA and by Article 3 of the aforementioned Council Decision 2005/671/JHA.

The optimal use of JITs against terrorism and foreign fighters could bring to successful results, for the reason that they put into action a close cooperation and exchange of information between EU countries. In fact, the participants to a JIT conduct the specific investigation side by side, like a single office: the main advantage of this operational tool is the ability of its members to share information and to request investigative or coercive measures directly among themselves, without the need for formal applications. Additionally, a strong support can be provided in terms of assistance or funding by EUROPOL and EUROJUST and also the involvement of Third Countries could be envisaged for the setting up of a JIT, considering the international dimension assumed by terrorist offences.

¹³ As defined in the fundamental Framework Decision 2002/475/JHA.

¹⁴ In particular, the State obligations to exchange information with EUROJUST have been significantly increased by the Council Decision 2005/671/JHA. At present, EU Member States shall transmit to EUROJUST at least appropriate information about prosecutions and convictions for international terrorism, including the specific circumstances surrounding the detected offences, gathered by the competent authorities (Article 2 par. 5 of the 2005 Decision).



In addition, **covert investigations** could be fully implemented and combined with JITs in order to contribute to ensuring a higher level of security in the EU. In fact, pursuant to Article 14 of the Convention on Mutual Assistance in Criminal Matters of 29 May 2000, MS may agree to assist one another in the conduct of investigations into specific crimes by officers acting under covert or false identity, defining together the duration of the covert investigation, its detailed conditions and the legal status of the officers involved, as well as cooperating to ensure that the covert investigation is properly prepared and supervised and that the officers acting under covert or false identity could operate safely.

While JITs already represent a successful instrument that today is quite regularly used and supported by the relevant European agencies, **it would be appropriate to further stimulate the use of covert investigations**, in order to allow the early detection of a terrorist threat and the obtaining of evidence that such an offense is being prepared or simply prefigured by an independent cell or a single actor, or that an activity of online recruitment is being occultly carried out on the so called deep web or dark web.

Still focusing on evidence gathering, the **European Investigation Order** (EIO) constitutes another form of cross-border cooperation in criminal matters, based on mutual recognition of judgments and judicial decisions. This measure has been recently introduced by the Directive 2014/41/EU and could apply to all the investigative measures aimed at collecting evidence, except for evidence gathering within a JIT. By means of a EIO, the issuing authority requests another MS to carry out specific investigative measures and thereby to transfer the evidence obtained or already in possession.

Such a legal tool could be decisive in criminal proceedings against international terrorists and foreign fighters: it would allow full access to evidence gathered by foreign national authorities upon request without needing letters rogatory. MS shall comply with this Directive by 22 May 2017. Until then, exchange of information and access to evidence within the EU will be governed by existing binding acts, *e.g.* the abovementioned Decision 2005/671/JHA.

Along with the aforementioned judicial cooperation measures, the **European Arrest Warrant** (EAW) represents the most relevant instrument implementing the principle of mutual recognition in criminal matters. It has been settled by the Framework Decision 2002/584/JHA of 13 June 2002, which was amended by the Framework Decision 2009/299/JHA to enhance the procedural rights of the accused person. The EAW is intended to replace extradition mechanisms between EU countries with faster surrender procedures,



based on mutual recognition of judicial decisions and limited grounds for refusal. Since it applies to serious crimes, terrorist offences are included. Thus, the use of EAW could widely simplify surrender procedures for criminal prosecution or execution of a custodial sentence towards foreign terrorist fighters.

Since January 2004, the EAW has proved to be one of the most effective instrument in the EU strategy to fight transnational crime. It has ensured the **swift return of numerous suspects who may not otherwise have faced justice**. In relation to terrorist attacks, the EAW allowed the requested Italian judicial authorities to surrender one of the suspected for the London bombings of July 2005 to UK in less than three months¹⁵.

Notwithstanding its potentiality in tackling foreign fighters phenomenon, the execution of EAWs might remain problematic. The EAW is based on the principle of mutual recognition in criminal matters, which allows reaching policy convergence without amendments to MS criminal justice systems.

