abstract

Europe faces a complex problem with foreign fighters returning after traveling to fight in Syria and Iraq. The number of foreign fighters traveling to fight in Syria and Iraq is unprecedented and cause for great concern, especially for interior EU member states whose security is dependent on the border security of the peripheral EU countries. This dependent relationship, and the vulnerabilities it exposes, has shaped the broader question of what the EU, and its member states, can lawfully do to achieve greater security in the age of transnational terrorism. Considering this complex and highly political issue, this Note suggests steps the EU and its member states can take to ensure greater security from the foreign fighter threat. This Note presents policy suggestions the EU may implement to address the foreign fighter threat and security in this age of transnational terrorism, while maintaining its integrity and value of human rights and civil liberties. These solutions include greater information sharing between member states, legislation targeted at terror-related activity, and increased de-radicalization programs within vulnerable communities.

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I. Introduction

An estimated 3,400 to 5,000 European Union (EU) citizens are fighting in Syria and Iraq, while their fellow countrymen live amid fears these fighters will return home with motivations similar to those of French national Mehdi Nemmouche. Mr. Nemmouche became radicalized in a French prison where he was serving a sentence for violent robbery. During his stay in prison, he “distinguished himself by his extremist proselytism,” and prison administrators informed French intelligence services upon his release. Nevertheless, the French did not place him under surveillance and, within weeks, Mr. Nemmouche left France bound for Brussels, London, Beirut, Istanbul and, ultimately, Syria where he joined the Islamic State.


3. Id.

4. Id.
French officials were unaware of Mr. Nemmouche’s return from Syria until he landed in Frankfurt, Germany and German officials notified French authorities. In an apparent effort to “cover his tracks” after leaving Syria, Mr. Nemmouche traveled to Istanbul, Malaysia, Singapore, and Hong Kong, before arriving in Frankfurt. Again, French authorities did not act on German intelligence, enabling Mr. Nemmouche to travel to Belgium armed with a Kalashnikov assault rifle and .38 caliber handgun. In what is now known as the Brussels Jewish Museum attack, Mr. Nemmouche, allegedly, opened fire, and killed three museum-goers, while critically wounding a museum volunteer. Mr. Nemmouche was neither identified nor apprehended until six days later when a bus he boarded, traveling a well-known cannabis smuggling route, was stopped during a routine drug search. During this search authorities found weapons and clothing matching the descriptions of those of the attacker, a piece of fabric inscribed with the Islamic State’s insignia, and a video in which a man, ostensibly Mr. Nemmouche, describes his responsibility for the killings at the Jewish Museum.

Since late 2013, European officials have foiled at least eleven different plots in Europe involving people who had previously joined jihadist groups in Syria, and estimates suggest as many as ten percent of European foreign fighters have become security threats after returning home. These foreign fighters returning to Europe present a complex set of challenges for policymakers, which are only magnified by the

5. Id.
6. Id.
7. Sam Jones, Europe Warned to Brace for Syria-Linked Attacks, FIN. TIMES (June 5, 2014, 8:54 AM), http://www.ft.com/cms/s/0/34832ce6-ec13-11e3-ab1b-00144feabdc0.html#axzz3XK5KjH3.
8. Sayare, supra note 2.
10. Id.
12. Sayare, supra note 2.
security loophole created by Europe’s border-free travel zone, known as the Schengen area.15 This paper presents ideas for how the EU can reconcile its increased anxiety over radicalized, battle-hardened fighters returning to Europe with a counter-terrorism policy that respects both human rights and the bloc’s commitment to free movement across the Schengen area. Part II describes the current foreign fighter phenomenon, the area of free movement within Europe and other fundamental rights protected in the EU, and how the EU has responded to foreign fighters returning home. Part III presents proposals made by EU policymakers regarding how to improve or change the EU’s response to the foreign fighter issue, specifically focused on improving the body’s current systems. Part IV addresses the tension the EU faces in developing a strategy to address the foreign fighter phenomenon, such as balancing the need to protect security with upholding fundamental human rights and EU goals. Finally, Part V presents a multi-faceted policy the EU may implement to address the foreign fighter threat and security in this age of transnational terrorism, while maintaining its integrity and value of human rights and civil liberties.

II. BACKGROUND

A. Foreign Fighters

While the phenomenon of foreign fighters is not new, the current issue of European foreign fighters and returnees is a complex and dynamic one because of the difficulty in tracking them and knowing their intentions.16 Since the Islamic State declared a caliphate on June 29, 2014, recruitment of foreigners has surged, bringing in fighters at a faster rate than any previous Jihadist conflict, including the Soviet-Afghan war in the 1980s and Iraq after the American invasion in 2003.17 The seemingly uninterrupted flow of Europeans traveling through the Schengen area to Turkey and into Syria has presented a unique and

difficult challenge for European policymakers. While families are worried about their youths being harmed abroad, authorities are concerned about the potential security threat foreign fighter returnees could pose to themselves and others.

The exact number of European fighters in Syria and Iraq is unknown. Estimates are based on information gathered from social media, community sources, or investigations, and these numbers tend to underestimate the true number of persons traveling abroad to engage in jihad because many wish to conceal their identities or keep their activities secret. In April 2014, Gilles de Kerchove, the Counter-Terrorism Coordinator for the EU (CTC), estimated that over 2,000 had gone to Syria from the twenty-eight member states of the EU, up from just 500 one year earlier. Reports from 2015 estimate 20,000 foreign militants are fighting in Syria and Iraq, including at least 3,400 Europeans, however, high estimates suggest up to 5,000 foreign fighters in these two countries are EU citizens. France, Britain, Belgium, and Germany have the largest numbers of citizens in the fight, while Belgium has the highest number of per capita foreign fighters in Europe with 350 out of a population of 11 million.

A major problem area in the flow of European foreign fighters is the long, porous border between Turkey and Syria. Turkey maintains it has closed most of its official border crossing points, though it is doubtful that militants would have used established border crossings anyway. Turkey claims in 2013 alone it denied entry to 4,000 people who had been on a no-entry list, but estimates suggest Turkey’s porous border has allowed thousands of militants to cross into both Syria and

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19. Id.
22. Abi-Habib & Parkinson, supra note 1.
27. Id.
Iraq. One such example is Imran Khawaja, a Briton who spent six months fighting in Syria. Even though Mr. Khawaja had been put on a U.K. blacklist after posing for a photograph with a severed head in Syria, he was able to cross into Bulgaria from Turkey and drive through Europe, without detection, until he was caught trying to sneak into the United Kingdom. Moreover, although Turkish intelligence declined to comment, media reports suggest some Islamic State militants were planning on using this same method, crossing into Bulgaria from Turkey, to carry out attacks in EU nations.

While many European intelligence officials fear that a wave of terrorism will sweep over Europe driven by the civil war in Syria and the crisis in Iraq, some argue the potential threat from foreign fighters is exaggerated. For instance, proponents of this theory argue that becoming a foreign fighter makes a terrorist much more likely to come to the attention of security services. Additionally, there are number of other factors that mitigate their likelihood of returning to Europe to conduct an attack. Many foreign fighters either die in suicide attacks or engagements with opposing forces, others continue fighting in the conflict zone or move on to the next battle for jihad never returning home, and still others quickly become disillusioned once in the conflict zone and return home with no violent motives. Others argue that the threat from returning foreign fighters is overstated because the entire foreign fighter experience can be thought of as a process from recruitment to fighting abroad to terrorism, and the vast majority of individuals do not pass through the entire process. Proponents of this theory argue that most individuals move off the road to terrorism at different stages in the process, and conflict-specific dynamics influence the likelihood that a given individual will travel all the way through the process to terrorism. The progression from foreign fighter to terrorist is not inevitable, and the majority of people who return from fighting in Syria and Iraq may pose no terrorist threat at all.

