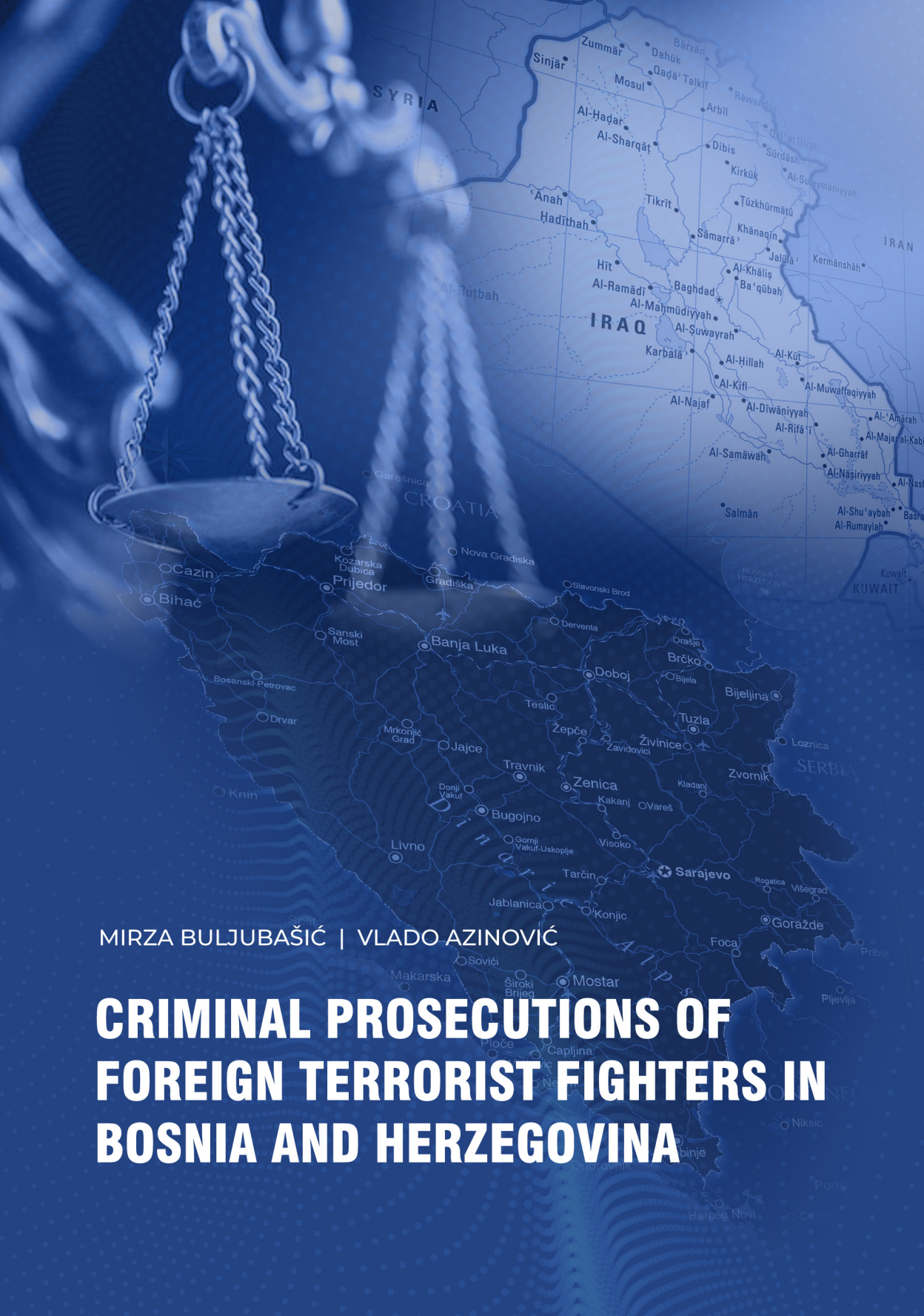

MIRZA BULJUBAŠIĆ | VLADO AZINOVIĆ

CRIMINAL PROSECUTIONS OF FOREIGN TERRORIST FIGHTERS IN BOSNIA AND HERZEGOVINA

Atlantic initiative

Center for Security and Justice Research

Norwegian Embassy

Sarajevo

NASLOV IZVORNIKA: KRIVIČNO PROCESUIRANJE STRANIH TERORISTIČKIH BORACA U BOSNI I HERCEGOVINI

CRIMINAL PROSECUTIONS OF FOREIGN TERRORIST FIGHTERS IN BOSNIA AND HERZEGOVINA

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CRIMINAL PROSECUTIONS OF FOREIGN TERRORIST FIGHTERS IN BOSNIA AND HERZEGOVINA

Sarajevo, 2023

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ABOUT AUTORS

Mirza Buljubašić is a criminologist and senior assistant at the Faculty of Criminal Justice, Criminology and Security Studies of the University of Sarajevo. He holds a PhD degree, master's degree and a bachelor's degree in criminology, a master's degree in criminal law and a master's degree in security studies at the University of Sarajevo. He has worked as a research supervisor and researcher in various organizations dealing with justice, security and crime research. His scholarly work deals with mass/war crimes, transitional justice, violent extremism and intergenerational right-wing radicalization. His work has been published in, among others, Oxford University Press, International Criminal Law Review, Criminal Topics and Criminal Justice Studies: A Critical Journal of Crime, Law and Society.

Professor Vlado Azinović works at the Department of Peace and Security Studies of the Faculty of Political Sciences of the University of Sarajevo and a co-founder of the Atlantic Initiative. Professor Azinović holds a PhD in political science from the American University in London (United Kingdom) and a master's degree in international relations from Norwich University (United States). Between 1995 and 2008 he worked as a senior editor at the Balkan Service, Radio Free Europe/Radio Liberty, Prague (Czech Republic). Professor Azinović serves as an expert witness for the prosecution in terrorism related cases before the Court of Bosnia and Herzegovina. Azinović is the author, co-author or editor of a large number of books, including "Waiting Games: Assessment and Response to the Threat of the Return of Foreign Fighters in the Western Balkans" (2018); "Between Salvation and Terror: radicalization and the phenomenon of foreign fighters in the Western Balkans" (2017). He is also the author of numerous book chapters, articles, essays and reviews on issues related to terrorism".

REVIEWERS

There is no doubt that this paper can be an exceptional source for the improvement of scientific, professional, and teaching processes in institutions whose competences and obligations or academic work include direct or indirect dealing with the issues of violent extremism, radicalism, and terrorism. The expressed approach of authors, unequivocally aiming to make the sentencing policy more understandable in the countering terrorism context in general, nominates this paper as a valuable monograph, too. Also, respecting the didactic standards in social sciences and humanities, this paper can provide good-quality content for numerous university and school subjects in the educational respect, especially in the field of studying contemporary policy of countering the most severe crimes. A specific combination of practical solutions, on the one hand, and an introductory theoretical explanatory part, on the other, represent a solid basis for education by specific thematic units. The quality of this paper is reflected in its methodical and methodological equipment, which meets the standards set for monograph works with a wide range of use. The submitted paper by (co-)authors Mirza Buljubašić and Vlado Azinović entitled Criminal Prosecutions of Foreign Terrorist Fighters in Bosnia and Herzegovina comprises several segments of analysis of the terrorism issue. Discussions and theoretical definitions of a publication are supported by concrete and concise findings and conclusions that give this paper a special scientific and professional importance. Focused attention on isolated forms of problems accompanying trials of terrorist fighters add a special quality to this paper. Finally, one can say without a doubt that, with its original research

results, methodology, and scientific facts and views, the publication is an up-to-date work the content of which contributes to the development of not only the research practice, but also of theory in the field of anti-terrorism in general to a significant extent. I believe that all, not only formal, but also actual conditions for the publication of this paper in the form of a monograph have been met, and it is important to emphasise that the paper is recommended as a valuable source for higher education in numerous legal, political-science, criminological and other related scientific disciplines.

prof. dr. Elmedin Muratbegović,
Faculty of Criminalistics, Criminology and Security Studies,
University of Sarajevo

The authors Buljubašić & Azinović present a conceptual definition of foreign terrorist fighters, a new phenomenon not only in Bosnia and Herzegovina, but also in the world, and further outline an analysis of the proceedings and actions of all stakeholders in criminal proceedings led before the Court of Bosnia and Herzegovina. The research and analysis present accurate indicators of the number of proceedings, presented evidence, gender of the perpetrators, access to evidence by the participants in the proceedings, the results of the proceedings and numerical indicators of pronounced judgments and the number of prosecuted foreign terrorist fighters before the judiciary in Bosnia and Herzegovina. Such research is significant and useful from several perspectives.

First, it provides a clear reflection on the actions of all participants in the proceedings so far, which gives an opportunity for a critical stance on past actions. On the other hand, it presents a comparative analysis of practices of other countries, both in the region and beyond, to place Bosnia and Herzegovina on the broader map of dealing with foreign terrorist fighters, radicalization and violent extremism. The authors have helped us in many ways to take a critical look at the current situation and perspectives of future actions in the prosecution of foreign terrorist fighters, as well as in the prevention of violent extremism and radicalism.

In addition, the research and analysis indicate how important the response of all segments of society is – the response of Bosnia and Herzegovina must therefore be appropriate and include a multisectoral approach. The analysis shows that due to efforts of all segments of society – the judiciary, governmental and non-governmental sectors, as well as religious communities in a complex system such as Bosnia and Herzegovina – our response to the emergence of foreign terrorist fighters, violent extremism and radicalism was fortunately adequate. It is noteworthy that the analysis and research show the real state of affairs and point to the inextricable link between violent extremism and radicalism and terrorism, which in a multi-ethnic society like Bosnia and Herzegovina represents a great challenge. The analysis shows us where we can respond better and more adequately, primarily with respect to prevention.

The analysis of legal, sociological and psychological texts is comprehensive and shows that the study is based on objective and relevant reference literature and a comprehensive approach. The authors, applying accurate indicators and objective sources, thoroughly present the situation both in terms of prosecution

and response to violent extremism and radicalism – a sound and reliable foundation for experts and practitioners to pursue ways to improve both.

Therefore, given its comprehensiveness, pioneering enthusiasm in the approach, objective legal, sociological and psychological sources, professional and analytical approach, outlining the significance of foreign terrorist fighters, violent extremism and radicalism, their mutual correlation, objectively presented current state of affairs and practice in Bosnia and Herzegovina, and a review of the practice of all authorities, this analysis represents an important document for the projection of future actions and provides a contribution to the overview of all factors that can influence all segments of society to improve the actions and practices. Therefore, as an objective document, it deserves praise and provides significant progress towards improving the actions and practices in this field.

Ćazim Hasanspahić,
Prosecutor, The Prosecutor's Office of Bosnia and Herzegovina

1. INTRODUCTION

On 10 February 2013, in a private house in Konjic, in Southern Bosnia and Herzegovina, the renowned leader of the country's Kharijite (or neo-Kharijite) extremist community[1] – Husein "Bilal" Bosnić – addressed a group of his devotees. Among other things, he told them: "Islam means following orders. Enslavement to Allah (swt) brings delight. There is no person who has not heard of *mujahideen*. It is only sad that we are not with them [in Syria], so we pray to Allah (swt) to resurrect us as *shaheeds* [martyrs who died fulfilling 'God's command']".[2] Bosnić used similar messaging to radicalize vulnerable people from afar as well, directing them to join the terrorist organizations fighting on

1 Perhaps the most appropriate definition of extremism for the purposes of this publication is found in the judgment in the case of *Prosecutor's Office of Bosnia and Herzegovina v. Mevlid Jašarević* (2012, p. 13–15). There, followers of the Islamist movement are said to "reject as 'unwanted novelties' almost everything after the development and practice of Islam of the first generations of Muslims... insist on preserving the Islamic teachings on monotheism and strive to return to the Qur'an (the holy book of Muslims) and the Sunnah (the tradition of Prophet Muhammad)... [and] consider their interpretation of the Islamic tradition to be the only correct one..." Importantly, terms such as Wahhabism and Salafism are characterized as "very controversial, often confusing" and it is noted that "in the vast majority of cases, these are groups that do not support violence or engage in it, but in the context of contemporary security challenges, it is precisely the attitude towards violence that distinguishes them from each other. Because of this, Islamic theologians today suggest that... the term Kharijites or neo-Kharijites would be more appropriate... neo-Kharijites reject human laws adopted in parliaments and courts, and recognize only God's law and judgement, of course, in their own interpretation. In addition, they tend to declare their dissenters [as] infidels (takfir) and approve the use of violence to achieve their goals."

2 It is worth noting that, in the case of *Prosecutor's Office of Bosnia and Herzegovina v. Husein Bosnić* (2015), witness Selvedin Beganović, a religious official, testified (main trial, 01:15–10:23) that the term *jihad* has a broad definition, and could imply a fight against oneself, or help for the poor; meaning, it does not exclusively imply harm or destruction. Thus, though the term *mujahid* commonly refers to a fighter, Beganović claimed it is equally broad and does not necessarily imply participation in armed battle on God's command. He similarly characterized the term *shaheed* as non-specific, noting that it could be used to describe a person who drowned, someone whose life was unlawfully taken, or even a mother who gives birth to a child, and not only a person who dies in armed conflict after fighting on God's command. Arguably, however, what is important in cases of radicalization is not what a word does or does not mean, technically speaking, but how it was interpreted by whomever it was intended to mobilize.

the battlefields of Iraq and Syria. For example, in a YouTube post on 27 September 2013 entitled, "Bilal Bosnić's sermon: Whom has Allah cursed", Bosnić discusses "[w]ho is fighting there [in Iraq and Syria]... young men are fighting in their best years... a brother from Sarajevo (Muaz Šabić) fell as a martyr, not as a coward. He sacrificed his life on Allah's path because Islam mobilizes." As a result of recruitment by Bosnić and his public encouragement of foreign terrorist fighting, a significant number of people departed Bosnia and Herzegovina (BiH) for battlefields in Syria and Iraq (First-instance judgment, *Prosecutor's Office of Bosnia and Herzegovina v. Husein Bosnić*, 2015, p. 2-4).

In an operation codenamed Damascus, carried out in the early morning hours of 3 September 2014, the State Investigation and Protection Agency (SIPA) of BiH detained 16 people on suspicion of terrorist activities, including Husein Bosnić (SIPA, 2014). After his indictment for publicly encouraging terrorist activities, recruitment for terrorism, and organizing a terrorist group, Bosnić faced overwhelming evidence and formidable testimony in the Court of BiH. During his trial, the cynical and underhanded methods he had used to radicalize youth were revealed, including through interactions Bosnić had with them in private houses, private *masjids* (unofficial places of prayer), and within the closed village communities of Ošve and Maoča. He also engaged with young followers through social media and other online platforms. His prosecution exposed the network of terrorist fighters from BiH that were in Syria and Iraq, and in part, the mechanisms of support and recruitment that had been used to drive these fighters to foreign battlefields. In a final judgment, Bosnić was sentenced to seven years in prison.

The Bosnić case highlights the need to better understand judicial practice pertaining to criminal offenses that relate to activities on foreign battlefields and support for or membership in terrorist organizations. Indeed, some citizens of BiH personally paid the costs of the downfall of the extremist ideologies and structures promoted by Bosnić, which briefly served as the building blocks to a so-called "caliphate". Some paid the ultimate price, with their lives, and some were captured (Bećirević, Halilović, and Azinović, 2018; Azinović and Bećirević, 2017; Azinović, 2017; Azinović and Jusić, 2016, 2015). Thus, at a time when terrorist organizations in Syria and Iraq are on the margins (indeed, the swift growth of terrorist groups in these countries was followed by their even faster decline), and as returns of citizens to BiH from Syria and Iraq are ongoing, it is apropos that the judicial response to participation on foreign battlefields be analyzed.

From 2014 to 2022, 35 individuals were prosecuted before the Court of BiH for criminal offenses related to terrorist activities on foreign battlefields. While a handful of independent and investigative media outlets have reported on the issue of foreign terrorist fighters (FTFs) and related criminal legal processes in BiH (e.g., BIRN, 2020abc), there are no academic or expert studies on judicial responses to the crimes of FTFs. Hence, this publication will: analyze criminal cases related to the departures and activities of FTFs (as of June 2022), meaningfully compare legal practices in selected European judiciaries with practices in BiH, and provide recommendations for policymakers and practitioners.

The next section presents information on the foreign fighting phenomenon. It is important to understand the processes that lead to violent extremism, which can manifest in terrorism or mass crime or can lead someone to depart for foreign battlefields. In order to contextualize the social response to violent extremism, including that of the judiciary, it is necessary to untangle the highly complex concepts that motivate the perpetration of criminal offenses by FTFs. This is followed by a summary of the research methodology (the approach used in data collection and analysis). The study employs a mixed research approach, which includes, *inter alia*, the analysis of judgments and court files, interviews with relevant subjects, and narrative and statistical methods. The research findings are then presented, with results divided by their relevance to the main procedural subjects, the defense, substantive law, procedural law, or sanctions. The findings also incorporate statistical analyses of court judgments and files, excerpts of interviews with members of the judiciary in BiH, discussion of comparative legal practice, and previous academic and expert research. The publication concludes by presenting considerations and recommendations for policy, practice, and future research.

2. FOREIGN TERRORIST FIGHTERS: A CONCEPTUAL UNTANGLING OF THE PHENOMENON

We must begin by addressing two concepts that lack clarity in current law in BiH: radicalization and (violent) extremism. Much is known about radicalization, but it remains quite difficult to universally define. In part, this is because it is a relative term, referring to a significant deviation from widespread norms and values in a society and to ideas that are extreme enough to disrupt the established order. It is a concept that has varied considerably over time, as it is defined in the context of dominant political values and ideologies. On top of this, many actors, individuals, and groups, including non-state and state actors alike, are involved in shaping processes of radicalization and in responding to radicalization. This means that the outcome of radicalization processes is neither clear nor universal. Further complicating matters is the fact that, in some individuals, extreme beliefs can exist absent any propensity for violence; and in others, extreme beliefs exist alongside extreme behavior that may manifest in various criminal forms, be it hate speech, terrorism, or mass atrocities.[3] Radicalization is thus a process in which an individual or group adopts increasingly extreme beliefs, or increasingly extreme beliefs *and* behaviors, and becomes more likely

3 Mass atrocity is the standard term used to describe war crimes, crimes against humanity, and genocide (Straus, 2015; Karstedt, 2013).

(but is not destined) to accept violence. This can manifest as political violence, including criminal offenses related to terrorism, war crimes, crimes against humanity, and genocide (Buljubašić and Holá, 2021).

The process of radicalization can begin anywhere (e.g., within families or communities, or in virtual spaces), but its outcome is never certain or foretold, and it is not bound to end in acts of violent extremism. Multiple, interconnected, and complex causative factors are at play in the context of radicalization, and can include: prior life experiences (such as social exclusion or marginalization), group dissatisfaction (especially in the form of grievances), and a desire for status or a search for significance (particularly during adolescence and early adulthood). There are various other factors that make an individual more vulnerable to radicalization as well. For example, people who are socially disconnected may be more susceptible to radicalizing influences, as well as people seeking an escape from personal problems. Some people also seem to be more prone to accepting narratives of group polarization, intragroup competition, or competition with the state, and are therefore more easily mobilized by the discourse of "us" against "them". At the same time, an excessive response by the state to radicalization can create new security threats and result in a continuing cycle of political violence (McCauley and Moskalenko, 2011; Kruglanski et al., 2014).

As with the concepts of radicalization and (violent) extremism, there is nothing in the law of BiH that refers to "foreign terrorist fighters" (FTFs), despite the fact that the activities of FTFs are criminalized in statutes related to terrorism (Simović and Šikman, 2017). Foreign fighters have been recorded throughout documented history, but the term was first widely used to describe fighters who traveled to Afghanistan to fight against the Soviet Union, and then for insurgents and terrorists in Iraq in 2003. The addition of the word terrorist – as in "foreign terrorist fighter" – reflects the creation of the unrecognized "Islamic State" and the growth of terrorist threats globally in the early twenty-first century (UNODC, 2019).

In 2014, the term "foreign terrorist fighter" appeared in United Nations Security Council resolution 2170, which was adopted in response to escalating crises in both Syria and Iraq. The resolution condemned the terrorist acts committed in these countries and the resulting civilian deaths, and called upon Member States to "suppress the flow of foreign terrorist fighters". The Security Council

also adopted resolution 2178 (2014), to tackle the acute and growing threat posed by the recruitment of FTFs into groups like the Islamic State of Iraq and Syria (ISIS), the Jabhat al-Nusrah Front, and derivatives of Al-Qaeda.

In resolution 2178, FTFs are defined as "individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict." Notably, an FTF does not have to engage in an armed conflict, as the term hinges on participation in a foreign terrorist organization. At the end of 2017, the Security Council adopted resolution 2396, reaffirming this definition and calling on Member States to tackle the threat posed by the return or relocation of FTFs from conflict zones (UNODC, 2019).

For clarity, it is important to emphasize that the term FTF does *not* refer to foreign fighters who engage in armed conflict but do not participate in terrorist activities. Some foreign fighters have been convicted only for participating in an armed conflict in another country, not for having committed terrorist acts. Some foreign formations that participate in armed conflicts are not labelled as or simply have no links to terrorist organizations, and instead attract mercenaries who engage in armed conflict on behalf of governments or private corporations for personal financial gain. Still, where political, financial, and ideological interests overlap, individuals may stray into criminality and therefore meet the definition of FTFs (UNODC, 2019).

Both ISIS and Jabhat al-Nusra are listed by the UN as terrorist organizations, which means that members of these groups are investigated and prosecuted when they return to Europe, their countries of origin or residence, or where universal jurisdiction exists (see Munivrana, 2005; Munivrana Vajda and Novoselec, 2017). Terrorist attacks carried out in Europe spurred the Justice and Home Affairs Council of the EU to issue a statement in Riga (Latvia) in 2015, known as the Riga Joint Statement, recognizing "terrorism, radicalisation, recruitment and financing related to terrorism" as "main common threats to [the] internal security of the EU." The following acts have thus been criminalized by European countries: preparation for terrorism, travel for terrorism, recruitment for terrorist purposes, being recruited for terrorism, enabling and accepting terrorist training, financing terrorism, illegally participating in armed conflict abroad, inciting or conspiring to commit terrorism, enabling financial support

for terrorism (including through money laundering), and possessing items for the commission of terrorism (on the problems of criminalizing FTFs see Duffy, 2018).

Beyond the designation of ISIS and Jabhat al-Nusra as terrorist organizations by the UN, these groups must also be understood as parties to a non-international armed conflict, and therefore obliged to apply and adhere to international humanitarian law (Genocide Network, 2020). In this context, terrorist organizations have committed especially horrific crimes in Syria and Iraq. At the peak of their power, they controlled more than 100,000 km of territory, home to some 11 million inhabitants.

In 2014, an international coalition of over 30 countries, led by the United States of America (the US), began launching attacks on terrorist formations in Syria and Iraq. In the years that followed, ISIS and Jabhat al-Nusra steadily lost control over territory, and by 2019, they had been almost completely defeated; yet, during their time in power, some 20,000 people had departed to these foreign battlefields from Europe, including many women and children. About 3,000 have returned to their countries of origin. Meanwhile, some 2,000 FTFs who were captured by the Syrian Democratic Forces remain in Syria, and another 1,000 are in captivity in Iraq. Upon their repatriation, the prosecution of these FTFs is expected to be automatic. In countries like France, the United Kingdom (the UK), Germany, The Netherlands, and Belgium, judicial practice related to the prosecution of FTFs is already relatively robust (Genocide Network, 2020).

When the armed conflict in Syria began in 2012, the Western Balkans[4] saw a significant number of departures to foreign battlefields. Over 1,100 people are thought to have traveled to Syria and Iraq from the region between 2012 and 2016, when these departures stopped, and it is possible that many of these people died there. It is also known that children were born there, and that there are gaps in the data due to departures of people from the diaspora, of those whose movements could not be followed, and of those for whom data is lacking. Therefore, data on departures should be understood as indicative, not concrete. Having said that, it is clear that citizens of Albania, BiH, Kosovo, and North Macedonia made up the largest share of departures from the region. And notably, it is believed that one-third of those who departed did not participate

4 The Western Balkans – a term coined by the European Union for potential members from Southeast Europe – encompasses Albania, BiH, Kosovo, Montenegro, North Macedonia, and Serbia.

in any fighting; in fact, compared to other "contingents" in Syria and Iraq, the Western Balkans contingent included a disproportionate number of elderly people and women (Azinović, 2021b).

Nearly 70 per cent of departures to Syria and Iraq from the region were recorded in 2013 and 2014, before a decrease in 2015 and the almost complete end to departures in 2016. This was not only the result of the downfall of ISIS and Jabhat al-Nusra, but also of intensified activities by security services and the judiciary in Western Balkan countries. On top of this, would-be foreign fighters increasingly had difficulties traveling to territories in Syria and Iraq due to combat operations, and defeats on the ground led to a gradual loss of motivation among individuals who had once been willing to participate in the fighting (Azinović, 2021b).

In the Western Balkans, the radicalizing forces that recruited FTFs to Syria and Iraq advocated a militant (Kharijite or neo-Kharijite) form of Salafism. This ideology took hold against the backdrop of a fragile internal structure, administrative dysfunctionality, frozen conflict, and unresolved identity and governance issues. Extremism tends to flourish in polarized societies that are unable to face the legacies of a violent and oppressive past, and where reductionist thinking and beliefs are prevalent. And in the Western Balkans, societies are generally considered post-conflict and/or post-authoritarian, but in truth, they are just as much pre-conflict and (pre-)authoritarian. Across the region, radicalization takes place in local (native) communities, through narratives that draw on past inter-ethnic conflict, rhetoric that highlights in-group segregation and victimization, and discourse that focuses on failed leadership and the unmet expectations of social progress.

It is the desire of young people to belong, be included, achieve equality, and feel a sense of pride and purpose, as well as other psychological needs, that make them vulnerable to radicalization; not an inherent extremism or even an attraction to violent ideology. In other words, when radicalizing figures meet the sociological and psychological needs of a young person, especially if those needs have gone unfilled by their family and community, the ideologies promoted by these figures can become intoxicatingly attractive. Many individuals who become radicalized grew up in broken families or experienced neglect and domestic violence, but traumatic experiences within the community can make individuals more vulnerable to radicalization as well, and one could

argue that the societies of the Western Balkans are burdened by various degrees of collective trauma. The region is also plagued by corruption, political incompetence and impunity, nepotism, unemployment, economic challenges, and dysfunctional administrations. All of these factors have the potential to be radicalizing, especially given that individuals who are most susceptible to radicalization and violent extremism – and thus to becoming FTFs, for example – come from the geographic, social, and economic margins, where the impacts of these factors are felt most profoundly.

The people who appear most vulnerable to radicalizing influences in the Western Balkans tend to be poorly educated, are often unemployed, and many display antisocial behaviors and have a history of mental health problems (Azinović, 2021b; see Bećirević, Halilović, and Azinović, 2018). It is notable, too, that over one-third of FTFs from the region have had criminal records, and over one-third lived, worked, or spent time in the West at some point as part of the diaspora. The motives of these individuals for departing to Syria and Iraq varied widely, however. Some were fleeing unhappy marriages, the burden of debt, criminal proceedings, or substance addiction; some were searching for adventure or a sense of belonging and purpose; some sought financial gain; some followed what they believed was a divine order to engage in jihad or Hijra.[5] Some who departed the region for Syria and Iraq were driven primarily by humanitarian concerns, and others believed they could truly build and live in an Islamic caliphate under Sharia Law. Layered on top of these motives for FTFs from BiH were the effects of post-traumatic stress and the tendency to identify with a threatened Muslim community.

This study focuses specifically on prosecutions of FTFs in BiH, where 94 individuals have returned from Syria and Iraq as of 2022 (56 men, 11 women, and 27 children) (Azinović, 2021b). So far, 35 people have been prosecuted in BiH for criminal offenses extending from activities related to FTF departures.[6] These criminal proceedings represent a novelty for judicial practice in the country (as they do in others). Nevertheless, and though the "incrimination and treatment of the issue of FTFs has additionally burdened the already overburdened judicial system" in BiH (Interview with judge, 17 May 2022), state institutions, the judiciary, law enforcement, and security agencies have proven they are up to the task of combating terrorism-related crimes.

5 Hijrah refers to a religious migration or exodus, which ISIS framed as a duty of its followers (see Azinović and Jusić 2016).

6 Primarily, these individuals have been charged with terrorism or with criminal offenses related to terrorism (such as joining foreign paramilitary formations).

3. METHODOLOGY

3.1. Data Collection

This study is underpinned by comprehensive desk research on the topics of radicalization, violent extremism, empirical law, political violence, and atrocity crimes. Legal, sociological, and psychological texts were analyzed to synthesize insights on the causes of and social responses to support for and participation in armed conflict, terrorism, and violent extremist groups. The study design – using a transversal (cross-sectional) approach with mixed methods – was informed by the existing literature, previous experience with researching FTFs, and applicable legislation and legal practice in cases involving FTFs.

The design of the study incorporates both quantitative and qualitative approaches; meaning that it uses statistical and narrative methods. Notably, this design was prescribed by the clear need to respond to a lack of relevant studies in BiH on this topic. Employing multiple methods can help eliminate bias by establishing a consistency of results (i.e., triangulation); can strengthen the results (i.e., complementarity), as well as the depth and scope of the study (i.e., expansion); and can improve the validity of the instruments and the integrity and significance of the study. Therefore, this study design seeks to eliminate any potential drawbacks of using a singular method approach (Creswell and Plano Clark, 2011; Tashakkori and Teddlie, 2010; Johnson, Onwuegbuzie and Turner, 2007).

Based on analysis of academic and expert literature, existing legislation, and legal practices in BiH and other countries, two instruments for data collection were carefully developed. The first is a codebook for entering statistical data from judgments into IBM SPSS statistical analysis software. All judgments of the Court of BiH that related to terrorism, including those involving FTFs, were analyzed and entered into SPSS using this codebook; then, only the cases related to FTFs were retained.[7] Logical and technical data controls were put in place to avoid potential errors during data entry. A total of 35 defendants were included in the analysis, representing the entire relevant population, not a sample.

The second instrument, a semi-structured protocol for interviews with practitioners, was used to carry out research interviews,[8] which lasted at least one hour in each instance.[9] These practitioners, primarily judges and prosecutors, were an extremely important source of knowledge to researchers about legal practice. Those practitioners with the most relevant experience were selected for interviews, as well as those who expressed a willingness to discuss the trials of FTFs. Therefore, sampling was very purposeful.[10]

Finally, in addition to collecting data through the analysis of court judgments and in interviews with practitioners, researchers also undertook audio-video analyses of trial recordings and analysis of trial transcripts and court documents (archives). They also carried out informal interviews with experts from BiH and Europe who work in relevant fields about study design and data collection and analysis.

3.2. Data Analysis

Descriptive analysis software was used to statistically analyze the data collected by researchers. A statistical model was created on the basis of a previously developed model used in earlier academic and expert research, and incorporating existing law and practice. In other words, descriptive statistical analysis was preceded by a qualitative empirical legal analysis of court

7 The units of analysis are individuals (a defendant, or the convicted or acquitted persons), not the cases *per se*.

8 Legal issues relevant to specific cases were discussed, as well as ambiguities and contradictions in legal practice. Practitioners also shared their experiences with investigations, indictments, and trials in terrorism-related cases, along with the challenges and advantages of specific criminal procedures.

9 To facilitate open discussion of sensitive legal and other issues, interviewees were guaranteed anonymity and data security. All interview data was anonymized, transcribed electronically, and archived in a secure electronic space, in accordance with data protection protocols (O'Toole et al., 2018).

10 To prevent redundancy in interviews, researchers carefully sampled a diverse but targeted group of individuals as interviewees, in order to obtain varied insights, perspectives, and interpretations of legal practice.

documents and applicable law, as well as an analysis of earlier research and knowledge relevant to the development of research design and instruments.

The content of court documents was entered into statistical software and analyzed, including to determine the frequency of certain dimensions of the phenomenon, mean values, and bivariate correlations.[11] The goal of this statistical analysis was to systematize existing data on different segments of the criminal process, present them in an elegant and interesting way, and describe the current state of judicial practice (Weinberg and Abramowitz, 2008; Witte and Witte, 2017). Upon the entry of data into SPSS, the initial coding was analyzed and controls were applied to eliminate potential errors. During data control, analyzed content was re-coded. Based on the coded (and re-coded) content of judgments, a system of different substantive, procedural, and sentencing dimensions was created.

This facilitated a thorough comparative analysis of judicial practice in Europe.[12] Researchers analyzed the contents of court judgments and academic and expert articles that problematize judicial practice in cases involving FTFs, then made comparisons with legal practice in BiH. Furthermore, the content of court archives was analyzed to gain additional insights into legal and factual matters. This enabled detailed insights into criminal processes that otherwise would not be discovered in a qualitative analysis of court judgments. For this reason, court documents were analyzed only after the content of judgments were analyzed and the related statistical analysis was performed (see Neuendorf, 2002; Krippendorff, 2018).

11 Point-biserial correlation (*r*pb) was performed. This is a special form of Pearson correlation that is used when one variable is quantitative and the other is dichotomous. Meaning, it is a standardized measure of the strength of the relationship between two variables when one of the two variables is dichotomous. The point-biserial correlation coefficient is used when the dichotomy is a discrete or true dichotomy (i.e., one for which there is no underlying continuum between categories) (Field, 2017; Tabachnick and Fidell, 2019). An example is the extenuating circumstance of family: one can be family or not, there are no latent possibilities in between. The calculations are detailed because the values 1 (presence) and 0 (absence) are dichotomous. The absolute value of *r*pb is: *r*pb < 0.3 is non-existent or extremely weak; 0.3 < *r*pb < 0.5 is moderate; and *r*pb > 0.7 is string (Moore, Notz, and Flinger 2013). All first-, second-, and third-instance cases (N=62) were included in the correlation analysis. *It is important to note that correlation does not mean causality!* Additionally, outliers (i.e., extreme values that deviate from the average) were controlled to perform point-biserial correlation. Assumptions were checked through Shapiro-Wilk's normality test and Levene's test of equality of variance. Autocorrelation inspections were also performed using the Durbin Watson test. Autocorrelation is a characteristic of data in which the correlation between the values of the same variables is based on related objects. In the methodological sense, the requirements for conducting the analysis have been met.

12 We are grateful to Margareta Ana Baksa and Margareta Blažević for their exceptional research and analytical contributions to this study through their analysis of international legal practice.

Trial recordings were also analyzed through a qualitative coding of audio-video sequences. This analysis was based on the assumption that the "live" observation of criminal processes can provide a more colorful picture of legal, ideological, and behavioral dimensions, which can uncover significant insights that are unlikely to emerge in the analysis of judgments and may not be shared in interviews with practitioners (see, e.g., Knoblauch, Tuma and Schnettler, 2014; Asan and Montague, 2014; Tuma and Schnettler, 2019). Researchers watched and analyzed trial recordings, then repeated the process in order to identify the sequences most significant to this study. Some parts of these recordings were subsequently extracted and interpreted.

Finally, interviews were conducted with practitioners. A detailed protocol for these interviews was developed, based on analysis of academic and expert literature, as well as caselaw. This protocol also informed the analysis of interviews. The inclusion of interview data strengthened the results of the overall analysis by providing personal and professional perspectives on the current practices applied in adjudicating cases involving FTFs, as well as additional information that could not be obtained by other methods. The initial coding of interviews took place as the interviews were carried out, and then during their electronic transcription. Data that complemented or revealed new information about the trials of FTFs were coded. These codes were then verified by other researchers to ensure the reliability of data interpretation.

