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Foreign Fighters and Their Place in Law

Zahraniční bojovníci a jejich místo v právu

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Abstract: States should avoid arbitrability in decision-making processes concerning foreign fighters by amending their current legislature including criminal prosecution of foreign fighters. Authorization regime similar to the one in Poland may offer higher guarantees, control and monitoring of medium to high-threat individuals whilst offering states direct targeting of prevention and mitigation policies. States should create a transparent and clear framework for evaluation of applications to travel abroad for the purpose of fighting with lawfully set discretion for state organs that will enable them to deny applications for political, social or even economic reasons.

Abstrakt: Státy by se měly vyhnout svévoli v procesu rozhodování o zahraničních bojovnících úpravou jejich stávající legislativy zahrnující trestní stíhání zahraničních bojovníků. Autorizační režim jako je v Polsku může nabídnout vyšší garance, kontrolu i monitoring středně a vysoce nebezpečných jednotlivců zatímco nabídne státům přímé cílení preventivních a mitigačních strategií. Státy by měly vytvořit transparentní a jasný rámec pro posuzování žádostí o vycestování k boji se zákonem danou diskrecí pro státní orgány, což umožní odmítat žádosti pro politické, sociální nebo i ekonomické důvody.

Keywords: Civilian-Military Relations; Foreign Fighters; Legal System; Legislature; Security Policy.

Klíčová slova: Civilněvojenské vztahy; zahraniční bojovníci; právní řád; legislativa; bezpečnostní politika.

INTRODUCTION

The Czech Republic is not known to be a renowned source of foreign fighters. However, tens of citizens have joined the war in Ukraine. There is not any information on how many people actually went abroad though. Legal status of foreign fighters has been theoretically and legally set, although practice is vastly different. The state may find a compromise between an absolute ineffective ban or arbitrarily decided *ad hoc* cases. Such reforms are not able to get traction in states like the Czech Republic because of low public interest (similar case as a much needed reform of military-related disciplinary proceedings).

Current laws do not fulfil their function. Factually, there is a disparity in handling foreign fighters cases in the Czech Republic - reaching as high as the Supreme Court. Are there any alternatives?

Belgium has been known as one of the European sources of foreign fighters mainly in the Middle East. It has a basic framework prohibiting foreign fighters fighting Belgian interests abroad, though they avoid criminalization unless they join terrorist organizations. Polish foreign fighters are numerous in Ukraine due to their close proximity and shared history. Poles have something called an “authorization” regime which is a special procedure of application and decision-making in case a Pole wants to travel abroad and fight. The Czech Republic has a total ban of foreign fighters with anti-terrorist laws enhancement. Although set up as such, courts have a hard time defining foreign fighter acts under this or other provision of penal code. State prosecutors rely heavily on anti-terrorist legislation, which should not be used against foreign fighters.

For the purposes of this article, foreign fighters are persons that engage in an armed conflict outside of their country of origin or residence. Author purposefully refuses any connection to foreign terrorist fighters and current definition including motivation or any other additional qualifier.¹ To note and clarify, the term foreign fighter does not exclude by definition foreign members (foreign or not) of state-recognized militaries of different countries. This article will, however, exclude these special cases, since these are regular soldiers of state-run armies and official members of armed forces of countries. Although posterior legalization of foreign fighters during military conflicts may be another interesting area for further research.

¹ Further argumentation on the important taxonomy in BARABÁŠ, Ludvík. Foreign Fighters and Alternatives to their Criminal Prosecution. Diplomová práce. Brno: Masarykova univerzita, Právnická fakulta, 2023. Link: https://is.muni.cz/auth/th/qkvyh/Thesis__Barabas__31032023.pdf

1 BELGIAN CASE

Belgium does not criminalize foreign fighters and instead focuses on data-gathering, control and government policies and programmes to mitigate negative effects of foreign fighters.

Belgian *Code Penal* contains little to no provisions on foreign fighters or their criminal prosecution. General Art. 113 states that whoever takes up arms against Belgium will be punished by imprisonment up to a lifetime. Bearing arms means combat, transport, indirect involvement, surveillance and other activities that might be seen as hostilities towards Belgium or its interests abroad. Apart from foreign terrorist fighter specific laws, there is no limitation for foreign fighters to travel abroad (f. e. to Ukraine).

Criminalization of acts against state interests is common among many modern states and goes further. Art. 126 deals with procurement of arms, levying soldiers or other acts reserved solely for the Belgian state without Government authorization. Individual foreign fighters might not be in the scope of this article. Sort of a Ban would apply to active Belgian military personnel. The issue of non-international armed conflict and foreign fighters engaged is shown in Art. 124: *“the non-state group inciting civil war or rebellion against the Belgian state.”* Art. 135quarter prohibits recruitment of minors as a reaction to many armed groups recruiting children.

