DEPARTMENT OF POLITICAL SCIENCE

Chair of Comparative Public Law

THE THREAT OF THE FOREIGN TERRORIST FIGHTERS: A COMPARATIVE LEGAL ANALYSIS BETWEEN ITALY, FRANCE AND GERMANY.

SUPERVISOR

Prof.ssa Cristina FASONE

CO-SUPERVISOR

Prof. Alessandro ORSINI

CANDIDATE

Benedetta Rondoni

Matr. 634762

Academic Year 2019/2020

Ai miei genitori,

che hanno sempre creduto in me.

"Nulla al mondo può prendere il posto della perseveranza;

Non il talento, nulla è più comune di uomini di talento falliti.

Non il genio; il genio incompreso è ormai un luogo comune.

Non l'istruzione; il mondo è pieno di derelitti istruiti.

Solo la perseveranza e la determinazione sono onnipotenti".

Calvin Coolidge

TABLE OF CONTENTS

CHAPTER II

International and European responses to the phenomenon of the Foreign Terrorist Fighters.

CHAPTER III

National strategies against Foreign Terrorist Fighters: Italy, France and Germany in comparison.

SUMMARY

Table of Abbreviations:

AMT	Association de malfaiteurs en relation avec une enterprise terroriste
ANF	Al-Nusra Front
AP	Additional Protocol to the Geneva Conventions
API	Advance Passenger Information
BGH	Bundesgerichtshof – German Federal Court of Justice
CGRA	Commissaire général aux réfugies et aux apatrides
CODEXTER	Council of Europe Committee of Experts on Terrorism
CTC	UN Security Council Counter-Terrorism Committee
CTED	UN Security Council Counter-Terrorism Executive Directorate
EAW	European Arrest Warrant
ECJ	European Court of Justice
EU	European Union
FDCT	Framework Decision on Combating Terrorism
FTFs	Foreign Terrorist Fighters
GC	Geneva Conventions
GCTF	Global Counter-Terrorism Forum
IAC	International Armed Conflict
IHL	International Humanitarian Law
ICC	International Criminal Court
ICTY	International Criminal Tribunal for Former Yugoslavia
ISIL	Islamic State of Iraq and the Levant
JTWJ	Jama ‘at al-Tawhid wa-l-Jihad
NIAC	Non-International Armed Conflict
PNR	Passenger Name Record
POW	Prisoner-of-war
QPC	Question Prioritarie de Constitutionnalité
RAN	Radicalization Awareness Network
RFTFs	Returning Foreign Terrorist Fighters
StGB	Strafgesetzbuch – German Criminal Code
UN	United Nations

Introduction

"France is at war"[1], thus says Francois Hollande after the Paris attack in November 2015. The target of this statement is not just the Islamic State of Syria and the Levant, commonly known as ISIL but more widely, the foreign terrorist fighters, those individuals who fight for ISIL and then perpetrate attacks against European countries. Hence, this dissertation stems from the interest in deeply understanding this phenomenon which represent a global and unprecedented threat to the international peace and security. As a matter of fact, the existence of combatants who joined conflicts in third countries is nothing new: suffice it to say that the Texas Revolution in 1835 – 1836 reveals some foreigners fighting in pursuit of freedom and civil liberties against the autocratic rule. Though, the continuous and massive flow of individuals who travel to Syria and Iraq to join the *jihadist* terrorist organization of the ISIL has drawn attention on the problem which is exacerbated by the systematic use of terrorism against military targets and civilians. In this sense, the numbers are disturbing, as since the beginning of the Syrian War in 2011 42,000 individuals leave their countries to fight in the ranks of the ISIL for the sake of the defence of Muslims in Middle East and for the creation of the global *Umma*. The concern are twofold: on one hand, it derives from the comparison with the Afghan *mujahideen* intervening in the Afghan war (1979 – 1992) because in less than four years the Syrian war has overcome in terms of foreign combatants the Afghan war which saw a ten-year flow. On the other hand, the unexpected influx of Western foreign fighters amounting to around 5,000 put a strain on the international and European counter-terrorism system.

Along with it, the brutal images of war crimes released via Internet and the terror infused by the terrorist attacks perpetrated by *jihadists* in the European territory have disrupted the Western society and have triggered a firm reaction from the international community. Indeed, in the aftermath of the declaration of the birth of the Caliphate on 29 June 2014 the United Nations take steps against foreign terrorist fighters with the adoption of SC Resolution 2178 by condemning their gross violations of human rights and ordering their withdrawal from Syria since their presence could prolong the conflict. However, the UN Security Council goes further inasmuch it envisages a comprehensive approach to this phenomenon including a variety of measures, namely criminal laws, administrative measures, intelligence operations and preventive strategies, thus dictating duties on States concerning the prevention and the

[1] Mullen J., Haddad M., *"France is at war", President Francois Hollande says after ISIS attack*, CNN, 17 November 2015.

repression phases. It should be recalled that the statutory reaction of the United Nations has been preceded by the military intervention of a coalition of Western states against the ISIL outposts since August 2014 whose solely consequence was to increase the empathy towards the Muslim community and to swell the ranks of ISIL in Syria and Iraq.

Here stands this dissertation which has the purpose of analysing three countries within the European context in order to highlight the legal measures enacted against the foreign terrorist fighters who greatly affect their security. Indeed, the European countries were taken aback by the various terrorist attacks carried out in their soil by the "returnees", the Western citizens who return from the conflict zone with specific skills such as to perpetrate violent actions in their home country or perform radicalization activities as well as finance the travels of other volunteers to the conflict zone. Therefore, the comparative analysis targets three European countries which in a different way get involved with the foreign terrorist fighters and with radicalizing *jihadists:* Italy, France and Germany. While the presence of Italian foreign terrorist fighters in the conflict zone has been very limited, France and Germany has experienced a high volume of citizens who approached the *jihadist* ideology and among them, around 2,000 French and 800 German were recruited by the ISIL and travelled to the Syrian conflict. In addition, France accounts for the largest number of jihadist terrorist attacks (42) between 2014 and 2018, some of them very bloody, namely the series of coordinated attacks in the night of 13 November 2015 which sacked and pillaged Paris or the cargo truck's attack into the crowd in Nice on 14 July 2016, with the toll of 89 and 86 deaths.

Nonetheless, the interest is mainly related to the legal implications of these events, or rather the evolution of their Criminal Code in the sections devoted to the terrorism and their preventive systems which have been greatly strengthened in order to stem the flow of foreign terrorist fighters and to prevent the on-line and off-line radicalization. Accordingly, the analysis compares Italy with its legislative measures aligning with the regulations derived from the European Union to France which established a permanent state of emergency and Germany which is remarkable due to its focus on deradicalization programs. The examination brings us to understand the differences and the similarities among these three countries, posing the focus on the dilemma between human rights, democracy and the security of citizens and on the question on how to deal with the foreign terrorist fighters who at the moment are still in the conflict zone while ISIL is crumbling down. At the end of the Introduction, the dissertation proceeds with an analysis which is divided into three sections.

Chapter One is dedicated to the illustration of the cultural and legal dimension of the foreign terrorist fighters. Indeed, the chapter analyses the historical assumptions of the global *jihadism* which permeates the ideology of the ISIL and of Al-Qaida before that and explains the birth of the figure of the foreign terrorist fighter who join conflicts in Muslim countries on the basis of the allegiance to the religion. Subsequently, a sociological analysis is mentioned, thus examining their characteristics, motivations and radicalization patterns, so that one can answer to the questions of "who", "why" and "how". On the other hand, the legal dimension equates to the definition of foreign terrorist fighters under international humanitarian law (IHL) due to their presence in armed conflicts. Hence, the chapter aims at searching out the status of foreign fighters within the types of armed conflicts due to the obscurity on the qualification of the Syrian war, to conclude with the reference to terrorism, broadly used by the foreign terrorist fighters but prohibited by the IHL.

After this frame on foreign terrorist fighters, the dissertation moves forward to the tabling of the international responses with particular emphasis on the United Nations and European Union resolutions. On one hand, the counter-terrorism system established by the United Nations is deeply analysed, starting from the Resolution 1267 and the post-9/11 Resolution 1373 enacted against Al-Qaeda, then the legislative framework set up against the foreign terrorist fighters until the most recent measures tackling the threat of the "returnees". Before focusing on the European level, Chapter Two briefly cites the international soft law elaborated by the Global Counter-Terrorism Forum and other relevant institutions to give recommendations to the States in drafting policies. On the other hand, the work of the Council of Europe is examined in order to emphasize the concern for the human rights in the fight against terrorism, while the position of the European Union as the main institution in the continent results in the four-strand strategy and in the 2017 Directive harmonising the Criminal Codes of the Member States.

Furthermore, Chapter Three constitute the core of the dissertation because it is consecrated to the analysis of the national strategies of the three countries. This follows a specific pattern since the focus is firstly located on the repressive system, thus the legislation is examined with the incorporation of the offences within the Criminal Code; then, Italy, France and Germany are inspected from the point of view of the administrative measures, be the expulsion or the special surveillance. Finally, there exists the need to put forward significant jurisprudence in order to compare the role of the judicial power in each country in the fight against foreign terrorist fighters. In the end, possible policies to deal with the Western fighters stationary in Syria and Iraq are put forward in order to answer to the research question.

Chapter I

Foreign terrorist fighters: cultural and legal dimension.

1. Foreign fighters in civil wars: an historical survey.

The phenomenon of foreign fighters refers to combatants who decide to join rebel groups in civil wars in countries different from their own primarily moved by ideology, religion or kinship. It is not confined to the Islamic State because this mobilization, whether it is Muslim or untied to religion, dates back to the Texas Revolution in 1835 – 1836. Nevertheless, it has acquired prominence in the last decade due to the expansion of the Islamic State which saw an unprecedented flow of combatants from West to the war scenario. Indeed, the term "foreign fighter" was firstly employed on March 21, 1988 in *The Times* of London which outlined the victory of Afghan mujahidin against the Soviet forces: "Khost outpost falls to mujahidin led by foreign fighters"[2]. Afterwards, the term was used to depict the Muslim volunteers joining the Yugoslav civil war and the ones who contributed to the Al-Qaeda crusade against the West.

Foreign fighters are defined as "non-citizens of conflict states who join insurgencies during civil conflict"[3]. This definition entails that these individuals leave their country of residence to join a party engaged in an armed conflict without any reference to inter-state wars. In addition, it is required the support to the insurgents to label individuals as foreign fighters, meaning that joining the governmental side does not amount to foreign fighting. In this respect, Mendelsohn stresses that "foreign fighters are found in asymmetric conflicts in which at least one side of the conflict is a non-state actor, usually a guerrilla force or another irregular outside group"[4], implying that these volunteers generally travel to the conflict zone in order to aid the rebel forces. The notion can be widened taking into consideration four criteria proposed by Thomas Hegghammer:

[2] Malet D., *Why Foreign Fighters? Historical Perspectives and Solutions*, Foreign Policy Research Institute, 2010, p. 107.
[3] Malet D., *Transnational Identity in Civic Conflicts*, Oxford Scholarship Online, 2013, p. 9.
[4] Mendelsohn B., *Foreign Fighters – Recent Trends*, Foreign Policy Research Institute, 2011, p. 190.

> *"(1) has joined, and operates within the confines of, an insurgency; (2) lacks citizenship of the conflict state or kinship links to its warring factions; (3) lacks affiliation to an official military organization; and (4) is unpaid"*[5].

The foreign fighter is deemed as an individual involved in an insurgency who is not a national of the state in which the conflict occurs, he is not enlisted in military organization and finally he is unpaid. The characterization is crucial to make a distinction among the different actors who participate in a civil conflict. Indeed, foreign fighters are opposed to soldiers who belong to an official military organization and they also differ from "global insurgent"[6] who maintains a political, cultural and ethnic link with the receiving state. In addition, foreign fighters need to be distinguished from mercenaries who take part in civil conflict for personal profit, hired in a foreign military service. This does not mean that foreign fighters could not receive a financial consideration but this is not the primary motivation to join insurgencies.

Nowadays, it is undeniable that foreign fighters are associated to individuals joining the Islamic State to perpetrate terrorist attacks and other serious criminal acts on the basis of the allegiance to a religion but the first cases of individuals participating in civil conflicts had different grounds. Indeed, in the American civil war, the US army relied on foreign troops to obtain the independence. Yet, in 1794 the Congress adopted the Neutrality Act which prohibited citizens to join wars in other countries as mercenaries or volunteers[7].

Foreign volunteers are found in the wars of independence in Latin America during the first decades of the 19th century against Spain which had colonized these regions since 16th century. Even though there were some who fought for profit, they were mainly motivated by the cause of freedom and liberty and by a feeling of belonging to a "universal ideology"[8]. In these conflicts, there were also some veterans from the Napoleonic Wars (1799 – 1815) who travelled to, just to mention a few countries, Colombia, Uruguay, Argentina, Venezuela, not only as a consequence of unemployment but also due to idealistic motives, namely sharing of some ideals with the Latin rebels.

The 1836 Texas war of independence provides some elements which are common to other civil conflicts in the subsequent years, namely the struggle against despotism. Indeed, Texan rebels

[5] Hegghammer T., *The Rise of Muslim Foreign Fighters: Islam and the Globalization of Jihad*, International Security, Vol. 35 No. 3, 2011, p. 57.
[6] Hegghammer T., *op. cit.*,, p. 55.
[7] Malet D. (2013), *op. cit.*, p. 35.
[8] Flores M., *Foreign Fighters Involvement in National and International Wars: A Historical Survey*, in De Guttry et al (eds.), Foreign Fighters under International Law and Beyond, T.M.C. Asser Press, The Hague, 2016, p.31.

fought against the Mexican central government in order to achieve democracy and defeat the oppression. Although the recruiters promised bounties of land in order to persuade foreign combatants, the latter joined Texan soldiers in pursuit of freedom and civil liberties against the autocratic rule. In addition, foreigners felt "the necessity of defending the transnational Anglo-American community"[9], thus they were connected to the local insurgents by ethnic ties. Likewise, they were involved in the Greek War of Independence against the Ottoman Empire in the 1820s as an uprising against conservative and centralist regimes[10] for the sake of the ancient Greek values. Worth mentioning is Lord Byron, a British politician who first joined a local association supporting the Greek independence and then in 1823 left for an expedition as commander against Ottomans.

Despite the above-mentioned conflicts, the academic literature evaluated the 1936 Spanish Civil War as the first remarkable case of foreign fighters' mobilization. The civil war erupted in 1936 after the so-called *pronunciamento*, namely a military coup d'état led by the fascist General Francisco Franco in order to overthrow the Popular Front government of the Spanish Republic. As a consequence, militias gathered together on both sides: on one hand the fascist Nationalist faction, supported by Germany, Italy and Portugal; on the other hand, the International Brigades, an international coalition composed of socialist, communist, anarchist and republican volunteers. The former benefitted from the flow of 70,000 Italian and 20,000 German troops who were recognised as soldiers, along with a number of volunteers in search for adventure or inspired by the anti-communist guerrilla[11]. Besides, they fought for the defence of the Christian Church who was threatened by the Communist values[12].

The latter outclassed the fascist faction because records estimated about 35,000 – 50,000 foreign fighters enlisted in the International Brigades, coming from Hungary, England, Italy, Austria, France and Poland. They were primarily driven by the ideology, which entailed a global conflict against fascism. The volunteers depicted the war as a moral duty; thus, they were ready to sacrifice themselves for the cause of defending democracy against fascism, protecting the oppressed against the fascist oppressors and providing social justice. In contrast to the prior conflicts in which foreign fighters shared ethnic links with the local rebels, in Spain the

[9] Malet D. (2013), *op. cit.,* p. 90.
[10] *Ivi*, p. 68.
[11] Flores M., *op. cit.*, p. 40.
[12] Malet D. (2013), *op. cit.,* p. 117.

volunteers were led by ideological affiliations. They did not share with Spanish forces any historical, linguistic or sectarian ties; still, they intervened to defend an identity under attack[13].

To sum up, the volunteers are lumped together by the same approach to recruitment message, namely "by framing distant civil conflicts as posing a dire threat to all members of a transnational community of which both the foreign recruits and local insurgents are members"[14]. This entails that the fighters share a connection with the rebels whose victory is deemed as crucial to their interests.

[13] *Ivi*, p. 108.
[14] Malet D. (2013), *op. cit.*, p. 4.

2. The global jihadism and the transition from foreign fighters to foreign terrorist fighters.

2.1 The Afghan war and the birth of the mujahideen.

It was the Afghan war which changed completely the perception of the foreign volunteers due to the high number of recruits and also due to their religious beliefs. An historical overview is necessary because of the importance of this war. In 1978 Afghanistan saw the military coup of a Marxist party, the People's Democratic Party of Afghanistan (PDPA), which established a pro-Soviet government, reaching out to Islamist uprising. Islamist Afghans were truly believers and they were keen to that Islamic Revolution whom a year later Iran was able to fulfil. This in turn generated assistance to Communists from Soviet Union. However, the situation worsened in September 1979 when the Afghan president, Mohammad Taraki, was assassinated and his deputy, Hafizullah Amin, took over. Soviet Union started worrying about this new government, accused of pursuing an extreme Marxist-Leninist policy and of being backed by United States. On Christmas Eve 1979 Soviet Union intervened in Afghanistan with the purpose of overthrowing the Afghan government and setting up a Communist leadership which complied with the Soviet *diktat* and was more capable of tackling the Islamist phenomenon.

This war represented a liberation struggle for the Islamists against the aggressor and constituted the birth of the *mujahideen,* the Islamist fighter who defended his country against Soviet Union. *Mujahideen* literally means a person who performs *jihad,* one of the sixth pillars of Islam. The term *jihad* comes from the Arab root *juhd* and basically refers to a struggle or an effort to get through difficult and serious problems[15]. Yet, it contains multiple meanings. Indeed, the Quran distinguishes three different types of *jihad: Jihad al-Akbar, Jihad al-Kabir, Jihad al-Asghar*, respectively the greatest jihad, the major jihad and the lesser jihad. The first one implies the self-purification, the subsequent one entails the propagation of the truth, which is embodied by the Islamic messages, and the last one is a defensive battle against oppressors and non-believers,[16] which is considered as not mandatory upon each Muslim. Therefore, *Jihad* is not

[15] Ramlan R., Erwinsyahbana T., Hakim N., *The concept of Jihad in Islam*, IOSR Journal of Humanities and Social Science Volume 21 Issue 9 Ver. 7, September 2016, p. 36.
[16] Bakircioglu O., *A Socio-legal Analysis of the concept of Jihad*, The International and Comparative Law Quarterly, Vol. 59, No. 2, April 2010, pp. 413-440, p. 424.

only an external struggle against the enemies of Muslim but it is also an internal one to avoid temptations and become a better Muslim[17].

In addition, Islamic law distinguishes two types of external jihad: the offensive jihad (*jihad al-talab)* is performed to expand the Islamic law and civility in the *Dar al-Harb[18];* the defensive jihad (*jihad al-dafa''a)* implies that, whether a Muslim territory is attacked by an aggressor, Muslims have the obligation to defend themselves and to protect the faith. The defensive jihad follows the doctrine of "just war"[19], embodied in the Quran which states *"and that you kill not the life which Allah has made sacred, save by right"[20]*. This means that whether there exists a just cause, a war could be considered just. Accordingly, Muslim could fight against the aggressor because the external aggression is deemed as a just cause. This idea is also contained in another verse of the Quran: "*permission to fight is given to those against whom war is made"[21]* which allows Muslims to fight against non-believers, satisfying one condition, namely self-defence. In addition, in the Quran there are some verses which clarify the other conditions which need to be satisfied and they basically reflect the requirements of the "just war" theory: the necessity and the proportionality. The *jihad* should be proportionate to the defence of the Muslim community and should be carried out as a last resort measure[22].

In Afghanistan, the defensive jihad saw its first application from the Afghan *mujahideen* who decided to fight locally against the Soviet invader in order to defend the country and to protect their own freedom. They were members of militias, led by local warlords, usually unskilled, ethnically diversified because there were Pashtun, Tajik, Hazara and at first they were not coordinated in their response to Soviet Union. Their uprising was a nationalistic revolt against a Marxist regime in which the Soviet repression was only instrumental in reinforcing their faith

[17] Gruppo di lavoro 67° Sessione Ordinaria e 15° Sessione Speciale, *Dal mujahidismo ai foreign fighters. Dinamiche, profili, attori e modelli organizzativi del combattentismo tra il XX e il XXI secolo,* Centro Alti Studi per la Difesa, p. 5.

[18] *Dar al-Harb* is considered as "the territory of war or chaos" and refers to all the lands in which Islamic law is not in charge in contrast to *Dar al-Islam* which is "the territory of peace". The latter encompasses the Muslim lands in which the *Quran* dominates. In addition, a difference relies on the fact that *Dar al-Harb* is inhabited by infidels or non-believers whereas in *Dar al-Islam* the *Ummat al-Islam,* the community of Islamic people, resides. The relation between the two territories is based undoubtedly on war: indeed, *Dar al-Harb* is ruled by an illegitimate government due to the origin of its power which is not Allah, coupled with the fact that some territories, which were part of *Dar al-Islam,* are now part of the *Dar al-Harb*. This entails that Muslims have the obligation to wage war against these infidels in order to enforce the God's name (the *Sharia*) worldwide.

[19] The Just war theory was envisaged firstly by the Article 51 of the United Nations Charter which allows States to wage war only in self-defence.

[20] Surat Al-An 'am 6:152.

[21] Surat Al-Hajj 22:40.

[22] Bakircioglu O., *op. cit.*, p. 426.

and increasing the numbers of fighters[23]. Later, the *mujahideen* combined their forces in the Islamic Unity of Afghanistan's Mujahideen in the spring of 1981[24] which was made up of the armies of the seven main Afghan warlords[25]. These armies were composed of young soldiers, usually remunerated, which relied on the support of the population and on the knowledge of the territory.

