‘FOREIGN TERRORIST FIGHTERS’: STRAFBAARSTELLING VAN VERBLIJF OP EEN TERRORISTISCH GRONDGEBIED?

‘Foreign terrorist fighters’: strafbaarstelling van verblijf op een terroristisch grondgebied?

Een toetsing aan materieel strafrechtelijke, mensenrechtelijke en volkenrechtelijke parameters

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Executive summary

The title of this study translates as: '*Foreign Terrorist Fighters': Criminalising stay in a terrorist territory? An evaluation in light of criminal law, human rights and public international law parameters.*

Terrorism and Jihadism have the full attention of policy and decision makers on the international and European level, as well as domestically both in the Netherlands and other states. A significant issue is the phenomenon of the so-called Jihadis or 'foreign terrorist fighters' who travel to territories controlled by terrorist organizations (so-called 'no go zones') and later return to the country of their residence. Confronting this issue the Dutch Parliament raised the idea of criminalization of 'voluntary stay in a territory controlled by a terrorist organization', hereinafter also referred to as the 'proposed territorial ban/or proposed criminal offence'. The rationale for this proposal is: 1. countering the Dutch citizens' connection to terrorist organizations and their participation in armed conflict and Jihadism; 2. protecting Dutch national security; and 3. enabling the arrest, interrogation and prosecution of any returned Jihad travellers. However, an exception must be provided to, for example, journalists in order to circumvent their criminal responsibility for their voluntary stay in a territory controlled by a terrorist organization.

The central question in this research is to what extent can appropriate criminalization of 'voluntary stay in a territory controlled by a terrorist organization' be determined taking into account: fundamental principles of criminal law, i.e. the principle of legality and the requirements that only human conduct is criminally punishable and only if it is wrongful (the criminal law parameters); relevant international human rights, in particular those guaranteed by the European Convention on Human Rights (ECHR) (human rights parameters); and public international law principles of sovereignty, territorial integrity and the authority to assert criminal jurisdiction (public international law parameters).

Chapters two, three and four address each of these parameters in greater detail and analyse the 'proposed territorial ban' in light of each of the named parameters. Chapter five offers syntheses, assessment and final conclusions. Due to the lack of a concrete specific criminal offense or a draft proposal to that effect (there is no bill or a proposal available) during this research, it is not possible to directly test a specific offense and offense specific elements. However, it is possi-

ble to delineate the following components as a starting point for analysis: 1. a 'territory' which is under 'control'; 2. the control is exercised by a 'terrorist organization'; 3. a person 'stays' in that territory 'voluntarily'; and 4. there should be an exception to criminal responsibility for individuals such as, for example, 'journalists'.

Chapter 2

In Chapter two, the 'proposed territorial ban' is analysed from the perspective of three basic concepts of criminal law, namely the principle of legality, the requirement that only human conduct is criminally punishable and the requirement that that conduct must be wrongful to incur criminal responsibility.

From the perspective of the principle of legality and, more specifically, the underlying principle of *lex certa* – which requires that criminal offences are clearly defined by law, accessible and foreseeable in their application to the individual – particularly the components of 'control' and 'terrorist organization' are problematic. Although both concepts are sufficiently clear both linguistically and legally, it can be difficult to foresee the exact extend of their application in practical terms given, at times, uncertainty about what entity exactly controls which (part) of a particular territory at a given moment. In specific situations it would be difficult to determine when a territory is 'controlled' due to the changing nature of conflict as well as a lack of clearly defined legal criteria for evaluation and the strong dependence on factual circumstances for that determination. In addition, it might be difficult for citizens to foresee what entities operating abroad qualify as a 'terrorist organization'. The final conclusion is that the criminalization of 'voluntary stay in a territory controlled by a terrorist organization,' as such, brings about so many problems with regard to clarity, specificity, and, particularly, foreseeability that from the perspective of the *lex certa* principle it is considered undesirable to create such an unqualified criminal offence.