4. TRIALS OF FTFs IN BOSNIA AND HERZEGOVINA: RESEARCH RESULTS

4.1. The Court, the Prosecutor's Office, and the Defense

The Court of Bosnia and Herzegovina (the Court of BiH) has jurisdiction over criminal offenses related to terrorism, and therefore over cases involving most FTFs. When it comes to the jurisdiction to prosecute mass atrocity crimes in Syria and Iraq, the question is somewhat complicated. Trials in these countries are not possible and options at the International Criminal Court (ICC) are limited by the principle of complementarity, because Syria and Iraq are not signatories to the Statute of the ICC (see Konforta and Munivrana Vajda, 2014).[13] Any jurisdiction conferred to the ICC through the UN Security Council is also problematically undependable, due to the possibility of veto by the five permanent members (the US, UK, France, China, and Russia) (see Mudrić, 2006; Krapac, 2011). Additionally, if the ICC were to focus only on crimes committed by members of terrorist organizations like ISIS and Jabhat al-Nusra, and exclude

13 Complementarity is regulated by the provisions of the Rome Statute on the admissibility of cases. Complementarity itself contains a further test consisting of two steps. The court must first determine: whether an investigation or criminal prosecution is ongoing in a certain state or whether an investigation or criminal prosecution existed in the past (the so-called "proceedings requirement"); and only when the response to this evaluation is affirmative, it evaluates if the State is willing or able genuinely to carry out the investigation or prosecution. If it is unable or unwilling, the cases are admissible before the International Criminal Court. In practice, complementarity is fraught with controversy (see Konforta and Munivrana Vajda, 2014).

the possibility of prosecuting members of the Syrian government or Syrian forces, this selectivity would challenge the legitimacy of the court. Previous proposals to establish a hybrid or mixed criminal court to prosecute members of ISIS and Jabhat al-Nusra have not been met with substantial support. Still, some states have applied the principle of universal jurisdiction in cases of mass atrocity crimes. For example, The Netherlands has asserted universal jurisdiction to prosecute accused FTFs within its borders.

In Europe, FTFs are most frequently prosecuted in Germany, France, Belgium, Finland, and The Netherlands (de Hoon, 2022); not because these countries have produced higher numbers of FTFs but because they have responded to the foreign fighter phenomenon most robustly. In BiH, 35 defendants have been prosecuted as FTFs. As noted above, just under 100 individuals have returned to BiH from Syria and Iraq to date (Azinović, 2021b), though some of these returnees – such as children born in foreign warzones – are clearly not subject to prosecution, and prosecutors have also opted not to charge women returnees. The question of whether women who have traveled to Syria and Iraq should face prosecution is discussed in more detail in the next section, but thus far, it is male returnees to BiH who have been charged for offenses related to foreign terrorist fighting. Prosecutors have also charged some would-be (but failed) FTFs, some who recruited and mobilized FTFs to depart BiH, and some who supported the cause of terrorist groups in Syria and Iraq from BiH (including the lone woman who has faced prosecution in these cases). Figure 1 (below) shows the total number of judgments handed down at all instances in the Court of BiH in cases involving FTFs: 36 before the First Instance Division, 24 before the Second Instance Division, and 2 before the Third Instance Division.

Judges in the Court of BiH sit on three-member panels, which issue decisions. The exception to this is the plea agreement process, in which a single judge issues a decision in a preliminary hearing. Some judges have served more often as panel presidents, and less often as the second or third panel member; but importantly, a decent proportion of judges in the Court of BiH has now gained experience on more than one case in which an FTF is accused. This demonstrates the overall capacity and professionalism of the Court, as well as the ability of judges to adapt relatively quickly to new security challenges and new criminal legislation. The contents of judgments and documents produced by the Court also indicate a tendency for technical (legal) precision vis-à-vis the legal discourse. Nonetheless, the specialization of judges, allowing for a focus

on terrorism-related cases, is a good practice that can prevent attempts to undermine the rule of law and can protect individuals from intimidation and retaliation (UNODC, 2009). In England and Wales, trials related to terrorism are thus "entrusted to a cohort of highly experienced... judges who are familiar with this field," in order to expedite the hearing of cases, avoid any errors that could lead to mistrial or re-trial, and add to the public legitimacy of the proceedings and sentencing (Haddon-Cave, 2021).

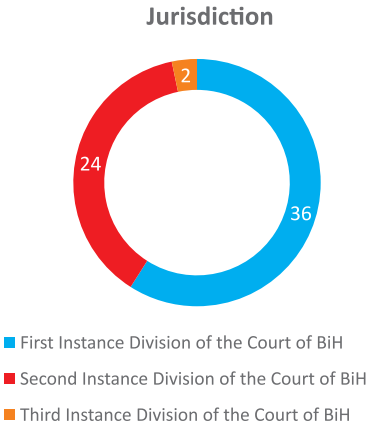

Figure 1. Number of cases involving foreign terrorist fighting, per instance, in the Court of BiH

In BiH, there has been significant variability as far as the representation of male and female judges as panel members in criminal trials involving FTFs. Figure 2 (below) shows the gender representation of judges in cases involving FTFs, and reflects that male judges have been represented at considerably higher rates on panels which have heard these cases. However, a closer look at the data shows that there has been more balanced gender representation in the judges selected as panel presidents. Moreover, the findings do not suggest that gender plays any decisive role in the judicial reasoning applied in these cases, or that gender differences affect final outcomes or judicial practice.

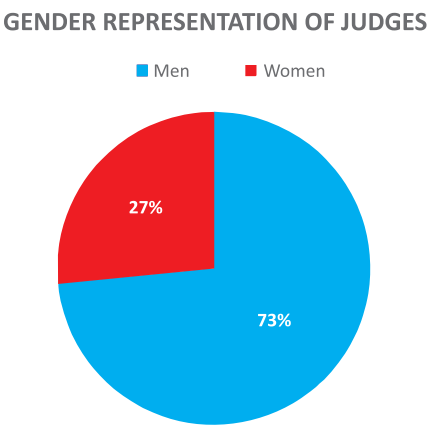

Figure 2. Gender representation among judges in the Court of BiH

This data is useful instead as a measure of the equality of male and female judges in the Court of BiH; a question that reverberates in specific ways in cases involving FTFs. Female judges, especially those who serve as panel presidents and therefore act as decision-makers and manage court processes, stand in stark contrast to the image of women promoted by extremist ideologues, as subjects of men and not as empowered decision-makers (Veljan and Čehajić-Čampara, 2021). When women judges preside over criminal trials of FTFs, it sends an implicit message not only to the defendant, but also to other (potential) extremists, that the liberal democratic legal order will protect basic human rights and prevent discrimination, including gender-based discrimination.[14] Gender balance in the judiciary and the equal representation of women as presiding judges breaks down prejudices among judicial professionals as well (Halilović and Huhtanen, 2014).

In the Prosecutor's Office of BiH, some specialization vis-à-vis cases involving foreign terrorist fighting seems to have developed, with most of the cases involving FTFs handled primarily by just two prosecutors, who have tried 19 and 7 such cases, respectively. Other prosecutors have experience with only one or two of these cases. The apparent specialization of two prosecutors is in line with Opinion No. 9 of the Consultative Council of European Prosecutors, to the Committee of Ministers of the Council of Europe on European norms

14 Indeed, radicalized FTFs are likely to perceive women as vulnerable, submissive, and inferior, through the lens of the heteronormative and patriarchal standards of extremist ideologies. For example, an analysis of English language ISIS propaganda (Ingram, 2021) found five main representations of women: three in-group archetypes, the "supporter", the "mother/sister/wife", and the "fighter"; and two out-group archetypes, the "victim" and the "corruptor".

and principles concerning prosecutors – which states, *inter alia*, that the specialization of prosecutors is essential to improving prosecutorial effectiveness and responding to the various challenges emerging from the complexity of contemporary society (2014, §119; §70; §57; also in UNODC, 2009; McCoy, 2011; Wright, Levine and Gold, 2021). The foreign fighter phenomenon is certainly such a challenge, as is terrorism more broadly. The Terrorism Bar in England and Wales offers one model for bringing this Opinion to fruition. It comprises a select group (about 20) of specialized practitioners who have the highest security clearance in order to access any and all relevant intelligence, and who cooperate hand-in-hand with specialist police units and intelligence agencies (Haddon-Cave, 2021).

Despite the greater proportion of men in the Prosecutor's Office overall (see Figure 3, below), men and women have been almost equally represented among the prosecutors assigned to criminal proceedings involving FTFs. Women have been tasked with an extremely small share of case work (6) compared to men (29), but this does not necessarily indicate a specific gender bias, given the premise that cases should be led by those most experienced, specialized, and motivated to try these cases. In other words, the success of prosecutors in complex terrorism cases is contingent not on whether a prosecutor is a certain gender, nor whether a perfectly balanced gender representation is achieved among prosecutors, but whether the assigned prosecutors are sufficiently expert in trying terrorism cases. Steps should be taken, as previously observed (Korner, 2016, 2020), to remove obstacles (such as quotas and unrelated workload burdens) that can make the work of specialized prosecutors even more effective in cases involving FTFs.

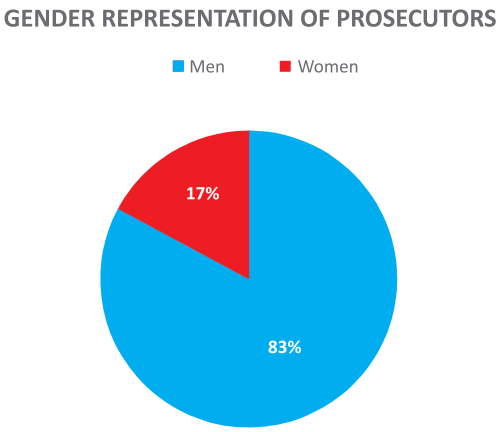

Figure 3. Gender representation of prosecutors in BiH

The gender representation of defense counsel (see Figure 4, below) is decidedly disproportional. It is possible that this is partly reflective of a continuing dominance by men in the legal profession (Halilović and Huhtanen, 2014); but in the context of cases involving FTFs, it is also likely that the patriarchal ideology of violent extremists plays a role in their decision to opt for representation by men (Veljan and Čehajić-Čampara, 2021; Pearson, 2018; Ispahani, 2016). Hence, just two women have acted as defense counsel for FTF defendants, in one case each.

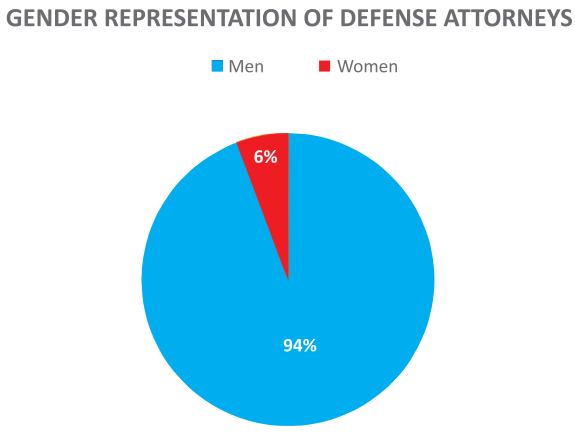

Figure 4. Gender representation of defense counsel

As with the gender of prosecutors, these findings do not imply any difference between men and women as counsel in these cases. Rather, they demonstrate that ideological, pragmatic, and technical reasons largely dictate the choices of defendants in choosing legal representation. Indeed, while a majority of the defense attorneys (15) who tried cases involving FTFs represented a single defendant, one attorney represented 11 defendants, all in separate cases. There were also three defense counsel who represented two defendants each, and one who represented three defendants. This suggests that, for some accused FTFs, their selection of counsel is based in part on the level of trust they have in the competence or character of an attorney, perhaps due to the knowledge of this counsel about the extremist ideology to which the defendant adheres, or due to the previous experience of this counsel working on similar or related cases. For example, in the trial of Jahja Vuković, the defendant claimed he had been called as a witness in other cases but was afraid of self-incrimination, as he did not know the law, so he had asked the Court to grant him a specific legal advisor, "because I have confidence in him" (*Prosecutor's Office of Bosnia and Herzegovina v. Jahja Vuković*, 2021, main trial).

4.2. Defendants

At the time of this research in June 2022, 35 individuals had been prosecuted for criminal offenses related to their association with foreign formations listed as terrorist groups by the UN, specifically ISIS and Jabhat al-Nusra (see the Consolidated United Nations Security Council Sanctions List, 2022). Though these defendants differ in various ways, commonalities among them allow for the development of a profile of FTFs from BiH. Many come from similar demographic and criminological backgrounds, and interestingly, they also share quite a few characteristics with defendants accused of war crimes, crimes against humanity, and genocide in BiH (see Buljubasic and Hola, 2019; for insights into motivations, see Dawson, 2021; Kovač, Storr, Bečirević, and Azinović, 2019; Azinović and Jusić, 2015, 2016).

4.2.1. Gender of defendants

As shown in Figure 5 (below) and mentioned above, in all but one trial before the Court of BiH involving FTFs, the defendants have been men, with 34 men and one woman accused. This reflects a focus by the Prosecutor's Office on adjudicating the crimes of men who have returned from (or attempted to

depart to) Syria and Iraq, and implies that female returnees are not viewed as potential defendants. In Europe, women are almost never prosecuted and convicted for crimes related to foreign fighting either (Rekawek et al. 2019). In several prosecutions of women FTFs in Europe (Genocide Network, 2020), such as in the UK and Germany, the defendants have been charged with child endangerment (i.e., knowingly disregarding the danger to a child by taking them into a warzone), not with crimes of terrorism.

There are several explanations for this, including pragmatic legal considerations such as the evidence available to prosecutors, but individual attitudes and assumptions about men and women in the context of foreign fighting influence charging decisions as well, and have resulted in men being prosecuted almost exclusively for these crimes. Given this, it is important to note that previous studies have demonstrated the danger of making gendered assumptions regarding the experiences and motivations of women and girls in Syria and Iraq (Duffy, 2018). Therefore, it is worth discussing why women are largely *not* defendants in BiH and elsewhere, before returning our focusing to the profile of the men (and one woman) who have been prosecuted in the Court of BiH.

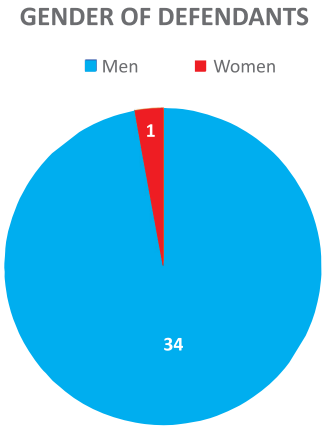

Figure 5. Gender of defendants

The idea of an "Islamic State" was just as attractive to many women as it was to many men, and some women took an active part in creating conditions of terror within that "state". Though they worked as teachers and medical professionals, women also recruited new members online and on social media,

often targeting those vulnerable to radicalization due to their socioeconomic or emotional condition. Even worse, some women in Syria and Iraq served in militant all-female units like the Al-Khansaa Brigade, a sort of morality police (*hisbah*) formed in 2014 to control women (and others).

The role of women under the control of terrorist organizations in Syria and Iraq began to grow more violent as territory and manpower were lost. Over time, there was no longer a question as to whether women could be used as suicide bombers, for example, or whether they could participate in armed conflict; and it is believed that thousands of women did end up participating in the fighting in some way. It is difficult to assess how directly the involvement of many women was in combat and terrorist activities, however, and whether they were motivated primarily by a desire to support male fighters or because they sought to sustain the "Islamic State" through military means themselves. A woman prosecuted in Germany, for example, joined an all-female battalion in 2017, apparently at her husband's insistence, but because she was heavily pregnant at the time, worked only as a driver (Higher Regional Court of Düsseldorf, 2020).

Either way, some women filled key positions in terrorist organizations, including in logistics, propaganda, and recruitment. It is important not to underestimate the significance of such roles to the success of terrorist groups, or neglect to see this behavior as criminal simply because the perpetrators are women. Women who departed for Syria and Iraq are frequently perceived first and foremost as victims, which can make it difficult to accept that some women participated as perpetrators and accomplices in terrorism, and that some even saw themselves as warriors for the "Islamic State" (Pokalova, 2020; Carter, 2013; Speckhard and Yayla, 2015; Chowdhury Fink, Zeiger, and Bhulai, 2016; Gan, Neo, Chin, and Khader, 2019; Fullmer, Mizrahi, and Tomsich, 2019).

In the legal sense, settling in a terrorist state and contributing to everyday life in that state could theoretically fall within the bounds of criminal liability, but legal practice positions the role of women on foreign battlefields as almost exclusively inferior to men, and treats women in this context as naïve and victimized (Bloom and Lokmanoglu, 2020). The fact is that women who departed in the earliest years may not have had much opportunity to engage in violence in Syria and Iraq, as terrorist groups were initially resistant to this idea, given the value of women as mothers and wives who could populate the "caliphate". It became clear that women were needed to fill other roles only after considerable losses

in manpower and the collapse of administrative structures; and women were desired for certain tasks because they could go unnoticed in many spaces where men could not (Pokalova, 2020).

Ideologically, women returnees from Syria and Iraq to BiH can be divided into three general categories: 1) those who express strong opinions rejecting ISIS; 2) those who express disappointment with the "Islamic State" but support the idea of a caliphate or a theocratic state; and, 3) those who remain devoted to the "Islamic State" specifically. Hence, comprehensive risk and threat assessments are essential to implementing appropriate resocialization and reintegration support for these women. A process of disengagement was already underway for most of them before they returned to BiH, yet this does not necessarily translate to their rejection of extremist ideology.[15] Still, after time spent in the area controlled by ISIS or Jabhat al-Nusra, many women return disillusioned by experiences of violence and poor living conditions, and their commitment to these groups gradually diminishes in most cases (Perešin, Hasanović, and Bytyqi, 2021).

The findings of this study certainly do not suggest that every woman returning from foreign battlefields should be prosecuted, but rather that prosecutors should not dismiss the possibility that some women returnees have played a significant contributing role in terrorist activities in Syria and Iraq. Increasingly, policies addressing the foreign fighter phenomenon should envision responses to the threat and challenge of FTFs that reject gender stereotypes and rely on evidence of the different roles taken on by women and men, boys and girls, in these contexts. It is also important to apply this same lens to *what we already know*. For instance, it is well known that extremist recruitment targets women and girls, and is sometimes perpetrated by women, but this process still tends to be viewed through a set of gendered assumptions that identify women as inherently passive and victimized, rather than as subjects with agency who may contribute to or commit crimes.

Of course, the fact that women and girls may participate directly or indirectly in criminal activity related to foreign terrorist fighting does not negate the

15 Most people who join violent extremist organizations eventually leave them. Extremism causes health, social, and economic consequences for individuals, and disrupts their relationships. While it is crucial that people and groups disengage from violence and are included in everyday social life, there is no universal path to disengagement. On some level, disengagement is simply the reverse of the radicalization process, and there is a relationship between these exit and entry experiences. Indeed, disengagement can similarly involve a complete or partial break with social norms, values, relationships, and networks (Barrelle, 2015).

reality that they are also exposed to flagrant violations of human rights within many terrorist groups, including forced marriage, human trafficking, and sexual violence. Needless to say, this is one of the factors that complicates the question of whether to prosecute women returnees. And indeed, some contributions of women to terrorist organizations should *not* be prosecuted. Moreover, prosecution should not be based only on the relationship of a woman with a known FTF (e.g., parental, spousal, or even pedagogical), nor should it be applied in cases where small amounts of money have been sent by mothers to their children, which clearly represents legal overreach with a gendered dimension.

Ultimately, the traumatic experiences of many women and girls within terrorist organizations means that they may be most appropriately considered both victims *and* perpetrators. This dual reality is not always viewed as mitigating or exculpatory, however, as in the widely publicized decision of the High Court in the UK to deprive Shamima Begum of her citizenship, on the premise that her status as a victim did not transform the threat she represented to the country (*Begum v. Secretary of State for the Home Department*, 2020).[16] In BiH, where some women returnees have now received extensive continuing care from psycho-social service providers over years, frontline practitioners report that these women have engaged willingly and cooperatively in reintegration and resocialization programming; and while it remains important to engage in regular threat assessments of any individual who has not entirely disengaged from extremist ideologies, there is no indication that women who have returned thus far pose any terrorist threat (Azinović, 2021b).

Personal empowerment has proved to be the strongest factor for resilience to further radicalization in BiH (Atlantic Initiative, 2018). Approached as victims, who are often parents as well, these women need rehabilitative and psychological treatment and support. This requires gender-sensitive training for practitioners (Duffy, 2018) and is crucial to breaking the vicious cycle of violent extremism in families. The value of intervening in this intergenerational process should be a consideration of judges when it comes to the question of prosecuting women returnees. As Judge Branko Perić emphasized, judicial professionals must balance the benefits and harms of prosecuting women; and in the case of women who did not participate directly in fighting, must assess the potential harm to their children of separation, even from an imperfect parent.

16 This practice is relatively common in the UK, where provisions allowing for citizenship deprivation in cases of serious crime were expanded in 2014, and where at least 172 people have been deprived of their citizenship since just 2010 (Bolhuis and van Wijk, 2020).

Further, Judge Perić has observed that disengagement from (violent) extremist beliefs is rarely achieved through punishment, but through comprehensive extrajudicial services (i.e., rehabilitation and resocialization). As BiH evolves from a whole-of-government to a whole-of-society approach to prevention and intervention, these extrajudicial mechanisms can and should be developed and expanded (Azinović, 2021b). To that end, the former head of the Anti-Terrorism Department of the Federation Police Administration, Anes Čengić, noted that much greater attention should be paid to the experiences and needs of returnee children as well[17] (Mujkic, 2019).

Notably, attorney Mirsad Crnovršanin argues that there is a legal basis in BiH for prosecuting women returning from a foreign battlefield, and the Mission of the Organization for Security and Co-operation in Europe contends that some women returnees will likely face criminal prosecution in the country. Peace and security should not be used by the state to unfairly instrumentalize women in this context, however. And it must be recognized that insufficient knowledge of the gendered dimensions of the foreign fighter phenomenon is an ongoing problem in judicial practice (Duffy, 2018).

4.2.2. Age of defendants

While defendants who have appeared before the Court of BiH for crimes committed as FTFs have been almost all male, they have varied in terms of age (see Figure 6, below). In Europe, for instance, most of the individuals prosecuted for these crimes have been around the age of 30 (Rekawek et al. 2019). While specific age data was not available in court files for 14 of the 35 defendants under study here, at least three defendants who committed criminal offenses as minors were prosecuted as adults. Two of these defendants were in middle adulthood when the judgments in their cases were issued, and the third was in young adulthood.[18]

17 Working with families and children who have returned from conflict zones is extremely demanding; for guidelines, see Radicalisation Awareness Network, 2017.

18 The age categories shown in Figure 6 were adapted from and are based on existing legal provisions and academic age-related studies. According to international standards and current legislation in BiH, criminal provisions on liability cannot apply to children 13 years and younger. Criminal codes in BiH do distinguish between younger minors (14 to 16 years old) and older minors (16 to 18 years old), however. Young adults are persons aged 18 to 21. By reviewing the academic literature (Kogan, 1979; Reker, Peacock and Wong, 1987; Maung, 2021) on age and aging (e.g., psychology, sociology), further categorizations were made among older age groups: middle adulthood (21 to 40), later adulthood (40 to 60), early old age (60 to 75) and later old age (75 onwards).

Not unlike the complexities that arise in prosecuting women returnees from Syria and Iraq, judicial professionals must consider various conflicting factors when adjudicating cases in which FTFs have committed crimes as minors. For example, the question of how the goals of punishment can be achieved must be weighed against the specific position of a minor at the time of perpetration and any potential developmental impairments they have suffered socio-emotionally. In most cases, these defendants were taken to Syria as minors by adults in their lives, and grew up in a family and community in which everyday violence, extremism, and terror were normalized. Many are traumatized, and the best interest of these defendants (and the larger community, in the longer term) may not necessarily be served by punitive measures.

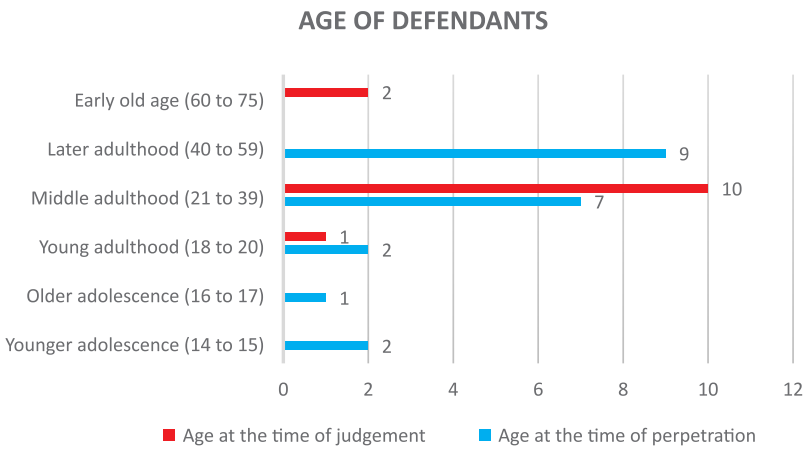

Figure 6. Age of defendants, in cases in BiH involving foreign terrorist fighting

Among the defendants for whom age data could be obtained, the youngest was 15 years old at the time of the criminal offense for which he was charged, and the oldest was 56. Most of these defendants were accused of having committed criminal offenses in later (9) and middle adulthood (7), however. At the time of judgment, the youngest of these defendants was 18, and the oldest was 75, but the highest number received their judgment while in middle adulthood (10).

Findings such as these diverge from the criminal trajectory identified in other research for those convicted of crimes related to terrorism. Studies based on court records have suggested that these offenses are usually committed at higher rates by minors or young adults, and gradually decrease in adulthood

– when criminal careers are either abandoned or interrupted – so that only an extremely small share of these perpetrators continue to commit these crimes as they age (see Buljubašić, 2022, 2020, 2019a; Simović & Kuprešanin, 2020; Doležal, 2009). The results of this study suggest instead that the criminal careers of most FTFs from BiH began relatively late, after age 21, with the exception of minors who were taken to Syria by their families. This late start may be more characteristic of terrorism that is specifically related to foreign fighting, for several reasons, including the needs of foreign terrorist formations to recruit individuals who are developmentally and functionally capable of making and executing the decision to travel to foreign battlefields. And, for some foreign fighters, the decision to do so is the culmination of a relatively long-term and gradual process of radicalization that may occur over years (see Nivette, Eisner, and Ribeaud, 2017; Nivette, Echelmeyer, et al. 2021; Nivette, Ribeaud, et al. 2021; Mattsson and Johansson, 2019; Perry, Wikström, and Roman, 2018; Ozer and Bertelsen, 2020).

4.2.3. Marital status of defendants

While researchers could not obtain any data on the age of some defendants in this study, data on marriage was more complete (see Figure 7, below). Most (24) are married, including the only woman defendant, and the remaining 11 are single. In several cases, a defendant's marital status was cited as a mitigating factor in sentencing. Still, it is possible that the marital data in court files is inaccurate, as they include no material evidence of marital and family status. It is therefore feasible that some defendants stated they were single, for example, but were in fact married under Sharia law; or that a defendant married to more than one partner did not disclose this in order to avoid self-incrimination.

Interestingly, there are no widows, cohabitants, or divorcees among the defendants. This is likely a reflection of the ideologies of extremism, which exalt marriage and the family and limit adherents to conservative values and rigid rules that reject divorce and extramarital unions. However, considering the environment from which these defendants have returned, a lack of widowers among them is notable. This may be linked to the plurality of partners (women) enjoyed by most men in the "Islamic State", which may mean that the loss of a wife is not perceived to make a man a widower. It is also possible, of course, that none of these defendants lost their partners on foreign battlefields or elsewhere.

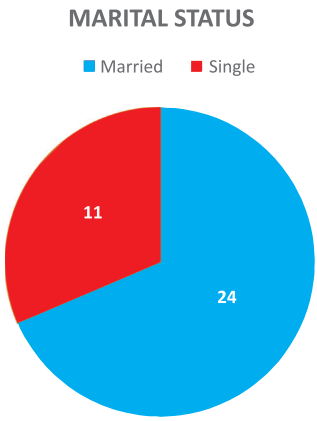

Figure 7. Marital status of defendants in cases in BiH involving foreign terrorist fighting

4.2.4. Education level of defendants

As Figure 8 shows (below), the FTFs under study are mostly educated through the secondary level. There is no education data for two defendants, but 23 completed their secondary education. Presumably, minors taken to Syria and Iraq by their families are among the seven defendants who completed only primary school or received no education. Notably, court records and judgments in these cases do not indicate whether and to what extent any defendants acquired specialized skills in their schooling (at the secondary level or higher) that were useful to them in perpetrating the criminal offenses for which they were charged.

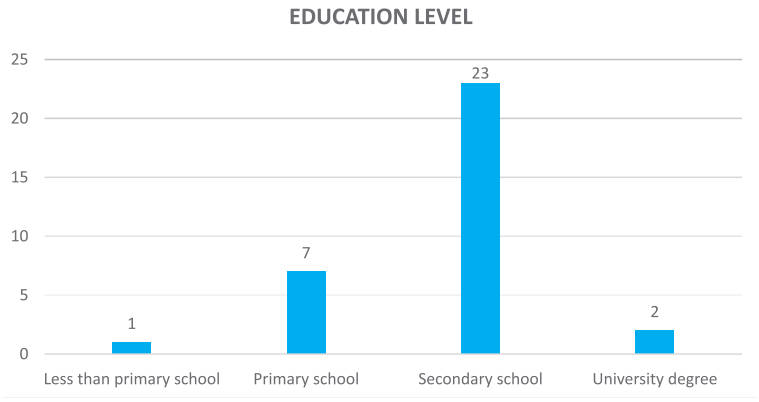

Figure 8. Education level of defendants in cases in BiH involving foreign terrorist fighting

In Europe, FTFs tend to have lower levels of education (Rekawek et al. 2019). But in BiH, a lower level of education or lack of education has not been found to make someone more vulnerable to radicalization (Atlantic Initiative, 2018), and these findings suggest that this is also true for individuals prosecuted as FTFs. Indeed, Fatih Hasanović – who was charged with organizing a terrorist group and supporting citizens of BiH in departing to Syria and Iraq – graduated from university with a degree in physical education and sports management, and renowned extremist leader Husein "Bilal" Bosnić received a degree in theology.

4.2.5. Employment status of defendants

Judicial practice does not focus extensively on determining the employment status of defendants, as this factor is mainly viewed in relation to the economic ability to bear the costs of criminal proceedings. Hence, for the most part, it is unclear from court records whether defendants were employed at the time they committed the criminal offense in question, what their profession was, or how close their income is to the average. And while poor financial standing is mentioned in some cases as a mitigating factor in sentencing, there is no data on employment for 13 of the 35 defendants under study. Of the defendants for whom data is available, the ratio of employed (10) to unemployed (11) is almost equal, though there is no indication as to the kind of work in which these defendants were employed. Given that this issue went mostly unaddressed by prosecutors, it is impossible to determine what if any role the employment of these defendants, or their unemployment, played in their radicalization or criminality.

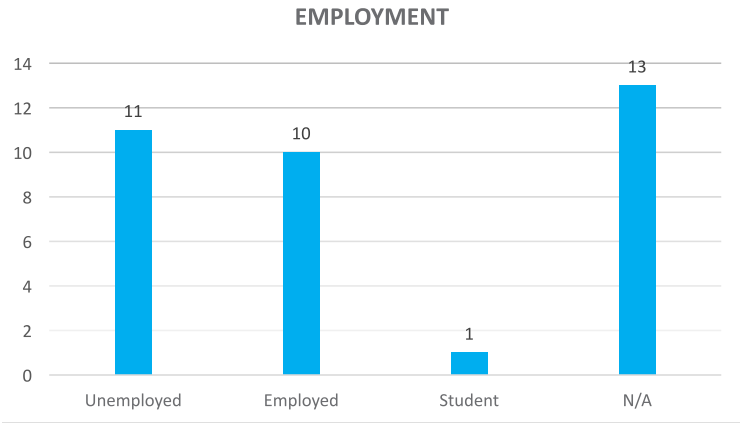

Figure 9. Employment status of defendants in cases in BiH involving foreign terrorist fighting

Even defendants who appear to have been employed may not have had stable employment or stable income. For instance, judgments simply refer to Jahja Vuković (who was acquitted) as a worker and to Mirel Karajić as a road traffic technician, but offer no information about whether they worked full time. In some cases, the profession of an unemployed defendant is specified in court records, such as with Muharem Dunić, who is described as an unemployed energy electrician. Still, how previous employment experience, or the employment status, of defendants played any role in their perpetration of criminal offenses was not deliberated in detail.

In Europe, many FTFs have been unsuccessful in their professional careers and have been unemployed at the time of their arrest (Rekawek et al. 2019). The practice of some European courts, such as Germany, is to incorporate lengthy and in-depth histories of defendants in judgments, detailing their family history, education, professional background, personal relationships, and path to radicalization. In BiH, the lack of personal data in court files, including regarding employment, ultimately means that no final conclusions can be drawn as to links between employment status and the criminal offenses with which these defendants were charged. The one exception is Husein Bosnić, who told the Court of BiH during cross-examination that he worked as missionary, spreading the ideology of Salafism (*Prosecutor's Office of Bosnia and Herzegovina v. Husein Bosnić*, 2015).

4.2.6. Criminal history of defendants

Individuals charged in BiH with offenses related to foreign terrorist formations have generally had no criminal record. Only five defendants had a history of previous sanctions. In this sense, these defendants are similar to those accused of perpetrating mass atrocity crimes (war crimes, crimes against humanity, and genocide) in BiH (Buljubašić, 2017). For some defendants, this may be due to the fact that prior criminal offenses were never prosecuted; but for others, it seems that "ordinary" people without a criminal history underwent some sort of transformative process (Smeulers, 2019; Byrne, 2017).

The fact that some FTFs do not have a criminal history in BiH may also be linked to their radicalization itself; either because ideological norms did not allow them to transgress or because they wanted to stay off the radar of security services. This lack of criminal history among FTFs who have been charged by

the Court of BiH should be understood in the context of the profile of these offenders, for whom criminogenesis is significantly different than that of "usual" (i.e., conventional) offenders (e.g., individuals who commit property crimes, "everyday" violence, or corruption). Processes of radicalization simply cannot be compared with the traditional concept of "becoming criminal".

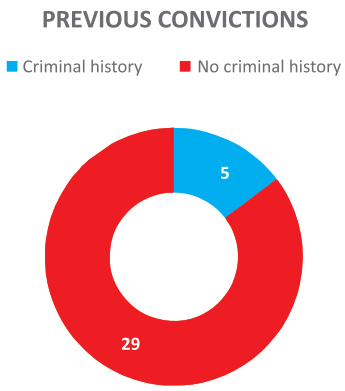

Figure 10. Prior convictions of defendants in cases in BiH involving foreign terrorist fighting

Of the five defendants for whom court records indicate prior convictions, no detail is offered in two instances. In another two, records state just that, "so far [the defendant] has not been convicted of the same or similar criminal offenses" (*Prosecutor's Office of Bosnia and Herzegovina v. Safet Brkić*, 2016) and that, the offense "belongs to the same group of criminal offenses, as the one for which [the defendant] was convicted in these proceedings" (*Prosecutor's Office of Bosnia and Herzegovina v. Milarem Berbić*, 2021). It is only in the case of Sena Hamzabegović (*Prosecutor's Office of Bosnia and Herzegovina v. Sena Hamzabegović*, 2021), that specific information about prior convictions appears in the judgment, relating to the defendant's belonging in an organized crime group involved in the "smuggling of persons" (Article 250 (4) in conjunction with Article 189 (1) of the CC BiH).