2.2 The Arab Afghans and their "call for Jihad".

The invasion of Afghanistan by Soviet Union caused different reactions in the international community. On one hand, in a Cold war scenario this was the whole point of the US administration calling the *mujahideen* as *"freedom fighters"*[26] and considering the Soviet invasion as a serious threat to peace. The US President, Jimmy Carter, accused USSR of *"a deliberate effort of a powerful atheistic government to subjugate an independent Islamic people"*[27]. President Ronald Reagan went further describing the Afghan fighters as "*defending principles of independence and freedom that form the basis of global security and stability"*[28], thus the country decided to give them military and technical assistance.

On the other hand, the Muslim world perceived the Soviet aggression as a "*call for Jihad"*[29], entailing that all Muslims have the responsibility to defend Afghanistan, being a Muslim territory. Arab countries started showing solidarity and providing military, technical, financial, economic and humanitarian assistance and Pakistan was the pivotal country because it appointed the *madrassas,* religious schools, to recruit young soldiers in order to encourage them to travel to Afghanistan to join the *jihad*[30]. In this context, one may frame the figure of Abdullah Yusuf Azzam, a Palestinian *sheikh,* who was the leader of a network supporting Afghan *mujahideen* located in Pakistan and a key player in mobilizing volunteers, planning and organizing their travel to Afghanistan and in inspiring their acts. Indeed, Azzam produced

[23] Siddiqi M.I., *Afghan Conflicts and Soviet Intervention – Perception, Reality and Resolution*, GeoJournal, Vol. 18, No. 2, March 1989, p. 128.
[24] *Ivi*, p. 129.
[25] Gruppo di lavoro 67° Sessione Ordinaria e 15° Sessione Speciale, *op. cit.*, p. 6.
[26] Malet D., (2013), *op. cit.*, p. 162.
[27] Westad O.A., *The Cold War: A world of history*, ALLEN LANE, 2017, p. 495.
[28] Proclamation 4098 – Afghanistan Day, March 10, 1982.
[29] Basileo D., *From Foreign Fighters to Foreign Terrorist Fighters*, Sicurezza, Terrorismo, Società, 2017, p. 137.
[30] Donnelly M.G., Sanderson T.M, Fellman Z., *Foreign fighters in history*, Center for Strategic & International Studies, April 2017, p. 3.

recruitment literature since 1982, declaring the necessity of the Muslim unity due to the serious threat the *ummah* was facing.

In *Join the Caravan* (1987), Azzam considered Afghanistan as one front in an everlasting war against Muslims, in which unbelievers had destroyed their territories and had slaughtered "their brothers and sisters"[31], and he enumerated sixteen reasons to perpetrate *jihad*, including that fighting is necessary in order that "*the Disbelievers do not dominate […], protecting those who are oppressed in the land"*[32]. Yet, the *sheikh* also proposed in *The Defence of Muslim Territories: The First Obligation after Iman* (1979) a legal justification to persuade Muslims to join the Afghan *jihad*, namely the *fard 'ayn:* fighting was no longer regarded as a collective duty (*fard kifaya)* in which obligations could be fulfilled by a group of Muslims on the behalf of the Muslim community but as an individual duty whom each Muslim must meet[33]. This means that the *jihad* is a duty incumbent upon each Muslim, not just the inhabitants of the oppressed lands and it is eternal, necessary to be a Muslim.

The Azzam's propaganda was successful enough to motivate thousands of Muslims to join the Afghan *jihad,* the so-called *Arab Afghans,* which came from Middle East, North Africa, North America and Southeast Asia. There is disagreement over the figures of the foreign fighters in Afghanistan which are estimated between 5.000 and 20.000 combatants[34] in a decade. However, it is possible to make a distinction among three phases: in the first one (1979 – 1984), a few were the fighters who travelled to Afghanistan mainly to give humanitarian assistance[35] whereas in the following phase (1984 – 1989), the numbers of fighters increased due to the activism of Abdullah Azzam. The influx of foreign fighters reached its peak in the last phase (1989 – 1992) in which they benefitted from the training camps in Pakistan[36].

The Arab Afghans were usually young, members of the least-favoured social classes and excluded at home, thus suffering a social marginalization in their own country. Nonetheless, there exists an opposition between the Arabs from Africa which respected the above-mentioned characteristics and the Arabs from the Gulf States, which were wealthy[37]. They adhered to the

[31] Basileo D., *op. cit.*, p. 137.
[32] Azzam A., *Join the caravan*, 1987, p. 4.
[33] Wiktorowicz Q., *A genealogy of radical Islam*, Studies in Conflict&Terrorism, Volume 28, 2005 – issue 2, p.84.
[34] This was the assessment of Thomas Hegghammer (2011) in contrast to David Malet (2013) which considered Arab Afghans as a group of 4000 combatants coming from South Asia, Malaysia, Africa and some were Westerners.
[35] Hafez M.M, *Jihad after Iraq: Lessons from the Arab Afghans*, Studies in Conflict&Terrorism, 2009, 32:2, p. 75.
[36] *Ibidem.*
[37] Malet D. (2013*), op. cit.*, p. 176.

jihad due to various motivations which can be classified in five categories: religious fulfilment, employment opportunities, adventure, safe heaven or military training[38]. Actually, there was also a handful of non-Muslims who travelled to Afghanistan in order to defeat Soviet Union in the key to anti-communism[39].

The small size of Arab Afghans matched with their little impact on the battlefield. Firstly, their arrival in Afghanistan was subsequent to major victories of the *mujahideen* against Soviet Union; secondly, they were disregarded by the Afghans which considered them as "glorified guests" and not as "holy warriors"[40]. Though, they achieved greater results in the creation of a transnational network of combatants who were willing not only to travel to conflict zones in defence of the oppressed Muslim population but also to promote the *jihad* in their home countries and in the training of some leaders who shortly after advanced the Muslim cause. Among them, Usama bin Laden stood out as a recruit who took advantage of the connections with Azzam and other leaders to constitute his militant organization, waging war against the unbelievers, namely the Americans.

After the departure of Soviet troops from Afghanistan in February 1989, even though this period amounted to the apex of influx in foreign fighters, some decided to return to their home countries where they engaged in local struggles [41] or where they acted as facilitators of *jihadist* movement; others participated in other war theatres in which Muslims were fighting their *jihad,* namely Bosnia and Chechnya. Here the figures were smaller with about 1.000 – 2.000 Arab Afghans who travelled to Bosnia since September 1992, becoming fully integrated in the Bosnian army[42] and at most 300 fighters who joined Chechnyan insurgents since 1994.

2.3 The new category of foreign fighters and the birth of ISIL.

Afghanistan represented a critical juncture in the birth of the figure of Muslim foreign fighters as combatants willing to leave their country of origin and travel to the war scenario in order to aid their brothers. However, after the Afghan war, the concept of foreign fighters as a combatant

[38] *Ivi.,* p. 171.
[39] *Ibidem.*
[40] *Ivi,* p. 179.
[41] Donnelly M.G., Sanderson T.M., Fellman Z, *op. cit.,*, p. 5.
[42] Malet D. (2013), *op. cit.,* p. 188.

who joins a non-state armed group in an armed conflict mainly due to the defence of freedom of the inhabitants was inappropriate to explain a new wave of foreign fighters which are commonly called as foreign terrorist fighters. These fighters are basically those who decided to participate in the terrorist activities of Al-Qaeda in the first place and then in the actions of the Islamic State of Iraq and the Levant (ISIL) and they are defined by the UN Security Council Resolutions 2178/2014 as:

> *"individuals who travel to a State other than their State 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"*[43].

The definition reiterates some elements of the definition of foreign fighter but inserts the idea that participation in the armed conflict is not a necessary requirement to label fighters as foreign terrorist fighters. Indeed, foreign terrorist fighters are defined by terrorism, namely the perpetration, planning and participation in terrorist acts as well as the terrorist training and financing.[44] Actually, the travel or the attempt to travel to the conflict zone is sufficient to treat them as terrorists because this status is acquired in the preparatory phase[45].

The transition from foreign fighters to foreign terrorist fighters could be explained as the consequence of some significant changes: first of all, the passage from *jihadism* to global *jihadism* which was perpetrated by Usama bin Laden and then proposed by Abu Musab al-Zarqawi, the leader of Al-Qaeda in Iraq, the forerunner of ISIL. Secondly, ISIL was pivotal to this transition because it recruited thousands of people with the promise of "a state in which every Muslim could serve his faith"[46]. In addition, the contemporary foreign fighters make use of terrorism in their war against state- or non-state parties in contrast to the old foreign fighters who fought with conventional methods[47]. Lastly, foreign terrorist fighters activate the so-called "blowback effect" which consists of those fighters returning to their country of origin where they may perpetrate terrorist attacks or perform radicalization activities as well as any ancillary activities. This was completely absent in the first *mujahideen* who usually returned to their home country peacefully, reintegrating in the society.

---

[43] UN Doc. S/RES/2178 (2014), 24 September 2014, para 2.
[44] Bilkova V., *Foreign Terrorist Fighters and International Law*, Groningen Journal of International Law, Vol. 6, No. 1, 2018, p. 5.
[45] *Ibidem.*
[46] Basileo D., *op. cit.*, p. 147.
[47] Sinkkonen T., *War on two fronts, the Eu perspective on the foreign terrorist fighters of ISIL*, FIIA Briefing Paper 166, January 2015, p. 3.

The legacy of Afghanistan laboratory was embodied by the doctrine of *jihadism* which declared the need of the Muslim community to stand up against the infidels and envisaged an Islamist unity against the oppressors. However, Usama bin Laden set up Al-Qaeda, going further than the Azzam's militant organizations in declaring a global war against the West and in urging each Muslim to "a global jihad without borders and limits"[48]. It no longer implied a conflict against the local regimes but against the West, especially United States which threatened the survival of the Muslim community[49]. This represented a watershed in the expansion of global *jihadism* which laid the foundation for the creation of the Islamic State of Iraq and the Levant.

ISIL derives from an Islamist organization established by al-Zarqawi in 1999 by the name of *Jama 'at al-Tawhid wa-l-Jihad* (JTWJ), a Sunni group operating in the North-West of Iraq. Al-Zarqawi was an advocate of the *Salafi* Islam, a political ideology founded on the idea of purity of the initial Islam and on the necessity of the purification of the Islamic world considered as populated by unbelievers embodied by the Shiites[50]. In 2004 JTWJ turned into an offshoot of al-Qaeda, called *Tanzim Qa'idat al-Jihad fi Bilad al-Rafidayn*, commonly known as al-Qaeda in Iraq (AQI) with the purpose of creating an Islamic caliphate which would have fought against both non-Muslims and Shiites[51]. The leadership of al-Zarqawi did not last long: in 2006 he was killed and he was succeeded by Abu Omar al-Baghdadi who decided to merge its militant organization with other jihadist groups, setting up the Islamic State of Iraq (ISI)[52]. Once Abu Omar al-Baghdadi died in 2010, Abu Bakr al-Baghdadi took over and he gave impetus to the expansionism into Syria which culminated on April 2013 when he declared the birth of the Islamic State of Iraq and the Levant (ISIL), including also Jabhat al-Nusra, an organization performing the *jihad* in Syria. Al-Qaeda rejected this decision and in February 2014 reported the schism between Jabhat al-Nusra and ISIL as well as the disaffiliation between ISIL and al-Qaeda[53].

[48] Maggiolini P., *Dal jihad al jihadismo: militanza e lotta armata tra XX e XXI secolo,* in Jihad e Terrorismo: Da al-Qa'ida all'ISIS: storia di un nemico che cambia, a cura di Andrea Plebani, 11 maggio 2016, p. 36.
[49] Hegghammer T., *Global Jihadism after the Iraq War,* Middle East Journal, Vol. 60, No. 1, 2006, p. 13. For the clash between Islam and West, see also Samuel P. Huntington "*The Clash of Civilizations and the Remaking of the World order",* 1993.
[50] Orsini A., *ISIS: i terroristi più fortunati del mondo e tutto ciò che è stato fatto per favorirli,* Milano, Rizzoli, 2016, p. 122.
[51] Donnelly M.G., Sanderson T.M, Fellman Z., *op. cit*., p. 18.
[52] Orsini A. (2016), *op.cit.*, p. 127.
[53] *"ISIS is not a branch of the Qaidat al-Jihad group, we have no organizational relationship with it, and the group is not responsible for its actions".* Al-Qaeda's General Command, "On the Relationship of Qaidat al-Jihad and the Islamic State of Iraq and al-Sham," al-Fajr Media, February 2, 2014.

Shortly thereafter, Al-Baghdadi proclaimed the birth of the Caliphate in June 2014 after the conquest of Mosul, ascending the role of caliph and *Amir al-Mu'minin*, the "leader for Muslim everywhere"[54]. Al-Baghdadi sponsored a new radical *Salafism* which combined the idea of purity with the obligation for each Muslim to perform *jihad* against the infidels, embodied by the Western countries, the Arab regimes accused of collusion with the latter, the conservative Muslims who did not believe in the external *jihad* and also against other jihadist groups as Al-Qaeda and al-Nusra who dismissed the superiority of the caliphate. In addition, ISIL embraced the idea that fighting is the real *jihad* which could justify the murder of civilians, prisoners and hostages along with the use of weapons of mass destruction (WMD) and the martyrdom[55].

The caliphate included large sections of Syria and Iraq and took the shape of a proto-state based on the Islamic law (the *sharia)*, built on a hierarchical system with decision-making apparatus and judiciary which administered territories, provided salaries, enforced Islamic law[56] and relied on the taxes and the oil supplies in order to make the system function. Besides, it strove for the creation of a welfare system which dealt with the citizens' education, employment and health[57]. The transition from terrorist organization to statehood represented the underlying cause of the great influx of foreign fighters which joined ISIL in its military activities as well as in the building of the caliphate.

[54] Basileo D., *op.cit*. p.149.
[55] Rabasa A., Benard C., *Eurojihad: Patterns of Islamist Radicalization and Terrorism in Europe*, Cambridge University press, 2014, p. 33.
[56] Donnelly M.G., Sanderson T.M, Fellman Z, *op. cit*., p. 23.
[57] Orsini A. (2016), *op.cit.*, p. 97.

3. Foreign terrorist fighters in Syria: features and motivations.

3.1 Statistics.

As mentioned below, foreign terrorist fighters are not a new phenomenon but the figures of those travelling to Syria and Iraq are unprecedented and they exceed the numbers of previous conflicts. Indeed, in less than four years, the Syrian war has overcome in terms of foreign combatants the Afghan war which experienced a ten-year influx[58]. More than 42,000[59] were the foreign terrorist fighters who travelled to Syria and to Iraq before and after the declaration of Al-Baghdadi in 2014. Yet, if in June 2014 the *Soufan Group* report identified about 12,000 foreign fighters, the birth of the caliphate boosted the departures which more than doubled in less than eighteen months[60] turning to 31,000.

Table 1. ISIL foreign fighters by country.

		Count				Count	
	Country	Official	Non-Official		Country	Official	Non-Official
1.	Tunisia	6,000	7,000	26.	Spain	133	250
2.	Saudi Arabia	2,500	-	27.	Canada	130	-
3.	Russia	2,400	-	28.	Denmark	125	125
4.	Turkey	2,100	-	29.	Australia	120	255
5.	Jordan	2,000	2,500	30.	Azerbaijan	104	216
6.	France	1,700	2,500	31.	Malaysia	100	-
7.	Morocco	1,200	1,500	32.	Philippines	100	-
8.	Lebanon	900	-	33.	Albania	90	150
9.	Germany	760	-	34.	Italy	87	-
10.	United Kingdom	760	-	35.	Norway	81	60
11.	Indonesia	700	500	36.	Finland	70	85
12.	Egypt	600	1,000	37.	Pakistan	70	330
13.	Belgium	470	470	38.	Sudan	70	100
14.	Tajikistan	386	-	39.	Switzerland	57	-
15.	Bosnia	330	217	40.	Israel	50	-
16.	Austria	300	233	41.	Ireland	30	30
17.	China	300	-	42.	India	23	45
18.	Kazakhstan	300	-	43.	New Zealand	7	6
19.	Sweden	300	300	44.	Brazil	3	-
20.	Kosovo	232	-	45.	Madagascar	3	-
21.	Netherlands	220	210	46.	Singapore	2	-
22.	Maldives	200	60	47.	Cambodia	1	-
23.	Algeria	170	225	48.	Moldova	1	-
24.	United States	150	250	49.	Romania	1	-
25.	Macedonia	146	100	50.	South Africa	1	-

Note: Based on data from The Soufan Group (2015).

[58] Dambruoso S., *Jihad. La risposta italiana al terrorismo: le sanzioni e le inchieste giudiziarie*, DIKE Giuridica Editrice, 2018, p. XI.
[59] RAN Manual, *Responses to returnees: foreign terrorist fighters and their families*, Radicalization Awareness Network, July 2017, p. 15.
[60] The Soufan Group, *Foreign Fighters: an updated assessment of the flow of foreign fighters into Syria and Iraq*, December 2015, p. 4.

Foreign terrorist fighters differ on the basis of the country of origin: they come from more than 110 countries, especially from MENA region, 20% is represented by Western countries and a small percentage from Canada, New Zealand and China[61]. The Arab countries remain the primary countries of origin of foreign terrorist fighters in the Syrian war, led by Tunisia and Saudi Arabia which are the largest sources of fighters for ISIL, respectively with 6,000 and 2,500 individuals[62].

Western foreign fighters amount to around 5,000 but there are significant differences between United States and Europe as well as among European countries: on one hand, the percentage of US foreign fighters is relatively low with about 250 departures to Syria and Iraq as of September 2015 whereas in Europe the ISIL recruitment has been successful. Though, it has created two groups of states: the ones who experienced a high mobilization, namely France, Great Britain, Germany and Belgium which account for 70% of these volunteers and the Southern Europe countries, remained backward. Indeed, France shows the highest number of fighters in Europe with about 1,800 individuals, Great Britain and Germany have 760 fighters each, and 470 volunteers come from Belgium[63].

On the other hand, Italy saw the departure of just 135 combatants[64], many of which did not own the Italian citizenship. Worth mentioning is the case of Russian Federation counting as of September 2015 about 2,400 combatants. They come from the North Caucasus – Chechnya, Dagestan and Ingushetia – a Muslim region which in the past have enjoyed a stream of Muslim *mujahideen* during the war of independence[65].

[61] Bakker E., Singleton M., *Foreign Fighters in the Syria and Iraq Conflict: Statistics and Characteristics of a Rapidly Growing Phenomenon*, in Foreign Fighters under International Law and Beyond, De Guttry A. et al. (eds.), T.M.C. Asser Press, The Hague, 2016, p. 16.
[62] Bremmer I., *The top 5 countries where ISIS gets its foreign recruits,* TIME, April 14, 2017.
[63] The Soufan Group, *op. cit.*, p. 12. Belgium has the highest ratio of foreign fighters to the population with about 50 per million people in contrast to France which stops at 30 per million (*Source*: ISPI).
[64] Marone F., Olimpo M., *Il problema dei foreign fighters catturati in Siria*, ISPI, 18 febbraio 2019.
[65] Bremmer I.,. *Art. cit.,* TIME.

3.2 Western foreign fighters and their motivations to travel to Syria and Iraq.

Foreign terrorist fighters could be classified on the basis of their country of origin between Western foreign fighters and non-Western foreign fighters. It is evident that the latter still represents the majority in the contingent of foreign fighters, which is moved by religious reasons and the above-mentioned "call for *jihad*". Though, there has been a great increase in the number of the former which could not be explained by ethnic and religious links but needs other motivation factors.

First of all, it should be clarified that Western foreign fighters do not fall into a specific category but they include European veterans from the first wave of jihadism, converts, young second- or third-generation immigrants and local jihadists. However, some characteristics could be identified. First of all, the majority of the contemporary foreign fighters are male between 18 and 25 years old with a little percentage of minors and only 17% of females in the total contingent of foreign fighters[66]. They usually possess neither a previous experience on the battleground nor military skills but they undertake a short military training when they reach the war scenario[67].

Western foreign fighters do not share the same motivation to fight overseas: some feel empathy for Muslim victims, other adhere to an ideology and still others are motivated by the search for an identity and meaning. In the first case, individuals are affected by the images of the cruel and barbarous atrocities committed in the war which elicit an emotional reaction of outrage towards the perpetrators as well as the Western countries, accused of complicity[68]. Therefore, they decide to travel to war zones in order to stop the violence and to aid the Muslim which are considered as victims of injustice. For instance, the mother of a deceased Canadian ISIL fighter affirmed that his son left for the need of protecting women and children in danger:

> *"His initial intentions were to help women and children, […]. He said women and children are being tortured, and murdered, and raped, nobody is doing anything about it […]. He truly, truly believed that even killing others was justified to save all these women and children who were victims and who could not stand up for themselves"*[69].

---

[66] Boutin B., Chauzal G., Dorsey J., Jegerings M., Paulussen C., Pohl J., Reed A., Zavagli S., *Foreign Fighters Phenomenon in the European Union: Profiles, Threats & Policies*, ICCT – The Hague, April 2016, p. 51.
[67] *Foreign Fighters from Western countries in the ranks of the rebel organizations affiliated with Al-Qaeda and the global jihad in Syria*, The Meir Amit Intelligence and Terrorism Information Centre, January 2014, p. 6.
[68] Frenett R., Silverman T., *Foreign Fighters: Motivations for Travel to Foreign Conflicts,* in De Guttry et al. (eds.), Foreign Fighters under International Law and Beyond, T.M.C. Asser Press, The Hague, 2016, p. 66.
[69] *Ivi*, p. 67.

It is important to stress the fact that empathy is not the primary motivation of the travel, even though it is the factor more susceptible to ISIL propaganda which manipulates the reality in order to encourage individuals to fight[70].

