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The Legal Limbo of Counter-Terrorism Criminal Law and Armed Conflict
Anti-Regime and Anti-IS (Foreign) Fighters Before European Courts

Abstract

The Syrian conflict has reached public prosecution offices and courts in numerous European states with full force. Criminal investigations and proceedings against so-called foreign fighters returning from Syria as well as against persons who arrived as refugees or migrants and were involved in the conflict as members of non-state armed groups have rapidly increased in recent years. Most of the fighters returning or arriving from Syria to Europe are members of the so-called Islamic State or comparable jihadist groups and are being prosecuted for counter-terrorism crimes. In this contribution, however, the focus will be on those groups for which classification as "terrorist organization" is less clear. This paper takes a closer look at the criminal investigations and proceedings that are being conducted in several European states against anti-regime and anti-IS (foreign) fighters. Do members of these groups also face prosecution under counter-terrorism criminal law after their return to or their entry into the country? Or does counter-terrorism criminal law differentiate between the groups involved in the Syrian conflict? Is this differentiation a legal or a political matter? Who is responsible for the decision? What criteria apply?

I. Introduction

The Syrian conflict is keeping public prosecution offices and courts in numerous states in Europe (and elsewhere) busy. Criminal investigations and proceedings against so-

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called foreign fighters returning from Syria[1] as well as against persons who arrived as refugees or migrants[2] and were involved in the conflict as members of non-state armed groups have increased in recent years. Most of the fighters returning or arriving from Syria to Europe are prosecuted for counter-terrorism crimes.[3] This is unobjectionable where members of the so-called Islamic State (IS)[4] or comparable jihadist groups such as Jabhat al-Nusra are concerned, in particular as these groups are listed as terrorist organizations by the United Nations (UN) and/or the European Union (EU) as well as by various countries.[5]

1 Since 2011, anywhere between 30,000 and over 40,000 people from over 100 states are said to have entered the conflict area in Syria and Iraq – the figures quoted in various publications vary and can therefore be understood more as indicators; see *B. van Ginkel/E. Entenmann*, The Foreign Fighters Phenomenon in the European Union – Profiles, Threats & Policies, 2016, p. 9. Around 5,000–6,000 of these people, 20 % of them women, came from (Western) Europe, most of them from the "sending states" (regarding this term, see *M. Zwanenburg*, Foreign Terrorist Fighters in Syria: Challenges of the "Sending" State, International Law Studies 92 (2016), p. 204, 205) France, Germany, Great Britain and Belgium; see *F. Ragazzi/J. Walmley*, The Return of Foreign Fighters to EU Soil – Ex-Post Evaluation, 2018, p. 26 et seq.; *R. Barrett*, Beyond the Caliphate: Foreign Fighters and the Threat of Returnees, 2017, p. 9 et seq.; *A. Schmid/J. Tinnes*, Foreign (Terrorist) Fighters with IS: A European Perspective, 2015. In the meantime, an estimated 1,500 have returned to Europe; see *Europol*, European Union Terrorism Situation and Trend Report, 2018, p. 26. Around 1,300 EU citizens are said to still be detained in Syria and Iraq, more than half of them children; see *A. Brzozowski*, EU launches new counter-terrorism database, Euractiv, 6.9.2019. Although not all of the individuals who had gone to the conflict area participated actively in the hostilities, a considerable number are so-called *foreign fighters*, i.e. individuals who are citizens of another state and/or have their permanent residence in another state and who travelled from there to Syria or Iraq in order to participate in the hostilities as members of one of the armed groups involved in the conflict or to support them in some other way; definition based on *P. Frank*, Strafverfolgung in Zeiten des islamischen Terrors, in: F. Lüttig/J. Lehmann (eds.), Der Kampf gegen den Terror in Gegenwart und Zukunft, 2019, p. 77, 94 (who in fact refers to ""terrorist" groups). Regarding the difficulties surrounding a precise definition of the term *foreign fighter*, see *J. Ip*, Reconceptualising the Legal Response to Foreign Fighters, International and Comparative Law Quarterly (ICLQ) 69 (2020), p. 103, 104 et seq. The phenomenon of *foreign fighters* is not a new one and is in fact well-known in recent history, for example in the conflicts in Chechnya, Afghanistan, Somalia or Yugoslavia; for detail, see *D. Malet*, Foreign Fighters: Transnational Insurgents in Civil Conflicts, 2013.

2 A total of 6.7 million people have (so far) fled Syria to escape the armed conflict, the vast majority of whom have found refuge in Turkey (3.6 million), Lebanon (just under 970,000) and Jordan (just under 670,000); UNHCR, Global Trends – Forced Displacement in 2018, 2019, p. 6. Approximately one million people have fled to Europe, of whom about 600,000 have travelled to Germany; see *S. Worbs/N. Rother/A. Kreienbrink*, Syrische Migranten in Deutschland als bedeutsame neue Bevölkerungsgruppe, Informationsdienst Soziale Indikatoren 61 (2019), p. 2 et seq.; UNHCR, Mid-Year Trends 2018, 2019, p. 14.

3 In addition, various administrative measures apply, e.g. deradicalization programmes and prohibitions on leaving the country leading as far as the withdrawal of citizenship, as well as migration law regulations for refugees with a history of armed combat.

4 In this article, the term "Islamic State"/IS is used throughout, even if judgments, decisions, documents etc. refer to Daesh, ISIL or ISIS.

5 For a detailed list, see *L. Jarvis/T. Legrand*, The Proscription or Listing of Terrorist Organisations: Understanding, Assessment, and International Comparisons, Terrorism and Political Violence 30 (2018), p. 199 et seq.

In this contribution, however, the focus will be on those groups for which classification as "terrorist organization" is less clear. These are groups which, with different motivations and with different objectives, fight against the regime of President Assad and/or the IS and at least also pursue objectives which coincide with the foreign policy interests of the European (home) states – and in the pursuit of which they receive some assistance, including military support, from Western governments. Specifically, these are the Free Syrian Army (FSA), the Ahrar al-Sham, and the Kurdish Yekîneyên Parastina Gel (YPG).[6] Do members of these groups also face prosecution under counter-terrorism criminal law after their return to or their entry into the country? Or does counter-terrorism criminal law differentiate between the groups involved in the Syrian conflict? Is this differentiation a legal or a political matter? Who is responsible for the decision? What criteria apply?

Despite its considerable determination by international, European, and EU law, counter-terrorism criminal law continues to be a decentralized matter for national criminal law systems, not only with regard to its enforcement but also – precisely because of the disagreement under international law regarding the distinction between terrorists and "freedom fighters" – especially in the definition of the concept of terrorism. Therefore, the Syrian conflict offers a good opportunity to explore more closely how various European states – here: Germany, France, the Netherlands, and the United Kingdom (UK) – are dealing with this problem, which is located at an intersection of foreign policy and criminal law[7].[8] Before the framework of terrorism criminal law and the relevant case law in the aforementioned states is described in more detail, the international legal background of the problem will be outlined.

6 Due to lack of space, it is not possible to elaborate further on the various groups. On the groups involved in the Syrian conflict, see *T. Gill*, Classifying the Conflict in Syria, International Law Studies 92 (2016), p. 353 et seq., on the Ahrar al-Sham in particular, see *G. Steinberg*, Ahrar al-Sham – the "Syrian Taliban": Al-Nusra ally seeks partnership with West, SWP-Aktuell, 27/2016. The conflict in Syria is complex and confusing: Hundreds of armed groups, some of them with flexible membership and different objectives, are joining together under different umbrella organisations and are supported to varying degrees by different states; a brief overview of the course of the conflict can be found in *Wissenschaftlicher Dienst des Bundestages*, Sachstand: Der Syrienkrieg – Akteure und Verhandlungen, June 2017.

7 *K. Barisch,* Die Bekämpfung des internationalen Terrorismus durch § 129b StGB, 2009, p. 229 ("an einer Schnittstelle von Außenpolitik und Strafrecht").

8 Due to the lack of publication, rulings and judgements often had to be reconstructed from secondary sources – academic articles, media coverage, etc. In this respect, the Netherlands deserves a positive mention: many decisions are available online and are in some cases translated into English. On the situation in France *H. Decœur*, The Criminalisation of Armed Jihad under French Law: Guilt by Association in the Age of Enemy Criminal Law, European Journal of Crime, Criminal Law and Criminal Justice (EurJCrimeCrLCrJ) 25 (2017), p. 299, 310 fn. 51.

II. Terrorism and International Law

International law does not provide a uniform definition of terrorism. As *Thomas Weigend* aptly puts it, the conceptual history of terrorism is instead a series of futile attempts to agree on a definition of its object that is manageable by (criminal) law.[9] The difficulties in obtaining a legal terminological grip on terrorism are essentially due to the strong political dimension of the term.[10] In public discourse, "terrorism" is not used in a criminal or criminological sense, but as a political "term of exclusion":[11] It is used to stigmatize (political) opponents as terrorists on account of their actions or goals; once this is achieved, their causes are delegitimized and declared as non-negotiable.[12] The political dimension of the concept of terrorism has an impact on the legal definition, and, therefore, some argue, it is impossible to define terrorism as a legal term.[13]

In its legal core, which, however, is not uncontroversial either; terrorism is understood as the use of severe acts of violence committed with the (immediate or intermediate) aim of spreading fear and terror among the population and/or putting pressure on the institutions of the state in order to achieve a specific (political, religious, ideological etc.) long-term goal.[14] The link between the short-term and the long-term goal usually consists of the aim of destabilizing the existing social and/or state order in order to ultimately replace it with another.[15] This rudimentary definition of terrorism is traditionally tailored to the circumstances found in democratic constitutional states.[16] However, much debate surrounds the question of how to deal with violence that is used in an attempt to defend the population against a tyrannical or dictatorial regime that violates human rights and/or commits crimes under international law. This is the reason why, despite all best efforts, it has not yet been possible to define a universal concept of terrorism under international law.[17] Indeed, a collective "humanitarian right of resistance" – a "right of civilian self-defence" – is not recognised under international

9 *T. Weigend*, Terrorismus als Rechtsproblem, in: R. Griesbaum et al. (eds.), Festschrift für Kay Nehm, 2006, p. 151.
10 *Weigend* (Fn. 9), p. 151.
11 *H. Münkler*, Die neuen Kriege, 2002, p. 175 ("Ausschlussbegriff"); see also *M. Zöller*, Terrorismusstrafrecht, 2009, p. 103.
12 *Zöller* (Fn. 11), p. 103 (Anliegen sind nicht verhandelbar); see also *A. Greene*, Defining Terrorism: One Size Fits All?, International and Comparative Law Quarterly (ICLQ) 66 (2017), p. 411, 436 et seq. (use of the label "terrorism" as a mechanism of "othering" and political exclusion); *B. Saul*, Defining Terrorism – a Conceptual Minefield, in: E. Chenoweth et al. (eds.), Oxford Handbook of Terrorism, 2019, p. 34.
13 See the references in *Zöller* (Fn. 11), p. 100.
14 See *M. Zöller*, Zehn Jahre 11. September – Zehn Jahre Gesetzgebung zum materiellen Terrorismusstrafrecht in Deutschland – Versuch einer Bilanz, Strafverteidiger (StV) 2012, p. 364, 367.
15 *Weigend* (Fn. 9), p. 151, 156.
16 See *Saul* (Fn. 12), p. 34, 46.
17 See *Weigend* (Fn. 9), p. 151, 160 et seq. (the problem of distinguishing between terrorism and violent freedom movements remains unsolved in principle). See also *Saul* (Fn. 12), p. 34.

law.[18] Instead, if a regime commits serious human rights violations and/or crimes under international law within its own national borders, international law discusses other states' responsibility to protect ("R2P") and the possibility of humanitarian intervention.[19] In continuation of this legal situation, the dispute over how to deal with the armed struggle for freedom and resistance shifts from the definition of terrorism under international towards domestic criminal law.

