

## 'Foreign fighters'

Member States' responses and EU action in an international context

### SUMMARY

As the hostilities in Syria and Iraq continue and terrorism activities worldwide seem to be on the rise, EU Member States are increasingly confronted with the problem of aspiring and returning 'foreign fighters'. Whereas the phenomenon is not new, its scale certainly is, which explains the wide perception of these individuals as a serious threat to the security of both individual Member States and the EU as a whole.

The problem has been addressed within international fora including the United Nations, which in 2014 adopted a binding resolution specifically addressing the issue of foreign fighters. The EU is actively engaged in relevant international initiatives.

Within the EU, security in general and counter-terrorism in particular have traditionally remained in the Member States' remit. The EU has however coordinated Member States' activities regarding the prevention of radicalisation, the detection of suspicious travel, criminal justice response and cooperation with third countries. The EU is seeking to strengthen its role given the widely shared feeling of insecurity in the wake of recent terrorist attacks. Existing and new paths for EU action are being explored, including the revived EU passenger name records (PNR) proposal.

Individual Member States have stepped up their efforts to address the problem using various kinds of tools including criminal law, administrative measures and 'soft tools', such as counter-radicalisation campaigns. The Member States most affected have also cooperated with each other outside the EU framework.

The United States has a particularly developed counter-terrorism framework now being used to deal with foreign fighters. Since 9/11, the EU and the US have cooperated on counter-terrorism despite different philosophies on issues such as data protection.



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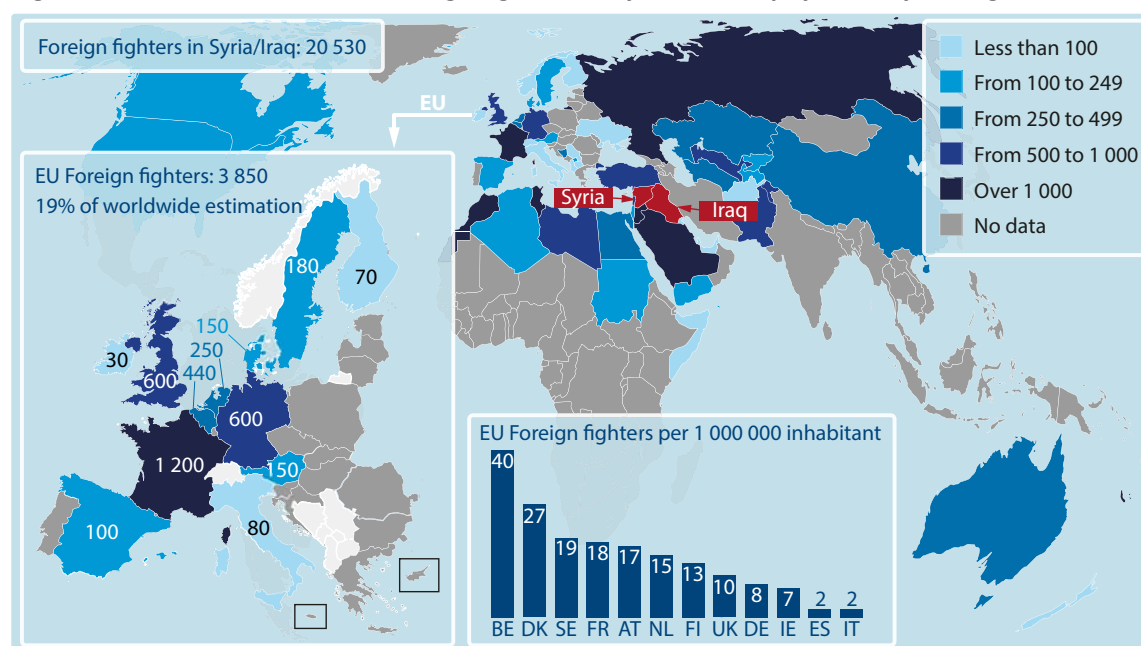
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## A new dimension to an old threat

The phenomenon of foreign fighters – i.e. individuals who join insurgencies abroad and whose primary motivation is ideological or religious rather than financial<sup>1</sup> – is anything but new. It is estimated that from 1980 to mid-2010 between 10 000 and 30 000 such fighters took part in armed conflicts in the Muslim world.<sup>2</sup> It seems, however, that since the Arab Spring protests turned into a fully fledged civil war in Syria, the phenomenon has acquired an entirely new dimension. Whereas until recently it appeared that terrorist activity was declining, the trend has changed markedly. This may be illustrated by the rise of the terrorist group calling itself 'Islamic state' (also known as *Daesh* or ISIL) that has captured large parts of Iraqi and Syrian territory and announced the reestablishment of the Caliphate.