Besides, foreign fighters could travel to Syria because of their adherence to an ideology, namely the belief on the *jihad* as the individual duty of each Muslim. However, they range in a spectrum from the "true believers"[71], who are committed to the building of the Caliphate, to those who embrace the ideology in the battleground. In the middle there are the fighters who leave for the search of identity, being the ideology only a secondary factor. In certain cases, the ideology does not pertain religion but it is related to politics or morality in which the obligation is to defend Muslim community from the Syrian government led by Bashar al-Assad[72].

The third type of foreign fighters are the "identity seekers"[73], those who feel outsiders in their homeland and they search for an identity. These individuals are frustrated because they do not have a specific role in society as well as they lack a meaning in life. They mature a sense of isolation, loneliness and bewilderment because of the alienation from the society and they are potential targets for ISIL propaganda which is capable of offering them a purpose: the creation of a new state based on justice and on the Islamic law where Muslim could be finally free[74]. Joining ISIL in the battlefield grows into an adventure which gives a meaning to their life and offsets the boredom and the emptiness of their previous life.

In addition, foreign fighters usually reject the values of the society in which they live, thereby the redefinition of their identity involves the pursuit of a community which guarantees them a sense of belonging. They find it in the Muslim community, the *ummah,* in which members are bound by the brotherhood and solidarity and the community's interests prevail over the individual's ones as opposed to the superficiality and individualism of the Western society[75].

These reasons are unable to explain all the typologies of volunteers fighting in Syria which include also the "death seekers"[76] which have suffered particular trauma and struggle with depression and mental health issues, thus recognizing the martyrdom in the Syrian war as a

[70] *Ivi*, p. 66.
[71] Basileo D., *op.cit.*, p. 142.
[72] United Nations Office of Counter-Terrorism, *Enhancing the Understanding of the Foreign Terrorist Fighters Phenomenon in Syria*, July 2017, p. 35.
[73] Tucker P., Defense One, *Why Join ISIS? How Fighters Respond When You Ask Them*, The Atlantic, December 9, 2015.
[74] Dambruoso S., *op. cit.*, p. XXII.
[75] Frenett R., Silverman T., *op. cit.*, p. 73.
[76] Tucker P., Defense One, *art. cit.*

glorious way to end the life. There are also fighters who are attracted by the social climbing accomplished through the heroic actions in the battlefield or by the rewards of the war, whether they are money, land or paradise[77].

Two are the main categories in which one could differentiate foreign fighters: converts and second-generation immigrants. On one hand, converts represent around 25% of jihadists[78] and are embodied by Western individuals, Christian-born or atheists, without any kinship with the Syrian people, who in a short time discover Islam by reading Qu' ran or by attending local mosques and religious places, convert, radicalize and enlist in the jihadist groups, ripe for the departure or for terrorist attacks in the homeland. The conversion entails not just new values and beliefs but also new manners of dressing, eating and drinking[79].

On the other hand, there are the sons of Muslim immigrants, who are Western citizens, supposedly integrated due to their secular habits, *de facto* on the fringes of the European society. Their level of education can vary on the basis of the country of origin as well as their family background: some come from a dire financial situation which prevents them from schooling whereas others belong to middle-class families and they have a higher education[80]. These individuals feel alienated in their home country due to the lack of integration or unemployment. They search for their own identity because they do not belong to the traditional society of their parents but they also do not fit with the values and the culture of the modern European society in which they live[81]. Their new identity is represented by ISIL and it is perceived as way of disregarding both societies but this could be considered a "re-conversion"[82]: these individuals are born in a Muslim family but they are not devout nor they have a full knowledge of their parental religion, thus they are deemed as "re-born" because they embrace a radical version of Islam[83].

[77] Schmid A.P., Tinnes J., *Foreign (Terrorist) Fighters with IS: A European Perspective*, International Centre for Counter-Terrorism, The Hague, December 2015, p. 36.
[78] Roy O., *Who are the new jihadis?,* The Guardian, April 13, 2017.
[79] Dambruoso S., *op. cit.,* p. XVIII.
[80]Schmid A.P., Tinnes J., *op. cit.*, p. 35.
[81] Abdelmalek Sayad describes this situation as "*doppia assenza",* in which second-generation immigrants feel a physical absence from their place of birth and a social absence from the place in which they live. They feel misplaced and they could react in two ways: rebellion against the society in order to achieve an identity or assimilation to appease other people. See Sayad A., *La doppia assenza. Dalle illusioni dell'emigrato alle sofferenze dell'immigrato,* Raffaello Cortina Editore, Milano, 2002.
[82] Dambruoso S., *op.cit.*, p. XVIII.
[83] *Ibidem.*

It should be recalled that a proportion of the Western foreign fighters is represented by women joining the Islamic State. Figures show that as of July 2018, 550 women[84] travelled to the conflict zones, even though it is quite impossible to draw up a profile of the women supporting ISIL due to the lack of available data but there are some common features, which basically are the age and the background. Indeed, they are young girls between 16 and 24, daughters of Muslim immigrants or converts. They travel mostly with their husband and offspring but in some cases they move alone or with female friends[85].

Marriage is wrongly considered as the main motivation factor because they follow their husband or they are attracted by "warriors badboys"[86] who encourage them to move there in order to build families. It is clear that women are crucial to the building of a permanent society and ISIL needs them in order to raise the new generation of fighters, the so-called "lions of the Caliphate"[87] as well as to create the state's infrastructure and to recruit other Western women. It is also true that Al-Baghdadi's call to action rules out female fighters because women fighting was forbidden in the Islamic State[88] but he encouraged them to remain at home as wives and mothers.

Notwithstanding, women have other motivational factors whom they share with men: the anger toward the injustices suffered by Muslims is the first reason to join the Islamic State. They perceive the *ummah* under attack and blame the West about being helpless and accomplice, thus leaving their society to help the Syrian people and stop their sorrows. In addition, female ISIL supporters suffer an identity crisis which is the by-product of frustration with the Western culture, discrimination and abuse, moving them to view *jihad* as the answer and as the meaning of their life[89]. There is no shortage of women fighters who see jihad as a personal duty which obliges them to join the Islamic State and to assist the expansion of Caliphate. Among them, some are moved by violence and intolerance towards the "unbelievers" and they are prepared to fight[90].

---

[84] Peresin A., *Why Women from the West are Joining ISIS,* in Special Issue on Female Migration to ISIS, Volume 56, Issue 1-2, Cambridge University press, November 2018, p. 33.
[85] *Ibidem.*
[86] Basileo D., *op. cit.*, p. 144.
[87] Peresin A., *op. cit.*, p. 35.
[88] It should be noted that in 2017 the Islamic State's newspaper, Naba, has published an article titled "The Duty of Women in waging jihad against the enemy" which called upon women to perform the jihad. ISIL declared that jihad is an individual duty for women who must be willing to fight in the name of Allah. See Katz R., *How do we know ISIS is losing? Now it's asking women to fight",* The Washington Post, November 2, 2017.
[89] Peresin A., *op. cit.*, p. 34.
[90] Basileo D., *op. cit.*, p. 145.

To sum up, ISIS has carried out a significant campaign of recruitment of women and young girls in order to persuade them to join their organization, presenting the Caliphate as safe place in which they could live freely. Indeed, the Islamic State was focused particularly on smart and high-skilled women who were able to perform key duties, namely providing the welfare services or instilling the moral beliefs[91]. In parallel, women were captivated by the opportunity of a social upgrade in the Syrian lands as opposed to the confinement in the West.

3.3 Radicalization patterns. The DRIA model.

The high number of foreign terrorist fighters as well as the threat they posed in Europe have substantiated the increase in the studies over the radicalization which are no longer focused in dealing with the question "why?" but in explaining the patterns through which a Western individual becomes fascinated by Islam and turns into a terrorist.

First of all, the radicalization is viewed as "a process of change, a personal and political transformation from one condition to another"[92]. The key feature involves the extremism since the radicalized individuals acquire extremist ideas which are opposed to the dominant ones[93]. The process of radicalization materialises in the variation of the value system of the individual who abandons the democratic beliefs of the Western societies to embrace the radical values of the Islam and the strict rules of the *sharia law*. This entails that radicalization is a resocialization process[94] because the jihadist experiences a rebirth. Although the pathways of radicalization are manifold, all the scholars agree on the features of the individual who approaches *jihadism*: he is frustrated with his life, he does not identify with the surrounding society and deprecates the governmental policies[95]. This situation is characterised by an identity crisis which is settled by the Islamist ideology.

[91] Peresin A., *op. cit.*, p. 36.
[92] Christmann K., *Preventing Religious Radicalization and Violent Extremism: A Systematic Review of Research Evidence,* Youth Justice Board for England and Wales, 2012, p. 10.
[93] Bennett, N., *One Man's Radical: The Radicalisation Debate and Australian Counterterrorism Policy*, Security Challenges, Vol. 15, No. 1, 2019, p. 48.
[94] Orsini A., *What Everybody Should Know about Radicalization and the DRIA Model*, Studies in Conflict & Terrorism, 2020, p. 1.
[95] Precht T., *Homegrown terrorism and Islamist radicalization in Europe: From conversion to terrorism,* Danish Ministry of Justice, December 2007, p. 32.

The pace of the radicalization depends on how the individuals radicalize, even though the introduction of the social networks has accelerated the process and has created a wide and anonymous community of radicals[96]. Indeed, nowadays social networks represent the principal means of recruitment which relies upon the speed and the extent of the audience, targeting people differing on the basis of gender, age, origin, background and motivation[97]. ISIL avails of this strategy which is called "narrowcasting"[98], or rather recruitment campaigns targeting sub-populations and tailored to their characteristics and needs. All the online platforms are employed: images and videos are posted on YouTube as well as forums are crucial to the creation of debates among recruiters and recruits in order to teach, provide training and plan terrorist activities.

In addition, scholars assume that the process consists of some specific and identifiable phases which transform the individual in a radical jihadist, willing either to fight in the battlefield or to perpetrate terrorist activities in the home country. Nonetheless, academics disagree on the number of the phases along with the dynamics which justifies the radicalization. The "Staircase to Terrorism"[99] drawn up by Moghaddam is the most sophisticated model to explain the transformation of a Western individual into a foreign fighter. Moghaddam builds a pyramid with six floors, in which the upward movement reduces both the size and the possibility to disengage[100]. The ground floor is represented by a plurality of individuals which are suitable to terrorism due to the injustice and the relative deprivation they perceive. In the next level, individuals seek for settling this condition and they are shaped by some psychological factors[101] which drive them to the second floor. The latter is known as "the displacement of aggression" which occurs through statements. From the third floor, the perception of a moral engagement is enhanced by the terrorist organization which approaches the individual and carries out its propaganda to illustrate the evilness of the Western countries and to persuade them to join their ideal society. The admission to the group is achieved on the fourth floor which anticipates the last level, e.g. the operational phase in which the terrorist is willing to execute attacks and to kill others for the sake of Islam. Moghaddam's model assumes that the fighter bears a relative deprivation, namely a condition in which individuals "who lack something, compare

[96] *Ibidem.*
[97] Weimann G., *The Emerging Role of Social Media in the Recruitment of Foreign Fighters*, De Guttry A. et al. (eds.), Foreign Fighters under International Law and Beyond, T.M.C. Asser Press, The Hague, 2016, p. 78.
[98] *Ivi*, p. 81.
[99] Moghaddam, F. M., *The Staircase to Terrorism*, Psychology of Terrorism, B. M. Bongar, M. Brown, L. E. Beutler, J. N. Breckenridge, P. G. Zimbardo. Oxford University Press, 2007.
[100] Christmann K., *op. cit.*, p. 16.
[101] See more Orsini A. (2020), *op. cit.*, p. 2.

themselves with those who have it, and in so doing feel a sense of deprivation"[102]. The Western society has failed to grant the individuals what they deserve in opposition to the jihadist ideology which guarantees opportunities to improve their social status.

Mitchell Silber and Arvin Bhatt published in 2007[103] a radicalization model based on four stages: preradicalization, self-identification, indoctrination and jihadization. The first phase defines the situation before the approach to jihadism, describing the background factors which make the individual sensitive to the jihadist ideology. In the second place, the self-identification requires a transition from the old identity to the Salafi Islam which stems from the "cognitive opening"[104], defined as a crisis in which the individual calls into question his previous beliefs and becomes receptive to new values. The "cognitive opening" is triggered by economic, social, political and personal reasons. In the indoctrination phase, the individual adopts the jihadist ideology and is persuaded of the necessity of the military action to support the Muslim community. This stage sees the presence of a "facilitator"[105] who introduces him to a group of radicals and help him deepen his ideological position. In the last phase, the individual, as a member of a group, is ready to commit terrorist attacks and to comply with his individual duty of *jihad*.

In this model, ideology plays a major role in explaining the radicalization in contrast to the model of Marc Sageman which ascribes to group dynamics the trigger to radicalization. According to Marc Sageman, the individual suffers frustration and exclusion which are satisfied by the opening to Islam through interactions with family and friendship[106], who have already faced the radicalization process and are members of some terrorist cells. The scholar argues that the violence is the outcome of four phases, namely the moral outrage towards the harassment of the Muslim community, the perceived war against Islam, the entanglement of personal experiences which worsen the anger and the mobilization through networks[107].

The social influence is the crux of the doctrine of Quintan Wiktorowicz in order to explain the accession of the individual to Salafi Islam. He points out that the "cognitive opening" is the outset of a process, made up of four phases, which closes with the socialization. The latter

[102] Parida P. K., *Globalization, Relative Deprivation and Terrorism*, SAGE, 2007, p. 130.
[103] Silber M.D, Bhatt A., *Radicalization in the West: the Homegrown Threat*, New York City Police Department, 2007.
[104] Orsini A. (2020)., *op. cit.* p. 7.
[105] *Ibidem.*
[106] Orsini A., *op. cit.*, p. 6.
[107] Christmann K., *op. cit.*, p. 13.

rebuilds the identity of the individual through the connections with a group which smooths his indoctrination and strengthens the identification among the militants, thus the individual interests intertwine with the group interests[108].

Worth mentioning is the DRIA model which has been firstly devised by Alessandro Orsini in his book on the Red Brigades[109] where he drew up a new type of terrorist, the "terrorist by vocation" which could be defined as an individual who is willing to sacrifice himself in order to fulfil a spiritual mission[110]. This implies that the terrorist consecrates his life to advocate a cause and the preservation of his group prevails over his life and his interests[111]. The concept has been widened in subsequent works in which Orsini has applied this typology to the Western fighters who decide to join ISIL, travelling to Syria and Iraq or carrying out attacks in their homeland.

The "terrorist by vocation" embraces the jihadi ideology which produces a radical mental universe based on seven cognitive categories: the radical catastrophism, the waiting for the end, the identification of the evil, the obsession with purification, the obsession with purity, the exaltation of martyrdom or desire to be persecuted, the purification of the means through the end[112]. The terrorist is persuaded that distress and pain have overgrown the world which is on the verge of a catastrophe due to the actions of some people who must be exterminated. The extermination provides with the eradication of moral corruption and with the protection of the pristine individuals who accept to be persecuted in order to achieve the moral regeneration of the world. According to Orsini, ideology is the trigger which moves the individual in the path to violence and it is responsible for the "binary code" mentality[113] in which the world is divided into two opposite sides, namely good and evil, influencing the choices of the terrorists.

The path to radicalization is characterized by four stages which forge the acronym DRIA: the disintegration of social identity and reconstruction of social identity through a radical ideology which constitute the cognitive radicalization as opposed to the violent radicalization which is composed of the integration in a revolutionary sect and the alienation from the surrounding

[108] Orsini A. (2020*), op. cit.*, p. 12.
[109] Orsini A., Nodes S.J., *Anatomy of the Red Brigades: the religious mind-set of modern terrorists*, Cornell University Press, 2011.
[110] Orsini A. (2020), *op. cit.*, p. 21.
[111] Orsini A., *Interview with a Terrorist by Vocation: A day among the Diehard Terrorists, Part II*, Studies in Conflict & Terrorism, 2013, p. 673.
[112] Orsini A. (2020), *op. cit.*, p. 24.
[113] Orsini A. (2011), *op. cit.*, p. 17.

world. The first phase arises from individuals who feel social marginality[114], a condition characterized by the refusal of the social values and the doubt about their place in the society. Personal traumas and failures as well as frustration with its life bring to an existential crisis in which the individual is responsive to new values and is willing to set up a new identity through a radical ideology.

Accordingly, the individual finds in the *jihadi* ideology a reference to satisfy its inner needs along with a purpose in his life: fighting in the name of Allah gives a meaning to the life of Western misplaced individuals who are banished in their society because they do not benefit from the opportunities of their peers[115]. This results in the reconstruction of the social identity which is perceived as a rebirth, epitomized by the change of name and habits. In this context, the cognitive radicalization, the phenomenon through which the individual acquires new radical views on society[116], is replaced by the violent radicalization.

Firstly, the jihadist starts searching for groups of people who share his views in order to interact and to strengthen his ideology. This occurs mostly on internet where communities have sprung in which members exchange views, read Islamic writings, listen to the preaching of the recruiters. This community could be real, based on face-to-face interactions, or virtual, found on internet[117] but in both cases the individuals feel a connection with the other affiliates and drift away from the Western society. Here, the last phase occurs in which the radicalized individual alienates from the surrounding society which is deemed as morally corrupt and becomes a terrorist. Orsini stresses that the moral corruption is the incentive to the "manifest alienation"[118] in which contacts with the Westerners are severed whereas the "latent alienation"[119] provides that the Western society is deprived of the influence imposed on the jihadists in order to avoid disengagement.

[114] Orsini A. (2016), *op. cit*., p. 145.
[115] Orsini A. (2020), *op. cit.*, p. 24.
[116] Neumann P., *The trouble with radicalization,* International Affairs (Royal Institute of International Affairs 1944-), Vol. 89, No. 4, 2013, p. 875.
[117] Orsini A. (2016), *op. cit.*, p. 170.
[118] Orsini A. (2020), *op. cit*., p. 25
[119] *Ibidem.*

4. The returnees and the blowback effect.

Hitherto foreign fighters have been examined in the light of their travel to Syria and their adhesion to Islamic State which impact on the course of the war since their intervention might prolong it. However, the menace goes beyond the mere support on the ground to encompass the phenomenon of "blowback", defined as the chance that fighters benefit from the training abroad and from the transitional networks to attack the Western countries[120]. Foreign fighters turn into veterans who may return to their homeland or settle in a third country in order to perpetrate terrorist attacks as well as to facilitate the recruitment of other individuals or to create new terrorist networks[121]. In this case, they become "*jihadi* entrepreneurs"[122] who gather around them recruits in order to further the global *jihadism.* Therefore, the risk is related to the increase in social tensions between Muslim community and the supremacist groups with the consequence of enhancing the social polarization[123].

As a matter of fact, not all of the foreign fighters, who go to the conflict zone, return to their home country: some die in the battlefield or they are murdered by the heads of ISIL because they no longer endorse the ideology; other could join Muslim insurgencies elsewhere and still others decide to settle in Syria or Iraq[124]. According to estimates, 30% of the about 5,000 Westerners involving in the Syrian war have returned home[125] but the rates vary across countries: in France, it is as low as 12%, in Germany it is 33%, in Denmark it is almost close to half whereas United Kingdom sees the half of its foreign fighters coming back home[126].

FTFs returnees fall into different profiles depending on their experiences and motivations but primarily, they could be distinguished on two generations: the first one is composed of men who travelled to Syrian war in anti-Assad sense[127] and returned in 2013 – 2014 before the

[120] Carenzi S., *Il ritorno dei foreign fighters europei: rischi e prospettive*, ISPI, Analysis No. 317, ottobre 2017, p. 4.
[121] Krähenmann S., *Foreign Fighters under International Law*, Geneva Academy of International Humanitarian Law and Human Rights, Briefing No. 7, October 2014, p. 12.
[122] Carenzi S., *op. cit.*, p. 5.
[123] *Ibidem.*
[124] Schmid A.P., Tinnes J., *op. cit.*, p. 29.
[125] RAN Manual, *op. cit.*, p. 15. Other figures point out that the EU's average return rate is around 22-24% (Scherrer A., *The return of foreign fighter to EU soil: Ex-post evaluation*, European Parliament Research Service, May 2018, p. 32).
[126] Scherrer A., *op. cit.*, p. 32.
[127] Note that the Syrian war is the consequence of the 2011 peaceful uprising against the government of the President Bashar al-Assad which turned into a civil war. Indeed, Assad suffocated the dissidents who replied with the call to arms. A civil war broke out. This was worsened by the intervention of the international community with Russia and Iran supporting Assad government while Western countries, Turkey and Arab states backing the rebels. To these are added terrorist organizations as the Lebanese Hezbollah which fought alongside the Syrian State forces and ISIL which fought for the creation of the Islamic State against both Assad and the rebels.

emergence of ISIL due to disillusion; the current one includes ideologically committed fighters who return with harmful intentions[128]. They possess battle experience; they are trained to bear arms and they are well-connected with the jihadist networks. Male returnees have learnt combat skills and have witnessed extreme violence whereas women are more prone to propaganda and indoctrination of children. Actually, there are also some children who have been severely indoctrinated and have been educated to combat roles from the age of 9[129]. Furthermore, motivation could differentiate returnees resulting in four categories: first of all, the disillusioned, having suffered traumas, who flee the ISIL territories because of the dire conditions of the war zones; the opportunists who continue to uphold the ideology but are forced to return home due to better living conditions in the West or due to health reasons; then, there are those who have been captured and returned unwillingly in their homeland; finally, there are the returnees who trigger the blowback effect since they arrive in the West with the intention of perpetrating terrorist attacks and of creating terrorist cells[130].

The Soufan Group has categorized the returnees on the basis of their level of risk, creating five categories: the first one is made up of those who leave early or after only a short stay and were never particularly integrated with IS; secondly, those who stayed longer, but did not agree with everything that IS was doing. Indeed, they feel a sense of disillusionment with the ISIL leadership even though they may share their goals. There are also fighters who had no qualms about their role or IS tactics and strategy but decided to move on. This means that they could reach other war scenario in order to fulfil their duty to *jihad.* In addition, some returnees committed to IS are forced out by circumstances, such as the loss of territory, or were captured and sent to their home countries. They represent a threat for they could represent a means of radicalization in their Western society. Finally, those who were sent abroad by IS to fight for the caliphate elsewhere[131].