The increasing overlap of terrorism and armed conflict and the legal regulations applicable in each case also contributes to the indefiniteness of the concept of terrorism.[20] Not least the events of 9/11 globalized and militarized terrorism and the fight against it. State armed forces are engaging with non-state "terrorist" armed groups. Under international humanitarian law, these actions are normally regarded as non-international armed conflicts and international humanitarian law does not recognise the privilege of combatants and the right to harm in such conflicts.[21] This means that non-state combatants can be prosecuted both for simple participation in the conflict and for individual acts of violence under national criminal law, including counter-terrorism criminal

18 See *C. Kreß*, Der Bürgerkrieg und das Völkerrecht – Zwei Entwicklungslinien und eine Zukunftsfrage, Juristenzeitung (JZ) 2014, p. 365, 371; *F. Mégret*, Causes Worth Fighting For: Is There A Non-State Jus Ad Bellum?, in: A. Constantinides/N. Zaikos (eds.), The Diversity of International Law – Essays in Honour of Professor Kalliopi K. Koufa, 2010, p. 171, in each case with considerations as to when non-state power could be legitimate under international law and can thus not be regarded as terrorism; see also *P. Scheuß*, Zur Rechtfertigung von Straftaten im nichtinternationalen bewaffneten Konflikt, Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW) 130 (2018), p. 23, 35 et seq., as well as German case-law from BGH, decision of 6.5.2014 (3 StR 265/13), mn. 22 (PKK); OLG Stuttgart, judgment of 6.10.2016 (3–2 StE 8/15) (Ahrar al-Sham), according to *Scheuß* ibid., 41.

19 *Kreß* JZ 2014, p. 365, 371; *Scheuß* ZStW 130 (2018), p. 23, 42.

20 *B. Saul*, Terrorism and International Humanitarian Law, in: B. Saul (ed.), Research Handbook on International Law and Terrorism, 2014, p. 208, 230.

21 See *J. Pejic*, Armed Conflict and Terrorism: There is a (big) Difference, in: A.M. Salinas de Frias/K. Samuel/N. White (eds.), Counter-Terrorism: International Law and Practice, 2012, p. 171, 183 et seq.; *Saul* (Fn. 20), p. 208, 223; *Scheuß* ZStW 130 (2018), p. 23, 29 et seq.; *C. Ritscher*, „Foreign Fighters" und Kriegsvölkerstrafrecht, Zeitschrift für internationale Strafrechtsdogmatik (ZIS) 2016, 807, 808 In the literature on international humanitarian law, the non-application of the combatant privilege in non-international conflicts is mostly criticized, see, e.g., *Saul*, ibid., p. 231; also *K. Ambos*, Die Verfolgungsermächtigung i.R.v. § 129b StGB – Notwendige Berücksichtigung völkerrechts- und außenpolitischer Interessen bei mangelnder Berücksichtigung humanitärvölkerrechtlicher Wertungen?, Zeitschrift für internationale Strafrechtsdogmatik (ZIS) 2016, 505, 514. Considerations on the introduction of a combatant's privilege in non-international armed conflict under certain conditions in *Kreß* JZ 2014, p. 365, 370 et seq. and *A. Cassese*, Should Rebels be Treated as Criminals? Some Modest Proposals for Rendering Internal Armed Conflicts Less Inhumane, in: A. Cassese (ed.), Realizing Utopia – The Future of International Law, 2012, p. 519, 523 et seq.

law.[22] In principle, this also applies to such acts of violence that are in principle lawful under international humanitarian law (e.g. attacks on state armed forces).[23]

III. German Counter-Terrorism Criminal Law

1. Legal Framework

a. § 129a StGB

German counter-terrorism criminal law is inherently related to associations of persons.[24] At its core lies the provision on the formation of a terrorist organization (*Bildung einer terroristischen Vereinigung*) under § 129a of the German Criminal Code (*Strafgesetzbuch*, StGB), which was introduced during the era of the *Rote Armee Fraktion* (RAF) in the mid-1970ies. According to this provision, anyone who forms a terrorist organisation, participates as a member or supports such an organisation is liable to prosecution. However, the term terrorism is not legally defined either here or elsewhere in the German Criminal Code – in §§ 129a/b StGB it is only found in the headings of the offences. According to § 129a para. 1 no. 1 StGB, an organisation is considered to be terrorist if its objectives or its activities are directed towards the commission of murders or those crimes under international law contained in the Code of Crimes Against International Law (*Völkerstafgesetzbuch*, VStGB) (with the exception of the crime of aggression), and according to § 129a para. 1 no. 2 abduction for purpose of extortion or hostage-taking. In contrast to § 129a para. 2 StGB, which includes less serious offences but – as a consequence of the implementation of the EU Framework Decision of 13 June 2002 on combating terrorism – presupposes a specific subjective intention and an objective ability to harm, the wording of para. 1 is still "ideology-

22 See *J. Kleffner*, From "Belligerents" to "Fighters" and Civilians Directly Participating in Hostilities – on the Principle of Distinction in Non-International Armed Conflicts one Hundred Years After the Second Hague Peace Conference, Netherlands International Law Review 54 (2007), p. 315, 321 et seq. International humanitarian law advocates amnesty for the participants in the conflict as well as for the acts of violence committed in accordance with the provisions of international humanitarian law (see Art. 6.5 ZP II, which also applies under customary international law). For war crimes, i.e. punishable violations of international humanitarian law, members of both non-state and state groups can be prosecuted under criminal law despite enjoying combatant privilege and immunity (warring nations).

23 *Pejic* (Fn. 21), p. 171, 184.

24 In addition to §§ 129a/b StGB, §§ 89a, 89b, 89c and 91 have recently been added to the German Criminal Code. With these offenses, particular attention is paid to radicalized lone offenders without concrete links to a terrorist organization. On the criticism of § 89a. para. 2a StGB in particular on account of the extension of punishability far in advance of the violation of legal interests, its vagueness and its corresponding function as a regulation of averting danger by means of punishment, see only the references in *J. Schäfer*, in: W. Joecks/K. Miebach (eds.), Münchener Kommentar zum StGB, 3rd ed. 2019, § 89a mn. 4.

free".[25] The legislature decided not to include the qualifying condition here because it was not considered possible from a criminal policy point of view on grounds of its unjust content.[26] If the objective or activity of an association is aimed at killing others, as will regularly be the case in armed conflicts, German criminal law therefore always defines the association as a terrorist organisation, without reference to the target and suitability to cause harm. This would only be different if the harmful acts which are the purpose or activity of the organisation were not punishable.[27] However, as already mentioned, justification cannot be based on international law due to the absence of a humanitarian right of resistance and combatant privilege, and the possibility of using (non-international law determined) domestic criminal law grounds of justification or excuse (self-defence, state of emergency, supra-statutory right of resistance) is also rejected in case law and the literature.[28]

b. § 129b StGB

With the enactment of 34th Criminal Law Amendment Act of 2002, § 129b StGB extended the applicability of, *inter alia*, § 129a StGB to terrorist groups based abroad.[29] For non-EU-based groups, two additional requirements were laid down: First, a specific link to Germany must be present according to § 129b para. 1 s. 2. Second, according to sentences 3 to 5, the Federal Ministry of Justice (*Bundesministerium der Justiz und für Verbraucherschutz*, BMJV) must issue an authorisation to prosecute. Finally, according to the newly introduced § 153c para. 1 no. 3 of the German Criminal Procedural Code (*Strafprozessordnung*, StPO), the public prosecutor's office may dispense with criminal prosecution if, in the case of a foreign association, the act of participation is of lesser importance or is limited to mere membership.[30]

aa) Link to Germany: The significance of § 129b para. 1 s. 2 StGB and in particular its relationship to the general provisions on the extraterritorial scope and applicability

25 This ("ideologiefrei") is the expression used in *Frank* (Fn. 19, p. 77, 81. On the suitability and determination regarding the acts of para. 2 see *T. Fischer*, Strafgesetzbuch mit Nebengesetzen, 66th ed. 2019, § 129a mn. 13 et seq.

26 BT-Drs. 15/813, p. 6 ("wegen ihres Unrechtsgehaltes für kriminalpolitisch nicht möglich erachtet").

27 See *Schäfer* (Fn. 24), § 129 mn. 38; *G. Altvater*, Das 34. Strafrechtsänderungsgesetz – § 129b StGB, Neue Zeitschrift für Strafrecht (NStZ) 2003, p. 179, 182; *Scheuß* ZStW 130 (2018), p. 23, 43 et seq.

28 See OLG München, judgment of 15.7.2015 (7 St 7/14 (4)), mn. 652 et seq. (Junud al-Sham), in detail also *Scheuß* ZStW 130 (2018), p. 23, 43 et seq.; also *Schäfer* (Fn. 24), § 129b mn. 24 and BT-Drs. 14/8893, 24.4.2002, p. 8.

29 BGBl. I, 3390; on the constitutionality of the provision OLG München NJW 2007, 2786 et seq.; see also BVerfGE 109, 38; 113, 273; BGH NStZ-RR 2005, 73; BGH NStZ-RR 2006, 240.

