

Tarik Gherbaoui

# Europe's Foreign Fighter Conundrum

Legal Responses, the Rule of Law,  
and Human Rights



ASSER PRESS



Springer

Tarik Gherbaoui  
T.M.C. Asser Instituut  
The Hague, The Netherlands

ISBN 978-94-6265-670-3      ISBN 978-94-6265-671-0 (eBook)  
<https://doi.org/10.1007/978-94-6265-671-0>

Published by T.M.C. ASSER PRESS, The Hague, The Netherlands [www.asserpress.nl](http://www.asserpress.nl)  
Produced and distributed for T.M.C. ASSER PRESS by Springer-Verlag Berlin Heidelberg

© T.M.C. ASSER PRESS and the author 2025

No part of this work may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, microfilming, recording or otherwise, without written permission from the Publisher, with the exception of any material supplied specifically for the purpose of being entered and executed on a computer system, for exclusive use by the purchaser of the work.

The use of general descriptive names, registered names, trademarks, service marks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.

This T.M.C. ASSER PRESS imprint is published by the registered company Springer-Verlag GmbH,  
DE part of Springer Nature

The registered company address is: Heidelberger Platz 3, 14197 Berlin, Germany

If disposing of this product, please recycle the paper.

# Acknowledgements

This book is to a large extent based on the doctorate I pursued at the European University Institute in Florence, an extraordinary place. My deepest gratitude goes to my Ph.D. supervisor Prof. Martin Scheinin. His expertise in the field of counter-terrorism and human rights has been invaluable to the completion of this thesis. I am immensely grateful for his support and availability in the past ten years.

I am greatly indebted to the examiners of my doctoral research, Prof. Kim Lane Scheppele, Prof. Sarah Nouwen, and Dr. Cian Murphy for their thorough and constructive engagement with my work. This book has hugely benefited from their thoughts and ideas.

Dr. Devika Hovell warmly welcomed me to the LSE Law Department, where I presented parts of this book at the LSE Staff Seminar. I also have fond memories of the inspiring conversations with Dr. Eduardo Baistrocchi during countless runs along the Thames.

My gratitude goes to Dr. Jillaine Seymour for her support throughout the years and for providing a home away from home at Sidney Sussex College, Cambridge. My time at Sidney was hugely formative in many ways.

I greatly benefited from my research stay in 2019/2020 in gorgeous Vienna. Professor August Reinisch warmly welcomed me to the Faculty of Law where large parts of this book were written.

I am grateful to my former teachers Dr. Catherine Brölmann, Arjen van den Herik, and Dr. Iryna Marchuk for their help and advice many years ago.

I would also like to extend my gratitude to Anna Di Biase and Claudia De Concini for their help during my time at the European University Institute.

This research would have been impossible without the generous funding I have received from the European University Institute, the European Commission, and in particular the Government of the Netherlands. I would like to thank the Forum Transregionale Studien and Stiftung Mercator for the funding I have received as a reconstitution fellow.

I am grateful to my current and former colleagues at the Asser Institute, Dr. Romyana van Ark, Zsófia Baumann, Prof. Janne Nijman, Dr. Christophe Paulussen, James Patrick Sexton, and Dr. Sofia Stolk, for facilitating the completion of this book. I greatly appreciate the smooth cooperation with Frank Bakker and Annika Mäkinen from T.M.C. Asser Press, and their keen eye for detail, during the publishing process of this book.

I would like to thank Robin van der Lugt, Gaia Zoboli, Paula Rodríguez Padilla, and Eylül Kabakci for their invaluable help in preparing the manuscript of this book for submission.

Finally, I would like to thank my wife Jasmina, daughter Nora, my parents Brigitte and Abed, my family, and my friends. Thank you for your encouragement, patience, and relentless support.