Whereas this new surge of jihadism is not restricted to Syria and Iraq (the activities of *Boko Haram* in Nigeria being one striking example elsewhere), the Syrian war has attracted more foreign fighters than any other past or present conflict. Their exact number cannot be established and the estimates available vary. According to [ICSR](#) (a London-based research centre), in the second half of 2014 the overall number of foreign combatants in Syria and Iraq exceeded 20 000. An estimated 3 850 fighters – representing 19% of the total – originated from the EU (see figure 1). In January 2015, Rob Wainwright, the Director of Europol [quoted](#) the figure of 3 000 to 5 000.

**Figure 1: Estimated number of foreign fighters in Syria and Iraq by country of origin in 2014**



Source: [ICSR](#), 2015. NB the figures used are ICSR's higher estimates in all cases.

The majority of European foreign fighters leave to join jihadist groups, including the 'Islamic State' and Jabhat al-Nusra, whose ideology is hostile towards Western democracies. These individuals are perceived as a serious security threat to the EU Member States because they may have become further radicalised and acquired combat experience, and therefore be capable of carrying out deadly terrorist attacks once they return to Europe. These concerns are exacerbated by the fact that some jihadist groups have urged Muslims in the West to undertake such attacks, examples of which have already happened: the perpetrator of the 2014 shooting in the Jewish Museum of Brussels is believed to have spent over a year in Syria, while the individuals

behind the 2015 attack on the French magazine *Charlie Hebdo* had reportedly received terrorist training in Yemen.

The actual threat represented by foreign fighters can only be assessed on a case-by-case basis. While some of them die in fighting or are captured abroad, others may choose not to return or may come back disillusioned and unwilling to engage further in extremist activities. From a sample group of fighters presented in one study, one in nine of those who had gone to fight returned to perpetrate attacks in the West. The author concluded that while foreign fighters cannot in general be seen as domestic fighters-in-the-making, this kind of experience is still one of the strongest predictors of individual involvement in domestic terrorist attacks. Moreover, the attacks perpetrated by foreign fighters having battlefield experience have been more lethal than the average.<sup>3</sup>

An EU debate has been launched on how to best address the foreign fighters issue and has evolved into debates in parallel at Member State and international levels, amidst growing concerns about the new worldwide surge of terrorism. The debate has been heavily marked by the 7 January *Charlie Hebdo* terrorist attack and the ensuing widely shared feeling of insecurity.

## Terrorist hotspots and the international response

### Regions of concern

The main problem stemming from the terrorist threat and the foreign fighters phenomenon is the difficulty of containing them in one particular country; porous borders and media communication technology facilitate the widening reach and dispersion of terrorists and violent extremists' ideologies. The fear of contagion and development of a safe haven that would allow clustering of terrorist groups in neighbouring countries, prompted many states to adopt anti-terrorism laws, some of them already enacted in the aftermath of 9/11, others introduced or amended more recently, after the new wave of violent extremism in the Middle East. The main geographic areas of concern lie beyond the Middle East; the Sahel area and South Asia. In particular, while the main centres remain the conflict areas in Libya, Syria, Iraq and Afghanistan, terrorist groups set up their bases in less [stable countries or regions](#) such as Yemen, Pakistan, Somalia, Sudan and Mali. These countries lack the ability to effectively control their territory, to monitor and prosecute terrorists. Laws permitting the prosecution of terrorist-related crimes may well be in place (as is the case in Yemen), however poorly trained and ill-equipped military forces, and corruption in border-security management weakens these countries' response capability to the terrorist threat.

### International cooperation

The international community has addressed the foreign fighters phenomenon within existing counter-terrorism fora including the United Nations (UN). In September 2014, the UN Security Council specifically addressed the problem by adopting a binding [Resolution 2178 \(2014\)](#) (see box) which calls on UN members to make it a criminal offence to travel abroad for terrorist purposes.

#### UNSC Resolution 2178 (2014)

UN Members are supposed to ensure that their domestic laws establish serious criminal offences with regard to:

- 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 of such travel.

The UN is a close partner of the [Global Counter Terrorism Forum](#) (GCTF). The Forum has adopted the first international [good practices on foreign fighters](#) which inspired the shaping of the UNSC Resolution 2178. A GCTF Working Group – co-chaired by Morocco and The Netherlands – and follows up on the implementation of those good practices, as well as coordinating initiatives addressing the foreign fighters phenomenon.