30 See *Schäfer* (Fn. 24), § 129b mn. 35; *H. Ostendorf*, in: U. Kindhäuser/U. Neumann/H.-U. Paeffgen (eds.), Nomos Kommentar zum StGB, 5th ed. 2017, § 129b mn. 12.

of German criminal law in §§ 3 et seq. StGB and also § 1 VStGB is controversial.[31] Recent case-law shows a tendency according to which § 129b para. 1 s. 1 and 2 StGB is to be seen as a special provision that supersedes the general rules of application of German criminal law.[32] Accordingly, § 129b para. 1 s. 1, StGB extends the scope of application of § 129a StGB universally to all criminal acts relating to a terrorist group in the EU.[33] In the case of non-EU associations, sentence 2 restricts this scope of application by way of requiring a specific, but nonetheless diffuse and very broadly defined link to Germany. It is thus sufficient, for example, that the perpetrator or victim has German nationality or, in the case of non-Germans who have been active members abroad, that they are present in Germany.[34] Hence, German criminal law becomes applicable and German prosecution authorities competent *ex post facto* solely by dint of the entry of the perpetrator into Germany irrespective of the requirement of double criminality.[35]

bb) Authorisation to Prosecute: In order to prosecute members or supporters of non-EU terrorist organisations, according to § 129b para. 1 s. 3–5 StGB, authorisation by the BMJV is required.[36] The authorisation to prosecute is a procedural prerequisite,

31 Regarding the inconsistencies, see, e.g., *M. Kuhli*, in: H. Matt/J. Renzikowski (eds.), Kommentar zum StGB, 2nd ed. 2020, § 129b mn. 10 et seq.; *D. Sternberg-Lieben/U. Schittenhelm*, in: Schönke/Schröder Kommentar zum StGB, 30th ed. 2019, § 129b mn. 6 et seq.; *Fischer* (Fn. 25), § 129b mn. 7 et seq.

32 See BGH, decision of 31.7.2009 (StB 34/09), mn. 5 (in any event, in contrast to § 7 para. 2 no. 1, the principle of active personality does not require double criminality ("Tatortstrafbarkeit")) and subsequently BGH, decision of 6.10.2016 (AK 52/16), mn. 33 et seq. (residence of the accused in Germany, but subsidiary examination of the further requirements of § 7 para. 2 no. 2 ("Tatortstrafbarkeit" and non-extradition); BGH, decision of 11.1.2017 (StB 41/16), mn. 17; BGH, decision of 11.1.2018 (AK 74/15), mn. 21; BGH, decision of 19.4.2018 (AK 18/18), mn. 22 (in each case without auxiliary recourse to § 3 et seq. StGB). *Frank* (Fn. 1), p. 77, 82 also seems to agree with this view, as does *Ostendorf* (Fn. 30), § 129b mn. 9 (the scope of German criminal law extends beyond §§ 3, 7 StGB, with reference to, *inter alia*, the declared intention of the legislator that in the aftermath of 9/11, so-called "sleepers" who are trained in Germany to carry out terrorist attacks (in other states) and who are waiting for their assignment should also be covered); see also *Scheuß* ZStW 130 (2018), p. 23, 44. The opposite view, according to which the provisions of general criminal law, that is §§ 3 et seq. StGB continue to apply to the act of committing the offence, is also represented in case law, see OLG München NJW 2007, 2786, and is the prevailing view in the literature, see *Schäfer* (Fn. 24), § 129b mn. 10; *Sternberg-Lieben/Schittenhelm* (Fn. 31), § 129b mn. 3 with further references; *Kuhli* (Fn. 31), § 129b mn. 6.

33 For criticism from a perspective of international law, see *B. Valerius*, Internationaler Terrorismus und nationales Strafanwendungsrecht, Goltdammer's Archiv für Strafrecht (GA) 2005, p. 696 et seq.; see also *C. Kreß*, Das Strafrecht in der Europäischen Union vor der Herausforde rung durch organisierte Kriminalität und Terrorismus, Juristische Arbeitsblätter (JA) 2005, p. 220, 227.

34 For criticism, see *Fischer* (Fn. 25), § 129b mn. 10 et seq.; *Kreß* JA 2005, p. 220, 227.

35 See *Kreß* JA 2005, p. 220, 227. According to another view, there is no *ex post* link to the act of activation, but rather to the permanent state of (passive) membership; see *Sternberg-Lieben/Schittenhelm* (Fn. 31), § 129b mn. 7.

36 See in detail *M. Nehring*, Kriminelle und terroristische Vereinigungen im Ausland, 2007, p. 302 et seq.

the absence of which constitutes an impediment to the initiation of proceedings.[37] It only affects the possibility of prosecution, not the criminal liability of the underlying facts of the case.[38] The Federal Prosecutor General (*Generalbundesanwalt*, GBA) must request the authorisation from the BMJV as soon as there is an initial suspicion that a person is a member etc. of a terrorist organisation.[39] The authorisation can be granted both for specific individual cases or as a general authority, i.e. in relation to a specific group and in respect of future offences.[40] According to the explanatory memorandum to the law, such a general authorisation should not only reduce bureaucratic effort, but should also enable the GBA to coordinate its prosecution measures with international partners.[41] The BMJV is not required to give reasons for the decision to grant or refuse a prosecution authorisation.[42] It is debated whether a decision by the BMJV can be subject to limited substantive review in court for arbitrariness.[43]

According to the explanatory memorandum, the requirement for an authorisation to prosecute is intended to achieve two objectives:[44] On the one hand, facts that are considered to be less serious, and thus "cases not worthy of punishment", can be excluded, thereby relieving the German prosecution authorities of some burden in view of the breadth the norm.[45] On the other hand, the authorization to prosecute is intended to create the possibility of taking foreign policy considerations into consideration and of

37 The legal basis of the authorisation to prosecute can be found in § 77e StGB. The special aspect of the authorisation according to § 129b StGB is that it requires authorisation by an executive body which itself is not affected by the acts. This is different from the other elements of the offence, which also require an authorisation (see § 90 para. 4, § 90b para. 2, § 97 para. 3, § 194 para. 4, § 353b para. 4). On this, see *Nehring* (Fn. 36), p. 304 et seq.

38 *Barisch* (Fn. 7), p. 205.

39 See *Ambos* ZIS 2016, p. 505, 510; according to the explanatory memorandum, in the period between application for and granting of the authorization, only those measures of criminal procedure law necessary to avert imminent danger are permissible, BT-Drs. 14/8893, 24.4.2002, p. 8. The withdrawal or revocation of the authorization is possible at any time before the legally binding conclusion of proceedings (§§ 77e, 77d para. 1 StGB).

40 In this respect, it may be limited in scope and time, see *Ambos* ZIS 2016, p. 505, 507.

41 See also BT-Drs. 14/8893, 24.4.2002, p. 9.

42 See *Ambos* ZIS 2016, p. 505, 508.

43 No checks on arbitrariness, for example: BT-Drs. 14/8893, 24.4.2002, p. 9; *Altvater* NStZ 2003, p. 179, 182; *Nehring* (Fn. 36), p. 311. For checks on arbitrariness e.g: OLG München, decision of 8.5.2007 (6 St 1/07) = NJW 2007, 2786; *Ambos* ZIS 2016, p. 505, 508; *Fischer* (Fn. 25), § 129b mn. 14a, according to which, similar to the procedure for declarations barring disclosure, a ruling is to be obtained through the administrative courts.

44 The authorization to prosecute was added at the insistence of the SPD and Bündnis 90/Die Grünen to avoid problems of legitimacy and practicability; see *N. von Bubnoff*, Terrorismusbekämpfung, Neue Juristische Wochenschrift (NJW) 2002, p. 2672, 2675.

45 BT-Drs. 14/8893, 24.4.2002, p. 9. *Ambos* ZIS 2016, p. 505, 509 rightly points out that the differentiation between punishable and non-punishable cases is one of the most fundamental duties of the criminal justice system, as is defined by provisions on prosecutorial discretion (§§ 153 et seq. StPO).

averting "disproportionate disadvantages".[46] In order to free the criminal prosecution authorities and the courts from this mostly (foreign) policy decision, it was transferred to the executive.[47]

The requirement of an authorisation to prosecute issued by the Federal Ministry of Justice is judged differently in literature. For some, it is "plausible" that the assessment of issues relevant to foreign policy should be the responsibility of the executive, because it is the executive that represents the state and is thus internationally responsible for its decisions.[48] Others see the authorisation to prosecute as a "politicization" of the judiciary that is alien to the (criminal) justice system, making the prosecution of members of a terrorist organization a matter of "day-to-day political routine" or "political arbitrariness".[49]

The decision to grant, refuse and also withdraw authorisation to prosecute is at the discretion of the BMJV.[50] The inclusion of an organization on the so-called "terror lists" of the UN or the EU is irrelevant for the Ministry's assessment[51], although we can assume, along with *Kai Ambos,* that inclusion – but not the non-inclusion – has a certain "indicative effect".[52] According to the "reprehensibility clause" of § 129b

46 BT-Drs. 14/8893, 24.4.2002, p. 9. See *Schäfer* (Fn. 24), § 129b mn. 24 (notwendiger Spielraum, um die Kriminalitätsbekämpfung strategischen oder außenpolitischen Interessen durch Verfolgung oder Nichtverfolgung der Beteiligten an ausländischen Vereinigungen steuern und unterstützen zu können).

47 See BT-Drs. 14/8893, 24.4.2002, p. 8 ("Verlagerung der Verantwortung auf die Staatsanwaltschaften und Gerichte" wäre bei "einem Sachverhalt, bei dem es auch um die (außen-)politisch sinnvolle Handhabung der Strafrechtspflege gehen kann, nicht angemessen").

48 See *Ambos* ZIS 2016, p. 505, 509 et seq. (the involvement of an executive body represents the "depoliticisation" of the activities of the prosecution authorities); see also *Altvater* NStZ 2003, p. 179, 181 et seq. (scope for political discretion is legally non-objectionable and necessary from a substantive point of view).

49 See e.g. *von Bubnoff* NJW 2002, p. 2672, 2675 (barrier to prosecute that is alien to the system); *Kreß* JA 2005, p. 220, 228 (susceptible to "politicisation"); *Zöller* StV 2012, p. 364, 366 (problems with the authorisation requirement ultimately lies in the fact that in individual cases there is scope for politicians to protect foreign policy interests by pursuing or not pursuing crimes); *S. Breidenbach*, Die strafrechtliche Bekämpfung terroristischer Vereinigungen, 2009, p. 110 (criminal justice put on the leash of politics); *Schäfer* (Fn. 24), § 129b mn 25 (relativisation of the separation between government policy and criminal prosecution).

