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Foreign Terrorist Fighters in Syria: Challenges of the “Sending” State

Marten Zwanenburg

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* Marten Zwanenburg is a legal counsel at the Ministry of Foreign Affairs of the Netherlands. This article was written in a personal capacity and does not necessarily represent the views of the Ministry of Foreign Affairs of the Netherlands or any other part of the government of the Netherlands. This article is based on a presentation given by the author at the workshop entitled “Syria: Can International Law Cope?,” organized by the Stockton Center for the Study of International Law at the U.S. Naval War College in conjunction with the West Point Center for the Rule of Law, U.S. Military Academy, November 16–18, 2015.

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I. INTRODUCTION

“Foreign terrorist fighters” are high on the agenda of the international community. This is illustrated by the adoption in 2014 of Resolution 2178 by the United Nations Security Council in which the Council expressed grave concern over the “acute and growing threat posed by foreign terrorist fighters,”¹ and, acting under Chapter VII of the Charter, obliged member States to take a number of measures to address the threat presented by such fighters. The international community’s focus has primarily been on individuals present in, or intending to travel to, Syria and Iraq to join terrorist groups since it is armed groups in these two States that attract the most fighters.

The fight against foreign terrorist fighters takes a wide range of forms, including preventive measures to counter violent extremism and address the conditions conducive to terrorism, military force, intelligence operations and law enforcement actions. It is also a fight in which States choose their own approach. This choice is influenced by many different factors; one of which is whether the State concerned is primarily a “sending” State or a “receiving” State.

This article examines the approach taken by the Netherlands, as a sending State, predominantly in the context of the Syrian conflict.² In April 2016, the government reported that approximately 240 individuals had traveled from the Netherlands to Iraq and/or Syria, and that around forty had returned to the Netherlands.³ The government has stated that those who have returned constitute a potential threat, although this has not been the case for the majority of individuals who have returned to date.⁴

As a consequence of this concern, in August 2014, the Dutch government presented an Action Program for Addressing Jihadism in an Integrated Way⁵ in which it set out thirty-eight measures to combat jihadism. The program included the introduction of new measures, enhancement of exist-

1. S.C. Res. 2178, pmb. ¶ 8 (Sept. 24, 2014).

2. “Conflict” is used here as shorthand. Arguably, there are two or even several armed conflicts ongoing in Syria.

3. Parliamentary Papers II, 34356 (R2064), No. 6, Apr. 1, 2016, at 9.

4. *Id.* at 7.

5. Parliamentary Papers II, 29754, No. 253, Aug. 29, 2014. English translation *available at* https://english.nctv.nl/Images/def-a5-nctvjihadismuk-03-lr_tcm92-562673.pdf [hereinafter Parliamentary Papers II, 29754, No. 253].

ing measures and the continuation of some measures already in place. Many of these measures address in whole or in part foreign terrorist fighters. This article considers those measures that have raised, or that may raise, questions of international law, primarily those measures undertaken in the field of law enforcement. For present purposes, law enforcement is understood in a broad sense as including measures taken on the basis of domestic criminal and administrative law.

At first sight, law enforcement measures appear to be regulated principally by domestic law and therefore international law might seem less relevant. It will be seen, however, that law enforcement measures raise important questions of international law that bear on the application and interpretation of domestic law. At this interface of domestic and international law, a number of challenges arise for the sending State. The measures that will be discussed concern criminal prosecution (Section II), freezing assets (Section III), deprivation of nationality (Section IV) and revoking travel documents (Section V).

This article will not deal with the use of military force or intelligence operations. However, to the degree that intelligence operations provide important information that may be used for the purpose of justifying a number of the law enforcement measures, the linkage between the two will be discussed in the context of the specific measures addressed.

As a preliminary matter before dealing with the specific measures, it is important to define the term “foreign terrorist fighter” and to distinguish it from a second term, “foreign fighter,” which is often used in international discourse. No single authoritative definition exists for either, although foreign fighter is viewed as the more general of the two. A UN Human Rights Council working group defined foreign fighter as “generally understood to refer to individuals who leave their country of origin or habitual residence and become involved in violence as part of an insurgency or non-State armed group in an armed conflict. Foreign fighters are motivated by a range of factors, notably ideology.”⁶

Resolution 2178 defines foreign terrorist fighters as “individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including

6. Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-determination, U.N. Doc. A/70/330, ¶ 13 (Aug. 19, 2015).

in connection with armed conflict.”⁷ The definition of “terrorism” or “terrorist” is notoriously controversial and introduces a measure of definitional uncertainty.⁸ Resolution 2178 does not include a definition of terrorism,⁹ appearing to leave it to the discretion of the member States. This aspect of the resolution has led to sharp criticism from commentators who argue that the lack of a definition increases the possibilities for abuse.¹⁰

In the Netherlands, at least in a domestic context, neither foreign fighter nor foreign terrorist fighter is used. The more frequently used terms are “jihad-goer” or, more specifically, “Syria-goer.” Just as with foreign fighter and foreign terrorist fighter, there is no single authoritative definition of these terms. The internal security service of the Netherlands, the General Intelligence and Security Service (Algemene Inlichtingen en Veiligheidsdienst, or AIVD), defines a jihad-goer as “an individual who, with jihadist intentions, leaves the Netherlands in an attempt to reach conflict areas where jihadist groups are active.”¹¹ On one hand, this definition is arguably broader than foreign terrorist fighters as defined in Resolution 2178, because instead of referring specifically to terrorist acts or terrorist training, it merely refers to jihadist intentions. On the other hand, because the term is specifically linked to jihad rather than terrorism more broadly regardless of motivation, it can be interpreted more narrowly than foreign terrorist fighters. Given that the issues to be examined deal specifically with individuals in Syria, for practical purposes the difference in terminology does not appear significant, therefore, foreign terrorist fighter, the more widely used term, will be used.

II. CRIMINAL PROSECUTION

Criminal prosecution is an important tool in combating foreign terrorist fighters. In recent years the Netherlands has been very active in pursuing prosecution; indeed, the initiation of a criminal investigation when a foreign terrorist fighter is identified is the first measure referred to in the gov-

7. S.C. Res. 2178, *supra* note 1, pmb. ¶ 8.

8. See e.g., BEN SAUL, *DEFINING TERRORISM IN INTERNATIONAL LAW* (2008).

9. It may be noted that the Council included a “working definition” of terrorism in Resolution 1566. S.C. Res. 1566, ¶ 3 (Oct. 8, 2004). Resolution 2178 does not expressly refer to that resolution, however.

10. See e.g., Martin Scheinin, *Back to Post 9-11 Panic? Security Council Resolution on Foreign Terrorist Fighters*, JUST SECURITY (Sept. 23, 2014), <https://www.justsecurity.org/15407/post-911-panic-security-council-resolution-foreign-terrorist-fighters-scheinin/>.

11. Parliamentary Papers II 2014–2015, 29754, No. 288, at 2 (unofficial translation).

ernment's action program.¹² In March 2016 there were 115 ongoing investigations concerning approximately 135 persons related to violent jihadism.¹³ A limited number of cases have proceeded to trial so far,¹⁴ with the first judgment on jihadism occurring in October 2013.¹⁵

Prosecution may take place either for common crimes such as murder, manslaughter and arson, or for specific terrorism-related offenses. A number of such offenses were introduced into the Dutch Criminal Code through the 2004 Terrorist Crimes Act,¹⁶ which was enacted in response to the Council of Europe's Framework Decision on Combating Terrorism of June 13, 2002 (EU Framework Decision).¹⁷ It required, *inter alia*, European Union (EU) members to define certain acts, as well as acts related to terrorist groups and terrorist-linked offenses, as crimes under their domestic legislation and to ensure the offenses were "punishable by effective, proportionate and dissuasive criminal penalties."¹⁸

One of the elements introduced by the Terrorist Crimes Act was the notion of "terrorist intent," which was inserted in the Criminal Code as Article 83a. Such intent is defined as "the intention of instilling profound fear in (part of) a country's population, unlawfully forcing a government to do, refrain from doing or tolerate something, or seriously disrupting or destroying the fundamental political, constitutional, economic or social structures of a country or international organisation."¹⁹ Article 83(1) lists those crimes which, if committed with terrorist intent, constitute a terrorist crime.

