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# *The Preventive Use of Criminal Law to Contrast Foreign Terrorist Fighters*

## *A Human Rights Perspective*


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# *Table of Abbreviations*

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| APCPT | Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism |
| CECPT | Council of Europe Convention on the Prevention of Terrorism |
| CJEU | Court of Justice of the European Union |
| ECHR | European Convention on Human Rights |
| ECtHR | European Court of Human Rights |
| EU | European Union |
| FDCT | Council Framework Decision of 13 June 2002 on combating terrorism |
| FTF | Foreign Terrorist Fighter |
| ICCPR | International Covenant on Civil and Political Rights |
| NGO | Non-Governmental Organisation |
| TE-SAT | Europol's annual report on the terrorist situation and trend |
| TEU | Treaty on European Union |
| TFEU | Treaty on the Functioning of the European Union |
| UN | United Nations |

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## *Abstract*

*As the phenomenon of foreign terrorist fighters displays its dramatic implications, the international community and national governments react by increasingly introducing criminal offences, hoping to prevent and to deter future terrorist attacks. The purpose of the study is to critically assess the impact of substantive criminal provisions adopted at the international and domestic level to contrast foreign terrorist fighters, to unveil some problematic aspects of the preventive approach of such legislation and its consequences on human rights and the fundamental principles of criminal law. The analysis compares the UN Security Council's resolutions requiring the criminalisation of foreign terrorist fighters-related offences, the criminal response enacted by the Council of Europe and the European Union and finally the application of Italian domestic legislation on terrorism. This methodology is conceived to illustrate the connection between international obligations and national legislation, in order to highlight the similar controversial features and to verify the concrete impact of the common criminal strategy on individuals accused of being foreign terrorist fighters before national courts. The thesis concludes that the over-expansion of criminal law in a preventive perspective criminalises acts which are the legitimate expression of fundamental rights or which are too far from the commission of the harm it aims to prevent, thus violating the principles of proportionality and necessity which shall guide the restriction of human rights at the European level and the principle of harm, protected by the Italian Constitution. Moreover, the vagueness of international legal obligations is reflected in domestic legislation, which appears broad and imprecise. In this regard, the hermeneutic activity of the Italian Supreme Court of Cassation plays a key role to limit the scope of application of such preventive legislation at the national level and to clarify its interpretation, in compliance with constitutional constraints. Nevertheless, the Supreme Court's jurisprudence is scarce, not homogeneous and sometimes contrary to those constitutional values. This may still entail considerable side-effects on fundamental human rights and the core principles of domestic criminal law.*


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# *Introduction*

Terrorism certainly represents a significative threat to life and to the integrity of a democratic system. Although there is no universally recognised definition of the terminology, it is clear that the factor that mostly characterizes terrorism and makes it a unique offence is the symbolical nature of the violence, that goes beyond the specific harm it may cause to its victims[1]. The real destabilizing power of terrorism lies in the ability to spread fear among the population and to diffuse a dangerous message, which is capable of instilling doubts regarding the legitimacy of political, social or religious values and norms[2]. Of course, such a message is delivered through the commission of attacks which may cause severe casualties. It is therefore not surprising that the reaction against terroristic manifestations by governments and parliaments may be driven by the need to provide a prompt response, which is able to reassure society about the ability of democratic institutions to contrast and to repress the threat.

In the contemporary fight against terrorism, criminal legislation certainly plays a crucial role. The evolution of the terroristic emergency and the parallel upraise of international criminal organisations animated by a jihadist ideology, have pushed international institutions and national legislators to continuously introduce new criminal measures, with the idea that a stronger criminal response would be an effective way to deter and to prevent future attacks. After each major attack, the fear that underground terrorist cells may grow and proselytise has regularly induced legislative intervention aiming at introducing harsher penalties and increasing the spectrum of terrorist offences.

Every reform has gradually extended the criminalisation of a larger number of preparatory acts which are considered to be conducive to terrorism, thus attempting to anticipate the potential commission of attacks by punishing acts which are far from the final event they should prevent. The consequential risk is to over-extend the application of criminal law in an unproportionate manner, with substantial drawbacks on human rights and the fundamental principles of criminal law and the due process.

This approach is particularly evident when the phenomenon of foreign terrorist fighters has gained the attention of the international community, once it displayed its dramatic implications for national security. Following the initial consolidation of the Caliphate in 2014, European democracies witnessed an increasing flow of individuals who, after having cultivated extremist religious ideals, left the countries they were stably living in to join the ranks of terrorist organisations in Iraq and Syria. The alert caused by the terrorist attacks in Brussels and Paris, perpetrated by returnees who

[1] Perliger, 2012, p. 506.
[2] *Idem*, p. 507.

received military training abroad, confirmed the concern and it triggered a wave of reforms whose focal point is constituted by criminal sanctions.

### *Methodology*

The thesis attempts to answer to the following research question: *How does preventive criminal legislation on foreign terrorist fighters affect human rights and the fundamental principles of criminal law?*

The phenomenon of foreign terrorist fighters has been chosen as it is one of the major issues related to international terrorism and it can be a parameter to evaluate the essential components of the overall criminal approach adopted by the international community and the Italian Government. The analysis is deliberately limited to critically assess the impact of the application of substantive criminal legislation, although it must be acknowledged that the fair application of procedural norms is equally relevant to ensure that the human rights of the suspect or the accused person are fully respected.

Each Chapter attempts to clarify the origin and the connections of the expanding criminal legislation to counter foreign terrorist fighters, by responding to specific sub-questions which should guide the reader to the final conclusion. To do so, the study follows what could be defined as an 'inverted pyramid' structure, by first analysing the international legal instruments adopted at the UN level, then narrowing the focus to consider the European response and finally concentrating on the Italian domestic legislation and jurisprudence. This peculiar structure has a twofold objective. First of all, it is conceived to emphasize the *fil rouge* that links the approach and the strategy followed by the international community with the one adopted by the Italian legislator, to reveal the overlapping similarities and the common controversial features. Secondly, it allows to verify how the theoretical human rights implications of the international and regional criminal response materialise in the application of domestic legislation, thus assessing its concrete impact on individuals accused of terrorist offences. In this regard, due attention is given to the role of the judiciary in the safeguard of constitutional rights and the fundamental principles of criminal law.

# I. The Role of the UN Security Council in Countering Foreign Terrorist Fighters

*Chapter I aims to answer to the following sub-question: what is the role played by the UN Security Council in the adoption of preventive criminal legislation against foreign terrorist fighters?*
*The analysis focuses on the most relevant resolutions which have attempted to define the phenomenon, with particular attention to the operative parts that explicitly require Member States to enact criminal legislation, in order to prevent and to suppress the flow of radicalised individuals that travel to join or to leave international terrorist organisations. The Chapter intends to trace the origin of the extensive use of criminal law as a preventive tool against future terrorist attacks and to consider the problematic aspects of these international legal instruments for fundamental human rights.*

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In order to address the reaction of the international community to the phenomenon of foreign terrorist fighters (FTFs) and to consider the critical elements UN Security Council's response, it may be first necessary to address the meaning of the terminology.

From a closer look, the concept of 'foreign terrorist fighters' is comprised by two distinct elements: it refers to 'foreign fighters', but it's characterised by a relation to some sort of 'terrorist' activity. These elements must be treated distinctly, to have a general overview.

Interestingly, there is no precise or common definition of foreign fighters under international law. This excludes foreign fighters to be a 'legal term of art'[3]. Although the phenomenon could be considered rather ancient, at least in its essential features[4], its conceptualisation is in continuous evolution. Generally speaking, scholars refer to individuals who leave their 'country of origin or habitual residence to join a non-State armed group in an armed conflict abroad, primarily motivated by ideology, religion and/or kinship'[5]. This definition entails those who decide to take arms in conflicts abroad on a voluntary basis, without joining the armed forces of their home country. In addition to that, Hegghammer considers that foreign fighters lack the citizenship of the State of

[3] Bílková, 2018, p. 2.
[4] For a general overview of the historical development of the phenomenon, *see* Flores, 2016.
[5] Kraehenmann, 2014, p. 6.

destination, they use insurgent tactics and they don't receive any economic reward (or at least that remains secondary to the ideological fulfilment), thus diverging from traditional mercenaries[6]. In this perspective, examples of foreign fighting can be already found in the last two decades of the Twentieth Century, were contemporary conflicts[7] attracted a substantial flow of ideologically motivated radicals from around the world.

However, the phenomenon obtained global attention after 9/11, when the international community was shocked by the brutality of the terrorist attacks and eventually realised the presence of foreign fighters in the Taliban and Al-Qaida. Although a comprehensive and accepted definition of terrorism has not yet been adopted at the international level, causing serious problems to legally define its components[8], the Twin Towers attack constituted a main shift in the international community's approach towards the matter.

Before 9/11, the UN General Assembly played a major role in the negotiation and the adoption of international treaties and conventions that criminalised specific terrorist offences[9], without providing a general definition of the phenomenon. The main purpose of these legal instruments was to ensure that the perpetrators would not go unpunished, thus extending national jurisdictions over acts that only had a partial territorial link with the State in question. They also generally provided for universal jurisdiction, in the form of the *aut dedere aut iudicare* obligation[10]. Nevertheless, terrorism was still considered to be as a domestic issue to be dealt with by each country individually.

On 28 September 2001, a few days after the attack, the UN Security Council adopted unanimously Resolution 1373, through which it reaffirmed the 'unequivocal condemnation' of the terrorist acts perpetrated on US soil and it formally declared that international terrorism constitutes a threat to international peace and security[11].

For the first time, a resolution required States to implement domestic legal instruments intended to tackle terrorism, by preventing and suppressing terrorism financing, freezing financial assets and other economic resources, refraining from providing any form of support to terrorist entities and preventing terrorist movement through border controls[12].

Moreover, paragraph (3) of the resolution obliges States to intensify their cooperation, through bilateral or multilateral agreements and through the exchange of relevant information, in the respect

[6] Heghammer, 2010, pp. 53 – 94.
[7] As the conflicts in Afghanistan after the 1989 Soviet invasion, in Bosnia, in Chechnya and Dagestan. *See*, Kraehenmann, 2014, p. 3.
[8] *Idem,* p. 33.
[9] These conventions aimed at suppressing several offences such as, *inter alia*, taking hostages, the seizure of aircrafts, terrorist bombings, nuclear terrorism and financing terrorist organisations or operations. *See*, Kraehenmann, 2014.
[10] Kraehenmann, 2014, p. 34.
[11] S/RES/1373 (2001), paragraphs (2) and (3) of the Preamble.
[12] de Guttry, 2016, p. 260.

of international human rights standards[13]. Paragraph (4) emphasizes the need of regional and sub-regional cooperation 'in order to strengthen a global response to this serious challenge and threat to international security'[14].

From this overview it is apparent that the innovation brought by Resolution 1373 was twofold: on one hand, it affirmed the law-making power of the Security Council in the field of counterterrorism; on the other, it highlighted that terrorism had become and international phenomenon that requires multilateral intervention. Yet, this approach did not go uncontested. Experts claim that the Security Council acted beyond the powers assigned by the UN Charter[15]. The major concern relates to the fact that it established a general and binding framework to combat terrorism, without there being any agreement on its precise definition.

In addition to that, the breadth of the obligations imposed on States and the evident human rights implications arising from the individual sanction regime introduced thereafter, raised serious doubts about the its *modus operandi*[16].

In 2014, after the atrocities committed by the Islamic State of Iraq and the Levant (ISIL) and the Al Nusra Front (ANF) in the territories of Iraq and Syria, the Security Council adopted two other fundamental resolutions to condemn the events and to contrast the upraise of those terrorist organisations, namely Resolution 2170 and 2178.

Both resolutions refer to foreign terrorist fighters and for the first time in UN legal documents the term 'foreign fighter' is combined with that of 'terrorism'.

Resolution 2170 imposes on Member States the international obligation to take action against those terrorist organisations by, *inter alia*, blocking the recruitment and the flow of foreign terrorist fighters to support ISIL, ANF and Al-Qaida. The flow of radicalised individuals is condemned as a major factor for the protraction of the conflict, for the circulation of violent ideologies and for the exacerbation of hostilities[17]. States are called upon to repress the phenomenon by taking measures intended to prevent the movement of 'terrorists' to and from their territories, by engaging with those within their territories at risk of recruitment and radicalisation, by discouraging travels for the purpose of supporting those organisations and by preventing the direct or indirect supply of weapons to such organisations[18]. Generally, Resolution 2170 confirmed an intrusive approach by the Security Council, with a reduced margin of appreciation for States to choose how to implement its decisions.

13 S/RES/1373 (2001), paragraph (3).
14 *Idem*, paragraph (4).
15 de Guttry, 2016.
16 Kraehenmann, 2014.
17 de Guttry, 2016.
18 S/RES/2170 (2014), paragraphs (7), (8), (9) and (10).

Resolution 2178 was adopted a few months later and it is intended to address the growing issue of FTFs more in detail. This resolution has a clear legislative purpose, since it imposed even stricter obligations on Member States which have raised serious concern[19].

Starting from its scope of application, the Preamble offers a definition of foreign terrorist fighters, described 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'[20]. Contrary to the definition of 'foreign fighters', 'foreign terrorist fighters' is a legal term and it entails legal consequences[21].

The term 'foreign' refers to individuals who travel to States 'other than their States of residence or nationality'. This expression is confusing, considering that States have different criteria to establish residency. Moreover, people with dual citizenship or nationals of the States they are travelling to have the right to return in their own country. The scope of the resolution could be interpreted in broader terms, in order to include the latter category into the possible definition of foreign terrorist fighters[22]. In this case a due balance with freedom of movement should be established. Otherwise, a more restrictive interpretation of the wording of the resolution would exclude, for example, Syrian or Iraqi nationals living in Europe and flying back home[23]. Such interpretation would also cause problems, since it would then exclude those nationals who do come back to join terrorist organisations.

In addition to that, the 'terrorist' qualification is here used to describe and to condemn specific groups, acts and purposes without providing a precise meaning to the term. Furthermore, the use of a vague terminology does not facilitate the accurate identification of who FTFs are, leaving such responsibility on States with the risk of abuses by authoritarian regimes[24].

It would be, for example, very hard to distinguish those individuals who travel to countries known for the presence of terrorist groups (as Syria and Iraq) from those who have a real 'terrorist intent', thus risking to infer such subjective element from the simple travelling activity or from religious beliefs, imposing a *de facto* prohibition to visit such areas[25]. These provisions could be used, for example, against members of NGOs travelling to conflict zones to provide humanitarian assistance.

Finally, the resolution blurs the line between terrorist activities and acts that would fall under international humanitarian law (IHL). The term 'fighters', in fact, recalls the participation in the

[19] Van Ginkel, 2014.
[20] S/RES/2178 (2014), paragraph (8) of the Preamble.
[21] Bílková, 2018, p. 4.
[22] Kraehenmann, 2016, p. 236.
[23] *Ibidem.*
[24] Ambos, 2 October 2014, online blog.
[25] Kraehenmann, 2016, p. 237.

hostilities. This interpretation is supported by the 'in connection with armed conflict' expression[26]. It appears that joining the groups mentioned in the instrument (ISIL, ANF and other cells, affiliates, splinter groups or derivatives of Al-Qaida), when they are also parties to an armed conflict, would amount to a terrorist activity notwithstanding the application of IHL[27].

Although the present analysis is not intended to address all the relevant implications of the FTFs definition under IHL, it is important to underline that there are still reasonable doubts concerning their legal status in armed conflicts.

As for the operative part, Resolution 2178 requires Member States to adopt a vast series of measures to contrast the FTFs phenomenon. In fact, they are expected to take effective measures against FTFs flow, such as border controls, financial and economic assets' freezing, exchange of information, preventing radicalisation and implementing prosecution, rehabilitation and reintegration strategies[28].

Paragraph (6) is particularly relevant, since it requires States to 'ensure that their domestic laws and regulations establish serious criminal offenses sufficient to provide the ability to prosecute and to penalize in a manner duly reflecting the seriousness of the offense'[29]. The provision further mentions the conducts which shall be object of criminalisation: travelling or attempt to travel for terrorist purpose, any form of direct or indirect fundraising which is done 'by any means' and is intended to finance travelling for terrorist purpose and, ultimately, any organization or facilitation of travelling for terrorist purpose[30].

Conducts are defined in an unprecise manner, making it difficult to discern the distinction between lawful and unlawful acts and thus to comply with the standards of foreseeability and legal certainty once they will be transposed into national criminal provisions. That complex task has been left on national legislators.

The approach adopted by the Security Council can have some serious drawbacks and the chances that fundamental human rights may be compromised are significant. As noted by Martin Scheinin, the former UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Resolution 2178 recalled the intrusive intervention of the first Resolution 1373 (2001), cancelling 'the piecemeal progress made over 13 long years in introducing protections of human rights and the rule of law into the highly problematic manner in which the Security Council exercises its supranational powers'[31]. He further considers the instrument as a 'a

26 *Ibidem.*
27 Kraehenmann, 2014, p. 42.
28 S/RES/2178 (2014), paragraphs from (2) to (10).
29 *Idem*, paragraph (6).
30 *Ibidem.*
31 Scheinin, 23 September 2014, online blog.

handy tool for oppressive regimes that choose to stigmatize as "terrorism" whatever they do not like – for instance political opposition, trade unions, religious movements, minority or indigenous groups'[32], specifically referring to paragraph (6).

The effects of this intervention may be appreciated by considering its influence on the resolutions dealing with FTFs that have been adopted after 2014.

Resolution 2396 (2017) appears of particular interest, since it deals extensively with the problematic aspect of FTFs returning from conflicts and with the major challenges posed by their return. The matter has become alarming since the Islamic State has recently started to crumble.

The Preamble recalls the definition of FTFs provided by Resolution 2178 to identify returnees, expressing grave concern 'over the acute and growing threat posed by foreign terrorist fighters returning or relocating, particularly from conflict zones, to their countries of origin or nationality, or to third countries'[33]. Such threats are identified in the possible commission of terrorist attacks in the State of return[34] and in the use of extremist narratives to radicalize new recruits[35]. In addition to that, Paragraph (17) draws the attention towards the potential involvement in terrorist activities of family members travelling with FTFs, underscoring the need to prosecute and to implement appropriate measures of reintegration and rehabilitation, especially for children who may have suffered traumas in the respect for their dignity and relevant international law[36].

Resolution 2178 and 2396 thus deal with 'two different sides of the same coin, the former focusing on individuals leaving their country of origin to engage in terrorism (foreign terrorist fighters), the latter on individuals returning to those countries after such an engagement (returnees and relocators)'[37].