28. Id.
29. Id.
30. Id.
31. Id.
32. Byman & Shapiro, supra note 11.
33. Id.
34. Id.
35. Id.
36. Id.
37. Id.
less, the difficulty remains how to distinguish those who will conduct an attack from those who will not.\footnote{Id.}

Despite arguments that returning foreign fighters pose little threat to domestic Europe, western security services fear that the foreign fighter threat in Syria and Iraq is different than past foreign fighter episodes.\footnote{Byman & Shapiro, supra note 24.} The concern is young European Muslims will go off to fight as “Sunni idealists” but return as “anti-Western terrorists.”\footnote{Id.} Not only will those going to fight return as hardened veterans, “steady in the face of danger and skilled in the use of weapons and explosives,” but they will also form networks and establish ties to jihadists around the world, making them prone to further radicalization.\footnote{Id.} Through these networks, the fighters could have access to training, weapons, and other resources necessary for an attack.\footnote{Id.} Furthermore, counter-terrorism officials fear that such attacks, involving returning battle-hardened jihadists, will only increase with time.\footnote{Id.} Considering this potential string of events, foreign fighters are arguably the biggest security threat to the EU today.\footnote{Zachary Goldman, The Foreign Fighter Resolution: Implementing a Holistic Strategy to Defeat ISIL, JU\textsc{ST} S\textsc{ECURITY} (Sept. 29, 2014, 11:15 AM), http://justsecurity.org/15721/foreign-fighter-resolution-implementing-holistic-strategy-defeat-isil/.

While the debate about the likelihood of foreign fighters conducting attacks against their home countries carries on, the threat of and concern for future attacks is not entirely unfounded. Political scientist Thomas Hegghammer estimates approximately ten percent of the European foreign fighters have become security threats after returning home.\footnote{Radicalisation Awareness Network, Report Cities Conference on Foreign Fighters to Syria, EUR. COMM’N DIRECTORATE-GEN, MIGRATION & HOME AFFAIRS (Jan. 30, 2014), http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/radicalisation_awareness_network/cities-conference/docs/report_cities_conference_on_foreign_fighters_en.pdf.

Although foreign fighter returnees could be recruited to conduct a large-scale attack, the more likely scenario is that some returned foreign fighters conduct self-directed, or lone wolf attacks. These attacks are very difficult for security services to predict and stop.\footnote{Sean Davis, Responding to Foreign Terrorist Fighters: A Risk-Based Playbook for States and the International Community, GLOBAL CTR. ON COOPERATIVE SECURITY 2 (2014), http://www.globalcenter.} For example, in May 2014, the previously mentioned Mehdi

\begin{thebibliography}{99}
\bibitem{note1} Id.
\bibitem{note2} Byman & Shapiro, supra note 24.
\bibitem{note3} Id.
\bibitem{note4} Id.
\bibitem{note5} Id.
\bibitem{note8} Dore, supra note 14.
\bibitem{note9} Sean Davis, Responding to Foreign Terrorist Fighters: A Risk-Based Playbook for States and the International Community, GLOBAL CTR. ON COOPERATIVE SECURITY 2 (2014), http://www.globalcenter.
\end{thebibliography}
Nemmouche, a French citizen of Algerian descent, committed a terrorist attack at the Jewish Museum in Brussels, leaving three dead and one critically injured.\footnote{European Jihadists, supra note 17.} Mr. Nemmouche spent a year in Syria fighting alongside the Islamic State before returning to France just two months before the attack.\footnote{Goldman, supra note 44; see also European Jihadists, supra note 17.}

Much more can be done to reduce the threat of foreign fighters committing terrorist attacks in Europe,\footnote{Byman & Shapiro, supra note 11.} but as the head of the EU’s police agency, Europol, warned, it is not possible to prevent all attack plots and “containing the threat fully is very difficult.”\footnote{Nielsen, supra note 1.} This increased anxiety over radicalized fighters becoming hardened on the battlefield has given leaders the motivation to generate an international consensus, and the accompanying legal instruments, to make progress against the foreign fighter phenomenon.\footnote{Goldman, supra note 44.} Undoubtedly, any progress against the foreign fighter phenomenon will involve dialogue about the EU’s freedom of movement and revive the longstanding tension over how to balance civil liberties and security in an age of transnational terrorism.\footnote{Sengupta, supra note 26.}

\section*{B. The Schengen Agreement and Other European Union Laws}

states abolished all internal borders, created a single external border, and increased coordination between police services and judicial authorities to guarantee security within the Schengen area. Additionally, the Schengen Agreement created common rules with regard to visas and border controls, and the Schengen Information System (SIS) was built to enable national border control and judicial authorities to obtain information on persons and objects.

Over time additional countries joined the Schengen Agreement. In 1997, through the Treaty of Amsterdam, the Schengen acquis, the original body of law governing the Schengen area, was incorporated into the main body of EU law, with the United Kingdom and Ireland as agreed opt-outs to the Schengen area. Today the Schengen area is made up of twenty-two EU and four non-EU member states, in which more than 400 million citizens are able to travel without being subject to internal border controls.

The Schengen achievement is extraordinary—it established an area of free movement in which more than 400 million citizens may move freely to work, live, and travel without being subject to internal border controls. But while the Schengen area provides for free movement of persons and goods for EU citizens, it also provides for free movement of those involved in cross-border criminal activity, including terrorist activity. The challenge, therefore, is striking a balance between security, legal immigration, and protection of individual rights, while a burgeoning terrorist threat complicates matters and jeopardizes achievement of this balance.

After the Treaty of Amsterdam, significant changes to the previous EU treaties came with the entry into force of the Treaty of Lisbon in 2009. Through the Treaty of Lisbon, the EU adopted the Charter of

57. Id.
58. Id.
61. Ferraro, supra note 55, at 3.
62. Id.
64. STEPHEN KABERA KARANJA, TRANSPARENCY AND PROPORTIONALITY IN THE SCHENGEN INFORMATION SYSTEM AND BORDER CONTROL CO-OPERATION 64 (2008).
Fundamental Rights of the EU (the Charter) as primary law, legally binding the EU and the national governments of the member states when they are implementing Union law.\textsuperscript{66} Additionally, the EU acceded to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), thus bringing all EU institutions and member states within the jurisdiction of the European Court of Human Rights.\textsuperscript{67}

The Charter was created as a single document to codify the rights and freedoms found in the ECHR, the case law of the European Court of Justice (ECJ), and the common constitutional traditions of EU member states.\textsuperscript{68} Emulating international law’s human right to freedom of movement,\textsuperscript{69} the Charter enshrines the freedom of movement and residence to all citizens of the EU, stating “every citizen of the Union has the right to move and reside freely within the territory of the member states.”\textsuperscript{70} The Charter also includes “third generation” fundamental rights such as data protection, where every person has the right to the protection of personal data concerning him or her; such data must be processed fairly, for specified purposes, and with consent by the concerned person.\textsuperscript{71} The fundamental rights identified in the Charter are guaranteed rights, and cannot be violated or infringed upon unless such action is “necessary and genuinely meet[s] objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.”\textsuperscript{72}

Despite mounting problems with foreign fighter returnees, the Charter protects both freedom of movement and fundamental human rights, creating a legal tension between freedom and security.

\textbf{C. The European Union’s Response to Foreign Fighters}

One of the many difficulties in coordinating counter-terrorism efforts at the EU level, including the foreign fighter issue, is that there is
no one single body that deals with all matters related to terrorism.\textsuperscript{73} After the 2004 attacks in Madrid, the European Council created the position of the EU Counter-Terrorism Coordinator (CTC).\textsuperscript{74} The CTC coordinates counter-terrorism efforts throughout the EU as well as with external parties by maintaining an overview of all counter-terrorism mechanisms, raising the visibility of EU counter-terrorism policies among the member states, and pressuring member states to fully implement EU-adopted counter-terrorism policies.\textsuperscript{75} In 2005, the EU published its Counter-Terrorism Strategy, which declared an EU commitment to combat terrorism globally while respecting human rights and promoting a safe environment that allows citizens to live in an area of freedom, security, and justice.\textsuperscript{76} The office of the CTC endeavored to achieve the strategic goals set out in the EU’s Counter-Terrorism Strategy through four pillars of action: prevent, protect, pursue, and respond.\textsuperscript{77} Notably, the strategy determined that member states hold primary responsibility for combating terrorism; however, the EU would augment those efforts by facilitating EU cooperation, developing collective capabilities, and promoting international partnerships.\textsuperscript{78}