In 2009, passage of the Act Concerning Training for Terrorism²⁰ added

12. Parliamentary Papers II, 29754, No. 253, *supra* note 5, annex, at 5.

13. Parliamentary Papers 2015–2016, 29754, No. 363, at 2.

14. Parliamentary Papers 2015–2016, 29754, No. 326, annex, at 2.

15. Rechtbank Rotterdam [District Court of Rotterdam], No. 10/960233-12 (ECLI:NL:RBROT:2013:8265), Oct. 23, 2013, http://uitspraken.rechtspraak.nl/inzien_document?id=ECLI:NL:RBROT:2013:8265.

16. Wet Terroristische Misdrijven, 24 juni 2004, Stb. 2004, 290 [hereinafter 2004 Terrorist Crimes Act]. This act inserted certain articles into the Wetboek van Strafrecht [hereinafter Dutch Criminal Code].

17. Council Framework Decision on Combating Terrorism, 2002/475/JHA, 2002, O.J. (L 164) 3 (EU) [hereinafter EU Council Framework Decision].

18. *Id.* art. 5.

19. 2004 Terrorist Crimes Act, *supra* note 16, at D.

20. Wet van 12 juni 2009 tot wijziging van het Wetboek van Strafrecht, Wetboek van Strafvordering en enkele aanverwante wetten in verband met de strafbaarstelling van het deelnemen en meewerken aan training voor terrorisme, uitbreiding van de mogelijkheden tot ontzetting uit het beroep als bijkomende straf en enkele andere wijzigingen (Wet

Article 134a to the Criminal Code. This constituted the domestic implementation of Article 7 of the Council of Europe Convention on the Prevention of Terrorism.²¹ In 2013, Article 421 criminalizing the financing of terrorism was inserted into the Criminal Code.

A. The Relationship between Terrorist Offenses and International Humanitarian Law

One of the most interesting questions that has arisen in the case law based on prosecutions for these offenses is the relationship between terrorist crimes and international humanitarian law (IHL). In several cases the accused have argued that the application of IHL precluded their conviction for terrorist offenses.

In the *Maheer H.* case, for instance, an individual was prosecuted for terrorist offenses committed while in Syria after his return to the Netherlands.²² He argued there was an ongoing non-international armed conflict in Syria and that as a result the provisions in Dutch criminal law on terrorism were inapplicable. He alleged that if it could be proven that he participated in an armed conflict, he would benefit from the protections of the Geneva Conventions, which meant that he could only be prosecuted for war crimes.²³ It appears the accused was claiming a form of combatant

Training voor Terrorisme), 18 juni 2009, Stb. 2009, 245 (Act Concerning Training for Terrorism).

21. Council of Europe Convention on the Prevention of Terrorism, May 16, 2005, C.E.T.S. 196 [hereinafter Council Terrorist Convention]. It may be noted that while the Convention defines training for terrorism only as providing instruction in certain fields (*id.* art. 7), the 2004 Terrorist Crimes Act made receipt of training a criminal offense (2004 Terrorist Crimes Act, *supra* note 16, art. 1(G)). On October 22, 2015, an Additional Protocol to the Convention was adopted that also requires the criminalization of receiving terrorist training. Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, art. 3, Oct. 22, 2015, C.E.T.S. 197 [hereinafter Additional Protocol to Council Terrorist Convention].

22. *Rechtbank's-Gravenhage* [District Court of The Hague], No. 09/767116-14 (ECLI:NL:RBDHA:2014:14652), Dec. 1, 2014, http://uitspraken.rechtspraak.nl/inzien_document?id=ECLI:NL:RBDHA:2014:14652 [hereinafter *Maheer H.*].

23. *Id.* ¶ 3. For the Geneva Conventions and their Additional Protocol, see Convention (I) for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention (II) for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Protocol Additional to the Geneva Conventions of

immunity.

Combatant immunity protects lawful combatants from punishment under domestic law for committing lawful acts of war, i.e., acts not in violation of IHL.²⁴ Although the term “combatant immunity” does not appear in IHL instruments, it is a basic principle underpinning that body of law. It is almost unanimously accepted, however, that combatant immunity only applies in international armed conflicts, not in non-international armed conflicts.²⁵ This was the reasoning followed by the district court in rejecting the accused’s claim.²⁶ The court, after finding that there was a non-international armed conflict in Syria, held that it followed from Article 3 of the Geneva Conventions, Additional Protocol II²⁷ and case law²⁸ that members of an organized armed group—in contrast to members of State armed forces—are not authorized to use force in a non-international armed conflict.²⁹ According to the court, this was also the view of authoritative commentators. It concluded that civilians who take a direct part in hostilities in a non-international armed conflict do not enjoy a status comparable to combatant immunity; consequently, they can be criminally prosecuted for their participation in hostilities.

The court went on to state that in a non-international armed conflict, IHL is not the only applicable law, and in doing so referred to a 2014 judgment of the General Court of the European Union.³⁰ The General

12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3.

24. SANDESH SIVAKUMARAN, *THE LAW OF NON-INTERNATIONAL ARMED CONFLICT* 514 (2012).

25. *Id.*; Waldemar Solf, *The Status of Combatants in Non-international Armed Conflicts under Domestic Law and Transnational Practice*, 33 AMERICAN UNIVERSITY LAW REVIEW 53, 57–59 (2011).

26. *Maber H.*, *supra* note 22, ¶ 3.

27. Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609.

28. *Maber H.*, *supra* note 22, ¶ 3 (citing Case T-208/11 and T-508/11,16, *LTTE v. Council* (Oct. 16, 2014), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=158631&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=27177> [hereinafter 2014 *LTTE* case]).

29. *Id.*

30. The General Court is one of the constituent parts of the Court of Justice of the European Union. *See* Treaty on European Union, art. 19, Oct. 26, 2012, O.J. (C 326). The General Court rules on actions for annulment brought by individuals, companies and, in some cases, EU governments.

Court dealt with a request by the Liberation Tigers of Tamil Eelam (LTTE) to annul regulations implementing EU legislation under which the LTTE had been placed on a European sanctions list.³¹ The LTTE submitted that the EU legislation concerned was not applicable to situations of armed conflict, since those conflicts—and therefore the acts committed during those conflicts—could only be governed by IHL.

According to the LTTE, it was

involved in armed conflict against the armed forces of the government of Sri Lanka, seeking self-determination for the Tamil people and their “liberation from the oppression” of that government. Given the way in which the LTTE’s armed forces were organized and their manner of conducting operations, the members of those forces meet all the requirements laid down by international law for recognition of the members of those forces as “combatants.” That status gave them immunity in respect of acts of war that were lawful under the terms of the law on armed conflict and meant that, in the case of unlawful acts, the LTTE would be subject only to that law, and not to any anti-terrorism legislation.³²

This argument was rejected by the General Court. The Court held that “contrary to what the LTTE claims, the applicability of international humanitarian law to a situation of armed conflict and to acts committed in that context does not imply that legislation on terrorism does not apply to those acts.”³³

The district court in the Maher H. case followed a similar line of reasoning in reaching its conclusion. The judgment held that the fact that violations of IHL in non-international armed conflicts have been criminalized as war crimes under Dutch criminal law, does not preclude these acts from also being punishable as common crimes, nor does it mean that other acts committed in the context of a non-international armed conflict cannot be punishable under common criminal law.

This may seem an obvious conclusion; however, in an earlier case a variation of the argument put forward by the accused had been successful.³⁴ That case concerned individuals accused of collecting funds for the

31. 2014 *LTTE case*, *supra* note 28.

32. *Id.* ¶¶ 42–43.

33. *Id.* ¶ 56. For the reasoning of the Court on this point, see ¶¶ 54–83.