## Activities at EU level

### The timeline of relevant policy instruments

Whereas the primary responsibility for addressing terrorism-related issues lies with the Member States, the EU has played a supportive and coordinating role, which it intends to strengthen. According to Gilles de Kerchove, [the EU Counter-terrorism Coordinator](#) (CTC), the foreign fighters issue has been the EU's top priority on counter-terrorism since mid-2013.<sup>4</sup>

In 2013, the Counter-Terrorism Coordinator proposed 22 measures to address the problem in six priority areas: better understanding of the phenomenon, prevention of radicalisation, detection of suspicious travel, investigation and prosecution, returnees and cooperation with third countries. These measures were endorsed by the [Justice and Home Affairs \(JHA\) Council of June 2013](#).

In June 2014, the European Council defined [strategic guidelines](#) for legislative and operational planning for the coming years within the area of freedom, security and justice (post-Stockholm programme). The guidelines stressed the need to mobilise all available instruments for judicial and police cooperation, with a reinforced coordination role for Europol and Eurojust, including action to address the phenomenon of foreign fighters.

In its [Conclusions of 30 August 2014](#), the European Council called for accelerated implementation of the 22 measures. The recognition of ISIL as a major threat to European security led to the adoption of a specific EU strategy against it (14479/14 EU RESTRICTED). The [outline](#) of the counter-terrorism strategy for Syria and Iraq, with particular focus on foreign fighters, has been made accessible to the general public.

In October 2014, the JHA Council [adopted](#) additional measures on foreign fighters and decided that checks at external borders should be improved under the existing legal framework. Moreover, the Ministers reiterated the call for the swift adoption of the EU Passenger Name Records (PNR) proposal. At the JHA Council in December 2014 the problem was further discussed, the two areas of focus being:

- judicial response (including the need to update the [Council Framework Decision](#) of 13 June 2002 on combating terrorism in the light of the recent adoption of the UNSC Resolution 2178 (2014).
- improving information exchange (with the enhanced role of Europol and Eurojust).

The French Interior Minister invited his peers from several EU Member States to meet on 11 January 2015 in Paris to discuss the issue and a further course of action. This meeting resulted in a [statement](#) in which they condemned the *Charlie Hebdo* attack and committed themselves to strengthening cooperation at EU level. This commitment was [reiterated](#) at the informal meeting of JHA Ministers in Riga on 29 and 30 January.

**Main areas for EU action<sup>5</sup>***Prevention of radicalisation*

In the aftermath of the attacks at the Jewish museum in Brussels, the 2005 [EU Strategy for Combatting Radicalisation and Terrorism](#) was [revised](#) in June 2014. The European Commission's [Radicalisation Awareness Network](#) (RAN) has been collecting data on existing initiatives addressing foreign fighters (such as the [Cities Conference on Foreign Fighters](#)). In this connection, the RAN issued the [Declaration of Good Practices for Engagement with Foreign Fighters for Prevention, Outreach, Rehabilitation and Reintegration](#).

Radicalisation is also being addressed through initiatives concerning the internet. These include developing counter-narratives to extremist propaganda, internet safety education in schools and high-level dialogue with internet companies. The Counter-Terrorism Coordinator has proposed establishing a forum with representatives from the EU institutions, Member States and industry to discuss related issues. He has also promoted the involvement of the EU institutions and Europol in referring extremist content on social media platforms for removal, as the Counter-Terrorism Internet Referral Unit (CTIRU) does in the **UK**. The more controversial issue of obliging internet and telecommunications companies to share encryption keys (widely used following Edward Snowden's revelations) with national authorities has also been considered.

*Detection of suspicious travel*

The EU passenger name record ([PNR proposal](#)) is among the major tools debated. The [proposed directive](#) provides for the collection, use and retention of PNR data on passengers taking international flights to and from the EU. The text, rejected by the LIBE Committee in April 2013 amidst concerns over its necessity, proportionality, and impact on data protection, was then referred back to the Committee. It is not clear at this point whether the Commission will make an amended proposal or if work on the existing one will be pursued.<sup>6</sup>

Whereas a significant increase in the use of the Schengen Information System (SIS II) has been noted since 2013, several Member States have been setting up their own systems to monitor travel information, including national PNR systems. Up to November 2014, 15 Member States had received Commission funding to build so-called Passenger Information Units. The CTC has invited the Commission to present a proposal amending the Schengen Borders Code to allow for broader consultation of SIS while developing technical solutions to reduce the impact on passenger waiting times at passport controls.