Several provisions of Resolution 2396 are devoted to the role of judicial measures and prosecution to contrast the flow-back of FTFs. The idea would be to apply the same criminal offences provided by the 2014 resolution now that the accused is in the reach of domestic judicial authorities[38]. Of course, that also implies that the doubts regarding FTFs definition and the vague description of the criminal conducts mentioned in paragraph (6) of Resolution 2178 raise the same concern, now that States are called upon in a global effort to prosecute returnees.

32 *Ibidem.*
33 S/RES/2396 (2017), paragraph (9).
34 *Idem*, paragraphs (12), (13), (14) and (15) of the Preamble.
35 *Idem*, paragraph (32) of the Preamble.
36 *Idem*, paragraph (17) of the Preamble.
37 Bílková, 2018, p. 8.
38 S/RES/2396 (2017), paragraph (1).

More in detail, the section on *Judicial Measures and International Cooperation* of Resolution 2396 provides for obligations of different nature: Member States are recalled to amend national criminal legislation pursuant to paragraph (6) of Resolution 2178 and they are urged to implement investigative and prosecutorial strategies for such offences[39]; they are encouraged to receive support from private actors to gather digital data and surveillance[40] and they are required to adopt measures for judicial cooperation, such as establishing bilateral/multilateral agreements and assisting each other in criminal investigations[41].

Paragraphs from (29) to (41) treat *Prosecution, Rehabilitation and Reintegration Strategies*: States are obliged to investigate and prosecute suspects, including women and children[42], and they must adopt rehabilitation and reintegration plans in order to relocate former FTFs into society[43], possibly engaging civil society.

From a general overview, Resolution 2396 has reinforced the obligation to adapt criminal law to the new emerging challenges and to bring perpetrators of terrorist acts before justice. This is not objectionable *per se*. Nevertheless, a closer look reveals some new potential challenges for human rights and the rule of law, especially when the 2014 and 2017 resolutions are considered altogether as part of a uniform project to counter the FTFs phenomenon.

As the current UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has noted, both 'these resolutions are deeply intrusive upon national sovereignty in new and little appreciated ways, and portend a move to side-step some of the most fundamental elements of national protection for rights, separation of powers within national legal systems and the checks and balances that most societies assume apply when substantive criminal law regulation is embarked upon'[44].

The implication is that the Security Council has worryingly progressed in undermining States sovereignty in criminal matters. It has debated on criminal justice and it has imposed its binding conclusions on national jurisdictions, even when poorly drafted, thus substantially eroding the separation of powers and the rule of law principle[45]. This process was started in 2001, it has been furthered in 2014 and now appears to be consolidated in 2017.

A second overall implication regards the function and the quality of such criminal measures. From an overlook of both resolutions, it appears that criminalisation plays a preventative role in countering

39 *Idem*, paragraphs (17) and (18).
40 *Idem*, paragraph (21).
41 *Idem*, paragraphs from (22) to (28).
42 *Idem*, paragraph (41).
43 *Idem*, paragraph (42).
44 Ní Aoláin, 17 January 2018, online blog.
45 *Ibidem*.

the FTFs phenomenon and extremism in general, rather than being an *ultima ratio*. The idea is to increase the spectrum of criminal offences in order to include acts which are far from the commission of the final terrorist attack, when they are committed with a specific intent[46]. Yet, such intent has not been precisely defined at the international level since terrorism has not been unequivocally defined either.

This presents two connected consequences. Firstly, it communicates the idea that security can be granted only where criminalisation and executive restrictions are increased, in a constant shift towards pre-emption of crime[47]. However, '[t]he primacy this resolution gives to criminal law seems a short-sighted and potentially counter-productive approach, especially considering the broader global landscape focused on countering and preventing the "violent extremism that is conducive to terrorism"'[48]. Secondly, it has led to the adoption of imprecisely defined conducts which will require national legislators to balance the obligations arising from international law with the fundamental principles of legality, certainty and proportionality imposed by criminal law[49].

A third and last implication, which is more evident in Resolution 2396, is the extension of surveillance powers and the increase of data gathering operations justified by the need of international cooperation to monitor FTF returnees[50]. This can only be acceptable when the right to privacy, the right to a fair trial and the presumption of innocence are respected. The information collected by intelligence agencies shall be carefully assessed and it shall not be used as a ground for executive measures, such as travel bans or preventive detention, nor for conviction, if the subject does not have the possibility to access to such information or to challenge it before an independent judicial body. However, this may not always be the case and the misapplication of intelligence data may be more frequent with returnees: where judicial authorities lack the necessary evidence to carry out prosecutions, the possible security threat may be exclusively assessed through such information, resulting in the prolonged and preventive application of executive measures without any formal conviction.

As the UN Special Rapporteur, Ms. Ní Aoláis, has affirmed: '[t]he assumption inherent in this resolution is somewhat naive, namely that all states will collect such information fairly, without discrimination and that the misuse of anti-terrorism definitions will not function as the means to scoop up large amounts of personal information about persons who simply disagree with the state and are routinely labelled terrorists in multiple countries'[51].

[46] *Idem*, p. 3.
[47] On the topic *see*, Ashworth & Zedner, 2014; *see* also, McCulloch & Pickering, 2009, pp. 628 – 645.
[48] Ní Aoláin, 17 January 2018, online blog.
[49] *Ibidem.*
[50] S/RES/2396 (2017), paragraphs (13) and (15).
[51] Ní Aoláin, 17 January 2018, online blog.

Of course, The UN and every national government have the responsibility to respond and to protect their citizens against terrorist attacks[52]. Nevertheless, security and human rights have to be addressed ad complementary goals[53] and only their mutual reinforcement is necessary for a complete response[54].

In this regard, paragraph (5) of Resolution 2178 demands Members States to act in line with international human right law, international refugee law and IHL[55]. So does Resolution 2396, in numerous paragraphs[56]. Yet, the vagueness of the definition the FTF phenomenon, the lack of universal consensus on the meaning of terrorism and the confusion deriving from the adoption of an unprecise terminology are combined with more stringent obligations upon States to prevent, to criminalise and to prosecute a broad spectrum of conducts related to such phenomenon.

That can have negative consequences on the role which is attributed to criminal law, on its fundamental principles and on the quality of criminal legislation in general. Furthermore, a concrete expansion of criminal law and governmental powers in the name of security may deeply affect the freedoms of expression, association or religious beliefs, the prohibition of discrimination and the rights to a fair trial and to privacy[57].

This is why FTFs measures 'mark a second major round of problematic counterterrorism laws and regulations that governments around the world have enacted since the attacks of September 11, 2001, largely as a result of binding UN Security Council mandates'[58].

[52] Tayler, 2016, pp. 455 – 482.
[53] *Idem*, p. 461.
[54] Paulussen, 2016.
[55] S/RES/2178 (2014), paragraph (5).
[56] S/RES/2396 (2017), paragraphs (4), (7), (11), (12), (13), (15), (18), (22), (23), (34) and (40).
[57] Tayler, 2016, p. 461.
[58] *Ibidem*.

# II. European criminal legislation in response to foreign terrorist fighters

*Chapter II aims at answering to the following sub-question: how does European preventive criminal legislation, adopted to contrast foreign terrorist fighters, affect human rights and the fundamental principles of criminal law?*
*The analysis focuses on the regional response to the phenomenon of foreign terrorist fighters and the influence deriving from the international obligations stemming from UN Security Council's resolutions.*
*Section 1 focuses on the Council of Europe's conventions dealing with foreign terrorist fighters and requiring States Parties to criminalise preparatory acts which may be conducive to terrorism. These conventions share the same criminal approach identified at the UN level and therefore the study considers the similar or the emerging issues deriving from the textual analysis of such instruments and the potential human rights implications.*
*Section 2 is devoted to the study of the evolution of the European Union's criminal legislation on terrorism, by drawing specific attention to the offences introduced by the latest Directive 2017/541. In this regard, due consideration is given to the nature of the legal instrument, to the content of the new terrorist offences and their potential violations of human rights and the fundamental principles of criminal, such as proportionality, necessity and the principle of legality.*

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## *1. The Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism*

The phenomenon of foreign terrorist fighters has triggered a strong response also at the European level, affecting the regional choices of criminal policy and criminal legislation. In this regard, the influence of the UN Security Council's resolutions has been relevant, although the obligations set forth in those legal instruments did not exclude margins of appreciation which should be taken into consideration, when addressing the strategies adopted by both the European Union and the Council of Europe.

Surely, these two organisations have mutually shaped each other's counter-terrorism policies and albeit there may be some difference in details, their common impact can be traced in the domestic approach of the Member States[59].

As for the Council of Europe, the Council of Europe Convention on the Prevention of Terrorism (CECPT) adopted in 2005, represents a central element to understand the methodology of its intervention against international terrorism and FTFs, more specifically.

Once again, the primary impulse to adopt the Convention came from 9/11: after the attacks, the Committee of Ministers set up a group of experts with the objective of reviewing and examining the implementation of the existing European Convention on the Suppression of Terrorism, dated 1977[60]. The process ended with the adoption of the Protocol which amends the latter Convention, in 2003.

Notwithstanding the amendments to the 1977 Convention, the discussion on a modern response to international terrorism brought the idea to draft a comprehensive instrument which would include the legal acts adopted also at the UN and the EU level[61]. However, this project was hurdled by contextual problems of technical and political nature[62].

First of all, the international framework of counterterrorism law was (and it's still now) based on *ad hoc* definitions of specific terrorist offences, without a universal definition of the meaning of 'terrorism'. Attempting to draft a comprehensive treaty posed serious concern about the possible interrelation of the various legal instruments which partially overlap and thus a more cautious approach was preferred[63].

In addition to that, a political obstacle was posed by the EU at the time: the position of its Member States, which constitute the majority within the Council of Europe, was to preserve the sectoral conventions which identify terrorism only through a series of terrorism-related acts[64]. Although this political position of the Union was contradicted by the parallel choice to provide a definition of terrorism which is binding for EU Member States through a framework decision adopted in 2002, it posed a definitive impediment during the negotiations of the Convention.

The resulting CECPT is then a treaty with a limited scope which covers the existing *lacunae* in international counter-terrorism conventions[65], with an exclusive focus on prevention of terrorism through criminalisation.

[59] Murphy, 2014, pp. 685 – 700.
[60] Explanatory Report CECPT, paragraph (3).
[61] *Idem*, paragraph (6).
[62] Hunt, 2006, p. 608
[63] *Ibidem.*
[64] *Idem*, p. 607.
[65] CODEXTER *2nd meeting 2004*, paragraph (15).

The Preamble expressly mentions the intention to 'to take effective measures to prevent terrorism and to counter, in particular, public provocation to commit terrorist offences and recruitment and training for terrorism'[66], but the way such measures are defined in the text has been highly contested.

The Convention only refers to 'terrorist offences', as specific terrorist acts which State Parties have the obligation to prevent through the implementation of domestic criminal legislation[67]. Article 1 CECPT provides that 'terrorist offence' means 'any of the offences within the scope of and as defined in one of the treaties listed in the Appendix'[68], which mentions 11 conventions defining and condemning acts such as the seizure of an aircraft, taking of hostages, nuclear terrorism, terrorist bombings and financing of terrorism[69].

The norm reflects international law and it reveals the plan of the drafters to achieve prevention by deterring the commission of specific criminal offences which amount to explicit manifestations of terrorism[70]. Nevertheless, several aspects of such formulation prove to be problematic.

The reference to the conventions listed in the Appendix has been contested as the definition of the main offences remain unclear, especially considering that those conventions describe themselves the conducts broadly and they often refer to other legal instruments[71]. Moreover, most of the offences mentioned in such conventions do not require a terrorist purpose, making the technique adopted for the CECPT definition both over and under-inclusive, since it may include the criminalisation of those who act without any terrorist intent and it fails to cover a wider spectrum of offences which terrorists may perpetrate[72].

As for the substantive part, articles from 5 to 7 CECPT illustrate the preventive scope of the legal instrument. The provisions require States to criminalise preparatory acts of those terrorist offences, namely 'public provocation to commit a terrorist offence', 'recruitment for terrorism' and 'training for terrorism', without being necessary that the final terrorist offence may occur[73].

In addition, article 9 establishes ancillary offences such as the participation in, the organisation or direction of and contribution to the commission of the preparatory acts[74]. This way, the norm includes other possible modes of liability.

The wording of the substantive norms deserves attention, in order to comprehend the nature of the approach adopted by the Council of Europe.

[66] CECPT, paragraph (4) of the Preamble.
[67] Hunt, 2006, p. 610.
[68] CECPT, Article 1(1).
[69] CECPT, *Appendix*.
[70] Explanatory Report CECPT, paragraphs (47), (48) and (49).
[71] Amnesty International, 1 February 2005, Article 1.
[72] Hunt, 2006, pp. 611 – 612.
[73] CECPT, Articles 5, 6, 7 and 8.
[74] CECPT, Article 9(1), (2) and (3).

Firstly, article 5 of the Convention blurs the line between the incrimination of incitement and apology of terrorism[75], requiring States to criminalise the distribution of a public message with the intent to incite the commission of a terrorist offence 'whether or not directly advocating terrorist offences', where such conduct 'causes a danger that one or more such offences may be committed'[76].

This formulation does not allow to easily distinguish prohibited acts from those falling within freedom of expression: there is no definition of the threshold which separates free speech from discourses that do not directly advocate in favour of terrorism but still pose a significant 'danger' for the commission of terrorist acts. On the matter, the ECtHR has found that the prohibition of public statements is allowed, under article 10(2) ECHR, if they directly incite to violence or they do so indirectly, by indicating that violence may be necessary or justified[77]. However, the risk is that the danger may simply be inferred from the religious or political character of the message, where national legislation or jurisprudence should fail to provide some criteria to measure its objective evaluation.

Article 6 CECPT proscribes recruitment for terrorism, defined as the solicitation of another person 'to commit or participate in the commission of a terrorist offence, or to join an association or group, for the purpose of contributing to the commission of one or more terrorist offences by the association or the group'[78]. From the text it is evident that there may be a potential overlap between public incitement and the solicitation to commit a terrorist offence. One element of distinction could be that article 6 does not require the solicitation to pose any concrete danger, nor it should lead to the commission of any of the terrorist acts[79], being only necessary that the recruiter approaches the addressee to be held criminally responsible[80]. In this perspective, the conduct raises doubts regarding its offensiveness, considering that no real threat for public safety has to be proven.

Furthermore, article 6 includes the crime of recruiting members into an association or group. The norm apparently requires the necessity to prove that such recruitment occurred for purpose of contributing to the commission of one of the terrorist offences defined in the Annex[81]. Nevertheless, the Explanatory Report allows States to interpret the terms 'association or group' as meaning one of the proscribed associations or groups under national law, in accordance with general principles of international law[82]. The idea would be to simplify the evidentiary burden to prove the specific intent

[75] Hunt, 2006, 621.
[76] CECPT, Article 5(1).
[77] *See* for example, The European Court of Human Rights, *Ahmet Arslan and Others v. Turkey* (Application No. 41135/98), judgement 23 February 2010; *Baskaya and Okçouglu v. Turkey* (Applications Nos. 23536/94 and 24408/94), judgement 8 July 1999.
[78] CECPT, Article 6(1).
[79] Hunt, 2006, p. 626
[80] Explanatory Report CECPT, paragraph (109).
[81] CECPT, Article 6(1).
[82] Explanatory Report CECPT, paragraph (107).

behind the recruitment, thus condemning any form of recruitment in a group which is identified as terrorist[83]. Yet, this approach somehow contradicts the choice of the drafters: the Explanatory Report apparently concedes States to criminalise recruitment by any sort of terrorist association identified by national criteria, whilst according to article 6 the recruitment should arguably be done for the purpose of the commission of the specific offences referred to in the Appendix. Assuming that this specific intent would automatically be proven by the 'terrorist' qualification of the group or association would be contrary to the textual interpretation of article 6.

Finally, article 7 proscribes 'training for terrorism', as providing instructions to use explosives, weapons, noxious substances and any other method or technique (not strictly related to lethal means[84]) 'for the purpose of carrying out or contributing to the commission of a terrorist offence, knowing that the skills provided are intended to be used for this purpose'[85]. Again, a coherent interpretation of the Convention should require States Parties to adopt criminal measures that provide the specific *mens rea* to commit one of the offences mentioned in the Appendix, at least considering the wording and the intent of the drafters.

As it appears from this brief overview, the threat posed by international terrorism fuelled the reaction which led the Council of Europe to define a wide range of criminal offences in a preventive perspective. This same approach has been furthered in 2015, when the issue of foreign terrorist fighters became more worrying.

Following UN Security Council's Resolution 2178, the Council of Europe adopted in 2015 the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (APCPT). The intervention has been shaped on the obligations to criminalise conducts directly related to the FTFs phenomenon, stemming from the resolution. The Preamble of the APCPT, in fact, mentions paragraphs (4) and (6) of Resolution 2178[86], which have been commented above.

As clarified by its Explanatory Report, the Protocol is intended to supplement the Convention 'by adding some provisions on the criminalisation of a number of acts which are related to terrorist offences and a provision on the exchange of information. The offences set forth in the Protocol, like those in the Convention, are mainly of a preparatory nature in relation to terrorist acts'[87]. The amendments introduced by the Additional Protocol therefore adhere to the same methodology adopted in the Convention to define preparatory acts of 'terrorist offences', without any reference to

[83] Hunt, 2006, p. 628.
[84] Financial support for terrorist activities could also be included. *See* Hunt, 2006, p. 630.
[85] CECPT, Article 7(1).
[86] APCPT, paragraph (6) of the Preamble.
[87] Explanatory Report APCPT, paragraph (10).

the concept of terrorism. In this regard, article 9 provides that norms of the Protocol must be interpreted within the meaning of the Convention[88].

The consequence is that the meaning of 'terrorist offence' shall be still looked for in the 11 international treaties listed in the Annex of the CECPT[89]. This also implies that the Additional Protocol raises the same concern as for the precise definition of such offences[90].

Sharing the view of the Security Council that criminal law would play a primary role in countering the flow of FTFs, articles from 2 to 6 APCPT introduce the additional offences to be implemented by the State Parties. More in detail, articles 2 and 3 of the Protocol are complementary to, respectively, articles 6 and 7 of the Convention[91]. Article 2 requires States to criminalise the participation in the activities of an association or group 'for the purpose of committing or contributing to the commission of one or more terrorist offences'[92], while article 3 obliges them to proscribe receiving training for terrorism 'for the purpose of carrying out or contributing to the commission of a terrorist offence'[93].

Article 2 intends to criminalise a behaviour which is closely related to 'being recruited for terrorism' but requires a degree of active participation as member of the group[94]. Nevertheless, the provision has raised concern since 'it is not clear what level of involvement in a group would be required to establish "participation in its activities" or what intent and level of awareness would be required for an individual's conduct to be deemed criminal'[95].