34. *Rechtbank’s-Gravenhage* [District Court of The Hague], No. 09/748801-09 (ECLI:NL:RBSGR:2011:BT8829), Oct. 21, 2011, <http://uitspraken.rechtspraak.nl/inzien>

LTTE. They were prosecuted for, *inter alia*, the crime of participation in the activities of an organization whose objective was the commission of terrorist offenses. As with the crimes in the Maher H. case, the charge was based on the EU Framework Decision.³⁵

In reaching its decision, the court addressed the question of whether the LTTE was an armed force within the meaning of the Framework Decision. Paragraph 11 of that decision provides:

Actions by armed forces during periods of armed conflict, which are governed by international humanitarian law within the meaning of these terms under that law, and, inasmuch as they are governed by other rules of international law, actions by the armed forces of a State in the exercise of their official duties are not governed by this Framework Decision.³⁶

This paragraph reflects wording similar to that found in a number of terrorism conventions. For example, Article 19(2) of the Terrorist Bombings Convention provides:

The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.³⁷

Article 6(2) of the Beijing Convention on the Suppression of Unlawful Acts relating to International Civil Aviation³⁸ contains identical wording, as does Article 4(2) of the International Convention for the Suppression of Acts of Nuclear Terrorism³⁹ and Article 26(5) of the Council of Europe Convention on the Prevention of Terrorism.⁴⁰

The district court found the forces of the LTTE were comparable to

document?id=ECLI:NL:RBSGR:2011:BT8829 [hereinafter 2011 *LTTE* case].

35. EU Council Framework Decision, *supra* note 17, art. 2(b).

36. *Id.* pmb. ¶ 11.

37. International Convention on the Suppression of Terrorist Bombings art. 19(2), Dec. 15, 1997, 2149 U.N.T.S. 256.

38. Convention on the Suppression of Unlawful Acts relating to International Civil Aviation art. 6(2), Sept. 10, 2010, 974 U.N.T.S. 178.

39. International Convention for the Suppression of Acts of Nuclear Terrorism art. 4(2), Apr. 13, 2005, 2445 U.N.T.S. 89.

40. Council Terrorist Convention, *supra* note 21, art. 26(5).

State armed forces, and that there was a non-international armed conflict between the LTTE and the government of Sri Lanka.⁴¹ It determined that since all the acts of the accused referred to by the prosecution were connected to the armed conflict, it could not convict the accused of participating in an organization whose purpose was the commission of terrorist offenses. The court implied that since the acts concerned were in its view outside the scope of the Framework Decision, they were also outside of the scope of the offense found in the legislation implemented into Dutch domestic criminal law.

On appeal, the district court's findings on this issue were reversed.⁴² The court of appeal held that the LTTE was an organized armed group engaged in an armed conflict,⁴³ and then addressed the question of whether Article 1(4) of Additional Protocol I was applicable.⁴⁴ It concluded the situation failed to meet the criteria of Article 1(4), but that there was, instead, a non-international armed conflict between the LTTE and Sri Lanka.⁴⁵ Finally, the court held that members of an organized armed group in a non-international armed conflict do not enjoy combatant status, characterizing them as "unprivileged belligerents" who could be prosecuted under domestic criminal law for their actions during the conflict.⁴⁶

The court of appeal's reasoning was followed by the district court of The Hague in its judgment of December 10, 2015 in the so-called "Context" case.⁴⁷ This case concerned nine accused who were charged with belonging to a group recruiting individuals to fight for the Islamic State of Iraq and the Levant (ISIS) and Jabhat Al-Nusra in Syria. One of the arguments put forward by the defense was that there was an international armed conflict in Syria and Iraq, or at least some areas of those States.⁴⁸ The defense claimed that many States supported insurgent groups, and that there was strong evidence indicating such assistance went beyond mere fi-

41. 2011 *LTTE* case, *supra* note 34,

42. Gerechtshof Den Haag [Court of Appeal of The Hague], No. 22-005123-11 (ECLI:NL:GHDHA:2015:1082), Apr. 30, 2015, http://uitspraken.rechtspraak.nl/inzien_document?pid=ECLI:NL:GHDHA:2015:1082.

43. *Id.* § 10.4.1.

44. *Id.* § 10.4.3.

45. *Id.* § 10.4.2.3.4.

46. *Id.* § 10.4.3.3.2.

47. Rechtbank's-Gravenhage [District Court of The Hague] (ECLI:NL:RBDHA:2015:14365), Dec. 10, 2015, <http://uitspraken.rechtspraak.nl/inziendocument?pid=ECLI:NL:RBDHA:2015:14365> [hereinafter *Context* case].

48. *Id.* ¶ 7.4.

nancial or logistic support. It alleged that, in fact, some States exercised “overall control” over certain groups, thus internationalizing the conflict.⁴⁹ Because combatants in an international armed conflict enjoy combatant immunity the defense considered that the Netherlands did not have jurisdiction over the alleged facts.⁵⁰

The court held that the armed conflict in Syria was a non-international armed conflict, finding insufficient evidence to conclude that the conflict had been internationalized.⁵¹ The court then stated that in a non-international armed conflict, the application of IHL does not exclude the application of other fields of law; a finding it indicated is supported in abundant case law and literature.⁵² According to the court, it followed that acts of violence committed during a non-international armed conflict can be crimes under both IHL and domestic law.⁵³

The court went on to find that in non-international armed conflicts members of armed groups have no combatant status. In reaching this conclusion it reviewed the drafting history of the 1949 Geneva Conventions, which indicated States were unwilling to grant combatant immunity to members of organized armed groups with which they were in conflict, because of their desire to prevent citizens taking justice in their own hands.⁵⁴ Thus, it held that members of organized armed groups are criminally responsible both for common crimes such as murder and violations of IHL.⁵⁵

The defense raised the issue of the meaning to be given to the provision excluding armed forces from the Framework Decision; specifically, whether paragraph 11 precludes the application of the terrorist offenses in Dutch criminal law to conduct occurring during armed conflicts.⁵⁶ The court held that it needed to establish the meaning of armed forces as used in the Framework Decision to answer this question.⁵⁷ It considered that the term clearly encompasses the armed forces of a State, but that non-State armed groups are usually referred to as “organized armed groups,” rather

49. *Id.* ¶ 7.4.

50. *Id.* ¶ 7.20.

51. *Id.* ¶¶ 7.5–7.13.

52. *Id.* ¶ 7.17.

53. *Id.* ¶ 7.18.

54. *Id.* ¶ 7.23.

55. *Id.* ¶¶ 7.22–7.23.

56. *Id.* ¶ 7.34.

57. *Id.* ¶ 7.37.

than “armed forces.”⁵⁸ The court then looked at the government’s interpretation, observing that although paragraph 11 had not been addressed in discussions between the government and parliament as the Framework Decision was being implemented, a comparable provision—Article 19(2) of the Terrorist Bombing Convention—was discussed. In that debate, the Minister of Justice defined armed forces as the “armed forces of a State,” but did acknowledge that different interpretations were inevitable.⁵⁹

The court also considered that in interpreting paragraph 11, the object and purpose of IHL and of the paragraph needed to be taken into account.⁶⁰ It noted that the Framework Decision was one of a number of instruments adopted by the international community in response to the global threat of terrorist groups⁶¹ and that the purpose of these instruments—the prosecution of suspected terrorists before domestic courts on the basis of domestic terrorism legislation—was of great importance. It found that interpreting the exclusion clause in a way that would make it impossible to prosecute suspected terrorists for their terrorist acts because these were committed during an armed conflict, would be unreasonable.⁶²

The court ultimately reached two important conclusions. First, that it was clear that the term “armed forces” as it appears in the Framework Decision encompassed only the armed forces of a State. Second, that members of organized armed groups do not enjoy combatant status and can be prosecuted under both IHL and domestic law.⁶³ Thus it did not consider that any conflict existed between the two regimes.

The attempts by the Dutch courts to clarify the relationship between IHL and counterterrorism instruments, and the meaning of exclusion clauses in the latter, are a welcome development in addressing issues that have created confusion. As the Minister of Justice stated, the exclusion clauses in counterterrorism instruments are formulated in a way that leaves room for interpretation.⁶⁴

This ambiguity has led to divergent opinions, particularly in how the term “armed forces” is interpreted. There is some support for the view that

58. *Id.* ¶ 7.40.

59. *Id.*

60. *Id.* ¶ 7.41.

61. *Id.* ¶ 7.42.

62. *Id.*

63. *Id.* ¶ 7.44.