50 See in detail *Nehring* (Fn. 36), p. 313 et seq. The explanatory memorandum (BT-Drs. 14/8893, 24.4.2002, p. 9) states that a competence of the BMJV, the supervisory authority of the GBA, has been established, since it is difficult for the German government to exercise its competence as a collegial body due to the tight deadlines in issues of detention and custody. In preparing its decision, the BMJV conducts a survey of departments involving, in addition to the Federal Foreign Office, the Federal Chancellery, which in turn involves the Federal Intelligence Service (BND), and the Federal Ministry of the Interior (BMI), which in turn draws on findings from the Federal Criminal Police Office (BKA) and the Federal Office for the Protection of the Constitution (BfV) (see BT-Drs 18/9779, 27.9.2016, p. 10, 14).

51 See the reference by Federal Prosecutor *Thomas Beck* during the discussion at the 40th Strafverteidigertag on 5.3.2016, who emphasised that the listing does not play a role, in *Ambos* ZIS 2016, p. 505, 510 n. 73.

52 See *Ambos* ZIS 2016, p. 505, 510.

para. 1 s. 5 StGB, the primary link between the decision and the "object of the assessment" are the objectives of the organization.[53] It is unclear whether this covers only the long-term and "ultimate purpose" of the organization, or whether short-term or intermediate goals are also to be taken into account.[54] It must be evaluated whether the objectives as a whole are "reprehensible", i.e. whether they "deserve an increased degree of disapproval".[55] The criteria for evaluation are the "fundamental values of a state order that respects human dignity" and the "peaceful coexistence of peoples".[56] The reprehensibility of the objectives can therefore be denied in the overall evaluation "if violent resistance, e.g. by a freedom movement, even in violation of criminal law standards, appears to be an understandable reaction to state arbitrariness".[57] If the objectives of the organization are not per se reprehensible in the overall assessment,[58] the means employed by the organization and thus the "injustice actually realized" must be included in the weighing-up process in a second step.[59] This means that even organizations that fight a governmental regime which systematically commits violations of human rights can be considered terrorist organizations that are to be prosecuted, taking into account the means and methods used to achieve the goal.[60] In the literature, the concept of the "reprehensibility clause" is criticized in that it neglects the terrorist means and methods in comparison to their objectives.[61]

53 BT-Drs. 14/8893, 24.4.2002, p. 9; see also *Ambos* ZIS 2016, p. 505, 511.

54 See *Nehring* (Fn. 36), p. 314 (objectives refers to the immediate and the long-term goals pursued by the organization, as well as the concrete background and circumstances of the terrorist activities). According to *Ambos* ZIS 2016, p. 505, 511 the focus is primarily on the long-term or the ultimate goal of the organisation.

55 BT-Drs. 14/8893, 24.4.2002, p. 9.

56 BT-Drs. 14/8893, 24.4.2002, p. 9 (elevating the German constitutional order to be the absolute standard is to be avoided).

57 BT-Drs. 14/8893, 24.4.2002, p. 9.

58 According to *Nehring* (Fn. 36), p. 313 et seq., the assessment of the efforts can at best indicate the reprehensibility, but it is always necessary to weigh up all circumstances in a second step. This means that in the overall weighing up, special circumstances could also argue against the indicated judgement of reprehensibility. However, the objectives of the organisation always remain the primary point of reference; the means and methods, on the other hand, are not the direct object of assessment, but can serve as a corrective to the reprehensible assessment made in the context of the overall weighing of interests.

59 BT-Drs. 14/8893, 24.4.2002, p. 9.

60 See *Nehring* (Fn. 36), p. 315; *Ambos* ZIS 2016, p. 505, 511; case law: BVerfG, decision of 30.11.2000 (2 BvR 1473/00); BGH, decision of 5.7.2000 (5 StR 629/99).

61 For criticism of the prioritisation of the intentional element of the organisation's objectives and goals over the means and methods, see e.g. *Schäfer* (Fn. 24), § 129b mn. 26; *von Bubnoff* NJW 2002, p. 2675. In general, see *Ambos* ZIS 2016, p. 505, 511. For a similar discussion in Swiss law, *D. Jositsch*, Terrorismus oder Freiheitskampf? Heikle Abgrenzungsfragen bei der Anwendung von Art. 260*quinquies* StGB, Schweizerische Zeitschrift für Strafrecht 123 (2005), p. 458 et seq., but convincingly *M. Forster*, Terroristischer Massenmord als „legitimer Freiheitskampf"?, Schweizerische Zeitschrift für Strafrecht 124 (2006), p. 331 et seq. Since the decisions of the BMJV neither have to be justified nor can their content be reviewed, in the final analysis, the provision is of little more importance than that of a "good-sounding set of programmes possibly aimed at reassuring the public" ("eines wohlklingenden,

The result is that, in view of the breadth of the definition of a terrorist organization under § 129a para. 1 StGB outlined above, the authorization requirement introduces a distinction between "ordinary" and "just" – at least "comprehensible" – terrorism: certain organizations that are to be regarded as terrorist on grounds of their objectives or activities directed towards listed offences can nevertheless be exempted from criminal prosecution by the executive branch out of consideration for the objectives it is pursuing.

2. Case Law

In light of the considerations outlined above, the question arises as to how the provisions relating to anti-Assad and anti-IS (foreign) fighters are applied in practice.

An overview of the way in which the Federal Ministry of Justice handles the authorisation to prosecute can be found in the Ministry's response to a minor inquiry of 27 September 2016,[62] according to which the Federal Prosecutor General has applied for an authorisation to prosecute in 110 cases and 90 have been granted since § 129b StGB came into force on 30 August 2002 – i.e. over a period of 14 years.[63] The prosecution authorisation was denied primarily in cases involving Colombian rebel groups and their members, but also for the FSA.[64] The Federal Prosecutor General applied for an authorisation to prosecute the FSA in mid-June 2013.[65] As already explained, the reasons for the refusal are not made public. It is reasonable to assume that the goal of the FSA of combatting the Assad regime, including by military means, is in line with Germany's foreign policy interests.[66] In the absence of an authorisation to prosecute, members (and supporters etc.) of the FSA cannot be prosecuted under §§ 129a/b StGB. Accordingly, the defendant Ibrahim A., a member of a 150-strong militia which belonged to the Ghoraba as-Sham group operating under the umbrella of the FSA, was not charged or convicted by the OLG Düsseldorf at the end of September 2018 for membership of a terrorist organisation; instead he was convicted only of specific crimes (murder, abduction for purpose of extortion, and several cases of war crimes).[67]

möglicherweise die Beruhigung der Öffentlichkeit bezweckenden Programmsatzes") according to *Schäfer* (Fn. 24), § 129b mn. 26.

62 BT-Drs. 18/9779, 24.4.2002, p. 9.

63 BT-Drs. 18/9779, 27.9.2016, p. 2 et seq. In 16 cases, the authorisations to prosecute were changed or rewritten at the request of the GBA (8 et seq.).

64 In addition: People's Modjahedin Iran (no authorisation at the present time), People's Republic of Donetsk (the authorisation under § 89a para. 4 StGB was granted), LTTE (but the authorisation was granted later).

65 BT-Drs. 18/9779, 24.4.2002, p. 10.

66 See *Ambos* ZIS 2016, p. 505, 509 n. 57 with reference to a remark by Federal Prosecutor *Thomas Beck* during the discussion at the 40th Strafverteidigertag on 5.3.2016.

67 OLG Düsseldorf, judgment of 24.9.2018 (III – 5 StS 3/16); the BGH dismissed the appeal on 6.8.2019 (3 StR 228/19). The Syrian citizen Mohamad K., a member of a group that could be attributed to the FSA, was also not charged or convicted for membership in a terrorist organization according to §§ 129a/b of the Criminal Code, but only for war crimes according to § 8 para. 1 no. 3 of the VStGB; see GBA, press release of 10.12.2018; OLG Stuttgart, judg-

Whilst it is less controversial in Germany, a look at reality in France and the Netherlands will show that the criminal treatment of members and supporters of the Ahrar al-Sham is an issue of debate on account of their complex role in the Syrian conflict.[68] The German GBA requested the authorisation to prosecute the Ahrar al-Sham on 26 May 2014 and it was granted by the BMJV on 25 July 2014.[69] However, in January 2016, the Ahrar al-Sham was invited to the Geneva peace talks on the Syrian conflict,[70] which led to press inquiries to the BMJV as to whether revocation of the authorisation was under consideration; in a brief reply the Ministry stated that in the course of a review it was decided to keep the authorisation to prosecute in force.[71]

At the beginning of October 2016, the OLG Stuttgart convicted four men in accordance with §§ 129a/b StGB for supporting a terrorist organisation abroad, this being the first proceedings in which the Ahrar al-Sham was classified as a terrorist organisation.[72] The Court found that the objectives and activities of the Ahrar al-Sham have the aim of committing murder (§ 211 StGB) or manslaughter (§ 212 StGB).[73] Denying arguments by the defence, the Court stressed that "the crimes attributable to the 'Ahrar al-Sham' in the Syrian civil war were not justified by international law or customary international law".[74] Following this ruling, a number of other proceedings based on §§ 129a/b StGB were brought against members and supporters of the Ahrar al-Sham.[75]

Less clear is the position of the German prosecution authorities with regard to the YPG and its members. It is estimated that about 250 persons left Germany to join

ment of 4.4.2019 (3 – 3 StE 5/18). However, in the reply to a minor question in BT-Drs. 19/1799, 23.4.2018, 14, it is stated that investigations conducted by the GBA in 2017 under § 129b StGB also concerned the FSA, among others.

68 See also *Wissenschaftlicher Dienst des Bundestages* (Fn. 6), p. 22 (the example of Ahrar al-Sham shows the complexity of the network of relations between the actors in the Syrian war).

69 BT-Drs. 18/9779, 27.9.2016, p. 4, 7.

70 See *H. Schmidt*, Syrische Gruppe Ahrar-al-Sham – Terrorhelfer oder Verhandlungspartner?, tagesschau.de, 28.1.2016.

71 BT-Drs. 18/9779, 27.9.2016, p. 11. See also *Schmidt*, tagesschau.de, 28.1.2016.

72 OLG Stuttgart (3rd StS), judgment of 6.10.2016 (3 – 2 SR 8/15). The appeal was dismissed as unfounded by the BGH, decision of 4.10.2017 (3 StR 145/17).

73 At least this was the case with the decision of the BGH of 14.7.2016 (StB 21/16) on the appeal on point of law regarding the remand of one of the defendants.

74 The press release of the OLG Stuttgart after publication of the BGH decision of 22.11.2017 states: "With this final judgment, a court in Germany has for the first time determined that 'Ahrar al-Sham' fulfills the requirements of a terrorist organization under German criminal law. The Criminal Senate of Oberlandesgericht has also expressly ruled – in response to objections from the defence – that the crimes attributable to the 'Ahrar al-Sham' in the Syrian civil war were not justified by international law or customary international law." See also *Scheuß* ZStW 130 (2018), p. 23, 41.