Moving on to the effective rate of blowback in order to assess the real risk posed to the Western community, Thomas Hegghammer carried out a research on the attacks between 1990 – 2010 and he noted that "no more than one in nine foreign fighters returned to perpetrate attacks in

[128] RAN Manual, *op. cit*., p. 20.
[129] Scherrer A., *op. cit.*, p. 37.
[130] Boncio A., *Disfatta ISIS e Foreign fighters di ritorno: il caso italiano*, ISPI, Working Paper No 66, ottobre 2017, p. 7 – 8.
[131] Barret R., *Beyond the Caliphate: Foreign Fighter and the Threat of Returnees*, The Soufan Center, October 2017, p. 18 – 21.

the West"[132]. It is a low percentage which is offset by the increase in the effectiveness in attacks perpetrated by veterans: plots come to execution are composed of 58% of veterans and the rate for executed attacks with fatalities rises to 67%[133]. In another survey of Hegghammer and Petter Nesser for the period 2011 – 2015, 69 plots were examined resulting in one in four involving at least one foreign fighter (sixteen out of 69) and in 9 of 16 plots there were fighters who travelled to Syrian war[134]. Recently, the attacks in the West have soared and the percentage of terrorists with a foreign fighting experience is around 18%. They participate in the most lethal attacks, namely January 2015 Charlie Hebdo attack, August 2015 Thalys train attack, November 2015 Paris attack, March 2016 Brussels bombings and July 2016 Ansbach bombing, which took place in France, Belgium and Germany, the most affected countries in terms of foreign fighters[135]. Actually, the first case of blowback dates back to May 2014 when Mehdi Nemmouche opened fire against the Jewish Museum in Brussels, killing four persons. He was a foreign fighter who spent almost a year with ISIL in Syria[136]. The 2015 Paris attack represents the most striking case of the blowback because 7 of 9 members of the group of operatives were foreign fighters which departed for Syria between 2013 and 2015. In addition, these returnees recruited other 21 individuals for logistical support, 7 of which fought in Syria or Iraq, notably Najim Laachraou, who was one of the three terrorists in the 2016 Brussels attack whereas the other two were stopped in Turkey in their route to Syria[137].

To sum up, returnees represent a security threat because they could commit terrorist acts and they are capable of recruiting other radicals to create terrorist cells. They become intermediaries between the ISIL leaders in Syria and the radicalized individuals who were unable to leave (usually called as "lone wolves"[138]). In the last period, the threat is worsened by the territorial losses suffered by IS which may trigger an increase in the number of attacks in the West.

---

[132] Hegghammer T., *Should I Stay or Should I Go? Explaining Variation in Western Jihadists' Choice between Domestic and Foreign fighting*, American Political Science Review, Vol 107, No 1, February 2013, p. 10.
[133] *Ibidem.*
[134] Schmid A.P., Tinnes J., *op. cit.*, p. 31.
[135] Vidino L., Marone F., Entenmann E., *Fear Thy Neighbor. Radicalization and Jihadist Attacks in the West*, ISPI, June 2017, p. 60.
[136] *Ivi*, p. 34.
[137] Cragin K.R., *The November 2015 Paris Attacks: the Impact of Foreign Fighter Returnees*, Foreign Policy Research Institute, Spring 2017, p. 218 – 219.
[138] The term "lone wolf" refers to individuals who act on his own without orders from and connections to an organization. This definition includes persons who are inspired by the actions of ISIL and by the jihadist ideology without being part of the network. Here, the threat to the West is exacerbated by the unpredictability and by the difficulty in the identification. See Bakker E., De Graaf B., *Lone Wolves. How to prevent this phenomenon?*, ICCT, November 2010.

5. The status of Foreign Terrorist Fighters in armed conflicts. International Humanitarian Law and Terrorism.

5.1 Foreign terrorist fighters under international humanitarian law.

The definition of foreign terrorist fighters in the UNSC 2178/2014 resolution provides that they engage in terrorist activities detached from any armed conflict[139]. Nonetheless, ISIL foreign fighters resort to terrorism during an armed conflict, namely the Syrian war, thus questioning their status under international humanitarian law. IHL is a part of international law and refers to a set of rules aimed at "limiting the effect of armed conflict"[140], or rather the protection of specific categories of participants in the armed conflict and the restriction of the methods of warfare. Indeed, the IHL protects the civilians which do not take part in the hostilities as well as the wounded and the sick no longer able to fight and defines the treatment of the prisoners of war. In addition, rules have been drafted prohibiting the killing of civilians, affirming the principle of proportionality in the attacks and banning some weapons.

IHL started being codified since 19th century[141] and nowadays they are contained in the four 1949 Geneva Conventions[142] and in the two 1977 Additional Protocols relating to the protection of victims of armed conflict[143]. These treaties pertain armed conflicts which do not include internal tensions or isolated acts of violence. The legal framework to be applied to foreign fighters depends on the type of armed conflict in which they are involved because IHL distinguishes between international armed conflict (IAC) and non-international armed conflict

[139] See *supra* note 41.
[140] ICRC, *What is International Humanitarian Law?*, Advisory Service on International Humanitarian Law, 2004.
[141] Before 1949 Geneva Conventions, other treaties have been signed in order to regulate different aspects of the armed conflict. The 1864 Geneva Convention drew up rules on the "amelioration of the condition of the wounded in the field", the 1868 Declaration of St. Petersburg was focused on the prohibition of the explosive projectiles under 400 grams weight which was deepened by the 1899 and 1907 Hague Resolution, banning other warfare methods. The 1929 Geneva Convention covered the wounded and the sick in the field along with the Prisoner of War (POW) status.
[142] (I) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in Field; (II) Geneva Convention for the Amelioration of the Condition of Wounded, Sick, Shipwrecked Members of Armed Forces at Sea; (III) Geneva Convention Relative to the Treatment of Prisoners of War; (IV) Geneva Convention Relative to the Protection of Civilian Persons in Time of War.
[143] (I) Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts; (II) Protocol Additional to the Geneva Convention of 12 August 1949 and relating to the Protection of Victims of Non-International Conflicts. The third Additional Protocol was adopted in 2005 relating to an additional distinctive emblem.

(NIAC). The former assumes the presence of two or more States whereas the latter occurs within a State between governmental forces and non-governmental armed groups[144]. As a matter of fact, there exists internationalized conflicts which are the result of the intervention of a third State on the side of the non-State actor against the Government[145]. The third State could deploy his troops or it could impose a control over the rebels who act on their behalf. The effective control does not correspond to the mere financial and military assistance but it requires the participation in the organization and in the supervision of the operations[146]. Still, the International Criminal Tribunal for the former Yugoslavia [thereafter ICTY] pointed out that "this requirement does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation"[147].

International humanitarian law is based on the principle of distinction which stresses that the parties to a conflict must distinguish between combatants and civilians who do not take part in the hostilities. However, this demarcation constitutes a significant discrepancy between the two categories of armed conflict for the international one recognizes in those who take direct participation in the hostilities the status of lawful combatants whereas in the NIAC the combatant status does not exist[148] with the consequence of the unlawfulness of the acts carried out during the conflict. In both cases, the civilians are protected under the Geneva Conventions since they do not intervene in the hostilities[149].

5.1.1 International Armed Conflicts: notions.

International armed conflict generally refers to a conflict occurring "whenever there is a resort to armed force between States"[150]. This simplistic definition is deepened by the 1949 Geneva Conventions, and in particular by the Article 2 common to the Four Conventions, which

[144] ICRC, *How is the Term "Armed Conflict" Defined in International Humanitarian Law?*, Opinion Paper, March 2008, p. 1.
[145] Sommario E., *The Status of Foreign Fighters under International Humanitarian Law*, in De Guttry A. et al. (eds.) , Foreign Fighters under International Law and Beyond, T.M.C. Asser Press, The Hague, 2016, p. 145.
[146] ICTY, *Prosecutor v. Tadic*, Case No. IT – 94 – 1- A, Judgment (Appeals Chamber), 15 July 1999, para 131.
[147] *Ivi*, para 137.
[148] Henry S., *Exploring the "continuous combat function" concept in armed conflicts: Time for an extended application?*, International Review of the Red Cross, 100, 267 – 285, 2018, p. 268.
[149] *Ibidem.*
[150] ICTY, *The Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para. 70.

contemplates the inter-state wars and the occupation regimes, and by the Additional Protocol I which broadens the categories of IAC including the wars of national liberation[151]. Firstly, common Article 2 states that:

> *"1. In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.*
>
> *2. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.*
>
> *3. Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power if the latter accepts and applies the provisions thereof[152]".*

According to this provision, an IAC arises whenever "High Contracting Parties", or rather sovereign entities, have recourse to armed force, regardless of the intensity and the duration of the conflict. In addition, the Geneva Convention could be applied in declared wars which are based on the formalism of the declaration or "in any other armed conflict" depending on the principle of effectiveness, or rather IHL rules are implemented once factual conditions are satisfied[153]. Therefore, no formal declaration of war is required nor the States must recognize the existence of a state of war but the incidence of hostilities between countries is sufficient[154].

The second paragraph introduces another category which fits the definition of international armed conflict, namely the occupation. The latter depicts a condition in which "a territory is actually placed under the authority of the hostile army"[155], which exerts an effective control without the volition of the legitimate sovereign[156]. Actually, the Article 2(2) provides the application of the rules of the Convention to cases of occupation which does not encounter any

[151] Vité S., *Typology of armed conflicts in International Humanitarian Law: Legal Concepts and Actual Situations*, International Review of the Red Cross, Volume 91, Number 873, March 2009, p. 70.
[152] Common Article 2 of Geneva Conventions of 12 August 1949.
[153] Vité S., *op. cit.*, p. 72.
[154] Pictet J., *Commentary on the Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958, p. 21.
[155] Article 42 of Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.
[156] Vité S., *op. cit.*, p. 74.

armed resistance in order to protect persons, establishments and property[157]. Ultimately, the provision deals with the situation in which almost one of the warring States is not a signatory of the Convention. In a conflict between two States, the Convention does not apply even though the warring parties must abide by the obligations stemming from the customary international law. The second sentence envisages the application of the Convention on the States whenever a State not party acts in a way that it accepts and applies the provisions contained thereof. Accordingly, whether a State not party disregards those rules, the Convention fails to enforce for either States[158].

Subsequently, the Additional Protocol I extends the categorization of international armed conflicts, which were limited to the inter-State hostilities, introducing the national liberation wars and the conflicts between the Government and non-governmental forces which strive for their right of self-determination[159]. As a matter of fact, before the Protocol I, those armed conflicts were considered as internal conflict, thus regulated by the national laws[160]. Article 1 para 4 defines these conflicts as:

> *"Armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations"*[161].

The provision was drafted in the light of the process of decolonization occurring in the Sixties and classifies the national liberation wars as international armed conflicts. They must meet two requirements: on one hand, they must stem from the struggle of a people against colonial domination, alien occupation and racist regimes; on the other hand, this struggle must be pursued in view of the principle of self-determination. One point which needs a clarification concerns the meaning of "alien occupation" which reminds the occupation regulated by the common Article 2 to the 1949 Geneva Conventions. If the latter consists of the occupation of the territory of a State by another State, the former covers conflicts between native peoples and

[157] Pictet J., *Commentary on the Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952, p. 33.
[158]ICRC, *Commentary on the Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Cambridge, 2016, par. 349.
[159] Vité S., *op. cit*., p. 73.
[160] Ronzitti N., *Diritto Internazionale dei Conflitti Armati*, Giappichelli: Torino, 2017, p. 144.
[161] Article 1 para 4 of the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

settlers as well as cases in which a territory, which has not yet been established as a State, is partially or totally occupied by another State[162]. It should be recalled that the ethnic, linguistic and religious minorities are not entitled to the right of self-determination but they can enjoy the protection under the Covenant on Civil and Political Rights[163]. Therefore, their wars of secessions are not recognized as international armed conflicts.

5.1.2 Non-international armed conflicts: remarks.

Foreign fighters are mostly active in non-international armed conflicts but the notion remains controversial. This is attributable to the fact that civil war was traditionally considered as being under the exclusive competence of the States which disregarded any foreign intervention[164]. Currently, two are the main legal sources which specify a non-international armed conflict as well as set out the rules applicable in this case, namely the Article 3 common to the 1949 Geneva Conventions and the Article I of the 1977 Additional Protocol II. The former states that:

> *In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:*
>
> *(1)Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.*
>
> *To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:*
>
> *(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;*
>
> *(b) taking of hostages;*

[162] Ronzitti N., *op. cit.*, p. 145.
[163] Article 27 of the International Covenant on Civil and Political Rights states that *"In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language".*
[164] Ronzitti N., *op. cit.*, p. 365.

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for[165].

In the first paragraph, it is evident that the Common Article 3 applies to "armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties". The negative expression "not of an international character" detects the reference to Article 2 common to the GCs whereby international armed conflicts involve two or more States. Hence, the conflicts defined by the common Article 3 include a party that is not governmental[166]. Indeed, a NIAC may occur between the governmental forces and the non-governmental forces or between such armed groups within a State. The requirement that the hostilities must occur in the territory of one of the signatories of the Convention does not make any sense, considering that the four GCs have been universally ratified[167]

The Common Article 3 sets a minimum humanitarian standard which the parties to the conflict must abide by. Yet, it is constrained to the existence of an armed conflict which needs to reach a certain level in order to be distinguished from other forms of violence occurring within the territory of a State, namely "internal disturbances and tensions, riots or acts of banditry"[168]. The Geneva Conventions are silent on the question but the ICTY has interpreted the provision, identifying an armed conflict as a "protracted armed violence between governmental authorities and organised armed groups or between such groups within a State"[169]. The ICTY goes further in fixing two criteria which assess a situation as a NIAC, that is (a) the intensity of violence and (b) the organization of the parties. On one hand, the armed violence must achieve a level of intensity which demands for the government to resort to armed forces instead of police forces against the rebels[170]. On the other hand, the organization of the parties entails that the non-governmental forces are endowed with a hierarchical structure, disciplinary rules and the capacity to recruit and train new fighters[171]. The Additional Protocol II gives a restrictive

[165] Common Article 3 (1) of Geneva Conventions of 12 August 1949.
[166] Vité S., *op. cit.,* p. 75.
[167] ICRC (2008), *op. cit.*, p. 3.
[168] *Ibidem.*
[169] ICTY, *The Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para 70.
[170] ICRC (2008), *op. cit.*, p. 3.
[171] ICTY, The *Prosecutor v. Fatmir Limaj*, Judgement, IT-03-66-T, 30 November 2005, para 171.

definition because it prescribes a higher threshold of the war. Indeed, according to Article 1 (1), it applies to non-international armed conflicts:

> *"which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol"*[172].

In the first place, the field of application is narrowed for the armed conflicts arise between the Government and dissident armed forces or other organized armed groups, thus the AP II does not apply in cases of hostilities between non-governmental groups which remain covered under Common Article 3 of the GC[173]. In addition, the dissident armed forces are expected to possess a responsible command and to exercise a territorial control which allows sustained and concerted military operations to be carried out[174]. Lastly, it is worth mentioning another source dealing with the NIACs, namely the Statute of the International Criminal Court (ICC) which envisages a new category of non-international armed conflict which does not fall into the provision of Protocol II[175]. Two are the war crimes committed during a NIAC: "serious violations of common Article 3" and "other serious violations of the laws and customs" of war[176]. Both do not include the "situations of internal disturbances and tensions" but the latter could be applied only "to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups"[177]. Accordingly, the Rome Statute adds a temporal criterion and does not mention the control of territory as defining a NIAC.

[172] Article 1 (1) of the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.
[173]Sandoz Y. et al. (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC/Martinus Nijhoff, Geneva/The Hague, 1987, para 4461.
[174] Sandoz Y., op. cit., para 4466.
[175] ICRC (2008), *op. cit.*, p. 4.
[176] Article 8 (2)(c), (e) of Rome Statute of the International Criminal Court.
[177] Article 8 (2)(f) of Rome Statute of the International Criminal Court.

5.2 The status of foreign fighters in armed conflicts.

5.2.1 Foreign Fighters in an International Armed Conflict: the combatant status.

IHL distinguishes various categories of people in an international armed conflict, each holding a different legal status: the combatants, the civilians and the *hors de combat* (the wounded, the sick, the shipwrecked and the prisoners of war). Nowadays, foreign fighters in an IAC are a low proportion due to the nature of current conflicts which are normally non-international armed conflicts.

Firstly, the combatants are defined by their "right to participate directly in the hostilities"[178] which result in the combatant immunity and in the prisoner-of-war status. The former denotes that combatants cannot be punished for the mere participation in the hostilities and the hostile acts are lawful unless they breach the international rules applicable to armed conflict and overlap with war crimes. In turn, they could be legitimate target for the attacks as long as they maintain their status and they do not become *hors de combat* or prisoners of war[179]. The latter implies that once captured, the combatants are prisoners of war, that is they are eligible for rights and protections under GC III, they can be detained in order to prevent them from returning to combat and they must be released and repatriated after the cessation of the conflict[180].

The notion of combatant is not spelled out in the Geneva Conventions but it is inferred from the concept of prisoner-of-war, contained in the Article 4 of the 1949 Geneva Convention III and in the Articles 43 – 44 of Additional Protocol I. Hence, fighters, who hold the POW status, are considered as lawful combatants. Article 4 outlines the categories of combatants:

> *(1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.*
>
> *(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside*

[178] Article 43 (2) of the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.
[179] Crawford E., *The Treatment of Combatants and Insurgents Under the Law of Armed Conflict*, Oxford University Press, 2010, p. 53.
[180] Bartoli R., *Lotta al Terrorismo Internazionale. Tra Diritto Penale del Nemico "Jus in Bello" del Criminale e Annientamento del Nemico Assoluto*, Giappichelli, Torino, 2008, p. 41.

their own territory, even of this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognizable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.[181]

Other categories enshrined in the Article 4 of the GC III are the members of organized resistance movements, the members of regular armed forces who belong to a government or an authority not recognized and the mass levy.

As regards the first paragraph, foreign fighters could be incorporated in a foreign army before the outbreak of the conflict or during the hostilities, enjoying the same privileges of the other soldiers and the full protection under GC III. The second paragraph deals with the irregular forces which are not embedded in the armies of the States. These are militias, volunteer corps and organized resistance movements which must comply with a number of conditions in order to be entitled to the POW status. First of all, the group must possess a certain degree of military organization so that to ensure "discipline, hierarchy, responsibility and honour"[182]. In addition, it is necessary that the group belongs to a Party to the conflict, following an official declaration or a tacit agreement[183]. Moving on to the conditions included in the Article above, the members of the movements are treated as lawful combatants whether they are under the command of a leader who is responsible for the actions of his subordinates taken on his instructions, regardless of being a civilian or a military chief. The second requirement is intended to fulfil the principle of distinction between combatants and civilians, imposing on the irregular forces to carry out a "fixed distinctive sign recognizable at a distance". The terms "fixed" and "distinctive" refers to the fact that the sign shall be equal to all the members of these groups and shall not be easily removed[184]. The interpretation of the attribute "recognizable at a distance" is controversial but it is generally agreed that "the sign should be recognizable by a person at a distance not too great to permit a uniform to be recognized"[185]. Furthermore, the group must carry arms openly

[181] Article 4A of the Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.
[182] Pictet J., *op. cit.*, p. 58
[183] *Ivi*,, p. 57.
[184] Sommario E., *op. cit.*, p. 148.
[185] Pictet J., *op. cit.*, p. 60.

in order to ensure that the partisans as the regular combatants are identifiable. Lastly, the partisans must respect the conventional law and the customary law in the field of armed conflicts[186].

The Additional Protocol I takes a step forward since it recognizes the national liberation fighters and the guerrillas as lawful combatants and removes the distinction between regular forces and the militias, volunteer corps and organized resistance movements under Article 4 of the GC III. Indeed, Article 43 reads:

> *"The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict"*[187].

According to this provision, the combatant status and the POW status are granted to the members of forces who satisfy three main criteria: they belong to a Party to the conflict, they are organized and they are commanded by a responsible leader. The Article 44 (3) reiterates the principle of distinction, introducing a temporal specification on the duty of the combatants to distinguish from the civilians, namely during or before an attack. Besides, in order to accommodate the needs of the guerrilla fighters, the provision imposes an exception which allows them to maintain their combatant status despite the impossibility of the distinction. It is sufficient that the fighters carry arms openly during military engagement and military deployment in which they are visible to the adversary[188]. Looking at the phenomenon of the foreign fighters, they could be entitled to the POW status since nationality is not a requisite to be satisfied in the qualification of combatant[189]. Moreover, they could be members of the armed forces of a Party to a conflict or they could be attached to an organized force which is led by a responsible commander without the necessity that they abide by the international laws of armed conflict[190].

Civilians represent the second category of individuals which are affected by an international armed conflict. They are negatively defined in reference to the combatants: those who do not

[186] Ronzitti N., *op. cit.*, p. 183.
[187] Article 43 (1) of the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.
[188] Crawford E., *op. cit.*, p. 24 – 25.
[189] Krähenmann S., *op. cit.*, p. 18.
[190] Sommario E., *op. cit.*, p. 153.

enjoy the POW status are considered civilians[191]. Civilians do not have the right to participate directly in the conflict[192] and they are entitled to "general protection against dangers arising from military operations"[193], meaning that they cannot be the target of military attacks. However, whether they take a direct participation in the hostilities[194], they turn into a lawful object of assaults, preserving their status of civilians. In this case, civilians act as combatants without the right to do so, thus they are deprived of the combatant immunity. They could be prosecuted for the mere participation in the hostilities under the domestic criminal law, even though they do not commit any war crime or they do not violate IHL, they could be detained over a period of time which does not amount to the war and they could not be transferred in a place other than the one they are captured[195].