In Europe, where a minority of FTFs have had criminal histories – including charges for robbery, theft, illegal trade in drugs and goods, fraud, violent crimes, and crimes related to terrorism – some researchers have raised the possibility of a crime-terrorism nexus. They argue that terrorism suspects or defendants who do have a criminal history have typically committed serious offenses (Rekawek

et al. 2019). In this study, researchers did not identify enough relevant data from BiH to make robust comparisons to findings in Europe, however.

4.2.7. Organizational affiliation of defendants

Because this study exclusively considers cases related to criminal terrorist organizations in Syria and Iraq, all the defendants were accused of being members of or supporting ISIS or Jabhat al-Nusra (Al-Nusra Front).[19] While 29 were charged with crimes related to their association with terrorist or paramilitary formations, 6 defendants were instead charged for activities undertaken as civilians (i.e., attempting to join a paramilitary formation (4), financial support to foreign fighters (1), and recruitment to participate on foreign battlefields (1)). Quite a few defendants (18) were accused of joining unspecified terrorist or paramilitary formations in Syria and Iraq (see Figure 11, below), and even where individuals are accused of joining specific formations, court records include no special disclosures or deliberations of facts related to the defendants' support for these organizations and do not establish the extent of crimes committed in Syria and Iraq. Prosecution of these cases has been facilitated instead by the fact that ISIS and Jabhat Al-Nusra are designated by the UN as terrorist organizations, and both operated in Syria and Iraq in the territories to which FTFs from BiH had direct or indirect links. This means that anyone who traveled to these countries and joined any affiliate of these terrorist organizations is in legal jeopardy, so that there is no need to establish the identity of that specific affiliate or the position of a defendant in it (Interview, 6 May 2022).

Citizens of BiH tended to join units in Syria and Iraq in which their compatriots served. A number of ISIS units included FTFs from BiH, including the Beit Commandos, led by Bajro Ikanović; the Muhajirin Unit, where Safet Brkić commanded citizens from BiH; and unspecified Balkan units commanded by Goran Pavlović and Ramo Pazara. Nusret Imamović, a leading terrorist figure in BiH wanted by Interpol, was not a member of ISIS, but of Al-Nusra Front, and it

19 There are significant differences between ISIS and the Al-Nusra Front. Perhaps the biggest is the degree to which Al-Nusra relied on donations from outside Syria. Al-Nusra also expressed a willingness to cooperate with other terrorist groups to promote the goal of creating an Islamic state, while ISIS did not. Moreover, ISIS was viewed as a foreign occupier, while Syrians perceived Al-Nusra as a Syrian organization despite its large contingent of foreign fighters. Indeed, Al-Nusra actively fought for the overthrow of the Syrian government. On the other hand, ISIS sought to establish its own rule over the territory and people, and avoided fighting the Syrian army because their focus was on building a state based on extreme interpretations of Islam (which they partially succeeded in doing by managing to build institutions like schools and a judiciary). In 2013 and 2014, initiatives to merge the two groups, or at least calm tensions between them, were unsuccessful (Hashim, 2014).

is possible that other citizens of BiH joined the organization due to his influence (Azinović and Jusić, 2015, 2016; Avdić, 2017a, 2017b, 2018).

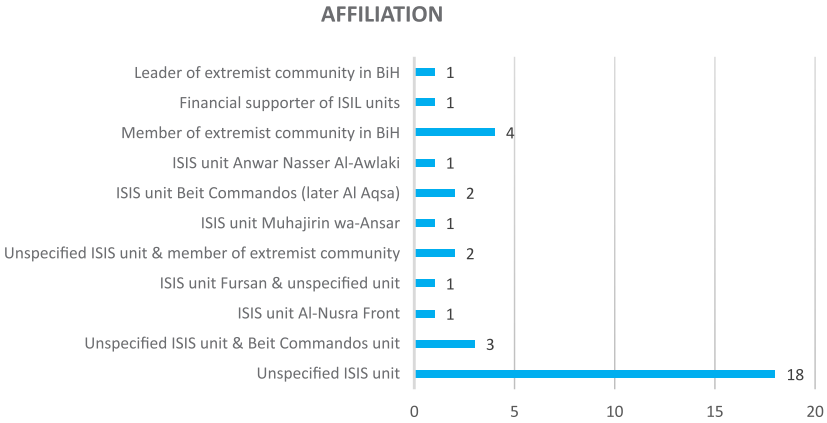

Figure 11. Affiliation(s) of defendants in cases in BiH involving foreign terrorist fighting

The six defendants who were accused of supporting or attempting to join foreign terrorist formations as civilians fall into three distinct categories. Husein Erdić, Midhat Trako, Nevad Hušidić, and Merim Keserović, who were jointly accused of supporting or attempting to join such a formation, constitute the first category. Court records identified them all as members of the Kharijite/neo-Kharijite extremist community linked to the masjid of Husein "Bilal" Bosnić. Bosnić himself, as the leader of that community, falls into the second category, having encouraged and recruited people to travel to foreign battlefields. Finally, Sena Hamzabegović – the only woman defendant – was charged with financially supporting a terrorist organization, in which her husband Muradif Hamzabegović participated.

4.2.8. In-group authority of defendants

Information about the authority or rank of defendants is scarce in court records. Nonetheless, a figure such as Husein Bosnić can easily be categorized as a high-ranking perpetrator. He was considered a leader of the extremist community in BiH and beyond (e.g., in the diaspora in Italy and Austria), and actively used his position to radicalize and recruit vulnerable individuals, including those who were mentally ill, economically disadvantaged, and socially marginalized. While

Bosnić may be categorized differently in the context of the broader, global terrorist landscape, his high position and authority among a large number of Muslims and role as a leader in BiH justifies his designation as a high-ranking authority here (see Azinović, 2021a). Husein Erdić is considered low-ranking but not without authority because he organized and managed the departures of Neva Hušidić and Merim Keserović to Syria with individuals he knew from the Republic of Turkey.

4.2.9. Role played by defendants

Figure 12 (below) shows the criminal roles played by the defendants under study, broadly categorized based on data in court files. Several defendants provided aid, including material assistance or labor to members of terrorist organizations. Despite his authority, Husein Bosnić served only as an indirect organizer by designing and implementing efforts to radicalize people to travel to Syria. On the other hand, Husein Erdić, mentioned above, was a direct organizer, because he intended to join a foreign terrorist formation and planned and coordinated activities to that end. No defendants who could be categorized as bystanders were identified; i.e., individuals with a passive role contributing to a crime (see Moerland, 2022; Botte-Kerrison, 2017; Cohen 2001).[20]

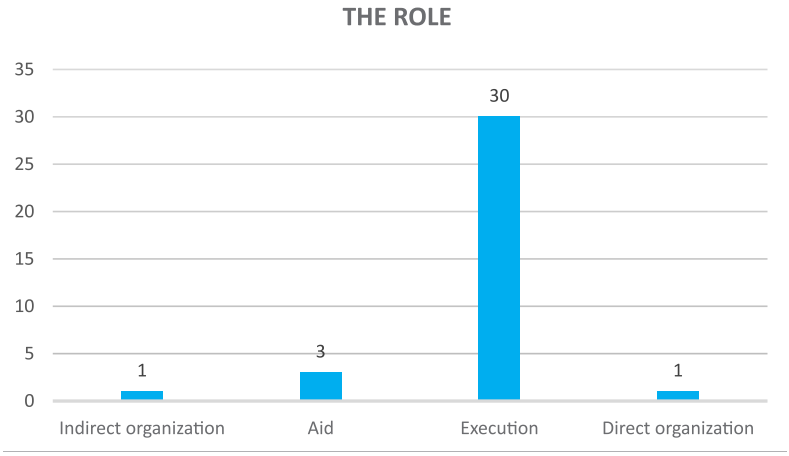

Figure 12. The roles of defendants tried in BiH in cases involving foreign terrorist fighting

20 This could mean advocating the birth policies of the "Islamic State", for example, or participating in the execution of criminal sanctions based on Sharia law (Revki, 2016).

German law addresses degrees of culpability in two ways, by stipulating in the Criminal Code that individuals charged with terrorism-related offenses who act as "ringleaders" face higher minimum sentencing (and may be banned from voting or holding political office), and by making a distinction between perpetration and secondary perpetration. Perpetration involves "direct perpetration, perpetration by means, and co-perpetration" and secondary perpetration involves either instigating or aiding an offense. Defendants charged with aiding a terrorist offense may receive a lesser sentence than primary perpetrators. German caselaw vis-à-vis FTFs also indicates that whether defendants have had decision-making authority is considered by the courts. For example, in the case of Harun P., the defendant was involved in an attack on Aleppo's central prison with many victims, but his contribution to the crime was considered minor as he was not in a command position and was not used directly at the front. The court assessed that "those fighting directly... were co-perpetrators, while the accused... was merely an accomplice", though it found that the severity of the crime justified a sentence of 11 years (Higher Regional Court of Munich, 2015).

4.3. Substantive Law

4.3.1. Criminal offense

In terms of substantive law, a number of criminal offenses relate to foreign terrorist formations and fighters, and thus to returnees from Syria and Iraq. Prosecutors have charged defendants before the Court of BiH with "organizing a terrorist group", "encouraging terrorist activities in public", "the funding of terrorist activities", "recruitment for terrorist activities", and the "unlawful establishing or joining foreign paramilitary or parapolice formations". Qualifying certain actions and proving the intent to achieve terrorist goals is extremely complicated, though, because the Criminal Code of Bosnia and Herzegovina (CC BiH) foresees combined and numerous possible forms or acts of terrorism. Some statutes stipulate that an act must represent a concrete danger to human life or property, for instance, while others do not impose such conditions. And for an offense to qualify as terrorism, the act(s) in question must relate to the fulfilment of (potential) consequences for a state or international organization, and must be of such a nature that they can seriously damage the state or international organization. In this context, "serious damage" can be broadly interpreted, but constitutes at the least an act that makes it difficult for the

state or organization to perform normal functions or causes significant damage to its international reputation.[21] In the case of a state, this would mean acts that prevent it from ensuring security, or basic rights and freedoms. As an employee of the Prosecutor's Office noted in an interview, these are often crimes for which the consequences (in terms of their impacts on the wider population and on security) "are seen only by those who investigate them" (Interview, 17 May 2022).

To date, four defendants – Nermin Šabić, Amir Haskić, Nevad Hušidić, and Merim Keserović – have been accused and convicted of attempting to commit a criminal offense in connection with travel to foreign battlefields and with joining or supporting a terrorist organization. These cases represent interrupted departures, and their small number could be assumed to signal problems within the security sector in preventing these criminal offenses from being perpetrated. But in truth, investigations into these offenses are extremely complex and difficult; among other reasons, because security services must have sufficient evidence that an offense will be committed in order to prosecute individuals for attempting to do so.

In the case of Amir Haskić, the first-instance court found that he had voluntarily renounced (see more in Babić and Marković, 2015; Tomić, 2008) the criminal offense at the time of attempted perpetration, and issued an acquittal. A second-instance court overturned this decision, however, and rejected the possibility of voluntary renunciation in his case because preparatory actions

21 According to Article 201 (1) of the CC BiH, terrorism is an act aimed at "seriously intimidating a population or unduly compelling the Bosnia and Herzegovina authorities, government of another state or an international organization to perform or abstain from performing any act, or with the aim of seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of Bosnia and Herzegovina, of another state or international organization." Importantly, the goals of a terrorist criminal offense do not have to have been achieved for the offense to have taken place; a subjective commitment to a terrorist act towards a certain goal is sufficient. The CC BiH stipulates that the sanction for the basic offence of terrorism is at least five years imprisonment. The aggravated form of the offense, defined in paragraph (2) as resulting in the death of one or more persons, carries a prison sentence of at least eight years. The most serious form of the offense is set out in paragraph (3) and involves the *intent* to take life, for which a prison sentence of at least ten years is applied. Paragraph (4) stipulates that preparing or creating conditions for the perpetration of terrorism will be punished by imprisonment of one to ten years. Paragraph (5), items a) through h), list intentional acts which, given their nature and context, may cause serious damage to a state or international organization, as follows: a) attack upon person's life, which may cause death; b) attack upon the physical integrity of a person; c) unlawful confinement of, keeping confined or in some other manner depriving another of the freedom of movement, or restricting it in some way, with the aim to force him or some other person to do or to omit or to bear something (kidnapping) or taking of hostages; d) causing great damage to a facility of Bosnia and Herzegovina, a facility of the government of another state or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property, likely to endanger human life or result in major economic loss; e) hijacking of aircraft, ships or other means of public or goods transport; f) manufacture, possession, acquisition, transport, supply, use of or training for the use of weapons, explosives, nuclear, biological or chemical weapons or radioactive material, as well as research into, and development of, biological and chemical weapons or radioactive material; g) releasing dangerous substances, or causing fire, explosion or floods the effect of which is to endanger human life; and h) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life.

constitute the substance of the criminal offense referred to in Article 162b (3). Notably, some criminal codes in the EU include separate offenses for preparing to participate in, or actively supporting, terrorist activities, which significantly eases the process of investigating and qualifying these criminal offenses (Genocide Network, 2020).

Most of the 35 defendants under study were indicted for a single criminal offense related either to travel to foreign battlefields or joining or supporting a terrorist organization. Only Nedžad Mujić faced four counts, or an extended criminal offense, because he participated in the activities of a terrorist group, on several occasions and with intent, providing financial and other assistance in continuity. Figure 13 (below) shows the criminal offenses with which these defendants were charged.

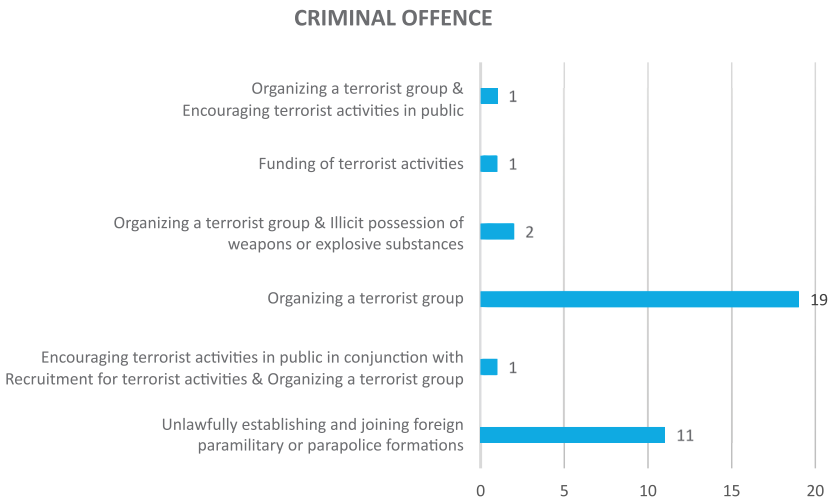

Figure 13. Criminal offenses with which defendants were charged in BiH in cases involving foreign terrorist fighting

The most common charge, of which 19 defendants were accused, was "organizing a terrorist group", under paragraph (2) of Article 202d of the CC BiH, in conjunction with the criminal offense of "terrorism" under Article 201 of the CC BiH. An organized terrorist group consists of at least three people, and paragraph (1) sets out that organizing such a group therefore requires uniting "a minimum of three individuals for the purpose of perpetration of [terrorist]

criminal offenses".[22] This research found that the qualification in paragraph (2) was instead used in the cases under study, referring to membership or participation in a terrorist group or to providing financial or any other assistance, which stipulates a sanction of at least three years imprisonment. In other words, FTFs in BiH have not been charged with organizing a terrorist group *per se*, but with belonging to or supporting one.

Every defendant who faced multiple counts was charged in one count with "organizing a terrorist group". This charge was part of the extended offense for which Nedžad Mujić, mentioned above, was prosecuted. Two other defendants were charged with "organizing a terrorist group" (in conjunction with "terrorism") along with a second count of "illicit possession of weapons or explosive substances" under Article 371 of the Criminal Code of the Federation of Bosnia and Herzegovina (CC FBiH). And Jasmin Keserović was charged with "organizing a terrorist group" (in conjunction with "terrorism") in combination with a second count of "encouraging terrorist activities in public" under Article 202a.

Keserović was charged under paragraph (2) of Article 202d for taking part in terrorist activities by providing assistance to and fighting in the Beit Commandos unit; and under Article 202a for encouraging terrorist activity on the SAFF media portal, where he posted a video message, while dressed in a military uniform and armed with an automatic rifle, directing Muslims to: "Rise... [and] kill Christians and their servants in their cities and their states, plant explosives in their cars, in their houses and their offices, kill them with snipers and silencers, kill them as you can, you Muslims, kill them even with a knife, do not differentiate between soldiers and civilians, just as their planes do not distinguish between civilians and soldiers of the Islamic State, rely firmly on Allah, help your brothers and do not doubt the righteousness of your actions, the words of Allah Almighty are sufficient for you, and when you punish, punish to the same extent as you were punished" (*Prosecutor's Office of Bosnia and Herzegovina v. Jasmin Keserović*, 2021).

22 Article 1 (23) of the CC BiH defines a terrorist group as "a structured group of at least three persons, formed and operational for a period of time with the aim of perpetrating one of the criminal offenses of terrorism." The offense of "organizing a terrorist group" defined in Article 202d, paragraph (1), applies to "whoever... unites a minimum of three individuals for the purpose of perpetration [of terrorism]" will be punished by a prison sentence of not less than five years. In paragraph (2), it is stipulated that membership in a terrorist group or any other type of participation in the activities of a such a group, including provision of financial or other assistance, is sanctioned by at least three years imprisonment. Paragraph (3) of this Article is noteworthy, as legislators envisaged the possibility of acquittal for a member of a terrorist group who discloses the group before participating in a criminal offense on behalf of the group; however, this acquittal is at the discretion of the Court, as the provision sets out sanctions ranging from a fine to a prison sentence not exceeding three years. Importantly, "organizing a terrorist group" is a special form of criminal offense and overrides the offense of "associating for the purpose of perpetrating criminal offenses" under Article 249 of the CC BiH, according to the principle of *lex specialis derogat legi generali*.

The criminal offense of "encouraging terrorist activities in public" applies to communications meant to encourage members of the public to engage in terrorist activities, and is sanctioned by at least three years imprisonment.[23] These communications must always reach the public, as the offense relates to the *dissemination* of violent/extremist ideology that can lead to terrorism. Therefore, no criminal offense exists in the case of private correspondence. At the same time, this offense can be charged even if terrorist activity is not perpetrated as the result of a publicly communicated message; it must only be proven that the content of a communication encourages terrorism or creates an abstract danger that terrorism may be perpetrated. Still, one of the problems in prosecuting defendants charged with "encouraging terrorist activities in public" is the unclear boundary between where the freedom to express oneself (freedom of speech) ends and the public encouragement of violence begins. This is a significant challenge to judicial professionals and impacts decision-making throughout and across criminal-legal processes.[24]

The issue of freedom of speech was raised by the defense in the case of Husein Bosnić, in second-instance proceedings, on the premise that he is a theologian tasked with sharing religious teachings and opinions. Bosnić was charged both with "encouraging terrorist activities in public" and "recruitment for terrorist activities", as well as "organizing a terrorist group". His defense asserted before the appellate court that there was no evidence of Bosnić's speech having influenced individuals to depart to foreign battlefields, and claimed that though his lectures were public, the defendant himself had not made them available and did not know how to make them available in digital format (*Prosecutor's Office of Bosnia and Herzegovina v. Husein Bosnić*, 2015). This argument was

23 The criminal offense of "encouraging terrorist activities in public" is perpetrated by any person who "publicly, through the media, disseminates or otherwise sends out a message to the public with the aim of encouraging another person to perpetrate the criminal offences [of terrorism]." This charge does not require action that creates or strengthens the decision of a *specific* person to commit terrorism, because the message is sent to an unspecified "public". In addition, this messaging does not have to refer to a specific criminal offense; it is sufficient that messaging directed towards the public generates a danger that terrorism may be perpetrated. This means that only the potential danger of a terrorist act, and not the execution of such an act, must be proven, i.e., the consequences are not determinant in these cases because the danger is abstract (Simović and Šikman, 2017).

24 The case of *Prosecutor's Office of Bosnia and Herzegovina v. Toni Bašić* is a good example in this context, of the qualification of a criminal offense and sanctioning. As a secondary school student, Bašić used the internet to encourage activities that were primarily qualified as terrorist, but due to content that was anti-Semitic, racist, and nationalist, and directed against the LGBTQ population, he was charged with the criminal offense of "inciting national and religious hatred, discord and intolerance". Bašić was not associated with any extremist groups and a neuropsychiatric examination established that the illegal acts in which he engaged were the result of adolescent infatuation and recklessness, without any real intent to cause harm. A good comparison is the Keserović case, in which the defendant clearly laid out the method by which his audience could execute terrorist acts, the group to target, and the ideological justifications; whereas Bašić only identified a target group. The case of *Prosecutor's Office of Bosnia and Herzegovina v. Maksim Božić* offers another useful contrast, as it was established that Božić acquired weapons for the execution of terrorist acts, which was not true of Bašić.

rejected by the Appellate Division of the Court of BiH, which found that freedom of speech has limitations in accordance with Article 10 (2) of the European Convention on Human Rights (see Ferhatović and Trlin, 2019; Munivrana Vajda and Šurina Marton, 2016).

The criminal offense of "recruitment for terrorist activities" under Article 202b, with which Bosnić was charged in one count, sets out sanctions for "whoever recruits or incites another person" to perpetrate, participate in, or assist in perpetrating terrorism, or to join a terrorist group, and stipulates a punishment of at least three years in prison. Incitement or recruitment refers in this context to any act that invites or entices individuals (i.e., mobilizes them) to commit terrorism. The CC BiH does not define acts of incitement, as they are determined on a case-by-case basis, contingent on the intent of the perpetrator. Sanctionable behavior in the context of foreign terrorist fighting could include speech that promotes and encourages extremist beliefs that can lead to terrorism, while promising a better life (e.g., in ISIS) and metaphysical rewards (i.e., compensation in the afterlife) for those who buy in; or providing financial and other forms of support (to others) for the purpose of committing terrorism or joining foreign paramilitary formations. It is irrelevant how this is achieved – whether indirectly through social media, for instance, or through direct interaction – as the frequency of this recruitment or incitement and its relation to terrorism are sufficient to prove the charge. A criminal offense also exists even if the perpetrator is unsuccessful. It is simply the intent to recruit or incite another person to commit or contribute to terrorist activity that must be proven.[25]

In his public addresses, the prosecution charged that Husein Bosnić encouraged his followers to travel to foreign battlefields or reinforced their decision to do so, and that he formulated (and offered those followers) theological justification for such actions (*Prosecutor's Office of Bosnia and Herzegovina v. Husein Bosnić*, 2015, first-instance judgment, p. 64). Bosnić also disseminated messages on YouTube, and the prosecution argued that their content and wide distribution created a concrete danger of criminal offenses being perpetrated. The Court of BiH affirmed this, and when challenged in the second instance, was unmoved by the claim of Bosnić's defense that, as a theologian, he was free

25 Importantly, this separates the offense of "recruitment for terrorist activities" from the offense of "incitement" under Article 30 in the CC of BiH. Unlike the incitement statute, the offense of "recruitment for terrorist activities does not hinge on whether a person is successfully recruited or induced to terrorist activities.

to share religious teachings of this nature (*Prosecutor's Office of Bosnia and Herzegovina v. Husein Bosnić*, 2015).

The case of Sena Hamzabegović – the only defendant charged with the criminal offense of "funding of terrorist activities" under Article 202 of the CC BiH[26] – is unique both for standing alone as the single application of this statute to date, and because she is the sole woman prosecuted to date on terrorism-related charges in BiH. Her criminal liability extends from the fact that she had power of attorney for her husband, Muradif Hamzabegović, enabling her to withdraw his money; which she forwarded directly to him in ISIS-held territory, based on his instructions. Notably, there are no other cases in court records of funding emanating from BiH to FTFs, though there are cases involving members of the diaspora, including individuals who later traveled to Syria themselves. The conclusion shared in interviews, by a number of employees of the Prosecutor's Office, is that Islamist extremists in BiH lack economic power and are therefore unable to fund terrorist activities.

In Europe, FTFs enjoy a variety of funding sources, both legal and illegal. Legal funding is actually most common and includes personal wages, savings, and insurance. Illegal funding is often generated from the proceeds of criminal activity, but details regarding specific flows of money remain largely unknown (Rekawek et al. 2019). In BiH, a perpetrator of the criminal offense of "funding of terrorist activities" under Article 202 is guilty if they collect or hand over funds, either directly or indirectly, with the aim of using them or with the knowledge they will be used (even in part) to finance activities related to terrorism. In the case of direct funding, a perpetrator has collected money for the express purpose of financing terrorist activities; while indirect funding refers to money collected under another premise or by another means (e.g., through

26 Article 202, paragraph (1), sets out that the offense of "funding of terrorist activities" may be perpetrated by "whoever by any means, directly or indirectly, provides or collects funds with the aim to use them or knowing that they are to be used, in full or in part," to perpetrate criminal offenses related to terrorism, "as well as any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking active part in the hostilities in an armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel the authorities of Bosnia and Herzegovina or any other authorities or an international organization to perform or to abstain from performing any act, regardless of whether terrorist activities were perpetrated or whether funds were used to perpetrate terrorist activities." The prescribed sanction is at least three years imprisonment. Paragraph (2) stipulates that the criminal offense exists under the same conditions in cases where funds are meant for or are used by terrorist organizations or individual terrorists to commit crimes related to terrorism. Paragraph (3) lays down the obligation to confiscate the funds in question; and paragraph (4) specifies that funding to which the statute applies can include any funds; i.e. "things, rights, tangible or intangible, movable or immovable, regardless of how they were acquired, nor in what form they are, legal documents or instruments, which are not limited to electronic or digital content, that prove ownership or right of ownership of assets, and include and are not limited to bank loans, traveler's checks, banker's checks, money orders, shares, securities, bonds, promissory notes and letters of credit."

humanitarian fundraising or criminal activities), but used at least in part for terrorist activities. According to a prosecutor interviewed by researchers, almost all FTF recruitment in BiH occurred within unofficial religious congregations and was targeted at individuals from the social and economic margins for whom it was enough that their ticket to Syria be funded, and this could easily be underwritten by the diaspora.

Importantly, the criminal offense of "funding of terrorist activities" exists regardless of whether the funds handed over or collected were intended to support acts of terrorism as defined by law; it is also irrelevant to what extent the funds were used for that purpose. What is necessary is direct intent on the part of the perpetrator. In other words, irrespective of whether terrorist activity was carried out, as long as funds were collected or handed over with the intention of funding activities related to terrorism, the criminal offense exists. In such cases, the confiscation of assets intended for a criminal offense or constituting the proceeds of a crime is mandatory, and includes all types of assets (i.e., tangible, intangible, movable, or immovable) no matter how they were acquired.

The jurisprudence of the EU suggests that it is not only individuals who should be under scrutiny for providing financial support to terrorist organizations, but legal entities as well, as there have been cases in which national courts in Europe have prosecuted companies for human rights violations and involvement in mass atrocity crimes. The best example is the case of the Lafarge company, being heard by the Court of Appeal of Paris. Lafarge had a subsidiary in Syria, which operated amid the armed conflict. Allegedly, the company made arrangements with ISIS to be allowed to pass through checkpoints and purchase raw materials, to enable production on land controlled by the terrorist organization. The company's Syrian employees had to continue working even as they faced kidnappings and as the armed conflict became more widespread and dangerous. When ISIS took control of the Lafarge factory in 2014, workers were left to fend for themselves. In 2017, the former director of Lafarge was charged with human rights violations; and in 2018, the company was also accused of financing terrorist activities, complicity in crimes against humanity, violating embargoes, and endangering human lives. An appeals process is currently underway (Justsecurity, 2021). On this topic, it should be noted that civil society organizations which represent the interests of victims of ISIS have called on governments to open investigations into social media companies because

they consider them liable for aiding and abetting the group in committing acts of terrorism and atrocity crimes (de Hoon, 2022).

As the Lafarge case and similar cases confirm, and international bodies have corroborated, ISIS and other terrorist formations in Syria and Iraq did commit war crimes, crimes against humanity, and genocide on foreign battlefields and in territories they claimed; but mass atrocity crimes were not considered in cases involving FTFs before the Court of BiH. This seems to have been a pragmatic choice by the Prosecutor's Office, as the burden of proof for the criminal offenses of "organizing a terrorist group" or the "unlawful establishing and joining foreign paramilitary or parapolice formations" does not require establishing that victimization resulted, which is required to prove violations of international law in connection with armed conflict. Furthermore, a prosecutor who was interviewed by researchers explained that, although "there is a *ius cogens* obligation for war crimes and they must be prosecuted, the issue is evidence," as it is difficult to gather and verify. But this prosecutor noted that "war crimes and terrorism do not consume each other, they are different criminal offenses... if a war crime cannot be proven, the simplest solution is to prove 162b [unlawful establishing and joining foreign paramilitary or parapolice formations]" (Interview, 6 May 2022).

Still, there remains a lack of a prosecutorial policy regarding the treatment of individuals accused of criminal offenses related to their travel to or activity on foreign battlefields, and membership in or support for terrorist organizations (Interview, 17 May 2022).[27] In total, 11 people have been charged in BiH under Article 162b for membership in paramilitary units in Syria and Iraq. The statute does not explicitly refer to "foreign terrorist fighters" but has been applied to FTFs because they unlawfully joined paramilitary and parapolice formations (Simović and Šikman, 2017).[28] Article 162b stipulates in paragraph (1) that the criminal offense of "unlawful establishing and joining foreign paramilitary or parapolice formations" exists if any person, "in violation of the Law on Defense of Bosnia and Herzegovina or the Law on Service in the Armed Forces of Bosnia and

27 Perić (2019) states that the solution lies in completing the investigative process under the control of the prosecution. This reform would include transforming the criminal divisions of police into prosecutorial structures. At the same time, there is a need to develop mechanisms of control and accountability for prosecutors themselves.

28 The "unlawful establishing and joining foreign paramilitary or parapolice formations" does not appear in the chapter of the CC of BiH containing criminal offenses against humanity and values protected by international law, but is grouped instead among criminal offenses against the integrity of BiH. As Simović and Šikman (2017) point out, this presents a problem given the political character of this latter group of offenses, the protection thereof, and the motives for their perpetration. In terms of extradition law, for example, the principle of non-extradition of political perpetrators applies to perpetrators of these offenses. Therefore, Simović and Šikman assert that it is unclear why the legislature criminalized the unlawful establishment and membership in foreign paramilitary or parapolice formations among criminal offences against the integrity of BiH.

Herzegovina, organizes, directs, trains, equips or mobilizes individuals or groups for the purpose of their joining in any way foreign military, foreign paramilitary or foreign parapolice formations that are acting outside the territory of Bosnia and Herzegovina." It is important to emphasize that no criminal offense exists if an individual lawfully acquires "the citizenship of a foreign country recognized by Bosnia and Herzegovina in whose army or military formation they serve, or [if] they serve in the military formations under control of governments internationally recognized by the United Nations" (see paragraph (6)).

There has been no one prosecuted in BiH under paragraph (1) of Article 162b alone. In the case of Husein Erdić et al., four defendants (Erdić, Midhat Trako, Nevad Hušidić, and Merim Keserović) were charged with violating Article 162b paragraphs (1), (2), and (3), but in conjunction with Article 26 of the CC BiH, which stipulates the treatment of perpetrators who intend to commit a criminal offense but do not succeed (an attempt). Beyond this, individuals charged to date in BiH have been charged under paragraph (2) of this statute, with six defendants accused of joining "a foreign military, foreign paramilitary or foreign parapolice formation, trained, equipped or mobilized as provided by Article 162b (1)"; or under paragraph (3), which applies to "whoever procures or renders operable the means, removes obstacles, creates plans or makes arrangements with others" to facilitate perpetration of this criminal offense.[29] For example, Amir Haskić was charged under paragraph (3), for developing a plan and the means to join ISIS.

When qualifying the criminal offense of joining foreign paramilitary or foreign parapolice formations, the Court considered that the individuals charged have been neither military nor civilian as prescribed by the Law on Service in the Armed Forces of Bosnia and Herzegovina. It was established that defendants traveled by their own transport or on a Sarajevo-Istanbul flight (in one case, Podgorica-Istanbul) with the intention of illegally entering Syria to join a foreign terrorist formation.[30] Individuals who joined a terrorist organization in Syria or Iraq but had no military experience underwent military training, and the

29 There is also a form of this offense for which individuals in BiH have not been charged at the time of this research, that is the distribution or transmission of messaging "by way of public media... which has the purpose of inciting another person" to unlawfully establish or join foreign paramilitary or parapolice formations, which is punishable by imprisonment of three months to three years (paragraph (4)). In paragraph (5), the statute also sets out the possibility of more lenient sanctions than those stipulated in the preceding paragraphs (even including acquittal), for perpetrators of the offense who expose the group they have joined and thereby prevent their perpetration of a crime.

30 For a case involving a defendants who traveled on his own, see *Prosecutor's Office of Bosnia and Herzegovina v. Osman Abdulaziz Kekić*, 2017; for a case involving air travel, see *Prosecutor's Office of Bosnia and Herzegovina v. Senad Koštić*, 2016.

process of joining was complete when they were assigned weapons and other equipment, and participated in battles or undertook the tasks of a guard.[31]

Defense counsel for some of these defendants argued that a lack of specificity about the details of travel to Syria in the indictments of their clients represented formal shortcomings and inadequacies in these prosecution cases. For example, in the preliminary hearing in the case against Osman Abdulaziz Kekić, the defense objected to imprecision regarding the place the charged offense was perpetrated; but the judge concluded that the indictment traced the path and movement of the defendant until he joined the ISIS-affiliated Anwar al-Awlaki paramilitary unit, and thus that the standard for establishing the place of perpetration had been met to a reasonable and sufficient extent (*Prosecutor's Office of Bosnia and Herzegovina v. Osman Abdulaziz Kekić*, 2017, Ruling on Preliminary Objections to the Indictment). Similarly, in the Ćufurović case, defense counsel objected to the timeline set out in the indictment, as the exact time Ćufurović entered Syria had not been not established. In the preliminary hearing, the judge stated that the time frame was precise enough, noting that the defendant could contest the accusations and offer evidence in his favor at the main trial. Though defense counsel continued to argue that findings of the investigation into Ćufurović were too general and were unsubstantiated, the court held that allegations arising from investigations need only produce an abbreviated explanation of the evidence to be presented at the main trial, and that this is sufficient to confirm the indictment (*Prosecutor's Office of Bosnia and Herzegovina v. Ibro Ćufurović*, 2019, Ruling on Preliminary Objections to the Indictment).

In a small number of cases, investigative bodies in BiH discovered the intention of individuals to depart for Syria and were able to intervene to prevent them from traveling to Turkey. An officer of SIPA who investigated the Jasmin Keserović case explained to the Court that operational information about the departures of citizens of BiH was not investigated until after 2013, however, because there was no awareness before then that these departures were linked to participation in an armed conflict or efforts to join terrorist organizations (*Prosecutor's Office of Bosnia and Herzegovina v. Jasmin Keserović*, 2021, main trial transcript). There have also been cases, such as that of Amir Haskić, in which would-be FTFs decided against carrying through with their plans and

31 For a case in which this process culminated in the defendant joining combat operations, see *Prosecutor's Office of Bosnia and Herzegovina v. Mirel Karajić*, 2016; for a case in which the defendant carried out guard functions, see *Prosecutor's Office of Bosnia and Herzegovina v. Osman Abdulaziz Kekić*, 2017.

voluntarily renounced. For Haskić, this fact led to his acquittal in a first-instance judgment that – despite this and other facts having been established correctly – was reversed in a second-instance judgment, as noted earlier.