Article 3 has the purpose to extend the criminalisation of training for terrorism also to those who receive instruction, knowledge or practical skills to commit a terrorist offence, in order to provide 'the Parties with additional tools to tackle the threats resulting from potential perpetrators, including those ultimately acting alone, by offering the possibility to investigate and prosecute training activities having the potential to lead to the commission of terrorist offences'[96]. The option to include 'self-study' for terrorist purpose as an additional offence has been left to States Parties' own discretion[97].

Articles 4, 5 and 6 of the Additional Protocol recall almost literally the obligations set forth in paragraph (6) of Resolution 2178 dealing with the extension of criminal measures to cover acts which would more directly relate to FTFs, as a phenomenon of people leaving a country to join a terrorist organisation abroad.

88 APCPT, Article 9.
89 Scheinin, 18 March 2105, online blog.
90 Amnesty International and ICJ, 19 March 2015, pp. 3 – 4.
91 Explanatory Report APCP, paragraphs (31) and (38).
92 APCPT, Article 2(1).
93 APCPT, Article 3(1).
94 Explanatory Report APCPT, paragraphs (31) and (33).
95 Amnesty International and ICJ, 19 March 2015, p. 6.
96 Explanatory Report APCPT, paragraph (39).
97 *Idem*, paragraph (40).

Article 4 establishes the offence of travelling abroad for the purpose of terrorism, meaning travelling to a State other than the State of residence or nationality 'for the purpose of the commission of, contribution to or participation in a terrorist offence, or the providing or receiving of training for terrorism'[98], recalling paragraph (6)(a) of Resolution 2178[99].

Article 5 introduces the offence of providing direct or indirect financial support which would fully or partially enable a person to travel abroad for purpose of terrorism, defined in article 4(1), with knowledge that the funding will be fully or partially intended to be used for this purpose[100], recalling paragraph (6)(b) of the resolution[101].

Finally, article 6 proscribes any act of organisation or facilitation that assist any person in travelling abroad for the purpose of terrorism, defined in article 4(1), with knowledge that the assistance is for that purpose[102], recalling paragraph (6)(c) of the resolution[103].

As it may be evident from the parallelism with Resolution 2178, the overall approach followed by the Council of Europe in the fight against foreign terrorist fighters may be criticised from a twofold perspective.

First of all, the APCPT defines the preparatory acts to terrorism in a manner that does not bring any substantial improvement to the vagueness and the unprecise drafting of the criminal offences operated by the Security Council. On the contrary, it follows the same strategy which aims at increasing significantly the spectrum of preparatory acts to be criminalised by domestic penal codes.

Fully aware of the possible consequences, the drafters of the APCPT decided to exclude the application of ancillary offences (such as aiding, organising, contributing and attempting) provided in article 9 CECPT to the crimes of the Additional Protocol, with the only exception of the attempt to travel for terrorism purpose mentioned in article 4(3) APCPT[104].

However, this choice is contradicted by different sections of the Explanatory Report. The Report reminds States that '[t]he conditions under which the conduct in question is criminalised need to be foreseeable with legal certainty'[105] and it requires them to draw 'special attention to the purpose/intent of a perpetrator to commit (contribute to, or participate in) a terrorist offence, which is an essential element of a criminal offence as defined by Articles 2-6 and should be proven in accordance with

98 APCPT, Article 4(1).
99 Explanatory Report APCPT, paragraph (43).
100 APCPT, Article 5(1).
101 Explanatory Report APCPT, paragraph (55).
102 APCPT, Article 6(1).
103 Explanatory Report APCPT, paragraph (60).
104 Explanatory Report APCPT, paragraph (83).
105 *Idem*, paragraph (29).

domestic law'[106]. Yet, the Report also clarifies that States retain power to decide whether to further extend the criminalisation in such a way as to include the ancillary offences of article 9 CECPT, failing to consider that such an open concession would practically undermine the safeguards of legal certainty that it requires to respect, through the explicit allowance for national legislators to criminalise attempting preparatory acts which appear to be far from the commission of the final terrorist offence. This may result in serious doubts on how to discern legitimate and apparently innocent acts from the unlawful support of terrorism and in a heterogeneous application of the Protocol.

Secondly, a careful analysis of the scope of application of the norms of the Additional Protocol, especially considering those incriminating travelling and supporting travelling for terrorist purposes, may uphold serious doubts concerning its usefulness.

As critically noted by Martin Scheinin, the Protocol shares with Resolution 2178 the same 'erroneous' assumption that FTFs joining a conflict in countries such as Syria or Iraq would automatically commit a terrorist offence there[107]. This assumption proves to be wrong at least in the vast majority of cases and the definitions adopted in both the CECPT and its amendment may instead pose serious challenges for national prosecutions.

The fact is that the CECPT defines terrorist offences by referring to the aforementioned 11 treaties in its Annex. Therefore, all the preparatory acts related to the FTFs' departure to conflict zones should be perpetrated with the intent to commit one of the specific conducts listed in such treaties. However, just few of these offences may be applicable to a situation of armed conflict, due to the substantive and legal restrictions posed by the same international instruments[108].

Prosecutors should then have to prove beyond reasonable doubt that the potential FTF has intention to perpetrate in those areas acts which are very specific and unlikely to happen or that cannot be defined as terrorist offences while committed during the conflict. This makes the Protocol practically useless to prevent the flow of FTF due to the limitations that are inherent to its provisions[109].

The only circumstance in which it may apply would be to cover departure for the purpose of receiving terrorist training that, according to article 3 CECPT, should aim to the commission of a

106 *Idem*, paragraph (30).
107 Scheinin, 18 March 2015, online blog.
108 As for the substantive nature of the offence, the instruments potentially applicable to the type of acts committed by foreign fighters in conflict areas are primarily the *International Convention Against the Taking of Hostages* (1979) and *International Convention for the Suppression of Terrorist Bombings* (1997). Yet, article 12 of the Hostages Convention excludes the application in armed conflicts, so does the Terrorist Bombings Convention. *See*, Scheinin, 18 March 2015, p. 4.
109 Schenin, 18 March 2015, p. 5.

terrorist offence[110]. Yet, the problematic application of the definition of 'terrorist offence' would pose the same problems.

Thus, the Protocol gains relevance only when used to prosecute returnees who attempt to commit a terrorist offence back in their home countries[111]. Nevertheless, the provisions which criminalise travelling related conducts would still remain substantially flawed and irrelevant in case foreign terrorist fighters decide to return to the European soil.

## 2. *The European Union legal response to foreign terrorist fighters*

### *2.1. EU criminal legislation on terrorism: The 2002 Framework Decision on Combating Terrorism and its amendment*

The European Union has been proactive in the fight against terrorism from both a political and legal perspective over the past two decades. Counter-terrorism policies have developed alongside with the process of European integration, they have been shaped by the powers that Member States have gradually attributed to the Union and they are reflected into the legal instruments which were deemed more appropriate.

EU had already put in place measures to contrast international terrorism even before the issue of FTFs had acquired a central importance in security agenda. In this regard, the UN Security Council's resolutions influenced the overall European approach (being France and UK permanent members), while the cooperation with the Council of Europe has brought the two organisations to share similar legislation, thus mutually reinforcing their criminal efforts on the matter[112]. Eventually, the EU has also signed and ratified the APCPT, thus making it binding for all its Member States with exception of Denmark.

An introductory overlook the European legislation on counter-terrorism will be helpful to understand its evolution and the specific formulation of terrorist offences related to the more recent issue of foreign terrorist fighters.

Once again, the shock caused by the attacks on the Twin Towers was the major propulsion for the implementation of a swift legislative response to the phenomenon of terrorism. On 13 June 2002, the

110 *Ibidem*.
111 *Ibidem.*
112 Murphy, 2014, p. 689.

European Union adopted Council Framework Decision on combating terrorism (FDCT). Although in a Pre-Lisbon era, the resulting instrument resembled more a supranational intervention rather than an intergovernmental act[113].

In fact, the purpose of the Framework Decision was to obtain a coherent approximation of national criminal legislations dealing with terrorism[114], by providing the first common definition of the concept within the EU together with a series of terrorism related offences which Member States were required to implement into their domestic systems[115]. Recital (9) of the Preamble clarifies that such purpose can only be effectively achieved through an action adopted at the European level, in line with the principles of subsidiarity and proportionality[116].

The most relevant provision of the FDCT is article 1, which provides a comprehensive definition of terrorism. The norm qualifies terrorism as a series of specific conducts which, 'given their nature or context, may seriously damage a country or an international organisation'[117]. The nine conducts, listed in the first paragraph, include acts such as attacks on a person's life, kidnapping and hostage taking, the destruction of public facilities and the possession or the use of mass destruction weapons. The norm further requires that the offences must be committed with terrorist intent, namely aiming at: (i) 'seriously intimidating a population'; or (ii) 'unduly compelling a Government or international organisation to perform or abstain from performing any act'; or (iii) 'seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation'[118]. This definition of terrorism requires specific attention, considering that it remained unaltered during the years.

The Framework Decision attempts to define terrorism by including the socio-political purpose of the specific criminal offences, which shall distinguish the conducts from those committed by 'ordinary' criminals or by criminal organisations in general[119]. However, scholars have highlighted how the formulation of article 1 may be problematic, especially considering that different official translations of the framework decision may add confusion to its interpretation[120].

The major issue regards the interpretation of the serious damage to a country or to an international organisation, required by the first part of article 1(1). Academics agree on such requirement being an objective threshold which shall further distinguish terrorist offences from ordinary crimes[121]. What

113 Murphy, 2019, p. 220.
114 Amnesty, 31 May 2005, p. 9
115 Symoenidou - Kastanidou, 2004, p. 14
116 FDCT, Recital (9).
117 FDCT, Article 1(1).
118 *Ibidem.*
119 Symoenidou - Kastanidou, 2004, p. 25.
120 Borgers, 2012, p. 70.
121 *Ibidem*; *see* also Symoenidou - Kastanidou, 2004, pp. 25 – 26.

remains uncertain is whether the degree of damage to the country or the international organisation remains a separate objective element to be ascertained by national judiciary, in addition to the commission of the act and the terrorist intent provided in the second part of article 1(1)[122]. If this were the case, it would be a complex task to define what amounts to a 'serious damage' but such interpretation may exclude lesser acts of violence that shall not be considered as terrorist manifestations. Otherwise, if the nine conducts were inherently dangerous, the terrorist offences would simply be distinguished by ordinary crimes because of the mental element and the damage to the State or organisation would be implied in such acts. As a consequence, the *discrimen* between terrorism and ordinary crimes would be purely psychological.

The Commission itself has failed to clarify the interpretation of the possible objective threshold, leaving to Member States large margins of appreciation. This may be justified by the fact that the FDCT provides for minimum harmonisation of criminal law and national legislators retain the power to choose more or less stringent requirements in defining terrorist offences.[123].

However, this lack of clarity entails that the definition terrorism given by the FDCT may also lack sufficient safeguards to avoid ordinary crimes to be labelled as terrorism and it could lead to abusive applications. This could be the case of crimes such as damaging public property during an activist or a political manifestation which may suddenly erupt in a more violent protest[124]. In this context it would be easy to infer the mental element, such as compelling a government to do or not to do something, and the perpetrator and his/her aiders may be convicted for terrorist acts or as members of a terrorist organisation. These considerations are not simply abstract speculations: Italy, for instance, was hopeful to include into the definition provided by the FDCT the brutal protests by *no-global* movements during the 2001 G8 summit in Genoa[125].

Although the manifestations preceded the adoption of the Framework Decision, this example illustrates how a broad and vague definition of terrorism may be used by State actors to preserve some political principles, by including acts of political violence which could hardly be considered as attacks with a terroristic motive[126].

In this regard, article 1(2) FDCT specifies that the framework decision 'shall not have the effect of altering the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union'[127]. Recital (10) of the Preamble explains that the FDCT respects the fundamental rights and freedoms enshrined into the ECHR and guaranteed by the

[122] Borgers, 2012, p. 72.
[123] *Idem*, p. 82.
[124] Kastanidou, 2004, pp. 27-28.
[125] Murphy, 2012, p. 58.
[126] *Ibidem*.
[127] FDCT, Article 1(2).

constitutional traditions common to Member States such as freedom of assembly, association or expression and the right to strike or to form a trade union[128].

The specific reference to the protection of fundamental rights and principles must be welcomed, but the fact that the definition of terrorism appears broad and partly unclear remains worrying since their infringement remains possible. In fact, considering that a framework decision cannot have direct effect on the approximation of domestic legislation[129], national parliaments will bear the responsibility to adopt legal measures that comply with the principle of legal certainty in criminal law (*nullum crimen sine lege certa*), which is now recognised as a fundamental principle of the Union under article 49 of the Charter[130] and is a common to EU States' constitutional traditions.

However, as illustrated by the Commission, the implementation of the Framework Decision has been rather heterogeneous, with regards to both the *actus reus* and the *mens rea* of the offence[131]. Following two implementation reports, based on article 11 of the FDCT, the Commission found that Member States such as Germany, Italy, Lithuania, Luxembourg, Poland, Slovenia and the UK have failed to transpose properly the material and the mental elements required by the definition of terrorism, while others have proceeded with its literal or at least partial transposition[132]. As it will be illustrated in the following Chapter, Italy has failed to list the conducts which constitute terrorist offences, rather opting for an open list which has been subject to severe criticism by national experts. Therefore, legal discrepancies in the implementation have generally developed uncertainties regarding the precise qualification of terrorism[133].

The 2002 Framework Decision was amended in 2008, by a subsequent framework decision (Framework Decision 2008/919/JHA). The new instrument has modified Article 3 of the FDCT, which regulates the 'offences linked to terrorist activities'[134], and article 4, defining the offences of inciting, aiding or abetting, and attempting[135]. As illustrated by Recital (7), the 2008 Framework Decision means to increase the spectrum of criminally relevant conducts 'in order to contribute to the more general policy objective of preventing terrorism'[136], in response to the new threats posed by

128 FDCT, Recital (10).
129 Klip, 2016, p. 55.
130 Charter of Fundamental Rights of the European Union, Article 49.
131 *Report from The Commission based on Article 11 of the Council Framework Decision of 13 June 2002 on combating terrorism*, 08 June 2004; *Report from The Commission based on Article 11 of the Council Framework Decision of 13 June 2002 on combating terrorism,* 06 November 2007; *Commission staff working document - Annex to the Report from the Commission based on Article 11 of the Council Framework Decision of 13 June 2002 on combating terrorism*, 06 November 2007.
132 Murphy, 2012, pp. 59 – 60.
133 *Idem*, p. 57.
134 FDCT, Article 3.
135 FDCT, Article 4.
136 Framework Decision 2008/919/JHA, Recital (7).

increasing radicalisation and recruitment through the internet[137]. The legislative intervention was also influenced by other international legal instruments devoted to the criminalisation of preparatory acts conducive to terrorist offences, such as the 2005 CECPT adopted by the Council of Europe[138]. A brief overview of the amendments may illustrate such general preventive role given to criminal legislation at the EU level, which will be useful to comprehend the latest Directive aiming to contrast the FTFs phenomenon.

Article 3 FDCT originally mentioned three 'terrorist-linked' offences, namely aggravate theft with the view of committing one of the acts listed in article 1(1), extortion and drawing up false administrative documents for that same purpose[139]. In the Annex to the first implementation report to the FDCT, the Commission explains that the relevant conducts do not require the specific terrorist intent, thus being crimes carried with the view of committing terrorist offences but without being terrorist acts themselves[140].

The amendments introduced three additional offences, namely: 'public provocation to commit a terrorist offence', meaning the distribution of a message to the public; 'recruitment for terrorism', meaning soliciting another individual to commit a terrorist offence; and 'training for terrorism', meaning providing instruction for the use of dangerous substances or techniques for the purpose of committing a terrorist offence[141]. Paragraph (3) of the amending provision further adds that for one of those preparatory acts to be punishable, it is not necessary that the final terrorist offence is committed[142]. Therefore, the possible connection between the incriminated conducts and the final harm which should be prevented may be extremely tenuous or even absent[143]. The formulation of the new offences needs further comment, since they have converged into the subsequent counter-terrorism legislation.

Public provocation has been strongly criticised since it apparently includes forms of indirect incitement to commit terrorist offences, being sufficient that such indirect incitement causes a danger that the advocated act 'may be committed'[144]. This formulation is problematic since it may render extremely complex to distinguish legitimate political expressions from forms of implicit provocations. The dividing line would exclusively be the subjective intent, which would be difficultly

137 *Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism,* 05 September 2014, p. 3.
138 Framework Decision 2008/919/JHA, Recitals (8) and (9).
139 FDCT, Article 3(a), (b) and (c).
140 *Commission staff working document - Annex to the Report from the Commission based on Article 11 of the Council Framework Decision of 13 June 2002 on combating terrorism*, 08 June 2004, p. 15.
141 Framework Decision 2008/919/JHA, Article 1(1) and (2).
142 *Idem*, Article 1(3).
143 Murphy, 2012, p. 67.
144 *Idem*, p. 70.

proven and it could easily lead to incriminate radical ideologies that would fall under the democratic political dialogue[145].

As for the other two offences, recruitment presents some elements of vagueness in its definition, considering that the meaning of 'soliciting' did not receive much attention during its drafting and thus there is no direct clarification as to its precise meaning. Training for terrorism, instead, is defined almost identically to article 7 CECPT. In this regard, the EU legislation is formulated in a more precise and comprehensive manner than the Council of Europe Convention, considering that the former provides a general definition of terrorism while the latter refers to international treaties whose coherent application is doubtful.

Article 4(1) of the FDCT required Member States to criminalise the acts of inciting, aiding and abetting the commission of a terrorist offence, offences related to a terrorist group and other terrorism-linked offences. Paragraph (2) of the norm required the criminalisation of the attempt to commit terrorist offences or terrorist-linked offences.

The 2008 amendments provide that an individual can be held criminally responsible for aiding or abetting also the three additional offences of public provocation, recruitment and training for terrorism, thus sensibly increasing the number of predicate offences to terrorism[146]. Considering that the reform explicitly excludes the occurrence of the final terrorist act to consider criminally relevant the aforementioned preparatory acts, it may be self-evident that article 4(1) incriminates conducts that are even more distant from the final harm, with a strongly pre-emptive approach. This means, practically, that aiding someone to indirectly advocate for the commission of a terrorist act, where such act is not committed but the provocation has caused a danger for it to happen, for example, should be considered a crime.

In contrast, the amended article 4(2) provides that incitement to commit a terrorist offence, offences related to a terrorist group and the original offences linked to terrorism must be punished, excluding though the latest three offences introduced by the 2008 Framework Decision[147]. Paragraph (3), similarly, requires the criminalisation of attempting the commission of terrorist offences or of the original terrorism-linked offences, without mentioning the membership crime and the new crimes[148]. Nevertheless, article 4(4) authorizes State to extend the criminalisation of the attempt to commit recruitment and training for terrorism, upon their discretion[149].