64. See, e.g., Claudia Martin, *Terrorism as a Crime in International and Domestic Law: Open issues*, in COUNTER-TERRORISM STRATEGIES IN A FRAGMENTED INTERNATIONAL LEGAL ORDER 639, 643–51 (Larissa van den Herik & Nico Schrijver eds., 2013).

organized armed groups fall under the category of the armed forces.⁶⁵ This interpretation could contribute to achieving certain policy objectives. First, it could provide an incentive for members of armed groups to respect IHL, as long as the exclusion of members of organized armed groups from the scope of application of counterterrorism conventions is limited to acts that are not prohibited under IHL. Second, each of the counterterrorism conventions typically requires a State to either prosecute or extradite individuals who commit an offense within the meaning of the convention. By including members of armed groups in the exclusion clause, third States would have discretion in deciding whether or not to prosecute them for acts committed during an armed conflict, insofar as they do not amount to international crimes, and would not be required to grant extradition requests. Some believe this would be consistent with the recommendation found in Article 6(5) of Additional Protocol II to “endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict.”⁶⁶

Notwithstanding these possible advantages for including organized armed groups within the definition of armed forces, the majority view is that armed forces in the exclusion clauses of counterterrorism instruments refers exclusively to State armed forces.⁶⁷ This interpretation is certainly the one most consistent with IHL and its classification of the legal status of members of organized armed groups. As the discussion by the Dutch courts demonstrates, the interpretation of exclusion clauses in counterterrorism instruments is closely related to the status of members of organized armed groups in non-international armed conflicts. It is widely accepted

65. See, e.g., Andrea Gioia, *The UN Conventions on the Prevention and Suppression of International Terrorism*, in INTERNATIONAL COOPERATION IN COUNTER-TERRORISM: THE UNITED NATIONS AND REGIONAL ORGANIZATIONS IN THE FIGHT AGAINST TERRORISM 3, at 18 (Giuseppe Nesi ed., 2006); Daniel O'Donnell, *International Treaties against Terrorism and the Use of Terrorism during Armed Conflict and by Armed Forces*, 88 INTERNATIONAL REVIEW OF THE RED CROSS 853, 869 (2006). See also the position taken by the Norwegian government in relation to the exclusion clause in the Terrorist Bombings Convention, ERLING JOHANNES HUSABØ & INGVID BRUCE, FIGHTING TERRORISM MULTILEVEL CRIMINAL LEGISLATION: SECURITY COUNCIL RESOLUTION 1373, THE EU FRAMEWORK DECISION ON COMBATING TERRORISM AND THEIR IMPLEMENTATION IN NORDIC, DUTCH AND GERMAN CRIMINAL LAW 401–2 (2009).

66. See, e.g., HUSABØ & BRUCE, *supra* note 65, at 383.

67. *Id.* at 384; Rikke Ishøy, *Humanity and the Discourse of Legality*, in SEARCHING FOR A “PRINCIPLE OF HUMANITY” IN INTERNATIONAL HUMANITARIAN LAW 304, 315 (Kjetil Mujezinovic Larsen, Camilla Guldahl Cooper & Gro Nystuen eds., 2013) (discussing the European Framework Decision).

that IHL does not grant combatant immunity to members of organized armed groups, except in those rare cases in which AP I, Article 1(4) applies.⁶⁸ This was correctly concluded by the Dutch courts, but this is not to say that there is no debate on this issue.⁶⁹

B. Incitement and the Freedom of Expression

Incitement to commit terrorist offenses has played an increasingly important role in the criminal prosecution of foreign terrorist fighters in the Netherlands.⁷⁰ Incitement is criminalized in Article 131 of the Criminal Code; Article 132 criminalizes the distribution of inciting texts or images. Both articles increase the maximum penalty if the offense that is incited is a terrorist offense. Under Dutch criminal law, for incitement to be proven a direct connection is required between the incitement and the criminal offense that is the object of the incitement.⁷¹ Incitement can take place directly or indirectly, but must be done publicly. Dutch courts have found that the Internet is a public place, provided the general public has access to the Internet page concerned.⁷² Case law has made clear that incitement can take the form of a request or urging, but can also be an expression of high moral appreciation for an act.⁷³

Prosecution for incitement raises the question of the relationship be-

68. SIVAKUMARAN, *supra* note 24, at 514.

69. In recent years there have been a number of voices that have called for introducing a qualified combatant immunity for members of organized armed groups under IHL. See e.g., EMILY CRAWFORD, *THE TREATMENT OF COMBATANTS AND INSURGENTS UNDER THE LAW OF ARMED CONFLICT* (2010); Geoffrey Corn, *Thinking the Unthinkable: Has the Time Come to Offer Combatant Immunity to Non-State Actors?*, 22 *STANFORD LAW & POLICY REVIEW* 253 (2011).

70. For a general discussion of incitement to terrorism see Yael Ronen, *Incitement to Terrorist Acts under International Law*, 23 *LEIDEN JOURNAL OF INTERNATIONAL LAW* 654 (2010).

71. On incitement in Dutch criminal law, see generally Jeroen ten Voorde, *Artikel 131–132*, in *STRAFRECHT: TEKST & COMMENTAAR* 965–70 (Tineke Cleiren, Jan Crijns & Rino Verpalen eds., 2014).

72. See, e.g., Gerechtshof Amsterdam [Court of Appeal of Amsterdam], (ECLI:NL:GHAMS:2009:BK4139), Nov. 23, 2009, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHAMS:2009:BK4139>; Hoge Raad [Supreme Court] (ECLI:NL:HR:2009:BJ7237), Dec. 15, 2009, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2009:BJ7237>.

73. ALFRED JANSSEN & AERNOUT NIEUWENHUIS, *UITINGSDELICTEN* ¶ 4.2.2.3.2 (2008).

tween this offense on the one hand and the freedom of expression on the other hand. The latter is enshrined in Article 6 of the Constitution of the Netherlands.⁷⁴ It is also set out in Article 10 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), which provides:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.⁷⁵

It follows from Article 10(2) that restrictions on the freedom of expression are permissible only if three criteria are met. First, the interference must be prescribed by law. Second, it must be aimed at one or more of the listed interests or values. Finally, the interference must be necessary in a democratic society. The adjective necessary within the meaning of Article 10(2) implies the existence of a “pressing social need.”⁷⁶ In determining whether there is a pressing social need, a national court must decide whether the interference was proportionate to the legitimate aims pursued and whether the reasons cited by national authorities to justify it are relevant and sufficient.⁷⁷ The aims referred to are the particular interests or values from the exhaustive list in Article 10(2) that are invoked by the government to justify its interference.

The relationship between freedom of expression and incitement was

74. GW. [Constitution] art. 6, sub. 1 (“Everyone shall have the right to profess freely his religion or belief, either individually or in community with others, without prejudice to his responsibility under the law.”).

75. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10, Nov. 4, 1950, 213 U.N.T.S. 222.

76. *Zana v. Turkey*, Application No. 18954/91, Eur. Ct. H. R. ¶ 51 (1997).

77. *Id.*

considered by the district court of The Hague in the case of Maher H.⁷⁸ In this case, the accused had, *inter alia*, distributed jihadist You Tube videos through Whatsapp, and posted a picture of himself with a Kalashnikov and photos of ISIL flags on his Facebook page. The defense argued, *inter alia*, that these expressions did not go beyond what was allowed under the freedom of expression provided by Article 10(1).⁷⁹ In rejecting this argument, the court invoked ECHR, Article 17,⁸⁰ which provides that

[n]othing in th[e] Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth [in the Convention] or at their limitation to a greater extent than provided for in the Convention.

On this basis, the court considered that the freedom of expression does not offer a safe haven for those who incite to terrorist offences.⁸¹

Incitement was also charged in the Context case.⁸² Six of the accused were charged with incitement to commit terrorist offenses, specifically to take part in armed jihad in Syria. The accused used a wide variety of media, including a website, a digital radio channel, YouTube, Twitter and Facebook, and public demonstrations. The court applied the ECHR Article 10(2) criteria finding that the criminalization of incitement was prescribed by law and that its purpose was to prevent the commission of criminal offenses, and was, therefore, a legitimate infringement on the freedom of expression.

As to the question of whether the interference with the freedom of expression was necessary in a democratic society, the judgment contains an extensive discussion of the acts charged as incitement in which the court took into account the content of the media and public statements, the context in which they were made, the places or occasions they occurred, the audience and their apparent objective.⁸³ Although an in depth analysis of this discussion is beyond the ambit of this article, it is interesting to note that the court held that the direct connection between a number of the statements and rousing others to participate in armed jihad in Syria was

78. *Maher H.*, *supra* note 22.

79. *Id.* ¶ 4.7.

80. *Id.* ¶ 4.8.2.

81. *Id.*

82. *Context* case, *supra* note 47.