75 See e.g. OLG Koblenz, judgment of 21.03.2019 (2 StE 6 OJs 20/17); OLG Frankfurt, judgment of 26.8.2019 (5 – 2 OJs 6/18 – 5/18). A case against five persons for supporting a terrorist organisation, the Ahrar al-Sham, is currently pending before the OLG München, see www.justiz.bayern.de/gerichte-und-behoerden/oberlandesgerichte/muenchen/presse/2019/43.php.

groups fighting against the IS in the border regions of northern Syria, mostly the YPG; of these, around 120 are believed to have returned to Germany.[76] With regard to the YPG, the Federal Prosecutor General initiated 16 criminal investigations between 2015 and August 2017 against persons from Germany – returnees and persons who are presumably still in the conflict area – on the basis of an initial suspicion under § 129a para. 1 no. 1, para. 5, § 129b para. 1 s. 1 and 2 StGB (members or supporters).[77] In the overwhelming majority of these investigations, prosecution has been waived pursuant to § 153c para. 1 s. 1 no. 1 or no. 3 StPO.[78] However, the GBA does not appear to have filed an application for authorisation to prosecute under § 129b para. 1 s. 3–5 StGB – at least not as of September 2016.[79]

Statements from the Federal Ministry of the Interior (*Bundesministerium des Innern*, BMI) are also interesting in this context. It states that German YPG foreign fighters are assumed to be a threat to internal security due to the military combat training and experience they have received in the conflict area, especially since they are assumed to have close ties to the PKK.[80] According to the BMI, it is the task of the security authorities to investigate this danger in general and also in individual cases.[81] This applies to all those returning home, regardless of which side they were fighting on; there are differences in the motivation and objectives of the fighters, and the "potential danger" is "quantitatively lower, but qualitatively no different from that of the jihadist Syrian fighters".[82] In this respect, according to the BMI, the Federal Government maintained its position of not distinguishing between supposedly "good" and "evil"

76 BMI, 23.10.2018, p. 2. See also BT-Drs. 18/11912, 10.4.2017, p. 2.

77 BT-Drs. 18/13423, 28.08.2017, p. 3. Slightly different figures come out of the response of the BMI, 23.10.2018, p. 4: According to the BKA, preliminary proceedings were initiated against YPG fighters in 32 cases, 27 of which were based on grounds for suspicion according to §§ 129a/b StGB (the others according to § 89a, § 109h StGB and § 20 VereinsG). Of these, 16 were suspended again in accordance with § 153c para. 1 s. 2 no. 1 StPO.

78 BT-Drs. 18/13423, 28.08.2017, p. 3. See also *E. Felden/M. von Hein*, YPG-Rückkehrer: Terrorbekämpfer unter Terrorverdacht, DW, 5.1.2020.

79 See the above-mentioned overview in BT-Drs. 18/9779, 27.9.2016. See also *F. Fade*, Das Dilemma der Justiz mit linken Anti-IS-Kämpfern, Die Welt, 6.11.2016; according to judicial circles quoted in the article, a prosecution of the YPG fighters is probably neither politically intended nor particularly opportune. See also *A. Shalal/M. Heinrich*, Germany Rejects Turkey's Assertion that Berlin Backs Militant Groups, Reuters, 8.11.2016; *N. Martin*, Terrorism Policing: the YPG/YPJ, an Ally Abroad but a Danger at Home?, openDemocracy, 9.1.2019.

80 BT-Drs. 18/13423, 28.8.2017, p. 4; BT-Drs. 18/3702, 7.1.2015, p. 7 et seq. On the connection between YPG and PKK, see BT-Drs. 18/3491, 9.12.2014, p. 7; see also *Shalal/Heinrich*, Reuters, 8.11.2016.

81 BT-Drs. 18/13423, 28.8.2017, p. 4.

82 See the remarks in the BMI report on current findings on the continuation of the ban on PKK associations, cited in BT-Drs. 18/3491, 9.12.2014, p. 8 et seq. (das "Gefährdungspotential" sei "quantitativ zwar geringer, qualitativ aber nicht anders zu bewerten als das der jihadistischen Syrien-Kämpfer").

terrorists.[83] However, there is no evidence of involvement of Syrian returnees from the Kurdish areas in violent or other serious crimes in Germany.[84]

IV. Comparative Perspective

The following will highlight how selected other European countries – France, the Netherlands, and the UK – deal under (counter-terrorism) criminal law with members of organizations that are fighting against Assad's regime and the IS in Syria and Iraq.

1. France

a. Legal Framework

France has extensive and strict legislation on terrorism, traditionally based on criminal law, but in recent years primarily using administrative and intelligence regulations.[85] In practice, the offence which has most frequently been used to bring charges, including in cases involving foreign fighters, due to its scope, flexibility and high threat of punishment, is that of participation in a group that has formed in order to prepare or to commit a terrorist act (*association de malfaiteurs en relation avec une entreprise terroriste*), Art. 421–2–1 of the French Code Pénal.[86] In criminal law relating to terrorism, the French jurisdiction covers offences committed extraterritorially in accordance with the principle of active personality and domicile, Art. 113–13 Code Pénal.

The central question for criminal liability is whether a group with a terrorist objective is involved.[87] According to Art. 421–1 and -2 Code Pénal, "terrorist acts" are defined as certain (listed) acts – e.g. attacks on life and physical integrity, extortion, dam-

83 BT-Drs. 18/3702, 7.1.2015, p. 1, preliminary remarks by the Federal Government.
84 BT-Drs. 18/3702, 7.1.2015, p. 8.
85 See UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism Concludes Visit to France, 23.5.2018 (new law adopted in October 2017 makes a number of profound changes to the counter-terrorism framework, which includes the prioritization of administrative measures as the undergirding legal basis to take measures to prevent terrorism and the establishment of a posteriori rather than a priori review, review is then taken through administrative rather than criminal law). See also *S. Weill*, Terror in Courts – French Counter-Terrorism: Administrative and Penal Avenues, Report for the Official Visit of the UN Special Rapporteur on Counter-Terrorism and Human Rights, 2018, p. 14 (institutionalisation of the state of emergency).
86 See *S. Weill*, French Foreign Fighters: The Engagement of Administrative and Criminal Justice in France, International Review of the Red Cross (IRRC) 100 (2018), p. 211, 223 Fn. 50; *Decœur* EurJCrimeCrLCrJ 25 (2017), p. 299, 306. Counter-terrorism (criminal) law has been reformed several times in recent years, following the serious terrorist attacks in Paris or Nice. For example, at the end of 2012, leaving the country for the purpose of, among other things, training in the use of arms for terrorist purposes was made a punishable offence. In 2014, a criminal offence for individual terrorist offenders was created, as was the controversial criminal offence of "justification of terrorism" (*l'apologie du terrorisme*).
87 See *Weill* IRRC 100 (2018), p. 211, 224 et seq.

age to property – committed with the goal of seriously disturbing the public order through intimidation and terror.[88] However, the terms "terror" or "terrorism" are not legally defined. Whether the group pursues a "terrorist objective" must therefore be decided by the courts, which have a considerable margin of discretion.[89] Attempts by criminal law scholars to restrict the concept of terrorism dogmatically have not been followed by the criminal prosecution authorities and courts.[90]

b. Case Law

At the beginning of the first wave of returnees in around 2013, France was hesitant to use criminal law to deal with its foreign fighters. It was argued that it was difficult to prove an offence of terrorism under criminal law even among those foreign fighters who had joined global jihadist groups, since the (short-term) goal of fighting the Assad regime, which France supported early on, stood at the forefront.[91] It was argued that merely taking part in combat activities could not be regarded as terrorism under French law.[92] However, this view changed rapidly. In November 2014, a first conviction was made against a returnee who had joined a jihadist terrorist group in Syria.[93] Now, all returning foreign fighters are prosecuted as participants in a terrorist organisation, regardless of their specific actions on the ground.[94]

88 See *Weill* IRRC 100 (2018), p. 211, 223 n. 50.

89 See *Weill* IRRC 100 (2018), p. 211, 225.

90 The Cour de Cassation has stated that the legislature and the Constitutional Council have left the interpretation of the terms "intimidation" and "terror" to the judicial authorities, see Cour de Cassation, Decision No. 16–84.596 (Criminal Chamber) of 10.1.2017, available at www.courdecassation.fr, after *Weill* (Fn. 85), p. 22 et seq.

91 *C. Paulussen/E. Entenmann*, National Responses in Select Western European Countries to the Foreign Fighter Phenomenon, in: A. deGuttry et al. (eds.), Foreign Fighters under International Law and Beyond, 2016, p. 391, 400 et seq. with further references. See also, for example, the statements by then French Interior Minister Manuel Valls (in *C. Lynch*, Europe's New 'Time Bomb' Is Ticking in Syria – Hundreds are joining the fight against Assad. Will they return as terrorists?, Foreign Policy, 9 July 2013): "For the time being, said Valls, there is no legal basis for arresting the European jihadists or barring them from leaving or entering France [...] 'The fighters in Syria are not fighting France or Europe; they are fighting against the Assad regime,' Valls said. 'It's not against French law to fight in a war, but it is a crime to participate in a terrorist organization.'"

92 *Paulussen/Entenmann* (Fn. 91), p. 391, 401, quoting a French security officer: "Legally speaking, then, we can't file charges against someone going to fight a bloody regime whose ouster [sic] most Westerners support – no matter how notorious or dangerous their allies are in that effort."

93 See *A. Mégie/J. Pawella*, Les procès correctionnels des filières djihadistes Juger dans le contexte de la „guerre contre le terrorisme", Les Cahiers de la Justice 2017, p. 235, 235; see also *C. Oberti*, Le parcours chaotique du premier Français accusé de jihad en Syrie, France24, 17.10.2014.