**Strengthening Europol**

Gilles de Kerchove argues that Member States do not contribute enough to the Europol Focal Point Travellers, since reportedly only four of them provide 80 per cent of the data. He also suggested that a European Counter-Terrorism Centre should be created at Europol following the example of the existing [European Cybercrime Centre](#).

Moreover, Europol has been running the so-called Focal Point TRAVELLERS – a pan-European analytical tool aimed at collecting, analysing and sharing information on the recruitment and travel facilitation of suspected individuals.

*Criminal justice response*

In the EU, criminal legislation on terrorist offences has been approximated to some extent by Framework Decision 2002/475/JHA on combating terrorism, as amended by the [Council Framework Decision 2008/919/JHA](#) ('FD 2008'). The 'FD 2008' requires that Member States criminalise public provocation to commit a terrorist offence,



recruitment for terrorism, as well as providing (but not receiving) training for terrorism. Specific actions to be taken following the October 2014 JHA Council include the assessment of the effectiveness of the FD 2008/919/JHA with respect to the foreign fighters issue in light of [UNSC Resolution 2178 \(2014\)](#). The collective implementation of this resolution is being considered<sup>7</sup> to avoid prosecution gaps throughout the EU and set standards on respect for individual rights<sup>8</sup>.

Possible improvements to [EU firearms legislation](#) and [ECRIS](#) (the European Criminal Records Information System) are among other issues being discussed.

#### *Cooperation with third countries*

The issue of foreign fighters has been addressed in political dialogues on counter-terrorism with third countries including Turkey (the porous border of which allows easy passage to Syria), the US, Saudi Arabia, Russia, Canada and the UN. Discussion also takes place in the framework of Frontex, Eurojust and Europol and within established international fora (e.g. the EU is a member of the [GCTF](#)), as well as through other channels.

#### **Leaving fundamental rights aside?**

In its 2011 [resolution](#) on EU counter-terrorism policy, the European Parliament stressed that the Charter of Fundamental Rights should always be the compass for EU policies in this field and for Member States implementing these policies. In this spirit, the Director of the EU Fundamental Rights Agency and European Data Protection Supervisor were invited by the EP Committee on Civil Liberties to a recent [joint debate](#) on foreign fighters. However, with the current EU and national discourses heavily marked by the feeling of urgency, data protection and fundamental rights aspects appear to be marginalised in the initiatives presented by various actors.

### **EU Member States' individual responses**

The Member States most affected by the phenomenon have been making considerable efforts to address it. *Ad hoc* coordinating structures have been set up, and attempts made to monitor both individuals intending to take part in *jihād* outside EU borders and returnees. In [France](#), 2 680 additional jobs related to counter-terrorism will be created over the next three years and €425 million earmarked for this purpose. According to Gilles de Kerchove, secret services are at this point capable of identifying around 70% of aspiring EU foreign fighters.<sup>9</sup> National authorities have been assessing the efficiency of existing legal frameworks, with some countries considering amendments to their laws.

Measures being used and debated can be largely divided into three categories:

- Criminal provisions;
- Administrative tools of preventive or punitive nature, and
- 'Soft' counter- or de-radicalisation measures.

Most Member States have addressed the problem at both departure and return stage through a mix of repressive and preventive measures.

#### **Criminal law measures**

By October 2014, six cases had been opened in the EU with nine persons convicted, whilst some other cases had reached trial.<sup>10</sup> This proves that successful prosecution of foreign fighters is possible. Cases come up against, however, various legal limitations and practical difficulties.

*Limits to jurisdiction*

With all EU Member States having ratified and implemented the Rome Statute of the International Criminal Court (ICC), foreign fighters could be made accountable for 'international crimes' (war crimes, crimes against humanity, and genocide) committed outside EU borders (within the limits of the [ICC's jurisdiction](#) though, which is not universal). However, in May 2014, Russia and China [vetoed](#) the referral of the situation in Syria to the ICC by the UN Security Council.<sup>11</sup>

As to 'ordinary' and terrorism-related offences (defined in criminal codes or specific counter-terrorism legislation), they may be prosecuted by individual Member States under condition that the offence has been committed on their territory (principle of territoriality), by their nationals (active nationality principle) or against their nationals (passive nationality principle). This means that non-nationals who commit crimes outside the EU are likely to escape prosecution since – in contrast with the US where extraterritorial jurisdiction is explicitly provided for in law – in the EU such jurisdiction is very controversial and could be applied, if at all, only exceptionally for 'international crimes'. Therefore some Member States have considered changing laws to allow for extraterritoriality also with respect to other categories of offences.<sup>12</sup>