These civilians along with the members of militias or other volunteer corps who are denied the POW status for they do not comply with the requirements in Article 4A (2) of the GC III are treated as "unlawful combatants"[196]. Despite the fact that they are not protected under GC I – III, they could benefit from a protection under the GC IV when they are in the hands of the enemy if they are acknowledged as "protected persons". Indeed, Article 4 of the GC IV specifies:

> *"Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.*

[191] Article 50 para 1 of Additional Protocol I reads: "*A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol".*

[192] This does not take into consideration the rare case of the *levée en masse* which allows civilians to intervene in a conflict and to grant combatant status. Article 4 para 6 recognizes the *"Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war"* as likely to hold the POW status, thus being lawful combatants.

[193] Article 51 of Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

[194] The notion of "direct participation in the hostilities" is prone to interpretation as well as the acts liable to determine the suspension of the civilian protection. Indeed, it is defined by the acts carried out as part of the hostilities between parties in an armed conflict. This act shall respect three criteria: the threshold of harm, the direct causation and the belligerent nexus, or rather the act must be likely and intended to affect the military operation of the other party, so that there is a casual link between the act and the harm. See Melzer N., *Interpretive Guidance on the notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, May 2009, pp. 41 – 64.

[195] Bartoli R., *op. cit.*, p. 44.

[196] The term "unlawful combatants" is not used in the Geneva Convention but it was firstly formulated in 1942 by the US Supreme Court to identify combatants perpetrating hostile acts without meeting the requirement for favourable treatment in contrast to the "lawful combatant" entitled to the POW status. See Vierucci L., *Prisoners of War or Protected Persons qua Unlawful Combatants? The Judicial Safeguards to which Guantanamo Bay Detainees are Entitled*, Journal of International Criminal Justice, Oxford University Press, 2003, p. 295 – 296.

> *Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are".*[197]

The first requirement is nationality, or rather persons in the hands of a party to a conflict are protected so long as they are not nationals of that party[198]. This entails that nationals of that party are excluded. An exception occurs which is based on the existence of diplomatic relations. According to the second paragraph, nationals of neutral states or co-belligerent States are not protected under GC IV since they could be protected by their state of origin through diplomatic representation without requiring the favourable treatment of the Convention[199]. Accordingly, nationality is key to determining the status of foreign fighters under GC IV as opposed to the lack of nationality as condition in assessing the POW status under GC III. Looking at the current conflicts, nationality is no longer capable of determining the allegiance and it could be replaced by ethnicity, religion or ideology. In Tadić case the ICTY provides that ethnicity becomes "determinative of national allegiance"[200] whereas in the Syrian war, commitment to *jihad* is the ground for the allegiance of the foreign fighters.

5.2.2 Foreign Fighters in a Non-International Armed Conflict: the unlawfulness of the acts committed during the conflict.

In a non-international armed conflict, the principle of distinction is somewhat tricky since the conventional law does not provide any definition of the terms "civilians", "armed forces" and "organized armed groups". Therefore, an issue arises on who is actually entitled to the protection from military attacks. This concept is specified in Article 3 common to the GCs, in which providing that "each Party to the conflict" shall protect those taking no direct participation in the hostilities entails that both parties to armed conflict own armed forces, engaged in the hostilities and detached from the civilian population who "do not bear arms"[201].

[197] Article 4 of Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949.
[198] Krähenmann S., *op. cit.*, p. 18.
[199] *Ivi*, p. 19.
[200] ICTY, *Prosecutor v. Tadić*, Judgment (Appeals Chamber) (IT-94-1-A), 15 July 1999, para 166.
[201] Pictet J., *op. cit.*, p. 40.

The vagueness of the GC is clarified by the Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (thereafter ICRC Interpretive Guidance) which describes the category of civilians as "all persons who are not members of State armed forces or organized armed groups of a party to the conflict"[202]. This is a negative definition which lays down the civilian immunity from attacks as long as they do not take part in the hostilities.

Undoubtedly, the members of State armed forces could not be qualified as civilians but the ambiguity relies on the members of the organized armed groups which basically represent the armed forces of the non-State participant to the armed conflict[203]. The ICRC Interpretive Guidance speaks eloquently: it distinguishes between dissident armed forces and other organized armed forces since the former is composed of former members of State armed forces whereas the latter is defined by the function carried out by his members[204]. Consequently, organized armed groups "consist only of individuals whose continuous function it is to take a direct part in hostilities ('continuous combat function')"[205]. This means that an individual belongs to an organized armed group whether he performs a continuous function within the group, namely the direct participation in the conflict which can be embodied by the preparation or the execution of the attacks[206]. The individuals shall be permanently integrated into the armed group. Accordingly, this criterion is crucial to establish that members of the organized armed groups are legitimate target along with the State armed forces, retrieving their protection as civilians once the "continuous combat function" is complete[207]. Here relies the discrepancy between civilians taking a direct participation in the hostilities and the members of the organized armed groups: the former lose protection only over the duration of the acts accounting for the direct participation whereas the latter cease to be civilians and they lose immunity over the duration of the affiliation to the group[208].

That said, the conventional law does not provide the combatant immunity and the POW status in a NIAC. Indeed, combatants are limited to the international armed conflict whereas in the non-international armed conflict there are not combatants but governmental troops and

[202] ICRC Interpretive Guidance, recommendation II.
[203] *Ivi*, p. 27.
[204] *Ivi*, p. 33.
[205] ICRC Interpretive Guidance, recommendation II.
[206] *Ivi*, p. 34. Note that members who support an organized armed group without a combat function are not considered as members under the IHL. Among them, those who assume political or administrative functions as well as recruiters, trainers and propagandists which remain civilians and as such, ensured from military attacks.
[207] Henry S., *op. cit.*, p. 272.
[208] ICRC Interpretive Guidance, p. 73.

rebels[209]. The latter do not have the right to intervene in the hostilities, thus they could not be considered as legitimate belligerents entitled to the combatant immunity and to the POW status once they are detained. This means that they could be prosecuted for the acts carried out in the course of the armed conflict, which are lawful under the IHL but unlawful under the domestic law. Accordingly, they are tried for the mere participation to the hostilities. They are not protected under Geneva Conventions which only argue that they shall be treated humanely[210].

As a matter of fact, the Additional Protocol II introduces the concept of amnesty for the participants in the armed conflict. Indeed, Article 6(5) states that

> *"At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained"*[211].

The provision contains an incentive to States to grant amnesty to the members of organized armed groups for the acts committed during the hostilities which do not amount to the war crimes. The power of according amnesties remains discretionary but due to the increasing number of amnesties, this could be considered as a" retroactive combatant immunity"[212] for the participants in a NIAC.

Lastly, it is important to stress that nationality or the permanent residency does not play any role in assessing the treatment of the fighters. Indeed, common Article 3 claims that

> *"Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria"*[213].

Here nationality is contained in the other criteria which prohibit the discrimination, so that foreign fighters have the right to the human treatment. Conversely, nationality could intervene when foreign fighters join the rebels and as such, they do not have the right to combatant immunity. Nationality could be the discriminant on the legal treatment whom States concedes

[209] Ohlin J.D., *The Combatant's Privilege in Asymmetric and Covert Conflicts*, Yale Journal of International Law, July 2014, p. 342.
[210] Common Article 3 (1) of Geneva Conventions of 12 August 1949.
[211] Article 6 (5) of Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.
[212] Crawford E., *op. cit.*, p. 105. Combatant immunity takes the form of special agreements, legislation and domestic declarations. On that, see Crawford E., *op. cit.*, pp. 105 – 109.
[213] Common Article 3 (1) of Geneva Conventions of 12 August 1949.

to them[214]. Whether the foreign volunteers travel to support the State, they benefit from the combatant immunity granted to the regular armed forces of the States[215].

5.2.3 Foreign Fighters as Mercenaries.

Foreign fighters are usually confused with mercenaries due to the fact that both are not nationals of the party to the conflict whom they join. Notwithstanding, unlike the foreign fighters, the mercenaries find an outline in the Geneva Conventions. First of all, the Article 47 (1) of the Additional Protocol I provides that they are not combatants and they cannot acquire the POW status, so that foreign fighters in the guise of mercenaries could be tried for the participation in the conflict. This means that they are unlawful combatants protected under Article 75 of the Protocol I which ensures the human treatment[216] . The second paragraph of the abovementioned article enumerates six conditions for a person to be a mercenary:

> *"(a) is specially recruited locally or abroad in order to fight in an armed conflict;*
>
> *(b) does, in fact, take a direct part in the hostilities;*
>
> *(c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;*
>
> *(d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;*
>
> *(e) is not a member of the armed forces of a Party to the conflict; and*
>
> *(f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces"*[217].

[214] Sommario E., *op. cit.*, p. 154.
[215] *Ivi*, p. 155.
[216] Fallah K., *Corporate actors: the legal status of mercenaries in armed conflict*, International Review of the Red Cross, Volume 88, Number 863, September 2006, p. 606.
[217] Article 47 (2) of Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

All the six conditions shall be met in order that an individual is considered a mercenary. They are defined as foreign individuals who participate directly in the hostilities and are motivated by "private gain". Individuals moved by other motives could not be deemed as mercenaries. Therefore, foreign fighters who are inspired by religion, ideology or kinship do not fall into this category. In addition, this provision does not include foreign fighters who own the nationality of the parties to a conflict but live abroad nor the foreign residents of a State on whose territory the conflict is waged[218].

5.3 Foreign terrorist fighters: the interplay between terrorism and international humanitarian law.

The international community has labelled the IS and its associates as terrorists due to the violent and brutal actions perpetrated against civilian population as well as due to the resort to inhumane means of warfare. The UN Independent International Commission of Inquiry on the Syrian Arab Republic has ascertained that ISIL as armed group has committed systematic violations towards civilians and *hors de combat*, amounting to war crimes "through the coordinated campaign of spreading terror among the civilian population"[219]. The report continues in computing the war crimes and the restrictions of the basic human liberties which account for terror, pinpointing an individual criminal responsibility for the executors of these crimes[220] .

While the legal status of foreign fighters in an armed conflict under IHL depends on the category of conflict whom they join, more complex is the assessment of the terrorist nature of the foreign fighters in an armed conflict. First of all, the presence of terrorist groups does not imply that an armed conflict is not occurring because the terrorist nature is irrelevant to the existence of an armed conflict regulated by IHL. On one hand, an armed conflict exists despite the use of terrorist means; on the other hand, the terrorist methods do not fit the definition of armed conflict because they fail to reach the required threshold[221]. In addition, the fact that ISIL

[218] Sommario E., *op. cit.*, p. 157.
[219] UN Office of the High Commission for Human Rights (OHCHR), *Rule of Terror: Living under ISIS in Syria*, 14 November 2014, para 77.
[220] *Ivi*, para 78.
[221] Sassòli M., *La dèfinition du terrorisme et le droit international humanitaire*, in Revue Québécoise de droit international, Avril 2007, pp. 29 – 48, p. 31.

participates in the armed conflict to fulfil the global *jihad* does not prevent the organization to represent a party to the conflict because the motivations of the groups are immaterial to their legal status[222]. Moreover, the latter is not influenced by the ISIL's contempt for the IHL rules because the respect for IHL is not a requisite to distinguish a mere violent situation from a NIAC, thus the campaign of terror perpetrated by ISIL does not alter the nature of the Syrian war as a non-international armed conflict.

IHL forbids acts of terrorism in an armed conflict whereas it does not take into consideration the terrorist violence committed by individuals or organizations without a substantial nexus to armed conflict. Four provisions are contained in the Geneva Conventions and in the Additional Protocols, prohibiting the use of terrorism against civilians and envisaging two categories of violent acts, namely the attacks with the primary purpose of spreading terror and the generic "acts of terrorism". Indeed, Article 33 (1) of the GC IV prohibits "collective penalties and likewise all measures of intimidation or of terrorism" against protected persons in international armed conflict. This clause has to be read in the light of the general prohibition of violent and inhumane treatment against civilians[223] and has been designed to protect civilians "in the hands of a Party to a conflict"[224], whether under the control of an Occupying Power or of belligerents, who might resort to measures of terrorism in order to prevent acts of resistance by the civilians and to subjugate them. Broadly speaking, the clause could apply to any terrorist act committed in occupied territories or in the territory of a party to the conflict[225]. A similar provision is contained in Article 4(2)(d) of the AP II which condemns "acts of terrorism" against persons who do not or longer participate directly in the hostilities during non-international armed conflicts. These acts translate into acts of violence "against people and against installations which may cause victims as a side effect"[226].

IHL also stipulates a limited category of "acts or threats of violence the primary purpose of which is to spread terror among the civilian population", provided in for Article 51(2) of 1977 Protocol I and for Article 13(2) of 1977 Protocol II. Here the prohibition is much more extensive

[222] Krähenmann S., *op. cit.*, p. 23.
[223] Article 27 of the Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.
[224] Article 4 of the Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949 which defines protected persons as *"those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals".*
[225] Cassese A., *The Multifaceted Criminal Notion of Terrorism in International Law*, Journal of International Criminal Justice, 4/2006, p. 944.
[226] Commentary on Article 4 of 1977 Additional Protocol II, p. 4538.

in two respects: firstly, it does not cover persons who are not in the hands of a party to a conflict, but it encompasses civilians who need to be protected from defensive or offensive attacks committed during the hostilities. This means that Article 51(2) and Article 13(2) are a specification of the principle of distinction among civilians and combatants which is a norm of customary international law[227]. In addition, it includes threats of violence intended to spread terror as well as indiscriminate attacks with the same purpose. However, it is necessary to clarify the meaning of the provision since violent acts in a warfare generally give rise to a state of terror in the population and in the armed forces. Acts of violence are considered as terrorism when "the primary purpose is to spread terror among the civilian population without offering substantial military advantage"[228]. Therefore, a terrorist act could be defined on the basis of two conditions: the *actus reus*, that is the act of violence or the threat thereof against civilians, with the consequence that attacks against military targets which incidentally provoke terror among civilians are not acts of terrorism, thus they are lawful in accordance with IHL[229]. On the other hand, attacks directed to combatants with the primary purpose of spreading terror, causing indiscriminate and intentional harm to civilians are prohibited because they equal to terrorism[230]. This means that the civilian as a target is not sufficient to qualify an act of terrorism but it is crucial the *mens rea*, or rather the intention to spread terror among civilians.

In a nutshell, acts of terrorism apply to individuals who are under the control of a party to a conflict whether they are captured or in the territory of the adverse party whereas acts against civilians with the primary purpose of spreading terror refer to all non-combatants who do not take part in the hostilities without any mention to the territory in which they are.

Another problem arises whether the prohibition of terrorism under IHL results in its criminalization. First of all, the 1998 Rome Statute of the ICC does not enumerate "acts of terrorism" as war crimes nor the Geneva Conventions consider them as "grave breaches"[231] but the judgments of the ICTY and the Special Court for Sierra Leone (SCSL) are clear on this point: acts of terror are war crimes. Indeed, the ICTY Statute recognizes the jurisdiction of the Court over the violations of the laws or customs of war, thus being entitled to prosecute persons

[227] Saul B., *Defining Terrorism in International Law*, Oxford University Press, 2006, p. 293.
[228] Commentary on Article 51(2) of 1977 Additional Protocol I, p. 618.
[229] Jodoin S., *Terrorism as a War Crime*, International Criminal Law Review, 7/2007, p. 92.
[230] *Ivi*, p. 94. Jodoin distinguishes between two forms of terrorism: the first one is lawful and it is made up of terrorist acts carried out against combatants. The single condition is the respect of other rules of IHL, namely perfidy, or rather the acts against military targets must not exceed a threshold represented by the superfluous injury and unnecessary suffering. On the other hand, terrorism against civilian target is always forbidden.
[231] Article 147 of Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

who infringe them. The Court identifies violations of the laws and customs of war by "unlawfully inflicting terror upon civilians"[232] as required by Article 51(2) of Protocol I and Article 13(2) of Protocol II. Hence, a crime of terror against the civilian population is shaped as followed:

> *1. Acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population.*
>
> *2. The offender wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence.*
>
> *3. The above offence was committed with the primary purpose of spreading terror among the civilian population".*[233]

The provision points out that the crime of terror pertains to the crimes of attack on civilians, but it is characterized by the *mens rea* element, the specific intent of spreading terror among the civilian population. This means that it is a specific-intent crime, which "excludes *dolus eventualis* and recklessness from the intentional state specific to terror"[234], since the perpetrator of the violent act is aware of the consequences of his act, namely terror among civilians, and he is also willing to pursue this outcome[235]. Nonetheless, the ICTY delves briefly into the meaning of terror, defined generally as long-term, direct, extreme fear causing long-term consequences though it lists factors which may induce terror[236]. Worth mentioning is the fact that terrorist acts committed in non-international armed conflicts are deemed as international crimes, thus international rules could apply to persons participating in an internal armed conflict which are bound to the respect of IHL rules concerning terrorism[237].

Violations of the prohibitions on terrorism entail individual criminal responsibility under customary international law[238], or rather executors of terrorist acts could be prosecuted by

---

[232] Saul B., *op. cit.*, p. 301.
[233] ICTY, *Prosecutor v. Stanislav Galic*, Judgment (Trial Chamber), IT-98-29-T, 5 December 2003, para 133.
[234] Saul B., *op. cit.*, p. 302.
[235] Sossai M., *La prevenzione del terrorismo nel diritto internazionale*, Giappichelli Editore, Torino, 2012, p. 192.
[236] These factors may amount to intense and dangerous violence, attempts to disrupt sleep or essential services, propaganda, targeting cultural icons. See Saul B., *op. cit.*, p. 303 – 304.
[237] ICTY, *Prosecutor v. Dusko Tadic*, Appeals Chamber Case No. IT-94-1-AR-72, 2 October 1996.
[238] A crime is defined as customary whenever it meets two conditions: *diuturnitas*, namely the presence of this conduct in the State practice and *opinio juris*. Therefore, a customary crime of terrorism is emerging due to the judicial precedents in international criminal law, due to the criminalization of terrorism in domestic legal systems as well as in military manuals and finally in the Statutes of Tribunals for Rwanda and Sierra Leone, respectively in Article 4 (2) of ICTR Statute and Article 3 (d) of SCSL Statute.

domestic tribunals, foreign courts or by international criminal courts because their acts account for war crimes[239]. In this case the distinction among civilians and combatants does not apply for any person could commit a terrorist act, either States armed forces in international armed conflict or dissident armed forces and other organized groups in non-international armed conflicts, or even civilians who take a direct part in the hostilities. Consequently, combatants could not benefit from combatant immunity or POW status and they could be punished for their acts contravening IHL rules[240]. In other words, unlawful combatants are prosecuted for acts of terrorism criminalized by the domestic law and for the war crime of terrorism whereas combatants could be brought to justice only for the acts of terrorism which are war crimes. In turn, this entails that in IHL terrorists do not fall into a specific legal category.

[239] In *Tadic* case, the ICTY enumerates the requirements whom a violation of international humanitarian law shall meet in order to fall under Article 3 of the ICTY Statute and be viewed as a war crime: *"(i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met; (iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule".* Therefore, the violations of the prohibitions on terrorism are war crimes whether they satisfy the abovementioned four conditions. See ICTY, *Prosecutor v. Dusko Tadic*, No. IT-94-1, Appeals Chamber, Decision on the Defence Motion for the Interlocutory Appeal on Jurisdiction, 2 October 1995, para 94.

[240] Gasser H.P., *op. cit.*, p. 560.

Chapter II

International and European responses to the phenomenon of Foreign Terrorist Fighters.

1. United Nations' strategy against terrorism before the Islamic State of Syria and the Levant: International Conventions and the engagement of the General Assembly.

Since ever, terrorism has been considered as a national phenomenon falling under the domestic competences, yet the international community has stepped in to deal with international acts of terrorism, building a counter-terrorism framework composed of treaties and resolutions[241]. These political and legal measures were drafted by the UN system in view of the necessity of the prohibition of terrorism and the criminalization of the perpetrators since terrorism may pose a threat to the international peace and security[242].

The endeavours failed to reach consensus on the characterization of terrorism, mainly due to the dispute over the legitimacy of the national liberation movements, while they accomplished the approval of sectoral Conventions addressing specific violent acts which could be considered as terrorists. Therefore, aircraft hijacking, acts of taking hostages, attacks carried out through bombs, the financing to terrorist organizations and the economic support to their activities, the possession and the use of radioactive and nuclear materials are criminal offences[243]. Here the notion of terrorism is dismissed in favour of the description of the act of terrorism (*actus reus)*,

[241] In this regard, it is noteworthy that already in 1937 the League of Nations held an interstate Conference in order to react to the 1934 assassination of Alexander I of Yugoslavia in Marseille, resulting in two Conventions dealing with the prevention and the repression of terrorism. They never entered into force because States did not ratify them. *See* Quadarella L., *Il nuovo terrorismo internazionale come crimine contro l'umanità*, Editoriale Scientifica, Napoli, 2006, p. 49 e ss.

[242] Saul B., *Defining Terrorism in International Law*, New York, Oxford University Press, 2006, p. 45.

[243] Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague, December 1970; International Convention Against the Taking of Hostages, New York, December 1979; International Convention for the Suppression of Terrorist Bombings, New York, December 1997; International Convention for the Suppression of the Financing of Terrorism, New York, December 1999; International Convention for the Suppression of Acts of Nuclear Terrorism, New York, April 2005.

along with the specific intent of the authors (*mens rea*), regardless of their motivations and purposes. The Conventions urge States to abide by the obligations to prevent and to repress terrorism: the former condense in practical measures to avert the acts and the preparations thereof as well as in the interstate cooperation for the exchange of information, figures and communications. The latter entails that the States must introduce in their domestic law the offences envisaged by the Conventions, or rather they must criminalize the defined conducts in their territory so that the executors of terrorist acts do not go unpunished[244].