Foreign fighters returning to their countries of origin present a complex set of challenges for the CTC and for European policymakers. The challenges are magnified for EU policymakers who must square the EU’s resolute focus on a counter-terrorism policy that fully respects human rights, rule of law, and international law\textsuperscript{79} with the bloc’s commitment to free movement across a region where passport and customs checks at national borders have been effectively abolished.\textsuperscript{80} The EU’s citizens have relatively easy access to all twenty-six countries within the Schengen area and systematic checks at internal borders are actually prohibited.\textsuperscript{81} Consequently, European security chiefs increasingly admit there is no easy way to close the security loophole created by the Schengen area’s border-free travel.\textsuperscript{82}

\textsuperscript{73} Fraser Cameron, An Introduction to European Foreign Policy 194 (2007).
\textsuperscript{74} Gilles de Kerchove & Christiane Höhn, Counter-Terrorism and International Law Since 9/11, Including in the EU-US Context, 16 Y.B. INT’L. HUMANITARIAN L. 267, 270 (2013).
\textsuperscript{75} Nicholson, supra note 63, at 232.
\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} De Kerchove & Höhn, supra note 74, at 271.
\textsuperscript{80} Abi-Habib & Parkinson, supra note 1.
\textsuperscript{81} Jones, supra note 7.
\textsuperscript{82} Jones & Robinson, supra note 15.
Further, the European Commission is reluctant to take a leading role in creating a common European response to the challenge of foreign fighters, stating that only member states are equipped with intelligence services that have the ability to assess the security threat. As a result, EU member states have reacted in many different ways to the burgeoning threat; some advocate strengthening the systems already in place, while others call for more drastic measures such as reforming the Schengen Agreement or ramping up EU-wide data gathering. Meanwhile, any measures taken will need to comport with international, EU, and individual member states’ national laws.

1. Criminal Justice Approach

The EU and its member states primarily use a criminal justice approach for the fight against terrorism, relying on police, law enforcement, judicial investigators, prosecutors, judges, and the prison system to track, catch, and prosecute terrorists. Member states see criminal justice as a way to “de-glorify” terrorists by showing persons convicted of terrorism as criminals instead of as combatants or martyrs, as terrorists would likely prefer. Using the criminal justice approach also enables the government to achieve justice while precluding terrorist groups from using the government’s counter-terrorism measures as propaganda tools to aid in radicalization and recruitment to terrorism. For instance, terrorist organizations have long used the United States’ detention approach at facilities such as Abu-Ghraib and Guantanamo Bay as recruiting and propaganda tools.

The criminal justice response to terrorism has proven a useful tool in the EU, as numerous terrorists have been convicted in regular criminal courts of terrorism or related inchoate crimes. Furthermore, criminal investigations and trials lead to the collection of valuable information on terrorist groups and networks because the suspects have an incentive to cooperate with the judicial and investigative authorities, primar-
ily in hopes for a reduced sentence.\textsuperscript{91} Notwithstanding reports that civilian courts are able to convict a high number of terrorists, critics to this approach argue the standards of proof to reach a terrorism conviction are too high in many European countries.\textsuperscript{92}

To further aid transnational criminal proceedings within the Schengen area, the EU replaced the pre-existing extradition system with a simplified European Arrest Warrant.\textsuperscript{93} The European Arrest Warrant enables EU member states to return EU citizens who have committed a serious crime to the country where the crime was committed to face justice by a more expeditious process.\textsuperscript{94} A related EU directive, entered into force in 2014, is the European Investigation Order whereby authorities must transfer evidence in cases with cross-border dimensions to the member states issuing the order.\textsuperscript{95} Although the arrest warrant and investigation order are typically used against corruption, drug trafficking, and organized crime, they may be very valuable in prosecuting terrorism related crimes, including travel through the Schengen area for terrorist purposes.\textsuperscript{96}

The criminal justice approach is a useful tool in addressing foreign fighters known to the member states and known to have returned to the member states, however, as of yet, it does not sufficiently address the issues of future fighters, fighters who have not yet returned, or fighters not known to the member states. Additional steps must be taken, in conjunction with a criminal justice approach, to significantly impact the problem.

a. Outlawing Travel for Terrorism Purposes

The debate over curtailing the flow of foreign fighters has opened up new legal territory, specifically raising the questions of when and how countries should prosecute their citizens for fighting in another country’s war.\textsuperscript{97} In 2013, de Kerchove, the EU CTC, proposed an extensive list of possible measures to address the foreign fighter issue,\textsuperscript{98} specifi-

\begin{itemize}
  \item \textsuperscript{91} Id. at 277.
  \item \textsuperscript{92} Sengupta, supra note 26.
  \item \textsuperscript{94} Id.
  \item \textsuperscript{95} De Kerchove & Höhn, supra note 74, at 275.
  \item \textsuperscript{97} Sengupta, supra note 26.
  \item \textsuperscript{98} Paulussen & Entenmann, supra note 11, at 95.
\end{itemize}
cally highlighting the need for a law in all member states outlawing the specific offense of going abroad for jihad. De Kerchove’s proposal also recommended balancing the use of criminal and administrative sanctions, such as freezing assets or withdrawing social benefits, and creating joint investigation teams to aid in the investigation and prosecution of foreign fighters. De Kerchove’s proposals made clear that a number of different local, national, and international-level actors can play a role before, during, and after foreign fighter travel, but critics of de Kerchove argue that it is not always clear who should take the lead.

Despite increased calls for a comprehensive approach to the foreign fighter phenomenon on the European level, there is currently no such Union-wide response; therefore, individual member states have taken a variety of measures to address the issue. In September 2014, the United Nations Security Council unanimously adopted UNSC Resolution 2178, requiring all countries to have laws that enable the prosecution of travel or attempted travel for terrorism purposes, willful provision or collection of funds to finance travel of foreign terrorist fighters, and willful organization or facilitation of such travel. The resolution also requires countries to prevent the entry or transit of individuals believed to be traveling for terrorism-related purposes. Nevertheless, the resolution is not self-enforcing and responsibility falls to U.N. member states individually, bilaterally, and multilaterally to develop ways of meeting the resolution’s obligations. In December 2014, in a meeting of EU justice ministers, de Kerchove called for an EU-wide law that would criminally prosecute foreign fighters to implement UNSC Resolution 2178, stating, “Having EU legislation harmonizing the behavior of all member states on this would ensure effective implementation, send a strong signal, prevent gaps and constitute a shared benchmark.”

100. Id.
101. Id.
102. Id. at 21.
103. S.C. Res. 2178, ¶ 6 (Sept. 24, 2014); see also Davis, supra note 47, at 1.
104. S.C. Res. 2178, supra note 103, ¶ 8; see also Davis, supra note 47, at 1.
105. Davis, supra note 47, at 2.
2. Border Security

Though the EU’s borders are open, policing remains national and, more importantly, controversial.\(^{107}\) The free movement of citizens within the Schengen area depends on mutual trust where each participating country is ready and able to apply the entire body of common EU rules regarding external border control.\(^{108}\) However, some EU member states refuse to coordinate policing powers, and their intelligence services are generally hesitant to contribute information for fear of compromising their material.\(^{109}\)

To address this bureaucratic hurdle, in early 2014, EU Interior Ministers agreed to speed up the implementation of a twenty-two-point plan created by the EU Commission to tackle jihadism.\(^{110}\) One of the primary proposals in the Commission’s plan is the introduction of systematic electronic checks at all external borders to ensure the validity of travel documentation.\(^{111}\) These electronic checks would be considerable improvement from the current visual-only inspections.\(^{112}\) The ministers noted that as member states establish powers to cancel passports, electronic checks may effectively prevent jihadists from traveling on expired papers.\(^{113}\)

The Schengen Border Code (SBC), the set of rules governing border control of the EU’s external borders, allows the temporary reintroduction of border control at internal borders, but only for a strictly limited time period when there is a serious threat to public policy or internal security.\(^{114}\) If such controls are reintroduced, the other Schengen countries, the European Parliament, the Commission, and the public must be informed.\(^{115}\) Although this provision would enable internal borders when a member state is confronted with a threat, it is rarely