83. *Id.* ¶ 11.16.

lacking. This was the case, *inter alia*, for the mere display of flags used by ISIS,⁸⁴ and also for two lectures concerning historic texts by Anwar Al-Awlaki. The latter were broadcast on a radio channel and made no reference to the contemporary situation in Syria.⁸⁵

This was not the case, however, for a broadcast lecture by one of the accused in which he, *inter alia*, begged for victory by ISIS and Al-Nusra, and condemned foreign terrorist fighters who had returned from Syria after only several weeks.⁸⁶ Taking into account the nature of the lecture, the radio channel on which it was broadcast and the audience, as well as the context in which it was delivered, the court considered that the apparent intention was to imprint on listeners that traveling to Syria to take part in armed jihad was desirable.⁸⁷

The court held that a number of the statements could be regarded as glorification of, or propaganda for, armed violence, but not as incitement.⁸⁸ The court noted that the former is not a criminal offence in the Netherlands and that propaganda in principle does not fall within the definition of incitement.⁸⁹ The accused were therefore acquitted of incitement with respect to these statements.⁹⁰

Of particular interest are the remarks by the court concerning the fleeting nature of messages on social media such as Twitter and Facebook. The defense of some of the accused stressed this character of social media. It argued that messages placed on Twitter or Facebook could not easily be regarded as indirect incitement, because the context surrounding them is lacking. The messages are usually short, often accompanied by a picture or hyperlink, un-nuanced and lack analysis. Further, it was argued, the messages are consumed quickly, often after superficial reading.

In addressing the defense's arguments, the court considered that while these characteristics may, on the one hand, reduce the impact left by the message, on the other hand, it places a larger responsibility on the sender. This is because the first message seen is the one that will be remembered.⁹¹ In other words, the court does not appear to have considered the fleeting

84. *Id.* ¶¶ 12.5–12.11.

85. *Id.* ¶ 12.35.

86. *Id.* ¶ 12.37.

87. *Id.* ¶ 12.38.

88. *See, e.g., id.* ¶ 12.41.

89. *Id.* ¶ 11.17.

90. *Id.* ¶¶ 12.41, 12.60, 12.73, 12.138 and 12.141.

91. *Id.* ¶ 11.21.

nature of social media as a reason to be more lenient in determining whether incitement has occurred. The court maintained that there is a responsibility on the part of the sender to consider what his/her message will convey when read superficially. It took this responsibility into account in its analysis of specific statements.⁹² All six of the accused were convicted of incitement; for one it was the only offense for which he was convicted.⁹³ He was given a prison sentence of seven days.

C. Terrorist Intent

As indicated above, the Dutch Criminal Code provides that certain crimes, if committed with terrorist intent, constitute a terrorist crime, with a resultant increase in the maximum penalty for these crimes. Article 83a of the Criminal Code defines terrorist intent as “the intention of instilling profound fear in (part of) a country’s population, unlawfully forcing a government to do, refrain from doing or tolerate something, or seriously disrupting or destroying the fundamental political, constitutional, economic or social structures of a country or international organisation.”⁹⁴ This definition is based on the EU Framework Decision.⁹⁵

The interpretation of terrorist intent was at issue in two cases decided by the district court of Gelderland in February 2015.⁹⁶ The cases concerned two men who were arrested in Germany in rental cars with large sums of money and bags filled with, *inter alia*, combat gear, balaclavas, combat goggles and iPhones. There were indications that the brother of one of them was fighting in Syria. Among the offenses charged was conspiracy to commit murder, aggravated assault and arson, all with terrorist intent. This required the court to analyze what constitutes terrorist intent. It held that the necessary intent cannot be deduced solely from the ideology of an accused and that to find terrorist intent there must be objective evidence of its presence. However, in determining whether such evidence existed, the

92. See *e.g.*, *id.* ¶ 12.74 (discussing certain Facebook messages).

93. *Id.* ¶ 22.46 (Imane B.).

94. Dutch Criminal Code, *supra* note 16, art. 83a (unofficial translation).

95. EU Council Framework Decision, *supra* note 17, art. 1(1).

96. Rechtbank Gelderland [District Court of Gelderland], No. 05/862117-13 (ECLI:NL:RBGEL:2015:757), Feb. 9, 2015, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBGEL:2015:757> [hereinafter *Hakim B.*]; Rechtbank Gelderland [District Court of Gelderland], No. 05/862092-13 (ECLI:NL:RBGELD:2015:756), Feb. 9, 2015, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBGEL:2015:756> [hereinafter *Mohamed el A.*].

thoughts and ideology of the accused could be taken into account.⁹⁷ In the case at hand because it was unclear whether the accused intended to travel to Syria and if so, for what purpose, neither the alleged acts nor terrorist intent could be proven.⁹⁸

Another case in which terrorist intent was at issue was decided by the district court of Rotterdam in June 2015.⁹⁹ This case concerned a returned foreign terrorist fighter who was planning a robbery to generate funds for jihad. The court concluded relatively easily that there was terrorist intent as the proceeds of the robbery were to go to jihadist groups known to commit large-scale human rights abuses in Syria. This, according to the court, was sufficient evidence for a finding of terrorist intent.

The courts thus have made a distinction between terrorist intent and ideological motive, but have held that motive can nevertheless play a role in establishing terrorist intent. This will ease the prosecution's burden in establishing intent in cases where the accused is an adherent of an ideology that encourages violence.¹⁰⁰

III. ASSET FREEZES

Another instrument that the Netherlands employs to combat foreign terrorist fighters is that of sanctions. Sanctions include travel bans and asset freezes. Travel bans are implemented via the non-issuance of a visa (to non-national foreign terrorist fighters) and the revocation of passports (for Dutch nationals).¹⁰¹ The section focuses on asset freezes.

The UN Security Council has imposed two asset freezes directly relevant to addressing the threat posed by foreign terrorist fighters present in Syria and Iraq. In Resolution 1373, the Council imposed an asset freeze on persons and entities involved in committing or facilitating terrorism.¹⁰² In

97. *Hakim B.*, *supra* note 96, § 3.3.2; *Mohamed el A.*, *supra* note 96, § 3.3.2.

98. *Hakim B.*, *supra* note 96, § 3.4; *Mohamed el A.*, *supra* note 96, § 3.5.

99. Rechtbank Rotterdam [District Court of Rotterdam], No. 10/960233-13 (ECLI:NL:RBROT:2015:3957), June 8, 2015, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBROT:2015:3957>.

100. Marlou van Noorloos, *De Strafrechtelijke Aanpak van Terrorisme en Syriëgangers vanaf 2014*, DELIK EN DELINKWENT 56 (2015).

101. See *infra* Section V on the revocation of travel documents.

102. S.C. Res. 1373, ¶ 1(c) (Sept. 28, 2001) ("States shall freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and

Resolution 1267 and subsequent resolutions, particularly Resolution 1989, it imposed an asset freeze specifically on Al-Qaida and other individuals, groups, undertakings and entities associated with it.¹⁰³ In Resolution 2253, the Council restated that asset freezes imposed in earlier resolutions apply to ISIL, Al-Qaida and associated individuals, groups, undertakings and entities.¹⁰⁴ In the case of the Netherlands, these regimes have been implemented through EU regulation. The general regime based on Resolution 1373 has been implemented through Common Positions 2001/930/CFSP¹⁰⁵ and 2001/931/CFSP,¹⁰⁶ together with Regulation 2580/2001¹⁰⁷ and subsequent regulations.¹⁰⁸ The Al-Qaida asset freeze has been implemented through EU Regulation 881/2002.¹⁰⁹ Based on this legislation the EU maintains lists of persons and entities to which the asset freezes apply.¹¹⁰

In the case of the asset freeze based on Resolution 1373, States list persons and entities to which the freeze applies on a national basis, in addition to the list maintained by the EU. The legal basis under national law in the Netherlands for doing so is the Sanctions Law of 1977, which authorizes the Minister of Foreign Affairs to promulgate ministerial regulations to implement international obligations.¹¹¹ Issued under this authority, Sanctions Regulation Terrorism 2007-II gives the Minister the authority to freeze the assets of any person or organization which, he, with the agreement of the Minister of Security and Justice and the Minister of Finance, determines fulfills the criteria set forth in Resolution 1373.¹¹² Imposing such an asset

entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities.”).