Furthermore, the proposed territorial ban is problematic from the perspective of the requirement that only human *conduct* (acts and omissions) can be subjected to criminal punishment (the requirement of human conduct). The conduct of staying in a particular area controlled by terrorists does not in and of itself mean that the fulfilment of a criminal offence – let alone a specific criminal offence – is actually realised. When somebody stays within a terrorist controlled area without contributing or intending to contribute to terrorism in any way, there is no significant correlation between that person's presence in that area and the emergence of a situation that is relevant from the perspective of criminal justice. Importantly, the requirement that only human conduct (acts and omissions) can incur criminal liability compels, at least, towards consideration and restraint in criminalising behaviour that is not criminal in itself. Given the fact that prevention of terrorism is of great societal importance, policy makers must be particularly careful not to extend the application of criminal law to cover all aspects of human life.

To the extent that the proposed territorial ban covers individuals who do not have any terrorist intentions or any involvement with a terrorist group, it creates moreover a tension with the requirement that only *wrongful* conduct can incur criminal responsibility (the requirement of wrongfulness). Such individuals, next to journalists, can be inter alia family members, business people and entrepreneurs, owners of real estate and other assets, people who have financial and legal interests or obligations in the prohibited area, persons who have bona fide religious reasons to go into or through the prohibited area, politicians, archaeologists, scientists, adventurers, travellers, quasi-journalists, representatives of non-governmental and/or human rights organizations, humanitarian aid workers and kidnapping and ceasefire negotiators. In these cases, it is difficult to identify, directly and indirectly, the substantial wrongfulness – in the sense of injustice, reprehensivness, harm, etc. – of their conduct of staying in the prohibited area. Unlike in cases of the so-called inchoate offenses (such as Articles 46, 80a, 134a, 140a of the Criminal Code (CC)), there is no compensation for deficit of wrongfulness by the criminal intent of the individual.

Chapter 3

In the third chapter the proposed territorial ban is analysed from the perspective of fundamental human rights and freedoms with particular reference to the ECHR. The criminalisation of 'voluntary stay in a territory controlled by a terrorist organization' constitutes an infringement – that is not a violation per se – of the right to leave any country including their own for a country of the person's choice (Article 2 § 2 Protocol IV ECHR, Article 12 § 2 of the ICCPR). The interference with this right affects any person who falls within the jurisdiction of the Dutch criminal law and wishes to stay in the prohibited territory. The infringement will be more severe where the reasons to stay in such an area become more compelling. Depending of the concrete circumstances of a particular case, also the right to privacy and family life (Article 8 ECHR, Article 17 ICCPR), the right to freedom of belief or religion (Article 9 ECHR, Article 18 ICCPR) and/or the right to freedom of expression (Article 10 ECHR, Article 19 ICCPR) might be infringed. Interference with these rights is more severe when an individual is subjected to coercive measures and/or that individual is prosecuted and punished.

Any interference with these rights can be justified only when the three classical requirements are fulfilled: prescribed by law, serving a legitimate aim and necessary in a democratic society. With regard to the requirement of 'prescribed by law', the proposed territorial ban encounters the same problems as discussed in the framework of the *lex certa* principle (Chapter 2). That the proposed territorial ban serves a legitimate aim is, as such, undisputable. More problematic is the necessity requirement, according to which the infringement caused by the criminal offense should be proportional, subsidiary, and effective in view of the objectives pursued by the infringing measure. With regard to the principles of proportionality and subsidiarity it is objectionable that the criminalisation interferes

with individuals' right to choose their travel destinations, which may be for protracted periods of time. The stronger the reasons are to travel and stay in prohibited areas the more severe the interference with fundamental rights will become. From a more procedural perspective, it must be added that such a criminalisation does not allow for an individualised periodical review of the necessity of interference by a judicial authority. The automatic application of the proposed territorial ban (criminalisation implies a general prohibition) does not leave room for taking into consideration the individual circumstances of each case.

Furthermore, the proposed territorial ban is problematic from the perspective of the requirement of effectiveness to the extent that it covers individuals who do not have any terrorist intentions or any such involvement. Limiting these individuals' right to travel to the specific prohibited areas does not in itself increase the national security of the Netherlands. Creating a prosecution policy that could take into account the necessary factual circumstances, only partially addresses the said objections against the proposed territorial ban, since introducing a general prohibition, as such, creates a barrier to travel to all sorts of areas/territories.