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\(^{110}\) *Id.*

\(^{111}\) *Id.*

\(^{112}\) *Id.*

\(^{113}\) *Id.*


\(^{115}\) SBC, *supra* note 114, arts. 27-30; see also Schengen Borders Code, *supra* note 114.
invoked because a majority of EU members view the principle of free movement of people as inviolable.\textsuperscript{116}

3. Schengen Information System II

The SIS, now in its second generation, is an EU-wide information system created by the Schengen Agreement enabling information exchange between national border control, customs, and police authorities.\textsuperscript{117} The original system contained information on: persons who may have been involved in serious crimes; missing persons; vehicles, firearms, bank notes, and identity documents that may have been stolen; or other persons who may not have the right to enter or stay in the EU.\textsuperscript{118}

Although the SIS has yielded success, specifically on the criminal side, in mid-2014, de Kerchove lamented a continued “lack of information sharing between EU member states.”\textsuperscript{119} One haunting example of the lack of coordination occurred in the case of Mr. Nemmouche, the putative Brussels Jewish Museum attacker.\textsuperscript{120} Upon entry into Germany a few months before the attack, German officials identified him as a suspicious individual because of his circuitous travel route from Turkey to Frankfurt by way of Southeast Asia, and alerted French authorities, but France did not immediately act upon these suspicions.\textsuperscript{121} Mr. Nemmouche was then able to travel to Brussels, without notice to the Belgian authorities, conduct an attack, then travel back to France, again unnoticed, where he was later arrested after an apparently random search of a bus in Marseille.\textsuperscript{122} Due to this incident and the growing threat posed by foreign fighters, by late 2014, the EU Parliament’s Committee on Civil Liberties agreed to include “foreign fight-
ers” as a special topic in the SIS to track jihadists when they enter and exit Schengen countries.

III. HOW CAN THE EU RESPOND TO FOREIGN FIGHTERS?

Many EU officials argue it would be better to improve the functioning of the existing institutions under the EU Common Security and Defense Policy, such as the SIS II and the EU’s judicial and law enforcement agencies, Eurojust and Europol, respectively, before creating new programs. However, as some officials lament, this would require overcoming many obstacles to improve information coordination and intelligence cooperation, such as dissimilar legal frameworks in the member states and intelligence services’ reluctance to share information due to the importance of source protection. Similarly, intelligence services prefer to work bilaterally and exchange the minimum amount of information necessary, a structure not conducive to a twenty-eight member state bureaucracy. Nevertheless, de Kerchove has stated, “[a]t the end of the day it is about trying to use the existing mechanisms to overcome the classic bureaucratic hurdles.”

Four areas on which to focus improvements of the EU counter-terrorism systems already in place to address the foreign fighter threat are data gathering, Schengen Agreement reform (including tighter controls of the EU’s borders), stronger counter-terrorism legislation, and non-criminal justice responses to the issue.

A. European Union-wide Data Gathering

The idea of EU-wide data gathering has met strong resistance throughout the bloc because privacy, a highly developed area of law in Europe, and individual data protection are fundamental rights in

125. CAMERON, supra note 73, at 196-97.
126. Id.
the EU. According to EU law, everyone has the right to the protection of personal data concerning him; such data must be processed only for specified purposes, with the consent of the person concerned or some other basis legitimized by law, and may be accessed by the concerned person. In addition, the limitation of this right must be proportional to the objective sought. Thus, when policymakers call for increased data collection, the member states and public at large are concerned about citizens’ fundamental right to privacy.

The Passenger Names Record (PNR) demonstrates the public’s general concern over privacy issues. The PNR, an EU database of air passenger data proposed by the European Commission, has been stalled for the past three years due to a deadlock in the European Parliament over civil liberties issues, specifically the concern that the database would amass information on millions of ordinary travelers in addition to potential targets. One version of the proposed PNR would require EU states to gather passenger information from all flights originating outside the EU, while an even more robust version of the proposed PNR would also require sharing of PNR information from flights operating within the EU. But, in addition to the civil liberties concerns associated with the PNR, this initiative has become increasingly politically toxic in the aftermath of the U.S. scandals surrounding the National Security Agency’s data collection techniques.

Nevertheless, the PNR debate has recently evolved as a direct result of European foreign fighter involvement in the increased violence in Syria. In late 2014, the EU Parliament’s Committee on Civil Liberties accepted the EU-PNR proposal, thereby signaling a shift in Parliament’s long opposition to the PNR. Finally, in early 2015, the European Council seized on public demands for greater security after the terrorist attacks against Charlie Hebdo in Paris and pressured the

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130. Louks, supra note 65, at 489.
131. Id. at 491-93; see Directive 95/46, supra note 129.
132. Louks, supra note 65, at 491.
133. See id. at 488-93, 507-09.
134. Rettman, supra note 128.
135. Davis, supra note 47, at 5.
137. Id.
138. Id.
Parliament into dropping its opposition to the PNR.\(^{139}\) Parliament did indeed back down and agree to come to the negotiating table; as of this writing, the Commission is negotiating the proposal with the Council of Ministers and the European Parliament,\(^ {140}\) but indications are the Council will not accept Parliament’s negotiation terms to couple the PNR with a data protection directive.\(^ {141}\)

Although member states want the PNR,\(^ {142}\) (fifteen member states have or are in the process of establishing their own PNRs\(^ {143}\) and Parliament has agreed to PNR negotiations, the final result will not come without further legal battle.\(^ {144}\) Critics of the PNR and civil liberty defenders question whether the level of scrutiny and proposed five-year retention period have any real impact on tracking down potential terrorists in the first place.\(^ {145}\) They argue that emphasis should be placed on tracking known suspects and on improving information sharing among police and security services instead of casting indiscriminate surveillance dragnets.\(^ {146}\) In contrast, defenders of the proposed PNR insist that an EU-wide legislative framework is necessary to preserve data protection safeguards instead of entrusting national governments with an ad-hoc system.\(^ {147}\)

In addition to the progress made within the EU Parliament regarding the PNR, UNSC Resolution 2178 calls on member states to require airlines to share advance passenger information about designated individuals and to prevent travel of foreign fighters through increased information sharing.\(^ {148}\) This resolution provides a vehicle to prompt expanded political commitment to controlling the transit of foreign fighters, and a mechanism to provide technical assistance towards that same end, “but the hardest work—to implement it effectively—has just


\(^{141}\) Panichi, supra note 139.


\(^{143}\) Id.

\(^{144}\) See generally Panichi, supra note 139.

\(^{145}\) Id.

\(^{146}\) Id.

\(^{147}\) Leaders Want Tighter Border Controls, supra note 128.

\(^{148}\) Davis, supra note 47, at 5.
To further complicate the legal issues around data gathering, in early 2014, the ECJ issued a landmark ruling and found unlawful the EU’s Data Retention Directive. According to the EU high court, the directive’s requirements violated the Charter, which includes a right to privacy. The ECJ’s criteria for general surveillance programs, in which surveillance occurs indiscriminately without any suspicion of a crime, are extremely narrow and the Data Retention Directive was far beyond that, particularly with regard to the proportionality principle. Significantly, the court did not rule that data retention itself is illegal, rather that the requirements in the EU’s Data Retention Directive were excessive. As a result, there is no current EU legislation on data retention, and any subsequent EU PNR debate will center on whether the data is processed fairly, proportionately, and legitimately by law for the general interest. All the while, the court may be called upon again to consider whether the proposed EU PNR violates travelers’ rights to the protection of privacy and personal data; if it does, the court may decide to scrap the law altogether.