In the fight against new forms of terrorism, the execution of a EAW may not be possible, as a recent EUROJUST report¹⁶ outlines, because even when an appropriate legal framework is provided and sufficient evidence has been collected, problems may hinder EAW functioning. For example, detection of foreign fighters returning to or from a Third State depends upon border checks against international databases, such as Interpol system.

Throughout the EU legal framework, **seizure and confiscation** of illicit proceeds represent fundamental measures to fight terrorism-related money flow. They prevent terrorists from enjoying the illegal gains of their activity and using ill-gotten proceeds to finance other illicit activities. Confiscation of criminal assets works both as a sanction and a preventative tool.

The European Agenda for Security¹⁷ had identified a number of areas to improve the fight against terrorist financing, among which **financial investigations** on foreign fighters constitute a central instrument that needs to be prioritised. ISIS is estimated to receive a considerable stream of money from oil but also from foreign donation, also made by means of Bitcoins traded on the deep web.

Therefore, the EU aims at disrupting the sources of revenue of terrorist organisations by targeting their capacity to raise funds in the first place. This is why the recent Directive

¹⁵ Annex to the intervention of the Attorney General to the General Assembly of the Court of Appeal in Rome, 31 January 2009.

¹⁶ *Foreign Fighters: Eurojust's Views on the Phenomenon and the Criminal Justice Response*. Updated Report, January 2015.

¹⁷ COM(2015) 185 final, Strasbourg 28.4.2015.



2014/42/EU provides for minimum rules with the objective to approximate MS regimes for freezing assets and extended confiscation, in order to strengthen the mutual recognition of criminal assets freezing and confiscation orders. With this purpose, the EU Commission is exploring the possibility to establish common rules on non-conviction based confiscation of property derived from criminal activities, included global terrorism.

Many of the recalled provisions on judicial cooperation were drafted with specific regard to the terrorist threat at the beginning of the 21st Century, mostly thinking to Al Qaeda and similar terrorist groups. This historical consideration raises **the question whether these legal tools are still adequate** and effective enough, allowing the judicial and police authorities to tackle the phenomenon of ISIS foreign fighters.

This delicate question is matter of a vivid debate at European level and EU institutions have recently agreed on the fact that is of paramount importance an enforcement of present judicial cooperation, though an updating of relevant legal acts does not seem to be imminent.

In June 2014, the European Council, defining strategic guidelines for legislative and operational planning against international terrorism, stressed the **need to deploy all the available legal instruments for judicial and police cooperation, with a reinforced coordination role for Europol and Eurojust**¹⁸.

It is undeniable, hence, that the first essential step is to ensure better application and implementation of EU legal instruments that are already in place, increasing mutual trust among MS and fully exploiting all the above described operational tools for information sharing and cross-border cooperation.

6. POTENTIAL RISKS FOR HUMAN RIGHTS, IN THE LIGHT OF THE ECHR AND CJEU JURISPRUDENCE

All the above outlined legal and operative tools for judicial cooperation against foreign fighters shall respect fundamental rights and civil liberties, according to supranational law and constitutional traditions, especially the presumption of innocence, the right to a fair trial, the freedom of expression, religion and association, as well as the right to private life ¹⁹.

¹⁸ See in the same sense the *Council Conclusions of 30 August 2014*, where the EU Council reaffirmed the strong necessity of strengthening mutual judicial cooperation and sharing information more effectively, including with relevant Third Countries, for the purpose of investigating and prosecuting foreign fighters.

¹⁹ Concerning this matter, Article 1 par. 2 of the Framework Decision 2002/475/JHA explicitly establishes that “*the Framework Decision shall not have the effect of altering the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union*”.



With this regard, the **case-law of the European Court of Human Rights and of the Court of Justice of the European Union** plays a key-role. However, judicial and police authorities are demanded to prevent serious attacks of foreign fighters and, then, to prosecute suspected terrorists long before they go into action, like when they are travelling abroad to be trained as ISIS militants.