Belgium has been praised for their counter-terrorist measures and preventive programmes². Belgian legislature does not prohibit foreign fighters as such. The Belgian government may also issue a warning or demotivate individuals not to get involved in a foreign conflict. Belgium has been reported on by the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism in his visit in 2018.³ Commenting on the Belgian law as “commendable”, highlighting its depth and breadth of attention being given by federal, regional, community and municipal authorities. The issues and challenges of the Belgian legal framework lay in the executive power, preventive and pre-emptive measures and the ability of Belgian authorities to deal primarily with foreign terrorist fighters returnee. Belgium adopted a series of policies that focus on the non-legislative part of the prevention and reintegration. Their experience and data-gathering has proven to be an immense source of information. Importantly, the second largest group of foreign fighters from Belgium comes from the former Soviet bloc, specifically Russia, and is represented by a far more

² MEHRA, T., PAULUSSEN, Ch. The Repatriation of Foreign Fighters and Their Families: Options, Obligations, Morality and Long-Term Thinking [online]. ICCT.com. 6. 3. 2019. [cit. 5. 12. 2023]: <https://www.icct.nl/publication/repatriation-foreign-fighters-and-their-families-options-obligations-morality-and-long>.

³ OHCHR, Human rights and counter-terrorism: UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism concludes visit to Belgium. Report of 31. 5. 2018, available here: <https://www.ohchr.org/en/statements/2018/06/human-rights-and-counter-terrorism-un-special-rapporteur-promotion-and>

experienced segment of foreign fighters.⁴ Moreover, more than half of all foreign fighters come back in the first month and do not present any threat or challenge to national security.⁵

Belgium might be one of the examples of a modern lenient approach. State interests are protected and the will and freedom of people is respected. Although the war in Ukraine may change many things, the data till now proves that transparency may over-compensate potential risks of returnees and of their reintegration to civil society.

2 POLISH CASE

History of militarism and internationalism reflects the authorization regime of Poland. Kodeks Karny reflects the Belgian one with several additions with a long line of court rulings and interpretation of judiciary. Poland is a major source of foreign fighters in Ukraine.

Kodeks Karny contains relevant Art. 141 § 1 and § 2 and § 3 where § 1 of Art. 141 demands authorisation of the relevant authority for Polish citizens who wish to take up arms or join a foreign army or military organization. Otherwise foreign fighters shall face up to 5 years of imprisonment. Provision of § 2 of Art. 141 focuses on mercenaries, therefore the Polish penal code prohibits Polish citizens to take up arms as mercenaries in any conflict and shall be subjected to persecution and punishment of up to 8 years. If we compare the two articles, we see two different influences. One is the prohibition of mercenarism, which is often absent in penal codes of many countries (US, Belgium). Special exemption from the rule of § 1 is set out in § 3 when joining a foreign armed forces is allowed even without authorization, if the individual is a national of a foreign state (with Polish dual citizenship), he resides in that state and serves his military service in the same state. However, recruitment of Polish citizens into the military of a foreign state is punishable by art. 142 of Kodeks Karny by up to 5 years of imprisonment. Mercenary recruiters may be punished even harsher by up to 8 years of imprisonment. Founding of the Ukrainian foreign legion might have been the ideal opportunity where foreign fighters could fulfill the conditions set out in the § 1 art. 141, because they can only join, with prior authorization, an official state army or its branch.

The Polish judiciary has extensively covered the issue of foreign fighters from Poland since the second world war. Judgment of the Provincial Administrative court in Warsaw of 7. 3. 2018, Decision No. IV SA / Wa 2533/17, specifies that the consent of the military authorities (under Ministry of National Defence) to travel abroad does not substitute for the obligation to perform military service in Poland. Polish citizens may end up losing

⁴ OSTAEYEN, P., VLIERDEN, G. V. Citizenship and Ancestry of Belgian Foreign Fighters [online]. ICCT Policy Brief, 1. 6. 2018. [4. 3. 2023]. <https://www.icct.nl/publication/citizenship-and-ancestry-belgian-foreign-fighters>.