103. S.C. Res. 1267 (Oct. 15, 1999); S.C. Res. 1989, ¶ 1(a) (June 17, 2011).

104. S.C. Res. 2253, ¶ 2(a) (Dec, 17, 2015).

105. Council Common Position (EC) No. 2001/930/CFSP of 27 December 2001, 2001 O.J. (L 344) 90.

106. Council Common Position (EC) No. 2001/931/CFSP of 27 December 2001, 2001 O.J. (L 344) 93.

107. Council Regulation (EC) No. 2580/2001 of 27 December 2001, O.J. (L 344) 70.

108. Including Commission Regulation (EC) No. 745/2003 of 28 April 2003, O.J. (L106) 22; Council Regulation (EC) No. 1791/2006 of 1 January 2007, O.J. (L363) 1.

109. Council Regulation (EC) No. 881/2001 of 27 May 2002, 2002 O.J. (L 139) 9.

110. European Union, Consolidated List of Persons, Groups and Entities Subject to EU Financial Sanctions, http://eas.europa.eu/cfsp/sanctions/consol-list/index_en.htm (last visited Apr. 17, 2016).

111. Sanctiewet 1977 van 15 februari 1980, Stb. 1980, 93.

112. Sanctieregeling Terrorisme 2007-II, art. 2 Strct. 2007, 248.

freeze is done by means of an administrative decision (aanwijzingsbesluit) that, in addition to freezing the assets of the person or organization, prohibits others from conducting financial services for, or in the interest of, or providing assets to such a person or organization.¹¹³

Between 2002 and January 2016, sixty-four asset freezes had been imposed on fifty-six individuals and on seven organizations (one organization twice) as a consequence of this Regulation.¹¹⁴ When considering whether an individual or organization should be added to the listing, the Ministry of Foreign Affairs will convene a so-called “asset freeze meeting” (bevriezingsoverleg), bringing together representatives of the Ministry of Foreign Affairs, the Ministry of Finance, the Ministry of Security and Justice, the Public Prosecution Service and the AIVD. Circumstances that may result in a listing include the initiation of a criminal investigation; prosecution for commission of, attempted commission of, complicity in or facilitation of a terrorist act; and conviction of such crime. Additionally, a listing may be initiated on the basis of an AIVD official report providing credible information of involvement of a person or organization in a terrorist act, attempted commission of such an act or complicity in, or facilitation of, such an act. In instances where a listing is being considered on the basis of an AIVD official report or an investigation or prosecution by the public prosecutor, the information underlying the report, investigation or prosecution must be examined by the Ministry of Foreign Affairs in order to determine whether it provides sufficient support for a listing. The decision to list a person or organization is ultimately made by the Minister of Foreign Affairs, with the concurrence of the Minister of Finance and the Minister of Security and Justice. It is then published in the government gazette (*Staatscourant*), and communicated in writing to the person or organization concerned, including the grounds for the listing in so far as practically possible. An administrative objection to the decision may be submitted to the Ministry of Foreign Affairs and, if unsuccessful, it may be appealed to the administrative courts.

Assets freezes related to Syria have not been judicially challenged to date. Challenges to other listings, however, provide insight into the standards courts would apply. Particularly illustrative is an April 2015 judgment

113. *Id.*, art. 2(2)–2(4).

114. The Netherlands, *National Terrorism List*, Dec. 31, 2015, <https://www.rijks-overheid.nl/documenten/rapporten/2015/08/27/nationale-terrorisraelijst> (last visited Mar. 21, 2016).

by the district court of Amsterdam.¹¹⁵ This case concerned the listing of three persons under Sanctions Regulation Terrorism 2007-II. They had been extradited to Belgium and convicted there for recruiting persons and raising funds for jihad in Chechnya.¹¹⁶ Asset freezes were subsequently imposed by the Minister of Foreign Affairs on the basis of their conviction in Belgium.¹¹⁷ After their administrative objection was rejected by the minister, they appealed the decision to the administrative chamber of the district court of Amsterdam. They argued, *inter alia*, that there was insufficient information to support the listing, which was based solely on the Belgian judgment (which in the meantime had been overturned by the Belgian Court of Cassation on procedural grounds).¹¹⁸

In reaching its decision, the court indicated that an asset freeze has serious consequences for the person being listed. For this reason, it held the minister in considering a listing has a far-reaching, proactive responsibility to obtain the information on which to base a decision, and the results of that information-gathering exercise must be described with sufficient clarity in the decision to list. The court found that the mere reference to the Belgian judgment did not meet this standard and revoked the listing.

This judgment illustrates that the factual information underlying a listing must meet certain minimum standards. These standards may be difficult to meet. The Ministry of Foreign Affairs is largely dependent on the intelligence services and the Public Prosecution Service to gather information. The former may be reluctant to provide information out of concern that it will become public. Moreover, even if the intelligence service or Public Prosecution Service is willing to obtain the necessary information, doing so may be difficult, particularly if the person concerned is in Syria.

Another challenge posed by listings is how to reconcile them with the goal of deradicalizing foreign terrorist fighters and reintegrating them into society. These are important objectives of counterterrorism efforts and freezing assets may be counterproductive to achieving these objectives in

115. Rechtbank Amsterdam [District Court of Amsterdam], No. AMS 14/6356, 6312, 6303 (ECLI:NL:RBAMS:2015:2350), Apr. 24, 2015, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2015:2350> [hereinafter *Asset Freeze* case].

116. Maarten van Dun, *Amsterdammers Veroordeeld in Belgische Terreurzaak*, HET PAROOL (Jan. 8, 2014), <http://www.parool.nl/amsterdam/amsterdammers-veroordeeld-in-belgische-terreurzaak~a3573850/>.

117. Staatscourant jaargang 2014, nr. 4430, 4431, 4433, Feb. 14, 2014.

118. *Asset Freeze* case, *supra* note 115.

certain circumstances.¹¹⁹

IV. DEPRIVATION OF NATIONALITY

The Dutch government has identified revoking the nationality of persons who travel from the Netherlands and join an armed terrorist group as a priority in combating the foreign terrorist phenomenon.¹²⁰

Existing rules on revoking nationality are set out in the Law on Dutch Nationality.¹²¹ This law provides a number of grounds for revoking nationality, some are mandatory and others lie within the discretionary powers of the Minister of Security and Justice. An important exception precludes revocation if this would lead to statelessness.¹²² This is a consequence of the obligations of the Netherlands as a party to the Convention on the Reduction of Statelessness.¹²³ This Convention prohibits a State party from depriving a person of his or her nationality if such deprivation would render him stateless.¹²⁴ It provides for a limited number of exceptions to this rule, including where a person has “conducted himself in a manner seriously prejudicial to the vital interests of the State.”¹²⁵ In order to be able to avail itself of this exception, the State concerned must at the time of signature, ratification or accession specify its retention of the right to revoke nationality in such instances.¹²⁶ The Netherlands did not make such a declaration.

To address jihadism, the government introduced two bills that would broaden the grounds for revoking nationality. The first, which was adopted by parliament on March 1, 2016, revises the nationality legislation to permit revoking citizenship in the case of terrorist offenses.¹²⁷ The explanatory memorandum accompanying the bill notes that the travel of young persons

119. *See e.g.*, DAAN WEGGEMANS & BEATRICE DE GRAAF, NA DE VRIJLATING (2015).

120. Parliamentary Papers II, No. 253, *supra* note 5, at 5.

121. Rijkswet van 19 december 1984, houdende vaststelling van nieuwe, algemene bepalingen omtrent het Nederlanderschap ter vervanging van de Wet van 12 december 1892, Stb. 268 op het Nederlanderschap en het ingezetenschap (Rijkswet op het Nederlanderschap), 19 december 1984, Stb. 1984, 628.

122. *Id.*, art. 14(6).

123. Convention on the Reduction of Statelessness, Aug. 30, 1961, 989 U.N.T.S. 175.

124. *Id.*, art. 8(1).

125. *Id.*, art. 8(3)(ii).

126. *Id.*, art. 8(3).

127. Parliamentary Papers 2013–2014, 34016 (R2036), No. 2 (Sept. 9, 2014) (Wetsvoorstel tot wijziging van de Rijkswet op het Nederlanderschap ter verruiming van de mogelijkheden voor intrekking van het Nederlanderschap bij terroristische misdrijven).

to Syria for the purpose of terrorist training is particularly topical for the Netherlands.¹²⁸ The bill permits the Minister of Security and Justice to revoke nationality on the basis of a final conviction for the crime of “providing oneself or another the opportunity, means or information or attempting to do so for the commission of a terrorist offense or an offense in the preparation for or facilitation of a terrorist offense, or acquiring knowledge or skills to that effect for oneself or another.”¹²⁹ This criminal offense was inserted in the Criminal Code in 2010.