Against this background, the implementation of a closer cooperation within European borders may cause legal jeopardies for the full respect of **fundamental rights and liberties** of the suspected terrorists, as solemnly declared by the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union. Article 15 of the ECHR (derogation in time of emergency) makes possible for States Parties to make partial derogations from fundamental rights guaranteed by the Convention.

On the 24th November 2015 France applied Article 15, in relation to national emergency measures taken after the large scale attacks by ISIS foreign fighters. Previously, also the United Kingdom invoked Article 15, after 9/11 attacks, in order to derogate exceptionally to Article 5 (right to liberty and security), because of the threat posed by foreign individuals that were member of a local network supporting Al Qaeda in England²⁰.

Even in state of public emergency caused by terrorist threats, States Parties are obliged to respect minimum fundamental rights, enlisted in the second paragraph of Article 15 ECHR. Thus, no derogation is possible to the right to life (Article 2 ECHR), to the prohibition of torture and inhuman or degrading treatment or punishment (Article 3), to the prohibition of slavery and servitude (Article 4) and to Article 7 (legality principle).

Most important of all, this **set of non-derogable rights** includes the absolute prohibition of torture and other cruel, inhuman and degrading treatment. There is, in fact, a conspicuous case law on Article 3 ECHR concerning counterterrorism operations towards Al Qaeda members, which is plainly applicable to the foreign fighters phenomenon, as well.

Firstly, the European Court of Human Rights jurisprudence is clear on prohibiting extradition or expulsion of international terrorists to Third States, when there are reasonable grounds that they will be subject to torture and inhuman treatment at destination. Having observed that any terrorist threat should not call into question the absolute nature of Article 3,

²⁰ See Grand Chamber, *A. and others v. United Kingdom* (no. 3455/05), judgement, 19 February 2009, which stated that UK derogations were *disproportionate* for the discrimination of non-nationals in respect to nationals.



the Court has condemned some European States, since they extradited international terrorists to countries where torture is widely practised, like Algeria²¹, Tunisia²² and Iraq²³.

Secondly, the case law on prohibition of torture is connected to **the right to a fair trial** under Article 6 ECHR, since it often regards use of evidence probably gathered by means of **torture and inhuman treatment of the suspected terrorist**. States Parties shall not make any use of such information²⁴; this legal constraint may greatly affect judicial and police cooperation with non-EU countries, since it might involve exchange of information with States where there is an actual risk of torture or ill treatment.

Thirdly, it shall be mentioned the case law of the Court of Strasbourg on **secret rendition operations**²⁵, which violate the prohibition of torture and the right to liberty and security, to private and family life and to an effective judicial remedy. According to the ECHR decision in the so-called “*Abu Omar case*”²⁶, extraordinary rendition and illegal detention in Third States can neither be justified by an alleged “war on terror”, nor covered by State secrecy.

Other fundamental rights provided by the European Convention, instead, are subject to derogation in case of exceptional situations; the interpretation from the Court of Strasbourg is flexible in this case, because it is necessary **a balance between the protection of human rights and the prevention of terrorist attacks**. With respect to *preventive detention*, for instance, the ECHR jurisprudence operates a balance when a public emergency, caused by a terrorist threat, requires that the suspected person is deprived of liberty for an indefinite period, but the temporary derogation to Article 5 (right to liberty) shall be proportionate and not discriminatory²⁷.

Passing to **Article 6 ECHR (right to a fair trial)**, the Court adopts again a combined approach, taking into account the rights of accused terrorists together with the public interest to prevent terrorist attacks. This is evident in the case law on the access to lawyers for the

²¹ *Daoudi v. France* (case no. 19576/08), judgement, 3 December 2009; *H.R. v. France* (case no. 64780/09), judgement, 22 September 2011; *Labsi v. Slovakia* (no. 33809/08), judgement, 24 September 2012.

²² *Saadi v. Italy* (case no. 37201/06), judgement (Grand Chamber), 28 February 2008; *Ben Khemasi v. Italy* (case no. 246/07), judgement, 24 February 2009; *Mannai v. Italy* (case no. 9961/10), judgement, 27 March 2012; *Toumi v. Italy* (case no. 25716/09), judgement, 5 April 2011; *Trabelsi v. Italy* (case no. 50163/08), judgement, 13 April 2010.