# Contents

<b>1</b>	<b>Introduction</b>	<b>1</b>
1.1	The European Foreign Fighter Conundrum	2
1.2	The Main Research Question	5
1.3	The Legal Response to Foreign Fighters at the International Level	9
1.4	The Legal Response to Foreign Fighters at the European Level	11
1.5	The Legal Response to Foreign Fighters at the Domestic Level	12
1.6	A Selected Thematic Dimension: The Deprivation of Citizenship	13
1.7	Methodology and Sources	13
	References	15
<b>2</b>	<b>The UN Security Council's International Legal Regime on Foreign Fighters and its Consistency with the Rule of Law and Human Rights</b>	<b>19</b>
2.1	Situational Background and Outline	20
2.2	The Introduction of the Novel and Ill-Defined Concept of the 'Foreign Terrorist Fighter' into International Law	21
2.3	Creating New Legally Binding Obligations on States to Address the Foreign Fighter Phenomenon	26
2.4	Foreign Fighters as Individuals Under International Law: Direct Effect of International Legal Obligations at the Domestic Level?	32
2.5	The Extraordinarily Wide Scope of Resolution 2178: International Cooperation and the Rise to Prominence of 'Countering Violent Extremism'	36
2.6	'International Legislation' by the Security Council	40
2.7	Security Council Resolution 2178 as a Piece of International Legislation	44

2.8	The Legality of Security Council Resolution 2178 in Light of the UN Charter and the Wider Framework of International Institutional Law .....	46
2.9	The Legality of Security Council Resolution 2178 Within the Wider Legal Architecture of the United Nations System .....	50
2.10	The Legality of Security Council Resolution 2178 and Subsequent State Practice .....	52
2.11	The Fundamental Flaws of the Security Council's International Legal Regime on Foreign Fighters and their Long-Term Repercussions .....	53
	References .....	55
<b>3</b>	<b>The Legal Response to Foreign Fighters at the European Level and Its Consistency with the Rule of Law and Human Rights .....</b>	<b>59</b>
3.1	Situational Background and Outline .....	60
3.2	The Council of Europe Criminalises Travelling Abroad for Terrorism .....	63
3.3	The Necessity of the EU Directive on Combating Terrorism .....	68
3.4	The Drafting of the EU Directive on Combating Terrorism .....	72
3.5	Assessing the Legality of the EU Directive on Combating Terrorism Under European Union Law .....	74
3.6	The Opaque Legislative Process Leading to the Adoption of the Directive .....	77
3.7	The Interplay Between the EU Definition of Terrorism and the European Legal Response to Foreign Fighters .....	80
3.7.1	The Objective Elements of the EU Definition of Terrorism .....	83
3.7.2	The Subjective Elements of the EU Definition of Terrorism .....	85
3.7.3	The Definition of a 'Terrorist Group' .....	88
3.8	The Novel Offence of 'Travelling Abroad for the Purpose of Terrorism' .....	90
3.9	Accumulating Legal Uncertainty: Rule of Law Concerns Regarding the Directive's Ancillary Offences .....	96
3.10	Addressing the Foreign Fighter Conundrum at the European Level: Opaque Legislative Procedures and Serious Definitional Defects .....	96
	References .....	101
<b>4</b>	<b>The United Kingdom's Criminal Justice Response to Foreign Fighters and Its Consistency with the Rule of Law and Human Rights .....</b>	<b>105</b>
4.1	Situational Background and Outline .....	106
4.2	Criminal Prosecution as the Primary Legal Response to Foreign Fighters? .....	111

4.3	Outlining the Legislative Framework to Prosecute Foreign Fighters Under UK Law .....	114
4.4	The Crucial Role of the Definition of Terrorism in the United Kingdom's Legal Response to Foreign Fighters .....	118
4.4.1	Extraterritorial Application of Counter-Terrorism Law and Fighting for a 'Just Cause' .....	122
4.4.2	Foreign Fighters as Members of Armed Forces and Exclusionary Clauses .....	126
4.4.3	Discretion in the Application of the Definition of Terrorism to Foreign Fighters and the Rule of Law ....	131
4.4.4	The Application of 'Counter-Terrorist Powers' in Order to Prevent Foreign Fighter Travel .....	132
4.5	Prosecuting Foreign Fighters for the 'Preparation of Terrorist Acts' .....	134
4.6	Avoiding Arbitrariness: The Sentencing of Foreign Fighters .....	137
4.7	Thou Shalt Not Enter: The Designated Area Offence and the Rule of Law .....	143
4.7.1	Assessing the Necessity and Proportionality of the Designated Area Offence .....	145
4.8	Assisting Foreign Fighters: Prosecuting Foreign Fighter Associates and the Rule of Law .....	148
4.8.1	Criminalising the Financing of Foreign Fighters: How to Assess Mens Rea? .....	150
4.8.2	Inciting Foreign Fighter Travel and Freedom of Expression .....	153
4.9	British Foreign Fighters, International Cooperation, and the Death Penalty .....	156
4.10	Summary Executions Outside the Realm of the Rule of Law? Airstrikes against British Foreign Fighters in Syria and Iraq .....	160
4.11	Bringing Foreign Fighters to Justice in the United Kingdom: Testing the Boundaries of the Rule of Law and Human Rights ...	163
	References .....	165
<b>5</b>	<b>The Netherlands' Criminal Justice Response to Foreign Fighters and its Consistency with the Rule of Law and Human Rights .....</b>	<b>171</b>
5.1	Situational Background and Outline .....	172
5.2	A Right to Return? The Repatriation of Dutch Foreign Fighters, the Rule of Law, and Human Rights .....	176
5.3	The Criminal Justice Response to Dutch Foreign Fighters: Trials in Absentia .....	181