In 2013, parliament adopted a motion calling on the government to make conviction for this crime a ground for automatic revocation of nationality.¹³⁰ The bill, however, does not provide for automatic revocation. Instead, it makes the act a discretionary decision of the Minister of Security and Justice. The bill does not change the existing prohibition on the revocation of Dutch citizenship if such an action would result in the individual becoming stateless.

The bill has raised a number of questions among commentators. One is whether it conforms to the treaties on revocation of nationality to which the Netherlands is party. In addition to the Convention on the Reduction of Statelessness, the Netherlands is a party to the European Convention on Nationality,¹³¹ which provides a list of possible grounds for revoking nationality. One of these, engaging in conduct seriously prejudicial to the State’s vital interests,¹³² has been invoked by the government as applicable in cases provided for in the bill. According to the government, a conviction under Article 134a of the Criminal Code will always meet this criterion.¹³³ Commentators, however, question whether a blanket decision is appropriate and suggest that revocation of nationality should be determined on a case-by-case basis.¹³⁴

A second bill provides for inclusion in the Law on Nationality the authority to revoke a person’s nationality “in the interest of national security.”¹³⁵ This bill was submitted to parliament in December 2015.¹³⁶ It would

128. Parliamentary Papers 2013–2014, 34016 (R2036), No. 3 (Sept. 9, 2014), at 2.

129. Dutch Criminal Code, *supra* note 16, art. 134a (unofficial translation).

130. Motie Dijkhoff c.s., Parliamentary Papers II 2012–2013, 29754, No. 224 (May 28, 2013).

131. European Convention on Nationality, Nov. 6, 1997, E.T.S. 166.

132. *Id.*, art. 7(1)(c).

133. Parliamentary Papers II 2015–2016, 34016 (R2036), C, at 9.

134. See, e.g., Gerard-René de Groot & Olivier Vonk, *Terrorisme en het Verlies van Nederlanderschap*, 4 ASIEL & MIGRANTENRECHT 397 (2013).

135. Parliamentary Papers II 2015–2016, 34356 (R2064), No. 2, Dec. 4, 2015.

allow the Minister of Security and Justice to revoke the nationality of a person located outside the Netherlands who has joined an organization involved in an international or non-international armed conflict when that organization is listed as a threat to national security by the Minister of Security and Justice.¹³⁷

The bill was drafted with the phenomenon of foreign terrorist fighters in Syria very much in mind. The explanatory memorandum to the bill outlines the threat posed by violent jihadists to national security. It refers, *inter alia*, to the rise of ISIS in Iraq and Syria as a destabilizing factor both regionally and internationally.¹³⁸ It is specifically aimed at preventing the return of violent jihadists to the Netherlands from abroad. To achieve this, revocation of nationality is a first step, followed by the designation of the person concerned as an undesirable alien.¹³⁹

One interesting feature of the proposal is the establishment of a list of organizations that threaten the national security of the Netherlands. The explanatory memorandum states that the list will be based on a selection of organizations placed on international terrorism lists created by the UN or EU.¹⁴⁰ Not all of the organizations on these international lists will be included, however, because not all of them pose a threat to the national security of the Netherlands. The explanatory memorandum also makes clear that the facts showing that a person has joined a terrorist organization must be established by the minister.¹⁴¹ A number of sources can be used for this purpose, including information provided by intelligence agencies and information provided by the Public Prosecution Service. In some cases information may also be publicly available, e.g., on the Internet.

This bill has received a number of critical questions from commenta-

136. *Id.*

137. *Id.* Before doing so, the Minister requires prior approval of the Council of Ministers.

138. Parliamentary Papers II 2015–2016, 34356 (R2064), No. 3, Dec. 4, 2015, at 2.

139. The Aliens Act (Wet van 23 november 2000 tot algehele herziening van de Vreemdelingenwet, Stb. 2000, 495 (Vreemdelingenwet 2000)) provides the possibility for the responsible Minister to declare someone an undesirable alien. The consequence of such a declaration is that the person concerned must leave the Netherlands. Article 197 of the Criminal Code makes the presence of a person who has been declared an undesirably alien a criminal offence.

140. Parliamentary Papers II, 2015–2016, 34356, No. 3, *supra* note 138, at 5.

141. *Id.* at 6.

tors and civil society organizations.¹⁴² One, which is similar to that raised with regard to the first bill, is whether joining a terrorist organization necessarily constitutes conduct seriously prejudicial to the vital interests of the State in the sense of the European Convention on Nationality. A closely related question is whether the act of joining is in and of itself sufficient to conclude that the individual is a threat to the Netherlands's national security, and therefore, whether revocation of nationality is a proportionate measure. Commentators have suggested an additional criterion to the act of joining a terrorist organization, i.e., that the person concerned must be personally involved in the commission of violent acts.¹⁴³

Other questions concern the possibility to appeal decisions to revoke nationality, and whether sufficient legal protection is provided. The bill creates the right to appeal to the district court when notified that the government intends to revoke nationality. A decision by the district court can then be appealed to the administrative jurisdiction division of the Council of State, the highest administrative court of the Netherlands. One question raised in relation to this appeals procedure is how the person concerned will become aware of the government's intention to revoke his nationality. If the person is unaware that the revocation proceedings have been initiated, he cannot effectively challenge them. In such a case, the bill provides for *proprio motu* review by the administrative court. The question is whether this meets the requirement of Article 13, ECHR that "[e]veryone whose rights and freedoms . . . are violated shall have an effective remedy before a national authority."

Other concerns are related to legal representation. The bill does not explicitly provide for legal representation of a person whose nationality is revoked. There is some debate about whether in order to safeguard adequate legal protection, it is necessary to appoint legal counsel.¹⁴⁴ A closely related question is whether, if legal counsel is assigned, he or she will be able to operate effectively without being in contact with the person concerned.

142. *See, e.g.*, Nederlands Juristen Comité voor de Mensenrechten (NJCM), Advies NJCM inzake wijziging van de Rijkswet op het Nederlanderschap in het belang van de nationale veiligheid (Dec. 12, 2015), <https://www.rijksoverheid.nl/documenten/rapporten/2015/12/01/ek-advies-njcm-inz-wijziging-van-de-rijkswet-op-het-nederlandschap-in-het-belang-van-de-nationale-veiligheid>.

143. *See, e.g.*, Adviescommissie voor Vreemdelingenzaken, Advies intrekken Nederlanderschap in belang nationale veiligheid (Feb. 16, 2015), http://acvz.org/wp-content/uploads/2015/04/16-02-2015_wetsadvies-IntrekkingBurgerschap.pdf.

144. *Id.* at 6.

Finally, an interesting point is that the Minister of Security and Justice, as a condition precedent to revoking a person's nationality, must find that there is an ongoing armed conflict. Such determinations are often very sensitive in terms of foreign policy with respect to other States. For this reason States are generally reluctant to make such determinations. This may not be an issue with regard to the situation in Syria and Iraq, but it may in the case of conflicts involving other States.

V. REVOKING TRAVEL DOCUMENTS

Revoking the nationality of foreign terrorist fighters limits their ability to travel. The committee established by the UN Security Council to monitor implementation of Resolution 1373 has underlined that "a very effective way to prevent the creation of foreign terrorist fighters is to ensure that those who attempt to travel to become foreign terrorist fighters are prevented from leaving their country of origin and/or residence to travel abroad to conflict zones."¹⁴⁵ A way to achieve that result, which is less far-reaching than revoking nationality, is to revoke travel documents, particularly passports.

In the Netherlands, a passport is normally issued by the mayor of a person's city or town of residence. Existing legislation allows the Minister of Security and Justice to request the Minister of the Interior and Kingdom Relations to "signal" a passport. This may be done in a number of circumstances. One of these is when there is a reasonable suspicion that the person involved will commit acts outside of the Netherlands that pose a threat to the security and other vital interests of the Netherlands or of friendly powers.¹⁴⁶ Once a document is signaled, the issuing authority must revoke the document. As of June 2015, seventy passports had been revoked through this signaling process.