Chapter 4

This chapter deals with the public international law principles of sovereignty (including territorial integrity and non-intervention) and the authority to exercise criminal prescriptive jurisdiction to acts committed abroad. A special feature of the proposed territorial ban is that it does not cover behaviour committed on Dutch territory, but directly addresses conduct that is committed on the territory of another sovereign state. By definition, the proposed offense can only be completed abroad.

The proposed territorial ban clearly relates to international instruments that intend to combat terrorism and 'foreign terrorist fighters', such as the UN Security Council Resolution 2178 (2014). From this resolution, however, an obligation cannot be derived to enact such a criminal offence as the proposed territorial ban, nor to assert extraterritorial jurisdiction over territories that are controlled by terrorist organisations. In addition, the resolution does not in any way add to or detract from the public international law principles of sovereign equality of states and the principle of establishment of extraterritorial jurisdiction. It is due to the fact that the proposed territorial ban relates to territories belonging to other sovereign states, the establishment of such a prescriptive extraterritorial jurisdiction certainly touches upon the sovereignty of the other state. In fact, such establishment may even affect the actual situation on the territory of that other state. However, international law does not impose an absolute impediment to the enactment of the proposed territorial ban, as such. Such jurisdictional establishment is not in itself prohibited by the principle of sovereign equality of states nor the more specific principles of territorial integrity and non-intervention or the fundamental principles associated with the doctrine of Kompetenz-Kompetenz, which refers to the power of a state to demarcate its own jurisdiction. It must be

added, however, that this general conclusion must be subjected to two important qualifications.

The first is that although the establishment of extraterritorial jurisdiction in relation to the proposed territorial ban is not prohibited, this does not mean that such jurisdiction is uncontroversial or unproblematic. A tension clearly arises with regard to sovereignty of another state and the power to create jurisdictional bases that, in principle, should be territorial and extraterritorial only by exception. In addition, when a state is claiming extraterritorial jurisdiction in such a specific way as in case of the proposed territorial ban, it could affect the further development of international law. It may mean that the jurisdiction claiming state – in this case the Netherlands – has to accept that other states will claim jurisdiction in a similar way. The question is therefore whether the proposed territorial ban is worth the potential legal and political tensions in international relations with other states.

The second qualification is that to the extent customary human rights norms do create an impediment to the enactment of the proposed territorial ban, this could mean that a claim for such extraterritorial jurisdiction could not be legitimate under public international law. This is of particular importance with regard to individuals whose human rights are severely limited while they do not have any terrorist intentions or any such involvement. Extending a jurisdictional claim over these individuals creates tension with state's power to establish prescriptive jurisdiction. More specifically, this is due to the 'none of your business rule' that holds that States should not establish jurisdiction if they have no real interest in doing so, the signal that such a jurisdictional claim reflects on the (in)adequacy of foreign state's legislative and/or enforcement system and the lack of an adequate jurisdictional basis because the universality and protective principles hardly justify the jurisdictional claim of such persons.

Chapter 5

Lastly, this chapter synthesises the findings and the conclusions from the preceding chapters, by focusing as much as possible on four concrete variants for criminalising the travel to and/or stay in areas that are controlled by terrorists: (I) an unqualified offence of 'voluntary stay in a territory controlled by a terrorist organization'; (II) specification of the prohibited areas falling within the scope of prohibition on a separate list to which the proposed criminal offence refers; (III) the inclusion of notions of wrongfulness as specific offence elements and/or providing for a general or a specific ground (excuse of justification) for excluding criminal responsibility; and (IV) alternatively, introducing a visa system, i.e. a system that obliges anyone who is planning to travel to and/or reside in specified areas that are under the control of terrorist organisations to request and obtain a travel or residence visa; and that failure to request such a visa would constitute a criminal offence. The analysis within these four possibilities proceeds from the perspective of the most salient problematic areas and obstacles rather than from a

successive discussion of the identified parameters. The discussion of the four possibilities briefly addresses the added value of each of the variants in relation to the already existing criminal offences. These concern, in particular, the following criminal acts: enlistment into a foreign military force and aid to the enemy (Article 101-102 CC, whether or not in conjunction with Article 107a CC which secures analogous application of these provisions in the event of armed conflict that can not be classified as war and in which the Netherlands is involved, either to individual or collective self-defence or to recover international peace and security), preparation of and training for terrorism (Article 134a CC), participation in a terrorist organization (Article 140a CC) and recruiting for armed conflict (Article 205 CC), whether or not as an inchoate offense (attempt, Article 45 CC; preparation, Article 46 CC; conspiracy, Article 80 CC) and/or in the form of criminal participation (Article 47 CC).