B. Schengen Agreement Reform

Additional proposals call for tightening the EU’s external borders by amending the Schengen Borders Code, which governs free movement. Germany’s Interior Minister has been vocal about the need to

149. Goldman, supra note 44.
150. Dario Sarmadi, Germany’s Debate over Data Retention Flares Following Paris Attacks, EURACTIV (Jan. 14, 2015, 4:17 PM), http://www.euractiv.com/sections/infosociety/germanys-debate-over-data-retention-flares-following-paris-attacks-511202; Benjamin Fox, What Does the Death of the EU Data Directive Mean?, EU OBSERVER (Apr. 9, 2014, 9:25 AM), https://euobserver.com/news/123791 (The Directive, agreed to in 2006, as an effort to tighten national security following the Madrid and London terrorist attacks in 2004 and 2005, required telecommunications companies to retain phone and email data for at least six months and up to two years (according to national law) to be used for investigating and prosecuting terrorist and other serious crimes.).
151. Sarmadi, supra note 150.
152. Id. Any interference with privacy and data protection must be strictly necessary to the attainment of the stated goal and requests to collect and use electronic communications metadata must be court-approved and individualized for specific searches. Federico Fabbrini, The European Court of Justice Ruling in the Data Retention Case and Its Lessons for Privacy and Surveillance in the United States, 28 HARV. HUM. RTS. J. 65, 86 (2015).
153. Fox, supra note 150.
154. Id.
155. Louks, supra note 65, at 499.
156. Nielsen, supra note 142.
157. Nielsen, supra note 128.
change the Schengen Agreement in order to prevent returnee jihadists from crossing borders within Europe undetected.\footnote{158} Likewise, national governments are looking for something more permanent than the strict Schengen Borders Code provision allowing them to impose only temporary internal border controls.\footnote{159} In the wake of the Charlie Hebdo attacks, the French called for an SBC revision that would require all travelers to undergo systematic checks as part of a larger effort to crack down on foreign fighters.\footnote{160} However, a push to change the agreement would likely face stiff opposition from the majority of EU members who view the principle of freedom of movement as inviolable.\footnote{161}

Furthermore, because it is a matter of EU law, reforming the Schengen Agreement could take years to achieve.\footnote{162} At a summit in February 2015, EU leaders agreed that there should be tighter controls at the EU’s borders, and the Council, representing EU member states, stated it is ready to review the Schengen Agreement to see where its security provisions might be strengthened.\footnote{163} Specifically, member states plan to make “a targeted amendment of the Schengen Borders Code, to allow for systematic checks against all relevant databases in order to detect and disrupt suspect movements, notably of foreign terrorist fighters.”\footnote{164} Conversely, the European Commission and the Parliament are against opening the Schengen Agreement up for debate; the idea of systematic checks has received a cool reception from the European Commission, which wants member states to make better use of existing security mechanisms.\footnote{165} All sides are now preparing their strategies for what are expected to be politically tense and technically complex security negotiations.\footnote{166}

\section*{C. Strengthened Counter-Terrorism Legislation}

The unanimously adopted UNSC Resolution 2178 reaffirmed that “any acts of terrorism are criminal and unjustifiable regardless of their
motivations, whenever and by whomsoever committed," and called on member states to institute laws that permit the prosecution of their nationals and others departing their territories who travel or attempt to travel for terrorism purposes. Yet, little precedent exists for the prosecution of individuals who have taken part or are planning to participate in combat in a third country.

Possibilities for charging foreign fighters require specific domestic criminal legislation focused on the travel, rather than acts committed while abroad. Once a fighter has returned to the EU, additional possibilities for charging them include, inter alia, war crimes, crimes against humanity, and terrorism.

1. Criminal Prosecution under Domestic Law

Individual EU member states are increasingly adding laws to their books specifically focused on terrorists preparing to travel abroad to fight and other related inchoate crimes. States previously relied heavily on general criminal and antiterrorism laws to prosecute foreign fighters, such as the Netherlands, which, in October 2013, convicted two potential foreign fighters of preparatory crimes. Shortly after the adoption of UNSC Resolution 2178, the home affairs ministers of EU member states supported the introduction of an EU law that would make traveling for terrorism or related training a serious criminal offense. Although there is no comprehensive EU law yet, individual member states are passing corresponding legislation at the national level.

169. Id. ¶ 6.
170. Paulussen & Entenmann, supra note 11, at 90.
171. See S.C. Res. 2178, supra note 103, ¶¶ 5-6; Paulussen & Entenmann, supra note 11, at 90.
172. Paulussen & Entenmann, supra note 11, at 90.
174. Lorenzo Vidini et al., Foreign Fighters: an Overview of Responses in Eleven Countries, CSS STUDY 6, 12 (March 2014), http://www.css.ethz.ch/publications/pdfs/Foreign_Fighters_2014.pdf (explaining that two suspects were convicted under ordinary criminal law of preparatory crimes related to traveling to Syria; one for “making preparations for murder” and the other for “preparing arson and/or an explosion and of spreading, showing publicly or having in stock to spread or show publicly a text and/or a picture which incites to committing a (terrorist) crime”).
175. Nielsen, supra note 128; see also BAKKER ET AL., supra note 16, at 18.
176. Nielsen, supra note 128; see also BAKKER ET AL., supra note 16, at 11–20. The Netherlands has yet to establish a travel-specific law but stated that participating in armed jihad or jihadist training abroad is a criminal offense punishable under the offense of assisting a terrorist crime. Belgium has criminalized public incitement to commit a terrorist crime, recruitment to commit a
In developing legislation to target foreign fighters returning to their countries, states must be precise with the legislation they enact to enable successful prosecution. France previously prosecuted aspiring foreign fighters under normal criminal laws or under terrorism-specific laws handled by special judges, but in response to a 2012 attack, the French government adopted a new counter-terrorism law, allowing authorities, among other things, “to prosecute French citizens who return to the country after having committed an act of terrorism abroad, or after training in terrorist camps (notably in the Afghanistan-Pakistan region) with the intention of returning to France to commit terrorist attacks.” Nevertheless, the prosecution of French foreign fighters remained difficult because it is “particularly complicated to qualify their adventures in Syria as acts of terrorism,” and under French law, “merely” participating in a war is not a crime. As a result, there was no legal basis to arrest individuals simply for leaving to or returning from combat in Syria, or to prohibit travel.

After UNSC Resolution 2178, France tightened its legislation to specifically address foreign fighters. In late 2014, the French Senate approved a new law that allows individuals to be charged with “terrorist conspiracy,” thereby negating the previous law that required two or more people to be involved in the conspiracy. Then, in January 2015, France adopted a decree forbidding certain people to leave French territory and prohibiting foreign fighters from entering France. Another criminal law adopted by France calls for “anyone found to be simultaneously in possession of dangerous objects or substances (such as explosives and weapons), and consulting terrorist websites or receiv-
ing terrorist training” to be charged and faced with a sentence of up to ten years and fines of up to 150,000 euros.\(^{185}\) Although these new laws will enable the detention and charging of foreign fighters, it remains to be seen how easy or difficult it will be to convict persons with plans to travel abroad to engage in jihad.\(^{186}\)

Likewise, Germany’s Justice Minister has relied on UNSC Resolution 2178 in his plans to make it a punishable offense to prepare for travel to a terrorist camp.\(^{187}\) In the proposed law, persons who seek to leave Germany to participate in “acts of violent subversion” abroad or to train for participation in such acts could be prosecuted in the future.\(^{188}\) Germany is also working on a new criminal law targeting terrorism financing.\(^{189}\) The trend toward developing such laws is increasing and may prove critical in future domestic prosecutions.

2. Criminal Prosecution under International Law

Another option to prosecute returning foreign fighters is to do so under international criminal law, but little precedent exists for the prosecution of individuals who have taken part or are planning to participate in combat in a third country.\(^{190}\) The relevant international criminal charges are war crimes, crimes against humanity, and terrorism, but given the volatile situation in Syria and Iraq, it would be extremely difficult to prove that somebody has committed one of these crimes.\(^{191}\)

According to the U.N. Human Rights Council, foreign fighters fighting alongside groups such as the Islamic State are “at a minimum bound by peremptory norms of international law, including prohibitions on the arbitrary deprivation of life, genocide, slavery, racial
discrimination, torture and other cruel, inhuman or degrading treatment, the taking of hostages, imposing collective punishment and the arbitrary deprivation of liberty.”\textsuperscript{192} In addition, “acts such as murder, torture, . . . [and] enforced disappearance, when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, constitute a crime against humanity and give rise to individual criminal responsibility.”\textsuperscript{193} Furthermore, the members of the Islamic State, including foreign fighters, are obliged to respect applicable rules of international humanitarian law, and serious violations of international humanitarian law may amount to war crimes, engaging the individual criminal responsibility of those responsible.\textsuperscript{194}

The U.N. Human Rights Council affirms that countries of nationality of foreign fighters should effectively investigate and prosecute those who commit such crimes whenever they can do so; only under certain circumstances may the jurisdiction of the International Criminal Court (ICC) be triggered.\textsuperscript{195} However, as the ICC is not currently involved, it would depend on states that have implemented comparable war crimes within their domestic legal system to prosecute foreign fighters in their own courts.\textsuperscript{196} Similarly, despite there being no internationally recognized definition of terrorism, UNSC Resolution 1373 “obliges States to prosecute and try all those responsible for acts of terrorism, wherever they are committed,” thus requiring a national law to charge suspects with terrorism.\textsuperscript{197}

D. \textit{Individual Member States’ Non-Criminal Justice Response}

In addition to implementing new criminal laws, EU member states are enacting administrative counter-terrorism legislation to quell the

\begin{footnotesize}

\textsuperscript{193} Id.