*Questions as to the adequacy of terrorism-related offences*

In line with the [Council Framework Decision 2008/919/JHA](#) ('FD 2008'), national criminal laws cover a series of terrorism-related offences. Those include 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 a step further and criminalised receiving such training. The use of these provisions to prosecute individual foreign fighters seems problematic, as travelling to a conflict area is normally not a crime *per se*, unless there are grounds to prove an attempt at committing a specific offence (interestingly, the first successful prosecution of foreign fighters intending to travel to Syria was based on provisions of **Dutch** criminal law on murder and arson, and not terrorism-related ones).

Member States have tried to address these limitations by reinterpreting existing rules or creating new ones. Attempts are being made at extending the scope of legal provisions to cover various preparatory acts and criminalising travel to conflict zones. In **Belgium** the idea of such criminalisation was first abandoned, as it was argued *inter alia* that it would have limited deterrent effect and would discourage families from reporting on their relatives.<sup>13</sup> However, following the anti-terrorist raid in Verviers, it is now one of the [12 measures](#) included in the proposal for a new counter-terrorism law. The **German** government also [intends](#) to criminalise travel to conflict zones.

*Evidence collection*

Whatever the qualification of the incriminating behaviour, to successfully prosecute a foreign fighter, one needs to demonstrate that a criminal act has been committed. This is not a straightforward task due to difficulties in collecting evidence abroad, especially in times of war. However, the increasingly widespread use of photos and video footage by terrorist groups, and individual combatants posting self-incriminating material on social media (e.g. Facebook) provides additional paths for gathering evidence.

**Administrative measures**

Some Member States including **Denmark**, [France](#), [Germany](#) the **Netherlands** and the **UK** provide for the possibility to confiscate travel documents (e.g. passports) of individuals suspected of interest in jihadist activity. This is limited to the Member State's nationals,

whilst foreigners may have their residence permits revoked or receive an order not to leave the country or be prohibited from entering it. In the **UK**, the [Counter-Terrorism and Security Bill](#) (currently before Parliament) would strengthen powers to seize passports and temporarily exclude British nationals from the UK. **Germany** has also used 'travel disruption plans' comprising various measures preventing departures. German security services not only undertake so-called 'hazard talks' (*Gefährde-ansprachen*) with aspiring combatants, making them aware of the implications of their actions, but also liaise with police and administrative authorities to be able to prevent travel at various levels. In **Belgium** some city councils have deleted individuals known to have travelled to Syria from the residence register, thus stripping them of access to social welfare.<sup>14</sup>

The **UK** and the **Netherlands** have gone even further, making it possible to revoke nationality. [In the UK](#), the Home Secretary can thus deprive individuals, who obtained their citizenship status through naturalisation, of their British citizenship if it is 'conducive to the public good' because they have engaged in conduct 'seriously prejudicial' to the UK's vital interests. This is possible even if this would leave them stateless.<sup>15</sup> Such decisions can be challenged in court, although only within one month. In the **Netherlands** revocation of nationality is not possible if it would render the person stateless.

There are additional administrative measures at hand when dealing with minors (child protection measures). In the **Netherlands**, the Child Protection Agency may impose custody in childcare institutions, curfews, as well as taking away identity documents of aspiring teenage combatants and children whose parents intend to travel to a conflict zone. In **Denmark** authorities may confiscate passports of minors and refuse to issue new ones unless the parents agree to it.<sup>16</sup>

It is important to note that the concurrent use of judicial and administrative measures may have undesired consequences, for example when the revocation of a document raises an individual's suspicions thus hindering an ongoing investigation.

### Soft measures

Whereas some countries seem to have favoured a repressive approach (e.g. **France** and **Spain**), others have opted for an 'inclusive' model (**Denmark**), relying on soft measures. The use of such measures is explained by limitations to a repressive approach, arguably leading to further exclusion of already marginalised groups and thus polarising societies. It is also based on a premise that individuals may pose various levels of threat to societies, some of them being able – if assisted – to return to normal life.

Soft tools are aimed either at preventing radicalisation or at reintegrating individuals already affected (e.g. prisoners). At an individual level, mentoring schemes, vocational training and psychological support to address post-traumatic stress are offered. These are coupled with awareness-making campaigns and efforts to strengthen relationships with ethnic communities and families. Various actors are involved including police, religious leaders, social workers and NGOs.