94 As a result, the number of proceedings has risen sharply; see also *Mégie/Pawella* Les Cahiers de la Justice 2017, p. 235 et seq. In the aftermath of the serious attacks in Paris in November 2015, the public prosecutor in charge announced a tightening of prosecution strategy in 2016: All returning foreign fighters who had joined a terrorist group in Syria or Iraq would

In determining whether a group qualifies as a terrorist organisation, the courts first considered whether the group is listed.[95] This formal approach is criticised in the literature because it is based on a political assessment, and the definition of terrorism used by the UN Security Council is not necessarily compatible with French law.[96] The courts then took the view that all jihadi groups were to be considered as terrorist groups.[97] However, this broad "catch-all" approach has not been consistently followed in recent cases.[98] In late 2018 and early 2019, in rulings made in cases of involvement in Ahrar al-Sham and Suqour al-Sham, the *Tribunal Correctionnel* stated that not every jihadist group is necessarily a terrorist group.[99] In evaluating a group as "terrorist", the Court stated that it is not the long-term goal that is the deciding factor, even if, as was the case of Ahrar al-Sham, the goal was the establishment of an Islamic state under strict Sharia law after the victory over the Assad regime – and not a democratic constitutional state that would respect human rights.[100] The deciding factor instead and in addition to the group being listed, which Ahrar al-Sham is not, is the means and methods used by the group to achieve its goal.[101] Neither is it sufficient that they are merely participating in an armed conflict, nor that the group commits war crimes or crimes against humanity.[102] Instead, the decisive factor is whether the group carries out sui-

be charged with involvement in a terrorist group in a serious case (*crime* instead of *délit*; penalty of at least ten years imprisonment; heard by the *Cour d'Assises*), regardless of their specific conduct on the ground. The new prosecution strategy has been heavily criticised, as it makes it possible to sentence persons to long prison sentences for minor and easily provable individual acts; see *Weill* (Fn. 85), p. 23; *F. Sturm*, Terrorisme islamiste: la nouvelle stratégie judiciaire, France Culture, 5.5.2017.

95 See *Decœur* EurJCrimeCrLCrJ 25 (2017), p. 299, 319.

96 *Decœur* EurJCrimeCrLCrJ 25 (2017), p. 299, 319 with further references.

97 For criticism of equating jihadist and terrorist activities, see *Decœur* EurJCrimeCrLCrJ 25 (2017), p. 299, 313.

98 See *S. Legrand/M. Lannuzel*, À Partir de Quand une „Association de Malfaiteurs" devient-elle „Terroriste"?, Europe1, 18.6.2019.

99 Tribunal Correctionnel de Paris, judgment of 28.9.2018 (Nr. 13099000941) (Lotfi S., Karim S., Anass B.); Tribunal Correctionnel de Paris, judgment of 12.12.2018 (Nr. 14108000203) (David M.); Tribunal Correctionnel de Paris, judgment of 8.2.2019 (Nabil O.). See in detail *Weill* IRRC 100 (2018), p. 211, 224 et seq. The judgement of the Tribunal Correctionnel of 28.9.2018 states: "The question that arises is whether or not, beyond his jihadist conception, which embraces diverse conceptions and which is not necessarily synonymous with terrorist involvement, such as his willingness to have Sharia law governing that country and to take up arms to ensure such an objective, X has actually carried out [terrorist] infractions." (22, cited in *Weill*, ibid., p. 225 n. 56).

100 Paris Tribunal de Grande Instance (No 13099000941), judgment of 28.9.2018, 22, cited in *Weill* IRRC 100 (2018), p. 211, 225.

101 Paris Tribunal de Grande Instance (No 13099000941), judgment of 28.9.2018, 22, cited in *Weill* IRRC 100 (2018), p. 211, 225.

102 See *Weill* IRRC 100 (2018), p. 211, 226 (the Court distinguished the crime of terrorism from crimes against humanity and pointed out that an armed group which commits crimes against humanity is not necessarily a terrorist group); and from the judgment of the Paris Tribunal de Grande Instance (No. 13099000941), judgment of 28.9.2018, 23 ("nothing allows the claim that joining this organization, becoming its member and even fighting for it, constitutes a terrorist-related offence", cited in *Weill*, ibid.).

cide bombings and massive attacks against the civilian population or calls for terrorist acts abroad.[103] This is not the case with Ahrar al-Sham.[104] In an *obiter dictum*, the Court also holds that, in view of the relativity of the term, the assessment of a group as "terrorist" is a political decision that should not (properly) be made by a court.[105] According to the Court, this becomes particularly clear in the case of Ahrar al-Sham, as the group is supported in its fight against the Assad regime by Western states and France's allies, namely the USA and the UK.

Since then, however, at least one ruling has gone to the contrary: At the beginning of August 2019, a woman, who had departed with her three children to Syria in 2017 and there married a fighter of Ahrar al-Sham, was convicted of involvement in a terrorist organisation, among other offences. The judges stated that a group could be considered terrorist regardless of not being listed. After evaluation of the available evidence, Ahrar al-Sham was to be classified as a terrorist organisation under French law because of its "operational links" ("*des liens opérationnels*") with Al Quaida.[106]

Due to the cooperation between the YPG and the French armed forces, French YPG foreign fighters are not being systematically identified.[107] France supports the YPG in the fight against IS by supplying weapons and military training and has stationed special forces in the region.[108] At least the French Foreign Ministry believes that the distinction between the YPG and the PKK is clear.[109]

103 See *Weill* IRRC 100 (2018), p. 211, 225: Paris Tribunal de Grande Instance (No. 13099000941), judgment of 28.9.2018, 22 ("it did not claim responsibility for suicide attacks or abuses committed against the civilian population").

104 In the final statement in the proceedings against Lofti S., Karim S. and Anass B. (no. 13099000941), the public prosecutor also referred in his or her assessment of Ahrar al-Sham as terrorist to the judgment of the OLG Stuttgart from 2016, see *Association Française des Victimes du Terrorisme*, Compte-Rendu du Procès de L. et K. SOULI et A.BELLOUM, 27./28.9.2018, 20.

105 See *Weill* IRRC 100 (2018), p. 211 226: "The judge, moreover, criticized the prosecution's request and clarified that it is not up to the court to take such a political decision, pointing out the relativism of the term 'terrorist group'". And from the judgment of the Paris Tribunal de Grande Instance (No 14108000203), judgment of 12.12.2018, 14: "It appears to the court that it is not within the jurisdiction of the judicial authority to order or recognize that a group constitutes a terrorist group and that if it did, the court would encroach on the powers of the legislative and executive branches."

106 For the judgments, see *euronews*, French Court Sentences Mother who took her Children to Syria to Eight Years in Prison, 8.8.2019.

107 See *Martin*, openDemocracy, 9.1.2019 (unlike other Syria-bound nationals, fighters with the YPG/YPJ "are not systematically pursued, regarding YPG cooperation with the French armed forces").

108 President Macron met with representatives of the YPG and assured them of continued support after the withdrawal of the USA, see *J. Irish/M. Pennetier*, France's Macron Vows Support for Northern Syrians, Kurdish Militia, Reuters, 29.3.2018.

109 See *Martin*, openDemocracy, 9.1.2019.

2. The Netherlands

a. Legal Framework

According to Art. 140a of the Dutch Criminal Code (*Wetboek van Strafrecht*, WvSr), the participation in a criminal organisation with the aim of committing terrorist offences is punishable.[110] Art. 83, 83a WvSr determines when an offence is a "terrorist offence". Art. 83 WvSr lists a number of common offences which become terrorist offences when there is a "terrorist intent".[111] The term "terrorist intent" (*terrorist oogmerk*) is to be understood according to Art. 83a WvSr which is based on the legal definition of Art. 1 of the EU Framework Decision of 13 June 2002 on combating terrorism, as the intention to "spread fear among the population or part of the population of a state or to illegally force a public authority or international organisation to perform, not to perform or to tolerate certain acts, or to seriously disturb or destroy the fundamental political, constitutional, economic or social structure of a state or international organisation".

b. Case Law

In the Netherlands, prosecution of members of Ahrar al-Sham has led to controversy. The Dutch Foreign Ministry has long considered Ahrar al-Sham to be a "moderate" group in the fight against the Assad regime.[112] In addition, the Netherlands supported various armed opposition groups between 2015 and 2018 within the framework of the so-called NLA ("non-lethal aid") programme by providing aid in kind worth 25 million euros.[113] Ahrar al-Sham was not itself among the Syrian partners in the programme, but groups that cooperated closely with it were.

In March 2019, the District Court of Rotterdam ruled in a case against Syrian returnees under Art. 140a WvSr that Ahrar al-Sham was a terrorist organisation within

110 In addition, there are the offences of preparation of a terrorist act (including training for terrorist purposes) (Art. 134a), incitement to commit terrorist acts (Art. 131, 132), preparation of specific acts such as arson or explosives (Art. 46, 157), recruitment for terrorist purposes (Art. 205) or financing terrorism (Art. 421).

111 See *Zwanenburg* International Law Studies 92 (2016), p. 204, 221. The norm on the "terrorist intent" was inserted in 2004 in the course of the implementation of the EU Framework Decision of 13 June 2002 on combating terrorism.

112 *M. Holdert/G. Dahhan*, „Gematigde" Strijdgroep Ahrar al-Sham is Volgens Rechter „Terroristisch", Nieuwsuur, 29.3.2019.

113 See *G. Dahhan/M. Holdert*, Hoe de Nederlandse Overheid een Syrische "Terreurbeweging" Faciliteerde, Trouw, 10.9.2018; *Holdert/Dahhan*, Nieuwsuur, 29.3.2019. The content of the NLA programme, which is classified as secret, is largely unknown. The aim of the programme is to support "moderate" groups by providing "non-lethal assistance". Between 2015 and 2018, 22 armed groups were supported, and in September 2018 nine of these groups were identified after research by *Nieuwsuur* and *Trouw*.

the meaning of Dutch criminal law in the decisive period as of July 2013.[114] The question of whether the organisation has the objective of committing terrorist offences depends decisively on the concrete conduct of the organisation. The objective in itself – in this case, the overthrow of the Assad regime (short-term objective) in order to establish an Islamic state (long-term objective) – is not sufficient to be considered terrorist.[115] Contrary to the view of the defence, the classification of the group by the Dutch Foreign Ministry is also irrelevant. Since Ahrar al-Sham has been cooperating since 2012 with, among others, Jabhat al-Nusra, which has been on the UN and EU sanctions lists since May 2013 and May 2014 respectively, and has been fighting various other armed groups but has also been engaging in sectarian violence against the Alawite and Shiite civilian population, it must be considered as a terrorist group within the meaning of Art. 140a WvSr.[116] In its reasoning, the Court also refers to the case law of the German BGH.[117] After the judgment, the Dutch Minister of Foreign Affairs said that the political and legal assessment of an organisation could diverge since the Ministry of Foreign Affairs, the Public Prosecutor's Office and the courts would examine the question of whether a group is to be classified as "terrorist" from "different perspectives".[118] While the public prosecutor's office and the judiciary would assess the actual events, i.e. the actions of certain persons during a certain period of time, the Foreign Ministry would base its assessment on the terrorist lists.