As a conclusive overview, it can be affirmed that both framework decisions have played an important role in the definition of terrorism and its related offences at the EU level and they can be

145 *Idem*, p. 71.
146 Framework Decision 2008/919/JHA, Article 1(2)(1).
147 *Idem*, Article 1(2)(2).
148 *Idem*, Article 1(2)(3).
149 *Idem*, Article 1(2)(4).

considered the basis for the subsequent legal provisions adopted to contrast the flow of foreign fighters abroad.

Nevertheless, the vagueness and broadness of the legal drafting, combined with the lack of a uniform transposition by Member States, raise concern as to the full respect of the principle of legality required by criminal law at the European level, in terms of foreseeability and accessibility[150]. Furthermore, although there is a general reference to the respect of fundamental rights in both legal instruments, the lack of precise elements which allow for the net distinction between terrorism and other ordinary offences, when considering the *mens rea* and the objective threshold posed by article 1(1) of the FDCT, may include into the definition of the offence conducts which would fall within political violence or even into the freedom of expression of radical ideas. Against this backdrop, the criminalisation of preparatory acts could stigmatise and impose coercive measures over individuals which may not be directly involved into terrorism, rather than actually preventing future attacks[151].

### *2.2. The phenomenon of foreign terrorist fighters within the European Union: numbers, threats and legal response*

The phenomenon of foreign terrorist fighters has significantly affected the European Union over the past decade. According to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs' (LIBE) 2015 draft report, it is estimated that over 5.000 individuals have left the continent to join ISIS forces in Iraq and Syria, animated by radical ideologies[152]. The flow of FTFs has intensified following the proclamation of the Caliphate in 2014[153]. This data is confirmed by the 2018 Europol's annual report on the terrorist situation and trend (TE-SAT), with approximately 2.500 people still actively fighting by late 2017[154].

The trend is decreasing by 2019 and the main reason would be the slow and inexorable collapse of the Islamic State[155]. This is reflected in the parallel decrease of major terrorist attacks and a lower number of foiled attacks in Member States, also thanks to effective intelligence operations[156]. Nevertheless, foreign terrorist fighters have been and are still considered a concrete threat for several reasons.

150 Murphy, 2012, p. 76
151 *Idem*, pp. 81 – 82.
152 LIBE Committee, 01 June 2015, p. 4
153 Bakker and de Roy van Zuijdewijn, 2015, p. 2.
154 Europol, TE-SAT 2018, p. 26.
155 Europol, TE-SAT 2019, pp. 32 – 33.
156 *Ibidem*.

First of all, travelling to conflict zones is believed to be a major factor for the consolidation of radicalised ideologies[157]. Second, such radicalised and trained soldiers would pose a concrete danger for national security once they would return back to EU territory[158]. The 2014 Brussels attacks and the 2015 Paris attacks against *Charlie Hebdo* were, in fact, perpetrated by returnees[159].

Third, EU governments consider terrorist attacks perpetrated by EU citizens as an additional divisive message for western democratic societies, which can fuel violent responses by other extremist movements[160]. In this regard, it would be interesting to question whether terrorism is the cause or rather the consequence of a divided democracy, as a tip of a major iceberg.

Fourth, FTFs may negatively influence other radical jihadist and they could promote the creation of sleeping cells or induce other 'lone-wolf' actors to commit attacks[161]. The 2019 TE-SAT report highlights that one of the actual risks of terrorism would still be the commission of attacks by individuals who are not directly supported by an international terrorist organisation. Of course, these attacks may be less harmful than the organised ones and, in some circumstances, the subjective intent could be the only *discrimen* to distinguish them from ordinary crimes[162].

From this perspective it appears that the main concern raised by foreign terrorist fighters is the fact that those individuals present a major risk factor once they return back to Europe. The reason would be that the things they learn and they do abroad make them skilled and potentially dangerous elements, which is a strongly destabilizing for democratic societies.

Of course, these are legitimate considerations, but they have to be kept in mind as a key to read and interpret the criminal legislation which has been adopted at the European and national level to contrast the issue, under the influence of the other international and regional legal instruments mentioned in the previous Sections of the thesis.

As for the legal response to the FTFs problem, starting from 2014 the EU Counter-terrorism Coordinator had drafted over 20 proposals for action against the foreign terrorist fighters, under the impulse of the obligations set forth in UN Security Council's Resolution 2178 (2014)[163].

The following year, in contemporary with the adoption of the Council of Europe's APCPT (2015), the European Parliament adopted a resolution on the European Agenda on Security, expressly underlining the need 'to counter the threat of EU nationals and residents who travel abroad for the

157 van Ginkel and Entenmann, 2016, p. 14.
158 *Ibidem*.
159 Bakker and de Roy van Zuijdewijn, 2015, pp. 5 – 6.
160 van Ginkel and Entenmann, 2016, p. 14.
161 *Idem*, p. 15.
162 Europol, TE-SAT 2019, pp. 32 – 33.
163 van Ginkel and Entenmann, 2016, p. 15.

purpose of terrorism ('foreign fighters')'[164]. In this regard, the Parliament has also reminded the importance to respect fundamental rights and the rule of law, calling for the balance between preventive and punitive measures 'in order to preserve freedom, security and justice'[165] and to protect the right to privacy, freedom of expression and association and the due process[166]. In all its subsequent interventions, proportionality has also been considered as a mandatory asset for counter-terrorism legislation[167].

After the *Charlie Hebdo* attacks in 2015, the EU response to the matter increasingly accelerated. The Justice and Home Affairs Ministers meeting in Riga required to intensify the efforts, acknowledging that the recent manifestations of terrorism are inevitably linked with the FTFs issue and that further legislative developments should have considered 'the common understanding of criminal activities related to terrorism in light of the United Nations Security Council resolution 2178 (2014)'[168].

Within this general frame, the EU Commission was working on a legislative proposal to be presented in 2016 which should have amended and replaced the previous 2002 and 2008 framework decisions, in line with the political plan established in the European Agenda on Security of 2015. One of the three priorities established in the Agenda was to tackle terrorism and the flow of FTFs[169]. The Commission called upon a solid criminal response to terrorism, 'covering investigation and prosecution of those who plan terrorist acts or are suspected of recruitment, training, and financing of terrorism as well as incitement to commit a terrorist offence'[170]. The plan was to enact more coherent laws which would have addressed foreign terrorist fighters-related offences under a twofold perspective: by preventing their departure and by addressing the cross-border challenges in gathering evidence for their prosecution, upon return[171].

Therefore, the criminal response anticipated by the Commission was both preventive and punitive and this will be reflected into criminal legislation and in the choices of criminal policy regarding the prosecution of returnees from the conflict zones.

The Agenda on Security also provided that the Commission would have launched an impact assessment of the legislative proposal in 2015, before its final presentation. The final proposal should have taken into account UN Security Council's Resolution 2178 obligation to criminalize travelling

164 LIBE Committee, 09 July 2015, paragraph (30).
165 *Idem*, paragraph (3).
166 *Ibidem*.
167 Voronova, 2017, p. 4.
168 *JHA Ministers Riga Joint Statement,* 29 and 30 January 2015, p. 7.
169 *The European Agenda on Security,* 28 April 2015, p. 12.
170 *Idem*, p. 14.
171 *Ibidem*.

for terrorist purpose and the result of the negotiations parallelly undertaken at the Council of Europe, for the adoption of the Additional Protocol to the Convention on the Prevention of Terrorism[172].

Things did not go as planned. Following the terrorist attacks in Paris in November 2015, the Commission decided to present a proposal for a Directive replacing the 2002 FDCT on 2 December 2015 and, 'given the urgent need to improve the EU framework to increase security in the light of recent terrorist attacks', it decided to exclude the preliminary impact assessment mentioned in the Agenda on Security[173]. In the proposal, the Commission stresses that the risk posed by returning FTFs can materialise, as it occurred in Paris[174].

The operative paragraph (6) of UN Security Council's Resolution 2178 and the APCPT are mentioned as references for the new legislation, reminding that the former is binding by its nature and that the latter was signed (and now ratified) by the EU[175]. The proposal clarifies, in fact, that the 2002 Framework Decision failed to criminalise the conducts of travelling abroad with terrorist intentions, receiving training for terrorist purposes and financing the offences of travelling, recruiting and training for terrorist activities. The new Directive will then include these new offences reacting, once again, to terrorist attacks by increasing the types of conducts that should be criminally relevant, in the optic of preventing future threats by enlarging the prohibition of acts that are conducive to terrorism. In this regard, the proposal affirms that the action undertaken helps to reduce the risk of terrorist attacks and radicalisation, somehow confirming the effectiveness of the preventive approach.

The proposal finally encompasses a series of human rights considerations. It recalls that the Union is founded on the respect of fundamental rights and freedoms, on the rule of law and on the protection of common democratic values, as provided by the Charter of Fundamental Rights in accordance with article 6(1) TEU. It further adds that all measures intended to enhance security measures must comply with the principles of necessity, proportionality and legality[176].

The Commission recognises that several fundamental rights protected by the Charter may be at stake, such as dignity, life and integrity, liberty and security, respect for private and family life, protection of personal data, right to property and the right to asylum[177]. The measures may also affect fundamental freedoms such as freedom of expression, religion, thought, assembly and the freedom of movement and residence, in addition to the prohibition of discrimination[178]. Therefore, all criminal

172 *Ibidem*.
173 *Proposal for a Directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism*, 2 December 2015, p. 12.
174 *Idem*, p. 3.
175 *Idem*, p. 5.
176 *Idem*, p. 13.
177 *Ibidem*.
178 *Idem*, p. 14.

legislation adopted to contrast terrorism, including the proposed Directive, must comply with the fundamental principles of criminal law, such as the principle of legality, the proportionality of criminal offences, the presumption of innocence, the right of the defence and the due process, excluding any form of arbitrariness[179].

However, the absence of a thorough preventive impact assessment evaluation, considering the possible human rights implications just mentioned, is worrying. The following analysis will consider whether such objectives are reflected in the legal drafting of the resulting Directive.

### *2.3. Directive 2017/541/JHA: the latest evolution of counter-terrorism legislation in response to the FTFs' threat*

On 15 March 2017, Directive 2017/541/JHA has been adopted in its final version. The instrument replaces the previous counter-terrorism legislation regulated by the Framework Decision 2002/475/JHA and amends Council Decision 2005/671/JHA, on the exchange of information and cooperation concerning terrorist offences.

The innovation brought by the Directive lays, first of all, in the nature of the instrument itself. Whilst the FDCT was adopted under the Third Pillar structure of the Union, after the entry into force of the Lisbon Treaty in 2009 the pillars were abolished and the Area of Freedom, Security and Justice (AFSJ) was incorporated into the TFEU (Title V), as a matter of internal policy of the EU[180]. The Directive was adopted under the new EU legislative procedure pursuant to article 83(1) TFEU, which allows the Union to establish some 'minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need  combat them on common basis'[181]. Terrorism is specifically mentioned as falling under the legislative competence in criminal matters of the EU.

The possibility to harmonise national counter-terrorism legislation through a directive implies that the Commission enjoys the monopoly on drafting of the initial proposal, whilst the Council wont' have to vote by unanimity but by a qualified majority, thus making the process more flexible[182]. The legislative process also allows for a greater parliamentary scrutiny. In the case of the adoption of

179 *Ibidem*.
180 Klip, 2016, pp. 54 – 57.
181 TFEU, Article 83(1).
182 Maliszewska-Nienartowicz, 2017, p. 189.

Directive 2017/541, the European Parliament and national parliaments were consulted and they proposed amendments to the original proposal, according to the principle of subsidiarity[183].

Additionally, where Member States should fail to transpose the Directive within the period required therein, the Commission could commence an infringement procedure for the failure to implement an obligation stemming from the ASFJ provisions[184].

Finally, the role of the CJEU is strongly increased, since the Court could also give preliminary rulings, thus granting a homogeneous interpretation of European counter-terrorism measures and ensuring that the general principles of the Union Law, resulting from the EU Charter of Fundamental Rights and from the ECHR, would be respected[185].

Therefore, it's self-evident how introducing a new comprehensive legislation on terrorism through a directive poses clear advantages in terms of democratic participation of national institutions, effective harmonisation of domestic legislations and uniform interpretation by the CJEU.

However the adoption of Directive 2017/541 did not go uncontested, since NGOs and several civil liberties advocates have opposed strong criticism to proposal, from both a substantive and procedural perspective, claiming that the drafting of the legislation did not comply with the principle of legality and that the lack of a previous impact assessment could have exacerbated the negative impact on fundamental rights and freedoms[186]. These concerns must be taken into account for a thorough analysis of the norms and of their possible drawbacks on the human rights framework.

As provided by the Preamble of the Directive, terrorism has been an evolving threat over the years and it recently concretised in foreign terrorist fighters travelling abroad and returning to Europe[187]. UN Security Council's Resolution 2178 and the APCPT are, once again, expressly mentioned as references for the EU intervention, in order to comply with international law obligations of its Member States[188]. In fact, all three legal instruments intend to interrupt the phenomenon of foreign terrorist fighters by using criminal law as a way to prevent and to punish their conducts, with a common approach[189]. The Recitals confirm this interpretation, clarifying that increasing the criminalisation of conducts would ensure that national authorities are empowered with more appropriate investigative tools, such as those adopted to combat other forms of organised crime[190].

Therefore, one of the main objectives behind the evolving counter-terrorism legislation would be, apparently, to provide police officials and prosecutors with the authority to prevent the commission

183 *Idem*, p. 190.
184 *Ibidem*.
185 *Ibidem*.
186 Voronova, 2017, p. 9.
187 Directive 2017/541/JHA, Recital (4).
188 *Idem*, Recitals (5) and (6).
189 Sánchez Frías, 2018, p. 202.
190 Directive 2017/541/JHA, Recital (21).

of terrorist attacks by intervening at its earliest phases, even when their final materialisation is distant. Nevertheless, there are interesting side-effects which have to be added to the equation when analysing the legal drafting of the reform.

Regarding the substantive part of Directive 2017/541, the instrument is structured in a way that is similar to the 2002 FDCT: its most innovative element is the criminalisation of a major number of preparatory acts, also defined as 'offences linked to terrorist activity' in the former framework decisions[191].

As for the general definition of terrorist offence, article 3 of the Directive does not bring any change to the definition provided by article 1 of the FDCT. Therefore, terrorist offence means the commission of specific conducts, 'which, given their nature or context, may seriously damage a country or an international organisation'[192], when perpetrated with the specific intent: (a) to seriously intimidate a population; or (b) to unduly compel a government or an international organisation to perform or abstain from performing any act; or (c) to seriously destabilise or destroy the fundamental political, constitutional, economic or social structures of a country or an international organisation[193].

The new definition simply adds to the list of acts which may amount to terrorism: the manufacture, possession, acquisition, transport, supply or use of explosives or weapons, including chemical, biological, radiological or nuclear weapons, or their development; and the illegal system interference and data interference[194].

This also implies that the concern regarding the formulation of such definition mentioned for the 2002 Framework Decision remains, especially considering the objective threshold of the 'serious danger' required by the norm, which lacks of clarity and its broad drafting may result in the inclusion of ordinary crimes within the concept of terrorism[195].

In addition to that, Amnesty International and other NGOs addressed a joint submission to the Commission, noting that the offence provided by article 3(1)(j) of Directive 2017/541 which was equally present in the FDCT and punishes 'threatening to commit any of the acts listed in points (a) to (i)' is problematic[196]. The fact is that the provision does not illustrate the qualities of such threat, such as the nature, precision, level of impact and potential dangerousness[197], with the risk that pure

191 Wittendorp, 25 July 2016, online blog.
192 Directive 2017/541/JHA, Article 3(1).
193 *Idem*, Article 3(2).
194 *Idem*, Article 3(1)(f) and 3(1)(i).
195 Borgers, 2012.
196 Amnesty International *et al.*, February 2016, p. 7
197 *Ibidem*.

expressions which are not backed by the means necessary to commit any sort of terrorist offence may be considered as such.

The NGOs substantially claim that mere intentions shall not be punished. Of course, threatening to commit a terrorist attack has the power to seriously intimidate a population or national institutions but, if the objective threshold must be met, it is hard to imagine how a threat may seriously damage a country or an international organisation. Otherwise, terrorism would be a purely psychological crime, meaning that whenever the spread of 'terror' is achieved, the material elements of the offence are fulfilled. This would be a very dangerous interpretation of the norm, since establishing what acts are able to intimidate a population, for example, is an entirely interpretative operation which would depend on the subjective perception of the population. Such reading of the norm would additionally blur the line between terrorism and freedom of expression, that does not protect criminal behaviour but it allows for radical discourses which could be easily interpreted as aiming to destabilise the political or social order.

Finally, it should be noted that the threat is different from the public provocation to commit a terrorist offence, regulated by article 5 of the Directive. Therefore, either the scope of application of such provision is so narrow as to make it practically inapplicable because it wouldn't meet the objective threshold requirements, or it would rather be used to prosecute entirely verbal expressions which would be addressed against a population or a government, without causing any material danger to society.

Article 4 of the Directive concentrates on the offences relating to a terrorist group, defined as 'a structured group of more than two persons, established for a period of time and acting in concert to commit terrorist offences'[198], where a 'structured group' is identified as 'a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure'[199]. This formulation is identical to article 2 of the FDCT. In its joint submission, Amnesty International considers such definition as 'overbroad and indeterminate', since it is not really clear what is the meaning of a group which does not have a developed structure[200]. Similar observations are made by the Meijers Committee, in its comment to the Directive's proposal[201]. The fact is that the definition provided by the EU instruments is apparently contradictory: on one hand it requires a terrorist group not be randomly formed for the immediate commission of an offence, meaning there must be some degree

198 Directive 2017/541/JHA, Article 4.
199 *Idem*, Article 2(3).
200 Amnesty International *et al.*, February 2016, p. 8
201 Meijers Committee, 16 March 2016, p. 4.

of coordination and participation in the commission of a terrorist offence; on the other, the group needs not have formally defined roles for its members, continuity and a developed structure.

Therefore, the provision itself excludes some of the key factors for the identification of the 'group', making it difficult to discern in what circumstance individuals acting jointly to commit a terrorist offence shall be considered as a terrorist group or as co-perpetrators. In this regard it must be noted that most of the coordinated attacks on the European soil were committed by individuals who organised for the commission of that specific attack, without a realistic perspective to commit further attacks in a longer period of time before police authorities would capture them. Would that be a 'randomly formed' terrorist unit or would it rather be considered as a 'group'?