²³ *M.S. v. Belgium* (case no. 50012/08), judgement, 31 January 2012.

²⁴ *Omar Othman (Abu Qatada) v. United Kingdom* (case no. 8139/09), judgement, 17 January 2012; *El Haski v. Belgium* (case no. 649/08), judgement, 25 September 2012.

²⁵ *Nasr and Ghali v. Italy* (case no. 44883/09), judgement, 23 February 2016; see similar cases of *Al-Nashiri v. Poland*, judgement, 24 July 2014; *El-Masri v. “The former Yugoslav Republic of Macedonia”*, judgement (Grand Chamber), 13 December 2012.

²⁶ *Nasr and Ghali v. Italy*, (case no. 44883/09), judgement, 23 February 2016.

²⁷ *A. and others v. United Kingdom* (no. 3455/05), judgement (Grand Chamber), 19 February 2009.



suspected terrorists in police custody: the presence of a lawyer can be legitimately delayed if there is an exceptionally serious risk of terrorist acts²⁸.

As another relevant example of this balance, we can look at the ECHR jurisprudence on **covert operations**. Despite the undeniable usefulness of covert investigations, whose further utilization has been here suggested, further reflections have been made by the Court concerning the substantive and procedural guarantees, given that the need of actually preventing terrorist acts can never justify an abusive practice by police authorities acting under false identity.

According to the established ECHR case law, in order to ensure a fair trial it is necessary that the action of law enforcement authorities remains strictly limited to the role as undercover agents and that such an intervention does not exercise a decisive influence on the suspected and on his intention of perpetrating a crime²⁹.

The European judicial cooperation against foreign fighters might conflict also with **freedom of religion, expression and association** (Articles 9, 10 and 11 of the ECHR), given the particular nature of terrorist offences, featured by strong ideological motivations and online propaganda. So, it is essential to clearly distinguish online publications, aimed at supporting foreign fighters attacks, from mere opinions of Islamic fundamentalist groups that lack the required *mens rea* and *actus reus* of terrorist offences.

Whereas European institutions are calling on a more effective collaboration between Internet providers and law enforcement authorities, in order to trace and suppress ISIS online recruitment and incitement, the Court of Strasbourg has reconciled States interest in tackling global terrorism with the respect of freedom of expression³⁰ and religion³¹.

Lastly, the European Court of Justice, too, has reaffirmed the need for respect of fundamental rights in this matter, more precisely in the blacklisting and **asset freezing system against international terrorists, which includes ISIS foreign fighters**. These

²⁸ *Ibrahim and others v. United Kingdom* (joined cases no. 50541/08, 50571/08, 50573/08 and 40351/09), 16 December 2014; *Salduz v. Turkey* (no. 36391/02), judgement (Grand Chamber), 27 November 2008.

²⁹ *Teixeira de Castro v. Portugal*, (case no. 44/1997/828/1034), judgement, 9 June 1998; *Calabrò v. Italy and Germany*, (case no. 59895/00), judgement, 21 March 2002; *Pyrgiotakis v. Greece*, (case no. 151000/06), judgement, 21 February 2008; *Malininas v. Lithuania*, (case no. 10071/04), judgement, 1 July 2008; *Bannikova v. Russia*, (case no. 18757/06), judgement, 4 November 2010.

³⁰ *Leroy v. France*, (case no. 36109/03), judgement, 2 October 2008.

³¹ *Güler and Uğur v. Turkey*, (joint cases nos. 31706/10 and 33088/10), judgement, 2 December 2014.



countermeasures, taken by the UN Security Council³² and the EU Council³³, are “smart sanctions”, *id est* administrative sanctions with preventive content towards individuals.