**Denmark** has a long-established counter-radicalisation strategy and has applied the so-called [Aarhus model](#). Foreign fighters wishing to return have been repatriated, offered employment and treatment for injuries. Steffen Nielsen, a Danish crime prevention advisor, referred to the practice of preventive arrests in the UK, comparing this with Danish practice: 'We are actually embracing them when they come home. Unlike in



England, where maybe you're interned for a week while they figure out who you are, we say, "Do you need any help?"<sup>17</sup>

In January 2015, **France** launched an online [campaign](#) addressing radicalisation by presenting counter-narratives to extremist propaganda. In **Germany**, numerous counter-radicalisation initiatives have been taken at *Land* level, as in the case of Hessen, where authorities visit schools to discuss related issues, and hotline and consultation centres have been made available to parents. At federal level, [the Federal Office for Migration and Refugees \(BAMF\)](#) has supported similar initiatives, trying to involve families of radicalised individuals.<sup>18</sup>

### **Cooperation between the Member States most affected**

The group of Member States affected by the problem has been growing. It now includes Belgium, Denmark, France, Germany, the Netherlands, Sweden, the UK and – to a lesser extent – Austria and Spain. Since 2013, their interior ministers have met regularly within the so-called 'EU6 Group' and then the 'EU9 Group', led by Belgium and recently joined by Ireland. In July 2014, they approved a set of measures pertaining *inter alia* to the better use of SIS II, targeted border controls, and sharing of information among national authorities and with Europol. These measures have been promoted at EU level. Moreover, several Member States, led by the Netherlands, have started to develop informal joint policies on social media and the legal framework for addressing the internet in connection with counter-terrorism.<sup>19</sup>

### **Case study: the United States**

#### **Counter-terrorism laws and policies**

The number of US foreign fighters is uncertain but was considered to be around 100 in September 2014.<sup>20</sup> US actions against foreign fighters are part of the broader [national counter-terrorism strategy](#), which relies on a wide range of tools developed in the aftermath of September 2001. The main policy lines followed by the US include a 'Whole of Government' approach and [repressive and preventive actions](#), taken abroad and domestically, as well as efforts to construct a global partnership on counter-terrorism. In this vein, since September 2014 the US has led an international coalition against 'Islamic State'.

The main bulk of domestic as well as foreign US activities have been focused on increasing monitoring and prosecution of foreign fighters. A whole structure was created to disseminate information on suspected terrorists and process new information for monitoring.

The National Security Administration's Domestic Surveillance Program, [made public by Edward Snowden](#), a former contractor of NSA, allowed NSA to obtain telephony and internet metadata, i.e. information not on the content but on the context of internet and communications connections. Such information includes calling records, and localisation of the person via cell-phone and social-network connections. All this information is gathered to create a mapping of suspected individuals and groups (through data mining and social network analysis).<sup>21</sup> While the instrumental importance of the programme for counter-terrorist activities can be recognised, this still attracted debate in the US on its legal implications, in particular for the protection of the First Amendment (freedom of expression) and for the protection of data privacy.<sup>22</sup> Indeed doubts were cast on the ability of such data mining and social network analysis to identify real criminal intent, while suspicion of criminal intent would instead be raised in

situations where freedom of expression should apply. While programmes like the Domestic Surveillance Program can be used to identify suspects, other databases are kept on already known or suspected terrorists. The [Terrorist Screening Database](#), TSD (also known as the Watchlist) is maintained for that purpose by the FBI Terrorist Screening Center to disseminate information useful to various other agencies and department databases, thus following the policy line of the 'Whole of Government' effort to streamline and disseminate information.

Information on suspects is often not enough to initiate proceedings against individuals. Evidence is sought then via undercover investigation undertaken mainly by [FBI agents](#). When sufficient evidence is gathered, prosecution of 'material support to terrorist organisations' is done through a [series of laws](#) enacted in 1994 and modified in the aftermath of 9/11 (by the so-called Patriot Act). US measures against foreign fighters concern both direct participation in terrorist acts as well as any kind of other material support (such as financial or weapons supply) and intangible aid, such as training, service and expert advice or assistance. Some measures may also be applied to non-US citizens through extra-territorial jurisdiction.<sup>23</sup> The provisions providing for extra-territoriality are fairly broad in application<sup>24</sup> and easily cover most cases concerning foreign fighters. The US is exploring the introduction of further punitive actions such as the denationalisation of US foreign fighters to prevent their return home. Denationalisation is currently not feasible under US law, where US citizens can lose their citizenship only in very limited cases. Currently, the US authorities keep a 'no fly list' to refuse return to individuals suspected of being terrorists.