In the Haskić case, the Prosecutor's Office insisted that the criminal offense committed by the defendant qualified as attempted perpetration under Article 162b, paragraph (2). The first-instance court correctly interpreted that the case fell under Article 162b, paragraph (3) instead. Yet, the second-instance court observed that, under paragraph (3), the defendant's actions were wrongly characterized as an attempt with the possibility of voluntary renunciation; that is, because Article 162b, paragraph (3) refers to creating a plan – an imperfective element. Thus, the court found that the criminal offense includes actions from stages of perpetration that precede an attempt, specifically preparation, and ruled that the defendant should be sentenced to one year and six months in prison. A third-instance court confirmed the decision of the second-instance court. The judgment against Amir Haskić is an example of good practice in the application of substantive law in the trials of FTFs.

In interviews with researchers, legal practitioners discussed problems that extend from the choice of legislators to criminalize the "unlawful establishing and joining foreign paramilitary or parapolice formations" within Chapter 16 of the CC BiH, which lists offenses against the integrity of BiH. First, it is not clear what damage or consequence of the crime made it relevant to this grouping of offenses.[32] Second, the sanctions set out in Article 162b are too severe compared both to other criminal offenses in the same group and to the related offense of "organizing a terrorist group" under Article 202d. Indeed, an employee of the Prosecutor's Office shared the opinion that "being a member of a terrorist group is a much more serious crime than joining a paramilitary formation" (Interview, 5 May 2022), but the CC BiH does not reflect this.

In practical terms, the difference between the two charges is that it is relatively easy to prove the offenses in Article 162b, because a defendant who unlawfully joins a foreign paramilitary or parapolice formation must simply have traveled to Syria and participated in the activities of a designated terrorist group. Though, in

32 As Duffy (2018) notes, new provisions on FTFs detach criminal conduct from any appreciable harm or consequence. Criminal law is thus a last resort (*ultima ratio*) to address clearly defined and delimited conduct that cannot be effectively addressed by less severe measures, and which causes significant damage to society or individuals. Trials based only on a radicalization of *beliefs* are not possible and would violate the human rights of defendants; and expansive criminalization provides a legal pretext for the prosecution of journalists, civil society organizations, scientists, lawyers, academics, and others under broadly framed counter-terrorism laws.

the event that an organization is not a designated terrorist group, its structure and activities must be determined in order for it to be considered a paramilitary or parapolice formation; i.e., to satisfy the elements of the criminal offense (Interview, 6 May 2022). In an interview, a judge noted that "the Prosecutor's Office generally has difficulties" in these instances.

Several criminal acts can exist in concurrence if there is a corresponding factual description (Interview, 17 May 2022), and van Ginkel (2016) has highlighted the problems of prosecuting only a defendant's departure (for the purposes of terrorism) and their having joined a terrorist group, and not crimes perpetrated in the warzone. This is illustrated by the Dutch case against Maher H., in which the defendant was sentenced to three years imprisonment; an unsatisfying result from the perspective of victims of ISIS, as it falls short of acknowledging the extent of their victimization or the scale of the crimes. This sanction also raises questions with respect to the retributive principle that is part of the rationale behind the adjudicatory task of the state.

4.3.2. The question of prosecuting atrocity crimes

While atrocity crimes committed on battlefields in Syria and Iraq have not been charged in cases before the Court of BiH, largely due to the evidentiary threshold, the jurisprudence in EU countries demonstrates that it is possible to cumulatively prosecute individuals for offenses related to terrorism as well as for war crimes, crimes against humanity, and genocide. In some countries, cumulative prosecution can take place on the same facts, while in others, there is a requirement to distinguish between the facts of crimes related to terrorism and the facts of mass atrocity crimes (Genocide Network, 2020). In Germany, The Netherlands, and the UK, photographs of victims have been sufficient to qualify a criminal offense as a war crime, crime against humanity, or genocide. According to senior researcher Tanya Mehra, such qualifications are becoming more frequent in cases involving FTFs (BIRN, 2020b).

The German Criminal Code is worth examining in this context, as Article 129a, which criminalizes "forming terrorist organizations" applies to those who form organizations with the aim of committing, among other things, "genocide (section 6 of the Code of International Criminal Law) or a crime against humanity (section 7 of the Code of International Criminal Law) or a war crime...". Article 129b of the Code stipulates that Article 129a pertains to "organizations

abroad." Hence, German prosecutors have frequently charged these offenses cumulatively with mass atrocity crimes, which are treated more severely than membership in a terrorist organization alone. This has been facilitated in part by the extensive use of expert witness testimony and expert reports, establishing contextual details about the specific activities of the terrorist organization(s) relevant in any given trial. But as noted above, the success of this strategy has also hinged on the acceptance of digital photographic evidence that, as yet, has not been viewed as singularly valid in the jurisprudence of BiH.

This is an issue with which judicial professionals must grapple, as prosecuting FTFs only for belonging to or supporting terrorist organizations, and not for the crimes they commit in conflict zones, is arguably unfair to victims (Grebo and Rovčanin, 2020). Indeed, members of ISIS and Jabhat al-Nusra are known to have carried out horrific mass crimes, and to have created an oppressive system of control reliant on terror and violations of basic human rights and freedoms. However, in the caselaw of BiH, no details are recorded about the horrors or scale of these crimes, or of the systemic oppression and terror for which ISIS and Jabhat al-Nusra were responsible. Victims of these groups, especially vulnerable populations such as the Yazidis – who were subjected to genocide – go unmentioned largely because this information is not important to proving the criminal offenses that have been charged, and the liability of the accused.

Nonetheless, there have been efforts by the judiciary in BiH to underscore the obligation to satisfy victims through (sufficient) criminal sanctions. Perhaps the best example of this is the statement of the Prosecutor during the plea hearing in the case of Ibro Ćufurović:

> "[I] call on you (the Court) to adequately sanction Ibro Ćufurović on behalf of all the victims of the Islamic State of Iraq and the Levant (Syria). We ask that a sentence closer to the maximum sentence for this criminal offense be imposed" (Trial transcript, 2019).

The finding of the United Nations International Commission of Inquiry is that ISIS participated in crimes of genocide, and the current Prosecutor of the ICC has declared that clear evidence exists of the intent of ISIS to exterminate the Yazidis as a religious group, on a "convert-or-die" basis, including through crimes of slavery and sexual slavery and crimes against children. Furthermore, the Parliamentary Assembly of the Council of Europe and a handful of countries

(the US, the UK, Canada, Australia, and The Netherlands) have recognized the crimes committed against Yazidis as crimes against humanity and/or genocide. However, Syria and Iraq, where these crimes took place, have not incorporated international standards into national legislation relating to mass crimes, as they have with crimes of terrorism.

Here, it is worth mentioning the case Taha al J., an Iraqi citizen tried in Germany under the principle of universal jurisdiction, who was sentenced by the Higher Regional Court of Frankfurt to life imprisonment for genocide, crimes against humanity, and war crimes, and was ordered to pay EUR 50,000 in compensation to his victims for moral damages. After Taha joined ISIS in 2015, he purchased a Yazidi woman and her child as slaves and forced them to practice Islam. He used such violence against them that the woman's five-year-old daughter urinated the bed in response to the trauma, and Taha punished her by tying her to a window and exposing her to heat until she died in front of her mother. These crimes were qualified as genocide because Taha had the specific intent (*dolus specialis*) to destroy the Yazidi religious group in whole or in part, even if there were only several victims in this case (de Hoon, 2022).

In another German case involving offenses related to the enslavement and abuse of Yazidi women and girls, but in which the defendant was herself a young woman who had been a juvenile at the time she perpetrated the crimes charged, the Higher Regional Court in Düsseldorf weighed various substantial factors in coming to a sentence of six years and six months. Prosecutors charged her with crimes against humanity, among others. The court found that the offenses she perpetrated, including holding seven Yazidi women and girls against their will and complying to their sexual assault by her husband, were so severe as to justify the application of adult penalty standards; but also, that the defendant was "a young person in terms of her moral and mental development.... [who] had a delay in maturation", and that "further maturation can still take place."[33] In fact, the judgment noted that the defendant was "already working successfully to continue and complete her school career and to (re)integrate herself into the existing value system." Though the court considered the duration of her perpetration, the damage she inflicted upon the victims, and the fact that she acted on extreme religious beliefs as aggravating factors; it valued her lengthy testimony and confession, her acknowledgement of the suffering of her victims,

33 The defendant married a German FTF in Syria, where she gave birth to three children, who were taken into state care when she returned to Germany.

and the fact that her husband was the dominant force in the offenses as mitigating. The court emphasized the need in this case to balance the weight of the defendant's wrongdoing against the consequences of punishment for her future development, but it determined that the severity of her crimes required a penalty of over five years (Higher Regional Court of Düsseldorf, 2021).

Among the charges this young woman faced were several counts of crimes against humanity, in conjunction with membership in a terrorist organization, as well as counts related to her aiding and abetting of her husband's crimes. This is a good example of a case in which myriad complicating factors had to be deftly balanced by the court in order to meet the purposes of punishment, but also where charging the defendant only for traveling to Syria and joining a terrorist organization could hardly be said to meet the mandate of justice. Prosecuting terrorism offenses and mass crimes cumulatively, as German prosecutors did in this case, and in the case of Taha al J., ensures greater criminal accountability for perpetrators and delivers more satisfaction to victims (Genocide Network, 2020).

Also notable are cases that have charged property looting as a war crime. One such case involves a German woman who traveled to Syria in 2013 and married a member of ISIS. In early 2014, she and her husband settled in a house that had been abandoned by its legal owners when they fled, for which the couple received plundered household appliances from the "Islamic State". Later that year, she and her husband moved to Raqqa, into another house left behind by owners who fled or were forcibly expelled. The defendant in this case identified with the norms and goals of ISIS, had come to accept violence, and loyally consumed the group's websites and praised its methods and lifestyle prescriptions. She was sentenced to five years in prison for membership in ISIS, the war crime of property looting, and violations of the weapons law (Higher Regional Court of Stuttgart, 2019).

In a very similar case, another German woman traveled to Syria in 2014 and married an ISIS fighter, before moving in 2015 into a house seized after the legal owners fled or were displaced. She was sentenced to three years and nine months imprisonment for membership in a terrorist organization and the war crime of property looting (Higher Regional Court of Düsseldorf, 2019). On appeal, the defense questioned the meaning of "belonging" to a terrorist organization; but given that the defendant had contributed to the goals of ISIS,

the second-instance court ruled that her participation in a terrorist organization was correctly qualified. Furthermore, the second-instance court examined the cumulatively of joining a terrorist group and war crimes, and as cumulative actions were found to have been proven, the trial judgment was upheld (Federal Court of Justice, 2019a).

In both of these cases, the seizure of property can be qualified as a war crime because there was no consent of the owner and it occurred in the context of an armed conflict. The existence of an armed conflict must naturally be established for property looting as a war crime to be proven. Property owners must also be enemies of a party to the conflict, but for the criminal offense to qualify as a war crime, it suffices that a victim whose property is seized "pursues objectives contrary to the intentions of the conflicting party" or espouses different goals or ideologies (Federal Court of Justice, 2019b).

Germany has also prosecuted women for war crimes for having permitted their children to participate in ISIS military training. For instance, a prison sentence of five years and three months was handed down to a German citizen who traveled to Syria in 2015, where she performed various activities for a terrorist organization, married an FTF, and repeatedly sent her own seven-year-old son to military training camps for children (in Raqqa). In December 2018, one of her sons died when their house, which was located near the front lines, was bombed. For her participation in ISIS and failure to protect her three sons, she was convicted in 2019 of participating in a terrorist organization, the war crime of recruiting a minor into an armed group, the war crime of parental abduction of a minor resulting in death, neglect of the duty to provide care and education, and neglect to prevent bodily harm (Federal Court of Justice, 2019).

It must be noted that, in some countries, membership in a terrorist organization is not a crime, as in Sweden and Finland. For this reason, FTFs in these countries have instead been prosecuted for war crimes. One defendant in Sweden was sentenced to nine years for the war crime of violating personal dignity, based on photographs presented during evidentiary proceedings that showed him posing next to the severed heads of enemy soldiers, and with his foot on the head of a deceased soldier (Scania and Blekinge Court of Appeal, 2017). In another case in Sweden, heard before the Stockholm District Court, a defendant was sentenced to life imprisonment for participating in the murders of seven captured soldiers, the details of which – from the specific time and place, to the individuals involved

– were discovered in Facebook and YouTube videos originally disclosed by the *New York Times* in 2013 (Stockholm Court of Appeal, 2016).

In Finland, an Iraqi citizen was sentenced to a 13-month suspended sentence for degrading and inhumane treatment after he posted a photo on Facebook in April 2015 that showed him with the severed heads of enemy soldiers. The defendant was a former sergeant in the Iraqi army and a member of ISIS, and the photo depicted him squatting, holding a weapon pointed towards the ground, surrounded by the heads. But there was insufficient evidence of his participation in beheadings or other contributory actions that would prove a more serious charge (District Court of Kanta-Häme, 2016).

In a case that has commonly been referred to as a "context case" in The Netherlands, Cuyckens (2021) notes that the Dutch court held that "the concept of 'armed forces' in a literal sense" refers to the armed forces of a state, and that this implies the impossibility of prosecuting members of a terrorist group for mass atrocity crimes, as this may be beyond the scope of the qualification of these criminal offenses. Meanwhile, in the Sharia4Belgium case, Belgian courts indicated that the definition of armed forces is applicable to members of terrorist organizations participating in an armed conflict. This demonstrates the challenge of linking mass crimes and terrorism, considering the lack of clarity regarding the definition of terrorism and thus of the nexus between the two, as national judiciaries can operate only within a framework of established norms. One problem lies in the fact that national legislation fails to clearly define the concept of a foreign fighter inclusive of terrorist actors and members of paramilitary formations. It could therefore be useful to list terrorist organizations within national frameworks. In BiH, international standards already incorporated into national legislation help address the nexus of terrorism and mass atrocity crimes, by enabling explicit prohibitions that apply to non-state armed groups such as ISIS and Jabhat al-Nusra.

Of course, it should be borne in mind that support to or participation in non-state formations abroad does not automatically imply the perpetration of terrorism, or of war crimes, crimes against humanity, and genocide. Not all actions of non-state armed groups are terrorist. In the case of Jitse Akse, who traveled to Syria with the aim of fighting on the side of the Syrian Kurdish People's Protection Units (YPG), the indictment against him did not charge criminal offenses related to terrorism, but participation in an armed conflict and the killing of ISIS fighters.

The indictment was dismissed due to lack of evidence, but also due to public pressure against criminally charging someone who "fought against the 'bad guys'" (Cuyckens, 2021). This case revealed the importance of keeping in mind the difference between terrorism and violations of international humanitarian law, and between foreign *terrorist* fighters and foreign fighters. Otherwise, any fighter in an armed conflict could face possible criminal liability for joining an armed group that is participating in an armed conflict and in possible mass atrocities. In other words, in order to prosecute FTFs, it is necessary to have evidence of the existence of a terrorist organization, either because it is designated as such by international, regional, or national authorities, or because other information indicates that a terrorist group or paramilitary or parapolice formation exists.[34] In the context of the war in Syria, most foreign fighters were members of a terrorist organization, but the Akse case is a reminder that the qualification of an FTF should not be confused with that of a foreign fighter.

The nexus of violations of international humanitarian law and armed conflict was illuminated in the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY), which established that: the perpetrator is a combatant; the victim is a non-combatant; the victim is a member of an opposing party; the act may be said to serve the ultimate goal of a military campaign; and the crime is committed as part of or in the context of the perpetrator's official duties. These parameters should assist in determining whether specific conduct falls under the auspices of laws regulating terrorism or atrocity crimes. Still, it is important to emphasize that jurisprudence in Europe has shown it is possible to prove a nexus between terrorism and mass atrocities, but that problems of evidence collection collide with what has been referred to as the judicial efficiency argument – the fact that membership in a terrorist organization is generally easier to prove than any acts committed as a function of that membership during the time a defendant was in Syria or Iraq (including mass atrocity crimes). The most common evidence presented in cases in The Netherlands and Germany in which this nexus has

34 It is worth pointing out that the case of *Prosecutor's Office of Bosnia and Herzegovina v. Gavrilo Stević* (2020) was not included in this analysis as the Court did not establish that the "Jovan Šević" unit, which Stević was accused of joining, was a paramilitary formation. The Prosecutor's Office failed to secure sufficient information about the "Jovan Šević" detachment, including its goal, operations, recruitment, equipment, and training. Unlike membership in ISIS and Jabhat al-Nusra, which are designated as terrorist groups by resolutions of the UN Security Council, the "Jovan Šević" unit is not on a UN list, making it necessary for prosecutors to prove it is indeed a paramilitary formation (i.e., modelled on a military formation). Although expert testimony, photographs, and videos showed Stević wearing a camouflage uniform and holding weapons bearing symbols of the internationally unrecognized Luhansk People's Republic, none of eight witnesses who testified had direct knowledge of Stević's activities in Luhansk. The court could not conclude beyond any reasonable doubt that the substantive elements of the criminal offense (unlawful establishing and joining paramilitary or parapolice formations under Article 162b (2) of the CC BiH) were met, as it was not established that the "Jovan Šević" unit is a paramilitary or a terrorist unit, nor that Gavrilo Stević is a foreign (terrorist) fighter.

been established have been photographs and videos depicting the aftermath of atrocities, as well as testimony from direct witnesses about crimes they observed or their own confessions of criminal acts (Cuyckens, 2021).

4.4. Procedural Law

The criminal procedural dimensions of cases involving terrorism and FTFs are normatively consistent with other criminal offenses; relating, as Simović and Šikman note (2017, p. 138–139), to criminal procedural subjects and criminal procedural relations between subjects, with the aim of unravelling and solving a criminal matter involving terrorism or FTFs and providing criminal legal protection to society and the state by countering terrorism, *inter alia* through legal response, investigation, and the evidentiary establishment of criminal offenses. Data on the main procedural subjects – the court, the parties, and defense counsel – were presented and described above. Notably, there are no injured parties or victims of crimes in these cases, even though they exist in an extra-legal and victimological sense. So, it is the testimony of witnesses and expert witnesses, and material evidence submitted in criminal proceedings, that are described here.

4.4.1. Prosecution witnesses

A glaring disparity was observed between the frequency of the appearance of witnesses for the prosecution and defense in the 35 cases under study, with prosecutors calling 240 witnesses, and defense counsel calling just 18.[35] In some cases, prosecution witnesses testified several times (i.e., they testified against several defendants in the same case). For example, 18 witnesses appeared in one case to testify against seven individual defendants (Enes Mešić, Jasmin Jašarević, Mirza Kapić, Salko Imamović, Adem Karamujo, Ibro Delić, and Samir Hadžalić). Figure 14 (below) shows the frequency with which prosecution witnesses appeared. While many testified only against a single defendant, quite a few gave evidence against multiple defendants, including seven witnesses who testified against six defendants in separate cases. It is possible, and perhaps even likely, that the number of prosecution witnesses would have been even higher if there had not been so many plea agreements reached in these cases.

35 The frequency of witness appearances is measured as a function of individual defendants, and not cases, as this is the only way to reflect the reality of criminal trials.

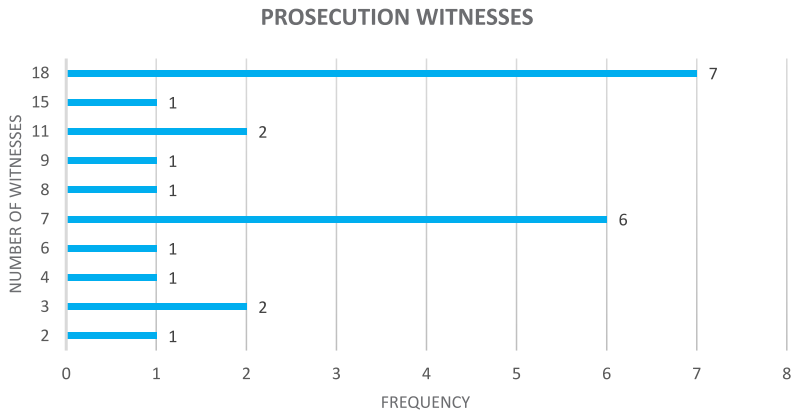

Figure 14. Prosecution witnesses in cases in BiH involving foreign terrorist fighting

These findings by no means imply that the number of witnesses who appear on behalf of procedural subjects plays a decisive role in the outcome of proceedings, as it is the quality or content of testimonies that matters. The case of *Prosecutor's Office of Bosnia and Herzegovina v. Osman Abdulaziz Kekić* exemplifies this, and the judgment in this case reflects good judicial practice in evaluating not only the quantity of evidence, but the quality of and logical connections between different pieces of evidence. A first-instance acquittal of Kekić was reversed by the second-instance court on the premise that a conscientious assessment of one witness, and of the testimony of that witness in relation to other evidence, had not been undertaken in drawing the conclusion that the decisive fact of joining a foreign paramilitary formation had not been proved. A retrial was ordered before the Appellate Division of the Court of BiH, which convicted Kekić and imposed a two-year prison sentence.

In its appeal in this case, the Prosecutor's Office argued that the Court did not conscientiously evaluate each piece of evidence separately and in relation to other evidence. The decisive fact had been assessed based on the testimony of Almir Džinić, disregarding testimony from other witnesses and material evidence, and the prosecution maintained that the Court had wrongly established that a conclusion about facts related to joining a paramilitary formation cannot be based on a single piece of evidence beyond a reasonable doubt. Indeed, the Prosecutor's Office contended that such a fact cannot exist on its own; and in this case, other facts and evidence existed, including proof of: the defendant's departure from BiH (with a known FTF named Senad Grabus,

and his family), his illegal entry into Syria and stay in the area controlled by ISIS, the confiscation of his passports upon arrival, and the death of Grabus.[36] The Court had failed to take into account well-known facts about the armed conflict in Syria, according to the prosecution, and had accepted the claim of Kekić that he traveled there merely "to see what the situation was" (*Prosecutor's Office of Bosnia and Herzegovina v. Osman Abdulaziz Kekić*, 2017, appeal against the first-instance judgment).

In line with good practice, the appeal of the Prosecutor's Office in the Kekić case cited the second-instance judgment against Enes Mešić, which established that non-involvement in combat operations does not equate to non-involvement in the activities of a terrorist organization; and that the evaluation of evidence is not arbitrary but based on the logic and rules of the relevant particularities and general principles behind causes and consequences. The Prosecution also pointed to the second-instance judgment against Miodrag Marković, in which it was established that the values, weight, and quality, and not the quantity, multiplicity, or nature of the evidence should be evaluated. Further, the appeal noted that the judgment against Željko Mejakić et al. had confirmed that a piece of evidence that is legal, authentic, and truthful may be sufficient to convict a defendant. The Appellate Chamber concurred, ruling that the number of witnesses and pieces of evidence are immaterial; the only relevant question is the quality of evidence (*Prosecutor's Office of Bosnia and Herzegovina v. Osman Abdulaziz Kekić*, 2017, second-instance judgment).

Several months after Kekić was sentenced by the second-instance court, a third-instance court modified the punishment, extending his imprisonment by a year (totaling three). In their appellate filing in the case, prosecutors had included a letter from the French Embassy in Bosnia and Herzegovina, stating that Kekić was banned from entering Schengen countries due to his participation in a terrorist organization and the threat he posed to public order (*Prosecutor's Office of Bosnia and Herzegovina v. Osman Abdulaziz Kekić*, 2017, appeal against the first-instance judgment). It was partly on this basis that the third-instance court deemed it reasonable to impose a lengthier sanction against the defendant (*Prosecutor's Office of Bosnia and Herzegovina v. Osman Abdulaziz Kekić*, 2018).

36 A witness testified that Grabus, who used the *nomme de guerre* "Abu Isa", had died in Syria fighting for ISIS.

Central to the acquittal decision of the first-instance court in this case was the notion that the evidence of only one witness is insufficient, even when that witness is considered truthful and credible, if there is no other material evidence or witness statements attesting to the same facts. The Court reasoned that the guilt of the accused could not be established beyond a reasonable doubt in such circumstances. The witness in question, Almir Džinić, was also an accused FTF and had a personal relationship with Kekić, through which he had learned directly that Kekić was a member of a foreign terrorist formation, that he owned a military uniform and weapons, and that he had received training. This case demonstrates that the 'one witness is no witness' principle (*testis unus, testis nullus*) should not be applied, rather the quality of any evidence should be evaluated (*testimonia panneranda sunt, non numeranda*). This is especially true in cases involving FTFs or terrorist activities, for which avenues of evidence collection are reduced due to the nature of the criminal offense(s) and the capacities of prosecuting authorities. It is very likely that problems in proving these complex crimes result in lenient sentencing for FTF offenders.

Some testimony before the Court of BiH was also given by other types of witnesses who spent time in Syria and had direct knowledge about defendants, such as in the case against Jasmin Keserović, for which four female witnesses provided testimony about his illegal activities in Syria (*Prosecutor's Office of Bosnia and Herzegovina v. Jasmin Keserović*, 2021, prosecution evidence DT-7, DT-71.1, DT-8, DT-9, DT-9.1, DT-10, and DT-10.1). A prosecutor who was interviewed by researchers explained that, in cases involving departures to foreign battlefields, "the aim is mostly to prove that a person was seen in a military uniform with weapons, and that they served as a guard; rarely does anyone say that [defendants] were in a trench on the frontlines of combat operations, or that they killed a civilian or a prisoner of war" (Interview, 6 May 2022). To this end, evidence regarding the existence of ISIS and its inclusion on the UN list of terrorist groups, as well as operational findings, were also provided by employees of the Ministry of Security and officers in the state security apparatus. In the case against Ibro Ćufurović, officers testified about their investigation into a public profile on the social network Twitter, which had posted a video appearing to show Ćufurović armed and wearing a military uniform, standing next to dead bodies; yet it was not possible to determine with certainty that the individual in the video was Ćufurović, due to image blur and potential editing. It should be noted, however, that similar evidence presented before courts in The

Netherlands and Germany has been assessed as sufficient to establish a factual basis for war crimes convictions.

Witnesses who had direct or indirect interaction with defendants in BiH also played a very important role in the cases under study. In the trial of Husein Bosnić, for example, witness testimony illuminated the extent to which Bosnić had been a powerful force of radicalization, recruitment, and public incitement inside BiH, for terrorist activities in Syria and Iraq (*Prosecutor's Office of Bosnia and Herzegovina v. Husein Bosnić*, 2015, see trial testimony 10:15–10:23). Šefik Ćufurović testified that his son Ibro had started working as a shepherd for Bosnić in 2013, and had departed to Syria soon after. Dino Pečenković described for the Court the role of extremist leader Nusret Imamović, who was replaced by Bosnić after he departed to Syria. Pečenković also detailed the radicalization and departure of his entire family to Syria under the influence of these figures. Witness statements such as these were generally found to be credible and provided valuable information about the everyday lives of defendants, as well as facts about their possession of military equipment and means to take certain actions, their activities in both BiH and Syria, and their connections with other FTFs.

Collecting evidence on the ground where crimes occurred is a considerable challenge in cases involving FTFs, particularly while armed conflict is ongoing. Yet defendants can only be convicted if there is sufficient evidence to establish that a criminal offense was committed beyond a reasonable doubt, especially in the case of mass atrocity crimes. Prosecutors in other European countries have also faced significant difficulties in finding credible victims and witnesses who can establish criminal liability (de Hoon, 2022). These practical obstacles to obtaining sufficient and relevant evidence mean that relatively few returnees have been prosecuted (Ip, 2020).

This has raised the importance of protected witnesses among those called by the prosecution in cases involving FTFs. In the cases under study, the Prosecutor's Office of BiH has thus called 12 protected witnesses against 8 defendants, including a single protected witness who testified against 5 defendants in separate cases (see Figure 15, below).[37] The importance of protected witnesses is illustrated by the example of witness N2, a member of ISIS who participated

37 It is also possible that other protected witnesses were used in multiple cases against different defendants, but under more than one pseudonym.

in terrorist activities with Jasmin Keserović and testified in the Keserović case to key facts, including that the defendant was an assistant to commander Goran Pavlović, had attended high-level meetings, oversaw a women's camp, and served as an interpreter (*Prosecutor's Office of Bosnia and Herzegovina v. Jasmin Keserović*, 2021).

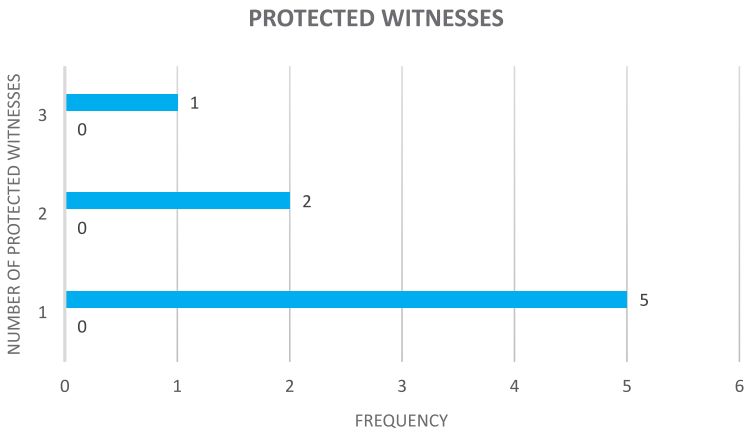

Figure 15. Protected witnesses in cases in BiH involving foreign terrorist fighting

It is crucial that returnees from foreign battlefields who are willing to testify to knowledge about criminal offenses be provided with protected witness status. Any individual prepared to contribute to exposing and proving these offenses should be protected at the earliest possible stage, and a failure to do so risks deterring other potential witnesses from cooperating. Perhaps this is best demonstrated by the experience of returnee Berin Tahić, who expressed his dissatisfaction about having been *inadequately* protected to Nermin Halilagić, an investigator in the Prosecutor's Office. Halilagić testified that Tahić was fearful of retribution from extremist actors and "angry with the Investigation and Protection Agency because this information, i.e., his statement [about FTFs from BiH] was leaked", as he had been threatened on Facebook (*Prosecutor's Office of Bosnia and Herzegovina v. Safet Brkić*, 2016, testimony of Nermin Halilagić, 11:22–12:22).

Indeed, protected witnesses are so important in the prosecution of FTFs because a protected status means they are free to provide information about criminal offenses without fearing potential threat or harm. For example, in the

prosecution's case against Husein Bosnić, protected witness B1 offered valuable testimony about citizens of BiH who spent time on foreign battlefields in Syria, including their activities in different military formations, but also testified about radicalization and recruitment processes that took place inside BiH (*Prosecutor's Office of Bosnia and Herzegovina v. Husein Bosnić*, 2015).

During the testimony of protected witness B1, the sensitive issue of religious freedom was raised, which is somewhat inevitable in criminal proceedings against FTFs who have returned from Syria and Iraq. But the judge allowed the line of questioning, given the context, noting that "we have been talking here about the way religion is practiced" (*Prosecutor's Office of Bosnia and Herzegovina v. Husein Bosnić*, 2015). The exchange between parties in the courtroom is worth recounting:

> *Prosecutor*: Protected witness B1, please tell me, how do you practice your religion?
>
> *Protected witnesses B1*: I practice the sunnah of Muhammad assalatu wassalamu (praiseworthy).
>
> *Prosecutor*: Is your way [of practicing] different than the way people who belong to the Islamic Community of Bosnia and Herzegovina practice religion?
>
> *Protected witnesses B1*: In some minor details.
>
> *Prosecutor*: Do people [who practice as you do] pray in the same mosques?
>
> *Protected witnesses B1*: they do, but [the mosques] have no administration.
>
> *Prosecutor*: In which mosques do people who practice religion like you pray in Bosnia and Herzegovina?
>
> *Defense counsel*: Objection, your Honor, if you allow me. Your Honor, the witness is being questioned about the circumstances of freedom of belief, freedom of religion, and the practice of religion, and the Prosecution is constantly trying to incriminate the practice of religion and associate it to the commission of some criminal offenses, which is unreasonable. I

believe that such interrogations are against the right to freedom of religion guaranteed by the European Convention, the Constitution of Bosnia and Herzegovina, and the Law on Freedom of Religion. I am asking your Honor to consider these issues.

Judge: All right. Thank you, defense counsel. Considering that we have been talking here about the way religion is practiced, the witness may answer this question.

(...)

Prosecutor: The people who come to these [unofficial mosques], and the way they practice religion, do they practice this religion in the same way as the people they saw in Syria?

Protected witnesses B1: Yes, all of them.

Prosecutor: When it comes to this way of practicing religion, who are the religious authorities?

Protected witnesses B1: ...Nusret Imamović and (Husein) Bilal Bosnić (trial testimony, 11:33–15:09).[38]

4.4.2. Defense witnesses

The extremely small number of defense witnesses who offered testimony in the cases under study can partly be explained by the marginalized position of returnees from Syria in local communities, and even in their families. Moreover, followers of extremist ideologies often reject the legitimacy of democratic institutions, including the judiciary, and many are distrustful of officials and may fear self-incrimination. It is also possible that there were simply no witnesses whom the defense could reliably use to their advantage.

38 It is also important to mention testimony in this case from religious official Enes Ljevaković, who was called by the defense and asked to explain the sources and interpretation of Islam and Islamic law. Ljevaković testified: "Neither the Prosecutor's Office, nor the Court, nor the defense should deal with the interpretation of Islamic law and Islamic teaching in general. Leave that to academic gatherings and the Islamic Community; you have your own regulations and laws. Don't draw Islamic teaching into this... that the indictment now goes into the teachings of Islam, I find extremely incorrect and disagreeable" (see *Prosecutor's Office of Bosnia and Herzegovina v. Husein Bilal Bosnić*, 2015, trial testimony, 09:30–30:14).

Of the 18 witnesses called to testify by the defense in these cases, the most frequently called witness testified in eight separate cases (see Figure 16, below). Defense witnesses were usually family members or the defendants themselves (e.g., Husein Bosnić, Merim Keserović, Safet Brkić, Jasmin Jašarević, Senad Kasupović, and Sena Hamzabegović). In some cases, defense witnesses testified about time they spent in Syria, as Berin Tahić and Sedin Huseinović did during the trial of Osman Abdulaziz Kekić, describing everyday life in ISIS territory and the process of mobilizing into paramilitary units.

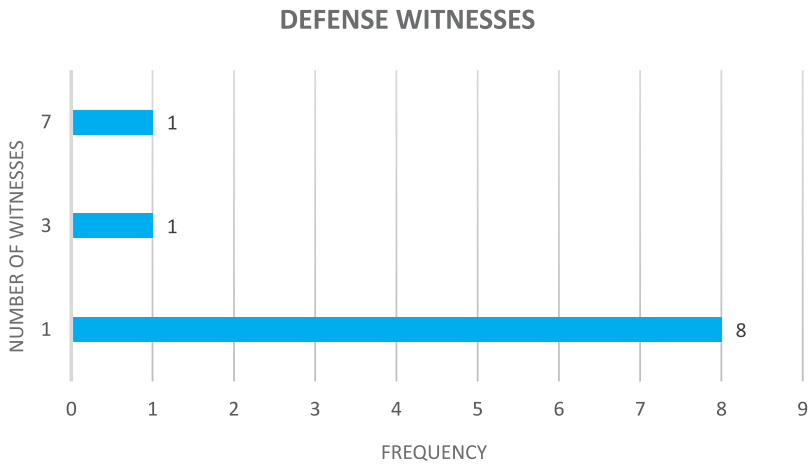

Figure 16. Defense witnesses in cases in BiH involving foreign terrorist fighting

In general, defense witnesses tended to be unreliable, or were irrelevant to resolution of the criminal case. For example, the witnesses mentioned above (Tahić and Huseinović) were in Syria in 2013 and 2014 but were called to testify in the case of a defendant (Kekić) who was there in 2015. In other words, the witnesses did not know Kekić, but offered testimony that their own mobilizations had not been forced and that, in their experience, people could work as paramedics and humanitarian workers or could remain unemployed in territory under the control of ISIS. Defense counsel relied on this testimony to argue that someone's presence in Syria did not necessarily imply their participation in combat operations. But the Court rightly gave no credence to these witness statements because they provided no direct findings about events in Syria, or the defendant's activities, in 2015.