5.4	The Legislative Framework to Address Foreign Fighters: Terrorist Offences Act 2004 and the Legal Response to Foreign Fighters .....	185
5.5	The Definition of Terrorism Under Dutch Law and its Impact on the Legal Response to Foreign Fighters .....	188
5.6	The Preventive Turn of Counter-Terrorism Law and the Legal Response to Foreign Fighters .....	191
5.7	Interpreting the Offence of Training for Terrorism in Light of International Legal Obligations .....	194
5.8	To Exclude or Not to Exclude? The Interplay Between Dutch Counter-Terrorism Law and International Humanitarian Law ....	199
5.9	The Dutch Criminal Justice Response to Foreign Fighters and its Impact on the Rule of Law .....	202
	References .....	203
<b>6</b>	<b>The Deprivation of Citizenship and Other Administrative Measures Aimed at Foreign Fighters and Their Consistency with the Rule of Law and Human Rights .....</b>	<b>207</b>
6.1	Situational Background and Outline .....	208
6.2	The Deprivation of Citizenship of Foreign Fighters in the United Kingdom: The Perils of Executive Discretion .....	213
6.2.1	The Begum Conundrum: Naïve Teenager or Enemy of the State? .....	218
6.2.2	The Deprivation of Citizenship of Foreign Fighters and International Legal Obligations to Prevent Statelessness .....	221
6.2.3	Citizenship Deprivation of Foreign Fighters and the Right to a Fair and Effective Appeal .....	225
6.3	Addressing Foreign Fighters Through Administrative Measures: The Counter-Terrorism and Security Act 2015, the Rule of Law, and Human Rights .....	230
6.3.1	Novel Powers to Seize and Retain Passports at the Border: Preventing Would-Be Foreign Fighters from Travelling? .....	233
6.3.2	The Retention of Travel Documents of Foreign Fighters .....	235
6.3.3	Temporary Exclusion Orders and Returning Foreign Fighters: Modern-Day Exile or a Managed Return? .....	237
6.3.4	Temporary Exclusion Orders and Their Consistency with International Human Rights Law .....	239
6.3.5	Temporary Exclusion Orders and International Legal Obligations to Counter Terrorism .....	244
6.4	The Deprivation of Citizenship of Foreign Fighters in the Netherlands .....	246



6.5	The Legality of the Deprivation of Citizenship of Foreign Fighters Under International Human Rights Law .....	251
6.6	From an Obscure Tool Used by Totalitarian Regimes to One of the Flagship Counter-Terrorism Policies of Liberal Democracies .....	257
	References .....	260
<b>7</b>	<b>Resolving the Foreign Fighter Conundrum: The European Legal Response to Foreign Fighters and Its Consistency with the Rule of Law and Human Rights .....</b>	<b>265</b>
7.1	Delimiting the Foreign Fighter Conundrum: A Definitional Quagmire .....	267
7.2	Resolving the Foreign Fighter Conundrum Through Multilateral Channels: The Legitimacy of International and European Legal Responses to Foreign Fighters Under the Rule of Law .....	269
7.3	Resolving the Foreign Fighter Conundrum Through the Lens of Counter-Terrorism: The Perils of Applying Counter-Terrorism Law to Situations of Armed Conflict .....	272
7.4	Resolving the Foreign Fighter Conundrum by Pre-Emptying Future Harm: the Preventive Turn in Legal Responses to Foreign Fighters and the Rule of Law .....	275
	References .....	279
	<b>Index .....</b>	<b>281</b>