⁵ Over half of Belgian volunteers have returned from Ukraine [online]. BrusselsTimes.com, 24. 3. 2022. [1. 3. 2023]. <https://www.brusselstimes.com/212437/over-half-of-belgian-volunteers-have-returned-from-ukraine>.

their citizenship, if they do not acquire authorisation from the Ministry, as it was stipulated in the Judgment of the Supreme Administrative Court in Warsaw of 30. 11. 2010, Decision No. II. OSK 1846/09. That is consistent with other decisions like the Judgment of the Supreme Administrative Court in Warsaw of 18. 11. 2010, Decision No. II OSK 216/10, Judgment of 28. 10. 2010, Decision No. II OSK 1700/09 and Judgment of 16. 1. 2015, Decision No. II OSK 1417/13. The concept of the foreign military or its branch, as it was suggested above, has been stable in the Polish court cases. It excludes mercenary bands, non-state actors, rebel groups and other armed groups. The term foreign military service is further explored and defined in NTA Judgment of 22. 4. 1928, Decision No. L.Rej. 3771/25, TSO VII 502, Judgment of Supreme Administrative Court of 16. 6. 2011, Decision No. II OSK 1245/10, Judgment of the Supreme Administrative Court of 26. 8. 2011, Decision No. II OSK 1776/10. The military services also account for the armed forces reserves where usually no extensive administrative procedure is required, according to the Judgment of the Supreme Administrative Court of 3. 2. 2012, Decision No. II OSK 2542/10.

Authorization regime offers the state to retain control over individuals going abroad. The authorisation regime is governed by the Act of 11. 3. 2022 On National Defence (Act No. Dz. U. poz. 655). Applicants may be Polish citizens with valid passports, with fulfilled military service or have available any decision regulating their military service, non-active soldiers and they are not part of a mobilization plan and there are no proceedings concerning military service or service during mobilization. These are the formal requirements of the application. The application will be reviewed by the competent body of the Ministry of National Defence. Material requirements include conditions: military service in question cannot harm, damage or threaten Polish national interests (security, international policy, strategic policy), the military service is in accordance with the IHL and international criminal law (excluding terrorist organizations) and such military service will not have any influence or affect in any way tasks or military operations of the Armed forces of Polish Republic.

The decision-making of the Ministry is therefore given a framework and is reviewable by a judicial body, providing necessary safeguards from the abuse or misuse of executive power. Material conditions of the application present the state with enough discretion. Applicants must also attach a clean criminal record, financial office statement, social security office statement, court certificates and they have to pay an administrative fee according to a special regulation. The application must be sent on a unified administrative form.

3 CZECH CASE

The Czech Republic officially criminalizes any foreign fighters together with foreign terrorist fighters with intertwined counter-terrorist measures and chaotic judicial practice. Practically, charges are brought up only against certain individuals. Such an approach has proven ineffective and presents a high risk of unwanted legal arbitrariness and violations of procedural law.

The Czech Penal code prohibits (§ 321) Czech citizens to serve in a foreign military and such an act is punishable by up to 5 years of imprisonment. According to the § 321a of Czech Penal code, it is prohibited to join a non-state armed group in a foreign state, whether indirectly or directly. Such an act is punishable by imprisonment for up to 5 years. There is no exception to this rule. Law presumes a unitary and equal approach. Charges have been mostly brought up against pro-Russian foreign fighters.

There is an exception to the general prohibition found in § 34 of Act No.585/2004 Coll., on Conscription and its Provisions. Citizens may enter into military force of a foreign country with the consent of President of the Czech Republic. This exception is not applicable in most cases of foreign fighters. Firstly, the exception goes as far as to official military body of a foreign country. This requires a sovereign state controlling a certain territory and population, existence of state-recognized military and clear structure of command. Foreign fighters usually do not serve in state-recognized militaries. Ukraine has been so far an exception with its *posterior* legalisation of Ukrainian Foreign Legion and therefore recognizing a body of foreign fighters as official part of the Ukrainian armed forces. Such case does not occur in rebellious Kurdish forces, Burmese rebels fighting Myanmar junta or Colombian FARC radicals, to name a few. Therefore, this exception does not apply to the scope of this article.

Erik Eštu was charged on the grounds of counter-terrorist measures (§ 311 in conjunction with § 313). Appellate court of Hradec Králové amended the decision of the district court and found Erik Eštu guilty of participation in the activity of an organized criminal group committing a terrorist act. The High Court in Prague annulled the decision of the appellate court and found Erik Eštu guilty of an attempted involvement and service in a foreign military on the grounds of § 321 Penal code.⁶ The decision of the High Court was later confirmed by the Supreme court.⁷

Pavel Kafka was sentenced by the Regional Court in České Budějovice on the grounds of participation in activity of an organized criminal group.⁸ The High Court confirmed the decision, however, further developed the legal reasoning.⁹ The Supreme court confirmed the decision of the appellate court.¹⁰ Similar fate with intertwined counter-terrorist measures awaited Oldřich Grund¹¹ or Alexej Fadějev¹².