These open interrogatives are relevant since article 4(b) incriminates the conduct of those who participate in the activities of a terrorist group, with knowledge of their contribution to such activities. Of course, identifying the existence of the group is the first step to address the mode of liability of the single perpetrators. This is particularly important for those actors who contributed to the commission of the crime but whose conduct cannot be regarded as direct perpetration: if such terrorist units would not be considered as a 'structured group', those who contribute to the co-perpetration might be criminally responsible as aiders or abetters, whilst they could be addressed as members if that same contribution is given to a terrorist group. The provision, in fact, does not even clarify the type of contribution needed to amount to a participation[202].

The consequences of an imprecise definition of what constitutes a terrorist group may thus have significative consequences before a court that has to establish the degree of culpability of several actors, differently involved in the commission of a terrorist offence, if the Directive is copy-pasted into the domestic legal system.

As for the offences related to terrorist activities, these are regulated in Title III of the Directive, specifically from articles 5 to 12. Some of these offences were already present into the FDCT, while others have been added, thus sensibly increasing the conducts which shall be criminalised at the national level[203]. Article 13 further provides that for an offence referred to in article 4 or Title III to be punishable, it is not necessary that the final terrorist offence is committed, nor it is necessary to establish a link with another specific offence laid down in the Directive[204]. This means that all those preparatory acts constitute inchoate offences. The Meijers Committee has noted that the norm generally 'stretches the relationship between behaviour and potential harmful consequences too far',

[202] Amnesty International *et al.*, February 2016, p. 10.
[203] Maliszewska-Nienartowicz, 2017, p. 194.
[204] Directive 2017/541/JHA, Article 13.

since it does not require such behaviour to pose a 'real danger'[205], being it sufficient that the material elements of the conduct are committed with a specific intent. The analysis will only focus on those new offences introduced in 2017 which are more strictly related to contrast FTFs.

Article 8 incriminates receiving training for terrorism, thus complementing article 7 that refers to providing training for terrorism. As indicated by the Commission's 2014 implementation report of the Framework Decision 2008/919, which first established the latter offence of providing training, a group of Member States (BE, DK, DE, IE, NL, AT, RO, UK) had already extended criminalisation to 'passive training'[206]. The new offence requires that those who intentionally receive 'instruction on the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or on other specific methods or techniques, for the purpose of committing, or contributing to the commission of, one of the offences listed in points (a) to (i) of Article 3(1)' shall be punished[207]. The norm initially did not clarify whether receiving training needed a specific purpose[208], but it has been added to the final version of the draft and this has to be welcomed. The same is for the intentionality element, which shall refer to the *dolus* behind receiving training and should distinguish the criminal conduct from the accidental reception of information potentially useful for the commission of a terrorist offence.

Yet, the provision aims to include also those who 'self-train' online, without getting in direct and voluntary contact with terrorist units and recruiters[209]. This last aspect is definitely more controversial, since it may violate the right to receive information and, even more important, how would it be proven that an individual has a terrorist purpose behind his/her the conduct? Would it be sufficient to condemn a suspect for acts of terrorism if he/she, by surfing the internet, opens several webpages containing information on how to make explosives without any apparent justification?

Certainly, the action might show the intentionality of the conduct (thus excluding the accidental reception of such information), but it may not necessarily indicate a terrorist purpose. The fact is, the *mens rea* could be inferred by objective elements but it is hard to envision evidence which would prove beyond reasonable doubt that the person is a terrorist and not just a potential one.

The risk of this specific application of article 8 is precisely to blur the line between a suspect, meaning an individual who could be a potential criminal but whose guilt must be proven, and a criminal. The implications for the presumption of innocence are evident. This is a consequence of a

[205] Meijers Committee, 16 March 2016, p. 5.
[206] *Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism,* 05 September 2014, p. 8
[207] Directive 2017/541/JHA, Article 8.
[208] Amnesty International *et al.*, February 2016, pp. 10 – 11.
[209] Maliszewska-Nienartowicz, 2017, p. 195.

pre-emptive use of criminal law: criminalising legitimate acts which are very far from the commission of the final offence, when perpetrated with a 'criminal' intent, entails a very delicate and precise evaluation of the guilt, with potential abuse.

Articles 9 and 10 contain some of the most discussed measures aimed at tackling foreign terrorist fighters: the criminalisation of travelling for the purpose of terrorist and the organisation of such travel abroad. These provisions reflect clearly the preventive strategy of the Commission that, together with the prosecution of returnees, constitute the two faces of the criminal response to the phenomenon[210]. The two norms implement and articulate the obligations set forth in paragraph (6) of UN Security Council's Resolution 2178, which requires States to prosecute individuals travelling abroad for the commission or the participation in the commission of terrorist acts and their facilitators.

More in detail, article 9(1) provides that Member States shall adopt measures to ensure that 'travelling to a country other than that Member State for the purpose of committing, or contributing to the commission of, a terrorist offence as referred to in Article 3, for the purpose of the participation in the activities of a terrorist group with knowledge of the fact that such participation will contribute to the criminal activities of such a group as referred to in Article 4, or for the purpose of the providing or receiving of training for terrorism as referred to in Articles 7 and 8' shall be punishable when committed intentionally[211].

Paragraph (2) includes, within the prohibited conducts, travelling to an EU Member State for that same purpose and the preparatory acts undertaken by a person entering in that Member State with the intention to commit or contribute to the commission of a terrorist offence[212].

Article 10, instead, requires Member States to criminalise 'any act of organisation or facilitation that assists any person in travelling for the purpose of terrorism, as referred to in Article 9(1) and point (a) of Article 9(2), knowing that the assistance thus rendered is for that purpose'[213].

First of all, it must be noted that these provisions sensibly affect the freedom of movement, which is recognised as fundamental by article 12 of the ICCPR, article 2 of Protocol No. 4 of the ECHR. As interpreted by the ECtHR in a judgement regarding the application by Italian authorities of preventive measures limiting freedom of movement on the ground of public safety, such fundamental freedom can exclusively be restricted by a legal provision, which must be proportionate and it must pursue a legitimate aim under the ECHR[214].

[210] *The European Agenda on Security,* 28 April 2015, p. 14.
[211] Directive 2017/541/JHA, Article 9(1).
[212] *Idem*, Article 9(2).
[213] *Idem*, Article 10.
[214] The European Court of Human Rights, *de Tommaso v. Italy* (Application No. 43395/09), Judgement of 23 February 2017.

Free movement of citizens within the Union is further protected by article 45 of the EU Charter and by articles 45 - 55 TFEU, which distinguish between free movement of workers and the right to establishment. Article 52 of the Charter generally recognizes the possibility to restrict such freedom, but 'subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others'[215]. These limitations are also addressed by article 27 of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely, which allows Member States to impose restrictions based on grounds of public policy, public security or public health.

From this overall perspective, both the Union and Member States can use criminal law as a measure to limit travelling when security concerns are relevant and terrorism would certainly be the case[216]. Nevertheless, such limitations must comply with the principle of proportionality and necessity and must be drafted in a manner that is consistent with the principle of legality.

In this regard, article 9 and 10 of the Directive have been object of several criticisms. To begin with, Amnesty international, the Meijers Committee and other NGOs have pointed out that the restriction of freedom of movement cannot be justified by offences which are too far from the commission of the concrete harm or danger they want to prevent[217]. In addition to that, they underline the broadness of the definition and its lack of clarity[218]. These are undoubtedly serious flaws of the provisions.

From a closer look, the offences of travelling and its facilitation are composed by a material element which is harmless *per se*, but it becomes again criminally relevant when the subjective element is assessed. This entails two observations.

First, the scope of application of criminal law is stretched to its very limits: the idea is to prohibit travelling because, based on a probabilistic yet indeterminate ground, the individual may commit a terrorist offence abroad, not only as a direct perpetrator, but also through its contribution or participation in the activities of a terrorist group. From this perspective, the principle of legal certainty may be violated: leaving aside the abovementioned considerations on the vagueness of the formulation of the offences relating to a terrorist group provided by article 4, it is hard to clearly identify what does 'contribution' or 'participation' mean and how should these conducts be proved *ante delictum*. The same could be said for the direct perpetration of a terrorist offence: unless some

215 Charter of Fundamental Rights of the European Union, Article 52.
216 Sánchez Frías, 2018, p. 212 – 213.
217 Meijers Committee, 16 March 2016, p. 7; Amnesty International *et al.*, pp. 12 – 13; Joint Civil Society Statement, 1 March 2016, p. 5.
218 *Ibidem.*

very specific plans are found, it would be quite challenging for the prosecution to prove, beyond any reasonable doubt, that the suspect is taking a flight with the precise purpose of being a terrorist.

This is connected to the second observation. Since the conduct is apparently harmless, the *mens rea* of the suspect will be the *discrimen* between legitimate acts and a terrorist crime[219]. Of course, the *mens rea* could be inferred by objective circumstances but, where direct evidence may be lacking, there is the considerable risk that the intention could be inferred by considering the place of destination (i.e. Syria/Iraq), the nationality of the suspect or his/her religious beliefs. This would certainly be discriminatory and it would additionally reverse the burden of the proof of the innocence on the suspect[220].

Hence, these problematic aspects are due to a combination of imprecise legal drafting and of an over-expansive application of criminal measures. As a consequence, the travelling related offences pose some serious doubts regarding their preventive usefulness, since their application would be too narrow and national prosecutors would very hardly provide sufficient and suitable evidence which would be acceptable for the standards of criminal law.

In this perspective, a realistic application of the provision would be once suspects return to Europe. In this case, there could be more evidence that the travel was done for the purpose of committing or participating in the commission of terroristic activity, rather than an *ex ante* probabilistic evaluation. However, even in this circumstance the norm seems of secondary importance: once the FTF has returned and there is evidence on his/her criminal activity, the person would be most probably accused for that activity rather than for travelling. Therefore, even the 'punitive' use of the provision might be almost futile.

Article 14 finally deserves a conclusive consideration. The provision refers to 'aiding, abetting, inciting and attempting' to commit a terrorist offence and, again, Directive 2017/541 widens the scope of criminal law if compared with the previous FDCT and its amendment[221]. Aiding and abetting is extended to the offences referred to in articles 3 to 8, 11 and 12[222]. These include, for example, offences related to a terrorist group, public provocation and receiving training for terrorism. Therefore, it is evident that increasing the spectrum of incriminated conducts to include preparatory acts also implies that a larger number of ancillary offences, which are less significative than those committed by primary perpetrators, are caught into the criminal legislation net. Nevertheless, if some of the new terrorist offences are far from the commission of a concrete harm and, in some cases, it

219 Murphy, 2019, p. 232.
220 Meijers Committee, 16 March 2016, p. 7.
221 Maliszewska-Nienartowicz, 2017, p. 195.
222 Directive 2017/541/JHA, Article 14(1).

results difficult to distinguish legitimate conducts from crimes, this is even more true for the responsibility of the aiders and abetters of such offences.

For instance, how would it be possible to discern the criminal responsibility of an individual who has aided another to commit self-training online, or that of an individual who has facilitated the online 'indirect' public incitement to commit a terrorist offence, from legitimate conducts? Would an online provider of chemistry notions which may be used to manufacture explosives be considered responsible? Or would a website developer be considered as an aider if the online blog of a suspect distributes a message that indirectly causes a danger that a terrorist attack may be committed? These are, of course, borderline cases that nevertheless may occur.

Article 14(2) further extends the criminalisation of incitement to all offences and article 14(3) provides that attempting one of the offences must be punished, with the only exception of receiving training and organising travelling for the purpose of terrorism. Regarding these norms, the same considerations apply. In fact, incitement to commit a preparatory offence is not clearly identifiable and the risk is to include many legitimate acts covered by freedom of expression.

As for the attempt, there are doubts as to whether attempting an offence which is conducive to terrorism may be too far from the actual harm the norm intends to avoid.

Although the present analysis is mainly focused on the criminal legislation adopted in response to the FTFs emerging threat, in order to assess its scope of application and its compliance with the fundamental principles of criminal law and human rights, it must be noted that Directive 2017/541 also includes other provisions which deserve mention. Article 23(1), for example, makes explicit reference to the protection of human rights as enshrined in article TEU, while paragraph (2) provides that Member States may establish conditions 'governing the rights and responsibilities of, and the procedural guarantees for, the press or other media where such conditions relate to the determination or limitation of liability', in line with the freedom of expression[223]. The inclusion of such obligations within the text of the Directive is certainly positive, considering that according to the original proposal these safeguards were originally only mentioned in the Recitals[224].

An innovation that it's worth mentioning is the incorporation of a set of norms on the protection, the support and the rights of the victims of terrorism, in the articles 24 to 26. In this regard, the Directive requires Member States to adopt specific services for the psychological, legal and medical support for the victims[225], to put into place measures against possible intimidations or retaliations

[223] Idem, Article 23(2).
[224] Meijers Commitee, 16 March 2016, p. 3.
[225] Directive 2017/541/JHA, Article 24.

against the victims[226] and to ensure that the victims are duly informed about their rights to receive support and protection and to grant them the access to such services[227]. The protection of victims was not contemplated by the 2002 FDCT nor by its 2008 amendment and it is definitely a step forward, which has to be considered within the increasing general interest of EU criminal legislation to harmonise national systems on the protection of the victims' rights[228], commenced with Directive 2012/29.

### *2.4. Concluding observations*

Directive 2017/541 is a fundamental reform of EU legislation on counter-terrorism. The Directive has expanded the role of criminal law with a distinct preventive approach, by decisively increasing the criminalisation of conducts which are preparatory in nature and are considered to be conducive to terrorism. The legal intervention has to be overlooked by taking into account the international scenario from which it originated. In this regard, UN Security Council's Resolution 2178 and the Council of Europe's 2015 Additional Protocol to the Convention on the Prevention of Terrorism were strongly influential, considering the binding nature of the former and the fact that the EU ratified the latter. Nevertheless, the EU has its own *modus operandi* and it adopted its own criminal choices.

The outcome of the 2017 intervention has been subject to strong criticism by leading scholars and by NGOs and members of the civil society who are active in the protection of human rights in the field of criminal law. The Directive has been contested on several grounds.

First of all, the lack of a previous impact assessment is considered to be unjustified and extremely dangerous, especially when adopting counter-terrorism legislation which may strongly impact on fundamental rights and freedoms. Although it is understandable how the Paris attacks shocked Europe, institutions must react lucidly and with a long-term perspective. There was already criminal legislation in place to contrast terrorism and national legislation already had available measures to respond. Therefore, the precipitous adoption of the latest Directive without first pondering its overall impact is worth the criticism.

The second major observation regards the substantive provisions of the Directive. There are two general comments in this regard. The first relates to the role of criminal law and, more specifically, to the limits of the use of criminal legislation to prevent crime by criminalising 'abstract dangers', meaning behaviours which are too far removed from the potential harm[229]. This is particularly evident

226 *Idem*, Article 25.
227 *Idem*, article 26.
228 For a critical analysis of Directive 2012/29/EU, *see* Klip, 2016, pp. 323 – 334.
229 Meijers Commitee, 16 March 2016, p. 4.

when analysing the definition of terrorist offences and the offences related to terrorist activities provided by the Directive. The risk would be to catch into criminal legislation conducts that are not simply harmless, but which are rather the manifestation of a fundamental right or freedom. This was acknowledged by the EU Council when it clarified its criteria for criminalisation, stating that a ‘conduct which only implies an abstract danger to the protected right or interest should be criminalised only if appropriate considering the particular importance of the right or interest which is the object of protection’[230]. Of course, there’s always been a thin line between freedom and security and, in certain circumstances, freedoms and rights can be restricted for the interests of public security. However, in those cases, criminalisation must still be necessary and proportionate and over-expanding its scope of application raises serious doubts precisely about its necessity and proportionality.

The second general comment it’s strictly related and it concerns the quality of the legal drafting and its compliance with the principle of legal certainty, as a corollary of the general principle of legality. This entails that criminal legislation must be written in a precise and detailed way, as to allow individuals to clearly discern what is prohibited and what is legitimate, so that they can conform their conducts to these prescriptions. This requirement should be even more stringent when criminalisation is extended to conducts which do not cause a direct harm, but rather increase the probability that such harm may occur, as done by Directive 2017/541.

Instead, commentators have noted how the terminology is often broad and vague and it does not really allow to contain its scope of application. The consequence is that the vagueness may be the cause of an abusive use of criminal legislation at the national level, directed against political dissidents or ordinary criminals rather than against real terrorists. Furthermore, these concerns are amplified when considering that States are obliged to implement the Directive, but they are free to choose how. This means that they could also just refer to the text of the Directive as it is, to identify the prohibited conducts, or they could copy and paste it into their domestic criminal codes[231].

Therefore, when drafting a piece of law, the EU bears a very high responsibility which cannot be blurred by the hurry to manifest a political response to acts of terrorism which, albeit being tragic, shall not shake the foundations of the criminal legislation of a democratic system.

[230] *Council Conclusions on model provisions, guiding the Council's criminal law deliberations*, 30 November 2009, paragraph 5.
[231] Klip, 2016, pp. 243 – 246.

# III. Domestic Criminalisation of FTFs-Related Offences: The Italian Case

*Chapter III aims to answer the following sub-question: how does Italian preventive criminal legislation on terrorism affect human rights and the fundamental principles of criminal law protected by the Constitution, when applied to individuals accused of being foreign terrorist fighters before domestic courts?*

*To answer such a question, the analysis focuses on the influence of international and regional legal obligations on national criminal law and on the latter's practical implications, in the light of domestic jurisprudence and constitutional constraints.*

*Section 1 briefly reports the evolution of the terroristic phenomenon in the country, from forms of political extremism to the most recent threat posed by foreign terrorist fighters, and the parallel development of counter-terrorism legislation, between international obligations and purely domestic demands.*

*Section 2 analyses the definition of terrorism provided by the Italian Supreme Court of Cassation and the interpretation of domestic legislation in compliance with the principle of harm required by the Constitution.*

*Section 3 finally addresses the application of terrorist offences to contrast the flow of foreign terrorist fighters. The study considers the possible drawbacks arising from the application of such norms and it assesses the fundamental role played by the Supreme Court of Cassation in guiding lower courts to interpret the provisions in compliance with the fundamental principles of criminal law enshrined in the Constitution.*

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## 1. *The evolution of terrorism in Italy: from political extremism to foreign terrorist fighters*

### *1.1. A brief history of terrorism in Italy*

Terrorism is a relatively old phenomenon in Italy and its roots can be traced back to the end of Second World War. Before the beginning of the 21st Century, when international terrorist organisations with a radical Islamic perspective became a prevalent threat, most of the violent terrorist attacks in Italy

were carried out by members of criminal organisations with an extremist political ideology. The attacks were brutal, they were often precisely addressed against State officials or individuals representing public institutions and they caused a great number of victims. Such phenomena were not exclusively Italian and they were relatively common in other European States whose democratic system had to consolidate, following the decades of instability and devastation brought by thirty years of conflict[232].

