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NOTE

From: EU Counter-Terrorism Coordinator
To: Delegations
Subject: Effective criminal justice response to the phenomenon of foreign fighters

1. Introduction

1. In August 2014, the European Council recognised that the rise of the Islamic State of Iraq and the Levant (ISIS) is a major threat to European security and that determined action to stem the flow of foreign fighters from Europe who join ISIS in Iraq and Syria is needed. The European Council, therefore, called for an accelerated implementation of the June 2013 package of 22 measures¹ in 4 priority areas: prevention of radicalisation, detection of suspicious travel, criminal justice response and cooperation with third countries. It also requested the Council to propose additional action, as required.
2. On 24 September 2014, the UN Security Council adopted a binding Resolution 2178(2014) which calls on the members of the UN to reinforce their engagement against terrorism, by, inter alia, making it a criminal offense to travel abroad for terrorist purposes.

¹ 9946/13. See also 16768/13 and 9280/1/14

3. Following-up on the European Council Conclusions of August 2014, on 9 October 2014 the JHA Council decided on a number of specific actions that will help to speed up the implementation of the already agreed measures, including such related to the assessment of the effectiveness of the Framework Decision 2008/919/JHA on combating terrorism to address the phenomenon of foreign fighters through criminal law in particular in the light of UNSC Resolution 2178(2014).
4. In view of the above, this paper is meant to launch a debate at EU level on the measures needed to provide an effective criminal justice response to the foreign fighter phenomenon.

2. Existing legal framework

5. At present, Framework Decision 2002/475/JHA on combating terrorism ('FD 2002'²), as amended by Framework Decision 2008/919/JHA ('FD 2008'³) sets up the legal framework for the approximation of the criminal legislation on terrorist offences in the EU Member States. In response to the evolving threats of radicalisation and recruitment for terrorism, linked to rapid changes in the modus operandi of terrorist activists and supporters, 'FD 2008' has introduced 3 new offences related to public provocation, recruitment and training for terrorism , further to the existing harmonised definition of terrorist offences.
6. The recently adopted UNSCR 2178 (2014) requires all States to establish in their domestic legislation as serious criminal offences the following:
 - travel or attempt to travel for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training;
 - financing of such travel
 - organisation, or other facilitation, including acts of recruitment, of such travel

² OJ L 164, 22/06/2002, p. 3–7.

³ OJ L 330, 09/12/2008, p. 21–23.

3. Challenges from a practical perspective

7. The FD on terrorism includes terrorism-related offences which could capture certain acts and conducts of potential foreign fighters or of those recruiting them, such as the participation in a terrorist group or the public provocation, training and recruitment for terrorism.
8. While this legal framework may be possibly sufficient to dismantle recruitment/facilitation networks (such as Sharia4Belgium), it might prove insufficient when it comes to the prosecution of individual foreign fighters who are self-motivated and travel by themselves. In addition, it is overly difficult to collect evidence on activities in foreign jurisdictions, required to prove the alleged criminal activities, such as the participation in a terrorist group.
9. A certain positive trend in terms of providing effective investigation and prosecution of foreign fighters should be noted over the past year. They were six cases opened in different Member States, resulting in convictions of nine persons, and some other cases have entered at trial stage. This is yet an insufficient record of ongoing judicial proceedings considering the scale of the problem, which is usually an indicator for existing shortcomings in the effective enforcement and prosecution of suspected foreign fighters.

4. Existing responses at national level

10. Against this background, a number of Member States have already identified the need to adapt their domestic legislation in order to address specifically the foreign fighters phenomenon. To this effect, the following offenses have been criminalised or are under consideration in some Member States and Schengen partners:
 - Preparation to receive terrorist training in connection to objective material facts, such as preparing the travel to the conflict zone in view of joining a jihadist group there.
 - Preparation for acts of terrorism in connection to objective material facts, such as regular checking of propaganda websites, buying materials for explosives or explosives, identification of targets, military training, suspect financial movements with the intention of committing acts of terrorism or assisting another to commit such acts.

- Traveling despite passport removal and prohibition to leave.
- Actively participating in an armed conflict in a third country or playing a support role for a party of the conflict there and attempt/preparation to do so (with the relevant exceptions for private military and security companies and government sanctioned operations).
- Related offenses by family members: Not disclosing the information as soon as reasonably practicable which a person possesses and knows/believes might be important in preventing the commission by another person of a terrorist act or securing the apprehension, prosecution or conviction of another person for a terrorism related offenses.
- Introducing extraterritoriality for all the offenses.

5. Next steps

11. The two tactical meetings held by Eurojust and the Report that was presented to the Council at the end of 2013⁴ provided useful insights into the different approaches already adopted in the Member States to counteract the foreign fighters phenomenon. The upcoming Eurojust report, expected by the end of the year, will provide additional information about arrests, pending investigations and convictions for terrorist charges linked to foreign fighters, as well as information on the legal framework and problems encountered in practice.

⁴ 16878/13 RESTREINT UE

12. In this context it seems timely and necessary to launch a debate at EU level on providing a coherent criminal justice response to the phenomenon of foreign fighters. Such debate might address in particular the need to review the existing legal framework at EU level in order to respond to the current threats posed by terrorism, including extension of the scope of the FD on terrorism to even earlier stages of preparatory acts or tackling the terrorist intent requirement from a broader prospective. The debate would benefit from exploring different approaches to this matter which would not require a direct terrorist intent, such as criminalising joining armed forces abroad, which would include non-State actors or criminalising the violation of a travel ban to leave the country.
13. In terms of sentencing, taking into account the increasing number of young adolescents engaging in foreign fighters activities, alternatives to prison sentences, such as probation measures and participation in re-integration programmes need to be explored. In this respect, the interaction between extended criminalisation and preventive efforts needs to be examined more closely.
14. Discussions about extended criminalisation should take full account of the fundamental rights implications, such as the presumption of innocence, legal certainty, proportionality both as regards criminalisation and the level of penalties.
15. Setting up a coherent criminal justice response to the foreign fighters phenomenon could be further supported by a broad range of concrete initiatives with the active participation of the Commission, Europol, Eurojust, EJTN, CEPOL and the EU Fundamental Rights Agency. Those measures could include concrete initiatives on the exchange of best practices and/or training as regards collecting and use of evidence, for example internet-based, sentencing practices, reinforced cooperation with third countries, including extradition and MLA in foreign fighters cases, capacity building etc.

In view of the above delegations are invited to express their views on the following points:

- a/ To what extent the existing measures in your national legislation are compliant with the requirement of UNSCR 2178(2014) to criminalise certain types of behaviour linked to the foreign fighters phenomenon? Do you plan to amend your legislation and what type of measures do you consider to this effect?**

 - b/ How would you assess the adequacy of the Framework Decision on terrorism in the context of the problems posed by foreign fighters to ensure an effective common EU legal framework to address this phenomenon? Which aspects need to be reviewed in this respect? Would it be desirable to have a collective implementation of UNSCR 2178(2014)?**
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