A person whose passport has been revoked can still obtain a national identity card. Although in the Netherlands the national identity card is not an official travel document,¹⁴⁷ it can be used to travel to a number of coun-

145. Annex to Letter dated 13 May 2015 from the Chair of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, U.N. Doc. S/2015/338 (May 14, 2015), at 16.

146. Paspoortwet van 9 maart 2014, Stb. 2014, 19, art. 23 [hereinafter Law on Passports].

147. *Id.*, art. 2.

tries, including Turkey, the State that is most frequently used by foreign terrorist fighters entering Syria from Europe. This is illustrated by the case of a Dutch woman who was arrested in Turkey in April of 2015, apparently intending to travel to Syria from there. Her passport had been revoked, but she had applied for and obtained a national identity card, which she used to travel to Turkey.¹⁴⁸ To address this lacuna, the government has announced its intention to introduce legislation that would automatically revoke both a person's passport and national identity card when a national travel ban has been imposed on that person.¹⁴⁹ This may raise questions concerning the right to leave and return to one's country, laid down in Article 12(2) and (4) of the International Covenant on Civil and Political Rights, respectively.¹⁵⁰ At the regional level, these rights are guaranteed in Protocol 4 to the ECHR.¹⁵¹

VI. CONCLUSION

As was stated in the introduction, this article does not present a comprehensive overview of the measures taken by the Netherlands to address the foreign terrorist fighters' phenomenon. Given the number and wide range of measures taken, such a review is beyond the scope of this article. Moreover, the legal and policy framework is constantly developing, so that any exhaustive description would very quickly become incomplete. This article has focused on law enforcement in the broad sense of the term. This should not create the impression, however, that the approach by Netherlands is solely—or even primarily—a security-based approach. The U.N. High Commissioner for Human Rights, among others, has warned against such a one-sided approach, calling for stepped up measures to address the

148. *Eindhovense Vrouw op Weg naar Syrië voor Tweede Keer Aangehouden, nu in Turkije*, EINDHOVENS DAGBLAD (Apr. 2, 2015), <http://www.ed.nl/regio/eindhoven/eindhovense-vrouw-op-weg-naar-syri%C3%AB-voor-tweede-keer-aangehouden-nu-in-turkije-1.4838666>.

149. Press Release, NL Government, *Wijziging Paspoortwet Maakt Vervallen Paspoort en Identiteitskaart Jihadgangers Mogelijk*, Sept. 4, 2015, <https://www.rijksoverheid.nl/actueel/nieuws/2015/09/04/wijziging-paspoortwet-maakt-vervallen-paspoort-en-identiteitskaart-jihadgangers-mogelijk>.

150. International Covenant on Civil and Political Rights arts. 12(2), 12(4), Dec. 16, 1966, 999 U.N.T.S. 171.

151. Convention for the Protection of Human Rights and Fundamental Freedoms arts. 2(2), 3(2), Nov. 4, 1950, 213 U.N.T.S. 222, as amended by Protocol 4, Strasbourg, 16.IX.1963.

broader conditions conducive to terrorism and extremist ideologies.¹⁵² The U.N. working group on mercenaries has stated in a report on foreign terrorist fighters that “preventive approaches must be balanced with repressive approaches,” including prosecutions, and “[b]lanket attempts to prosecute all aspiring and returning foreign fighters could have a radicalizing effect and reinforce recruitment narratives.”¹⁵³

This balance is not necessarily easy to strike. There has been some criticism by commentators in the Netherlands that the criminal law framework is being reverted to too easily to address the threat of foreign terrorist fighters. These commentators argue that criminal law is increasingly considered as an *optimum remedium*, where it should be an *ultimum remedium*.¹⁵⁴ Whatever views one holds on the proper role of criminal law in combating terrorism, there is no doubt that the Netherlands has put in place many measures promoting a “soft” approach. These include, *inter alia*, multi-annual consultations with imams on the government’s approach to radicalization, education, discrimination and Islamophobia; appointment of a national confidential advisor to support key figures in the Muslim community who promote an alternative view and take a stand against jihadism; and establishment of a national advisory center to offer support to family members and associates of radicalized individuals or jihadist travelers and assistance, under strict conditions, to extremists who wish to escape the jihadist movement.¹⁵⁵

When looking at the specific measures discussed in this article, one conclusion that may be drawn is that they illustrate the close relationship between international law and domestic law in the field of counterterrorism. This relationship consists of different strands. The first strand is the implementation of international obligations in domestic law. There are many international instruments relating to terrorism generally and an increasing number that focus specifically on foreign terrorist fighters. The prime example of the latter is Security Council Resolution 2178.¹⁵⁶ The implementation of these instruments often requires States to take measures in

152. U.N. Doc. A/HRC/28/28, Sept. 12, 2014, ¶¶ 36–39.

153. Report of the Working Group on the Use of Mercenaries, *supra* note 6, ¶ 78.

154. See e.g., Andreas Kouwenhoven & Sheila Kamerman, “Strafrecht Misbruikt bij Aanpak Terrorisme,” NRC HANDELSBLAD (Nov. 2, 2015), <http://www.nrc.nl/next/2015/11/02/strafrecht-misbruikt-bij-aanpak-jihadisme-1552110>.

155. Parliamentary Papers II, 29754, No. 253, *supra* note 5, at 17–20.

156. Another example is Additional Protocol to Council Terrorist Convention, *supra* note 21.

their domestic law, including criminalizing certain conduct. When measures taken on the basis of domestic implementation are brought before the courts, national judges may look to the international instrument “behind” the national law in interpreting the latter. This may be made more difficult by the ambiguous drafting of the international instrument concerned, as illustrated by the Dutch courts’ grappling with the interpretation of exclusion clauses, in particular preambular paragraph 11 of the European Framework Decision.

This discussion also illustrates a second strand, namely the relationship between international instruments dealing with terrorism on the one hand and IHL on the other hand. The attempts by Dutch courts to clarify this relationship are a welcome development. This author considers that the approach taken by these courts, which focuses on the distinction between international and non-international armed conflicts, is sound under *lex lata*.

A third strand consists of limitations imposed by international law on measures under domestic law. Of particular importance is State respect for human rights obligations when taking measures domestically. As illustrated by the human rights concerns that have been leveled at bills introduced by the government relating to deprivation of nationality, measures to combat foreign terrorist fighters have an impact on human rights. Whether such measures remain within the limits of a State’s human rights obligations depends, in addition to the nature of the measures concerned, on the human rights obligations of that specific State. For the Netherlands, the main point of reference is the ECHR and European Court of Human Rights jurisprudence. Thus far, the measures taken by the Netherlands in combating foreign terrorist fighters have not come before that Court.

A final conclusion concerns cooperation. The discussion of different measures has underlined the need for cooperation between different actors within the Dutch legal system and between different Dutch governmental agencies and units. For example, the Ministry of Foreign Affairs is largely dependent on the AIVD and the Public Prosecution Service to provide the information necessary to freeze assets. Similarly, information provided by the AIVD may be the trigger for a criminal investigation and prosecution by the Public Prosecution Service. Cooperation between national and municipal authorities is required for the revocation of passports.

In the Netherlands, the National Coordinator for Combating Terrorism and for Security (Nationaal Coördinator Terrorismedebestrijding en Veiligheid, NCTV) plays an important role in fostering interagency cooperation. This institution was created in 2005 for that specific purpose. Coop-

eration is not only required at the national level, however. By definition, foreign terrorist fighters cross borders between States. The threat they represent can be addressed effectively only if the different States involved, sending States, transit States and receiving States, increase and strengthen their cooperation. It is the need for cooperation that appears to be the most important challenge in the immediate future.¹⁵⁷

157. It may be noted that the Netherlands is actively involved in efforts to strengthen such cooperation, inter alia in its capacity as co-Chair of the Global Counter Terrorism Forum (GCTF). For example, cooperation was an important theme at the joint meeting of the Foreign Terrorist Fighters Working Groups of the Global Counterterrorism Forum and the Global Coalition to Counter ISIL/Da'esh, convened by the Netherlands on 16 January 2016. See *Minister Koenders Convenes Major Counterterrorism Conference in the Hague*, Ministry of Foreign Affairs of the Netherlands (Jan. 11, 2016), <http://www.the-netherlands.org/news/2016/01/global-counterterrorism-forum.html>.