Variant I: Introduction of an unqualified criminalization of 'voluntary stay in a territory controlled by a terrorist organization' would increase the possibilities for the authorities to apply powers of criminal law and procedure against potential jihadist/'foreign terrorist fighters' as compared to the existing possibilities. However, such criminalisation does not pass the test presented by the various parameters. This is true even if an exception for journalists, or the like, is created. Basically, four interrelated problems present themselves: 1. the criminal offence cannot be clearly defined by law, nor be specific enough or reasonably foreseeable as to its application; 2. it covers all areas worldwide that are controlled by terrorists organisations; 3. it covers individuals who do not have any terrorist intentions or any such involvement; and 4. it affects the sovereignty of other states.

Variant II: Limiting the proposed criminal offence to areas that are specifically mentioned on a list would address several of the identified obstacles. Qualifying the proposed territorial ban in such manner would negate the problems related to the *lex certa* principle (criminal law parameters) and the requirement that an interference with a human right can only be justified if it is prescribed by law (human rights parameters). In addition, the limitation of the proposed territorial ban to areas specified on a public list would diminish – but not fully eliminate – the tension with the public international law parameters. An additional advantage of limiting the relevance of the proposed criminal offence to a public list is that it retains its added value as compared to existing criminal offences. The issue that still remains problematic is that such limitation does not address the concerns that follow from the fact that the proposed criminal offence also covers individuals who do not have any terrorist intentions or any such involvement with terrorist groups.

Variant III: It proves possible to address the problem that the proposed criminal offence also convers individuals who do not have any terrorist intentions or any such involvement with terrorist groups by including offence specific elements that relate to wrongfulness of the conduct so as to exempt these individuals from criminal liability. This approach would ensure that the proposed territo-

rial ban would not be problematic from the perspective of: various fundamental criminal law principles (legality, requirement of human conduct, requirement of wrongfulness); relevant human rights; the possible prohibition to claim extraterritorial jurisdiction whenever it contradicts human rights that are customary law; the 'none of your business rule'; and the lack of appropriate jurisdictional basis for such a jurisdictional claim. However, this variant does not address the international legal and political disadvantages that are created by such a criminal offence. Because these disadvantages are inherent to any format of the territorial ban as proposed, they can only be removed if and when such a criminal offence is not introduced. Importantly, introduction of a criminal offence according to this third variant would add little or no added value to the possibilities as compared to existing relevant criminal offences.

As an alternative, it would be possible to reduce the scope of affected individuals who do not have any terrorist intentions or any such involvement by introducing an abstract or specified defence. This approach would retain most of the added value as compared to the existing offences. However, even if an additional limitation of specifically identified territories on a list is introduced, this variant remains problematic from the perspective of *lex certa*'s requirement of specificity. Moreover, a defence can justify criminal conduct only *ex post facto*. This means that persons who have legitimate reasons to travel to the prohibited areas a priori incur criminal liability, which jeopardizes legal certainty and creates a 'chilling effect' on the willingness to travel to those areas. Moreover, this variant III criminal offence does not diminish the international legal and political disadvantages that are inherent to the territorial ban.

Variant IV: The tensions and disadvantages in relation to criminal law, human rights and public international law parameters do not occur – or at least to a much lesser extend – within the alternative of a system of travel or residence visa. Ultimately, the main issue with such visa system is whether any refusal, restriction or retraction of such visa in a concrete case would be compatible with the requirements of proportionality, subsidiarity and effectiveness. Meanwhile, a travel or residence visa system clearly has added value as compared to the existing criminal offences, even more than the proposal for an unqualified territorial ban. This does not mean that it is concluded that a visa system should be introduced. On the basis of the underlying research it is simply not possible to answer the question of whether such a visa system is desirable, achievable or effective, for this system has not been independently analysed and evaluated in light of the different parameters. For such analysis and evaluation, however, the final conclusion of this study is relevant, namely that the proposed criminalisation of 'voluntary stay in a territory controlled by a terrorist organization' cannot be meaningfully realised within the existing legal parameters.