While it is clear that merely being present in Syria does not constitute a criminal offense; what it is not entirely clear in legal practice is when the presence of a defendant in an area controlled by ISIS or Jabhat al-Nusra, without being involved in combat, *does* constitute a criminal offense. Though, a partial clue can be found in the case of Nedžad Mujić, in which the defendant was convicted after having worked as a cook for ISIS paramilitary units. A connection with a terrorist organization or its paramilitary units, or at least a minor contribution to terrorist activities must be proved, but assertions by defense witnesses and arguments by defense counsel that being in ISIS-controlled territory is not itself criminal also cannot be accepted as a valid basis for acquittal on its own. The fact that someone was in Syria and was not part of a paramilitary formation does not mean they had no connection to a foreign terrorist group, even if they performed medical or humanitarian functions. Indeed, it is easy to argue that traveling to an area controlled by a terrorist organization, in most cases by crossing borders illegally, constitutes sufficient proof of the intent to contribute to the goals of that organization. Hence, proof of support for terrorist activities does not require evidence of participation in combat or military operations, but may include evidence of non-kinetic contributions to these goals.

4.4.3. Prosecution evidence

As with the frequency of witnesses in cases involving FTFs, the prosecution presented disproportionately more material evidence in these cases than the defense. The Prosecutor's Office entered 1,060 pieces of material evidence into the record against all 35 defendants (see Figure 17, below). This volume of evidence submitted by the prosecution would have been even larger except that, in cases against several defendants, the same or mostly the same material was presented.

The material evidence most frequently presented by the Prosecutor's Office in these cases included letters from the Ministry of Security of BiH, as well as UN Security Council decision SC/11019 and resolutions concerning terrorism, to establish that ISIS was designated a terrorist organization by the UN on 30 May 2013. According to Halilović and Bećirević (2018), special investigative measures that were implemented in BiH in 2003 have played a significant role in the collection of other kinds of evidence in cases involving FTFs. These measures are aimed at collecting evidence that would otherwise be extremely difficult to obtain, and include various forms of surveillance and other covert investigatory

techniques. Of course, it is important that the use of such measures does not violate the legal and procedural rights of citizens and defendants, or else the practice risks affecting the legitimacy of court proceedings. For example, in the UK, the use of secret evidence that is not disclosed in pre-trial disclosures and the submission of "safety interviews" as evidence have drawn criticism from Amnesty International (2017) that the state has created conditions in which "fewer possibilities [exist] to challenge counter-terrorism measures and operations."[39]

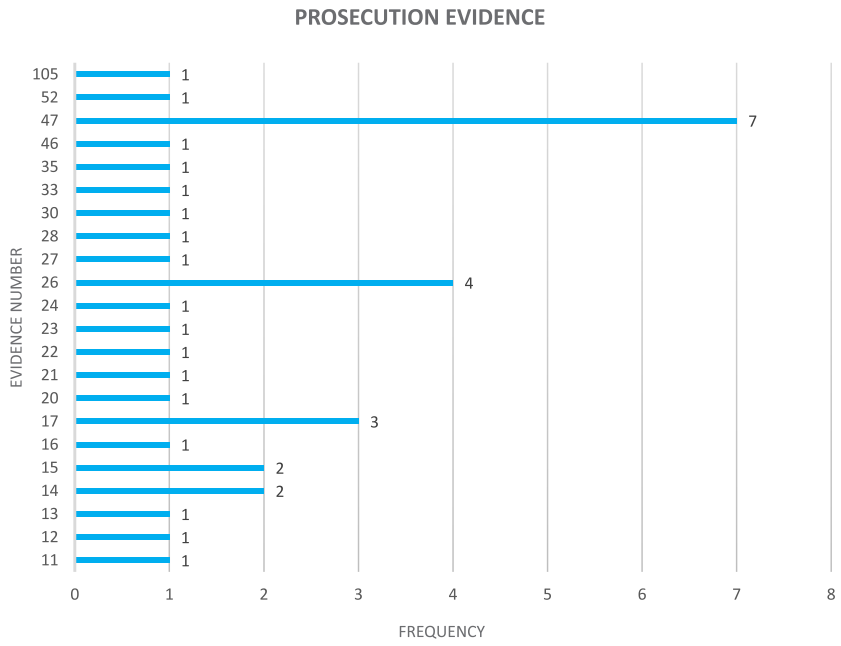

Figure 17. Prosecution evidence in cases in BiH involving foreign terrorist fighting

In BiH, special investigative measures have been used in nearly every case involving FTFs (Halilović and Bećirević, 2018).[40] Predrag Petrović, of SIPA, testified

39 A safety interview can be carried out by police or security services in the UK without typical pre-interview procedures – including ensuring a suspect has legal representation or allowing them to alert a third party to their arrest – on the premise that they have information that is urgently needed in order to determine whether any immediate risks to persons or property exist.

40 According to Articles 116 through 122 of the Criminal Procedure Code, actions that may temporarily restrict fundamental human rights and freedoms during the collection of data and evidence necessary for the conduct of criminal proceedings are: surveillance and technical recording of telecommunications, access to computer systems and computerized data processing, surveillance and technical recording of premises, covert following and technical recording of individuals and objects, undercover investigators and informants, simulated and controlled purchase of objects and simulated bribery, and supervised transport and delivery of objects of criminal offense; and these measures may be ordered for investigations of criminal offences against the integrity of BiH, crimes against

that surveillance of the telecommunications of family members of suspected FTFs has revealed crucial information about the time period many defendants spent in Syria operating under the auspices of a terrorist organization, and that some even recruited their own family members to leave BiH and join them (*Prosecutor's Office of Bosnia and Herzegovina v. Fatih Hasanović et al.*, 2016, trial testimony, 52:00–54:00). Srđan Lazić, who was an inspector for SIPA in the case against Fatih Hasanović et al., told the Court that the defendants had been located through surveillance of an unencrypted conversation they had, in which "they simply talked about where they were, [and] to which *qetib* (military formation) they belonged." One defendant in the case, Enes Mešić, had also communicated on Skype with ISIS commander Bajro Ikanović that he had "been waiting for a month for an ID card, the same for a passport." When Ikanović warned Mešić to "be careful," Mešić joked that he was "already at war with the police... [and] just waiting to leave hahaha" (*Prosecutor's Office of Bosnia and Herzegovina v. Fatih Hasanović et al.*, 2016, trial transcript 17:00–24:55).

Digital evidence generally plays a significant role in proving these cases, and the contents of social media and other digital communications have been presented in many trials of FTFs in BiH. This includes: photos indicating a connection between the defendant(s) and a terrorist organization (see *Prosecutor's Office of Bosnia and Herzegovina v. Emir Ališić*, 2021; and *Prosecutor's Office of Bosnia and Herzegovina v. Mirel Karajić*, 2016); audio-video recordings of invitations to defendants to join the Islamic State (see *Prosecutor's Office of Bosnia and Herzegovina v. Jasmin Keserović*, 2021); texts sent via mobile phone or messages sent through communication applications (e.g., Skype) from Syria detailing activities related to foreign terrorist formations on the battlefield (see *Prosecutor's Office of Bosnia and Herzegovina v. Enes Mešić et al.*, 2016); and evidence of support provided for others to travel to a foreign battlefield, for example by providing resources like money or plane tickets (see *Prosecutor's Office of Bosnia and Herzegovina v. Husein Erdić et al.*, 2015). Among the best examples of the use of digital photographic evidence in the cases under study is in the trial of Husein Bosnić, presented during the testimony of witness Sedin Husejnović. Husejnović's testimony focused on the time he spent in Syria and, on the basis of photographs presented by the prosecutor, he offered details about citizens of BiH who had been on foreign battlefields as members of terrorist organizations. One such exchange developed as follows:

humanity and violations of international law, terrorism, and any criminal offenses punishable by imprisonment of three years or more (see DCAF, 2020).

Prosecutor: "Do you recognize the face in the photograph?"

Husejnović: "I do. I knew him."

Prosecutor: "Where is he from?"

Husejnović: "From Sarajevo. Velić. We called him Memo."

Prosecutor: "Where did you see him in Sarajevo?"

Husejnović: "He was in Hadžići for a while (Sarajevo Canton)."

Prosecutor: "Did he go to the Zaklopača (Sarajevo) masjid [that FTFs attended]?"

Husejnović: "Yes."

Prosecutor (holding up a photograph showing FTFs from BiH with a flag behind them): "And this flag? What is this flag?"

Husejnović: "The Islamic State currently uses that flag. [It] was previously used by all [ISIS] units" (*Prosecutor's Office of Bosnia and Herzegovina v. Husein Bosnić*, 2015, main trial, 28:05–29:06).

Current practice in Germany and The Netherlands emphasizes the value of digital evidence not only in prosecuting charges of support for or participation in a foreign terrorist formation, but also to prosecute mass atrocity crimes, especially through cooperation with national and international civil society organizations and other governments (Cuycken, 2021). Witness statements alone can sometimes be insufficient for conviction, and international and national justice systems in much of Europe have faced difficulties investigating and proving criminal offenses involving FTFs. For prosecutors in many countries, the state sovereignty principle and absent or underdeveloped mutual legal assistance, along with a lack of capacity and security, make it impossible to carry out criminal investigations in the countries where the offenses were committed. Yet, as the value of testimonies diminishes over time and material evidence only grows farther out of reach, it is vital that cooperation exist between bodies of the UN – specifically, the Investigative Team for Accountability of Daesh/ISIL; the International, Impartial and Independent Mechanism for Syria;

and the Independent International Commission of Inquiry on the Syrian Arab Republic – and specialized civil society organizations such as the Commission for International Justice and Accountability, the European Centre for Constitutional and Human Rights, Human Rights Watch, TRIAL International, the International Federation for Human Rights, Redress, the Syrian Observatory for Human Rights, Amnesty International, and Yazda (de Hoon, 2022; Genocide Network, 2020).[41]

In some European countries, the evidentiary standard for a conviction on war crimes charges is lower than in BiH, and a smaller volume of material evidence is sufficient to prove the criminal offense. For example, a German citizen convicted of membership in a terrorist organization was also found guilty of the war crime of violating human dignity because he had used his mobile phone to film himself as he brutally mutilated a dead Syrian soldier. He was sentenced to eight years and six months in prison (Higher Regional Court of Frankfurt, 2016a). Another German citizen was convicted of the same war crime (violating human dignity) on the basis of three photos posted to Facebook, in which he had posed next to the severed heads of members of opposing forces, impaled on stakes. A second-instance court further interpreted the qualification of war crimes, and ultimately sentenced the defendant to two years in prison (Federal Court of Justice, 2017).

Video evidence has been used with similar success by prosecutors in Sweden, such as in the December 2015 conviction of two FTFs for involvement in the fighting in Syria. In this case, the Court could not establish whether the defendants had participated in combat, nor which group they had joined, but in two videos presented as evidence – both showing killings, one a beheading, of people the court said were likely civilians – the defendants could be seen celebrating these atrocities. Despite a lack of evidence linking the defendants directly to participation in a terrorist group or in combat, the Court concluded that the purpose of their crime had been to cause fear in people in Syria and other countries, and that this was sufficient for conviction (van Ginkel, 2016). And in the rather unique Sharia4Belgium case, in which 36 of 46 defendants were tried *in absentia* in the Belgian courts, their convictions were based on evidence gathered in virtual space, along with wiretapped telephone conversations and the testimony of returnees (van Ginkel, 2016).

41 There are no civil society organizations in BiH that work exclusively on obtaining evidence of crimes committed by FTFs. In the EU, some states have support from civil society organizations that play a significant role in facilitating access to certain material evidence or witness statements. For example, two civil society organizations in The Netherlands that collected statements from Yazidi victims in Iraq discovered the involvement of Dutch citizens in crimes committed against Yazidis. In the case of Yazidi woman Layla Taloo, for example, a Danish citizen (a FTF) and his Dutch wife had enslaved and sexually abused her (de Hoon, 2022).

Conducting field investigations in Syria and Iraq is difficult if not impossible due to concerns over accessibility and safety, and investigations must therefore be conducted using the sources (and resource) available. This includes direct and indirect witnesses, as well as material evidence about terrorist organizations and key individuals that is gathered using modern investigative techniques. Evidence can also be obtained through cooperation with other states and entities, including militaries. On top of this, as a rule, investigators should analyze open-source information in virtual spaces such as social networks or other online platforms and should confiscate electronic devices such as computers and phones (Genocide Network, 2020).

Irhad Kos, an expert witness on IT who testified in the case against Husein Bosnić, explained how evidence was gathered from YouTube videos of the defendant speaking, as well as from mobile phones that had been seized and communications that were intercepted. This led investigators to detect communication among a network of people who all traveled to foreign battlefields (*Prosecutor's Office of Bosnia and Herzegovina v. Husein Bosnić*, 2015, trial testimony, 01:20–37:52). SIPA investigator Srđan Lazić also testified in the Bosnić case, and presented photos collected from open sources in which citizens of BiH who had joined terrorist organizations in Syria were identified. According to Lazić, "Late in 2013, [SIPA] decided to intensify the collection of data on citizens who went to the battlefield in Syria. To that end, we at the regional office... started collecting certain data on those individuals." The prosecutor probed for more details:

Prosecutor: [Individuals] who went to foreign battlefields?

Lazić: Who were already there.

Prosecutor: Please, Mr. Lazić, how did you do that?

Lazić: We noticed that these individuals were very active on the Internet, particularly on certain portals and social networks, so we decided to create a Facebook account and use it to download photos and different posts from their public pages.

Prosecutor: And did you do that? Create the Facebook account? And since when have you had the Facebook account?

Lazić: Late 2013.

Prosecutor: Through your work, have you managed to identify persons who are currently in Syria, learn more information about them, whether they have fought in combat, in which unit, and so on?

Lazić: Yes, we have obtained information on many people. As the law prohibiting departures of citizens was not in force at the beginning [of the war in Syria], people posted photos and comments on the Internet publicly, and they were much more active then in taking photos of themselves with weapons or wearing military uniforms, and posting information about their location and what they were doing.

Prosecutor: Were you able to identify citizens of BiH who were killed?

Lazić: Yes, we were, since they began posting so-called "shaheed photos", post-mortum...

Prosecutor: These photos, how did you download them; let's say, from Facebook?

Lazić: On Facebook, every photo on a user's Facebook wall, if the wall is public, everyone can see that photo, or any post, information, or data.

Prosecutor: Do you need any access code?

Lazić: If the account is public, anyone with a Facebook account, anyone in the world can access those photos, videos, and posts (trial transcript, 03:27–08:33).

Using digital evidence alone can sometimes be problematic, though, and in The Netherlands, there are different and contradictory practices in this regard. In one case, the Dutch court accepted a video in which the defendant bid farewell to the world and declared he would die as a martyr, combined with information about his death that circulated on social networks at the same time he stopped sending messages via WhatsApp and Twitter (in early 2015), as evidence he was deceased. Yet, in a similar case involving a Dutch FTF, the court refused to accept photographs suggesting that the defendant had died, because the sources and authenticity of the material could not be objectively verified and the fact that the defendant was inactive on social networks was not considered sufficient to establish his death.

When it comes to human sources, asylum seekers and migrants are also among those who may have valuable information related to the activities of terrorist actors or organizations. Overcoming the complexities and obstacles that exist in adjudicating cases involving FTFs thus requires that information scattered across various entities is systematized within a country (e.g., between different administrative units) and among government bodies, including relevant services such as immigration and social work, and externally with civil society, other states, and international bodies. Indeed, strengthening intra-state and cross-border cooperation should be a priority in countering violent extremism and terrorism (Genocide Network, 2020). When material evidence is difficult to obtain, this cooperation is even more necessary in order to learn the facts; for example, by receiving information from military or intelligence sources about the training, equipment, and activities of a terrorist group or "lone wolves" (ICRC, 2019).

Prosecutors in BiH have encountered the same challenges as their colleagues in many European countries as far as obtaining and using material evidence in court, and prosecuting FTFs more generally. It is the admissibility of evidence that poses the biggest challenge, as any evidence successfully collected in combat zones is often gathered through covert actions and special investigative measures. This has led to the emergence of evidentiary sources not previously encountered by the Court of BiH. For example, organizational data on the "Islamic State" and membership cards of FTFs were obtained in raids by coalition military forces and used in investigations.

As discussed above, prosecutors in BiH have also presented evidence gathered from social media networks and the Internet, including photos, videos, and communications posted on Facebook, Twitter, and YouTube, as well as messages exchanged via applications such as WhatsApp or Telegram. In the case against Jahja Vuković, for instance, an inspector from SIPA testified before the Court that police had discovered an incriminating video of Vuković on Telegram (*Prosecutor's Office of Bosnia and Herzegovina v. Jahja Vuković*, 2021, main trial). This has been the practice in Europe as well. For example, a defendant in the UK was prosecuted on multiple terrorism counts, based on evidence that included messages he had sent on WhatsApp and Kik in which he offered to fund travel to Syria and shared extremist propaganda (Court of Appeal, 2016a). Similarly, in The Netherlands, nine individuals were convicted of crimes ranging from inciting terrorism to participating in terrorist organizations

and preparations for a terrorist act, based on digital evidence obtained by downloading communications and materials available on social media and the Internet. And in Germany, prosecutors entered photos into evidence that showed a defendant posing next to the severed heads of enemy soldiers, which had been posted on Facebook by another person and were found on the devices of friends and relatives of the defendant (Pokalova, 2020).

Social media posts have become increasingly crucial in some cases to demonstrating the intent of a defendant. Proving the intent to undertake military operations in a warzone or join a terrorist organization or armed conflict remains a significant procedural challenge in cases involving FTFs. Lacking concrete evidence of *mens rea*, it is extremely difficult to establish the objective of defendants in traveling to Syria and Iraq, especially when they claim the journey was of a benevolent nature. In a Dutch case, for example, the defendant insisted that he had been motivated by the injustices occurring in Syria and traveled there to work for a humanitarian organization; but, by examining his social media activity, the court was able to establish the existence of a terrorist intent behind his participation in the armed conflict there. And in the US, Nader Elhuzayel was arrested at the airport in Los Angeles before flying to Turkey via Israel, on the basis of social media posts that provided sufficient information to establish his intent to support a terrorist organization. In his posts, Elhuzayel openly expressed sympathies for the "Islamic State" and shared a video he took of himself pledging an oath of loyalty to ISIS.

Still, while posts on social media can be used to demonstrate the intent of FTFs, especially in terms of incitement to and glorification of terrorism, and are considered relevant in the preparation and conduct of investigations, their use by prosecutors in court creates an opening for defense counsel to raise freedom of speech issues. This was true in BiH in the case of Husein Bosnić, as mentioned earlier, as it was in the case of Arafat Nagi, who was convicted in the US of providing financial support to ISIS. Nagi had expressed strong support for the group on social media and in public speeches, yet his defense counsel emphasized that Nagi was protected by the freedom of speech guaranteed in the First Amendment of the US Constitution. After considering additional evidence, including travel by the defendant to Turkey and his purchase of military equipment, the court ruled that freedom of speech cannot extend to actions that go beyond mere advocacy. Nagi was convicted of attempting to provide support and resources to a terrorist organization (Pokalova, 2020).

A somewhat unique problem that also faces investigators and prosecutors in cases involving FTFs and crimes committed in Syria and Iraq is the fact that many perpetrators have never returned from these countries. Some European judiciaries have launched investigations against these individuals nonetheless, leading to trials in absentia, in Belgium, the Netherlands, France, and Italy. This has enabled a more proactive approach to prosecution but has simultaneously led to various complications, including due process concerns. In some cases, for instance, attempts to serve court summonses to individuals in warzones have failed, rendering them unable to prepare evidence for their own defense (Pokalova, 2020).

4.4.4. Defense evidence

In BiH, defense counsel have presented 94 pieces of evidence in cases involving FTFs; a volume that pales in comparison to the 1,060 pieces submitted by the prosecution. As Figure 18 (below) shows, the most defense evidence was presented in just one case. The defense counsel of Husein Bosnić presented the largest volume of material evidence in a single case (52 pieces), including evidence of his previous military service, his status as a war invalid, his impaired health, and information about his marriage and many children.

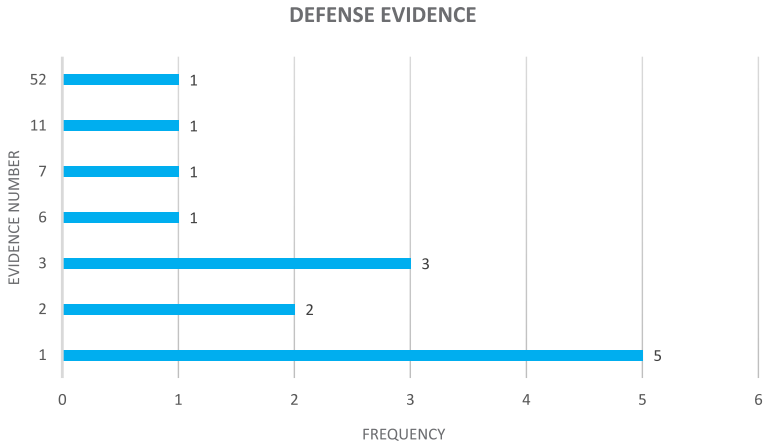

Figure 18. Defense evidence

The trials of Almir Džinić and Adem Karamuja – whose defense teams presented 11 and 7 pieces of material evidence, respectively – are good illustrations of the kind of material submitted by defense counsel in cases involving FTFs in BiH.

With the aim of proving arguments that would exonerate Džinić or at least reduce his prison sentence below the legal minimum, his defense presented the following: a record of the questioning of the defendant, a record of the questioning of witness Sedin Huseinović, the passport of Džinić, a certificate of the confiscation of his travel document (passport), a certificate of return-delivery of confiscated items, actions of the Border Police of Bosnia and Herzegovina related to the border crossing of Džinić, an official note with photos of Džinić on the battlefield in Syria, a record of questioning of witness Samir Čolić, and an excerpt of the criminal record and report of SIPA (*Prosecutor's Office of Bosnia and Herzegovina v. Almir Džinić*, 2016). The defense team of Karamuja submitted: a certificate of stay based on a pilgrimage card (Hajj), a photocopy of the passport of Karamuja, a gun licence issued to Karamuja, an Order of the Court of BiH, and a motion of the defense counsel to the Prosecutor's Office for the delivery of evidence and documentation of medical treatment. In both of these cases, and in others, defense counsel rested on the argument that evidence presented by the prosecution was insufficient to determine the criminal liability of the defendant(s) beyond a reasonable doubt.

Attorney Senad Bilić claims that prosecution evidence tends to be "slim, [and] based on the mere fact that someone went to Syria, but the question of what they did there, who they joined, which unit, remains unanswered in ninety per cent of cases, and practically unproved." Senad Dupovac, another attorney, adds that material evidence is scarce in these cases, and very difficult to prove without conducting investigations in Syria and with the people who have been harmed (i.e., the victims), or their relatives (Grebo and Rovčanin, 2020). In countries such as the UK, however, where the Terrorism Bar concentrates resources to the advantage of prosecutors, defense counsel may confront more robust evidentiary hurdles.[42] As senior British judge Charles Haddon-Cave (2021) explains, in terrorism cases in the UK, "the defense brief... remains a difficult brief"; defense counsel "encounter practical difficulties, for instance, in accessing their clients in the high security units of prisons... [and] the work is invariably publicly funded." This should be a reminder that specialization among prosecutors and cooperation between the judiciary and state security agencies should not create a circumstance in which defense attorneys face an impossibly uphill battle to sufficiently defend their clients.

42 In the UK, prosecutors have Tech teams at their disposal, which "excel at condensing a mass of data (for instance, cell-site evidence or ANPR [Automatic Number Plate Recognition] evidence) into easy-to-follow timelines and chronologies." It is also common for undercover officers who have communicated with defendants under the guise of sharing extremist ideologies or goals to testify in trials (Haddon-Cave, 2021), as protected witnesses. The UK courts have also found "safety interviews" (mentioned earlier) to be admissible.

It should also be noted that the relatively small amount of evidence presented by defense counsel in cases in BiH involving FTFs is certainly not due to a lack of motivation or professionalism. Defense teams are simply focused on the specific evidence that is likely to contribute to an acquittal or a reduced sentence. And as with the number of witnesses called by the prosecution and defense, the amount of material evidence submitted in cases involving FTFs does not appear to be linked to any particular outcome.

4.4.5. Comparative practice on the admissibility of evidence

It is notable that judicial practice in BiH does not consider photographic evidence sufficient to prove atrocity crimes; while other European courts have taken photographs as proof of complicity in mass atrocities, in addition to their value in proving that a defendant joined a foreign terrorist organization. Generally, charges of war crimes, crimes against humanity, or genocide require a very high evidentiary threshold, which makes the problem of obtaining quality material evidence and first-hand testimonies related to criminal offenses on foreign battlefields an even greater obstacle. It is hard enough to prove a defendant's affiliation with or support for a terrorist organization in Syria and Iraq, as current practice in BiH shows (Grebo and Rovčanin, 2020).

The jurisprudence of The Netherlands highlights the specific importance of digital material evidence in the prosecution of FTFs for mass atrocity crimes. In the District Court of The Hague, a Dutch citizen was sentenced to seven years and six months in prison for joining a terrorist organization and committing war crimes (from 2014 to 2016), based on evidence of transactions with ISIS for the services of a sniper, photos of the defendant in a military uniform with weapons and standing next to a deceased person hanging on a cross, and conversations captured from modern communication platforms. At the same time, the defendant was acquitted of counts related to the distribution of images of (beheaded) deceased persons, because it could not be proved that he distributed them (District Court of The Hague, 2019). In another Dutch case, a woman was convicted for the mass distribution of ISIS propaganda via Telegram, including two videos of ISIS members brutally killing prisoners of war. In posting one of the videos, the woman had commented on the murders and justified the crime. She also encouraged others to commit terrorist activities and war crimes, trained herself and encouraged others to make explosive belts, and transferred money to individuals involved in terrorist activities. The court

established these facts based only on analysis of the defendant's activity on Telegram, and concluded moreover that ISIS is not only a terrorist group but also a criminal organization aimed at committing war crimes (District Court of The Hague, 2021).

These outcomes in The Netherlands highlight the importance of building certain capacities among investigative bodies at the national and sub-national levels. Dutch prosecutors and police have the benefit of departments designed to address war crimes, crimes against humanity, and genocide, which can conduct investigations based on the universal jurisdiction principle. This enables them to collect material evidence and testimonies beyond the borders of the EU. And, in much the same way that the UK's Terrorism Bar cooperates closely with specialist police units and British intelligence agencies, the Dutch national prosecutor's office works in concert with intelligence services and the anti-terrorism unit to gather evidence and press for the return and prosecution of FTFs.

Germany goes even further than The Netherlands when it comes to asserting universal jurisdiction. German courts have argued that citizens of Germany who committed offenses in Syria are subject to German law not only because they are German nationals but because the Syrian government "was not able to, due to the fighting... [to] exercise state and punitive powers... and the judicial system there no longer existed" at the time the crimes were perpetrated (Higher Regional Court of Frankfurt, 2016b). But German law allows its Central Unit for the Fight against War Crimes to conduct thematic and structural investigations regardless of whether the suspect or defendant is on German soil or not, and whether they are a German citizen or not (van den Berg, 2019). This means German investigators can collect evidence against suspects from outside German territory, for example by gathering testimonies from refugees, and then decide whether to prosecute a suspect in Germany (e.g., through extradition) or forward the information to the jurisdiction in which the suspect is located.

In Sweden and France, the judiciaries have established a Joint Investigation Team, in cooperation with Eurojust, with the aim to facilitate comprehensive investigations of suspected mass crimes perpetrators in Syria and Iraq and to solve possible problems of jurisdiction and parallel investigation. This team is focused primarily on offenses committed against the Yazidi population, and its

capacity to identify and find victims and witnesses of crimes carried out by FTFs adds significantly to the ability to collect valuable evidence inside and outside of the countries where these crimes have occurred. In addition, Eurojust will "assist... in determining the most suitable jurisdiction for prosecution and provide advice to prevent multiple legal actions against perpetrators for the same offence, thereby avoiding a breach of the so-called *ne bis in idem* principle" (van den Berg, 2019).

These examples of good practice in Europe suggest that BiH should expand and deepen the work of investigative bodies in the context of universal jurisdiction, and should develop judicial practice that allows prosecutors to adequately (cumulatively) charge individuals responsible for atrocity crimes. To that end, the security services of BiH bear a considerable burden to find, investigate, collect, and preserve digital evidence of a sufficient quality to prove the perpetration of a criminal offense without evidence from witnesses (see UNODC, 2019 on investigations in the virtual space). This does not mean, of course, that the rights of defendants or the bounds of procedural law should be abused. Prosecutions in the countries where the crimes of FTFs have been committed (i.e., Syria and Iraq) serve as examples of bad practice in this sense, and have been plagued with violations of the rights of defendants (e.g., related to fair trials and death sentences) (de Hoon, 2022).[43]

4.4.6. Reports of expert witnesses

The prosecution called expert witnesses in proceedings against 26 of the 35 defendants under study in BiH. In cases that did not use expert witnesses, defendants generally entered into plea agreements with the Prosecutor's Office. The expert witnesses called most often, in 20 cases, had expertise in IT and provided information on mobile devices and computer hardware and software (see Figure 19, below). The prevalence of IT professionals as witnesses reflects the growing importance of digital forensics in the evidentiary process, as the special investigative measures mentioned above have played an ever

43 Every country must ensure that it does not cooperate with other countries in the transfer of persons, or the collection, exchange, or receipt of information and evidence, in a manner that violates its own obligations or aids and abets the wrongdoing of other countries. Cooperation agreements should be based on national legislation that sets out clear parameters and safeguards for the collection and receipt of information in accordance with international standards and seeks to ensure that information provided to other states is not used for illegal purposes. Before entering into an agreement on the exchange of information and intelligence data with any partner country, its track record on human rights and data protection, as well as legal guarantees and institutional controls, should be assessed (Duffy, 2018).

more crucial role in investigating the criminal offenses with which FTFs have been charged (Grebo and Rovčanin, 2020).

Figure 19. Expert witness reports

Expert witnesses in neuropsychiatry were frequently called to testify as well. The expert reports of neuropsychiatrists and psychologists are extremely important in cases involving FTFs because research has indicated that these individuals may experience significant mental and emotional challenges. For instance, an expert witness offered testimony in the trial of Jahja Vuković, explaining that the defendant suffers from post-traumatic stress disorder and was affected adversely by detention, and that he was an adolescent with impaired judgment at the time he was taken to Syria. Interestingly, this expert witness also testified that Vuković had not in fact been radicalized but had "lived as he had to, in order to survive" in the household of his father. Vuković knew nothing about religion until he was 12, according to this witness, and only practiced it after visiting his father in Germany. Though his father later died as an FTF in Syria, the expert witness claimed that the defendant had never accepted his father's "life philosophy" as his own (*Prosecutor's Office of Bosnia and Herzegovina v. Jahja Vuković*, 2021, main trial).

It was also common to hear from experts in explosives and in ballistics and mechanoscopy, as well as in dactyloscopy. Remarkably, terrorism experts were rarely called; though it is feasible, but impossible to conclude from court records,

that the practice of earlier cases related to terrorism and expert knowledge from those cases, especially as it relates to FTFs, was considered. Evidence presented in previous proceedings can be used if it is relevant, especially expert witness reports, and expert witnesses may be invited to additionally contextualize their expertise as it relates to a specific case.

In some cases, the use of psychological expertise is a practical necessity, such as when a defendant was a minor at the time they committed the offense(s) in question, or when they have an emotional or pedagogical relationship with other suspects or defendants (e.g., spouses, parents, religious leaders, etc.). When defendants charged as FTFs are young, it is important to understand how their developmental trajectories and transition into adulthood may have been hindered by living in the midst of war and under radicalizing influences. In each such case, the genesis of the extreme beliefs that led young defendants to perpetrate a criminal offense should be established; among other reasons, to apply the most appropriate sanctions. Expert witnesses in psychology are also required in certain cases involving support for loved ones who are FTFs or on foreign battlefields, to better understand the intent of the defendant.

It is worth noting that expert witnesses in BiH have not included individuals with expertise in military, criminal, or political matters, or in radicalization and violent extremism (apart from terrorism). It is possible that this expertise was considered irrelevant in criminal proceedings against FTFs, or that, at the time of proceedings in which such expertise might have been relevant, less was known about specific paramilitary formations or individual paths to radicalization. It is also possible that expert witness reports on disputed facts are considered unnecessary when fact finding can be achieved in ways that better assure the economy and efficiency of proceedings (but not at the expense of fairness). Although requests for expert witness reports are often legitimate, as the defense counsel for Husein Erdić pointed out in his closing remarks, they are not necessary if facts can be proved indisputably or if disputed facts can be made indisputable based on earlier expert witness reports (*Prosecutor's Office of Bosnia and Herzegovina v. Husein Erdić et al.*, 2015, trial transcript, 40:06–41:20).

A judge who was interviewed for this research also emphasized that expert witness reports can be introduced, or facts established in earlier criminal proceedings made indisputable, by questioning the parties about them; for

example, to establish the fact that ISIS is a terrorist organization (Interview, 17 May 2022). This may be true, too, of facts that cannot assumed to be common knowledge, such as information about the ideology of Salafists. This has been relevant in various cases involving FTFs and terrorism more generally, as it was in the 2012 case against Mevlid Jašarević, in which an expert witness clarified that adherents of this form of extremism should more appropriately be referred to as Kharijites or neo-Kharijites (*Prosecutor's Office of Bosnia and Herzegovina v. Mevlid Jašarević*, 2012, 13–15). Yet, this terminology has not been used in subsequent practice. As in many other European countries, judgments in BiH in cases involving FTFs make very little use of previous caselaw and do not engage deeply in a cross-examination of the facts. Some facts are simply accepted as indisputable, such as the existence of conflict and crimes in Syria and Iraq. This contributes to convictions, but the details of this conflict over time are not necessarily considered.

The testimony of expert witnesses can be used to frame the facts of an offense through a wider-angle lens as well. In the case against Husein Bosnić (2015), for instance, expert witness Vlado Azinović described the broader implications of citizens of BiH departing for foreign battlefields, and provided the basis for arguments emphasizing the community threat and seriousness of offenses associated with FTFs and foreign terrorist organizations.[44] This kind of information contextualizes the gravity of a criminal offense and the purpose of proportionate punishment, as this exchange between Azinović and the prosecution demonstrates:

> *Prosecutor*: "From the security aspect, in view of the evidence you have received, what are the implications of Bosnić's statements and public speeches for Bosnia and Herzegovina, that is, for the security of Bosnia and Herzegovina?"
>
> *Azinović*: "[Bosnians] don't need a lecture on the complex society in which we live, a post-conflict, wounded one, resting on almost entirely collapsed norms, where this kind of rhetoric... brings fear and uncertainty to certain communities. And probably, to the people listening to it, in a way, it also instils fear in those who do not identify with it. Therefore, this kind of [extremist] rhetoric, in addition to encouraging someone to go to foreign battlefields... [in] an environment like Bosnia and Herzegovina, automatically poses a

44 In the case of *Prosecutor's Office of Bosnia and Herzegovina v. Bektašević et al.* (2007) – which was unrelated to travel to a foreign battlefield and was not included in this analysis – the expertise of a political scientist was similarly used to determine the damage to BiH caused by terrorism-related criminal offenses.