Nevertheless, Italian political terrorism sadly proved to be seriously destabilizing and its evolution has to be taken into consideration when analysing the parallel development of counter-terrorism measures and criminal legislation. In this regard, the national response adopted to contrast the most recent issues of international terrorism and the flow of FTFs must be assessed against the backdrop of international obligations, without forgetting the influence of the historical events that preceded.

Around the 1950s, there was already some political terrorist activity as a manifestation of fascist and Nazi pockets which remained after WW II[233]. However, terrorist groups developed and intensified their activities from the 60s to the 90s, in the so-called 'Years of Lead'[234]. During these decades, extremist ideologies were fuelled by the geo-political polarisation commenced with the Cold War and they were embedded into an emerging modern society which was struggling to overcome past atrocities and to gain a solid foundation. Additionally, the 1970s oil crisis dropped production and brought considerable inflation, thus increasing social discomfort[235]. These factors have been fertile ground for terrorists, considering their ideologically driven nature.

Between 1969 and 1979, terrorism acts were performed by both left-wing and right-wing militants, causing enormous casualties. These groups, mainly represented by the *Brigate Rosse* (Red Brigades) and the *Nuclei Armati Rivoluzionari* (Revolutionary Armed Groups) were characterised by a twofold approach in their attacks: they either targeted high-profile individuals, as judges, State officials and renewed entrepreneurs, or they aimed at causing mass civilian casualties, by placing bombs in public spaces or transports[236]. Each 'red' or 'black' organisation claimed the responsibility for the attack and sent a very specific message to the government.

Some of the most (unfortunately) notorious attacks were: the 1969 bombs placed in Piazza Fontana (Milan) before the National Agriculture Bank; the 1976 assassination of a public prosecutor in Genoa, Francesco Coco; the 1977 killing of Fulvio Croce, President of the Bar Association in Turin; the 1979 infamous kidnapping by the Red Brigades of Aldo Moro, several times Prime Minister and future candidate for the Presidency of the Republic; the 1980 bombing of the Bologna train station, which

232 Mihr, 2017.
233 Praduroux, 2015, p. 269.
234 *Ibidem*.
235 Vettori, 2007, p. 7.
236 *Idem*, p. 8.

caused 85 victims and became the most serious terrorist attack in Europe at the time[237]. It was during this tremendous wave of violence that, in 1974, the word 'terrorism' has been used for the first time by the Prime Minister in an official statement to the Parliament[238].

These troubled years triggered the response of national institutions, which acknowledged that the existing criminal law framework was insufficient to tackle the new form of terrorist offences. As a consequence, a series of laws were adopted to amend the Criminal Code, making sure that these tragic events could be properly sanctioned by criminal legislation. The resulting 'legislation of emergency'[239], which tried to contrast political terrorism, is relatively old if compared to contemporary international legal instruments, but it is still the foundation upon which more recent counter-terrorism legislation has been built.

During the 80s, political extremism continued and so did terrorism. However, the intensity and the frequency of the attacks gradually started to decrease. Scholars have hypothesized that different factors may have contributed, such as economic recovery and growing welfare, a stronger judicial response or the fragmentation of the major organisations into smaller and less intimidating units[240].

A further decreasing trend was registered in the 90s, after the fall of the Berlin Wall initiated a new global cooperation and it reduced the ideological opposition between East and West, thus partly affecting political views as well[241]. There was a partial resurgence of left-wing terrorism between 1999 and 2002, when the New Red Brigades murdered Massimo D'Antona and Marco Biagi, two professors who were advising the Government on labour reforms[242].

However, these were the last significative attacks performed by political terrorism in Italy when a new form of terrorism, animated by religious ideals, suddenly shocked the world on 9/11. The radicalised jihadi terrorism immediately displayed its international nature and the new means of communication and transportation helped it to proliferate in Europe and around the world. As highlighted in the previous chapters, this emerging threat brought the international community and regional organisations to adopt immediate measures, trying to define the phenomenon and requiring its prompt criminalisation.

From a domestic perspective, Italy was not severely affected by Islamic terrorist attacks and this is in contrast with data coming from other EU countries, which depict and overall increase in the number of attacks until a few years ago[243]. In fact, the attacks performed against Italian citizens or on

237 Praduroux, 2015, p. 270.
238 Della Porta, 2007, p. 154.
239 *Idem*, p. 9.
240 *Idem*, p. 11.
241 *Idem*, p. 12.
242 Praduroux, 2015, p. 271.
243 *See*, Europol, TE-SAT (2018) and TE-SAT (2019).

Italian territory range from 3 to 15 per year in the last fifteen years[244]. The severity of the attacks cannot be compared with the suicide bombings and the mass shootings occurred in other parts of the continent, to the extent that some authors refer to Italy as a country that has been substantially immune from serious manifestations of Islamic terrorism[245].

There may be a combination of several factors which contributed to minor offensiveness of the attempted attacks, such as the rudimental preparation of some deadly devices, the investigative pressure posed by national authorities and the fragmentation of local terrorist cells, whose presence on the territory was already reported between the 90s and the early 2000s[246].

Against this backdrop, the raise of ISIL in 2011 was certainly a destabilising factor for all European States, since it fuelled online propaganda and it attracted flows of individuals to fight in its ranks. By 2015, the Italian Minister of Defence declared that around 87 individuals had travelled from Italy to Syria and Iraq[247], but such estimates include Italian citizens (around 12), foreigners residing in Italy for medium/long periods (11) and foreigners travelling abroad who had transited the country (approximately 64 individuals)[248]. In 2016, the Chief of national police affirmed that the number of FTFs linked to Italy should be around 98 individuals[249], which would be very low in comparative terms, considering that the approximated amount of people travelling abroad for terrorist purpose from France, the UK, Germany and Belgium could be over 3,000[250].

In this regard, experts struggle to detect the precise quantity of foreign terrorist fighters since the majority of radicalised Muslims residing or leaving from Italy are not nationals and they have been subject to an extensive use of administrative expulsions from the territory, without a prior trial which would ascertain their criminal responsibility[251]. These expeditious deportations are believed to interrupt radicalisation of suspects but at the same time they proved to be extremely controversial not only in legal terms, but also because they impede to have enough information about the major factors that contributed to radicalisation. In fact, the application of expulsion and deportation measures eliminates from the statistics on FTFs those individuals, such as second-generation immigrants, who were embedded into Italian society and developed anti-democratic views, thus losing the opportunity to better comprehend the possible personal, economic and social reasons behind radicalisation and jihadi terrorism. The fact is that second-generation immigrants constitute the backbone of home-

244 Fama, 19 November 2015, online newspaper; *see* also, Europol, TE-SAT (2018) and TE-SAT (2019).
245 Beccaro and Bonino, 2019, p. 2.
246 Vidino, 2014, p. 33.
247 Il Sole 24 Ore, 20 September 2015, online newspaper.
248 Marone, 2016, pp. 4 – 5.
249 Quotidiano.net, 26 April 2016, online newspaper.
250 Marone, 2016, p. 5.
251 *Ibidem*.

grown radicals in Western democracies[252] and their fullest integration into society is often frustrated by being born in a country where you do not belong, as it does not recognise you as a citizen. These factors are of key importance to understand the roots of modern international terrorism and should not be underestimated.

In any case, the threat to security and to democracy posed by this new form of terrorism and by the FTFs phenomenon has certainly affected domestic criminal legislation on the matter. In this perspective, the Italian approach is definitely *sui generis* since it is comprised of a traditional doctrine developed to fight political terrorism during the Years of Lead, combined with the international obligations deriving from the UN Security Council's resolutions and the regional organisations to which Italy is a Member State. The following sub-Section will briefly analyse the chronological evolution of Italian criminal legislation on terrorism and the influence of the aforementioned international legal obligations. This will be necessary to understand how the evolution of terrorism has shaped domestic law. Once light is shed on the increasingly preventive approach of counter-terrorism criminal legislation, it will be possible to comment the parallel evolution of the national definition of terrorism and to consider whether the application of such legislation to the FTFs phenomenon may concretely affect the human rights protected by the Italian Constitution.

### *1.2. The development of domestic criminal legislation on terrorism: from internal issues to an international threat*

Terrorism certainly represents a significative threat to life and to the integrity of a democratic system. In fact, although there is no universally accepted definition of terrorism, everyone agrees that in order for an attack to be considered as a terrorist offence, it is not only necessary that such act is committed in a violent way and is potentially extremely harmful, but it is also necessary that the conduct follows a distinguishable ideological, political or religious purpose and it aims at sending a message to both the institutions and the civilian population.

What then really characterizes terrorism and makes it a unique offence is the symbolical nature of the violence which goes beyond the specific concrete harm it may cause to the victims[253]. The final objective of terrorism is, in fact, the destabilisation of the political order and the corrosion of its legitimacy. Therefore, 'terrorism is not (just) about how many people are killed, but how effective

[252] *Idem*, p.23.
[253] Perliger, 2012, p. 506.

the attack is in instilling doubts in the minds of people regarding the legitimacy or utility of the existing political values, norms, and practices'[254].

This symbolical power is then, arguably, the aspect of terrorism which is most feared by democratic governments. After all, contemporary jihadi terrorists do not have the instruments to realistically endanger the existence of a State nor to obliterate its institutions and individuals acting alone may cause a relatively low number of victims. Of course, there have been tragic events in the past 20 years where casualties were tremendous and these cases have certainly increased the 'terror' of being under the attack of an invisible and unpredictable enemy. However, even in these circumstances, the major achievement of terrorists is the sonority of their crimes and of their ideals.

These characteristics of terrorism must be born in mind when considering the legislation adopted by international or national actors to tackle the problem. As it was discussed in the previous chapters, the international community reacted immediately to each of the major attacks by drafting and requiring the implementation of a criminal legislation which, under this perspective, appears to be more a symbolic response to a symbolic threat, than a concrete solution to contrast a specific crime.

The problematic aspect of such approach is that the fundamental principles of criminal law and some human rights may be severely affected by counter-terrorism legislation which goes beyond its predominantly repressive or punitive purpose, and acquires a considerably preventive role. The 'political' use of criminalisation emphasizes security over freedom and promises an always new and more decisive response to terrorism and its manifestations, each time with the idea that including additional preparatory acts into the definitions of terrorist offences will finally interrupt the phenomenon. This over-extension of criminal norms seriously risks to drift towards a pre-emptive legislation, which does not simply anticipate the commission of a crime but it anticipates even its potential preparation, thus labelling legitimate acts as offences. The potential distorted use of those measures is therefore evident and it could undermine the credibility of the whole criminal response to the issue.

As for the development of Italian counter-terrorism legislation, similar considerations can be drawn. Following the violent attacks perpetrated by political terrorists during the 60s and the 70s, the Italian legislator acknowledged the novelty of the situation and the unsuitability of existing criminal legislation to properly describe and include these very specific crimes. The tension and the fear caused by those terrible acts triggered a significant criminal response. Several reforms amended the national Criminal Code but the most significant intervention was the adoption of Decree Law No. 625/1979, which was converted into ordinary legislation by Law No. 15/1980. This legislative act is part of a

[254] *Idem*, p. 507.

series of 'emergency legislation' and governmental measures, adopted to cope with extremely destabilising crimes[255]. Other instruments complemented the overall institutional response by strongly broadening investigative powers, extending the maximum period of preventive detention, increasing the maximum sentence for crimes committed through violence and reforming high-security prisons[256].

Scholars defined those reforms as '*façade* norms', aiming to reassure public discomfort rather than being an effective solution[257], since the inability to end internal terrorism was mainly based on the raise of a social phenomenon that police was totally unprepared to face[258]. However, radical changes were brought to substantive and procedural criminal law and terrorism played a crucial role.

Law No. 15/1980 represents the very first criminal legislation intended to tackle terrorism directly. Article 3 of the law introduced article 270-*bis* into the Criminal Code, which is addressed against terrorist organisations. The provision punishes whoever promotes, constitutes, organizes, directs or finances organisations which intend to commit violent acts for the purpose of terrorism or for the subversion of the democratic order[259]. The 1980 reform also amended the former article 280 of the Criminal Code, criminalising attacks against life or physical integrity for the purpose of terrorism or for the subversion of the democratic order.

Interestingly, these norms refer to terrorism without providing any useful definition of the concept. This, of course, raised concern as to the possibility to clearly identify the criminal conduct proscribed by the reform and scholars could not agree on its scope of application[260]. A first clarification was given by the Court of Cassation in a judgement issued in 1987, where the Court identified 'terrorism' as the purpose to spread terror in the community, through the commission of criminal conducts which are not addressed against individuals but rather against what those individuals represent, thus aiming to undermine people's trust in the existing order[261]. This definition reflects the interpretation of a norm which was clearly linked to the political terrorism of the period and was not influenced by international approaches.

Things changed from 2001, when the manifestations of international terrorism became more evident and political terrorism became a minor issue. Just a month after the Twin Towers attack and a few days after the entry into force of UN Security Council's Resolution 1373, which declared international terrorism a threat to international peace and security, the Italian legislator reacted by

[255] Della Porta, 2007, p. 155 – 157.
[256] *Ibidem.*
[257] *Ibidem.*
[258] *Idem*, p. 160.
[259] Law No. 15/1980, Article 3.
[260] Palma, 2002, pp. 8 – 10.
[261] Italian Supreme Court of Cassation, judgement no. 11382/1987.

adopting a new emergency Decree Law (No. 374/2001), which was converted by Law No. 438/2001. The law reformed both substantive and procedural criminal legislation.

Considering the new substantive criminal provisions, article 1 of the conversion law added a paragraph to article 270-*bis,* to include among the violent acts committed with the purpose of terrorism by the organisation also those directed against another State or international organisation or institution[262]. This way, the amendments extended the scope of application of a criminal provision which was initially conceived to contrast internal terrorism[263].

Article 1 also introduced the new article 270-*ter* into the Criminal Code. The norm establishes the accessories' responsibility, by criminalising forms of facilitation to the members of a terrorist organisation identified under article 270-*bis*, such as sheltering or providing means of transportation or communication[264]. However, the provision does not require any evaluation of the subjective element of the crime, therefore apparently excluding the necessity to evaluate the knowledge of the perpetrator that his/her conduct is actually aiding or furthering the terroristic activity of the group.

The consequences of this formulation may be extremely problematic, since it could be sufficient to prove that the author has acted with general intent and that the conduct falls within one of the forms of facilitation provided by the norm to hold an individual responsible as an aider/abetter of a terrorist organisation. In this regard, scholars tend to interpret the provision as including into the *dolus generalis* the awareness of the perpetrator that the conduct is actually facilitating one of the members of a terrorist organisation, without being necessary that he/she shares the terrorist purpose of such organisation[265]. In any case, some textual clarification would have been helpful to avoid the application of the provision to those who are unaware of such circumstance.

Just a few years later, in 2005, arguably the major legislative reform of domestic counter-terrorism legislation occurred. Twenty days after the terrorist attack in the London Underground, Decree Law No. 144/2005 was adopted and it was immediately converted into law by Law No. 155/2005.

Once again, the attack proved to be the spark which ignited the reaction but, in this case, international legal sources have strongly influenced the final outcome of the domestic intervention.

In 2002, Framework Decision 2002/475 on combating terrorism (FDCT) was adopted by the EU. The FDCT provides the first comprehensive definition of terrorism given at the European level and it imposed on Member States the obligation to punish a considerable number of criminal offences related to terrorist activity.

262 Law No. 438/2001, Article 1(1).
263 Palma, 2002, pp. 10 – 12.
264 Law No. 438/2001, Article 1(1-*bis*).
265 Palma, 2002, p. 18.

Afterwards, the Council of Europe Convention on the Prevention of Terrorism (CECPT) was drafted and it was opened to signature from 16 May 2006. Although Italy definitively ratified the Convention in 2017, it signed it around a month before the approval of Decree Law No. 144/2005.

From this perspective it may become more evident how the chronological proximity of these regional legal instruments ensures that their norms are partially reflected into the substantive provision eventually introduced by Law No. 155/2005.

First of all, the reform has sensibly extended police investigative powers[266], by establishing an *ad hoc* counter-terrorism Unit (article 5), by introducing new provisions on telephone and traffic data surveillance (article 6) and on the use of DNA for identification (article 10) and by amending the criminal procedure on arrest and custody for suspects of terrorist activity (article 13)[267].

Law No. 155/2005 additionally introduced executive measures such as the possibility to extend the residence permit to foreigners for investigative purpose and the expulsion of foreigners for the prevention of terrorism, following the authorisation of the administrative authority[268]. Although the present analysis does not focus on the legitimacy and the appropriateness of using administrative procedures to impose coercive measures on criminal suspects, it must be noted that the application of such measures has been generally contested by international experts[269]. The ECtHR has also intervened on the matter, condemning Italy for the application of the preventive expulsion procedure where the such measure would expose the addressee to a treatment that violates article 3 of the ECHR[270].

Most importantly for the present analysis, the 2005 intervention has further introduced new offences into the Criminal Code, thus extending criminalisation to cover a broader range of preparatory acts which may be conducive to terrorist attacks. Article 270-*quater* punished the active recruitment of one or more persons for the commission of violent acts with the purpose of terrorism or for the subversion of the democratic order (this last part is a remnant of the former legislation on political terrorism), even when those acts are addressed against a foreign State or an international institution or organisation[271]. The provision does not prejudice the application of article 270-*bis* on the participation in a terrorist organisation and this may make its scope of application extremely limited. This provision was amended in 2015.

Furthermore, the reform introduced article 270-*quinquies* which originally proscribed training for terrorist purpose, meaning providing instructions for the preparation and the use of explosives,

266 Vettori, 2007, p. 16.
267 Law No. 155/2005, Articles 5, 6, 10 and 13.
268 Law No. 155/2005, Articles 2 and 3.
269 *See* for example, Boutin, 2016; Macken, 2011.
270 The European Court of Human Rights, *Saadi v. Italy* (Application No. 37201/06), Judgement of 28 February 2008.
271 Law No. 155/2005, Article 15.

firearms or other weapons, chemical or bacteriological substances which are noxious or dangerous, as well as of any other technique for the commission of violent acts or sabotage of essential public services with the purpose of terrorism[272]. This provision was also amended in 2015.

The last modification to the Criminal Code has been the inclusion of article 270-*sexies*. This norm is particularly relevant since it finally provides a definition of 'conducts with the purpose of terrorism', therefore becoming the parameter for the interpretation of the notion of terrorism used by the other criminal provisions. These are conducts that, by their nature or context, may seriously damage a country or an international organisation, where they are committed with the aim of intimidating a population, compelling a Government or an international organisation to perform or abstain from performing an act, or destabilising or destroying the fundamental political, constitutional, economic and social structures of a country or of an international organisation[273].