Within the Terrorist Screening Database, most names are non-US citizens.<sup>25</sup> Not surprisingly, one of the main fields of action of the Obama administration has been to get collaboration from other countries to gather evidence and apprehend foreign fighters.<sup>26</sup>

### Cooperation with the EU

Since the aftermath of 9/11, EU-US cooperation in data sharing and border security activities has been sealed with several agreements.<sup>27</sup> These information-exchange agreements complement existing US surveillance programmes and are used *inter alia* for the monitoring of foreign fighters; for example: data from PNR agreements, including the [EU-US PNR agreement](#) of 2012 – similar to those signed by the EU with [Australia](#) and [Canada](#) – are used by the US customs authority (CBP) and the Transport Security Authority as part of their respective surveillance programmes of flights, passengers and cargos. Similarly, the so-called [Swift agreement](#), allowing US and EU authorities to access financial data held by the Belgium-based consortium of banks known as Swift, is an integral part of the US Treasury Department's Terrorist Finance Tracking Program. The US also has an agreement with [Europol](#) and [Eurojust](#), on cooperation in investigations and exchange of information on suspected terrorists; moreover some EU Member States collaborate alongside the US within the [Interpol Foreign Terrorist Fighter Programme](#). The US has concluded two agreements with the EU, in force since 2010, on [mutual legal assistance](#) and [on extradition](#). It is important to point out that, under Article 13 of the Agreement on Extradition, the death penalty cannot be applied or carried out.

While the value of these agreements for enhancing security and fighting terrorism is recognised, tensions remain with respect to their implications for data protection and have even increased since the NSA surveillance programme was revealed. In response

to the NSA scandal, the European Parliament passed (in March 2014) a [resolution](#) on the basis of the [Moraes report](#) containing a number of recommendations for future EU-US relations. In order to find more common ground on the protection of data privacy, the EU and the US have started negotiating an [umbrella agreement](#) on data privacy and protection (DPPA).

A further difficulty in US-EU cooperation stems from the current EU institutional setting. Notwithstanding the various competences of the EU on terrorism, prime competence still remains in Member States' hands. Mostly, actions in the field of the judiciary and police are carried out via cooperation among EU national authorities. Cooperation in intelligence matters is not always effective and the US has often preferred to cooperate directly with national entities.<sup>28</sup>

## Main references

[Foreign Fighters: An Overview of Responses in Eleven Countries](#) / L. Vidino, L. Pighi and A. Snetkov, CSS, 2014.

[Report on the implementation of the EU Counter-Terrorism Strategy](#) / EU Counter-Terrorism Coordinator, 2014.

[EU CTC input for the preparation of the informal meeting of Justice and Home Affairs Ministers in Riga on 29 January 2015](#) / EU Counter-Terrorism Coordinator, 2015.

[Addressing the Foreign Terrorist Fighters Phenomenon from a European Union Perspective](#) / ICCT, December 2014.

[Foreign fighters and European responses](#) / EPRS Keysource, Roy Hirsh, January 2015.

## Endnotes

<sup>1</sup> One of numerous existing definitions, proposed by Thomas Hegghamer. See [Foreign Fighters under International Law](#) / Geneva Academy of International Humanitarian Law and Human Rights, 2014, pp 5–6.

<sup>2</sup> [The Rise of Muslim Foreign Fighters: Islam and the Globalization of Jihad](#) / T. Hegghamer, International Security, vol. 35, no. 3, p. 53, Winter 2010/2011.

<sup>3</sup> [Should I Stay or Should I Go? Explaining Variation in Western Jihadists' Choice between Domestic and Foreign Fighting](#) / T. Hegghamer, American Political Science Review vol. 107, no. 1, 2013, pp 6 and 10. See however also [Homeward Bound? Don't Hype the Threat of Returning Jihadists](#) / D. L. Byman and J. Shapiro, 2014 whereby the authors warn against a possible overreaction by Western governments. In the same vein, see also [Europe considers surveillance expansion after deadly attacks](#) / P. Hockenros, The Intercept website, 20 January 2015.

<sup>4</sup> [Report on the implementation of the EU Counter-Terrorism Strategy](#) / EU Counter-Terrorism Coordinator, 2014.

<sup>5</sup> In November 2014, Gilles de Kerchove submitted a [report](#) on the implementation of the EU Counter-Terrorism Strategy to the Council and then provided [input](#) for the preparation of the January informal meeting of JHA Ministers in Riga. The two papers provide deep insight into paths currently explored by the EU and have therefore been extensively used as sources for this section.