\textsuperscript{194} Id. ¶ 42.

\textsuperscript{195} Id. ¶ 44.

\textsuperscript{196} BAKKER ET AL., supra note 16, at 10.

\textsuperscript{197} Paulussen & Entenmann, supra note 11, at 95; see S.C. Res. 1373, ¶ 2 (Sept. 28, 2001) (deciding that all States shall “[e]nsure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts”).
\end{footnotesize}
flow of foreign fighters out of and back into the EU. Individual member states have taken a variety of measures, ranging from more drastic policies such as confiscating passports and stripping outgoing and returning fighters, facilitators, and recruiters of their welfare benefits and freezing their financial assets, to more soft-handed approaches, like investing in good relationships with local communities.

The United Kingdom, an EU-member but not party to the Schengen acquis due to the opt-out provision, has led the way with the most radical proposed counter-terrorism legislation. The United Kingdom can seize passports of Syria-bound travelers not charged with a separate offense. Even more drastically, in May 2014, the U.K. Home Secretary signed into law a highly controversial bill that allows terrorism suspects to be stripped of their citizenship if such measure is “conducive to the public good,” even if this would render the individual stateless. The United Kingdom is also considering “new rules to bar airlines that do not intend to comply with the UK no-fly lists or security screening measures from landing in the UK, new powers for police at ports to seize passports, upgraded terrorism prevention and investigation measures, and [I]nternet address matching.”

Similarly, the current German passport law allows German officials to confiscate travel identification documents and prohibits an individual from leaving Germany when he or she constitutes a threat to the internal or external security, or to other significant interests of Germany. However, one significant limitation to the passport laws is that the German national identification card, which is available to citizens above the age of sixteen, is sufficient to travel through the Schengen area to Turkey, where a citizen could subsequently cross the border to

198. See generally Bakker et al., supra note 16, at 11–21; see also Anti-Terrorist Measures in EU Go in All Directions, supra note 83.


201. Rijpma, supra note 60, at 123, 129.


204. Paulussen & Entenmann, supra note 11, at 116–17.


206. Paulussen & Entenmann, supra note 11, at 107–08.
Consequently, Germany is considering a provision enabling it to revoke national identity cards.\footnote{207} Other drastic measures deal with Internet surveillance because member states are concerned with radicalization conducted through the Internet.\footnote{208} EU leaders have called on increased Internet surveillance measures and have asked major Internet providers to help “combat terrorist propaganda” and to stop the spread of “hatred and violence” on the web.\footnote{209} EU leaders have additionally called for the “monitoring and removal of content promoting terrorism or violence on the Internet.”\footnote{210} In the immediate aftermath of the Charlie Hebdo Paris attack in early 2015, France passed decrees allowing authorities to shut down, without getting a court order, websites advocating or provoking terrorism.\footnote{211} Member states also plan to address the foreign fighter phenomenon through de-radicalization and reintegration programs.\footnote{212} De Kerchove has recognized the need for alternative programs for returning fighters because prisons are “large incubators” that often result in deeper and more widespread radicalization.\footnote{213} Similarly, not all those returning will “have blood on their hands” or pose a threat,\footnote{214} therefore some member states are offering a way out for those who realize they have made a mistake.\footnote{215}

The Netherlands and the United Kingdom offer models for building comprehensive case histories of returnees and for using “risk banding” to determine the optimal state response, whether it be prosecution, lawful surveillance and monitoring, or rehabilitation and reintegration.\footnote{216} Meanwhile, in Denmark, there is a counseling and assistance program for returning foreign fighters that consists of a screening interview to determine a returnee’s activities abroad, assess the risk to society from the returnee, and determine his physical or psychological treatment needs.\footnote{217} Returnees deemed immediate security risks are
passed to security services, while others enter the program.\textsuperscript{219}

This type of differentiated approach is important both for making effective use of state resources and for minimizing the risk of alienating members of the ethnic and religious communities from which foreign fighters may have been recruited.\textsuperscript{220} Such programs provide a returnee with an opportunity to disengage from the influences that led to his decision to fight abroad and allow law enforcement and intelligence services to focus on the most serious threats.\textsuperscript{221}

IV. HOW GOOD ARE THESE OPTIONS?

A. Policy Concerns in Responding to Foreign Fighters

At an early 2015 summit, EU leaders released a joint statement proclaiming, “We will safeguard our common values and protect all from violence based on ethnic or religious motivations and racism.”\textsuperscript{222} The primary question is, how? Policy concerns associated with addressing the foreign fighter problem must balance the tension between the desire for more security and the desire to uphold human rights, such as privacy rights and rights against ethnic profiling, while upholding freedom of movement and other EU goals.

1. Upholding Human Rights

States have a duty to protect populations from violence and insecurity and to deliver justice, but these measures must be anchored in respect for human rights.\textsuperscript{223} It is critical for member states to step up measures to address the conditions conducive to terrorism and to counter violent extremism by ensuring that any measures they take to stem the flow of foreign fighters complies with their obligations under EU and international human rights law.\textsuperscript{224}

Additionally, from a criminal justice perspective, ensuring that counter-terrorism legislation and policy are grounded in human rights helps promote a legally and procedurally sound prosecution and conviction of individuals engaged in acts of terrorism.\textsuperscript{225} This further encourages

\textsuperscript{219.} Id.
\textsuperscript{220.} Id.
\textsuperscript{221.} Id.
\textsuperscript{222.} Leaders Want Tighter Border Controls, supra note 128.
\textsuperscript{223.} UNHRC Report, supra note 192, ¶ 20.
\textsuperscript{224.} Id., ¶ 36.
\textsuperscript{225.} Id., ¶ 20.
legal consistency between national jurisdictions, thereby facilitating international cooperation. Conversely, compromising on human rights has proven corrosive to the rule of law and undermines the effectiveness of any counter-terrorism measure.

Even though UNSC Resolution 2178 contains provisions for ensuring compliance with international human rights law, the U.N. High Commissioner for Human Rights and other human rights activists have raised concerns over the broad nature of some provisions and the potential that implementing these measures may result in human rights violations at the national level. Specifically, the lack of a definition for terrorism within the resolution has prompted concerns that nations may adopt repressive measures against otherwise lawful, non-violent, activities of groups or individuals. However, Resolution 2178 explicitly requires states to ensure compliance with international law. Therefore, member states must implement legislation that is clear and precise so as to respect the principle of certainty of the law and ensure that these provisions are not subject to an interpretation that could unduly broaden the scope of the proscribed conduct. Overly vague or broad definitions of terrorism would not meet this requirement and could be used by states to limit otherwise lawful conduct.