In another trial, Driss M., who had joined Jabhat al-Shamiyah in 2014 to fight the IS and returned to the Netherlands at the end of 2015, was convicted in the first instance of terrorism-related crimes.[119] Jabhat al-Shamiyah cooperated closely with Ahrar al-Sham, but was also part of the FSA, which was supported by the Netherlands under the NLA programme, and the verdict was therefore heavily criticised by the defence and the public. In June 2019, the defendant was acquitted by the Hague Court of Appeal because it could not be proven beyond reasonable doubt whether he had actually joined Jabhat al-Shamiya.[120] Thus, it was not necessary to decide whether Jabhat al-Shamiya was a terrorist organization.

Finally, considerable criticism was levelled at the criminal investigation on suspicion of homicide but not terrorism-related crimes conducted against Jitse A., a former sol-

114 Rechtbank Rotterdam, judgment of 29.3.2019 (ECLI:NL:RBROT:2019:2420), https://uitspraken.rechtspraak.nl (in Dutch).

115 The Court here refers to Hoge Raad, judgment of 8.1.2019 (ECLI:NL:HR:2019:12).

116 As an example, the Court cites the participation of Ahrar al-Sham in an offensive in Latakia province in August 2013, in which ten Alawite villages were attacked and 190 Alawite civilians killed.

117 See BGH, decision of 6.9.2018 (AK 34/18).

118 See answer by the Foreign Minister, 9.5.2019, www.rijksoverheid.nl/documenten/kamerstukken/2019/05/09/beantwoording-vraag-kamerlid-voordewind-over-uitspraak-rechter-over-ahrar-al-sham.

119 See also *A. Esman*, Investigation Finds Dutch Program Aided Terror-Tied Groups, IPT, 17.9.2018.

120 Gerechtshof Den Haag, judgment of 27.6.2019 (ECLI:NL:GHDHA:2019:1676), https://uitspraken.rechtspraak.nl (in Dutch). See also *M. Holdert/G. Dahhan*, Vrijspraak voor teruggekeerde Syriëganger Driss M., NOS, 27.6.2019.

dier who had fought with the YPG against the IS.[121] The public prosecutor's office argued that Dutch law does not permit the use of deadly force against other persons, except in special situations such as self-defence.[122] This also applies in the context of armed conflicts when IS fighters are killed – the power to decide over life and death in these cases is reserved for the armed forces alone. The proceedings were later closed for reasons related to evidence.[123]

3. United Kingdom

a. Legal Framework

The starting point and basis of British counter-terrorism criminal law is still the Terrorism Act of 2000.[124] According to the definition set out in Sec. 1, terrorism is the use or threat of action committed in the UK or abroad such as serious violence against persons, serious damage to property, creation of a serious risk to the health and safety of the public, attempts to influence the government of UK or another country or an international organisation, or intimidation of the public or sections of the public in order to advance a political, religious, racial or ideological cause. Sec. 11 criminalises membership and Sec. 12 support of a terrorist organisation formally proscribed by the Home Office (Sec. 3). The Terrorism Act 2006 extended the criminal law relating to terrorism.[125] The Act encompasses the offences in Sec. 1 (encouragement of terrorism), Sec. 5 (preparation of terrorist acts), Sec. 6 (training for terrorism) and Sec. 8 (attendance at a place used for terrorist training).[126] Sec. 17 of the 2006 Act extends UK criminal jurisdiction to cover a number of terrorism-related acts committed abroad, including those committed by non-British nationals. Finally, the Counter Terrorism and Border Security Act 2019 created further terrorism-related offences, including criminalising entering into or staying in an area outside the UK that has been designated as such.[127]

121 *R. Gallagher*, To Syria and Back, The Intercept, 10.7.2017.
122 See AFP, The Guardian, 15.1.2016.
123 See *C. Paulussen/K. Pitcher*, Prosecuting (Potential) Foreign Fighters: Legislative and Practical Challenges, 2018, p. 25.
124 The Terrorism Act 2000 was intended to consolidate the existing legislation on terrorism, but after 9/11 it was the starting point for a number of other legislative acts which included criminal and administrative provisions. See *A. Petzsche*, Strafrecht und Terrorismusbekämpfung – Eine vergleichende Untersuchung der Bekämpfung terroristischer Vorbereitungshandlungen in Deutschland, Großbritannien und Spanien, 2013, p. 240 on the extrajudicial measures, some of which are extremely far-reaching, also *C. Walker*, Foreign Terrorist Fighters and UK Counter Terrorism Laws, Asian Yearbook of Human Rights and Humanitarian Law (AYBHRHL) 2 (2018), p. 177, 195 et seq.
125 *Petzsche* (Fn. 124), p. 240.
126 For a detailed overview see *Petzsche* (Fn. 124), p. 252 et seq.
127 Now Sec. 58a of the Terrorism Act 2000: "of entering or remaining in an area outside the UK that has been designated in regulations by the Secretary of State".

Sec. 117(2A) of the Terrorism Act 2000 and Sec. 19(2) of the Terrorism Act 2006 require the Attorney General to consent to initiating the prosecution of terrorism-related crimes committed either outside the UK or with an intent that wholly or partially affects the affairs of another state.[128] Unlike in Germany, consent must be given separately for each individual case. The reason for this requirement is that the decision as to which members of groups involved in extra-territorial conflicts are to be prosecuted in the UK is not primarily a legal issue but a (foreign) policy decision, which is partly based on intelligence information and must therefore be beyond the jurisdiction of the courts.[129] In making the decision, the Attorney General primarily examines whether prosecution is in the public interest, taking into account, among other aspects, the UK's international relations and national security, but also the seriousness of the offence and the need to punish.[130] The Attorney General can, for example, limit the prosecution to persons who represent a danger to internal security after their return or, as a deterrent, prosecute all persons who have left the country.[131] The grounds for the Attorney General's decisions are not made public.[132] The Guidance in Relation to the Prosecution of Individuals Involved in Terrorism Overseas states that if an individual leaves the country to take part in an armed conflict, a public interest in prosecution will generally be considered to exist.[133]

b. Case Law

In contrast to Germany, France and the Netherlands, the focus in the UK is not provisions regarding terrorist organisations. Instead, Sec. 5 of Terrorism Act 2006, which is also applied in cases of returnees, is the most frequently provision applied to bring charges for preparing a terrorist act.[134] This is due, on the one hand, to the fact that the

128 The Attorney General is the highest legal advisor to the Queen and the Government. He or she is appointed by the Government, but is not a member of the Cabinet. The Attorney General oversees the Crown Prosecution Service. However, the Prosecution Service has the sole prosecutorial discretion to decide which crimes are to be prosecuted, and the Attorney General is not empowered to give instructions in this regard. The Attorney General must, however, give his or her consent for prosecution in certain categories of offence, including terrorism-related offences. He or she decides independently of the Government, but may consult ministers ("Shawcross exercise"). The number of times consent for prosecution has been given by the Attorney General has increased steadily in recent years. Such consent was given in 2013 in respect of 10 suspects, but the number had already risen to 34 in 2014 and to 40 in 2015; *Anderson*, The Terrorism Acts in 2015, 2016, para. 9.20.

129 See *Greene* ICLQ 66 (2017), p. 411, 430.

130 See *Crown Prosecution Service*, Terrorism: Guidance in Relation to the Prosecution of Individuals Involved in Terrorism Overseas, 2019.

131 See *Greene* ICLQ 66 (2017), p. 411, 430.

132 On anti-IS foreign fighters, see *Walker* AYBHRHL 2 (2018), p. 177, 190.

133 *Crown Prosecution Service* (Fn. 130). The reference directly concerns the exercise of the prosecutorial discretion by the Public Prosecutor's Office, but is transferable to the decision of the Attorney General.

134 See *Walker* AYBHRHL 2 (2018), p. 177, 186; *Ip* ICLQ 69 (2020), p. 103, 115.

legislation includes a wide range of (preparatory) acts with a terrorist aim within the preliminary stages of a punishable attempted act or the agreement to commit an act and, on the other hand, to the severe sentencing framework with a maximum penalty of life imprisonment.[135] Moreover, the provision is not restricted to members of officially prohibited terrorist groups.[136]

The distinction between non-terrorism, "ordinary" terrorism and "good", "noble" or "just" terrorism has been discussed *in extenso* in several judgments in the UK, although not all of them have concerned the Syrian conflict.

One pertinent judgment much referred to in later proceedings was handed down in 2007 in *R v F* in connection with the Libyan armed conflict.[137] The defendant argued that he could not be charged with criminal offences under terrorist law since the actions involved were against the Libyan government. He argued that the Terrorism Act 2000 is not intended to protect undemocratic governments. However, the Court rejected this defence strategy: Although the definition of terrorism in Sec. 1 Terrorism Act 2000 is very broad, the court ruled that "the legislation does not exempt, nor make an exception, nor create a defence for, nor exculpate what some would describe as terrorism in a just cause. Such a concept is foreign to the 2000 Act. Terrorism is terrorism, whatever the motives of the perpetrators".[138] And, "the terrorist legislation applies to countries which are governed by tyrants and dictators".[139]

This view was implicitly confirmed by the Supreme Court in *R v Gul* in 2013.[140] In the ruling, the Supreme Court dealt with the definition of terrorism according to Sec. 1 Terrorism Act 2000 and discussed in particular the relationship between counter-terrorism (criminal) law and armed conflict. The Supreme Court clearly criticised the broad definition of terrorism and the discretion granted to law enforcement authorities in individual cases.[141] Nevertheless, the Court concluded that the wording of the legislation does not permit a restrictive interpretation.[142] This suggests that military or quasi-military force intended to overthrow a (foreign) government is also covered,

135 *Petzsche* (Fn. 124), p. 262 ff., therefore also referred to as a "catch-all offence" (264) – note that this is a "catch-all offence" with a sentence of up to life imprisonment.

136 A conviction for membership in a prohibited terrorist organization under Sec. 11 appears to have occurred in only two cases so far, both of which relate to the IS (*R v Tareena Shakil* (2016) and *R v Mohammed Abdallah* (2017)). See also *Walker* AYBHRHL 2 (2018), p. 177, 186.

137 *R v F* [2007] QB 960. See also *Greene* ICLQ 66 (2017), p. 411, 426 et seq.

138 *R v F* [2007] QB 960, para. 27.

139 *R v F* [2007] QB 960, para. 32.

140 [2013] UKSC 64.

141 The Supreme Court points out that the definition of terrorism in Sec. 1 of the TA 2000 is the starting point for an immense number of measures, some of which are extremely invasive, not only by the prosecution authorities but also by the police and immigration authorities, see also [2013] UKSC 64, para. 26 et seq. In para. 62, the Supreme Court, *obiter dictum*, recommends that the British legislature tighten the definition of terrorism in Sec. 1 TA 2000.