In addition, the treaties apply to acts with an international character, thus excluding acts "committed within a single State, the alleged offender and the victims are nationals of that State, the alleged offender is found on the territory of that State and no other State has a basis to exercise jurisdiction"[245]. Accordingly, the offences spread across various countries, impacting on several jurisdictions thus questioning the principle of territorial jurisdiction[246]. Therefore, the Conventions fill the vacuum by requiring the principle of *"aut dedere aut judicare",* in which States could prosecute terrorists found within their borders or extradite them. This means that, in case of a State failing to request the extradition, the other State could try the alleged violators of the Conventions, even though he is not a national of that State or he has carried out the terrorist act in a third State[247].

Whilst it is true that at first the UN bodies pursued a pragmatic and a case-oriented approach, finalising conventions in the aftermath of heinous terrorist acts in order to avoid the problem of the definition of terrorism, it is likewise true that the 1999 Convention for the Suppression of the Financing of Terrorism submitted an accessory definition of terrorism inasmuch it prohibits the funding to terrorist activities provided for in the other Conventions and to other violent acts carried out against civilians with the purpose of striking terror and influencing the decisions of the governments[248]. Afterwards, the international community gained perspective and introduced a holistic and long-term approach to the phenomenon of terrorism resulting in the 1994 Resolution 49/60 of General Assembly, the so-called "Declaration on Measures to

[244] Geneva Academy, *op. cit.*, p. 34.
[245] Article 3 of the 1997 International Convention for the Suppression of the Terrorist Bombings.
[246] Saul B. (2006), *op. cit.*, p. 131.
[247] Quadarella L., *Il nuovo terrorismo internazionale come crimine contro l'umanità,* Edizione Scientifica, Napoli, 2006, p. 70.
[248] Article 2 (1) (b) of the International Convention for the Suppression of the Financing of Terrorism states that *"any other act intended to cause death or serious bodily injury to a civilian, or any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act".*

Eliminate International Terrorism", which is no longer focused on the prevention of terrorism, but on its elimination. Indeed, the General Assembly condemned all acts and forms of terrorism, "in any circumstance unjustifiable, whatever the considerations"[249] and by whomever committed, thus also denouncing the guerrilla actions of the national liberation movements. In addition, the Declaration reaffirms the necessity of the cooperation among States on tackling terrorism and sets up requirements on States to refrain from organizing or encouraging acts of terrorism in third countries and to enforce the principle of *"aut dedere aut judicare"*[250]. Furthermore, the resolution gave an original definition of terrorism as "criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes"[251]. In any case, the provision remains vague in respect to the "state of terror" but it constitutes a critical juncture since it paved the way to the drawing up of a global convention against terrorism.

The Resolution 49/60 of 1994 was integrated by 1996 Resolution 51/210 which essentially broadened the spectrum of policy measures[252] and established an *Ad Hoc* Committee[253], empowered to elaborate a Comprehensive Convention on International Terrorism to deal with terrorist acts not covered by the abovementioned Conventions and to define the crime of terrorism. In this regard, the draft handed over by India is clear on the description of terrorism as criminal acts unlawfully and intentionally committed, causing death or serious injury to persons or damage to public or private property, with the terrorist intent of intimidating a population or compelling a government to do or not to do some action[254]. In conjunction with the *Ad Hoc* Committee, a Working Group was launched by the Sixth Committee of the General Assembly to negotiate the text of the Convention which is still being discussed, due to divergences on state terrorism and on the field of application of the provisions of the Convention. Indeed, there is some debate as to whether acts of the national liberation movements are lawful, thus equated with the activities of the armed forces, so that the Comprehensive Convention could not apply; otherwise, the struggle of the guerrilla fighters

[249] UN Doc. A/RES/49/60, 9 December 1994, Annex, para 1.
[250] Saul B., *Research Handbook on International Law and Terrorism*, Cheltenham, UK; Northampton, MA: Edward Elgar, 2014, p.568.
[251] UN Doc. A/RES/49/60, 9 December 1994, Annex, para 3.
[252] Among them, consultations among security officials; research and development on methods of detection of explosives; analysis of the use of electronic communications system to carry out the attacks; investigations on organizations and associations which may serve as a cover for the terrorists' activities; struggle against the financing of terrorism. *See* A/RES/51/210, 17 December 1996, para 3.
[253] The *Ad Hoc* Committee was also responsible for the drafting and the signing of the sectoral Conventions, namely the 1997 International Convention for the Suppression of Terrorist Bombs and the 1999 International Conventions for the Suppression of the Financing of Terrorism.
[254] Article 2 of 2000 Draft Comprehensive Convention against International Terrorism.

would amount to terrorism[255]. Nonetheless, the Convention represents a first step towards a universally accepted definition of terrorism as well as towards a comprehensive approach to the problem of terrorism.

Lastly, the General Assembly has preserved its holistic approach against terrorism with the adoption of the UN Global Counter-Terrorism Strategy in 2006 which was promoted by the 2006 report of the former Secretary-General Kofi Annan, "Uniting against terrorism: recommendations for a global counter-terrorism strategy"[256]. The Global Counter-Terrorism Strategy is composed of a declaration and a "plan of action", namely "measures to address the conditions conducive to the spread of terrorism; measures to prevent and combat terrorism; measures to build States' capacity to prevent and combat terrorism and to strengthen the role of the United Nation system in this regard; measure to ensure respect for human rights for all and the role of law as the fundamental basis of the fight against terrorism"[257]. The resolution does not contain any achievement but it is remarkable since on one hand, it comprehends all the previous resolutions, agreements and speeches on terrorism and on the other hand, it copes with the causes of terrorism, which were at first set aside in favour of the sectorial approach, in order to prevent the terrorist attacks. In addition, there is an earliest mention to the phenomenon of cyberterrorism, as the use of Cyberspace to spread ideas and to recruit followers, which needs to be tackled at the national level by "using the internet as a tool for countering the spread of terrorism"[258].

[255] *See* e.g., Saul B., *Research Handbook on International Law and Terrorism*, Cheltenham, UK; Northampton, MA: Edward Elgar, 2014; Hmoud M., *Negotiating the Draft Comprehensive Convention on International Terrorism*, Journal of International Criminal Justice, 4 – 2006, pp. 1031 – 1043; Sossai M., *La Prevenzione del Terrorismo nel Diritto Internazionale*, Giappichelli Editore – Torino, 2012.

[256] UN Doc. A/60/825, *Uniting against terrorism: recommendations for a global counter-terrorism strategy*, 27 April 2006. Kofi Annan proposed a strategy based on five pillars: "dissuade disaffected groups from choosing terrorism as a tactic to achieve their goals; deny terrorists the means to carry out their attacks; deter States from supporting terrorists; develop State capacity to prevent terrorism; defend human rights in the struggle against terrorism".

[257] UN Doc. A/RES/60/288, *The United Nations Global Counter-Terrorism Strategy*, 8 September 2006.

[258] *Ivi*, para 12 (b) of II pillar.

1.1 The UN Security Council Resolutions 1267/1999 and 1373/2001: the sanctions regime and the post – 9/11 evolution.

Before the emergence of Islamic terrorism, the Security Council played a secondary role in the fight against terrorism, delegating the task to the General Assembly which achieved great results in criminalizing different conducts and focused on a working definition of the phenomenon in order to give birth to a customary crime of terrorism. Indeed, the Security Council simply adopted resolutions in response to specific acts of terrorism, dooming the authors and calling on States to prevent those acts. As a matter of fact, the term "terrorism" was not used in the early resolutions and it appeared only in 1985 when Resolution 579 recognized the hostage-taking and abduction as "manifestations of international terrorism"[259]. This inaction could be explained by the deadlock in which it was stuck following the Cold War and the cross-fire of vetoes as well as by the understanding that terrorists operate at local level in the framework of regional conflicts[260].

September 2001 represented a radical shift in the approach of Security Council since it converted to the leading player in the UN counterterrorism system which was composed of binding and quasi-legislative measures and oversight committees. However, even before September 2001, the Security Council had to tackle the increasing violence committed by Al-Qaeda and its associates through the adoption of sanctions aimed firstly at States sponsoring terrorism and then at specific individuals or groups in order to prevent the impact on civilian population. The starting point was Resolution 1267 of 1999 which demanded Taliban regime refrain from providing the Afghan territory to Al-Qaeda for the training of terrorists and for the organization of attacks and from ensuring a safe haven to Usama Bin Laden[261]. This resolution is noteworthy since it established a sanction regime, known as "Al-Qaeda and Taliban Sanctions Regime" which was directed at the Taliban regime due to their territorial, economic and political support to Al-Qaida. Under the regime, the Security Council required all the States to implement some measures, namely the asset freeze, the arms embargo and the travel ban to individuals and entities which are enumerated in the Al-Qaida Sanctions List. The latter was elaborated by the 1267 Sanctions Committee, a sub-committee of the Security Council composed of 15 members, which was entrusted with the task of monitoring the implementation

[259] Saul B. (2006), *op. cit.*, p. 217.
[260] Rosand E, *The UN-Led Multilateral Institutional Response to Jihadist Terrorism: Is a Global Counterterrorism Body Needed?*, Journal of Conflict and Security Law, Volume 11, Issue 3, 2006, p. 408.
[261] UN Doc. S/RES/1267 (1999), 15 October 1999, preamble.

of the sanctions and updating the list, though it cannot intervene in the event of the States' non-compliance. The scheme is evident inasmuch each State could request to the Committee the inclusion in the list of an individual or an entity, which needs the approval of all the members of the Committee, so that States must carry out the sanctions[262]. The individual or entity must satisfy a single requirement to be added to the sanctions regime, that is the "association with Al-Qaeda", even though the Committee did not clarify the meaning of association. It should be noted that the listing does not lead to an individual criminal status because the purpose of the sanctions is not punitive but preventive, or rather avoiding the perpetration of terrorist acts by locking the abilities of terrorists to act[263]. Yet, it is true that individuals who violate the measures could incur in "appropriate penalties" imposed by States within their jurisdiction, which could also "bring proceedings" against them[264].

Shortly after, the fall of the Taliban regime in 2002 resulted in a change of the 1267 Sanctions Regime, which was expanded in order to deal with the global threat posed by Al-Qaeda. Indeed, the Resolution 1390, adopted after the 9/11 attack, transmuted a territorial sanctions regime into a global one, irrespective of the territory and without time limits, no longer targeting a sponsored-State but directly a terrorist organization and its associates, even in contrast to the early sanctions adopted by the Security Council against States which were alleged to collude with terrorists[265]. Indeed, the measures must be performed against "Usama Bin Laden, members of the Al-Qaeda organization and the Taliban and other individuals, groups, undertakings and entities associated with them"[266]. This means that sanctions are indeterminate, aimed at non-state actors and are not confined to the activities perpetrated in the Afghan territory but they encompass acts of terrorism carried out by Al-Qaeda wherever these occur[267]. Through subsequent resolutions, the Security Council emended the sanctions regime and pointed out the meaning of "association with Al-Qaeda". On one hand, the 1267 Sanctions Regime has been divided into two separate regimes, namely the 1988 sanctions regime dealing with the Taliban and the 1989 Al-Qaeda sanctions regime targeting Al-Qaeda[268]. The latter was then adjusted by Resolution 2253 which stipulated that the 1267/1989 Al-Qaeda Sanctions Committee shall

[262] Saul B. (2014), *op. cit.*., p. 609.
[263] Geneva Academy, *op. cit.*., p. 37.
[264] UN Doc. S/RES/1267 (1999), 15 October 1999, para 8.
[265] Sanctions were adopted against Libya and Sudan, respectively after the Lockerbie incident in 1992 and the assassination of Egyptian President Hosni Mubarak in 1996. UN Doc. S/RES/748 (1992), 21 January 1992; UN Doc. S/RES/1054 (1996), 26 April 1996; UN. Doc. S/RES/1070 (1996), 16 August 1996.
[266] UN Doc. S/RES/1390 (2002), 16 January 2002, para 2.
[267] Saul B. (2014), *op. cit.*, p. 610.
[268] UN Doc. S/RES/1988 (2011), 17 June 2011.

henceforth be known as 1267/1989/2253 ISIL and Al-Qaeda Sanctions Committee and the sanctions list shall be renamed to ISIL and Al-Qaeda Sanctions List, so that the sanctions could be enforced against ISIL and its affiliates.

On the other hand, the Resolution 1989 assumed that an individual, entity or undertaking is affiliated to Al-Qaeda whenever he takes a direct part in the financing, planning, preparing and perpetrating of acts of terrorism, or in the supply of weapons or even in the recruiting of volunteers[269]. The fact that association is the solely requirement to add an individual in the list, along with the lack of any mention to the nationality, entails that also foreign fighters could be subjected to the sanctions: foreign fighters who travel to Syria to fight in the ranks of ISIL as well as those who do not reach the war scenario but remain in their country of origin where they recruit followers and facilitate their travel[270].

The 9/11 attack brought about a harsh reaction of the international community which acknowledged the terrorist attack "like any act of terrorism, as a threat to international peace and security"[271]. This represents a change of perspective insofar the resolution describes as a threat to peace no longer a specific terrorist incident but terrorism *per se*, namely all acts of international terrorism whenever, wherever and by whomever carried out[272]. Therefore, this determination foresees that acts of terrorism are a global challenge impacting on all the States, carried out by individuals or entities without any connection to a State, committed in any place, thus encompassing acts of domestic terrorism[273]. In this regard, the Security Council reaffirms the need to "combat by all means" the terrorist threat, envisaging the chance of an individual or collective self-defence, even though it did not authorize a US-led military action. Indeed, the terrorist act is not considered as an act of war but as a crime which results in the criminalization of the authors, the organizers and the sponsors[274].

Moreover, the Security Council gave birth to the second pillar of the UN counter-terrorism system through the adoption of Resolution 1373 which acquired a legislative character since it

[269] UN Doc. S/RES/1989 (2011), 17 June 2011, para 4.
[270] Geneva Academy, *op. cit.*, p. 37.
[271] UN Doc. S/RES/1373 (2001), 28 September 2001, preamble. The determination "threat to peace" is already included in Resolution 1368, adopted the day after the 9/11 attack. *See* UN Doc. S/RES/1368 (2001), 12 September 2011, para 1.
[272] Nesi G., *International Cooperation in Counter-Terrorism: The United Nations and Regional Organizations in the Fight against Terrorism*, Aldershot; Burlington, VT: Ashgate, 2006, p. 95.
[273] *Ivi*, p. 98.
[274] Saul B. (2012), *op. cit.*, p. 233. Resolution 1368 states all the States must *"bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and those responsible for aiding, supporting or harbouring*" them. UN Doc. S/RES/1368 (2001), 12 September 2001, para 3.

imposed on all the States general obligations, detached from a particular conflict or act and unlimited in time. These shall be divided into three categories: mandatory measures against terrorist financing, compulsory requirements against terrorism in general and recommendations on state cooperation over information sharing and criminal prosecution. In the first section, the States' obligations are taken up by the International Conventions since they concern the suppression and the prevention of the terrorism financing and they provide for the assets freeze of terrorists. Though, the Resolution 1373 represents an innovation from two sides: on one hand, States are required to criminalize terrorism financing, so that the financial support to terrorist acts is a crime[275]. On the other hand, the assets freeze shall be targeted not just at persons who participate in the terrorist act but also at

> *"entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities"*[276].

Therefore, the measure provided for by the Security Council is much broader than the similar one contained in the 1999 International Convention for the Suppression of the Financing of Terrorism which simply envisages the duty to freeze the assets of the authors of the terrorist attacks[277]. In addition, the provisions of the Resolution 1373 are binding on all the States and automatically apply without a national legislative action whereas the UN Terrorism Financing Convention apply only to signatory countries and need their ratification[278].

The second part demands that States refrain from directly or indirectly support terrorists through the adoption of legislative measures in order to suppress the recruitment and to eliminate the supply of weapons. In addition, States must bring to justice those who "participate in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts"[279], thus terrorist acts as well as the preparatory acts are incorporated in the domestic laws as criminal offences, resulting in serious penalties[280]. Other preventive measures include the

[275] UN Doc. S/RES/1373 (2001), 28 September 2001, para 1 (b).
[276] *Ivi*, para 1 (c).
[277] Saul B. (2014), *op. cit.*, p. 628.
[278] Feinberg M., *Sovereignty in the age of Global Terrorism: The Role of International Organizations*, Leiden; Boston: Brill Nijhoff, 2016, p. 38.
[279] UN Doc. S/RES/1373 (2001), 28 September 2001, para 2 (e).
[280] Saul B. (2012), *op. cit.*, p. 236.

travel ban in order to hinder the terrorist mobility and border controls on identity documents to combat the counterfeiting and the denial of a safe haven to terrorists.

Furthermore, Resolution 1373 established the Counter-Terrorism Committee (CTC), composed of the members of the Council, empowered to monitor the implementation of the resolution through the evaluation of the reports submitted by the States, which specify the steps undertaken in seven areas: legislation, financial asset controls, customs, immigration, extradition, law enforcement and illegal arms trafficking[281]. This Committee does not have a punitive nature for it does not sanction the States' non-compliance but it hinges on the cooperation with the States in order to provide them with technical assistance in the adoption of legislative and administrative measures. Therefore, the CTC plays a pivotal role in the coordination of the States' counter-terrorism efforts[282]. This means that the CTC diverges from the 1267 Sanctions Committee because it does not draw up a list of individuals or entities to be targeted by the national actions but it assigns the competence to identify the recipients of the measures, the activities to be criminalized as well as to define terrorism to each State[283]. Since 2004, the CTC is assisted by the Counter-Terrorism Executive Directorate (CTED) and works in synergy with the 1540 Committee which deals with the prohibition of the proliferation of nuclear, chemical and biological weapons and with the 1566 Working Group which is in charge of elaborating practical measures against terrorists and of creating an international fund for the victims of terrorism[284].

[281] Rostow N., *Before and After: the Changed UN Response to Terrorism since September 11th*, Cornell International Law Journal, Volume 35, Issue 3, Winter 2002, p. 483.
[282] Rosand E., *op. cit*., p. 410.
[283] Feinberg M., *op. cit.*, p. 125.
[284] Rosand E., *op. cit.*, p. 414. The 1540 Committee, commonly known as the Non-Proliferation Committee, was launched by the Resolution 1540 (2004), tackling the phenomenon of the weapons of mass destruction (WMD). The 1566 Working Group was established by Resolution 1566 (2004) in response to the seizure of hostages and the death of children occurred in Beslan, Russia.

2. The rise of the Islamic State and the UN Security Council activism: the Resolution 2170/2014.

The threat posed by the Islamic State was at first overlooked by the Security Council which started addressing it as of 2014 when the terrorist organization had already conquered certain parts of Syria and Iraq and announced the birth of the Caliphate. The increasing concern of the international community was related to the relentless flow of foreigners travelling to the war zone which resorted to cruel methods of warfare instilling terror in the population, committed IHL violations and underwent training helpful in carrying out terrorist acts in their home country. Therefore, the activities performed by the foreign fighters engendered the adoption of two significant Resolutions a month apart under Chapter VII of the UN Charter in which the Security Council condemns the events in the Middle East accomplished by ISIL, Al-Nusra Front and affiliated entities and focuses on the phenomenon of "foreign terrorist fighters".

Indeed, on 15 August 2014 the 15 members of the Security Council unanimously enact Resolution 2170 to stop the flow of money, weapons and fighters to the war zone, swelling the ranks of ISIL and other associated terrorist organizations. After deploring the "continued gross, systematic and widespread abuses of human rights and violations of international humanitarian law"[285] committed by ISIL, the Resolution introduces a new terminology "foreign terrorist fighters" to describe fighters connected to a particular group, ISIL and Al-Nusra Front (ANF), and to terrorism without giving a definition neither of FTFs nor of terrorism[286]. Indeed, the Council firstly approaches the FTFs, condemning their recruitment and requiring them to withdraw immediately since their presence could prolong the conflict and result in violent radicalization. In addition, those recruiting foreign terrorist fighters and the FTFs themselves are liable to be listed in the Al-Qaida sanctions regime, along with other individuals or entities who may finance or facilitate the travel of FTFs[287]. Sure enough, six individuals linked to the Islamic State or Al-Nusra Front are added to the 1267 Sanctions List[288].

[285] UN Doc. S/RES/2170 (2014), 15 August 2014, para 1.
[286] Alì A., *La risposta della comunità internazionale al fenomeno dei Foreign Terrorist Fighters*, La Comunità Internazionale, 2/2015, p. 185. In this regard, it is important to recall that the term "fighter" is not included in the international humanitarian and criminal law which employ the term "combatant" to portray the individuals who lawfully participate in the hostilities. In addition, the reference to foreigners joining a war in a country different from their own firstly appears in the Resolution 1649 (2005) when the Security Council demands that States bring to justice the political and military leaders of "foreign armed groups" linked to foreign States operating in the eastern part of the Democratic Republic of Congo.
[287] UN Doc. S/RES/2170 (2014), 15 August 2014, para 7.
[288] *See Ivi*, Annex.

Furthermore, the Resolution reflects the trend in the Security Council's legislative role by dictating some duties on States concerning the prevention and the repression phases which could be divided into three sections. Firstly, States are required to take national measures to suppress the flow of foreign terrorist fighters and to bring them to justice as well as to prevent the movement of terrorists from and to their countries through border controls, interstate cooperation and information sharing[289]. Besides, States are also encouraged to interact with persons following the radicalization path in order to "discourage travel to Syria and Iraq for the purposes of supporting or fighting for ISIL"[290] and to assist them in the social reintegration. The second obligation concerns the terrorist financing and in particular States must suppress the financing of terrorism and refrain from any direct or indirect support to the terrorist organization[291]. Obviously, this is modelled after the Resolution 1373 and the 1999 International Convention on Terrorism Financing but here the focus is on the foreign terrorist fighters and their travel to conflict zone. In this context, the Security Council reaffirms the prohibition of individuals or entities making available funds for terrorist acts and points out that ISIL controls oil fields in Syria and Iraq, so that direct or indirect trade is forbidden because it amounts to financing of terrorism[292]. Finally, States must enlarge the sanctions regime imposed on Al-Qaeda to ISIL and ANF since they are associated forces of Al-Qaeda. This means that States could enumerate in the 1267 Sanctions List individuals or entities connected to these terrorist organizations[293].