Since the asset freezing against blacklisted terrorists has the same effects of a **non-conviction based confiscation**, the right to private property is at stake. Under Art. 17 of the EU Charter of Fundamental Rights, confiscation is legitimate only if in the public interest and if provided for by law. Moreover, its application shall ensure that enlisted terrorists have the right to a fair trial, especially the right to defence, to be heard and to an effective judicial review, as to the CJEU in the “*Khadi case*”³⁴ and in analogous sentences³⁵.

Correspondingly, the UK Supreme Court³⁶ openly criticised two executive orders allowing the government to freeze the assets of suspected terrorists. The domestic Court found that the government exceeded its authority by freezing assets **based solely on “reasonable suspicion” of terrorist activity**.

7. PROPOSALS FOR ENHANCING THE EU COUNTERTERRORISM STRATEGY

I. On the basis of the previous analysis, **a common minimum standard of incrimination** is required in all MS, in order to successfully tackle foreign fighters with legal tools. For this reason, we strongly support **a EU initiative to update the legal framework set out by the Framework Decision 2002/475/JHA and its amendments**. EU substantive criminal law on combating terrorism needs to be in line with the requirements of UN Security Council Resolution 2178 and in particular with the problem of foreign fighters.

The role of **EU legislative acts in implementing the UN Resolution 2178 (2014) would be twofold**. First of all, they could better define some terms used in the text of the Resolution, referring to the conducts of recruiting, financing and training individuals for a terrorist

³² See UN Security Council Resolution 1267 (1999) concerning Al-Qaida and associated individuals, now referred to as the “*ISIL (Da’esh) & Al-Qaida Sanctions List*” after UN Security Council Resolution 2253 (2015) that added ISIS foreign fighters to the blacklist.

³³ The EU acts provide for two separate lists of terrorists: one is implementing the UN list; the other one is autonomously created by the EU Council.

³⁴ *Khadi – Al-Barakaat v. European Commission* (Case T-85/09), 30 September 2010; *Khadi – Al-Barakaat v. Council and Commission* (Joined Cases C-402/05 P and C-415/05 P), Grand Chamber, 3 September 2008.

³⁵ *Abdulrahim v. Council and Commission* (Case T-127/09), 14 January 2015; *Al-Aqsa v. Council*, (Case T-348/07), 9 September 2009; *People’s Mojahedin Organization of Iran v. Council* (Case T-284/08), 4 December 2008; *Othman v. Council and Commission* (Case T-318/01), 11 June 2009.

³⁶ Supreme Court of the United Kingdom, *HM Treasury v. Ahmed* [2010] UKSC 2, judgement, 27 January 2010.



purpose that every Member State shall criminalise and repress. In second place they should boost the approximation of national legislations against terrorism and foreign fighters, thus facilitating the mutual cooperation rules already in place.

Following the tragic events occurred in 2014 and 2015, the EU counterterrorism is now under review. In December 2015 the Commission proposed a Draft Directive on combating terrorism, aimed at replacing the 2002 Framework Decision, which is still under discussion. Whether approved, it would impose MS to introduce new criminal offences punishing **receiving (not only providing) training** for terrorism, travelling abroad for the purpose of terrorism, funding and facilitating **international travels for terrorist purpose**. Judicial cooperation would also be significantly improved, since every MS would be able to prosecute foreign terrorist fighters before they go into action.

II. Considering the effectiveness of criminal investigations, we stress the importance of gathering **Internet-based evidence** in order to early detect ISIS virtual propaganda and attempts of online recruitment, even when committed in the dark web or deep web. In fact, technological progress provides terrorists with ever-changing methods for interaction, communication and networking on the Internet.

Investigation and prosecution of foreign fighters become increasingly difficult, requiring judges and prosecutors to have a full expertise on the functioning of procedural tools set forth by the *Budapest Convention on Cybercrime*, adopted by the Council of Europe in November 2001. In particular, reference is made to real-time collection of traffic data and content data tapping, which should be extended to VoIP systems, social networks, as well as to the dark web. In this respect, appropriate agreements between Internet providers and law enforcement authorities should be concluded, while specialised investigators should perform monitoring and undercover activities, since online recruitment and incitement of foreign fighters take place using those impenetrable channels.