142 [2013] UKSC 64, para. 38.

even if this is (officially or unofficially) also in the (foreign) political interests of the British government.[143]

In *R v Sarwar & Ahmed,* the question of "noble terrorism" was again discussed by the Court of Appeal, this time at the level of sentencing and in the context of the Syrian conflict.[144] In May 2013, the defendants had joined Jahbat al-Nusra, which was at the time of their departure not yet banned as a terrorist organisation in the UK, but instead was part of the FSA, which was financially supported by the UK.[145] The defence argued that – particularly in view of the broad scope of the offence under Sec. 5 Terrorism Act 2000 – mitigating circumstances should be taken into account, namely that the defendants had joined a group that they believed would fight against the Assad regime and intended to harm only soldiers of the Syrian armed forces and not the civilian population. Again, the Court ruled that the defendants' actions fell under the definition of terrorism in Sec. 1 Terrorism Act 2000 and, furthermore, it was not for the court to decide on the basis of political considerations whether the defendants' involvement in the FSA was a kind of "noble cause terrorism". Making such a distinction would force the court to take complex and delicate political arguments into account in a situation that is inherently fluid and unclear, where loyalties are ambiguous and, as in Syria, subject to constant change.[146] Finally, the fact that the defendants did not plan any terrorist activities in the UK was irrelevant in terms of sentencing, since Sec. 5 Terrorism Act 2006 explicitly covers terrorist activities abroad.[147]

In 2016, the Court of Appeal in *R v Kahar and others*, also a Syria-related case, established certain guidelines for the assessment of punishment in convictions under Sec. 5 Terrorism Act 2006, particularly in view of the breadth of the offence and the potentially high penalty.[148] Here, the Court once again stated that it does not constitute a mitigating reason if the defendant acts with "good" intentions. Sec. 5 of the 2006 Act covers a whole range of circumstances, including both the preparation of terrorist acts intended to take place in the UK and those intended to take place abroad, the latter often in the form of providing violent support in the context of non-international armed conflicts.[149]

143 [2013] UKSC 64, para. 38. Also under international (humanitarian) law, the concept of terrorism need not be restricted; critical of this *A. Coco*, The Mark of Cain – The Crime of Terrorism in Times of Armed Conflict as Interpreted by the Court of Appeal of England and Wales in *R v. Mohammed Gul*, Journal of International Criminal Justice 11 (2013), p. 425 et seq.; see also *A. Greene*, The Quest for a Satisfactory Definition of Terrorism: R v Gul [2013] UKSC 64, Modern Law Review 77 (2014), 780 et seq.

144 [2015] EWCA Crim 1886.

145 The Court leaves open the question of whether Jahbat al-Nusra really was part of the FSA at that time.

146 *Sarwar & Ahmed* [2015] EWCA Crim 1886, para. 41.

147 *Sarwar & Ahmed* [2015] EWCA Crim 1886, para. 46.

148 *R v Kahar and others* [2016] EWCA Crim 568.

149 *R v Kahar and others* [2016] EWCA Crim 568, para. 16 et seq. In some cases, these two categories would exist simultaneously, e.g. when a foreign fighter fighting in a non-international conflict returns to the UK to commit terrorist acts.

Criminal investigations involving YPG have led to dispute as well. The official handling of YPG foreign fighters has been criticized as erratic: In some cases, similar to Germany, returning YPG fighters were considered a threat to public security; some were questioned on their return to Britain, some had their homes searched, others had their passports confiscated and other administrative measures imposed, in a few cases criminal proceedings were initiated, but in most cases were not.[150] In 2016, Josh W., who had joined the YPG, was investigated for preparing terrorist acts under Sec. 5 Terrorism Act 2006. The Crown Prosecution Service claimed that the defendant was pursuing a political and ideological goal by joining the YPG and its armed struggle. However, the competent court decided that there was no case to answer on that charge, as the YGP's fight against the IS could not be considered terrorism.[151] The Court argued similarly in the case against Aidan J.[152] J. had travelled to Syria in 2017 and was trained there, first in a PKK-run (refugee) camp in Iraq and later in a YPG-organised camp in Syria. The prosecution argued that even combat actions undertaken against the IS by a person who is not integrated into the armed forces of a state constitute terrorism in the terms of Sec. 1 Terrorism Act 2000. However, J. was acquitted with respect to the YPG-related accusations. As part of the Syrian Defence Forces, the YPG is a group that is supported by the UK and others in its fight against the IS to protect the Kurdish population and does not pursue any other political or religious (long-term) goals. The YPG's fight is therefore not a kind of "noble terrorism", but should from the outset be

150 See *Gallagher*, The Intercept, 10.7.2017 (during a debate in the House of Commons, it was stated that of 20 anti-IS foreign fighters, two had been detained under the Terrorism Act, four had been questioned but not detained and 14 had returned to their homes completely unchallenged by the authorities); *J. Blackbourn/D. Kayis/N. McGarrity*, Anti-Terrorism Law and Foreign Terrorist Fighters, 2018, p. 24; *Martin*, openDemocracy, 9.1.2019. See also the report of the *Foreign Affairs Committee of the House of Commons*, Kurdish Aspirations and the Interests of the UK, 9.2.2018.

151 W. was instead brought before court for possession of *The Anarchist Cookbook*, which was found in the course of a search of his home, but was acquitted of all charges of terrorism; see *R. Gallagher*, How the U.K. Prosecuted a Student on Terrorism Charges for Downloading a Book, The Intercept, 28.10.2017. On the proceedings against James M., who had been accused in 2018 of having been trained in a camp for purposes connected with the preparation of a terrorist act, see *Martin*, openDemocracy, 9.1.2019. The proceedings were subsequently halted without specific reason, see *L. Dearden*, James Matthews: Former British soldier who fought against Isis attacks 'incoherent' terror charge, The Independent, 11.2.2019.

152 Vgl. *L. Dearden*, Aidan James: British fighter who battled Isis in Syria jailed for four years, The Independent, 7.11.2019.

regarded as "no terrorism at all".[153] On the other hand, J. was convicted for being present in the PKK camp.[154]

Finally, in connection with the FSA, the criminal investigations against Bherlin G. should be mentioned. G. had joined FSA-associated groups from Sweden and was arrested at Heathrow airport while in transit sometime after his return from Syria. However, the charges of terrorism-related crimes under Sec. 7 of the Terrorism Act 2000 were withdrawn when it became apparent that the UK had supported these groups in their fight against the Syrian regime, including by supplying arms.[155]

V. Concluding Remarks

This cursory comparative law summary of the way anti-regime and/or anti-IS (foreign) fighters are dealt with shows that the demarcation between terrorism and "resistance" or the topic of "terrorism and armed conflict" is handled differently in the domestic criminal law systems, that it is problematic and that it also produces non-uniform results within various member states of the EU – the area of freedom, security and justice, but without a common foreign policy, after all. The controversies under international law centring on finding a manageable definition of terrorism are reflected in domestic criminal law systems and are growing more serious in view of the overlap between terrorism and armed conflict. The non-existence of a collective right of resistance under international law makes it feasible that all armed groups, even those who are resisting state leaders who commit crimes under international law or other terrorist groups such as the IS, can be included under the concept of terrorism. The lack of

153 See the sentencing decision of Justice Edis, Central Criminal Court, 7.11.2019, www.judiciary.uk/judgments/sentencing-remarks-of-the-honourable-mr-justice-edis-r-v-aidan-james. Justice Edis criticises the decision of the Attorney General to prosecute British YPG foreign fighters at all; he is "uneasy about the prosecution of a man who is able to say that at least some of the acts of terrorism for which he was preparing or trained were carried out with the support of the RAF".

154 The Court stated that the PKK also protected around 12,000 Kurds from the IS in the refugee and training camp where J. was staying. However, since the PKK was a terrorist organisation prohibited under British law, staying in the camp was a punishable offence. In an interim decision, the Judge explained why the legislator has not standardized any exemption from the elements of the crime, justification or other exclusion of punishment for terrorism "in a just or noble cause", among other things: military operations can cause excessive civil collateral damage, especially when carried out by amateurs; returnees can be traumatised and pose a risk to themselves and others in the UK; government support for non-state armed groups is subject to certain conditions, such as compliance with national and international humanitarian law; alliances change quickly and the public has no information available to them from the intelligence services to decide what is in their and Britain's interest; it is therefore generally preferable for individuals not to go abroad to fight and to make that decision on the basis of information they have received in the media and on the internet. See Court of Appeal, *R v AJ*, 11 April 2019, [2019] EWCA Crim 647, para. 24.

155 *R. Norton-Taylor*, Terror trial collapses after fears of deep embarrassment to security services, The Guardian, 1.6.2015.

combatant privilege in non-international armed conflict offers the possibility – even for states not involved in the conflict – of prosecuting the members of such groups solely for participating in a conflict.

These aspects are rarely addressed in national criminal law systems. Expressly named and explicitly shifted into the sphere of politics by § 129b para. 1 s. 5 StGB, the delimitation is found only in German law. In France, the Netherlands and, in view of the requirement for the Attorney General's consent, also to a lesser extent in the UK, the decision regarding the (non-)existence of terrorism is left to the courts – a state of affairs which is criticised by the courts themselves, as it is essentially a political decision. Whereas in Germany the scope of § 129a para. 1 StGB makes the concept of terrorism layered, the delimitation in other legal systems is between terrorism and non-terrorism.

Also, there is no uniformity in the criteria to be used in assessing an organisation as terrorist in nature or not. Whereas in Germany the wording of the reprehensibility clause gives the objectives of the organisation a certain precedence (although it is unclear whether this refers to the long-term or the intermediate objective), the courts in France and the Netherlands emphasise that the means and methods used are decisive for the evaluation. The question of whether the organization receives direct or indirect military aid or other political support from the government or allies is also assessed and weighted differently. The tensions between counter-terrorism criminal law and foreign policy are clearly evident in the complex structure of the Syrian conflict.

It is also clear that counter-terrorism criminal law, which is designed for application in democracies and in times of peace, is extremely flexible and highly inclusive in all legal systems, especially in the context of armed conflicts. Broadly drawn substantive offences, some of which include notably vague legal terms, are combined with an expansion of extraterritorial applicability of domestic criminal jurisdiction. This means that the fog of counter-terrorism criminal law in an armed conflict first envelops every member of a non-state group. In addition, for all the differences in detail, the prosecution authorities generally have broad discretion whether to prosecute or not and the possibility of initiating rather harsh criminal procedural measures. Thus, counter-terrorism criminal law can be applied, without further differentiation, as an instrument for assessing the dangerousness of all (foreign) fighters and, if necessary, for determining their involvement in specific crimes. This becomes clear – in Germany, but also in the UK – especially when dealing with YPG fighters who have to undergo a terrorism-related security check upon their return even though criminal prosecution, at least not according to §§ 129a/b StGB, is not pending.