As a matter of fact, Resolution 2170 does not expand the counterterrorism framework built by the Resolution 1267/1999 and 1373/2001 but it deserves the credit for bringing the attention to the issue of foreign terrorist fighters and for prescribing the respect of human rights in the combat against terrorism. Indeed, in the preamble of the Resolution the Security Council compels States to "comply with all their obligations under international law, in particular international human rights, refugee and international humanitarian law", implying that their national strategies must not abuse any human rights or the rule of law[294].

---

[289] Alì A., *op. cit.*, p. 184.
[290] UN Doc. S/RES/2170 (2014), 15 August 2014, para 9.
[291] *Ivi*, para 11.
[292] UN Doc. S/RES/2170 (2014), 15 August 2014, para 14.
[293] *Ivi*, para 18.
[294] For the relationship between counter-terrorism and human rights, *See* Nesi G., *International Cooperation in Counter-Terrorism: The United Nations and Regional Organizations in the Fight against Terrorism*, Aldershot; Burlington, VT: Ashgate, 2006; Saul B., *Research Handbook on International Law and Terrorism*, Cheltenham, UK; Northampton, MA: Edward Elgar, 2014; Cadin R., Carletti C., Colacino N., Cotura S., Guarino A., *Contrasto Multilivello al Terrorismo Internazionale e Rispetto dei Diritti Umani*, Giappichelli Editore, Torino, 2012.

2.1 The UN Security Council Resolution 2178/2014: the first definition of "Foreign Terrorist Fighters".

A month after the issuing of the Resolution 2170[295], on 24 September 2014 the Security Council unanimously launched Resolution 2178 dealing specifically with foreign terrorist fighters, which was built upon a draft resolution handed in by the United States which called for the enhancement of the counterterrorism obligations and for a clear strategy against foreign terrorist fighters. The Resolution represents the peak of the well-established practice of the Security Council to legislate on matters related to terrorism, but it goes further in following a holistic approach to the phenomenon of foreign terrorist fighters since it provides a variety of national measures to address the challenge, namely criminal laws, administrative measures, intelligence operations and preventive strategies, as de-radicalization[296]. Though, the provisions of the Resolution are not directly effective in the domestic systems, implying that the Security Council instructs States to implement the obligations, granting them the faculty of deciding the penalties and defining terrorism.

Resolution 2178 is structured in some sections which could be simplified in individual obligations, States obligations, international cooperation, countering violent extremism (CVE) in order to prevent terrorism and the UN engagement on the FTF threat. However, the preamble is already meaningful since it contains the first definition of FTFs which are 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"*[297].

The targets of the Resolution 2178 are those individuals who travel to a conflict zone with a terrorist purpose, i.e. the preparation, perpetration of or participation in a terrorist act as well as the providing or receiving of terrorist training. The Resolution assumes that foreign terrorist fighters are recruited by Islamic State, Al-Nusra Front or Al-Qaeda and its associates but the aforementioned provision is not limited to a particular group, so that everyone, even belonging to other groups, who leaves his country of origin with the intent of resorting to terrorism could be labelled as terrorist. Moreover, the final sentence "including in connection with an armed

[295] The international community faced the challenge posed by ISIL not only through binding resolutions of the Security Council but also through a military intervention led by United States which were worried about the territorial gains of ISIL in Syria and in Iraq. The air attacks against ISIL positions in Iraq started on 8 August 2014 whereas the attacks in Syria kicked off on 23 September 2014.
[296] Feinberg M., *op. cit.*, p. 41.
[297] UN Doc. S/RES/2178 (2014), 24 September 2014, para 8 of the Preamble.

conflict" ambiguously links terrorism with armed conflict, hinting two readings: on one hand, individuals are designed as FTFs whether they commit terrorist acts in peace time or in war time; hence, acts governed by IHL are deemed as terrorists without limiting the term to acts forbidden by IHL. This means that acts which are lawful under IHL could be categorized as terrorist, thus subject to the measures contained in the Resolution 2178[298]. On the other hand, the travel of FTFs to the conflict zone amounts to an act of violence during an armed conflict, thus to a terrorist felony[299]. Therefore, joining or attempting to join an armed group designated as terrorist or travelling to a country in which a terrorist organization operates is a serious offence because it equates to "receiving terrorist training", despite the fact that IHL applies in these cases. Added to this is the uncertainty on the definition of terrorism which may result in the characterization of foreign terrorist fighters as those individuals who travel only to fight, activity which is basically lawful in an IAC and unlawful in a NIAC, irrespective of their nationality, and also women or girls who do not take a direct part in the hostilities may fall within this category[300].

The second innovation relies on the first paragraph of Resolution 2178 which directly addresses foreign terrorist fighters, requiring them to "disarm and cease all terrorist acts and participation in armed conflict"[301] and raising the issue whether the Resolution creates binding legal obligations also upon individuals[302]. Here, the individual obligations are not mediated by States but they directly flow from the Resolution 2178 which is the legal basis of the prohibition of committing terrorist acts or participating in the armed conflict by the side of ISIL. Moving on to the duties of States, the Security Council reiterates some obligations laid down in previous treaties, including the travel ban, the assets freeze and the sharing of passenger's name, and inserts new precise obligations regarding FTFs. Yet, the prevention and the suppression of the "recruiting, organizing, transporting or equipping"[303] of FTFs, in compliance with the

[298] Geneva Academy, *op. cit.*, p. 42.
[299] Capone F., *Countering "Foreign Terrorist Fighters": A Critical Appraisal of the Framework Established by the UN Security Council Resolutions,* Italian Yearbook of International Law, 25 (2015), p. 236.
[300] *Ivi*, p. 231.
[301] UN Doc. S/RES/2178 (2014), 24 September 2014, para 1.
[302] According to Anne Peters, a Security Council resolution could be able to create obligations for individuals due to the nature of the UN Charter as a world constitution which allows the Security Council to have "a special authority that - within the boundaries of the principles of legality - also is effective *erga omnes* vis-à-vis individuals". In addition, the Council cannot approach only states to suppress terrorism but it is necessary that it also turns to individuals and groups with legal orders to stop the terrorist activities. *See* Peters A., *Security Council Resolution 2178 (2014): The "Foreign Terrorist Fighter" as an International Legal Person Part I,* EJIL Talk, 20 November 2014, Available at: https://www.ejiltalk.org/security-council-resolution-2178-2014-the-foreign-terrorist-fighter-as-an-international-legal-person-part-i/.
[303] UN Doc. S/RES/2178 (2014), 24 September 2014, para 5.

international law and international humanitarian law, remains the main duty which is embodied firstly by the avoidance of the mobility of terrorists through border controls, checks on identity papers and travel documents as well as tackling the practice of counterfeiting. In this regard, the Security Council encourages States to collect and analyse travel data, benefitting from the database, the procedures and the system of advisory notices to track identity papers and forgery, devised by the INTERPOL in dealing with the FTFs' threat[304]. In the second place, States are urged to bring to justice individuals who take part in the preparation, planning, perpetration, financing of and supporting terrorist acts, as such they must introduce in their legal system the following criminal offences which shall be proportionate to the seriousness of the offence:

> *(a) their nationals and other individuals who travel or attempt to travel from their territories to a State other than their States of residence or nationality;*
>
> *(b) the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to finance the travel [of foreign terrorist fighters];*
>
> *(c) the wilful organization, or other facilitation, including acts of recruitment, by their nationals or in their territories, of the travel of 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[305].*

Therefore, States are obliged to criminalize in their domestic law conducts related to terrorism which range from the mere preparatory acts to the effective commission of terrorist acts. Again, the failure in defining terrorism provides a risk of abuse from oppressive States which find in the Resolution 2178 a legal justification for criminalizing the political opponents[306].

Furthermore, the Resolution calls upon Member States to prevent the entry into or transit through their territories of individuals falling into the list designated by the 1267 and 1989 Sanctions Committee and to require airlines operating in their territory to supply advance passenger information, including flight information and passenger information, to national authorities in order to detect attempted entries or departures[307]. With regard to the third section, the Council recommends Member States to strengthen international cooperation on the sharing

[304] UN Doc. S/RES/2178 (2014), 24 September 2014, para 18 of the Preamble.
[305] *Ivi*, para 6.
[306] *See* Scheinin M., *Back to Post – 9/11 Panic? Security Council Resolution on Foreign Terrorist Fighters*, JUST SECURITY, 23 September 2014. Available at: https://www.justsecurity.org/15407/post-911-panic-security-council-resolution-foreign-terrorist-fighters-scheinin/. Scheinin
[307] UN Doc. S/RES/2178 (2014), 24 September 2014, para 8 – 9.

of information and adopting best practices to ban the travel of FTFs, to identify them and to prevent them from the use of technology in recruiting other fighters. In addition, the Resolution recalls the Resolution 1373 in providing "one another the greatest measure of assistance in connection with criminal investigations or proceedings"[308] regarding the financing of and the support to terrorist acts carried out by FTFs. The cooperation could also translate in assistance among States in order to build capacity to tackle the phenomenon of FTFs, or in the reinforcement of the measures set up by INTERPOL. The fourth part of the Resolution is based on the CVE which is considered as "an essential element" in the strategy against FTFs and coincides with an additional breakthrough of the Resolution 2178, namely the shift from more reactionary and repressive measures to preventive ones, dealing with the conditions conducive to terrorism. For this purpose, the Council encourages States to engage with local communities and non-governmental actors in three steps: countering the violent extremist narrative developed by ISIL through the elaboration of non-violent alternatives, implementing rehabilitation strategies for those individuals at risk and reintegration ones for returning FTFs and empowering communities and civil society to operate more effectively[309].

Finally, the Council reaffirms that foreign terrorist fighters, as well as those who finance, support and facilitate their travel could be inserted in the Al-Qaeda Sanctions List, so that they could be the target of the sanctions imposed by the 1267 – 1989 Sanctions Committee. This means that States are invited to propose the names of FTFs whom they ask for listing[310]. In the last section of the Resolution 2178, the Council also reshapes the roles of the institutions entitled to the fight against FTFs, namely the 1267 – 1989 Sanctions Committee, the Analytical Support and Sanctions Monitoring Team and the Counter-Terrorism Committee[311] and urges them to cooperate.

[308] UN Doc. S/RES/2178 (2014), 24 September 2014, para 12.
[309] Chowdhury Fink N., van Deventer F., Entenmann E., van Ginkel B., Kessels E., Millar A., Paulussen C., Singleton M., *Addressing the Foreign Terrorist Fighters Phenomenon from a European Union Perspective: UN Security Council Resolution 2178, Legal Issues and Challenges and Opportunities for EU Foreign Security and Development Policy*, Global Center on Cooperative Security, December 2014.
[310] UN Doc. S/RES/2178 (2014), 24 September 2014, para 20. Also the paragraph 7 envisages the listing as a measures against "*individuals, groups, undertakings and entities associated with Al-Qaida who are financing, arming, planning, or recruiting for them, or otherwise supporting their acts or activities, including through information and communications technologies, such as the internet, social media, or any other means*".
[311] UN Doc. S/RES/2178 (2014), 24 September 2014, para 21 – 25.

2.2 The UN Security Council Resolution 2249/2015: the right to self-defence against ISIL.

Security Council Resolution 2249/2015 represents a new chapter in the fight against terrorism since it introduces the concept of self-defence against terrorists, circumventing the prohibition of the use of force provided for by the UN Charter and it strengthens the UN security system. The resolution was adopted on 20 November 2015 in reaction to several terrorist attacks perpetrated by ISIL during that year in Sousse (June 2015), Ankara (October 2015), Sinai (October 2015), Beirut (November 2015) and in Paris (November 2015). First of all, it reiterates that Islamic terrorist groups constitute a threat to international peace and security, but it transcends in the determination of ISIL which is singled out as a "global and unprecedented threat to international peace and security"[312]. In light of this, the Council calls upon member states which

> *"have the capacity to do so to take all necessary measures, […] on the territory under the control of ISIL also known as Da'esh, in Syria and Iraq, to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by ISIL […] and to eradicate the safe haven they have established over significant parts of Iraq and Syria"[313].*

Here the language is prominent inasmuch Member States are called upon to implement "all necessary measures", term which is normally used as a reference to Chapter VII, especially in the authorizations of the Security Council to the use of force. These measures are crucial to the redoubling and coordination of the actions against ISIL which may occur only in the territories governed by ISIL in Syria and in Iraq. This means that the fight against the Islamic State must not infringe the sovereignty of Syria and in Iraq through efforts in their territories nor these efforts could take place in third states[314]. Moreover, the main purpose of these measures shall amount to the eradication of the save haven whom ISIL has built in Syria and in Iraq, entailing the use of military force. Yet, Resolution 2249/2015 does not account for an authorization to the use of force since it is not enacted under Chapter VII, so that a military intervention would be illegal. Likewise, self-defence and Article 51 of the Charter[315] are not mentioned in the resolution. Therefore, the resort to self-defence could be justified by the element of the "immediacy", or rather by the reference in the paragraph 1 of the resolution to the "capability

[312] UN Doc. S/RES/2249 (2015), 20 November 2015, para 5 of Preamble.
[313] *Ivi*, para 5.
[314] Hilpold P., *The Fight against Terrorism and SC Resolution 2249 (2015): towards a more Hobbesian or a more Kantian International Society?*, Indian Journal of International Law, 20 June 2016, p. 539.
[315] Article 51 of the UN Charter states that *"Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security".*

and intention [of ISIL] to carry out further attacks", implying that States are facing an imminent threat of attacks which could explain the ongoing operations against ISIL in parts of Syria and Iraq. In this regard, the Security Council reaches an important goal for it declares that the right to self-defence of States relies on their own right to self-defence without the necessity of the consent of the other States in which terrorists operate[316], namely Syria and Iraq, hence it is sufficient that they meet the criterion of the "immediacy" to carry out military attacks[317]. However, the "immediacy" shall not be interpreted as referring to actual and imminent armed attacks, but to the chance of further attacks which require the intervention of the member States.

In addition, the Resolution 2249 is quite unclear on who is entitled to avail of self-defence because it refers to all the States, even those which are distant from the region of the conflict, which "have the capacity to do so", without clarifying the meaning of the capacity. The latter could be material or military or it could relate to political or legal obstacles or simply to a matter of contributions, thus States shall intervene in the fight against ISIL on the basis of their capabilities[318]. Therefore, the Security Council makes a generalized appeal, circumscribed to the member States which could contribute, so that the other States are exempted[319]. Lastly, while each State could invoke its right to self-defence, it is also true that the Security Council encourages them to coordinate their actions in order to enhance the efficacy.

Furthermore, the resolution envisages an additional means of tackling the Islamic State which diverges from the military forces, that is the international criminal responsibility of terrorists and foreign terrorist fighters perpetrating terrorist acts. Indeed, acts of terrorism are deemed as criminal and "the continued gross systematic and widespread attacks directed against civilians, abuses of human rights and violations of international humanitarian law, including those driven on religious or ethnic ground, its eradication of cultural heritage and trafficking of cultural property"[320] evokes a criminal prosecution before the International Criminal Court (ICC) to

[316] For the interpretation of self-defence in the international law, see Hilpold P., *The evolving right of counter-terrorism: An Analysis of SC Resolution 2249 (2015) in view of some basic contributions in International Law Literature*, QIL, 29 January 2016; Nigro R., *La Risoluzione del Consiglio di Sicurezza delle Nazioni Unite n. 2249 (2015) e la legittimità dell'Uso della Forza contro l'ISIS in base al diritto internazionale*, Diritti Umani e Diritto Internazionale, vol. 10, n. 1, 2016.
[317] Weller M., *Permanent Imminence of Armed Attacks: Resolution 2249 (2015) and the Right to Self Defence against Designated Terrorist Groups*, EJIL Talk!, 25 November 2015, Available at: https://www.ejiltalk.org/permanent-imminence-of-armed-attacks-resolution-2249-2015-and-the-right-to-self-defence-against-designated-terrorist-groups/.
[318] Hilpold P. (2016a), *op. cit.*, p. 538.
[319] Hilpold P., *The evolving right of counter-terrorism: An Analysis of SC Resolution 2249 (2015) in view of some basic contributions in International Law Literature*, QIL, 29 January 2016, p. 18.
[320] UN Doc. S/RES/2249 (2015), 20 November 2015, para 5 of Preamble.

held the executors accountable because such activities could equate to crimes under Article 5 of the Rome Statute[321].

In conclusion, Resolution 2249 paves the way for future interventions against the Islamic State which shall be restricted to specific parts of Syria and Iraq and shall not trespass their sovereignty. It acknowledges the "immediacy" as the solely requirement to invoke the self-defence, but it also points out that military interventions in Syria and in Iraq against non-state actors has made recourse to the consent of the State or its cooperation. Indeed, the military intervention in Iraq has relied on the call for help made by the Iraqi government to cope with ISIL whereas the armed action in Syria has revealed the silent approval of the Assad government which agreed with the international community in perceiving the Islamic State as a global threat[322].

2.3 The UN Security Council Resolution 2396/2017: the threat of returnees.

For the sake of clarity, it is necessary to discuss the supplementary development of the UN counterterrorism framework which has equipped itself with legal instruments to handle the new menace, namely the returning or relocating FTFs. Indeed, the increasing number in the terrorist attacks committed by recruits of ISIL worldwide has shifted the focus from those fighters who leave their country of origin to fight in the ranks of ISIL to those individuals who return to their home country to perpetrate terrorist activities. The returnees are firstly mentioned by Resolution 2368/2017 in which States are urged to cooperate through sharing of information and best practices concerning those fighters "leaving zones of armed conflict, returning to their countries of origin, transiting through, traveling to or relocating to or from other Member States"[323]. Though, this concern is further explored by Resolution 2396, unanimously adopted on 21 December 2017, which brings up the issue of the risk associated with the returnees and relocators, or rather to those FTFs "returning or relocating, particularly from conflict zones, to their countries of origin or nationality, or to third countries"[324] in order to organize, plan and

[321] Hilpold P. (2016b), *op. cit.*, p. 32.
[322] Nigro R., *La Risoluzione del Consiglio di Sicurezza delle Nazioni Unite n. 2249 (2015) e la legittimità dell'Uso della Forza contro l'ISIS in base al diritto internazionale*, Diritti Umani e Diritto Internazionale, vol. 10, n. 1, 2016 p. 154.
[323] UN Doc. S/RES/2368 (2017), 20 July 2017, para 38 of Preamble.
[324] UN Doc. S/RES/2396 (2017), 21 December 2017, para 10 of Preamble.

participate in terrorist attacks against "soft" targets[325], prompted by the appeals of ISIL. The resolution reminds Resolution 2178/2014 inasmuch it extends the legal regime established by the latter against the volunteers joining ISIL on the ground to the individuals who return home or move to third countries after engaging in terrorism. This means that States are forced to prosecute the returning FTFs and penalize their activities, by introducing the criminal offences required by Resolution 2178 in their domestic law, while Resolution 2396 does not envisage new criminal offences. Though, the Security Council incorporates new obligations with regard to border security and information sharing in order to protect their citizens from the threat of the returnees: the first mandated measure relates to the detection and the disruption of the travel across borders through the Advance Passenger Information (API) and the Passenger Name Record (PNR), which basically imply that States must require passenger information from airlines operating in their territory[326]. In addition, States are called upon to develop watch lists and databases of known and suspected terrorists, including FTFs, in order to screen travellers and conduct investigations and to collect biometrics data, namely fingerprints, photographs and facial recognition, to identify FTFs and bring them to justice[327].

Moreover, Resolution 2396 "recognizes the need to counter this threat in a tailored, nuanced way"[328], meaning that Member States must implement appropriate actions especially in relation to the prosecution, rehabilitation and reintegration of FTFs and their accompanying families, including espouses and children. Here the Council stresses the need of the involvement of the civil society and educational institutions in elaborating strategies tailored to individual situations in order to reintegrate returning FTFs into their community and to prevent the radicalization of other individuals. Finally, the resolution fosters the coordination among the several counterterrorism bodies in tackling the threat of the returning or relocating FTFs, especially in ensuring capacity-building and technical assistance and in identifying new practices and requests the strengthening of the cooperation with INTERPOL and the private sector in gathering and sharing biometrics data[329].

[325] The soft target commonly refers to public spaces or other locations which are accessible to civilians and slightly protected, including markets, bus stations, schools and other religious institutions. The terrorist attacks on soft target are explained by the *ratio* of maximizing the civilian casualties and of producing a greater amount of terror.. See UN Counterterrorism Executive Directorate, *Analytical Brief: Responding to terrorist threats against soft targets*, 16 September 2019, Available at: https://www.un.org/sc/ctc/wp-content/uploads/2019/09/CTED-Analytical-Brief-Soft-Targets.pdf.
[326] UN Doc. S/RES/2396 (2017), 21 December 2017, para 11 – 12.
[327] *Ivi*, para 13, 15.
[328] UN Doc. S/RES/PV.8148 (2017), 21 December 2017, p. 3.
[329] UN Doc. S/RES/2396 (2017), 21 December 2017, para 45.

3. International soft law against Foreign Terrorist Fighters. Prosecution and reintegration.

3.1 The Hague – Marrakech Memorandum on Good Practices for a More Effective Response to the FTF Phenomenon (2014) and its Addendum (2015).