However, these measures must have legal basis that establish circumstances and conditions to allow such data interception, as well as appropriate safeguards against possible abuse³⁷. For this purpose, **defining common standards for this interception at EU level** is essential to ensure not only the respect of private life and correspondence, but also to facilitate judicial cooperation through evidence gathering and exchange.

³⁷ See ECHR, *Kennedy v. The United Kingdom*, (case no. 26839/05), judgement, 18 May 2010.



III. Moreover, considering the significant amount of economic benefits that ISIS obtains from online trade on the deep web (in terms of weapons trafficking or crowdfunding), the use of cryptocurrency like Bitcoins should be further investigated too. As they are anonymous and untraceable, Bitcoins could serve as an ideal environment for terrorist assets and money exchange. Thereby, the EU Commission has recently presented a specific action plan aimed at **strengthening controls on digital currencies in the effort to eliminate channels of terrorist financing**. In addition, an amendment to the Anti-Money Laundering Directive is likely to be soon proposed, in order to add virtual currency exchange platforms under its scope of application.

IV. For the same reasons, **suspicious travel movements** to or from conflict areas should be further monitored, whether supported by solid data protection safeguards. The *Proposal for a Directive on the use of Passenger Name Record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime* represents a step towards this direction³⁸. Its forthcoming adoption would introduce European **common standards for the investigative use of passengers name in external and internal flights**, including adequate safeguards for security and privacy of personal data.

The future EU binding provisions would limit storage, process and exchange of such sensitive information between national competent authorities only to specific purposes, among which the most significant ones are the investigation and prosecution of terrorist offences and serious cross-border crimes, in particular the identification of previously ‘unknown’ suspects through a real-time or a pro-active analysis.

V. Lastly, we would like to underline that a stronger commitment in a “pursue and prosecute” strategy, carried out by law enforcement and judicial authorities in the EU, is not sufficient in itself to tackle the foreign terrorist fighters threat. On the contrary, it cannot be addressed without **a comprehensive approach that also relies on soft-law measures** aimed at either preventing radicalisation or reintegrating already affected individuals³⁹.

³⁸ It should be considered, in fact, that the Focal Point Travellers run by Europol already offers in this field an innovative and useful tool for collecting, analysing and sharing information at European level on the recruitment and travel facilitation of suspected individuals, aimed at producing analyses of EU travel patterns.

³⁹ As underlined in the *Commission communication on Preventing Radicalisation to Terrorism and Violent Extremism of 15 January 2014*, “building trust within and between the communities, promoting a better understanding of each other’s sensitivities and problems” is a crucial factor for adding value to the current EU counterterrorism strategy. In fact, recalling the words of the *revised EU Strategy for Combating Radicalisation*



Along with security-focused hard measures, MS should also promote specific policies and programmes, which foster dialogue with aspiring or reformed foreign fighters, as well as with their families, friends and local community members. Social workers and NGOs may help with this task. The objective is to delegitimise and invalidate Jihadi group narratives, encouraging foreign fighters to come to terms with their past and reintegrating them into society, by means of both practical assistance and psychological support.

By way of example, an **inclusive and multidisciplinary** model might be developed through proposals of counselling services and centres for assistance, trusted partnerships with religious leaders and local representatives of the Muslim communities, exit programmes based on vocational trainings and psychological assistance, as well as awareness-making campaigns⁴⁰.

From a long-term perspective, the promotion of tolerance, economic development, social cohesion and inclusion represents the most efficient weapon for eradicating terrorism. Only a multilevel strategy could take individuals, made vulnerable by economic and social marginalisation, away from terrorist recruiters.

and Recruitment to Terrorism, “the challenge of radicalisation and recruitment to terrorism will not be met by governments working alone, but by collaboration with communities, civil society, non-governmental organisations and the private sector”.

⁴⁰ It is noteworthy that a relevant contribution to boost such approach can already be offered by the Radicalisation Awareness Network (RAN), set-up by the European Commission in 2011 and composed by a wide range of practitioners and local actors involved in preventing and countering radicalisation with the purpose to share their experience and knowledge and to support States wishing to promote such approach.