From this translation and from the comparison between article 270-*sexies* and article 1 FDCT, it is evident that the domestic definition of terrorism copies almost literally the one given at the European level. However, the most notable difference lies in the fact that the Italian norms does not identify a closed list of conducts identifiable as terrorist offences such as the one provided by article 1(1), letters (a) – (i) of the Framework Decision[274]. Furthermore, the Italian legislator refers to international conventions or international legal obligations as an additional criterion to identify the meaning of terrorist conducts. This approach was taken to avoid an excessively rigid definition which would have left out other possible manifestations of terrorism. Yet, on the other hand, this provision has been strongly contested since it fails to meet the criteria of legal certainty and it has often been interpreted by the judiciary as including crimes which are hardly related to terrorist offences[275]. Further considerations on the national definition of terrorism will be done in the following Section.

The issue of foreign terrorist fighters became more evident for European countries after the latest major terrorist attacks were committed. The attack in Brussels' Jewish Museum in 2014, the *Charlie Hebdo* shooting in 2015 and the 13/11 massacre in Paris that same year, were all perpetrated by former FTFs who had received training abroad and had returned afterwards in Europe[276]. These dramatic events triggered both international and national reactions and, whilst the Union had accelerated the process for the hurried adoption of Directive 2017/541, the Italian legislator preceded the European legislation.

[272] *Ibidem*.
[273] *Ibidem*.
[274] Praduroux, 2015, p. 273.
[275] Crispino, 2017, p. 231.
[276] Bakker and de Roy van Zuijdewijn, 2015, pp. 5 – 6.

Following the attack to the satirical newspaper on 7 January 2015, the Italian Government adopted another 'emergency' Decree Law (No. 7/2015), whose application was confirmed immediately after, by Law No. 43/2015. This intervention has again extensively reformed national counter-terrorism legislation, although the content of the decree is quite heterogeneous.

As provided by the second paragraph of the Preamble of the decree, the legal intervention intends to comply with the obligations imposed by UN Security Council's Resolution 2178 (2014)[277], which specifically requires Member States to amend their criminal legislation in order to contrast the increasing flow of FTFs to conflict zones. However, the legislative act does not exclusively deal with substantive and procedural criminal law measures, since it reforms the detention system, it further extends police surveillance powers, it attributes the authority to investigate terrorist offences to the National Anti-mafia Prosecutor Office, it increases administrative measures which should be used to prevent potential threats, it indistinctly extends Italian military missions in Europe, Asia and Africa (notwithstanding the very different nature of each mission) and it finally increases the financial support to the peacekeeping and peacebuilding initiatives carried out by international organisations.

This eclectic approach has been justified by the Explanatory Report to the draft proposal of Law No. 43/2015 as an overall strategy which is not limited to contrast terrorism from a criminal perspective, but it rather addresses external factors which are potentially destabilizing and which may contribute to fuel forms of international terrorism[278], such as conflicts in Northern Africa and the Middle East or mass migrations from war-torn countries. The choice has been strongly contested by legal scholars, who have claimed that the decree law is instead an uncoherent piece of legislation which aims to implement very different political interests with the excuse of fighting jihadi terrorism[279].

As for the substantive criminal law amendments, article 1 of the decree introduces three new terrorist related offences, following the methodology adopted at the international level: the legislator emphasizes the effectiveness of repressive criminal measures and considers its expansive application as a solid response to the attacks[280]. Therefore, it is not surprising that the new offences cover a wider spectrum of preparatory acts, since anticipating the punishment at an earlier stage will sensibly decrease the chance that future terrorist threats, according to this narrative. However, this symbolic reaction may severely affect the constitutional foundations of criminal legislation and fundamental civil liberties.

277 Decree Law No. 7/2015, paragraph (2) of the Preamble.
278 Explanatory Report (*D.d.l.*) to the draft proposal of Law No. 43/2015, pp. 1 – 2.
279 Cavaliere, 2015, pp. 227 – 288.
280 *Ibidem*.

More in detail, article 1 adds a paragraph to article 270-*quater* of the Criminal Code, which now punishes also the person that is recruited for the purpose of terrorism and not exclusively the recruiter[281]. Moreover, the reform introduces article 270-*quater.1*, that criminalises the organisation, financing or promotion of travelling abroad for the commission of conducts with the purpose of terrorism as defined by article 270-*sexies*[282].

Finally, article 1(3) of Decree Law No. 7/2015 extends the criminalisation of training for terrorist purposes, provided by article 270-*quinquies*, also to those who receive training or 'self-train', when they commit acts which are univocally directed to the commission of a terrorist offence under article 270-*sexies*[283].

A last legislative intervention deserves mention. On July 2016 Law No. 153/2016 was approved by the Parliament. Shortly after the major reform of 2015, this new legislation has a twofold importance, since it authorizes the ratification of several international conventions on terrorism and it introduces additional criminal offences into the Code. Under article 1 of the Law, the President of the Republic authorizes the ratification of the Council of Europe Convention on the Prevention of Terrorism (2005), its Additional Protocol (2015) designed to contrast FTFs more directly, the International Convention for the Suppression of Acts of Nuclear Terrorism (2005), the Additional Protocol to the European Convention on the Suppression of Terrorism and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005)[284].

Article 4 of Law No. 153/2016 instead introduces the offences of financing conducts with the purpose of terrorism (article 270-*quinquies.1*), the theft of property or money which have been seized to prevent terrorism (article 270-*quinquies.2*) and acts of nuclear terrorism (article 280-*ter*)[285].

This brief chronological overview means to illustrate how the evolution of criminal legislation on terrorism has followed the parallel evolution of the criminal phenomenon, from an internal political extremism to international jihadi terrorism and foreign terrorist fighters. National reforms have been shaped each time by the need to provide a legal, but mostly symbolical, response to a threat which has strongly destabilised political and social cohesion. The domestic approach shares, in fact, the same perspective and the same narrative on the international instruments commented in previous Chapters of this analysis. Of course, international obligations must be implemented but, in some cases, the Government has even preceded the adoption of international legal instrument on the matter.

281 Decree Law No. 7/2015, Article 1(1).
282 *Idem*, article 1(2).
283 *Idem*, article 1(3).
284 Law No. 153/2016, Article 1.
285 *Idem*, Article 4.

In this regard, it is worth noting that the Italian Government has responded to the European Commission's 2020 Report in the transposition of Directive 2017/541 by communicating 22 previous legal reforms that should grant a detailed implementation of the obligations therein, without the need of further intervention[286]. Of course, the aforementioned legislation represents the backbone of domestic counter-terrorism criminal legislation.

As a general consideration, Italian criminal law has been expanding its scope of application in a constant trend, always attributing the occurrence of terrorist attacks to the lack of sufficiently repressive measures. The reforms have also modified surveillance and investigative powers and they have introduced new administrative measures which, albeit being truly coercive, are not subject to the procedures and the guarantees of criminal law.

Therefore, it will be necessary to assess how the evolution of counter-terrorism legislation has consequently moulded the definition of terrorism, as interpreted by national jurisprudence. Finally, it will be necessary to verify what is the impact of the application of substantive criminal norms to individuals accused of being foreign terrorist fighters, against the backdrop of constitutional principles and constraints. These two issues are object of the following Sections.

[286] *Cf.*, *National transposition measures communicated by the Member States concerning: Directive (EU) 2017/541,* in (accessed July 2020): https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32017L0541

## 2. *The definition of terrorism according to the Italian Supreme Court of Cassation*

In order to assess whether the application of domestic counter-terrorism legislation to FTFs phenomenon may affect constitutional rights, it will be first necessary to determine the definition of terrorism given at the national level and the hermeneutic role of the Italian Supreme Court of Cassation.

As already mentioned, before the adoption of Law No. 155/2005 and the introduction of article 270-*sexies* into the Criminal Code, the main provision which mentioned terrorism was article 270-*bis*, although it failed to provide any further clarification about its meaning. The norm was, in fact, initially adopted to contrast internal terrorist organisations with political ideologies.

The Court of Cassation originally interpreted the notion of terrorism in the notorious decision dated 1987 (mentioned above), identifying as a major component the aim to spread panic into the population and to undermine citizens' trust in the political and institutional order[287].

Following the 2005 reform, the legislator introduced article 270-*sexies* into the Criminal Code. The norm generally defines the meaning of conducts perpetrated with a terrorist purpose, reflecting almost *verbatim* the definition provided by article 1 of the 2002 FDCT. As already noticed in the previous Section, the most notable difference with article 1 FDCT is that the domestic provision fails to list the specific conducts which may amount to terrorism, closing instead with an open reference to 'any other conduct' defined by international conventions or other binding international legal sources[288].

In this regard, there are several observations that can be raised. First of all, the literal transposition of the Framework Decision has to be criticised, considering that the definition provided at the European level presents elements of broadness and vagueness[289]. Moreover, the Commission failed to clarify some important elements, such as how to interpret the 'serious damage to a country or to an international organisation' requirement, established in article 1(1) FDCT[290].

However, the possible negative consequences of the confusing definition given by the FDCT should have been compensated by national parliaments implementing the provision, through a more precise legal drafting. In fact, a framework decision cannot have direct effect on the approximation

287 Italian Supreme Court of Cassation, judgement no. 11382/1987.
288 Italian Criminal Code, article 270-*sexies*.
289 Borgers, 2012.
290 *Ibidem*.

of domestic legislation[291] and the Italian legislator should bear the responsibility to comply with the principle of legal certainty, required by article 25(2) of the Constitution and specified by articles 1 and 2 of the Criminal Code.

To the contrary, article 270-*sexies* did not simply copy-paste the European provision without adding a more precise qualification of the concept, but it rather describes terrorism in an even broader and less defined manner, thus potentially violating the principle of legal certainty[292].

As for the definition provided by article 270-*sexies*, scholars agree that for a conduct to be considered as terrorism, objective and subjective elements must be fulfilled. The objective part refers to the conducts that, by their nature or context, are capable of causing 'serious harm' (the equivalent of the 'serious damage' mentioned in article 1(1) FDCT) to a State or an international organisation[293].

The subjective element requires the determination of two different *doli*: the general intention to perpetrate the conduct and the specific intent to intimidate a population, to compel a Government or an international organisation to perform or abstain from performing an act, or to destabilise or destroy the fundamental political, constitutional, economic and social structures of a country or of an international organisation, alternatively[294]. However, the imprecise definition has affected the judicial interpretation of terrorism, occasionally causing the inclusion of apparently ordinary crimes committed with a political motive among terrorist offences.

In 2013, when a member of animalist movement 'Animals Liberation Front' deliberately set on fire eight trucks belonging to a dairy industry, the Pre-trial Chamber (*Ufficio GIP*) of the Tribunal of Florence found that the conduct should have been identified as terrorism[295]. The chamber found that the conduct was capable of causing 'a serious damage to a country' since the material damages provoked by the arson were followed by the diffusion of a message on the internet which could have induced other individuals to participate in the extremist manifestations of a group which is internationally considered as terrorist. This interpretation was in compliance with article 1(1) of the FDCT for the judiciary[296]. Furthermore, from the dissemination of the online images supporting the crime the specific intent to destabilise or to destroy the economic and social structures of a country should have been inferred.

This judicial decision raises doubts on a twofold perspective. The first concern is whether it may be appropriate to include ordinary crimes committed with an ideological motive into the notion of

[291] Klip, 2016, p. 55.
[292] Crispino, 2017, p. 231.
[293] *Ibidem.*
[294] *Ibidem*.
[295] Pre-trial Chamber (*Ufficio GIP*) of the Tribunal of Florence, judicial order of 9 January 2013.
[296] *Ibidem*; *see* also Valsecchi, 2013, p. 5.

terrorist offences and whether an animalist movement which may have extremist tendencies should be labelled as a terrorist organisation. Although this is a conceptual question, the consequences of such approach could have serious implications on the application of counter-terrorism legislation, since every crime that is perpetrated with an intention which may have ideological nuances could then be considered as a terrorist attack.

This is connected to the second observation. Although article 1(1) of the FDCT and article 270-*sexies* may be partially vague, scholars agree that both provisions require the conduct to seriously damage a country or an international organisation and that this element constitutes an objective threshold that distinguishes terrorism from other crimes. Instead, the Pre-Trial Chamber determined that it is not necessary for the conduct to cause such damage (it would be hard to imagine how burning eight trucks could damage a whole country), being sufficient just the intentional causation of such damage[297]. This interpretation disconnects the notion of terrorism from the principle of harm, since the Chamber did not consider whether the acts were actually capable to cause the serious damage required by the norm.

A similar judgement was issued by the Pre-trial Chamber of the Tribunal of Turin, when in 2013 protesters of the movement against the construction of infrastructure for high-speed trainlines (*No-Tav*), erupted into the building site and threw *molotovs* and rudimental explosives which damaged the machineries in the area. Four of them were accused for the commission of a terrorist attack.

The Court of Cassation ruled on the appeal issued by the defence and it finally clarified that article 270-*sexies* shall be interpreted as requiring the conducts to be objectively capable to achieve the purpose described by the norm[298]. More in detail, the Court determined that the conducts must pose a concrete danger to the State or to an international organisation and therefore the 'serious damage' must be assessed in objective terms[299]. As for the *mens rea* of the perpetrator, it is necessary that he/she acts intentionally (*dolus generalis*) and that the conduct aims to provoke one of the three events listed in the provision (*dolus specialis*). Regarding the specific intent to compel a Government (to do or to abstain from performing an act), this must be ascertained by taking into consideration three cumulative elements, namely: the 'scale' of the decision potentially imposed to the Government, which should be particularly relevant; the objective threshold of the 'serious damage'; and the use of illicit means of coercion[300]. Therefore, the Court of Cassation reversed the decision and requested the Pre-trial Chamber to verify whether the conducts of the four defendants have materially altered

[297] Crispino, 2017, p. 235.
[298] Italian Supreme Court of Cassation, judgement no. 28009/2014.
[299] *Ibidem*, p. 30; *see* also Zirulia, 2014, p. 1.
[300] *Ibidem*, pp. 25 – 26.

the Government's decision regarding the building of the trainlines and whether a serious damage to the State has occurred.

The Court of Cassation had the chance to rule again on the same case in 2017, following the appeal on the merits issued by the Prosecutor against the decision of the Appellate Courts of Assizes[301]. Again, the Cassation has reiterated its interpretation, finding that the crimes did not amount to terrorist offences, since it's not sufficient that the accused had intention to compel a government, but it is also necessary that for the conduct to be capable to achieve such purpose.

Therefore, the Court has clarified that terrorism cannot be a purely psychological crime and it must concretely destabilise the institutional or social order, thus impeding potential abusive applications of the provision which would violate the principle of harm.

These judicial decisions are extremely relevant not only because they illustrate how to interpret the notion of terrorism but, most importantly, because they highlight the need for the judiciary to intervene where the legislator has failed to draft precise legal provisions.

All the emergency legislation on terrorism has been adopted as a prompt response, but the precipitous negotiations has consequently affected the final outcome. As a consequence, symbolical criminal legislation risks to violate the principle of harm, which has been recognised as a constitutional principle of criminal law by the Constitutional Court in several occasions[302]. In fact, criminal law must be treated as an *extrema ratio* and its application should be limited to cases where it is strictly necessary, by punishing those who tangibly harm a public interest or by preventing the concrete and plausible occurrence of such harm[303], without proscribing conducts based on a potential abstract danger or a purely subjective intent. To the contrary, counter-terrorism legislation is characterised by an increasing criminalisation of conducts that are far from this final harm and that often are not even capable to objectively endanger society.

This does not mean that such conducts may not amount to crimes, but considering those crimes under the lens of terrorism is an operation that stretches criminal provisions beyond the constraints imposed by the principle of harm. This may happen because the judiciary interprets the criminal provisions 'improperly' or because criminal legislation is not sufficiently precise.

Under this perspective, the intervention of the Court of Cassation represents the attempt to frame such legislation within the constitutional foundations of criminal law and to correct the inaccuracies of the legislator, by limiting its misinterpretation and misapplication of the definition of terrorism.

301 Italian Supreme Court of Cassation, judgement no. 44850/2017.
302 *See* for example, Italian Constitutional Court, judgement no. 519/2000, paragraph. 2 of 'Ritenuto in Fatto'.
303 *Ibidem*.

## *3. Problematic aspects regarding the application of domestic criminal legislation to the FTFs phenomenon*

The phenomenon of FTFs is one of the most recent and most problematic manifestations of international terrorism and it has revealed its dramatic implications over the last years. Criminal legislation has been one of the areas of intervention and obligations arising from international law imposed on national governments to constantly reform their criminal codes. This perspective does not mean to reduce nor to minimise the responsibility of each legislator with regards to the outcome of their domestic reforms, since international obligations should be equally balanced with constitutional constraints. However, it is necessary to recall the interconnection of different legal sources and their mutual influence in order to have a clearer picture of the domestic criminal response, considering the latter just as the tip of an inverted iceberg whose base can be found in the decisions of the international community as whole.

This discourse is particularly evident when considering the development of Italian criminal legislation on the matter. From 2001, the amendments to the Criminal Code increased the number of preparatory acts which shall be considered as terrorist offences, in order to possibly prevent future terroristic manifestations. The main issue related to the criminalisation of preparatory acts is the inclusion of legitimate conducts among the offences. As noted in the previous Section, if the offence is too far from the final harmful event the provision intends to prevent, the risk would be to punish acts on the solely illicit intention. This would go against the Court of Cassations' reported jurisprudence and the principle of harm protected by the Constitutional Court.

The present Section will therefore analyse those criminal provisions which may be applied to tackle foreign terrorist fighters more specifically, in the light of domestic jurisprudence, in order to assess the practical constitutional implications arising from such legislation.

Article 270-*bis* of the Criminal Code is particularly relevant, since it prohibits the membership to a terrorist organisation. This provision is the one mostly used to punish foreign terrorist fighters and 'lone-wolf' actors who have developed a radical ideology and who diffuse public messages sharing the doctrine of ISIS, the notorious terrorist organisation.

This membership crime has a clear preventive purpose since it aims at disrupting terrorist activities regardless of the commission of one or more attacks, from the moment the organisation is set up or new components join it. Although this may not be theoretically problematic, the practical application of the criminal offence has exposed a questionable approach by judicial authorities.

Following the Court of Cassation's aforementioned jurisprudence on the objective requirements of a terrorist offence, an individual should be criminally responsible under article 270-*bis* where there is evidence of a link between the suspect and the organisation and where the organisation is structured in such a way as to pose a concrete threat to materially achieve the terrorist purposes mentioned in article 270-*sexies*.