<sup>6</sup> [EU PNR – the way forward: Following the Orientation Debate of 21 January 2015 on the European Agenda on Security](#) / a note from the European Commission leaked by Statewatch, 2015.

<sup>7</sup> [Report on the implementation of the EU Counter-Terrorism Strategy](#) / EU Counter-Terrorism Coordinator, 2014, p. 6.

<sup>8</sup> Gilles de Kerchove's [address](#) to the EP Committee on Civil Liberties, Justice and Home Affairs, 27 January 2015.

<sup>9</sup> [Ibid.](#)

<sup>10</sup> [Effective criminal justice response to the phenomenon of foreign fighters](#) / EU Counter-Terrorism Coordinator, 2014, p. 3.

<sup>11</sup> [New Paths to Accountability for Crimes in Syria and Iraq \(Including ICC Jurisdiction Over Foreign Fighters\)](#) / J. Trahan, 2014.

<sup>12</sup> [Effective criminal justice response to the phenomenon of foreign fighters](#) / EU Counter-Terrorism Coordinator, 2014, p. 4.

<sup>13</sup> See [Dealing with European Foreign Fighters in Syria: Governance Challenges & Legal Implications](#) / E. Bakker, Ch. Paulussen and E. Entenmann, ICCT Research Paper, December 2013, p. 13 for a description of this discussion.

- <sup>14</sup> [Foreign Fighters: An Overview of Responses in Eleven Countries](#) / L. Vidino, L. Pighi and A. Snetkov, CSS, 2014. p. 8.
- <sup>15</sup> For criticism of this measure see [UK Measures Rendering Terror Suspects Stateless: A Punishment More Primitive Than Torture](#) / ICCT Commentary by Ch. Paulussen and L. Van Waas, 2014.
- <sup>16</sup> L. Vidino et al. [op. cit.](#) pp 9 and 13.
- <sup>17</sup> [Denmark introduces rehab for Syrian fighters](#) / S. Hooper, Al Jazeera, 2014.
- <sup>18</sup> L. Vidino et al. [op. cit.](#) p. 11.
- <sup>19</sup> EU Counter-Terrorism Coordinator, [op. cit.](#) p. 13.
- <sup>20</sup> The address before the [Senate Committee on Homeland Security and Governmental Affairs by Deputy Director of the National Counter-terrorism Center](#).
- <sup>21</sup> Steven Morrison (2014), 'The System of Domestic Counterterrorism Law Enforcement', *Stanford Law and Policy Review*, vol. 25.
- <sup>22</sup> See, *inter alia*: Steven Morrison (2014), 'The System of Domestic Counterterrorism Law Enforcement', *Stanford Law and Policy Review*, vol. 25; L. K. Donohue (2014), 'Bulk Metadata Collection: Statutory and Constitutional Considerations', *Harvard Journal of Law and Public Policy*, vol. 37 n.3; J. Joo (2014), 'The Legality of the National Security Agency's Bulk Data Surveillance Programs', *Harvard Journal of Law and Public Policy*, vol. 37 n.3
- <sup>23</sup> See: *United States vs. Mohammed Ibrahim Ahmed* (22 March 2012), F.Supp.2nd, 2012 WL 983545.
- <sup>24</sup> Beyond the explicit provisions within the statute, extraterritoriality jurisdiction has been applied following principle of customary international law and in particular the "protective principle" which allows jurisdiction when action is taken against the US interest. This protective principle was used in the case mentioned above against Mohammed Ibrahim Ahmed. See also: *United States v. Yousef*, 327 F.3d 56, 90-1 (2d Cir. 2003)
- <sup>25</sup> W. J. Krouse and B. Elias, 'Terrorist Watchlist Checks and Air Passenger Prescreening', *CRS Report* (30 Dec 2009).
- <sup>26</sup> Examples of US foreign policy measures would include: counter-terrorism capacity building programs with African countries; sending prosecutors and FBI agents to assist officials investigating and prosecuting foreign fighters in Balkan, Middle East and Northern African countries; actions taken within the UN (Security Council resolutions).
- <sup>27</sup> On a recent overview of US-EU relations: K. Archick, 'US-EU Cooperation Against Terrorism', *CRS Report* (1 December 2014).
- <sup>28</sup> See: the Interpol Foreign Terrorist Fighters programme or UK collaboration in the NSA Surveillance Program.

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