> security threat; it is embedded in this [specific] interpretation of our reality and in the mission of a number of people in our society. And that mission is, practically, to fight against everything that does not correspond to how they perceive themselves, their place in the world, and the world in general" (trial transcript, 17:09–18:24).

Importantly, while expert witnesses can be a valuable source of knowledge, their expertise should be examined critically. Some have only a superficial understanding of the foreign fighter phenomenon and the conflict in Syria and Iraq, or the crimes committed by FTFs. In legal practice in cases involving FTFs, however, some kinds of expert witnesses are challenged at a higher frequency than others. The testimony of those with expertise in security, criminology, and terrorism is contested more often than that of academic, medical, or environmental experts; and not because the information provided by experts in security and terrorism is more disputable, but because the knowledge base is less established in these areas. How expert testimony and reports are interpreted by courts also plays a role in the value of this expertise in caselaw. In a cautionary tale from The Netherlands, three experts on security, terrorism, and Islam developed a report for a 2015 case related to terrorism financing, entitled "Destination Syria", from which one conclusion among many was elevated by the court in its interpretation of the findings.[45] Although the report detailed various scenarios, the Rotterdam District Court interpreted from it that travel to or time spent in specific parts of Syria always implied a contribution to terrorist activities, and this was the crucial legal fact in later proceedings in which the report was submitted.[46]

4.4.7. Duration of pre-trial custody and proceedings

Pre-trial custody was imposed against 33 of the 36 defendants under study in BiH. Information about the custodial measures imposed in each case could be found in court files, and on average, custody for these defendants lasted just

45 The body of the report is focused primarily on the Islamic State, but also includes information on other organizations, including Jabhat al-Nusra. The report discusses the daily and economic life of people in "Islamic State" territory, and the roles of men and women there. The findings are based on interviews with just 26 individuals that range from members of the security services to Syrian citizens. The conclusion of the report is that, from the beginning of 2014, it became impossible to remain in the "Islamic State" without joining a terrorist organization, especially for young men. Yet, it underscores that this does not necessarily imply involvement in armed conflict, even if all men were listed by ISIS as reservists and employed in some way to serve the organization. The report also emphasizes that the research it describes is of an exploratory nature, and has limitations.

46 Defense counsel in the initial 2015 case did challenge the credibility of the report. Then, during a trial in 2019, the defense argued that, based on this earlier expert witness report, caselaw had been established that overreaches. Still, despite its reliance on relatively few interviews and the acknowledgement of its authors that their research was exploratory, the report has been deemed relevant for future cases (Anwar and Goede, 2021).

under one year, at 360 days. Still, one defendant was in custody for 816 days, and one for just 24 days; meaning that the range between the longest and shortest time in custody was well over two years (792 days).

DURATION OF CUSTODY			DURATION OF CRIMINAL PROCEEDINGS
Valid	34	34	34
	Missing	1	1
Mean		360.33	269.68
Median		290.00	249.50
Mode		230	509
Range		792	621
Minimum		24	5
Maximum		816	626

Table 1. Duration of custody and of criminal proceedings in cases in BiH involving foreign terrorist fighting

Custody is the most severe measure that can be imposed to ensure the presence of a suspect or defendant in court, in terms of the degree to which it interferes with their personal rights and freedoms. General and special reasons for the imposition of custody are set out in Articles 131 and 132 of the Criminal Procedure Code (CPC) of BiH, which stipulate that duration of custody must amount to the shortest time necessary.[47] All entities and bodies participating in criminal proceedings are also obliged to act with urgency (also see Halilović, 2019; Sijerčić-Čolić, 2008).

47 According to Article 131, pre-trial custody may be ordered or extended only under the conditions prescribed by the Code, "and only if the same purpose cannot be achieved by another measure." Custody is decided by an order of the Court (paragraph (1)) and issued on a motion of the Prosecutor, after the Court hears from a suspect or defendant (except in a case prescribed by Article 132, paragraph (1) (a)). To extend custody, the Prosecutor is obliged to submit a reasoned motion to the Court no later than five days before the expiration set in the decision ordering custody, and the Court to submit the motion to the suspect or defendant and defense counsel immediately (paragraph (3)). Importantly, "[t]he duration of custody must be reduced to the shortest necessary time. It is the duty of all authorities participating in criminal proceedings and of agencies extending them legal aid to proceed with particular urgency if the suspect or defendant is in custody" (paragraph (4)). At any time during the proceedings, custody "shall be terminated as soon as the grounds on which it was ordered cease to exist," and the defendant is to be released immediately. If a motion is filed by the defendant or defense counsel to terminate custody, based on new facts, the Court must hold a hearing or chamber session, and the "[a]bsence of duly summoned parties and defense attorney shall not prevent the hearing or chamber session from being held." An appeal against a decision rejecting the termination of custody is allowed (paragraph (5)). Article 132 stipulates the grounds for pre-trial custody. Custody may be ordered if there is a reasonable suspicion that a defendant: a) is hiding or may abscond; b) will destroy, conceal, alter, or falsify evidence relevant for the criminal proceedings, or may hinder the criminal proceedings by influencing witnesses, accessories, or accomplices; c) will repeat the criminal offense, complete an attempted criminal offense, or commit a threatened criminal offense, when such an offense is punishable by three years or more in prison; d) when a criminal offense charged is punishable by imprisonment of ten years or more, or the release of the defendant would result in a threat to public order.

In the opinion of a judge who was interviewed for this research, custody is unfounded in most cases involving FTFs because these defendants generally do not represent a flight risk. He suggested potential alternatives such as restricting the movement of defendants, and felt it was appropriate to order custody only "in exceptional cases and based on good arguments" (Interview, 17 May 2022). Perhaps the best example of good argumentation in this respect can be found in the case of *Prosecutor's Office of Bosnia and Herzegovina v. Husein Erdić et al.* (2015). In a discussion between the prosecution and defense team, the prosecutor noted that the risk the suspects could abscond (Article 132, paragraph (1) (a)) arose "from the very acts of perpetration with which they are charged." He continued:

> "if these defendants really do communicate with persons still unknown to us who are in the territory of Turkey, and we have confirmed this with evidence, that these persons unknown to us finance departures from Bosnia and Herzegovina.... This means there is a well-branched network and a group of people who organize departures with the two suspects. If they were to be free, I really don't see any reason for them not to organize their own departure to Syria.... There is a risk that they will become inaccessible to the Court and the Prosecutor's Office of Bosnia and Herzegovina, because if they could do this for other people, I don't see why they wouldn't do it for themselves, especially now, as they are aware of the evidence against them... and the sanctions facing them. When it comes to [paragraph (1)] (b), the Court has found in earlier decisions that there is a possibility of [defendants] influencing witnesses and obstructing the criminal investigation... not only in this case, but also in other cases for which the Prosecutor's Office runs investigations. If released, they could influence witnesses and other suspects.... When it comes to [paragraph (1)] (c), the Prosecutor's Office of Bosnia and Herzegovina accuses these people of collecting funds, organizing, and developing a plan for the other two defendants to leave Bosnia and Herzegovina and go to Syria. We do not see a single reason or way, if these people were to become free, for them not to repeat the criminal offense.... [W]hen you see the indictment and evidence, you will realize how cautiously they commit criminal offenses... cell phones are left in one room, and they go to another room so that nobody can hear the conversation... encrypted messages are distributed... money for tickets is given through a second suspect.... All of this... is why we are requesting custody" (*Prosecutor's Office of Bosnia and Herzegovina v. Husein Erdić et al.*, 2015, 07:00–12:27).

The arguments of the defense, which were not accepted by the Court in this case, relied on the assertion that the defendant "never intended or attempted to go to a foreign battlefield," and only "helped [others] establish contact or possibly buy plane tickets." Defense counsel proposed that "issues such as potential influence on witnesses, leaving the territory of Bosnia and Herzegovina, [and] possible perpetration of the same or similar criminal offense" could be solved by seizing the defendant's travel documents, along with an "obligation on my client to report to a competent police office... [And he] could be prohibited from contacting witnesses... In this way, the rules of the Criminal Procedure Code and the European Convention concerning the rights to freedom and the effect on unobstructed conduct of criminal proceedings would be respected" (*Prosecutor's Office of Bosnia and Herzegovina v. Husein Erdić et al.*, 2015, 26:30–30:39).

While the Court considered more lenient measures than custody in the case against Ibro Ćufurović, the circumstances in their entirety led to the conclusion that the risk of the defendant fleeing could be eliminated only by ordering custody (*Prosecutor's Office of Bosnia and Herzegovina v. Ibro Ćufurović*, 2019, Decision ordering custody).[48] In the subsequent decision to extend that custody, the Court highlighted an international warrant for the defendant, the length of time Ćufurović was in hiding from authorities, and his acquaintances and connections abroad, and cited Decision AP 6/08 of the Constitutional Court of Bosnia and Herzegovina (13 May 2008) establishing the relevance of the seriousness of the criminal offense in question when deciding on custody. Despite the reasoning of the defense that Ćufurović did not represent a flight risk as a citizen of BiH with a residence in the country and no passport, the Court found that custody represented the only effective measure to ensure the presence of the defendant in criminal proceedings (*Prosecutor's Office of Bosnia and Herzegovina v. Ibro Ćufurović*, 2020, Decision ordering custody).

The duration of criminal proceedings in these cases was less than that of pre-trial custody for defendants. This is partly due to the effect of plea agreements – which significantly shortened the length of proceedings in some cases – but also to the fact that many defendants were in custody not only before the start of their main

48 In the case against Ibro Ćufurović, the Court ordered custody because of the risk of absconding, noting that the legislature did not provide an exhaustive list of circumstances that should be valued as decisive when assessing the existence of such risk, but that caselaw indicates certain circumstances and facts are valued in each case related to the suspect's or defendant's behavior before and after the commission of the criminal offense or after the initiation of criminal proceedings, as well as their personality, to serve as the basis for a conclusion that the suspect or the defendant will hide or abscond (*Prosecutor's Office of Bosnia and Herzegovina v. Ibro Ćufurović*, 2019, Decision ordering custody).

trial but also after sentencing. On average, criminal proceedings lasted 270 days, with the shortest wrapping up in 5 days and the longest stretching over 626 days (over a year and a half). In Europe, the average duration of proceedings in 2017 was 447 days (Scottish Legal), which means the duration of proceedings in cases against FTFs in BiH is near that European average, particularly when the impact of the large number of plea agreements entered in BiH is taken into account. Still, proceedings in German courts are typically completed in three to four months (90 to 120 days), and if they extend any longer, this is valued as a mitigating factor in sentencing (in favor of the defendant).

4.4.8. Plea agreements

In cases involving FTFs in BiH, 14 defendants have entered into plea agreements, as reflected in the inner circle in Figure 20 (below). The outer circle shows that 10 of these defendants pleaded guilty during the main trial, and 4 before the main trial began. In principle, plea agreements enable criminal proceedings to conclude more quickly, and thus with greater economy and efficiency (see Imamović-Čizmić and Nikolajev, 2019, 2020). This reasoning is reflected in court records in cases that ended with plea agreements, alongside compulsory subjective statements of the defendants towards the agreement.

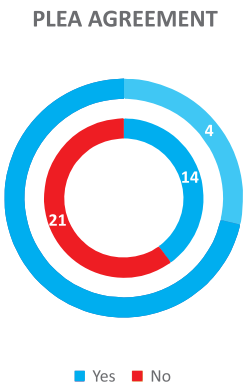

Figure 20. Plea agreements in cases in BiH involving foreign terrorist fighting

During the investigation and plea-bargaining process, some defendants described their own experiences in detail, contributing to a better understanding of the foreign fighter phenomenon and the departures of FTFs

to foreign battlefields, including the process leading to departure, information about military training and weapons, the affiliations of paramilitary formations, activities of FTFs during combat operations, and aspects of everyday life under ISIS rule. The court accepted confessions in these cases as complete and credible, and found they did not challenge indictments. Still, considering the gravity and nature of the criminal offenses in question, even with mitigating factors (e.g., admission of guilt, remorse, cooperation with authorities, voluntary renunciation, etc.), the sanctions for defendants who have entered a plea agreement appear to be particularly lenient, as they have been significantly below the legally prescribed minimum. The truth is, this is the rule and not an exception in the context of plea agreements in BiH; representing a convenience to the defendant but also alleviating a burden on the judiciary. And given the specificity of the criminal offenses charged against FTFs, which must be prosecuted with very scarce evidence, the tendency to enter plea agreements whenever possible is understandable.

In principle, the Court can reject a plea agreement if the punishment is disproportionate to the crime committed and the purpose of sentencing is not met. But it is not clear that the sentencing purpose has really been achieved by the short prison terms typically imposed in cases where FTFs have entered plea agreements, except when the defendant was taken to Syria as a minor, and these agreements have nevertheless been accepted by the Court. While it is essential to respect the guarantees of transparency and fairness, the Court should also take into account the interests of victims and the public in considering plea agreements, and reject agreements for which doubts arise about the fairness or proportionality of the punishment. A good example of this was the refusal of the Prosecutor's Office to enter into a plea agreement with Osman Abdulaziz Kekić (*Prosecutor's Office of Bosnia and Herzegovina v. Osman Abdulaziz Kekić*, 2019, Notification of guilty plea).

Some defendants who have entered plea agreements in BiH have acknowledged to the Court that they did so in exchange for a reduced sanction. For example, at his plea agreement hearing, Fikret Hadžić noted that, "it is clear from my previous statements, I am signing the agreement in exchange for a lesser sentence." He claimed this was the reason he was endorsing "a statement that I am a member [of a terrorist organization], but in reality, I am their fierce opponent" (*Prosecutor's Office of Bosnia and Herzegovina v. Fikret Hadžić*, plea agreement hearing, 12:42–13:44). However, given the challenges of obtaining

evidence in cases involving FTFs, especially as these cases represent the very inception of caselaw in this area, prosecutors tend to justify the use of plea agreements for these defendants (Interview, 6 May 2022).

The consideration of a plea agreement by the Court should not only reflect on sentencing, but also the content of the plea, in which the defendant may uncover facts and shed light on other criminal offenses or the individuals responsible for them. For instance, Almir Džinić entered into a plea agreement and became a crucial witness in the case against Osman Abdulaziz Kekić. For some defendants, a plea agreement should not be overly focused on the aim of significantly reducing their sentence, though, as the outcome of their case should still convey a clear message to the public that certain criminal offenses (related to departures to foreign battlefields) will be punished satisfactorily. As a judge who was interviewed by researchers noted, a plea agreement "is a mechanism that relieves the court... but it is a very sensitive issue" (Interview, 17 May 2022).

One example of good practice from the UK is in the case against KN. At the age of 19 or 20, she married AK, who would later become an FTF.[49] It was eventually discovered that KN was transferring money to AK through a terrorist-linked network, when an intermediary in financial transactions involving KN and AK was arrested in 2016 and explained his role.[50] Subsequently, KN was interviewed, and stated that she believed AK was on a vacation in Turkey with friends, where she had visited him briefly for a couple of days, and that he intended to stay there on business. She claimed she was unaware that he was connected to a terrorist group, and used intermediaries because it was culturally unacceptable for a woman to send money directly. The confiscated phones of KN were then examined and it was found that AK had demanded she communicate with him through the *Threema* app, where he sent her messages and photos related to a terrorist organization, pressured her to join the organization herself, and demanded she send more money. In 2017, police interviewed KN again about operational findings, after which she pleaded guilty and was sentenced to five years and three months in prison (Woolwich Crown Court, 2018).

49 From 2014, AK attended public gatherings of extremists, including individuals convicted of racial hatred and other crimes. That same year, AK took out a bank loan and traveled to Turkey, where he was in custody for a short time; his whereabouts have been unknown since his release. Based on messages he sent to KN in 2015 and 2016 through modern communication technologies, he was believed to be in Syria as a member of ISIS.

50 KN sent £1,500 through the *MoneyGram* application to the intermediary, who told her that more money should be sent via Western Union to another intermediary, and finally to a third intermediary. KN did this through a co-worker, claiming that her husband needed money for his studies and had no identification documents. Also, per AK's instructions, KN ordered chargers for an iPad and smartphones, solar panels, flip flops, and boots.

In BiH, there has been a general downturn in the number of judgments reached on the basis of a plea-bargaining process, in all types of cases, though it remains relatively common in cases involving organized crime, economic crime, and corruption. Plea agreements are rarely rejected by courts in BiH, which indicates that the legal requirements for entering into these agreements have been fulfilled, but says less about the proportionality and purpose of punishment. Many prosecutors have put their faith in plea agreements, however, and the fact is that they are usually extremely effective tools. Still, as the motivation exists for almost any defendant to begin the plea-bargaining process, this alone should by no means be the reason a plea agreement is entered, as they should never come at the expense of effective criminal process and punishment (Sijerčić-Čolić, Pleh and Gotovuša, 2020).[51]

Interestingly, plea agreements as such are not used in German practice, though the country's Criminal Procedure Code does leave room for agreements to be made between the court and parties to a proceeding. Any such agreement hinges on acceptance by the accused and the prosecutor, and on the accused making a confession; the court may also specify upper and lower limits of punishment. Even these agreements are rare in German jurisprudence, however, and researchers found only a single instance of one having been reached in a German case involving FTFs, whereby the sentencing range was still set at 10 to 14 years (Higher Regional Court of Munich, 2015).

4.5. Sanctions

According to Article 5 of the CC BiH, criminal sanctions include punishments (imprisonment or fines), suspended sentences, security measures, and educational measures. Nevertheless, in the caselaw to date, suspended sentences and educational measures have not been imposed in cases involving FTFs, despite their imposition in other countries. For example, in The Netherlands, a parent lacking ideological motives received a suspended prison sentence of one month and two years of probation, for having transferred EUR 200 to an underage son who joined ISIS (District Court of Rotterdam, 2019a). Another Dutch defendant who received a suspended prison sentence of one month and two years of

51 Perić warns that prosecutors and judges are "lost in the labyrinth of interpretations and new formalism... [and] have become prisoners of procedural and anachronistic forms that are increasingly rendering both court and justice meaningless;" and that the "inability of practitioners to bring the interpretation of rules beyond the framework of outdated formalism prevents the evolution of procedural law and the efficient delivery of justice." This leaves the judiciary a mechanical and uncreative structure that cannot be trusted by the public, and risks pushing the judiciary "to the periphery of life and [giving] way to other justice distribution systems" (2021).

probation was also without ideological motives, and was actually opposed to the ideology of the "Islamic State", but sent EUR 90 to his brother, an FTF (District Court of Rotterdam, 2019b). Closer to BiH, Kosovo has made pragmatic use of suspended sentences as a means of ensuring the rehabilitation of a number of women returnees from Syria and Iraq, whose sentences (of two to three years, suspended) mandate psychiatric treatment and are imposed with the goal of proactively fostering their reintegration (Avdimetaj and Coleman, 2020).

All told, in BiH, 33 individuals have been convicted of crimes related to foreign terrorist fighting. In Figure 21 (below), the number of counts charged in indictments and the number of counts for which a defendant was convicted is shown. The sole defendant charged with four counts was Nedžad Mujić, mentioned earlier, who was convicted on each, constituting an extended criminal offense. In separate cases, Mirza Kapić, Adem Karamuja, Ibro Delić, and Jasmin Keserović were all indicted and convicted on two counts. Of the 30 other defendants under study, 28 were convicted; meaning, two were acquitted (Sena Hamzabegović and Jahja Vuković). Adem Karamuja is the only defendant who was convicted on some counts but acquitted of another. He was found guilty of membership in a terrorist group and providing assistance to a terrorist group, but as the Court found beyond a reasonable doubt that Karamuja had the approval of a police authority to carry weapons, he was acquitted of charges related to acquiring and possessing firearms and ammunition without prior approval (*Prosecutor's Office of Bosnia and Herzegovina v. Enes Mešić et al.*, 2016).

As acquittals of these defendants has been rare, it is worth examining the two cases in which all charges were acquitted. Sena Hamzabegović was acquitted of the charge of "funding of terrorist activities" on the grounds that evidence had been illegally obtained and no subjective element of the body of the criminal offense had been proved. The defense objected that the search of a laptop's central processing unit had been conducted illegally, as the Prosecutor's Office and SIPA had carried out special procedural actions without prior consent from the Court of BiH. The Court reasoned that any evidence obtained in a legal manner, based on information arising from evidence that had been obtained illegally, was legally invalid (i.e., the fruit of the poisonous tree). As a search warrant from a judge was lacking, and the evidence rendered illegal and inadmissible, related expert witnesses did not testify.

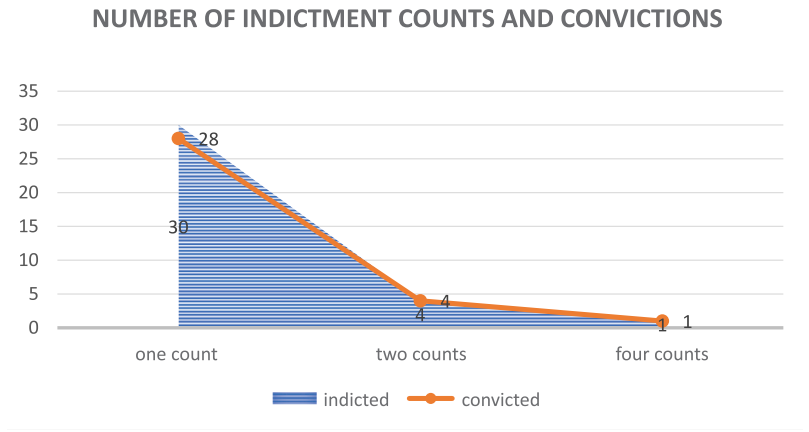

Figure 21. Number of counts for which defendants were indicted and convicted in cases in BiH involving foreign terrorist fighting

The Court was also persuaded by claims of the defendant that her husband, an FTF, had employed other people to deliver money to him after she left it at designated sites, and concluded in a first-instance judgment that she had no intention of financing a terrorist organization when she had indirectly transferred this money to her husband. The Court noted that "the wives of other people who returned were not prosecuted or sanctioned" for similar behavior. Moreover, Hamzabegović had allegedly visited Syria several times to pursue a divorce from her husband and the Court found that her visits and obedience to her husband were reflective of certain emotional dynamics in their relationship and a pattern of patriarchal control. Thus, convicting Sena Hamzabegović would "look more like an unfair, than a fair" judicial treatment. Finally, the Court was guided by the principle that criminal liability should be proved beyond any reasonable doubt, and that an acquittal should be pronounced both when the defendant's innocence has been proved with certainty but also when the Court has any doubts about the defendant's guilt (*in dubio pro reo*) (*Prosecutor's Office of Bosnia and Herzegovina v. Sena Hamzabegović*, 2021).

A second-instance court confirmed the decision of the first-instance court that proof of her husband's membership in a terrorist organization, and her knowledge of this, was not enough to imply the direct intent of Sena Hamzabegović to contribute to that terrorist organization through her actions (*Prosecutor's Office of Bosnia and Herzegovina v. Sena Hamzabegović*, 2022).

Although this practice aligns with the argument of scholars that hypothetical contributions to crime and its consequences cannot be punishable (e.g., Anwar, 2020, 2022), judicial practice on European soil says otherwise, in contradiction of the decision in the Hamzabegović case.

In The Netherlands, for instance, complex questions have arisen regarding the intent of defendants who have sent money to family, friends, or acquaintances that are members of terrorist groups. In one case, a defendant sent money on two occasions to his two brothers who were members of ISIS, through intermediaries in Turkey and Lebanon, to pay human smugglers to help the brothers return safely from Syria to The Netherlands. Because the defendant knew his brothers had become members of a terrorist organization, the fact that they intended to return was considered irrelevant. And though there was no ideological motive on the part of the defendant, the court found he had conditional intent by accepting the possibility that the money he sent would benefit a terrorist organization, directly or indirectly. Ultimately, the court imposed a much more lenient sanction than that requested by the prosecution, sentencing the defendant to 191 days in prison, of which 90 days could be served as probation over a period of two years, and 240 days of community service (District Court of Rotterdam, 2019c).

It should be noted that terrorist financing is not a strict liability crime in The Netherlands. To prove intent, the Court must be satisfied that a defendant had "reasonable ground to suspect" that money could end up in the wrong hands. Adjudicating this legal question in court can require expertise regarding the modus operandi of terrorist groups and conditions in the territories where money was transferred. Such expertise tends to be specialized and can ignore wider issues related to the complexity of armed conflict and the financing of states fighting the official Syrian regime; though, it has been sufficient for conviction, even when evidence of the actual destination and use of money has been lacking.

In the UK, this was true in the case of *Regina v. Sally Lane and John Letts*, when two fact witnesses were called to share their knowledge on counter radicalization, and despite no possibilities to examine their credibility or cross-examine them, the court included information about their credibility in the judgment; enabling a covert transformation of fact witnesses into expert witnesses. At the same time, the parents (Sally and John) who were defendants in this case had information about the activities of their son and details of his

life in Syria on the battlefield, the legal weight of which was not examined. In addition to academic knowledge about radicalization and the armed conflict in Syria and Iraq, which was accepted by the jury as sufficient for a conviction of terrorism financing, it is crucial to emphasize the equal importance of the testimonies of Sally and John in this case, and what they knew at the time they were sending money to their son. This is especially true because the testimony of an expert witness was declared inadmissible, and hence, there was no evidence presented on the situation in Raqqa when their son was there, the activities of ISIS at the time, the group's membership processes or claims to territory, or the complex and fluid shifting of the front lines. This meant there could be no examination of legitimate support to the fight against the official regime in Syria or the state funding of certain groups for this purpose (Anwar and Goede, 2021; see *Regina v. Sally Lane and John Letts*, 2018).

The position of the UK court in this case was that anyone inside the territory of the "Islamic State" could be considered a member of a terrorist organization, whether they participated in combat or not. Yet, no experts were used to examine the mental state of the defendants, even when their distress and desperation were expressed explicitly and frequently throughout the trial and the court was essentially considering whether they acted reasonably. Moreover, an expert witness who did testify described Sally and John as anxious and psychologically broken as a result of their son traveling to Syria. There seems to have been some neglect of the psycho-emotional condition of these parents, who were eventually convicted of financing a terrorist organization for sending money to their son (Anwar and Goede, 2021; see *Regina v. Sally Lane and John Letts*, 2018).

In the context of caselaw in The Netherlands and the UK, Anwar (2022) observes that what makes terrorism financing cases unique is that a judgment depends on the existence of a *possibility* that the money could be used to finance violence, rather than the existence of a concrete contribution to violence. In other words, there is no need to prove that funds were used for terrorist purposes, as the mere existence of a reasonable possibility that they could be used in this way will suffice. The frame of this jurisprudence is such that the identification of individuals as terrorists or areas as terrorist-controlled simply disables or eliminates any other possible interpretation of activities outside the context of terrorism. Yet, the presumption of innocence relates to time, space, objective activities, and subjective connections with criminal offenses. In

this sense, the case of *Prosecutor's Office of Bosnia and Herzegovina v. Jahja Vuković* is a good example of practice from BiH.

Jahja Vuković is the only other person who has been acquitted in BiH of charges related to activities on a foreign battlefield, as the Court could not establish his guilt beyond a reasonable doubt. The principle of *in dubio pro reo* was again applied, according to which a judgment is rendered in favor of the defendant in the case of doubt; i.e., facts that are detrimental to the defendant must be established with complete certainty and the existence of doubt about such facts defines them as unestablished (*in peius*), while facts favoring the defendant are established even if they are only probable and even if the existence of facts to the detriment of the defendant is more likely (*in favorem*). This means that the Court delivers an acquittal not only when the innocence of a defendant is proven, but also when their guilt has *not* been proven.

In the Vuković case, evidence presented at trial was unreliable. Photographs of the defendant did not indicate that he was a member of a paramilitary formation, and statements of a witness were circumstantial (hearsay) and unconvincing. Still, this case is of specific nature because the defendant was taken to Syria when he was 14 years (and 10 months) old, upon the invitation of his stepmother to travel as a family from Germany to visit his father, a FTF. The family traveled first to Turkey and then illegally entered Syria in a terrorist-controlled area, where they met the defendant's father. Vuković was sent for a 15-day military training in a nearby village, and then accompanied his father to the front lines of armed conflict against the forces of the Syrian government. Sometime in May 2015, his father was killed, and sometime after that, Vuković underwent sniper training (lasting two and a half months) on the order of extremist leader Nusret Imamović (from BiH). Vuković then joined the Džemal al-Hattab unit, before his transfer to Jabhat al-Nusra. On his own accord, he found work at a marketplace until he found a way to return to BiH through his uncle, that is, via extradition from Turkey (*Prosecutor's Office of Bosnia and Herzegovina v. Jahja Vuković*, 2021).

The prosecutor in this case, who was interviewed, underscored the fact that the defendant had neither the awareness and agency to travel to Syria at 14 years old, nor the will to stay there. "How could he, when he was taken away as a child? When he matured, he tried to leave" (Interview, 6 May 2022). A judge who was interviewed similarly emphasized that, while minors who were

taken to Syria can feasibly be seen as part of a terrorist organization, in this case "the child was unaware, and was taken away... [he] had no way to return" (Interview, 17 May 2022). This judge contends that it may be more expedient not to prosecute defendants such as Jahja Vuković, or to consider alternative forms of sanctioning outside the carceral system, arguing that minors (at the time of perpetration) must be given "a chance to re-socialize" (Interview, 17 May 2022). As Duffy (2018) notes, sentences should always be adapted to the age and personal circumstances of a defendant, and there should be an absolute prohibition on minor perpetrators being sentenced to life imprisonment without the possibility of release, or to death. Duffy also echoes the judge quoted above, asserting that courts should consider alternatives to prison sentences whenever possible for defendants from vulnerable groups.

4.5.1. Duration of imprisonment

The 33 defendants who were convicted in BiH of criminal offenses related to foreign terrorist fighting were sentenced to a total of 76 years in prison. One-year (12 month) sentences were most commonly imposed (see Figure 22, below) despite failing to meet the statutory minimum, but as discussed earlier, these judgments reflect the frequent use of plea bargaining. According to Judge Tatjana Kosović, mitigating factors have also been applied rather generously in cases involving FTFs in BiH; though, this was more true in the earliest cases, as sanctions in recent cases have been somewhat more stringent.[52] Ultimately, this study confirms the tendency in BiH to impose relatively short sentences for convictions in these cases, especially compared to the EU, where the average sentence for participation in activities on foreign battlefields varies between five and six years (Grebo and Rovčanin, 2020).

52 Article 49 of the CC BiH stipulates that the court may set the punishment below the statutory limit, or impose a more lenient sanction, when law allows a lesser punishment and/or when the court finds particularly mitigating factors indicating that the purpose of punishment can be attained by a more lenient sanction. Article 50 sets limitations on the reduction of punishment as follows: if imprisonment of ten or more years is prescribed as the minimum punishment for a criminal offense, it may be reduced to five years imprisonment; if imprisonment of three or more years is prescribed as the minimum, it may be reduced to one year of imprisonment; if imprisonment of two years is prescribed as the minimum, it may be reduced to six months of imprisonment; if imprisonment of one year is prescribed as the minimum, it may be reduced to three months of imprisonment; if imprisonment not exceeding one year is prescribed as the minimum, it may be reduced to thirty days of imprisonment; if imprisonment is prescribed for a criminal offence without indication of a minimum, the court may impose a fine in lieu of imprisonment; and if a fine is prescribed as a minimum punishment, it may be reduced to five daily amounts, and if it is imposed in the fixed amount, it may be reduced to BAM 500 (paragraph (1)). When deciding on the extent that punishments can be reduced in accordance with these rules, the court "shall take into special consideration the minimum and maximum punishments prescribed for the particular criminal offense (paragraph (2)).

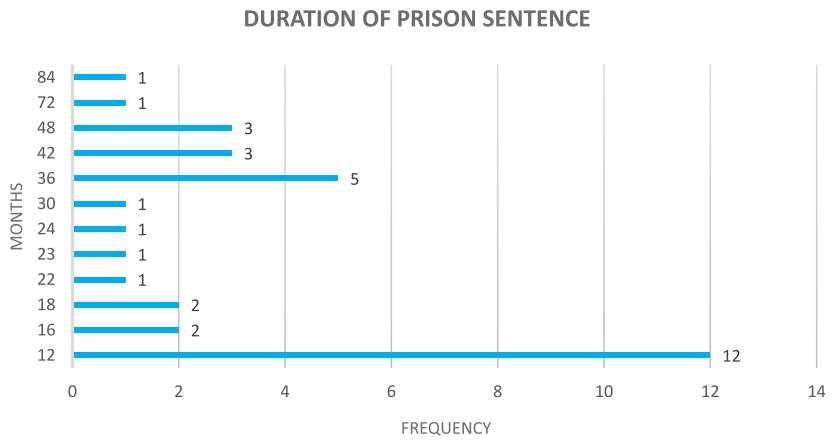

Figure 22. Duration of prison sentences in cases in BiH involving foreign terrorist fighting

In the case of *Prosecutor's Office of Bosnia and Herzegovina v. Enes Mešić et al.* (2016), in which seven defendants were convicted of "organizing a terrorist group" under Article 202d of the CC BiH, their sentences ranged from one year to three years imprisonment. The named defendant, Enes Mešić, received the longest sentence. Unlike the other defendants, he had communicated with ISIS field commander Bajro Ikanović, had previously spent significant time in Syria and had participated in combat, and had not returned to BiH willingly. In another case involving multiple defendants, in which four FTFs were convicted of the "unlawful establishing and joining foreign paramilitary or parapolice formations," their sentences varied from one year to three-and-a-half years in prison. Again, the longest term was imposed against the named defendant, Husein Erdić, who had planned and facilitated the departures of two of the other defendants to Syria (*Prosecutor's Office of Bosnia and Herzegovina v. Husein Erdić et al*, 2016). Similar sentences of three to four years in prison were imposed in the cases of a number of defendants who returned from the war theater in Syria and Iraq.

To date, the most severe sentences handed down in BiH in cases involving FTFs have been imposed against Jasmin Keserović and Husein Bosnić. Keserović, who was sentenced to six years in prison for "organizing a terrorist group" (Article 202d) and "encouraging terrorist activities in public" (Article 202a), spent a good deal of time in Syria involved in the activities of paramilitary formations including the Beit Commandos unit. Given the facts and circumstances of the

case, Keserović's sentence was proportional and met the purpose of punishment (*Prosecutor's Office of Bosnia and Herzegovina v. Jasmin Keserović*, 2021). Indeed, the Keserović judgment is an example of good practice in proving the case against an FTF and imposing appropriate punishment. But the caselaw is inconsistent; for example, Keserović was sentenced to three years for the offense of "organizing a terrorist group" while Senad Kasupović received a sentence of four years for the same offense in a modified second-instance judgment (*Prosecutor's Office of Bosnia and Herzegovina v. Senad Kasupović*, 2021).

The seven-year sentence imposed against Husein "Bilal" Bosnić was the longest in the cases under study. The Prosecutor's Office argued that Bosnić should be punished stringently not only because the criminal offenses with which he was charged are extremely serious, but because of his widespread influence as a radicalizing figure and the potential long-term security threat represented due to the spread of his extremist beliefs (*Prosecutor's Office of Bosnia and Herzegovina v. Husein Bosnić*, 2016). Importantly, the Court rejected the argument of the defense that it was these beliefs and Bosnić's movement on trial, and not the defendant himself.