The correctness or legal quality of these decisions has already been somehow assessed by authors focusing on the national specifics.¹³ The fact remains that the Czech Republic arbitrarily prosecuted only certain individuals. No matter how morally or

⁶ Judgment of the High Court in Prague of 17. 7. 2019, Decision No. 10 To 71/2019.

⁷ Supreme Court Ruling of 30. 6. 2020, Decision No. 6 Tdo 153/2020.

⁸ Judgment of the Regional Court in České Budějovice of 1. 7. 2020, Decision No. 2 T 15/2020-733.

⁹ Judgment of the High Court in Prague of 22. 10. 2020, Decision No. 2 To 89/2020.

¹⁰ Supreme Court Ruling of 12. 5. 2021, Decision No. 8 Tdo 310/2021.

¹¹ Judgment of the Regional Court in Ústí nad Labem of 1. 10. 2020, Decision No. 49 T 7/2020-659.

¹² Supreme Court ruling of 9. 6. 2022, Decision No. 4 Tdo 192/2022.

¹³ RICHTEROVÁ, A. Zahraniční Bojovníci a možnosti jejich trestněprávního postihu. Praha: Karlova Universita, 2021, p. 154-158. Also BÍLKOVÁ, V. Zahraniční terorističtí bojovníci a česká právní úprava. Trestněprávní revue, no. 2/2019, p. 40.

politically right that might be, arbitrability is undesired in any practice and application of law. Moreover, this grey zone only creates possible issues for future data-gathering, prevention programmes and government policy.

Is There any Need for a Change?

There is no popular demand for a change. There is no political will for a change. Therefore, why should we pay attention to anything like this? The counter-arguments to any amendment are many. Traumatized returnees need medical care - psychological and physical. Who is going to pay for that? Returnees will present a security risk and threat to further radicalization. Foreign fighters will get military-grade training, experience in combat and may succumb to undemocratic ideologies and extremism. There may be political consequences for allowing citizens to go fight for a different country - fighting for Ukraine may be politically correct, but what if foreign fighters want to go fight NATO allies in the Middle East (in the ongoing unlawful invasion of Turkish army in the northern Iraq and Syria)? The arguments against any amendments amount to impenetrable mountains.

The answer is simple as it is complex. There is no salvation in ignoring increasing privatization of war and demand for foreign fighters. Early stages of Russian aggressive war in Ukraine are shining examples of foreign fighter importance. Traumatized returnees (even from one side of the conflict) shall return anyway and in unchecked numbers. Their integration might be even more problematic. They will strain the public healthcare system whether from prison or outside. Questions of security and radicalization arise when the Government ignores returnees and acts like there are none or all are already in prison. Concerns of training, extremism and experience in combat are valid, but may pose a threat in prison just as much as outside world. Political issues might be avoided by the state deciding transparently on who gets the authorization and who does not.

Whether to allow or continue to ban foreign fighters is comparable to legalization of marihuana or prostitution. Same types of arguments with small modifications may be used also for or against foreign fighter reforms, therefore, it is needless to go through them again and again. What is primarily left to be said is that Ukraine relied heavily on foreign expertise and experience, foreign fighters were among the most effective and proved to be valuable assets to the Ukrainian theatre of war. Foreign fighters will play a major role in future small and medium-scale conflicts. The threats, issues but also advantages of more lenient legislature concerning foreign fighters must be taken into account in any legal review.

CONCLUSION

Belgium does not criminalize foreign fighters unless they join a terrorist organization. It has huge experience with data-gathering, monitoring and prevention programmes aimed at returnees and their surroundings. Polish foreign fighters are governed by a strict authorization regime with similar limitations in counter-terrorist measures. The Czech Republic has a formally unified approach to foreign fighters and foreign terrorist fighters,

however shows arbitrary decision-making when it comes to the factual prosecution of individuals depending on the political factors of their case.

The Authorization regime seems to be a compromise between the Czech and Belgian case since it combines near-close criminalization with political exception for little to no political price. Authorization regime with combination of the Belgian re-integration approach may result in effective controlling and monitoring mechanism with no unlawful arbitrability in decision-making.

The continuous and historically repetitive importance of foreign fighters, maybe even mercenaries, in small and medium-scale armed conflicts shall demand further notice from states and their governments. Foreign fighters pose risks and threats to national security, but their deployment provides several advantages as shown in the case of Ukraine. Amendment to the existing legislature may fix legal issues and introduce a new future into research of foreign fighters, their deployment and reintegration, usage, risk prevention and threat control.

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