Another area of concern regarding how states will address foreign fighters stems from the international human rights law that everyone has a right to a nationality, albeit no right to a specific nationality, as guaranteed by the U.N.’s Universal Declaration of Human Rights. The loss or deprivation of nationality must meet certain conditions in order to comply with international law: the conditions must serve a legitimate purpose, be the least intrusive instrument to achieve the desired result, and be proportional to the interest that is to be protected. Where the loss or deprivation of nationality leads to statelessness, the impact on the individual is particularly severe; therefore, international law strictly limits the circumstances in which the deprivation of nationality leading to statelessness can be recognized as serving

226. Id.
227. Id.
228. Id. ¶ 46.
229. Id. ¶¶ 46–47.
230. Id. ¶ 48.
231. Id.
232. Id. ¶ 51; UDHR, supra note 69, art.15.
233. UNHRC Report, supra note 192, ¶ 51.
a legitimate purpose.234 Furthermore, states should ensure adequate procedural standards to guarantee that nationality regulations are not applied arbitrarily, and relevant safeguards against statelessness are implemented effectively.235

Civil liberty defenders warn of a power grab by governments immediately following attacks for the sake of creating a perception of greater security.236 These actions lead to a concern that human rights will be sacrificed for the sake of security, especially when emergency legislation modifies detention policies, revises criminal justice rules and practices, and imposes limitations to the freedoms of expression, peaceful assembly, and movement.237 Broad-reaching surveillance practices have continued to infringe on individuals' human rights, in particular the right to privacy, owing to a lack of adequate national legislation and enforcement, weak procedural safeguards, and ineffective oversight that all contribute to a climate of government impunity.238

In addition, predominantly in Germany, there remains a large concern of overreaching government controls and monitoring due to the heavy surveillance of citizens practiced under Hitler’s Nazis and in the communist German Democratic Republic, informally East Germany.239 Despite the German government's agreement to tighten its anti-terrorism laws, German history poses a problem for these measures.240 Specifically, stripping German citizenship from “would-be terrorists” is a delicate matter because Hitler arbitrarily deprived German Jews of their nationality during the 1930s.241 Equally fraught are measures that would restrict the right of Germans to travel abroad or grant intelligence services wider powers to collect and store private data.242

a. Concern for Privacy

As stated previously, the concern for privacy is a significant concern of policy makers and any law enacted must adhere to the proportionality principal. In striking down the Data Retention Directive, the ECJ

234. Id.
235. Id. ¶ 52.
236. Leaders Want Tighter Border Controls, supra note 128.
237. See UNHRC Report, supra note 192, ¶ 19.
238. Id.
239. Louks, supra note 65, at 488.
241. Id.
242. Id.
determined that the legislation’s excessive requirements interfered, in a particularly serious manner, with the fundamental rights of respect for private life and protection of personal data.243 Similar to the Data Retention Directive’s requirements, UNSC Resolution 2178’s requirement that airlines provide advance passenger information to appropriate national authorities implicates important considerations for the right of individuals to be protected from unlawful or arbitrary interference in their privacy. Therefore, when implementing pertinent legislation, states should ensure that any measure interfering with the right to privacy is both necessary and proportionate to the specific risk being addressed. Additionally, procedural safeguards and effective, independent oversight must be in place to prevent against discriminatory measures or abusive use of personal data, and provide for redress in cases of abuse.244

b. Concern for Ethnic Profiling

Morten Kjaerum, the former chief of the EU’s Fundamental Rights Agency, warned against the use of ethnic profiling as authorities seek to tighten security in the wake of the terror attacks in France and Denmark.245 His primary fear was that profiling could become intrinsic to EU policies designed to target individuals with suspected terrorist links, thus stigmatizing individuals and communities, and pushing already disenfranchised young people toward radicalization.246 He further warned that the EU PNR and national plans to confiscate travel documents would likely open the door to ethnic profiling.247 Therefore, any of these policies must be concerned with fundamental human rights from the outset.248

To comply with international law, UNSC Resolution 2178 encourages member states to employ evidence-based risk assessment and screening procedures on travelers, without resorting to profiling based on discriminatory stereotypes.249 Respecting human rights and creating a system free of discrimination is especially important because without properly understanding the effect anti-terrorist policies have

243. Fox, supra note 150.
244. UNHRC Report, supra note 192, ¶ 53.
246. Id.
247. Id.
248. Id.
249. S.C. Res. 2178, supra note 103, ¶ 2.
on Islamic groups in Europe, EU policies may increase the threats they seek to counter.\textsuperscript{250} Thus, the need to respect international law is greatly important in the fight against terrorism lest more resentment be provoked, fomenting more extremism.\textsuperscript{251}

2. Upholding European Union Goals

The freedom of movement is enshrined in EU law as a fundamental right.\textsuperscript{252} Even though a number of member states have already taken measures to curtail the movement of foreign fighters, it is extremely important that travel limitations be lawful, pursuant to a legitimate aim, and necessary to achieve that aim.\textsuperscript{253} Admittedly the freedom of movement is not absolute, but states must take care to comply with international human rights law when fighting terrorism, because at a practical level, respect for human rights and the rule of law are essential to a successful counter-terrorism effort.\textsuperscript{254} In light of these considerations, the U.N. Human Rights Council specified that there were few, if any, circumstances in which the deprivation of the right to enter one’s own country could be reasonable.\textsuperscript{255} Additionally, the Council affirmed, “measures such as travel bans, the revocation of passports, and the denial of citizenship also raise important due process concerns, where decisions are taken following secretive proceedings, in absentia or on the basis of vaguely defined criteria without adequate safeguards to prevent statelessness.”\textsuperscript{256}

As evidenced, controlling the foreign fighter threat is a polycentric problem—any proposed solution implicates a number of additional policy concerns. Therefore, policymakers must carefully construct policies that uphold human rights in addition to safeguarding their nations from terror threats.

\textsuperscript{250} See Nielsen, supra note 245.
\textsuperscript{252} EU Charter, supra note 66, art. 45.
\textsuperscript{253} UNHRC Report, supra note 192, ¶ 50; see generally Bakker et al., supra note 16, at 12–21.
\textsuperscript{254} UNHRC Report, supra note 192, ¶¶ 35, 50.
\textsuperscript{255} Id. ¶ 50.
\textsuperscript{256} Id.
EU MOVEMENT IN AN AGE OF TRANSNATIONAL TERRORISM

V. HOW SHOULD THE EUROPEAN UNION RESPOND TO THE THREAT OF FOREIGN FIGHTERS?

EU member states have both a duty to protect their populations from violence and insecurity and to deliver justice; therefore, their actions to counter terrorism must respect both domestic and international law, specifically EU and international human rights law. In protecting human rights and ensuring respect for the rule of law, while countering terrorism, nations can create a climate of trust between the state and those under its jurisdiction, thus supporting communities’ resilience to threats of violent radicalism.

Due to the complex nature of the foreign fighter threat, the EU should complement member states’ actions by implementing a multi-faceted counter-terrorism strategy at the institutional level. This EU-level strategy should integrate improvements to the existing EU security programs, stronger counter-terrorism legislation, and more deradicalization programs at the community level. Even though these policy recommendations may implicate additional concerns, such as privacy, a comprehensive approach such as this will relieve some of the privacy-concern burden by focusing efforts to stop the radicalization process before an individual would be subjected to potential invasion of privacy via post-radicalization monitoring. This multi-faceted approach to counter-terrorism will promote security and continued freedom of movement within the Schengen area while accounting for privacy and other human rights.

A. Improvement of Current Programs

To improve Europe’s counter-terrorism measures in response to the foreign fighter threat, the EU should focus on increased intelligence sharing. Member states should improve existing mechanisms for operational cooperation and information sharing between national law enforcement and judicial authorities and the EU’s police agency, Europol, and judicial cooperation body, Eurojust. Although nations are apprehensive to share data due to privacy concerns, member states should develop an EU-level data-sharing agreement through Europol.

257. Id. ¶ 20.
258. Id.
259. Radicalisation Awareness Network, supra note 45.
260. Jihadist Safe Havens Hearing, supra note 199.
261. Leaders Want Tighter Border Controls, supra note 128.