Including these two lengthiest sentences, individuals convicted in BiH of crimes related to foreign terrorist fighting have faced sanctions averaging just over two years and three months (28 months) in prison; which is still below the statutory minimum in BiH and is less than half the EU average (Grebo and Rovčanin, 2020). If we remove the two significant deviations from the mean in BiH (the two longest terms, of six and seven years), the "true" mean – or the average when those deviations are not counted – is a mere one year and ten months (22 months) imprisonment. As highlighted in the discussion of plea agreements above, however, given the frequency with which the plea-bargaining process resulted in sentences of approximately one year for some FTFs, this should come as no surprise.

Prison term in months		
N	Valid	33
	Missing	2
Mean		27.79
Median		22.00
Mode		12
Range		72
Minimum		12
Maximum		84

Table 2. Duration of imprisonment in months in cases in BiH involving foreign terrorist fighting

Sentences imposed against FTFs in European countries and in the US have been much more severe. In France, for instance, Flavien Moreau was sentenced to seven years in prison upon conviction for joining a terrorist organization, after spending only ten days in Syria. When his brother, Nicolas Moreau, returned from Syria, he was also charged and convicted for activities related to his connections to a terrorist organization, and was sentenced to ten years imprisonment. Both brothers had criminal histories; Flavien had committed violent offenses in the past and Nicolas had been serving a five-year sentence when he converted to Islam in detention. In the final hearing on his sentencing, Nicolas claimed that the harsh sentence imposed by the court would make his reintegration into the community so difficult that he would have no choice but to re-join a terrorist organization (Pokalova, 2020).

In the UK, Ayman Shaukat was sentenced to ten years in prison on two counts of "preparing for acts of terrorism" based of digital evidence from his phone that included extremist content and messages, and the fact that he helped another man depart to Syria, though Shaukat himself never left the UK. The court gave little value to witness testimony regarding Shaukat's prominent and respected role in the community or the assertion of an imam that Shaukat's views were not extreme. The judge emphasized that the level of criminality of the offense was determined by the seriousness of the terrorist activity with which the defendant assisted or was complicit (Court of Appeal, 2016b).

Though sentences of between three and four years have been handed down by German courts in a number of cases involving FTFs – in line with the first sentence imposed on a defendant accused of foreign terrorist fighting in

Germany, when Kreshnik B. was sentenced in December 2014 to three years and nine months in prison for activities in Syria in 2013 – the German judiciary has also delivered much lengthier terms in some cases. In the case of Abdelkarim El-B., who was arrested at the German Embassy in Turkey and extradited to Germany, the defendant was convicted of joining a terrorist organization and committing a war crime, and was sentenced to nine years and six months in prison. An eleven-year sentence was also delivered in the case of Harun P., who joined Jabhat Al-Nusra in Syria. He was convicted of joining a foreign terrorist organization and of attempted murder (Pokalova, 2020).

Since 2014, a number of countries have prosecuted FTFs for mass atrocity crimes, hate crimes, and murder. However, according to Pokalova (2020), sentences in many of these cases have been more lenient than sanctions in some cases charging terrorism-related offenses alone. For the most part, longer prison terms remain atypical in cases involving terrorism and FTFs largely because the activities of defendants during their time in Syria or Iraq are so difficult to prove. Indeed, when evidence of these activities has been concrete, some of the longest sentences have been imposed, such as in the case of British returnees Yusuf Sarwar and Mohammed Ahmed, sentenced to 15 years and 3 months in prison for preparing a terrorist act. Photographs presented in court proved they had participated in combat and had prepared explosives, and both pleaded guilty. Their sentences reflected the indisputable evidence of their intent to commit murder, and as Pokalova (2020) explains, "in cases where proof of actual murder was available," courts have delivered the harshest sentences. In Belgium, for instance, Hakim Elouassaki received a sentence of 28 years for killing a prisoner in Syria. And in Sweden, Hassan al-Mandlawi and Al-Amin Sultan received life sentences for terrorist activities including two beheadings in Aleppo that were captured on video (Pokalova, 2020).

4.5.2. Non-carceral measures

Beyond imprisonment, fines have been imposed against some FTFs in BiH (i.e., replacing imprisonment with a fine),[53] and security measures have been ordered in some cases. Notably, the goal of security measures is not to punish, but to eliminate conditions and circumstances that may result in the repeated

53 In two cases, the prison sentence was replaced by BAM 23,000 (i.e. EUR 11,500) and BAM 36,000 (i.e. EUR 18,000), respectively (Azinović and Bećirević, 2017). But, it remains unclear how convicted in those cases were not able to afford the costs of the proceedings and the defense attorney, but were able to repay the sentences that were imposed below the legal minimum.

commission of a criminal offense (i.e., adverse prognosis); that is, to protect society from crime and actively support the reformation of the defendant (special preventive effect) (Datzer, 2021; more information in Babić and Marković, 2015).[54] Five defendants in BiH had objects confiscated from them as a security measure, and in all cases, the items seized included either digital devices or arms. A mobile phone with a Turkish SIM card and ammunition were confiscated from Safet Brkić; a semi-automatic rifle was confiscated from Mirza Kapić; ten hand grenades, a rifle, and ammunition from Ibro Delić; two mobile phones from Amir Haskić; and three mobile phones from Sena Hamzabegović (which were later returned because she was acquitted). It should be emphasized that the legislature did not foresee the need for security measures unique to defendants accused of crimes related to radicalization and violent extremism, which could be applied to FTFs. In an interview with researchers, a judge described this lack of specific regulation as problematic, remarking that "it is a pity the law does not lay down security measures that would be adequate to counter radicalization" (Interview, 17 May 2022).

The UK has implemented security measures tailored to countering terrorism and radicalization, and in the context of returnees from Syria and Iraq, these measures are triggered at first contact with the state. For instance, if authorities in the UK are notified that a British national and her child have been detained in Turkey, their identities are verified through DNA testing to establish their right to British passports; then, a series of measures can be activated to ensure protection of the public and the child, all the while encouraging the rehabilitation of the mother. First, a judge can issue a Temporary Exclusion Order, which specifies the route to be used to return the woman and child to the UK and imposes "obligations upon the individual [the mother] once they return." On arrival in the UK, as police undertake an investigation to determine whether criminal charges are warranted, the mother is required to report regularly to the police and authorities are involved to ensure the safety and welfare of the child. If police determine that charges should be brought, prosecutors will start proceedings, but if not, "the mother is assisted in reintegrating into society, for example, by requiring her to attend a series of sessions with a specially trained de-radicalisation mentor" (Government of the United Kingdom, 2018).

54 According to Article 69 of the CC BiH, these measures may include: mandatory psychiatric treatment; mandatory treatment of addiction; prohibition to carry out a certain occupation, activity or duty; and forfeiture.

In Germany, researchers found that special security measures were imposed infrequently in cases involving FTFs; however, German judicial proceedings tend to operate on a much faster timeline than those in other countries, which may somewhat reduce the need for certain measures. Judges in Germany manage trials and take the leading role in establishing the facts and questioning witnesses, and they do explicitly consider the rehabilitation and resocialization of radicalized defendants. For example, the process of truth-finding that judges undertake in cases involving FTFs or returnees includes an evaluation of a defendant's "prognosis for socialization" (Klosterkamp and Reuber, 2017). Further, when defendants in Germany engage in activities during pre-trial detention that are likely to facilitate their social reintegration, such as attending schooling, judges appear to consider this in assessing their personality, though they do not value it as a mitigating factor *per se* in sentencing.

4.5.3. Mitigating and aggravating factors

At the sentencing stage, the law in BiH stipulates that courts have discretion in considering various factors when determining sanctions, including the circumstances and motives of the defendant when perpetrating the offense(s) and any previous criminal history.[55] In cases involving FTFs, the Court of BiH has valued 32 mitigating factors and 10 aggravating factors overall, with an average of 5 mitigating and 2 aggravating factors influencing sentencing for these defendants (see Table 3, below). While at least one mitigating factor or one aggravating factor was considered in the case of every defendant, for some defendants, no mitigating factors (e.g., *Prosecutor's Office of Bosnia and Herzegovina v. Mehmed Tutmić*, 2017) or aggravating factors (e.g., Ibro Delić and Samir Hadžalić in *Prosecutor's Office of Bosnia and Herzegovina v. Enes Mešić et al.*, 2016) were valued.

55 Article 48 of the CC BiH sets out general sentencing rules. The court is obliged in paragraph (1) to impose a sentence within the limits provided by law, keeping in mind the purpose of punishment and all the circumstances affecting the severity of sentencing (mitigating and aggravating factors). In particular, these include: the degree of guilt, the motives behind perpetration of the offense, the degree of threat or injury to a protected good, the circumstances of perpetration, the past of the perpetrator, the personal situation of the perpetrator and their demeanour after perpetrating the criminal offense, and other circumstances related to the personality of the perpetrator. Paragraph (2) relates to the imposition of sentencing in the case of recidivism, and directs the court to take into special consideration whether the most recent offense "is of the same type as the previous one, [and] whether both acts were perpetrated from the same motive," as well as the period of time that has elapsed since previous conviction or since the sentence has been served or pardoned. According to paragraph (3), when a fine is imposed, the court shall consider the financial status of the perpetrator, including their salary, other income, assets, and family obligations.

		Number of mitigating factors	Number of aggravating factors
N	Valid	32	10
	Missing	3	25
Mean		4.53	2.10
Median		5.00	2.00
Mode		5	1
Range		7	3
Minimum		1	1
Maximum		8	4

Table 3. Frequency of application of mitigating and aggravating factors in cases in BiH involving foreign terrorist fighting

4.5.3.1. Mitigating factors

Figure 23 (below) shows the multitude of mitigating factors that were considered during sentencing in cases involving FTFs. Valued most often were family circumstances (here, distinguished from the factor of having children) and a lack of prior convictions, each in the cases of 16 defendants. The young age of a defendant at the time of perpetration was also considered in quite a few cases (15), as well as the fact that a defendant had entered a guilty plea (12).

Separate from other family circumstances, having children was considered a mitigating factor for ten defendants, while marriage was valued as mitigating for four.[56] Economic factors such as marginalization, unemployment, and indigency were found to be mitigating in some cases as well. Good behavior by a number of defendants during the investigation and trial phases was valued as mitigating, including their demeanor in court, expressions of remorse, cooperation with authorities, and contribution to the investigation of a crime. The earlier behavior of defendants, in proximity to perpetration of the crime, was also considered mitigating in several cases; for instance, if they had only attempted an offense, had chosen to return from the battlefield on their own volition or intended to never return, or their criminal activity was of a low

56 In some cases, the specific circumstances of being married or having children was cited as mitigating. But in other instances, referred to here as "family circumstances", it was found to be mitigating that a defendant simply had a family or was a "family man"; and often, court records offered little or no elaboration.

intensity and short duration. For several defendants, health issues and old age were valued as mitigating as well.

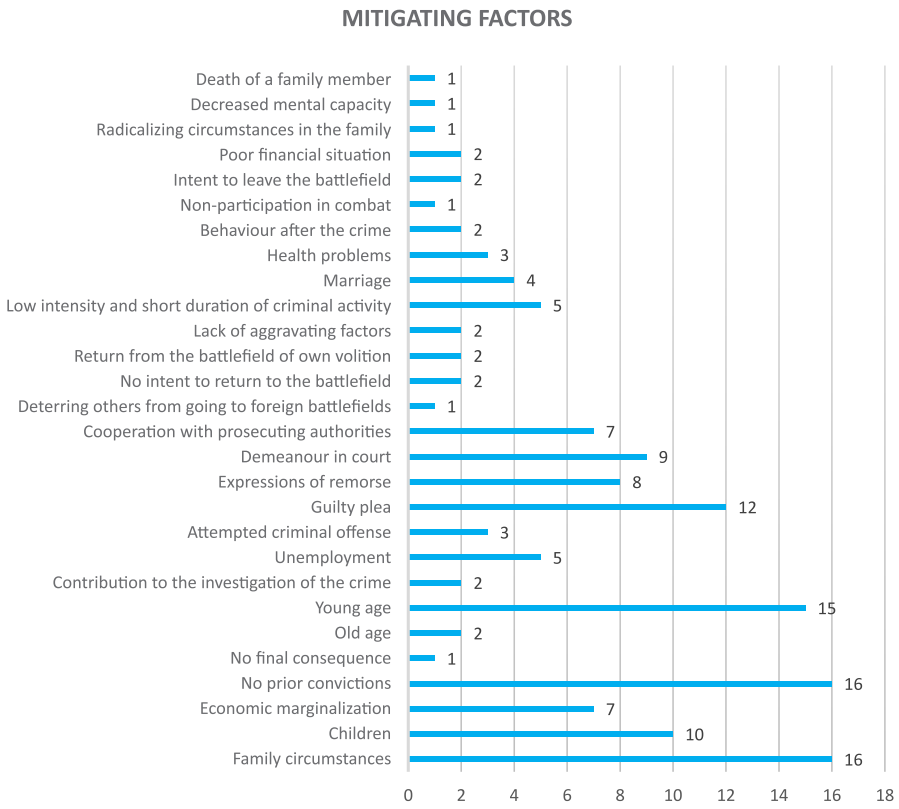

Figure 23. Mitigating factors in cases in BiH involving foreign terrorist fighting

According to the CC BiH (Article 48), the Court may consider "all the circumstances bearing on the magnitude of punishment," particularly: the degree of guilt, motives for perpetration, the severity of danger or injury to the protected good, the circumstances under which the offense was perpetrated, past conduct of the perpetrator, the personal circumstances of the perpetrator and their demeanor after perpetration, and "other circumstances related to the personality of the perpetrator." In sentencing reoffenders, Article 48 stipulates that the Court assess factors such as whether the recent and previous criminal offenses are of the same type or not and have the same motives or not, as well as the lapse of time between them. Yet, despite an obligation (see Article 290 of

the CPC BiH) to "specifically present the reasons which guided" it in deciding the effect of mitigating and aggravating factors on sentencing, judicial practice in BiH is such that verdicts rarely reflect any consideration of the authenticity of certain mitigating factors, like expressions of remorse. In fact, guilty pleas and statements of remorse are frequently valued as mitigating, with almost no discussion as to whether these gestures reflect genuine contrition.

This raises concerns that expressions of remorse arise from mere pragmatism on the part of some defendants, in order to receive more lenient punishment. In interviews for this research, a prosecutor underscored that "sincere remorse and cooperation deserve a lighter punishment" (5 May 2022), but a judge noted that the sincerity of remorse is hard to assess, as "it is a verbalization, not something to be established." While the prosecutor conceded that "nobody has a 'radicalometer' to measure how radicalized someone is" and to what extent their remorse is sincere, meaning that imperfect determinations may be made, the judge argued that remorse should not even be viewed as a mitigating factor in the cases of FTFs, nor should a lack of prior convictions or their proper conduct in court. Though a lack of prior convictions is often valued as mitigating, it should be noted that FTFs have rarely been convicted before, and this is especially true for those who joined terrorist groups in Iraq and Syria when they were very young. In these cases, a lack of prior criminality should not constitute a mitigating factor, but the age of the defendant and the circumstances of their young life should. Nonetheless, the judge acknowledged that "judges and prosecutors sometimes make compromises in order to meet the norm" (Interview, 17 May 2022).

On the other hand, this judge believes that "voluntary return should be valued as a mitigating factor" for FTFs, "but it is a sensitive and nuanced issue" (Interview, 17 May 2022). Indeed, just as credibility is difficult to evaluate in the context of remorse, the same is true of the expressed or apparent intent behind seemingly voluntary returns from the battlefield. Still, when defendants in BiH are found to have exhibited an intent to leave the battlefield, appear to have voluntarily returned from the battlefield, or have expressed a lack of intent to travel again to the battlefield, this has been considered mitigating by default.[57] As the Court has not examined intent in this context in detail, though, it remains unclear from court records whether a defendant's return to BiH resulted from a rejection of extremist beliefs, either generally or as it relates to justifications

57 Intent can only be considered when it is not a separate element of a criminal offense.

of violence, or was due to other factors, such as the fall of ISIS and Jabhat al-Nusra, poor living conditions in Syria, etc.[58] Research has found that FTFs have returned for a variety of reasons, ranging from the ideological to the practical, and including disappointment and disenchantment with ISIS, separation from family, the dangers of living in a combat zone, and the living conditions therein. Hence, researchers suggest that it is important to determine why individuals traveled to Syria in the first place, what they did there, and exactly why they returned (Duffy, 2018).

Arguably, some other factors considered by the Court as mitigating should not be valued as such. For example, when a defendant attempts but fails to commit a criminal offense, this is often valued as mitigating. Yet, an attempt is a stage of crime perpetration, not a specific circumstance under which the offense was perpetrated. Moreover, as a rule, the same circumstances should not be valued twice; meaning, if a defendant was tried for an attempted criminal offense or if the attempt is part of the body of the criminal offense, there is no need to value the attempt as a mitigating factor. According to a judge who was interviewed, "An attempt is an element of a criminal offense. The fact that there was no harmful consequence can be considered, but it cannot be valued as a mitigating factor" (17 May 2022).

Additionally, the agreeable demeanor of a defendant after perpetrating a criminal offense, their cooperation with prosecuting authorities, and their proper conduct in court should not be valued as mitigating, as this behavior is expected. Even following perpetration of a crime, compliance with applicable law should be presumed. Hence, this compliance should be considered only exceptionally, or not at all. The cooperation of a defendant with authorities may be considered mitigating when it helps to clarify the specific criminal offense and other crimes, but proper conduct before the court should be valued only in cases involving other defendants who exhibit *improper* conduct, in order to set an example for those defendants. Rewarding proper conduct in this way is essentially an incentive-driven approach, contrary to the previous punitive practice of charging contempt of court, used in earlier cases involving multiple

58 For some FTFs, the collapse of ideals in the "Islamic State" and an everyday life of terror and trauma, or simply the fall of ISIS and Jabhat al-Nusra, led to their genuine rejection of the idea of creating a state based in violent extremism, or playing any part in violence again. Whether returning from the battlefield should itself be viewed as a mitigating factor, however, must be decided on a case-by-case basis. The fact that a defendant joined and/or participated in the activities of a foreign terrorist formation should not be mitigated by having voluntarily returned or by asserting the will to abandon a foreign battlefield, except in cases where it can be established that these actions were linked to a deradicalization or disengagement from violence, and a rejection of extremism in beliefs and behaviours.

defendants. This may be particularly important in the case of FTFs, considering the cynicism with which extremist ideologies treat the judiciary and other democratic institutions. It is also unclear why a lack of aggravating factors was valued as mitigating in two cases; it would appear the purpose is to justify a reduced sentence, but such justification should have a legal and factual basis.

For many defendants, the Court found it mitigating that they had a family, were married, or had children (court records refer in some cases to family generally, and in some cases to marriage or children specifically). Yet, the fact that a defendant has children says little about their treatment of those children, and the same is true of a spouse or partner. And while the Court may frequently reason that the reliance of family members on the financial support of a defendant justifies shorter sentencing, in the context of radicalization and departures to foreign battlefields, having a family should only be valued as a mitigating factor in specific cases, and its weight should be minimal. Some of these defendants abandoned their families when they left BiH, some have disowned family members over ideological disagreements, and some sold their property and took their family members with them to Syria, exposing them to exceptionally traumatic experiences. These are family circumstances that should be valued as aggravating, or perhaps not valued at all, but should not be considered mitigating and should not be normalized or validated by the Court. As one prosecution investigator remarked in his testimony, "what struck me the most… [in the case of FTFs who traveled with family] is that someone decided to take their family to a foreign battlefield, where people die every day" (*Prosecutor's Office of Bosnia and Herzegovina v. Safet Brkić*, 2016, trial transcript, 17:14–17:34).

It is worth noting that, in the case of Husein Bosnić – who did not depart BiH but encouraged others to do so, and with their families – the Court valued the fact that the defendant has a family, and that he is married, as mitigating. This was despite claims that the defendant lived with four wives, which may itself constitute an offense; though, the defense team submitted evidence that he was formally and legally married only once (*Prosecutor's Office of Bosnia and Herzegovina v. Husein Bosnić*, 2015; 2016). Irrespective of any potential illegalities, the fact that Bosnić influenced many FTFs to abandon or reject family members, or take them to a foreign war zone, was apparently ignored by the Court, given that his role in radicalizing others was not considered an aggravating factor (see Azinović 2021a on Bosnić's role).

In cases involving FTFs, marital status may certainly be considered, especially as it relates to the motivation to travel to a foreign battlefield, because it is known that marriage (and thus the chance to start a family) were promised to many recruits in the process of radicalization. Hence, information about when a marriage occurred and the relations between spouses can be revealing in terms of establishing the motivation of an FTF. It is only with this information that it is possible to establish whether and how these facts may affect sentencing. However, the automatic valuation of the fact that a person is married as mitigating raises legitimate questions regarding the unequal position of single people, and those married by common law, within the judicial system. If a defendant's marriage is related to their perpetration of a criminal offense, it may be weighed. But as one judge commented – discussing the positive valuation in some cases of a defendant's status as a "family man" – "a family man should defend" their family, and when "children and families are taken to Syria; it should rather constitute an aggravating factor" (Interview, 17 May 2022).

A factor that is sometimes impossible to disentangle from broader family circumstances in cases involving FTFs, and which is frequently and appropriately valued as mitigating by the Court of BiH, is the young age of a perpetrator. Generally speaking, this should be considered a particularly mitigating factor, and the dynamics of radicalization within the family and community of defendants should be considered in each case. This can help clarify the causes and conditions of perpetration of the offense, and shed light on various personal circumstances that may reasonably be considered mitigating; unlike the mere fact of having a family, children, or a spouse (Interview with judge, 17 May 2022). The radicalization process is unique in each individual, but some extremists are exposed to indoctrination in the family long before they perpetrate a criminal offense, so information about the specific influences that led a defendant to develop extremist beliefs and behaviors, and at what age, can reveal crucial facts about the circumstances that led to perpetration. In the case of Jasmin Keserović, for example, the Court notes that "when he went to Syria, he was about 19; he was young and dropped out of school in order to pursue practicing religion in a different way, as he comes from a religious family, and with certain propaganda and other circumstances, this [led to] his decision to travel to a foreign battlefield" (*Prosecutor's Office of Bosnia and Herzegovina v. Jasmin Keserović*, 2021, §124). In other countries, Duffy (2018) notes that young age is always considered a mitigating factor in sentencing.

In several cases, defendants who were taken to Syria by family members cooperated with prosecuting authorities in BiH when they returned, sharing important knowledge about the Syrian battlefield. In such circumstances, a more lenient punishment can be considered, when it can be established that the defendant has rejected extreme beliefs (e.g., see the testimony of Almir Džinić in *Prosecutor's Office of Bosnia and Herzegovina v. Enes Mešić et al.*, 2016). According to a judge who was interviewed by researchers, "the departure of [some] people [to Syria] is not an expression of free will, but a combination of family and situational circumstances" (Interview, 17 May 2022). Indeed, for children who were taken to Syria, the best-case scenario was an upbringing marked by the severe trauma of incessant violence and war, but the frequent result was their radicalization.

In much the same way that the Court often considers family circumstances as mitigating, it also tends to value poverty and economic marginalization as mitigating. The inability of a defendant to cover the costs of a trial can confirm this circumstance; but this should by no means be valued as a mitigating factor in cases where it has been established during proceedings that the defendant financed their own departure(s) to Syria. In other words, a defendant exempted from the obligation to pay the costs of legal proceedings should not necessarily be considered indigent when the Court assesses mitigating factors.

In BiH, it is when defendants enter plea agreements that mitigating factors seem to be valued excessively, with far too much emphasis placed on particularly mitigating factors in some cases. A judge admitted as much to researchers, saying that "it can be difficult to find particularly mitigating factors" sometimes, leading the Court to "put some extra effort" into finding them (Interview, 17 May 2022). Still, a guilty plea and the remorse of a defendant as mitigating factors in plea agreements should be highly valued in sentencing, though it is generally not necessary to cite them as mitigating factors *per se*. The defendant has confessed and has expressed remorse through the plea agreement (whether that remorse was motivated by pragmatism or not), which was accepted by the Court, so their value as mitigating factors has already been mutually agreed and recognized. In other words, a defendant's cooperation with the prosecuting authorities, and other mandatory conditions, are assumed if a plea agreement has been entered, as is a motion to reduce punishment. If the Court accepted the plea agreement, it may not be necessary (or may be redundant) to cite guilt and remorse as mitigating factors.

If, however, particularly mitigating factors such as a guilty plea and remorse are valued, it would be useful for the Court to contextualize this by discussing the sentence a defendant would have received otherwise, and how these factors serve to reduce it. The Court should also explain how the conclusion of an agreement before the main trial, or after the main trial has already started, is valued, relatively speaking. The case of KN in the UK, is a good example of this. The defendant provided significant financial support to her husband, an FTF, and was preparing to send him equipment and supplies, knowing he was a member of a terrorist organization. He convinced her to engage other innocent people in their scheme, as intermediaries, through deception. Meanwhile, she used encrypted applications to communicate with her husband, with the aim of hiding his and her own activities. Over time, KN sought to distance herself from her earlier actions in support of terrorist activities, eventually pleading guilty to financing a terrorist organization and expressing her remorse. This reduced her sentence by 25 per cent, and the Court noted that this reflected the value of her early, but not *sufficiently early*, guilty plea (Woolwich Crown Court, 2018).

In the practice of BiH, the plea agreement and sentencing in the case of Almir Džinić is a good example worth highlighting. It was established that Džinić was taken to Syria at the age of sixteen, where he voluntarily left the battlefield. He cooperated with authorities upon his return and testified in other cases against FTFs. Moreover, he entered a guilty plea well before the start of his trial. Considering these circumstances, the evidence, and the established facts, the Court sentenced him to one year in prison.[59] It should be emphasized that factors valued as so mitigating as to reduce a sentence below the statutory minimum must be justified, as they constitute an exception to regular sentencing practice. This means that particularly mitigating factors deviate from the criminal justice framework and should not be a rule, but an option only where a restrictive interpretation of well-established factors exists.

The lenient sentencing seen in criminal cases in BiH involving FTFs is due in part to the valuation of particularly mitigating factors, but this should not be true in all the cases in which it was observed in court records (e.g., *Prosecutor's Office of Bosnia and Herzegovina v. Enes Mešić et al.*, 2016; *Prosecutor's Office of Bosnia and Herzegovina v. Mirel Karajić*, 2016). As the third-instance chamber asserted in the case against Osman Abdulaziz Kekić, it was inappropriate for

59 The Court has full discretion to reject a plea agreement due to a disproportionate sanction, and is not bound to seek reasons to accept an agreed sanction below the statutory minimum.

the second-instance chamber to consider factors such as the defendant's family circumstances, proper conduct during criminal proceedings, and a lack of prior convictions as particularly mitigating (*Prosecutor's Office of Bosnia and Herzegovina v. Osman Abdulaziz Kekić*, 2018). A sentence must be an individualized; but it must also be proportionate, must represent a social-legal condemnation of a criminal offense, and must be purposeful. Hence, sanctions that fall below the statutory minimum should not be imposed outside of the most exceptional cases.

When it comes to establishing the circumstances that led to the perpetration of crime related to travels to foreign battlefields, the case of British national Alexanda Amon Kotey (2022), prosecuted in the US, is an example of good caselaw. During proceedings, a statement from Kotey was read, and findings were entered into evidence about his birth, childhood difficulties in his family and community, the family's economic deprivation and social marginalization, his father's death, his mother's struggle to support the family and provide parental guidance despite many obstacles and challenges, and a community where the rate of crime and violence was high. All of this influenced the life choices of the defendant, who was already close with his uncle – a career criminal – before he gradually began committing drug-related crimes himself, in adolescence. Although Kotey attended school consistently and received average grades, his conduct in the classroom was problematic and he was prone to physical fighting, for which he attended counseling and behavioral therapy. Though Kotey consumed marijuana, and experimented with cocaine and ecstasy, he successfully completed his high school education. Then, late in adolescence, Kotey had an experience at a nightclub that led him to question his own life and lifestyle. He had been raised in Orthodox Christianity, but without consistently practicing or attending church, and he began to study alternative religions. He found that Muslims with whom he interacted seemed to form close bonds with each other and had many of the positive qualities he felt were missing in his life. So, at the age of 19, Kotey converted to Islam.

Over time, Kotey abandoned his criminal behavior and stopped abusing drugs and alcohol, but also developed extreme beliefs. Eventually, he fell under the influence of Salafist figures and interacted with former foreign fighters who had returned from the battlefield in Afghanistan. As he studied Salafist practices and teachings, he became motivated to join the fight against unjust attacks on Muslims around the world. Thus, in 2012, Kotey left London for Syria.

There, he would participate two years later in the kidnappings of four American citizens that culminated in their murders.[60] Although Kotey did not personally witness the killings, he contributed significantly to the widespread abduction campaign ISIS undertook. He arranged payments for the release of abducted people, filmed them, and obtained information from them, largely through their ill-treatment. Kotey entered a plea agreement and received a sentence of five life terms in prison, but while he was convicted of the most serious crimes, the court found that minimum measures were justified due to his proper conduct and personality. The sentencing judgment also discusses facts about his family, including that Kotey has one adult daughter and three minor daughters with a woman he met in Syria, that he tries to maintain contact with them and play a fatherly role, and that he has regular contact with his emotionally supportive mother and stepfather.

To date, no defendant tried in BiH is known to have committed crimes of this magnitude in Syria; but the detail of the Kotey judgment should nonetheless be a model for the Court and judges should strive in every case to offer a clear and comprehensive narrative of the causes for and circumstances of a defendant's perpetration. This is important to developing practice in this area, and will help inform sentencing decisions, but understanding defendants in this way will also support the implementation of appropriate and effective extrajudicial interventions. As one judge told researchers, in cases involving departures to foreign battlefields, not all defendants should be "locked up in penal institutions... [as BiH] should integrate them into society." To do that, the Prosecutor's Office must have "broader powers" and an expanded scope of possible sanctions written into the law (Interview, 17 May 2022), and judges must understand the needs and motivations of defendants as fully as possible.

In Europe, all courts are advised to consider all the factors relevant to assessing appropriate and proportionate penalties. This includes evaluating factors of vulnerability, such as age, impaired mental health, intellectual disabilities, or the relative positions of perpetrator and victim. These factors may need to be considered in order to determine whether it is even appropriate to prosecute in some cases, and if so, how certain defendants should be punished most appropriately.

60 Kotey, who has a British accent, was one of the four ISIS members referred to by these American captives as the "Beatles".

4.5.3.2. Aggravating factors

In contrast to the number of mitigating factors considered in the cases under study, the frequency with which aggravating factors were valued by the Court was minimal. Figure 24 (below), showing the factors valued as aggravating in cases involving FTFs, makes this clear, as it charts both fewer factors overall and a much lower frequency of their application in individual cases. For four defendants each, a lack of remorse or their long membership in a terrorist organization were considered aggravating; and for three each, the persistence they showed in perpetrating the offense or the fact that their return from foreign battlefields resulted from being captured (by Kurdish forces) was valued as an aggravating factor. In a handful of cases, prior convictions, the defendant's high degree of guilt, participation in a terrorist organization, arranging for others to travel to a foreign battlefield with their families, planning a trip to a foreign battlefield, and an attempt to return to a foreign battlefield were also considered aggravating by the Court.

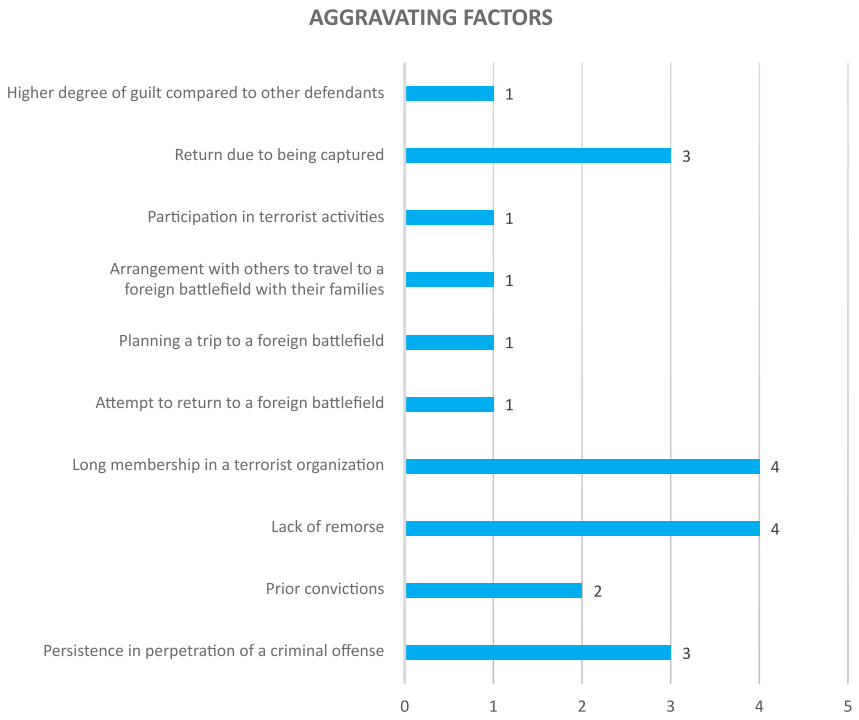

Figure 24. Aggravating factors in cases in BiH involving foreign terrorist fighting

Aggravating factors must be directly connected to the criminal offense in question.[61] For example, a defendant's intent and contribution (e.g., agreement with others to travel to a foreign battlefield) should be considered only when it is not a special element of the offense. Similarly, given that a factor such as remorse is a response to an offense in its aftermath, it should be considered minimally or not at all in the context of factors valued as aggravating. To the extent that a lack of remorse is viewed as aggravating in a given case, it should be linked to a persistence of extremist beliefs with a tendency towards violence, which can be determined through the findings and opinions of experts (e.g., clinical psychologists, social psychologists, and experts in terrorism and violent extremism). Even then, the degree to which a former extremist has maintained or abandoned the ideals that drove earlier criminal behavior can be very difficult to establish; and in the worst-case scenario, radicalized defendants reject democratic values and institutions (i.e., the legitimacy of the Court) and remain open to carrying out the same or similar (illegal) acts again, if the chance arises.

The case of Husein Bosnić is a good example of this kind of criminal persistence and lack of remorse. Bosnić showed a particular lack of remorse towards the parents of children who, after being radicalized by his rhetoric and recruitment efforts in BiH, died on Syrian battlefields. Remorse should never be assumed, but especially not in the case of defendants with the psychological profile of some of the FTFs who have appeared before the Court of BiH.

In some cases, lenient sentences were imposed even when aggravating factors were cited by the Court, including criminal persistence and contempt of court. While legal practice does not fully clarify what persistence actually means in the context of specific offenses, it seems as though the Court viewed the duration of a defendant's stay in Syria as evidence of persistence in these cases. Yet, the length of time someone spent in Syria does not necessarily translate directly to their greater persistence in perpetrating crime, given the wide variety of reasons people traveled to, stayed in, and left Syria. For instance, many individuals were captured and detained by Kurdish forces for a long period of time (e.g., one to two years), and it is possible that much of their stay in Syria or Iraq was not linked to terrorist activity. Instead, it is more relevant to examine the question of persistence as a function of radicalization and mobilization or support for foreign terrorist formations. To that end, it is useful to consider the means by

61 Unlike mitigating factors, aggravating factors should be linked to the specific criminal offense, and not to the behavior of a defendant following perpetration of the crime.

which a defendant was radicalized as well as the depth of their radicalization, and how that is reflected in their preparations for departure and/or participation in combat or terrorist activities, rather than the time they spent in a certain part of Syria.