However, the analysis of national jurisprudence illustrates a double standard of interpretation when applying article 270-*bis,* revealing a notable difference between cases where the offence is applied to incriminate the participation in an internal terrorist organisation from those where the crime is applied to punish members of an international organisation[304]. In fact, judges rely on more rigorous criteria to establish whether a group can be considered as a national terrorist organisation and these also elevate the evidentiary standards that are necessary to prove the link between the individual and the group. For instance, judges evaluate elements such as: the presence of an explicit criminal programme which establishes the commission of specific acts of violence; the hierarchical and detectable structure of the organisation and the presence of a chief with the authority to control such organisation; the stability and continuity of the organisation which should grant the effective commission of one or more crimes with the purpose of terrorism; the concrete contribution that members must bring to the activities of the organisation and their effective inclusion within said organisation[305], thus excluding cases of purely ideological participation[306].

To the contrary, the evidentiary standard applied to condemn individuals for their membership to Islamic terrorist organisations with an international visibility is substantially less accurate, since the existence of a local terrorist cell pertaining to such organisation is often inferred in a simplified manner. First of all, there is the tendency not to seek for a specific criminal programme of the organisation or the cell, since the judiciary relies on ISIS being universally recognised and condemned. In a 2016 judgement issued by the Court of Assizes of Milan, the bench simply recalled UN Security Council's Resolutions 2170 and 2178 and their qualification of the 'Islamic State' as a terrorist organisation[307].

The same approach is followed to assess the structure of the organisation: since ISIS has an international reach and it is already defined as terrorist at the international level, it is not necessary to decide upon the structural requirement of the organisation. Additionally, since ISIS calls upon individuals to carry out the *jihad* against western countries, it becomes acceptable that the structure of the organisation is fragmented and that Muslims acting alone are doing so on behalf of the Islamic

304 Bartoli, 2017, p. 244.
305 *Idem*, pp. 245 – 247.
306 *See* for example, Italian Supreme Court of Cassation, judgements no. 12252/2012 and 22719/2013.
307 1st Court of Assizes of Milan, judgement no. 3/ 2016, paragraph 3(1).

State[308]. As a consequence, suspects can be considered as members of this major terrorist organisation even if they are not part of a local terrorist cell, rather relying on their simple psychological adherence to its extremist ideology, without further assessing any material link with the general organisation nor the concrete contribution to its activities[309]. Therefore, lone actors or ready-to-leave travellers who possess materials which may indicate their proximity with the Islamic State can be prosecuted under article 270-*bis*. Some case-law has further weakened the link requirement, inferring the membership of the accused by more general acts such as hosting other suspects, preparing false documents, or soliciting fundraising to support the families of the suicidal 'martyrs'[310].

In this panorama, there is an emerging jurisprudence from the Supreme Court of Cassation which has recalled the same requirements used to identify internal organisations to assess the existence of a local terrorist cell which is connected to an international organisation. The Court has established that, albeit the cell should simply share the ideology of the major organisation to be considered as its branch, it additionally needs a structure which allows it to concretely commit terrorist attacks in Italy and to plan specific attacks which can materially damage the State or an international organisation, not being sufficient that the single cells promotes a radical doctrine[311]. This interpretation is certainly more compliant with the principle of harm and the higher evidentiary standard should be extended also to the assessment of the participation of the accused in the local cell.

Therefore, the majority jurisprudence on article 270-*bis* is not in line with constitutional principles, since judges applied the criminal provision without thoroughly ascertaining the material elements which prove the membership and the active participation of the suspect in the organisation nor the concrete danger posed by the individual or the local cell acting on its behalf. By relying solely on the psychological adherence to the ideology of the organisation, the judiciary risks to punish acts are at an earlier stage than the effective membership, thus substantially incriminating the preparatory acts of a preparatory acts[312]. However, the latest decisions of the Court of Cassation are gradually modifying the consolidated case-law on the matter, acknowledging the constitutional implications arising from such interpretation.

Similar considerations can be done regarding article 270-*quater*, introduced by the 2005 reform. The provision proscribes recruiting for the purpose of terrorism and from 2015 the offence also applies to the person being recruited. This offence is subsidiary to article 270-*bis* and it has been introduced to contrast FTFs who are recruited on Italian territory and leave to join the ranks of terrorist

308 1st Court of Assizes of Milan, judgement no. 8/2016, p. 10.
309 Bartoli, 2017, p. 245 – 248.
310 Italian Supreme Court of Cassation, judgement no. 2651/2016.
311 Italian Supreme Court of Cassation, judgements no. 48001/2016 and 50189/2017.
312 Bartoli, 2017, pp. 248 -249.

organisations abroad, since no other criminal provision was deemed suitable to repress such conducts[313]. Article 270-*quater*, in fact, further anticipates criminalisation aiming to repress recruiting at a stage that precedes the participation in a terrorist organisation. However, considering that the evidentiary standards to prove the link between the suspect and an organisation like ISIS are quite low, recruiting should cover all residual situations where there may be some remote contact among radicalised individuals which cannot be ascribed within the already broad membership offence.

Not surprisingly, the provision is applied rarely and the leading jurisprudence is dated 2015. In a notorious decision, the Court of Cassation has provided a thorough interpretation of the norm which has raised serious concern among legal scholars[314]. The Court had to decide whether an Albanian national could be held responsible for attempting recruitment of other Muslims into ISIS, from a combined application of article 270-*quater* and 56 of the Code (which establishes the general circumstances in which attempt is criminally relevant). At first the Court focused on the material elements of the offence, clarifying that the crime is perpetrated when the recruiter and the recruit conclude a serious agreement which is capable to effectively introduce the latter into the organisation[315]. This should distinguish the offence from ideological proselytizing, protected by articles 19 and 21 of the Constitution[316].

However, the Court affirms that the agreement is sufficient to materialise the offence also when it does not aim to the commission of subsequent specific terrorist acts. According to legal scholars this interpretation violates the principle of harm, since the simple expression of a radical, albeit dangerous, ideology should at least manifest the serious intention to commit identifiable acts of violence[317]. Otherwise, the punishment would be exclusively based on a general *mens rea*.

Additionally, experts consider the interpretation of the offence as a source of confusion, since the guidelines provided by the Court do not allow to distinguish the crime from the general solicitation and the agreement to commit one or more terrorist offences, provided by the combined application of articles 302, 304 and 414(2) of the Code[318].

Finally, the Supreme Court evaluates the possibility to condemn the attempt. In their line of reasoning, judges interpreted the provision in a teleological manner, following the normative tendency established by the legislator to constantly expand the scope of application of terrorist offences to include preparatory acts which could have been previously considered as attempts[319].

313 De Marinis, 2017, p. 74.
314 Italian Supreme Court of Cassation, judgement no. 40699/2015.
315 *Ibidem*.
316 De Marinis, 2017, p. 75.
317 *Idem*, p. 76.
318 *Ibidem*.
319 *Idem*, p. 77.

As a consequence, promoting a general agreement where the parties share a common terrorist intent without specifying the commission of defined attacks would be punishable under criminal law, even before such broad agreement is even concluded. This solution has been criticised since it failed to consider, once again, the constitutional constraints posed of the principle of harm and the principle of legality, by anticipating criminalisation to a stage which is too far from the commission of the offence it wants to prevent and it does not allow to really distinguish the criminal offence from the fundamental freedoms enshrined in the Constitution[320].

Article 270-*quater.1* deserves a conclusive mention. The provision was introduced by the latest reform in 2015 and it implements the obligations imposed by paragraph (6) of UN Security Council's Resolution 2178, which expressly requires Member States to adopt criminal measures which prohibit travelling for the commission of terrorist acts[321]. More specifically, the domestic norm punishes those who organise, finance or promote travelling abroad for the commission of terrorist offences, as identified by article 270-*sexies*.

However, the norm specifies that the application of the offence shall be limited to cases that would not fall under articles 270-*bis* and 270-*quater* of the Code. Considering the vast spectrum of conducts included into the latter offences, it is not surprising that article 270-*quater.1* has been applied very rarely. In fact, there is no jurisprudence of the Court of Cassation on the matter and the most authoritative interpretation of the offence remains a judicial decision issued by the Assizes Court of Milan in 2016[322].

The complex legal case originated from the departure of two radicalised Muslims from Italy, who subsequently convinced their relatives to join them to Syria and to become part of the Caliphate. Those involved in the criminal net were charged with several offences and, in particular, the father of the first Muslim woman going to Syria was accused of financing the travel of the other daughter who decided to follow her sister abroad.

In the leading (and only) case on the application of article 270-*quater.1*, the Court has tried to identify the elements of the offence[323]. First of all, the perpetrator must provide a necessary and essential contribution to the organisation of the travel, whilst performing ordinary executive acts (such as purchasing luggage or withdrawing passports) is not sufficient[324]. In this case the father used his last salary to finance the travel and he took other important organisational steps.

320 *Idem*, p. 78.
321 Decree Law No. 7/2015, paragraph (1) of the Preamble.
322 1st Court of Assizes of Milan, judgement no. 8/2016.
323 *Idem*, paragraph (7).
324 *Idem*, pp. 84 – 90.

As for the *mens rea*, the perpetrator must act with the knowledge that those whose travel is being organised will commit a terrorist offence, including joining to terrorist organisation once arrived[325]. The father, in fact, knew that the daughter intended to be a member of ISIS.

However, the Court realised that the formulation of the provision makes its application extremely rare, since it would not cover 'self-organisation' of travels nor incriminates the conduct of the traveller.

A part from the potential incompliance with international and European obligations which require to punish the conducts of those who travel for terrorist purposes and not only those who organise travelling[326], the limited application of the domestic provision needs some comment. By recalling national jurisprudence , the Court has noted that articles 270-*bis* and 270-*quater* would comprise most conducts potentially falling within the scope of article 270-*quater.1*, since an individual organising travels for others in the interest of an international terrorist organisation could be easily linked to the activities of such organisation, either as a member or as a recruiter. Similarly, those who depart could be implementing the agreement established with a recruiter or they could be physically joining the organisation they act for.

Therefore, it might be necessary to wonder whether the offences linked to terrorist activity introduced by article 270-*quater.1* are really useful and pondered by the legislator. It could be the case that symbolic criminal legislation, again, results inappropriate or imprecise. Italy is certainly under the obligation to introduce those offences into the domestic legal order but this cannot justify the lack of considerations regarding the respect of constitutional norms. In fact, the formulation of the offence is very problematic and the implications for the principle of legal certainty and foreseeability are evident[327], regardless of the scarce jurisprudence on the topic. The main concern regards the broadness of the provision, which does not allow to distinguish those conducts that are legitimate from those committed with a terrorist purpose, with the risk to infer such purpose through factors such as the nationality or the belief of the perpetrator. The real *discrimen* between organising an innocent travel and committing a terrorist offence would then be the knowledge of the organiser about the terrorist motive of the travel. Yet, this aspect is also dubious since it would basically allow to punish individuals because, those whose travel they organise, are resolved to commit a terrorist act abroad, considering that they may also decide not to follow that path. Therefore, the punishment of the suspect would depend on the future potential actions which the traveller will decide to undertake before any of these actions is commenced.

325 *Idem*, p. 84.
326 *Cf.*, Directive 2017/541/JHA, Articles 9 and 10.
327 Cavaliere, 2015, p. 231.

This appears to be in contrast with the principle of harm, unless it could be proven that the foreign terrorist fighter will commit specific and concrete acts which materially damage the State or an international organisation. Unfortunately, there is not enough case-law on the matter nor any interpretation provided by the Court of Cassation. Hopefully, future jurisprudence will make sure the offence will be applied in compliance with constitutional principles, although the vague formulation of the provision does not simplify the task.

From this overview, it may be clear that the domestic criminal legislation adopted over the years to contrast international terrorism is also applied to deal with the foreign terrorist fighters' phenomenon. However, the hurried drafting of the legal reforms and the pressure that international legal obligations arguably posed to the national legislator have affected the outcome of the resulting criminal legislation. The provisions are often imprecise and too vague. In this regard, the judiciary plays a fundamental role since it bears the burden to interpret legislation in way that complies with the fundamental principles of criminal law protected by the Constitution. Yet, the judiciary should not replace the legislator in a civil-law system and where the quality of the drafting is scarce it may be more probable that judicial interpretation departs from the protection of that fundamental principles. This should not justify erroneous applications of domestic criminal law by national courts and, as commented above, the resulting jurisprudence has been occasionally but surprisingly contrary to those constitutional principles it shall protect. However, it is reasonable to believe that more precise and unequivocal legal sources also imply a minor hermeneutic discretion by the judiciary, with a consequential lower risk of inaccurate interpretation.

Therefore, both legislative and judicial authorities should make sure that counter-terrorism legislation fully complies with the principles of criminal law which govern democratic societies and ensure the respect for the rule of law. Both powers should act by keeping in mind the long-term impact of such legislation and the potential extensive human rights violations of its misapplication, without reacting to the symbolic threat posed by terrorism in a way that contradicts those same democratic principles they should guard.

# *Conclusions*

Foreign terrorist fighters constitute a serious danger for national security which shall not be underestimated. The latest major attacks performed on the European soil were committed by individuals who pertain to this category of terrorists and they have unfortunately revealed the consequences of the lethal skills they refined after joining international terrorist organisations. Under these circumstances, it is comprehensible that there might be the tendency to draw attention to security and prevention, thus preferring the restriction of apparently legitimate acts which may cause catastrophic consequences.

However, the common approach followed at the international, regional and domestic level to achieve these results is the reason for serious concern. The analysis has illustrated that a gradual but constant renewal of criminal legislation has been agreed upon in the international arena and it has been implemented by national parliaments, on the assumption that the cause of tragic events was the lack of a sufficiently strict criminal legislation and that imposing new criminal measures will finally decrease the chance of future attacks. Nevertheless, such a narrative is disproved by the same continuous necessity to introduce new criminal offences: if the reaction to the previous attack has already exacerbated repressive measures, then why didn't that impede the following one? Of course, not every criminal offence is preventable and this is true for terrorism as well. In this regard, it must be noted that there is no precise way to assess whether the introduction of new criminal offences does effectively deter the commission of terrorist attacks. Yet, criminal legislation resulting from decades of international and domestic reforms has sensibly increased the number of offences, including now conducts which are of a purely preparatory nature and acts that are at a very early stage of the commission of an attack, claiming that each amendment constitutes a step forward towards the prevention of terrorist phenomena. Therefore, the major justification behind the increasing expansion of criminal legislation should rather be looked for in the possibility to extend investigative powers of national authorities, which would be legally authorised to intervene when the crimes are being planned or, in some cases, simply hypothesized.

Another relevant factor which might have strongly influenced the outcome of criminal legislation on terrorism is the political message that institutions and governments address to the public opinion, as a reaction against the fear and the ideological aggression of democratic foundations perpetrated by terrorists.

Nevertheless, the thesis aims to assess what is the concrete impact on human rights and the fundamental principles of criminal law of such criminal legislation and how it is applied to individuals

accused of being foreign terrorist fighters before national courts. The analysis has shown that the unpondered reaction against the threat of foreign terrorist fighters and the over-expanding application of criminal legislation in a preventive perspective can seriously undermine the principles of legal certainty, of proportionality and necessity and the principle of harm, which is protected by the Italian Constitution. Therefore, the violation of these core principles may consequently affect human rights and fundamental freedoms, such as the freedom of expression, association or religious beliefs, the prohibition of discrimination and the rights to privacy and to a fair trial.

To begin with, imprecise legal drafting which is characterised by broad and vague terminology makes it difficult to distinguish between lawful acts and criminal offences. The consequence would be the incompliance with the standards of foreseeability and legal certainty and the potential abusive use of criminal legislation, directed against political dissidents or ordinary criminals rather than against real terrorists. In this regard, international and regional legal instruments have shaped domestic legislation, although the Italian long history of political terrorism has been equally important. However, the imprecise formulation of the obligations imposed by international sources is reflected in national law and the Italian legislator has often failed to articulate the general requirements, in a manner that respects the principles of clarity and precision of criminal law. This is particularly evident when considering the definition of the conducts with the purpose of terrorism, provided by article 270-*sexies* of the Criminal Code, which does not allow to easily discern legitimate acts, ordinary crimes and terrorist offences. The study has revealed the crucial role played by the Supreme Court of Cassation, which has guided lower courts in the interpretation of national provisions in line with constitutional constraints, thus attempting to correct the inaccuracies of the legislation and its misapplication. However, a reform of domestic legislation would be preferable.

Moreover, the criminalisation of conducts which are too far from the concrete commission of the harm they want to prevent may catch into criminal legislation acts that are not simply harmless, but which are rather the manifestation of fundamental rights or freedoms. This worrying scenario was revealed first of all at the European level, especially considering the substantive provisions enshrined into the latest Directive 2017/541. In fact, the newly introduced criminal offences do not appear justified under the principles of proportionality and necessity, which govern the criminal competence of the European Union. Consequently, the criminal norms of the Directive have been evaluated by many as an emotional and political response rather than as a lucidly and pondered intervention which takes into account the long-term implications and possible side-effects on human rights, due to its lack of a previous impact assessment.

At the domestic level, Italian criminal provisions increasingly incriminate preparatory acts, thus equally proscribing conducts that are very far from the commission of a terrorist offence. This

legislation is relevant since it is applied to prevent the departure of radicalised individuals, who are prosecuted for being accused as potential foreign terrorist fighters. However, the Constitutional Court has clarified that criminal provisions must comply with the principle of harm. This means that criminal law must be adopted as an *extrema ratio* and its application should be limited to cases where it is strictly necessary, by punishing those who tangibly harm a public interest or by preventing the concrete and plausible occurrence of such harm, without condemning conducts based on a potential abstract danger or a purely subjective intent. Therefore, the application of national criminal legislation which aims to disrupt potential terrorist activity at the earliest moment can hardly be considered respectful of said principle. In this regard, the analysis has illustrated the fundamental hermeneutic activity performed by the Court of Cassation, which has attempted to limit the scope of application of preventive criminal provisions in line with constitutional requirements. This is true for the emerging jurisprudence on the application of article 270-*bis*, which punishes the membership to a terrorist organisation and which is largely applied to condemn those individuals who travel to become part of ISIS' military campaign.

However, it must be noted that there is scarce jurisprudence on the matter and that some judicial decisions appear surprisingly in contrast with the principle of harm, with the incrimination and condemnation of conducts which do not concretely damage nor endanger public security.

Through this overall analysis, the thesis means to argue that substantive criminal legislation shall not be applied beyond the limits which are inherent to its coercive force and that prevention cannot be an excuse to derogate from the respect of fundamental rights and freedoms. Under this light, it becomes clear how both legislative and judicial authorities should make sure that counter-terrorism legislation fully complies with the principles of criminal law which govern democratic societies and ensure respect for the rule of law. This last consideration is of utmost importance: only a legal response which is fully aware of human rights implications can be a credible, solid and a long-term solution to the problem of terrorism and foreign terrorist fighters, as its latest manifestation. Democratic States cannot risk to sacrifice the fundamental principles on which their systems are founded in the name of prevention, or they would undermine the same core values that terrorists aim to destroy.

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