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and in coordination with the European Data Protection Supervisor\textsuperscript{262} to detect foreign fighter recruitment, aggressively monitor online communications, and share airline passenger information in advance of flight.\textsuperscript{263}

Even though policymakers are reluctant to implement a comprehensive intelligence-sharing system across Europe, this improved information sharing would increase member states’ awareness of foreign fighter returnees, strengthen Schengen area border security by expanding the use of the Europol and SIS notice systems, and enhance European states’ overall ability to mitigate the threat.\textsuperscript{264} As part of the SBC, the EU should develop common criteria for identifying foreign fighters and reporting these individuals in the SIS, enabling member states to track foreign fighters as they enter and exit Schengen countries.\textsuperscript{265}

While increased information sharing between intelligence and law enforcement agencies would likely produce valuable results, these agencies should also implement a process to better share publicly available data. The rise of social media has changed the structure and dynamic of the EU jihadist movements;\textsuperscript{266} intelligence services should capitalize on this public information to aid with identifying, tracking, and prosecuting would be or returned foreign fighters. Member states should also strengthen their collaboration with social media providers to develop a plan to counter the communications strategy of groups such as the Islamic State.\textsuperscript{267}

Through the criminal justice approach, individual member states could conduct interviews and debriefings of all known foreign fighter returnees, and share data and analysis with other member states through criminal or intelligence channels, as appropriate.\textsuperscript{268} Additionally, third countries through which foreign fighters travel could share information about deportations of suspected foreign fighters, in order to help member states detect previously unidentified foreign fight-

\textsuperscript{262}. The role of the European Data Protection Supervisor is to ensure that EU institutions and bodies respect people’s right to privacy when processing their personal data. 	extit{European Data Protection Supervisor (EDPS)}, EUR. UNION (June 19, 2015), http://europa.eu/about-eu/institutions-bodies/edps/index_en.htm. Sengupta, supra note 26.

\textsuperscript{263}. Sengupta, supra note 26.

\textsuperscript{264}. \textit{Jihadist Safe Havens Hearing}, supra note 199.

\textsuperscript{265}. Dore, supra note 14.

\textsuperscript{266}. Id.

\textsuperscript{267}. Id.

\textsuperscript{268}. Davis, supra note 47, at 5.
ers. This additional information would allow member states to begin to develop appropriate responses to returning foreign fighters, including prosecution if warranted. Given the challenge of gathering physical evidence from conflict zones for use in post-return prosecution, member states should continue to develop lawful ways to transform the classified intelligence they have gathered against a foreign fighter on the battlefield into evidence able to be used in prosecution.

B. Strengthened Legislation

As with other counter-terrorism measures, any new legislation implemented by member states or the EU must be consistent with domestic and international human rights standards and comply with the principle of legality. These laws must also be formulated with sufficient precision to enable an individual to regulate his conduct accordingly, and must be made accessible to the public. In addition, these laws should provide sufficient guidance to those officials charged with applying them to enable officials to ascertain the sort of conduct that falls within their scope.

Because the foreign fighter threat affects the entire EU, there must be an EU-wide response to this EU-wide problem. The EU should implement a law mirroring UNSC Resolution 2178 whereby member states may criminally prosecute foreign fighters under a “shared benchmark.” The EU should also create a PNR that finds “the right balance to make [it] a tool that is both effective [sic] respectful of personal freedoms.” Such law that balances the right to privacy, data protection, and national security will require reduced retention periods and tighter restrictions on government and third party access to data. There should be a distinction made between the aggressive collection of data and the use of that data, with a keen emphasis on privacy in the use of the data. Data, such as flight records, should be

269. Id.
270. Id.
271. Id.
272. UNHRC Report, supra note 192, ¶ 28.
273. Id.
274. Id.
275. EU Anti-Terrorism Chief Wants Law Against Foreign Fighters, supra note 106.
277. Fox, supra note 150.
available for collection and retention, for a limited time; however, access to that data should be restricted to a limited group and only when the principle of proportionality has been met. As previously stated, human rights groups have denounced even the collection of such data as a violation of privacy, however, the violation of privacy does not occur until the data is accessed, viewed, and used.

Member states should also amend their laws to criminalize attendance, not just training, at terrorist camps. Such laws may potentially deter some foreign fighters from traveling to Syria and Iraq, as well as allow states to prosecute more returnees because this would likely be an easier charge to prove than actually receiving terrorist training.

Additionally, the EU should amend the Schengen Agreement and SBC. One revision to the SBC should include the ability to conduct electronic checks at internal borders in order to verify the validity of individuals’ travel documents. Coupled with a foreign fighter category in the SIS, these electronic checks could easily identify whether someone who is traveling on illegitimate documents is also identified as a foreign fighter; this instantaneous identification will enable border authorities to further question the individual or take other appropriate action. Member states should also be able to conduct unsystematic, random anti-terrorism measures at their internal borders, increasing the likelihood of identifying individuals known in the SIS as foreign fighters or traveling with invalid documentation. These random measures could include more expansive searches of individuals, vehicles, or both, and would be implemented at non-standard intervals, similar to a random sobriety checkpoint. Lastly, a revised Schengen Agreement should require internal countries to provide robust aid to border control at the Schengen area’s external borders.

C. Counter-Radicalization and Rehabilitation Programs

A significant way to curb the foreign fighter issue is to address disenfranchisement and radicalization before a person becomes radicalized and decides to travel to engage in a foreign conflict. In UNSC Resolution 2178, the Security Council

Recogniz[ed] that addressing the threat posed by foreign terrorist fighters requires comprehensively addressing underlying

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278. Jihadist Safe Havens Hearing, supra note 199.
279. Id.
factors, including by preventing radicalization to terrorism, stemming recruitment, inhibiting foreign terrorist fighter travel, disrupting financial support to foreign terrorist fighters, countering violent extremism, which can be conducive to terrorism, countering incitement to terrorist acts motivated by extremism or intolerance, promoting political and religious tolerance, economic development and social cohesion and inclusiveness, ending and resolving armed conflicts, and facilitating reintegration and rehabilitation.\(^\text{281}\)

Member states should focus on counter-radicalization efforts to stem youth from becoming radicalized and traveling to foreign countries to perform jihad. Member states should focus on community-based policing and social service outreach, especially in communities vulnerable to extremist messages, and provide authorities with ways to identify aspiring foreign fighters who do not seek to hide their intentions.\(^\text{282}\) In doing so, the state can be a pivotal member in building vulnerable communities’ resilience against extremist messaging.\(^\text{283}\) Member states may also enact legislation to impose financial penalties on organizations or entities promoting and conducting radicalization. The primary goal should be for member states to provide programs to deter foreign fighters from ever entering the path to violent extremism, but if they do, states should also provide a way to leave that path behind.\(^\text{284}\)

**VI. Conclusion**

Although the true threat that foreign fighters pose is unknown, and potentially exaggerated,\(^\text{285}\) the EU and its member states have a duty to protect their populations from violence and insecurity.\(^\text{286}\) While it is necessary for member states to have tools to bring foreign fighters to justice, these tools alone will not solve the problem.\(^\text{287}\) Therefore, the EU and its member states must develop a comprehensive counter-terrorism response to prevent foreign fighter attacks, while respecting

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283. *Id*.
international law, international human rights law, and its own EU values.\textsuperscript{288}

The EU’s counter-terrorism measures in response to the foreign fighter threat should be multi-faceted. The EU should refine the systems already in place, enact legislation to address the foreign fighter phenomenon, create robust programs to counter radicalization, and provide returning fighters a path away from violent extremism.\textsuperscript{289} Improved information and intelligence sharing among member states is imperative to enhancing member states’ awareness of returning fighters and overall ability to mitigate the threat.\textsuperscript{290} Furthermore, states can utilize the criminal justice approach, and corresponding investigations, to enhance their information about returning foreign fighters, and share data and analysis with other states through appropriate criminal or intelligence channels.\textsuperscript{291} Lastly, member states should focus on counter-radicalization efforts to build resiliency, stem youth from becoming radicalized and traveling to foreign countries to perform jihad, and help returning fighters turn away from violent extremism.\textsuperscript{292} By implementing a multi-faceted approach to countering foreign fighters, incorporating presently available mechanisms with strengthened legislation and counter-radicalization programs, the EU can create a more protective system with increased security from the foreign fighter threat while maintaining the bloc’s freedom of movement within the Schengen area.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{288} UNHRC Report, supra note 192, ¶ 20.
\item \textsuperscript{289} Radicalisation Awareness Network, supra note 45.
\item \textsuperscript{290} Jihadist Safe Havens Hearing, supra note 199.
\item \textsuperscript{291} Davis, supra note 47, at 5.
\item \textsuperscript{292} Radicalisation Awareness Network, supra note 45; see also Davis, supra note 47, at 5–6.
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