Disrespect for the Court may itself indicate persistence as it relates to the radicalization of some defendants. As noted above, extremist ideologies tend to reject the legitimacy of democratic institutions, and while inappropriate behavior before the Court should not be tolerated in any instance, it is important to insist on adherence to courtroom norms in cases involving FTFs. Some defendants in these cases have been removed from the courtroom for refusing to stand when the judge enters (*Prosecutor's Office of Bosnia and Herzegovina v. Enes Mešić et al.*, 2016), but this has not been linked to the ideological persistence of extremist beliefs in the defendant, and thereby to the criminal offense. Thus, it should be noted that the goal of many individuals who join terrorist groups or support their activities is to disrupt the democratic order. In this sense, disruptive behavior during a trial represents a continuity of violent extremist beliefs that relate to the psychological causes of crime perpetration. Such behavior is therefore very much linked to the criminal offense and is quite reasonable to value as aggravating.

The plea hearing of Mehmed Tutmić is illuminating in this context (*Prosecutor's Office of Bosnia and Herzegovina v. Mehmed Tutmić*, 2016). Upon entering the courtroom, the judge found the defendant sitting and asked about the reason for his non-compliance with the rules. Tutmić responded that, as a Muslim, he was prohibited from standing. The judge issued a warning, citing the stipulation of the CPC BiH that "everyone must stand up at the bailiff's call," and told the defendant that if he refused to stand again, he would be expelled from the courtroom. When Tutmić did not stand during identification, the Court asked once more for an explanation, to which the defendant replied: "It's not that I refuse, I cannot stand up." The judge pressed Tutmić as to how he had gotten to the courtroom if this was indeed true, and questioned whether his assertions of a religious prohibition to standing in the courtroom had something to do with his condition. The defendant claimed he was obliged to stand only in the context of Islamic prayer, and the following exchange ensued:

Judge: "You are not attending a prayer here."

Tutmić: "I am, in life. You are denying my fundamental right. I cannot, I must not... I cannot and must not trample on what is older than me and you; the Lord of all worlds. You are denying me my right as a Muslim."

Judge: "You are switching up the thesis. You are not on trial for being a Muslim, but for being a member of a terrorist group."

Tutmić: "Because somebody made that up [about me]."

Judge: "I really don't know that."

Tutmić: "If I may get my right to honor Allah Ta'ala."

Judge: "Nobody is denying you that right... I am simply telling you to stand up when they call [your name]."

Tutmić: "I don't want to."

Judge: "Leave the courtroom; take him out" (plea hearing, 0:10–04:05).

Just as the Court should assess the persistence of a defendant's extremism, it should assess the persistence of a defendant's criminality. Among cases involving FTFs, of the five defendants who had prior criminal records, previous conviction was valued as an aggravating factor for two of them. Court records contain scarce information on the criminal history of defendants, though, and this should be used as an aggravating factor only in cases where similar or related offenses are charged, or the same motives have been established. Further, the lapse of time since any prior conviction, and whether a defendant served their sentence or was pardoned, should be taken into account. And, while it is important to determine whether a defendant is in fact a career criminal; in the case of very young defendants, prior convictions should be valued as aggravating only minimally, or not at all.

For some FTFs, especially those who come from marginalized and dysfunctional family and social backgrounds, and even those who have a criminal history, one of the paradoxes of the radicalization process is that it tends to transform the potential threat they represent to society. In other words, they are no longer at a risk of committing "garden variety" ("conventional") crimes, or at least those

defined as such in Sharia law (e.g., theft, drug crimes, etc.), but may become more likely to commit violence linked to their extremist beliefs. This elevates the importance of reintegration for FTFs. According to psychologist Renata Krstmanović, "the danger [they pose] is greater when they get out of prison, because of the stigma and marginalization" associated with their crimes, in wider society (BIRN, 2017). A prosecutor affirmed this in an interview with researchers, and noted that most of these defendants come from "closed environments" where a collective extremism prevails, and that when they return to these communities (or social networks), it is easy for them to fall back into an ideology of violent extremism (Interview, 6 May 2022). This is even more true when individuals do not have the whole-of-society support they need to reintegrate and resocialize.

4.5.4. Correlations between mitigating and aggravating factors and sentence duration

In an attempt to understand specific correlations between mitigating and aggravating factors and the duration of prison sentences imposed in cases involving FTFs, researchers conducted a correlation analysis. Only correlations between each factor and the length of prison terms were observed, not the relationship between mitigating and aggravating factors. Table 4 (below) shows a simplified overview of the most significant correlations.[62]

Having children, being married, exposure to a radicalizing environment in the family, decreased mental capacity, and the death of a family member were all valued as mitigating, and are factors very negatively correlated with the duration of prison sentences; meaning, they greatly reduced imprisonment.[63] As discussed earlier, family circumstances – including the fact that a defendant has children or is married – must be considered in context and with caution at the sentencing stage, because processes of radicalization and departures to foreign battlefields affect entire families, almost always in adverse ways. Hence, the strong correlation observed here between the mitigating factors of having

62 To make the data more accessible to a wider audience, the table presents just these significant correlations. In column 2, the Pearson correlation indicates the correlation strength, which may be none or weak ($rpb < 0.3$), medium ($0.3 < rpb < 0.5$), or strong ($rpb < 0.7$). The Sig. label indicates a statistically significant correlation where the probability value is less than 0.05; and here, all values are less than 0.01. In other words, the results indicate the existence of a correlation. Finally, the analyzed sample (N=62) includes first-instance, second-instance, and third-instance judgments.

63 Positive correlations indicate a relationship between two factors that follows the same trajectory. As one value increases, the other rises as well; and as one value decreases, so does the other. Negative correlations indicate the opposite, or a relationship that diverges. As one value increases, the other declines; and as one value decreases, the other value rises.

children or being married and shorter sentencing may indicate punishment that is disproportionate to the crimes perpetrated.

Factor valued in sentencing		Months in Prison
Mitigating factor: children	Pearson correlation	-.588*
	Sig. (2-tailed)	.000
	N	53
Mitigating factor: marriage	Pearson correlation	-.430*
	Sig. (2-tailed)	.001
	N	53
Mitigating factor: radicalizing environment within family	Pearson correlation	-.471*
	Sig. (2-tailed)	.000
	N	53
Mitigating factor: decreased mental capacity	Pearson correlation	-.471*
	Sig. (2-tailed)	.000
	N	53
Mitigating factor: death of a family member	Pearson correlation	-.471*
	Sig. (2-tailed)	.000
	N	53
Aggravating factor: criminal history	Pearson correlation	.598*
	Sig. (2-tailed)	.007
	N	19
Aggravating factor: lack of remorse	Pearson correlation	-.790*
	Sig. (2-tailed)	.000
	N	15

*Correlation is significant at the 0.01 level (2-tailed)

Table 4. Correlation between mitigating and aggravating factors and duration of sentence in cases in BiH involving foreign terrorist fighting

Other circumstances related to the family, such as a radicalizing home environment, were rarely valued as mitigating, but were appropriately correlated with more lenient punishment. The infrequency with which this was apparently considered may indicate a need to more thoroughly examine the genesis of criminal offenses involving FTFs during criminal proceedings, to inform sanctioning decisions. Reduced mental capacity and the death of a family member in the perpetration of a crime are also factors that were reasonably valued by the Court as mitigating. These findings show that more

lenient sanctions are associated with specific mitigating factors, in some cases justifiably and in others, less so. For this reason, any mitigating factors, but especially those related to family circumstances, should be weighed with a particular diligence when it comes to sentencing.

Surprisingly, the factor found to be correlated with the greatest reduction in prison sentences in these cases was an *aggravating* factor, a lack of remorse. At first glance, it may be hard to imagine how and why this would correlate so negatively with sentence duration; and because this analysis examined mitigating and aggravating factors in isolation, the findings do not answer these questions. But it must be assumed that in the four cases where lack of remorse was valued as aggravating, other mitigating circumstances also existed and outweighed the impact of this aggravating factor on sentencing. As noted earlier, however, a lack of remorse should not be valued as aggravating in the first place, as it is not a circumstance of the offense but a response to the offense *ex post facto*. Moreover, it may be naïve to expect genuine remorse from most violent extremists. A majority of FTFs continue to hold beliefs and promote ideological perspectives that deviate from democratic norms, and it is rarely through criminal proceedings that these beliefs and perspectives are changed. This is why it is so important to arrive at the appropriate combination of penal measures and extrajudicial mechanisms in each case, to hopefully foster a transformation of beliefs in individuals who have been charged with crimes related to foreign terrorist formations.[64]

The other aggravating factor that had a significant impact on sentence durations in cases involving FTFs in BiH was a defendant's prior convictions, and as one may expect, this was found to correlate to more stringent punishment. As Table 4 shows, this is the only factor among those with the most significant correlations that had the effect of increasing the length of a defendant's prison term, and quite considerably in some cases. Yet the question of prior convictions remains a sensitive one in the context of FTFs, few of whom have a criminal history, much less prior convictions for charges related to or similar to those facing defendants in these cases (e.g., terrorism and mass atrocity crimes).[65]

64 For the special preventive effects of punishment to have a practical meaning, there should be a systemically coordinated approach to rehabilitation and reintegration (see Radicalisation Awareness Network, 2016ab).

65 Notably, in a number of cases involving FTFs in the German courts, a *lack* of criminal history has been valued as mitigating. Conversely, previous convictions tend to be valued as aggravating by default in Germany, but are given less value if they are unrelated to the current charges.

4.5.5. Satisfying the purposes of punishment

Criminal law theory suggests that it is necessary to integrate retribution, general prevention, and special prevention in practice (Bojanić and Mrčela, 2006; Cvitanović, 1999).[66] To that end, the CC BiH stipulates in Article 39 that the purpose of punishment is to express community condemnation of the criminal offense; deter future perpetration on the part of an offender and encourage their rehabilitation; deter others from perpetrating criminal offenses; and contribute to public awareness of "the danger of criminal offenses and of the fairness of punishing the perpetrators." In every case involving FTFs in BiH that has reached the sentencing stage, the Court has briefly stated that the purpose of punishment is general and special prevention, but no further explanation of the purpose of punishment is offered in most cases. Court records indicate, however, that punishment mostly satisfies the negative and positive dimensions of general prevention, as well as the negative dimension of special prevention to some degree (see Datzer, 2021 on the dimensions of special and general prevention).

When it comes to general prevention, it seems the aim of the Court is to influence the awareness and accountability of citizens, and to strengthen confidence in the system (positive general prevention), but also to deter citizens from committing criminal offenses (negative general prevention). Yet, it is hard to say what message is conveyed to the public by a sentencing policy that has been extremely lenient in practice, and moreover, what this communicates to other extremists. While it is possible that the leniency observed in sentencing in BiH, especially based on comparisons to terms imposed in terrorism-related cases abroad, stems from the specific contexts surrounding FTFs from BiH and criminal procedural differences, the Court should explain the purpose of punishment more thoroughly in each case. This would send a clearer message to the public regarding both the positive and negative dimensions of general prevention, which certainly include not only deterring the perpetration of crime but also condemning extremism and its impacts on BiH.

Importantly, Datzer (2021) argues that deterrence by punishment alone is ineffective, both because it does not necessarily lead people to fear being caught for another offense in the future, and because the punishment for many crimes is not enough to outweigh the possible benefits of committing further offenses. Simply put, punishment must be combined with truly rehabilitative

66 Also see Datzer (2021) on penalties and punishment as a policy to combat crime.

programming to be *preventive*.[67] Indeed, other research confirms that even lengthy and severe prison sentences lacking adequate programming have no positive effect on extremist beliefs and preventive outcomes (Entenmann, 2015; see Walkenhorst, et al. 2020). This is why the Court must, as one judge put it, "account [for] personal circumstances and avoid clichés and the tendency to [want to] punish everyone," and should keep in mind that "everyone is different" (Interview, 17 May 2022). At the same time, when rehabilitation programming aimed at disengagement and other meaningful approaches to the resocialization of FTFs are not operational (Metodieva, 2021), it seems the only purpose of special prevention is to protect society from offenders. While justifications for negative special prevention can be seen in a decline in terrorist activities and organizations in Syria and Iraq as well as the fact that terrorism-related criminal offenses are now assumed by perpetrators to be met by prosecution and imprisonment, the practice of the Court of BiH in case involving FTFs cannot be said to satisfy the positive dimension of special prevention.

The short imprisonment of Emin Hodžić for the offense of joining a foreign paramilitary organization is an example of a failure in the sentencing policy in BiH and clearly did not satisfy the special preventive purposes of punishment. After being released from prison, Hodžić was arrested when officers carrying out a vehicle inspection found military-grade weapons including two automatic rifles, a shoulder-fired missile, three hand grenades, an unknown explosive device, and two assault vests (Radio Sarajevo, 2017). Another case that stands out in this regard is that against Enes Mešić et al., in which the Court imposed extremely lenient sentences that were mostly below the statutory minimum, much like those negotiated through plea agreements. The evidence presented in this case, combined with the unlawful behavior of defendants during trial, raises questions as to why such lenient sentencing was found to be adequate given the rigid extremist beliefs openly on display in the courtroom (*Prosecutor's Office of Bosnia and Herzegovina v. Enes Mešić et al.*, 2016). When punishment appears to be disproportionate to a crime in this way, it casts additional doubt on whether the special preventive purpose of punishment has been met.

It is important to highlight, too, that BiH is not without examples of good practice in achieving the purpose of special prevention; even in some cases

67 There are any number of good practices that can be adapted to meet specific resocialization and reintegration needs (see Radicalisation Awareness Network, 2019), as well as opportunities to create innovative programming that is unique to the context and political and cultural character of BiH (see Radicalisation Awareness Network, 2016ab, 2018).

where sentences fell below the statutory minimum. In the case of Fikret Hadžić, for instance, the defendant returned to BiH and deterred others from traveling to foreign battlefields, and expressed consistently and convincingly that he was very "disappointed with his own actions" (BIRN, 2017). This has also been true for some defendants who joined terrorist groups as minors or very young adults, and three cases involving minors stand out as examples of good practice. Almir Džinić, who was taken to Syria as a sixteen-year-old, joined a paramilitary formation there but soon voluntarily returned to BiH; at the age of 18, he was prosecuted, pleaded guilty, and was sentenced to one year in prison (*Prosecutor's Office of Bosnia and Herzegovina v. Almir Džinić*, 2016). Hamza Labidi was also taken to Syria by his family, as a fifteen-year-old, and returned to BiH when he was 22, where he was sentenced to one year in prison as the result of a plea agreement (*Prosecutor's Office of Bosnia and Herzegovina v. Hamza Labidi*, 2021). In both of these cases, age was appropriately valued as a particularly mitigating factor due to the specific circumstances in which the defendants were raised, including their exposure to extremism in families that settled in territory controlled by a terrorist organization, and shorter sentences are thus justified. Finally, the acquittal of Jahja Vuković – who was taken by family members to Syria as child, was said to have adopted extremism only as a matter of survival within his family and community, and was underage at the time he perpetrated the offense charged – was reasonable as well (*Prosecutor's Office of Bosnia and Herzegovina v. Jahja Vuković*, 2021).

It should be noted that there are some nuanced differences in the purpose of punishment, as stated by the Court, in cases of homegrown terrorism versus those involving FTFs. For instance, in the case against Mevlid Jašarević, who sporadically fired an automatic weapon at the US Embassy in Sarajevo for nearly an hour in 2011 and injured a policeman, the Court of BiH very clearly stated in the sentencing stage that its purpose in imposing sanctions (and much more stringent ones than have been imposed against FTFs) was to demonstrate via penal policy that the state will protect its citizens from terrorism. It argued that this should primarily be achieved through individual deterrence that could "sufficiently affect the Accused's understanding... of religious beliefs, cultural and democratic values on which the state of BiH is established... as well as to become aware of the detrimental consequences of any type of extremism." The Court also highlighted the need for general deterrence in light of multiple cases of terrorism pending before the judiciary, and though it was considered mitigating that Jašarević was young at the time of perpetration, was poorly

educated, and had likely been indoctrinated by extremist figures in the Salafist community, he was nevertheless sentenced to 18 years in prison. The danger to society would be too great, the Court reasoned, if "the state gives way to extremism" (*Prosecutor's Office of Bosnia and Herzegovina v. Mevlid Jašarević*, 2012). After appeal, his sentence was reduced to 15 years, which the second-instance court argued "adequately reflects the gravity of the crime" (*Prosecutor's Office of Bosnia and Herzegovina v. Mevlid Jašarević*, 2013).

However, in the case of Husein Bosnić, who was a much higher-ranking extremist figure than Jašarević and responsible for the radicalization of many vulnerable individuals and their recruitment as FTFs, the Court imposed a sentence of just seven years (*Prosecutor's Office of Bosnia and Herzegovina v. Husein Bosnić*, 2015). The Court rejected the arguments of the defense that the defendant's beliefs were on trial and the proceeding was politically motivated, and emphasized the general preventive dimensions of punishment, noting that every individual in BiH should be deterred from breaking the law and the state must intervene and protect its citizens from criminal offenses, including those related to terrorism. This can represent good judicial practice; yet, considering the degree to which Bosnić exploited the trust of his followers and his position of authority, it is curious that no greater priority was given to individual deterrence in this case, especially when contrasted with the punishment and reasoning in the Jašarević case. While sanctions should of course be individualized, the Bosnić case and others examined in this study indicate that previous judicial practice in the sanctioning of criminal offenses related to terrorism in BiH has been abandoned in favor of a more lenient sentencing policy for offenses related to foreign terrorist fighting.

Among legal practitioners in BiH, there is some disagreement regarding the extent to which general prevention has been effectuated by punishments imposed in cases involving FTFs. Some practitioners believe the goals of general prevention have been met, and beyond, citing the fact that acts related to foreign terrorist fighting have been criminalized since 2014 and FTFs were prosecuted when the "Islamic State" was at its peak of territorial control in Syria and Iraq. By incriminating, prosecuting, and punishing FTFs, they argue, the purpose of general prevention has been satisfied. On the other hand, some practitioners contend that this incrimination, prosecution, and punishment has been completely irrelevant in the context of general prevention because legal proceedings have no practical influence over defendants who, on an

ideological basis, reject the laws or institutions of BiH. In reality, both can be true, depending on individual perceptions of incrimination, prosecution, and punishment in these cases. A good example of this is the testimony of Ramiz Ibrahimović, who transported defendants Nevad Hušidić and Merim Keserović from Zenica to the Sarajevo airport to buy plane tickets, in their effort to (try to) join a terrorist organization in Syria or Iraq. During the ride, Ibrahimović asked Hušidić and Keserović if they were in fact planning to travel to Syria, and though they denied this, he warned them anyway: "don't risk it... because you may be held liable" (*Prosecutor's Office of Bosnia and Herzegovina v. Husein Erdić et al.*, 2015, closing arguments hearing, 33:43–34:03). In other words, even some individuals who are ideologically motivated to support FTFs or the activities of terrorist organizations may be restrained from some acts by a desire to avoid contact with judicial (and other) authorities.

Court records do not include any specific discussion of the efficacy or inefficacy of the special preventive effects of punishment. According to Cvitanović (1999), special prevention should be the primary purpose of punishment, as opposed to general prevention, in imposing individualized sanctions. Yet, given the limits, both legally and practically, to the sanctions that can be imposed in cases involving FTFs, it is arguably difficult to justify sentencing through the lens of special prevention. Research conducted in prisons and during post-penal treatment shows, for instance, that the rehabilitation potential for perpetrators of crimes related to armed conflicts is extremely weak (e.g., Buljubašić, 2019b). When the special preventive effects of imprisonment have very little or no influence on an individual (Ritchie, 2011), these effects will not only fail to induce any personal transformation, but worse, imprisonment itself is likely to significantly increase their risk of reoffending (Nieuwbeerta, Nagin, & Blokland, 2009).

Research suggests that disengagement from extremist beliefs is improbable to impossible without adequate support from, and for, the families and communities to which a convicted person returns; and without ensuring access for those persons to sufficient treatment for challenges (e.g., psychological) they face independent of other external factors (Delves and Norfolk-Whittaker, 2013). For this reason, a judge underscored that "punishment in itself will have no influence without the work of the community... this is about radicalization, which is a greater danger than participation in a war. The court cannot expect to achieve the special preventive effects of punishment, so the state [through

extra-judicial mechanisms] must deal with it... we cannot look at the complexity of this social phenomenon and delude ourselves into believing that the judiciary is the one [institution] that solves this problem" (Interview, 17 May 2022). The caselaw in BiH does include some interesting and useful approaches to this dilemma, such as in the case of Jahja Vuković, wherein the judge asked an expert witness in neuropsychiatry for her recommendations of any extrajudicial means by which Vuković could be treated for trauma and other mental health problems (*Prosecutor's Office of Bosnia and Herzegovina v. Jahja Vuković*, 2021, main trial). This is an example of good practice and sensitivity on the part of the Court in a case involving a defendant whose development was hindered as a minor by the trauma of living in a warzone and whose wellbeing was thus undermined. In such cases, the possibility of achieving special preventive effects outside the scope of imprisonment should be considered, in order to best meet the purposes of punishment.

In nearly every case that was examined for this study, the Court failed to indicate the specific goals it sought to achieve through its punishment of FTFs. Stating simply that the purpose is general and special prevention, without a concrete explanation justifying the punishment imposed on individual defendants, does not represent good practice. Further, there appears to be a negative consistency in sanctioning across trials; meaning that trials in cases involving FTFs do not follow up on or develop existing practice, except when it comes to the frequent use of plea agreements and a lenient sentencing policy. Nevertheless, trials constitute the seeds of a legal practice unknown so far and a caselaw yet to be written. The findings and opinions presented in this study should thus be viewed not as a critique, but as an opportunity to improve the work of the judiciary in future cases.

5. CONCLUSION

In BiH, the first chapter is now closed on trials involving FTFs, but more criminal proceedings are expected as the remaining contingent of former fighters and their families return from Syria and Iraq. While trials conducted to date have fulfilled the retributive purpose of criminal proceedings, it is clear that extrajudicial sanctions and reintegration mechanisms within communities are key to satisfying the preventive purposes of punishment. As these have yet to be developed to the extent necessary, the Court and prisons are left to shoulder more of the burden for rehabilitating offenders in these cases than other institutions.

This study revealed a tendency within the Court, and among prosecutors and defense attorneys, to specialize in cases involving FTFs. This kind of specialization should be encouraged so that judicial professionals with the most experience in these cases, which are complex from an investigative standpoint and highly specific in terms of concepts and circumstances, can develop the practice in this area. Importantly, the gender representation of those in the courtroom during trials also carries a unique weight in cases involving FTFs, in light of the tendency for many of these defendants to cling to extremist ideologies that subordinate and discriminate against women and girls. But the Court must also consider how its own gender biases may impact decision-making in cases related to foreign terrorist fighting, as this research showed that only men have faced punishment in BiH for these crimes, even though there have been a significant number of women among returnees from Syria and Iraq.

The fact that no specific evidence of contributions by women and children returnees to terrorist organizations has been uncovered so far does not mean that criminal proceedings against women should be rejected *a priori*. Still, in deciding on criminal proceedings and possible sanctions, their justification and the potential to facilitate resocialization through extrajudicial mechanisms should be considered, in every case.

For the most part, the defendants in the cases under study were married and socio-economically marginalized. Many were unemployed or had low incomes, despite having completed a secondary education. Some had completed only a primary education or had no education because they were taken to Syria as children or adolescents. Only a few were university educated, and these defendants often played an organizational role in the offenses charged against them. Interestingly, very few of these individuals had any criminal history prior to committing crimes related to foreign terrorist fighting. For many, their criminality emerged quite late, which reflects the fact that radicalization can occur in anyone at any age.

While the affiliation of defendants to specific terrorist formations, the hierarchy within these formations, and the role of defendants within them were not established in trials, this is hardly surprising given the nature of these cases. Investigations into the criminal offenses with which FTFs have been charged are complicated, and conviction does not require evidence of participation in terrorist activities. With ISIS and Jabhat al-Nusra on the UN's list of designated terrorist organizations, it is sufficient to prove that defendants supported either one of these groups or traveled or attempted to travel to Syria to join one of these groups.

The offenses most commonly charged in BiH in cases involving FTFs have been "organizing a terrorist group" and the "unlawful establishing or joining foreign paramilitary or parapolice formations", but qualifying these offenses is extremely challenging due to difficulties with evidence collection. On the other hand, an offense for which quite a few defendants have been prosecuted in other countries, but has been charged in very few cases in BiH, is the funding of terrorist activities. The reasons for this lie not in the inability of investigative and judicial bodies to detect or prosecute the crime in BiH, but in resource deficiencies among extremists in the country that mean there is simply no solid evidence of established networks involved in the financing of FTF departures.

And while investigative authorities in BiH did detect funding networks located outside the country, involving members of the diaspora, the individuals responsible apparently traveled to Syria themselves, and were killed there.

Also rarely charged have been the offenses of "encouraging terrorist activities in public" and "recruitment for terrorist activities", which are extremely difficult to prove. Despite this, it is interesting to note that some extremist figures changed their rhetoric completely, or adjusted it so as not to cross the line into illegality, after these offenses were criminalized and early prosecutions were carried out. Indeed, since then, at least as far as far as publicly available messaging goes, SIPA Inspector Srđan Lazić testified that the agency has identified no online posts that suggest liability under this legislation (*Prosecutor's Office of Bosnia and Herzegovina v. Husein Bosnić*, 2015, main trial transcript, 36:59–37:27).

In BiH, the offenses of funding, encouraging, and recruitment for terrorism all require evidence that proves the existence of the offense and of criminal liability, beyond a doubt. For the most part, evidence establishing this degree of certainty has not been found in investigative or judicial practice. However, a much more liberal approach can be observed in European jurisprudence when it comes to proving the links between defendants and organized terrorist organizations or formations. For example, Dutch practice has established such low standards of proof that time spent in an area controlled by a terrorist organization, along with a few material or personal pieces of evidence and a report by an expert witness from an earlier case, may be sufficient for conviction. Similarly, in Germany – where prosecutors have charged FTFs not only with criminal offenses related to terrorism but also with mass atrocity crimes (war crimes, crimes against humanity, and genocide) – a few pieces of photographic or video evidence from mostly open sources, or testimony from information technology experts alongside the use of special investigative measures, can constitute a sufficient basis for conviction.

The testimonies of witnesses have played a significant role in developing the legal practice of BiH in this area. Still, with very few *direct* witnesses in these cases, little information can be gleaned from court records about the specific activities undertaken by citizens of BiH while they were in Syria and Iraq. But the frequency with which IT experts have testified and submitted reports to the Court in cases involving FTFs speaks to the use by investigators of special investigative measures and evidence that derives from digital sources,

including evidence of the activities of defendants in Syria. In other words, there are no significant differences in the investigative or judicial practice of courts in Europe and in BiH, but European courts have taken a more liberal approach to accepting evidence and a stricter approach to sentencing.

Judicial professionals in BiH (from both the Prosecutor's Office and the Court) explained to researchers that the standard of "beyond a reasonable doubt" is rigorously tested in BiH, to an extent not seen in the jurisprudence of Austria, Germany, and The Netherlands, for example. In these countries, the standard of proof beyond a reasonable doubt does not place the burden on the form, which in this case would test the credibility of digital evidence, but rather on the content. This means that facts available from public sources are often deemed much more relevant in European caselaw. As one prosecutor put it, judicial professionals in BiH "are still stuck with the formal aspects of evidence collection," unlike in some European practice, where the content of the facts functions to satisfy the form of the facts (Interview, 6 May 2022). A judge confirmed this, noting that "the judicial process is highly formalized, [even] burdened with formalities" in BiH (Interview, 17 May 2022).

Nevertheless, authorities in BiH have been successful in proving guilt in most cases involving FTFs. And while it is not a full measure of the success of police and prosecutors, the rate of convictions of FTFs can serve as an indicator of how well criminal legal systems are responding to the foreign fighter phenomenon. However, to date, prosecutors in BiH have yet to charge any returnees from Syria with war crimes, crimes against humanity, or genocide, as has been the practice in some European countries; not because they lack the will, but because they have lacked sufficient evidence.

Despite the fact that quite a few plea agreements were reached in the cases analyzed in this study, the practice is becoming less common in BiH. Still, even if criticism that plea agreements result in lenient sentencing may be justified, it is important to keep in mind that they represent a useful tool which allows investigators and prosecutors to obtain direct witness testimony for possible future criminal cases. This is particularly valuable in cases involving FTFs, given that trials of FTFs remain a novelty in BiH and elsewhere.

Over time, the trend of sentencing below the statutory minimum is changing, though, as the Court gains more experience with these cases and its practice

naturally develops. The Court has full discretion to assess mitigating and aggravating factors in the sentencing stage, which a prosecutor characterized as "the Court's right... in deciding on a sentence" (Interview, 6 May 2022), but until recent years, the judiciary has had no experience in cases involving FTFs. Hence, current practice still reflects many early challenges in proving the offenses charged, and the difficulties of rationalizing particularly mitigating and mitigating factors in the context of punishment. Gradually, as this practice has become more deeply informed by previous caselaw, the Court has begun to move away from lenient sentencing.

Having said that, it must be emphasized that punishment should be purposeful, and so far, neither the general nor special prevention effects of punishment have been adequately explained, specified, or demonstrated by the Court in its decisions. The general prevention dimension of punishment is perhaps presumed to be obvious, but should be specified in concrete cases. And the special prevention dimension, meaningful only in rare cases of sincere disengagement or the renunciation of violence, must be addressed much more directly by the Court. Generally speaking, as one judge admitted to researchers, there is an apathy in legal thinking exhibited by the Court, and the necessary degree of deliberation on some issues "is practically non-existent" (Interview, 17 May 2022).

It is important to contextualize these findings of shortcomings and highlight that any criticisms herein of the security services, the Prosecutor's Office, and the Court of BiH are not unique. Other countries in Europe have responded comparably to the foreign fighter phenomenon, and in every country, judicial practice related to cases involving FTFs is still in its early years. In fact, trials of FTFs that have taken place in BiH can serve as an example for other European countries where the caselaw is less robust. And it is reasonable to expect that as the practice in this area develops, future cases will be challenged by fewer procedural, structural, or other obstacles.

6. RECOMMENDATIONS

In an effort to define meaningful, knowledge-based recommendations for the judiciary, state institutions, and civil society, as well as recommendations for future research, the following recommendations are shown below in categories, indicating the implications for: (i) judicial policy, (ii) non-judicial policy, and (iii) future research.

6.1. Judicial Policy Implications

- *Specialization should be prioritized* by ensuring that future criminal proceedings for defendants charged with offenses related to foreign terrorist fighting involve judges and prosecutors with previous experience in these cases.
- *A prosecution policy should be introduced* and should clearly lay out a framework for investigations, indictments, and all trial stages.
- When weighing the prosecution of women, the gravity of the act(s) in question, the purpose of proceedings, and the purpose of punishment should all be considered; and if the damage of criminal proceedings is determined to be higher than the benefit of possible punishment in any case, appropriate *extrajudicial resocialization and reintegration mechanisms should be utilized*.
- The criminal prosecution of minors or persons who committed crimes as minors, especially those who were taken to a foreign battlefield by adults, should be carefully considered – especially the purpose of punishment –

with an awareness of how *potential developmental delays and traumatic experiences may present special circumstances*.

- *Prior convictions for offenses related to organized crime may suggest a nexus between terrorism and organized crime*; establishing any such links thus calls for particular attention.
- Whenever possible, even where it is not required to prove a charge, *the affiliations of defendants with specific paramilitary formations or terrorist organizations should be established*, as well as the role(s) defendants played in these groups.
- *The Court must impose the most severe sanctions on the highest-ranking extremist figures and those who have contributed most significantly to the activities and goals of terrorist organizations*, to send a clear message to the public and to other extremists or would-be extremists that illegal activities including encouraging terrorism or recruiting fighters will be met with a decisive response in BiH.
- *Some cases involving FTFs should be cumulatively prosecuted*, for offenses related to terrorism and departures to foreign battlefields as well as mass atrocity crimes (war crimes, crimes against humanity, and genocide).
- Whenever possible, *the victims of crimes committed by terrorist organizations with which FTFs are affiliated should be identified and invited to cooperate* with authorities.
- *The Court should rethink its treatment of evidence*; specifically, the quality of evidence must not be discounted by requirements for a quantity of evidence, and the formalization of evidence should not occur at the expense of its substance.
- *The Court should rely more on previous caselaw*, including various expert reports, which should be used whenever relevant to current cases.
- *Plea agreements should be used only as an exception*, for example when key information can be acquired that relates to future cases, or specific mitigating circumstances of age, perpetration, or power exist.
- *Punishment below the statutory minimum should be an exception*, but it should be permitted.
- *When evaluating the mitigating factors in any case, the specific circumstances, how they arose, and the consequences should all be taken into account*; in the case of FTFs, this may require understanding the dynamics of an individual's radicalization, perhaps within their family, or through other social interactions and networks.

- Whenever necessary, the Court must *determine the mental capacity of the individual at the time the offense was perpetrated*.
- *The purpose of punishment should be clearly explained* so that the public understands the reasoning behind sanctions.
- *A stricter sentencing policy should be applied*, to achieve the general prevention effects of punishment and to create opportunities for the practical implementation of special prevention within penitentiary institutions and through extrajudicial means.
- *In some cases, alternative sanctions or extrajudicial disengagement mechanisms are necessary*, not only to relieve the judiciary but also to effectively resocialize and reintegrate an individual into society.

6.2. Non-Judicial Policy Implications

- *The Criminal Code of Bosnia and Herzegovina should be amended* to reduce the upper statutory limit for the criminal offense of "unlawful... joining foreign paramilitary or parapolice formations".
- *There should be consideration of the addition of security measures to the CC BiH* that are specific to crimes of radicalization and violent extremism.
- *The CPC BiH should prescribe the conditions under which it is permissible to withdraw from a signed plea agreement*, and the consequences of withdrawal (see Perić, 2019).
- *It should be an urgent priority to establish and maintain intra-state and cross-border cooperation with national governments, international organizations, and civil society*, for the purpose of information and knowledge sharing.
- *Specialization should be maintained within the security services, and training should be offered regularly* on investigative methods, including in virtual space.
- *The surveillance of influential extremist figures should continue*, particularly as it relates to any potential money flows linked to these individuals.
- *There should be a strategic focus on developing new and more mechanisms to prevent and combat violent extremism* that can lead to terrorism, including evidence-based resocialization and reintegration programs.
- *A reliable and robust network of state institutions, local institutions, and civil society organizations should be built to facilitate the resocialization and reintegration of returnees* into local communities, for the purpose of more fully achieving the special prevention effects of punishment.

6.3. Future Research Implications

- Future research should *examine jurisprudence in cases involving all terrorism-related criminal offenses, using more complex statistical analyses* than this study did.
- *The focus of research should move from the courtroom to the enforcement and effect of criminal sanctions, and it should include returnee communities* in order to identify the practical impacts of various forms of punishment, or acquittal, vis-à-vis resocialization and reintegration.
- Future research could pursue the *complex links between organized crime, terrorist groups, and mass atrocity crimes*.

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Excerpt from reviews

One can say without a doubt that, with its original research results, methodology, and scientific facts and views, the publication is an up-to-date work the content of which contributes to the development of not only the research practice, but also of theory in the field of anti-terrorism in general to a significant extent. I believe that all, not only formal, but also actual conditions for the publication of this paper in the form of a monograph have been met, and it is important to emphasise that the paper is recommended as a valuable source for higher education in numerous legal, political-science, criminological and other related scientific disciplines.

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given its comprehensiveness, pioneering enthusiasm in the approach, objective legal, sociological and psychological sources, professional and analytical approach, outlining the significance of foreign terrorist fighters, violent extremism and radicalism, their mutual correlation, objectively presented current state of affairs and practice in Bosnia and Herzegovina, and a review of the practice of all authorities, this analysis represents an important document for the projection of future actions and provides a contribution to the overview of all factors that can influence all segments of society to improve the actions and practices. Therefore, as an objective document, it deserves praise and provides significant progress towards improving the actions and practices in this field.

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