Outside the UN context, the international community has undertaken to tackle the phenomenon of FTFs through the gathering of experts which provide governments with good practices and recommendations relevant to the drafting of policies. In this regard, an informal platform was launched in New York in 2011, the Global Counterterrorism Forum (GCTF), with the purpose of facilitating the adoption of a long-term and comprehensive strategy to react to the threat of terrorism and to approach the conditions conducive to terrorism. It constitutes a major player due to the broad voluntary membership and to the reinforcing relations it maintains with the UN bodies and the regional and sub-regional organizations in order to tune a shared understanding of the FTFs patterns of radicalization, recruitment and travel[330]. In the official document, the 29 signing States[331] commit to strengthen the international cooperation regarding terrorism and set some fundamental principles about the forthright condemnation of the acts of terrorism and the necessity of a peaceful solution consistent with international law[332]. In addition, the GCTF shall supervise the proper implementation of the UN Global Counter-Terrorism Strategy and shall serve as a forum for national counterterrorism officials, policymakers and practitioners to share expertise and to develop solutions. It is composed of a Coordinating Committee and six working groups, one of which is geared to FTFs, chaired by Morocco and Netherlands.

As of September 2013, the two countries started to promote some meetings as part of the "Foreign Terrorist Fighters Initiative" among experts from various countries to share good practices in addressing the phenomenon of terrorism. After six meetings, on 23 September 2014

[330] Davis S., *Responding to Foreign Terrorist Fighters: A Risk-based Playbook for States and International Community*, Global Center on Cooperative Security, November 2014, p. 7.
[331] The founding States of the GCTF are: Algeria, Saudi Arabia, Australia, Canada, China, Colombia, Denmark, Egypt, United Arab Emirates, France, Germany, India, Indonesia, Italy, Japan, Jordan, Morocco, Netherlands, New Zealand, Nigeria, Pakistan, Qatar, United Kingdom, Russia, Spain, United States, South Africa, Switzerland, Turkey e European Union. UN takes part in the activities of the GCTF.
[332] GCTF Political Declaration, 22 September 2011, New York.

the Hague-Marrakech Memorandum on Good Practices for a More Effective Response to the FTF phenomenon was adopted during the GCTF Ministerial plenary meeting, predating the Resolution 2178/2014, introduced the following day, which reflects many aspects of the Memorandum. The latter is a non-binding document, i.e. the "soft law", intended to guide both signatory countries and those who are not party to it in the elaboration of the national strategies against FTFs. The Memorandum spots nineteen good practices contained in four macro-areas, covering the path of the foreign terrorist fighter from the radicalization to the ride home: violent extremism; recruitment and facilitation; travel and fighting; return. First of all, violent extremism programs require interstate cooperation and the collaboration of local communities since Islamist ideology could take root in every segment of the population. The crucial action concerns the implementation of non-violent counter-narratives and positive alternatives tailored to at-risk individuals in order to prevent radicalization and the recourse to violence as well as to ensure that those individuals could withstand extremist messages. These programs need to be extended to the online platforms for terrorist organizations take advantage of social media to recruit volunteers and to create communities. In addition, the GCTF suggests empowering youth, women and civil society in the drawing up of the counternarratives, especially those who are more susceptible to recruitment, and warns about the chance of bias in the identification of FTFs which may hinder the effectiveness of these programs[333].

Secondly, the Memorandum addresses the issue of recruitment and facilitation, by making it clear that recruitment consists of different techniques and could occur in different times. Indeed, the fighter could radicalize before or after traveling to the conflict zone and he could be the target of Internet campaigns or it could initiate the process due to ethnic, religious or linguistic affinity. Therefore, on one hand the GCTF advises to develop community awareness and encourages each community to communicate with other actors, especially in the framework of the inter- or intra-religions dialogue. Moreover, States could benefit from the use of law enforcement techniques to identify FTFs and the sanctions regime established by UNSC Resolution 1267 and following. On the other hand, States are encouraged to cooperate with INTERPOL and EUROPOL to gather information on FTFs and with Internet companies in order to monitor the activities of alleged terrorists on Internet, thus detecting the criminal conducts[334].

[333] Global Counter-Terrorism Forum, The Hague – Marrakech Memorandum on Good Practices for a More Effective Response to the FTF Phenomenon, 23 September 2014.
[334] *Ibidem.*

As concerned the third section, the document invites States to impede the travel of fighters through effective criminal and administrative measures. Indeed, the national authorities must introduce the criminalization of the preparatory acts other than rely on administrative and regulatory steps such as the denial or revocation of social benefits and passports[335]. Furthermore, the GCTF strengthens the air travel security measures by using specialized tools to screen the travellers, their luggage and potential weapons, by enhancing the interview protocols and by inspecting documents and identity papers to prevent forgery, counterfeiting and misuse and to halt the travel of FTFs, along with the collection of PNR information. No less importantly, the Memorandum recalls the obligations of the UNSC Resolutions, recommending the States to avoid that FTFs cross land borders and avail of their territory to prepare and plan terrorist attacks through surveillance and border patrol[336].

The last section relates to the problem of returning fighters which will be later deepened by the Addendum to the Memorandum adopted in 2015. Though, already in the 2014 Memorandum the GCTF lays down some good practices for the governments, from the law enforcement and the CVE perspective. States must anticipate returnees through the monitoring of the social media, blogs and the activities of family members, friends and relatives in order to detect them upon their arrival, asking for assistance from INTERPOL or other States. Once detected, the approach must be tailored on the basis of the nature of returnees and they encompass both the prosecution of the fighters and the disengagement and rehabilitation programs. The former implies that States "strengthen investigations and prosecutions of FTFs, when appropriate, through improved information sharing and evidence gathering"[337], thus through the recourse to mutual legal assistance. Finally, the motivational factors ought to be the discriminant in developing targeted programs, bearing in mind the need to involve the families and the communities connected to the returnees.

In 2015 the GCTF launched the "Initiative to Address the Life Cycle of Radicalization to Violence", empowering the working group to elaborate an Addendum to the Memorandum which was connected with and widening the good practices of the 2014 Memorandum concerning the new potential threat of the returning foreign terrorist fighters (RFTFs)[338]. The

[335] Global Counter-Terrorism Forum, "The Hague – Marrakech Memorandum on Good Practices for a More Effective Response to the FTF Phenomenon", 23 September 2014.
[336] *Ibidem.*
[337] *Ivi*, Good Practice #17.
[338] Bos W., van Ginkel B., Mehra T., *Capacity-Building Challenges: Identifying Progress and Remaining Gaps in Dealing with Foreign (Terrorist) Fighters,* ICCT – The Hague, May 2018, p. 7.

2015 Addendum fixes seven non-binding recommendations[339] including the consolidation of the international cooperation, the coordination between countries of origin, transit and destination and the information sharing among law enforcement authorities, intelligence, border control agencies and public prosecution services in order to timely detect RFTFs. In addition, the Addendum reiterates the necessity of targeted measures which shall consider the following factors:

> *"the risk the individual poses with respect to the commission of a terrorist attack; the gravity and seriousness of the crime; the available evidence; motivational factors; the age of the returnee; the support network of family and friends; the impact on victims; and the public interest"*[340].

The GCTF proposes to issue a comprehensive approach which combines prosecution with rehabilitation of the RFTFs, implemented before, during or after the criminal trial, meaning that rehabilitative measures are preferred over a prison sentence in order to better reintegrate the RFTFs into the society. In this regard, the returning minors form a special group inasmuch the prosecution and sentencing are strongly discouraged in favour of measures of child protection which include education, support and counselling.

Several other Memoranda were sponsored by the GCTF, focusing on some elements related to the Hague – Marrakech Memorandum: among them, the 2012 Rabat Memorandum on Good Practices for Effective Counterterrorism Practice in the Criminal Justice Sector, the 2012 Rome Memorandum on Good Practices for Rehabilitation and Reintegration of Violent Extremist Offenders, and its subsequent Addendum (2013), the 2013 Ankara Memorandum on Good Practices for a Multi-Sectoral Approach to Countering Violent Extremism.

[339] (1) "Ensure timely detection of, and intensify information sharing on returning FTFs within and between States." (2) "Use individual risk assessment tools that provide a basis for tailor - made interventions." (3) "Apply a case-by-case approach and address specific categories of returnees." (4) "Invest and develop a close partnership with local government and local communities to deal with returning FTFs." (5) "Engage and build sustainable partnerships with multi - disciplinary actors in the private sector and civil society organizations." (6) "Integrate rehabilitative measures within and beyond the criminal justice response." (7) "Consider using administrative procedures within a rule of law framework to effectively mitigate the risk posed by returning FTFs."

[340] Global Counter-Terrorism Forum, Addendum to the Hague-Marrakech Memorandum on Good Practices for a More Effective Response to the FTF Phenomenon, with a focus on Returning FTFs, 2015.

3.2 The Madrid Guiding Principles (2015) and its Addendum (2018) and The Malta Principles for Reintegrating Foreign Terrorist Fighters (2016).

Following the Resolution 2178/2014 which acknowledged the increasing threat posed by foreign terrorist fighters and pursuant to a statement by the President of the Security Council in November 2014, the CTC decided to arrange summits among member states, international and regional organizations in order to draw up recommendations for national authorities in addressing the menace of FTFs. On 27 and 28 July 2015, the Committee held a meeting, hosted by the Government of Spain in Madrid, which was preceded by technical sessions of the CTED in which the discussion revolves around the gaps in the capabilities of the states in implementing the binding SC resolutions and in developing successful strategies. Therefore, thirty-five Guiding Principles were identified, highly dependent on the findings of the 2014 Memorandum, and then adopted by the Security Council[341]. They are divided into three branches amounting to the various stages of the radicalization: the detection of, the intervention against and the prevention of the incitement, recruitment and facilitation of foreign terrorist fighters; the prevention of travel by foreign terrorist fighters; and criminalization, prosecution, international cooperation and the rehabilitation and reintegration of returnees.

As regards the first branch, the document states that an effective strategy is based on the involvement of different actors and on the strategic partnership between civil society and the government in order to identify the motives which justify the travel of the FTFs. In addition, it is recommended to enforce methods which monitor the interactions of the FTFs over the Internet and other communication technologies used as platforms for incitement and recruitment and to develop a counter-messaging[342]. Secondly, member States must hinder the movement of FTFs through operational measures, that is the collection, the analysis and the use of timely information regarding their activities, they must enhance the performance of the API and the PNR in order to strengthen the security of the borders to stem the flow of FTFs. Finally, the third theme relates to the initiatives to address terrorists and returnees by suggesting creating mechanisms for police-to-police cooperation, mutual legal assistance and joint investigations[343].

[341] UN Doc. S/2015/939, 23 December 2015.
[342] UN Security Council Counter-Terrorism Committee, Madrid Guiding Principles, 28 July 2015.
[343] Guiding Principle 33 of the 2015 Madrid Guiding Principles states that *"Member States, consistent with their national law and legal framework, should also consider establishing appropriate laws and mechanisms that allow for the broadest possible international cooperation, including effective joint investigations, the appointment of*

In the subsequent years, the slow crumbling of ISIL has shifted the focus of the international efforts to the RFTFs, so that additional principles were introduced by the CTC, pursuant to the request from Resolution 2396/2017 of reviewing the 2015 Madrid Guiding Principles in order to enhance the capabilities to detect, prosecute and reintegrate the terrorists[344]. Therefore, on 13 December 2018, the CTC convened a special meeting in New York enacting the Addendum to the 2015 Madrid Guiding Principles which provides with seventeen good practices. The latter concern measures to be taken in compliance with international law in the field of border security and information sharing; countering terrorist narratives; preventing and countering incitement and recruitment; countering violent extremism conducive to terrorism; judicial measures, including prosecution, rehabilitation and reintegration strategies; international cooperation; protecting critical infrastructure, vulnerable or soft targets and tourism sites; and preventing and combating the illicit trafficking of small arms and light weapons.

At last, worth mentioning is the joint initiative between the Hedayah Research Centre and the International Institute for Justice and the Rule of Law (IIJ), the Malta Principles for Reintegrating Foreign Terrorist Fighters, launched in 2016, which takes over the responsibility of delivering twenty-two non-binding principles, serving as a guidance to the national governments in the elaboration of community-based programmes on the reintegration of the RFTFs[345]. These programmes must meet some requirements, namely they need to be tailored to the specific features of the returnee as well as to the local and cultural conditions. In addition, they are obliged to comply with the basic human rights, that is the right to freedom of religion and opinion, other than the right to a fair treatment which represents the core of the rule of law[346]. The document is designed in four sections concerning different aspects of the programme, specifically the structure, the foundational elements, the role of the participants in the programmes and the reintegration components. First of all, the IIJ suggests governments concern to establish "clear goals and objectives", to adopt good practices in developing reintegration programmes and to make analysis of the returnees in order to learn about their background, to foresee the effects of the interventions and to adjust them, in case of failings[347].

liaison officers, police-to-police cooperation, the establishment of 24/7 networks for cooperation, the transfer of criminal proceedings and the transfer of sentences".

[344] UN Doc. S/RES/2396 (2017), 21 December 2017, para 44.

[345] UN Office on Drugs and Crime, *Foreign Terrorist Fighters: Manual for Judicial Training Institutes South-Eastern Europe,* Vienna, 2019, p. 41.

[346] Hedayah and The International Institute for Justice and the Rule of Law, "The Malta Principles for Reintegrating Returning Foreign Terrorist Fighters", 2016.

[347] *Ivi*, principles 1 – 3.

The second section is more meaningful because it provides a key role of the law enforcement in the reintegration initiatives, in which enforcement officials should be highly qualified in the recognition of radicalization, in the communication with the RFTFs and their family so as to gain their trust and the cooperation of the surrounding community, resulting in effective reintegration programmes. Along with the security forces, the document stresses the necessity of devising multidisciplinary reintegration strategies which rely on several experts from a wide range of fields, such as psychologists, social workers, religious scholars, youth services, community representatives, aftercare experts[348]. Each of them plays a specific role in dealing with RFTFs, though in the light of an essential coordination among government and civil society. In addition, we should not underestimate the crucial contribution of the victims of terrorist violence who could set up a dialogue with the RFTs in order to prove the wickedness of their acts and of the former extremists disengaged from terrorism who could lead the way on the reintegration into the society. In the last section, the Malta Principles focuses on the components of the reintegration initiatives which are asked to ensure cognitive skills programmes, education courses, employment assistance and aftercare programmes in order to prevent recidivism and to allow them to integrate within their community.

[348] *Ivi*, principle 7.

4. The counterterrorism framework of the Council of Europe before the Islamic State of Syria and the Levant: the 2005 Convention on the Prevention of Terrorism.

Before the "war on terror", earlier attempts at developing a pan-European strategy against terrorism failed because European States were not eager to cede their sovereignty in matters of security and criminal justice. The first successful response equated to the 1977 Convention on the Suppression of Terrorism which marked the principle of *aut dedere aut judicare* in respect of those responsible of terrorist offences provided in by Article 1[349]. These offences were deemed as "acts of terrorism", despite the fact that the term "terrorism" was not defined, thus they could not be prone to the exemption of political offences to extradition[350]. However, there was a limitation related to the non-discrimination clause inasmuch the extradition could be refused when the person would be prosecuted on grounds of race, religion, nationality or political opinion[351]. In this case, the State was obliged to prosecute the person in its territory.

The terrorist attacks in September 2001 displayed the limits of the 1977 Convention which was amended by the Multidisciplinary Group on International Action against Terrorism, resulting in a Protocol adopted in 2003. The latter provides an updated list of the offences of the Article 1 which were the expression of the new relevant UN convention and it precluded extradition to a country where there was the risk of torture, death penalty or life imprisonment without parole[352]. Even though the emergence of Islamic terrorism had moved the Council of Europe to work on a comprehensive regional convention, the Committee of Experts on Terrorism (CODEXTER) was entrusted with the adoption of various detached conventions dealing with different aspects of terrorism. Hence, the CODEXTER enacted the Convention on the Prevention of Terrorism in Warsaw in 2005[353] in order to prevent the perpetration of terrorist violence which affect human rights and especially the right to life through national measures

[349] The offences reflected the ones forbidden by the International Conventions adopted in those years, namely the offences within the scope of the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, the 1971 Convention for the Suppression of Unlawful Acts against the Safety of the Civil Aviation, "a serious offences regarding an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents" or "the kidnapping and the taking of hostages", or even the "use of bomb, grenade, rocket" and "an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence".
[350] Saul B. (2012), *op. cit.*, p. 147.
[351] Article 5 of the Convention on the Suppression of Terrorism, 27 January 1977.
[352] Article 4 of the Protocol amending the European Convention on the Suppression of Terrorism, 15 May 2003.
[353] The same day, the Council of Europe also adopted the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, tackling the financing of terrorism through money laundering from criminal activity or through legitimate activities.

and international cooperation. First of all, the Convention mentions the protection and support to victims of terrorism, it imposes a duty to investigate and reiterates the principle of *aut dedere aut judicare*. Then, it must be said that the Convention did not seek to define the notion of terrorism but it simply overlapped terrorism with the offences set up by the International Conventions[354]. The 2005 Convention did not introduce new terrorist offences but it requires Member States to criminalize three new offences which may lead to terrorist acts with effective, proportionate and dissuasive penalties, namely "public provocation to commit a terrorist offence", "recruitment for terrorism" and "training for terrorism", along with ancillary offences, defined as the complicity (aiding and abetting) in the commission of the aforementioned offences. Specifically, the Convention did not demand that an actual terrorist act took place for an offence to be committed. This implies that national authorities punished the executors of those crimes, irrespective of the actual commission of a terrorist attack and of the place in which it was committed[355].

The first offence is described as

> *"the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed*[356].

This provision poses some concerns since it exceeds the mere direct "incitement to terrorism" but it covers the indirect incitement and the *apologie*, or rather the public expression of support to terrorist organizations and the justification of terrorism. Indeed, the *ratio* of the criminalization of this conduct relies on the creation of "an environment and psychological climate conducive to criminal activity"[357], thus prohibiting the praise of the perpetrator of the attack, the denigration of the victims and the raising of money to fund the terrorist activities. Besides, the conduct must be combined with a specific intent to incite a terrorist offence and it must trigger a danger that an offence might be carried out. The second criminal offence is the "recruitment for terrorism", inveigling individuals to carry out, participate in or contribute to

[354] It is also true that the 2005 Convention identifies in the preamble acts of terrorism as having *"the purpose by their nature or context to seriously intimidate a population or unduly compel a government or an international organisation to perform or abstain from performing any act or seriously destabilise or destroy the fundamental political, constitutional, economic or social structures of a country or an international organisation".*
[355] Council of Europe, Explanatory Report to the Council of Europe Convention on the Prevention of Terrorism, Council of Europe Treaty Series No. 196 (16 May 2005), para 123.
[356] Article 5 of the Convention on the Prevention of Terrorism, 16 May 2005.
[357] Saul B. (2012), *op. cit.*, p. 150.

terrorist attacks. Member States must criminalize the specific intent of the recruiters who solicit recruits via internet or one-on-one, even though the recruits do not actually perpetrate terrorist acts[358]. However, the Convention is silent on the criminalization of the conduct of receiving training for the purpose of committing terrorist violence. Lastly, the Council of Europe urges States to criminalize the "training for terrorism", defined as the supplying of military instructions for the purpose of the commission of a terrorist offence.

Coupled with the 2005 Convention, the Council of Europe dealt with terrorism from the perspective of the protection of human rights, as stated by the Convention on Human Rights. In 2002 the Council of Ministers elaborated a document, the Guidelines on human rights and fight against terrorism, which lays down a positive obligation and a negative one. The former entails that States need to protect people within their jurisdiction against terrorist acts, especially their right to life, whereas the latter recognizes that States must respect basic conditions in the implementation of measures against terrorists[359], namely the prohibition of arbitrariness and the torture, legal guarantees for arrest, the right to a fair trial, the prohibition of extraditing a terrorist to a country in which he could be subject to torture or death penalty.

4.1 The follow-up of the UN Security Council Resolution 2178/2014: the Additional Protocol to the Council of Europe Convention on Prevention of Terrorism (2015) and the Counter-Terrorism Strategy for 2018 – 2022.

The adoption of the Security Council Resolution 2178/2014 envisaged the obligation for Member States to criminalize the preparatory acts of terrorism. In turn, this propelled the Council of Europe to step forward in addressing terrorism through measures supplementing the 2005 Convention which prevented and stemmed the flow of the FTFs. Therefore, in November 2014 the CODEXTER initiated to investigate the issue of radicalization and foreign terrorist fighters, configuring the Committee on Foreign Terrorist Fighters and Related Issues (COD-CTE) to draft an Additional Protocol to the 2005 Convention which was presented in April 2015 and then introduced on 19 May 2015 by the Committee of Ministers. The purpose of the Additional Protocol was the criminalization of several offences committed intentionally, thus

[358] Explanatory Report, para 109.
[359] Nesi G., *op. cit.*, p. 142.

implementing the criminal requirements of the Resolution 2178/2014 without paying attention to the other measures envisaged there[360]. In addition, the targets of the Additional Protocol are the FTFs, though they are not mentioned in the text but in the preamble they are defined on a par with Resolution 2178/2014 as "persons travelling abroad for the purpose of committing, contributing to or participating in terrorist offences, or the providing or receiving of training for terrorism in the territory of another State"[361].

Articles 2 to 6 of the Additional Protocol constitute the key provisions of the Protocol, identifying the five offences of a preparatory nature to be criminalized due to their potential of inducing the commission of terrorist acts, respectively: participating in an association or group for the purpose of terrorism; receiving training for terrorism; travelling abroad for the purpose of terrorism; funding travelling abroad for the purpose of terrorism and organizing or otherwise facilitating travelling abroad for the purpose of terrorism. The conducts share the irrelevance of the place in which they are carried out and the fact that they are committed unlawfully and intentionally, meaning that the authors hold a terrorist purpose or they are aware of the terrorist purpose[362]. More specifically, Article 2 deals with the active participation in the activities of a terrorist organization to perpetrate terrorist offences, thus excluding the passive affiliation or the membership in an inactive organization[363]. Article 3 is noteworthy because it inserts the receipt of training in the list of offences criminalized by the Council of Europe, integrating the offence of "training for terrorism" in Article 7 of the 2005 Convention. Here the receptor could be trained in the camps run by terrorist organizations in the conflict zones or via Internet and social media, though they must possess the purpose of committing or contributing to commit a terrorist act[364]. Article 4 has been long debated because of the implications for the freedom of movement, so that the COD-CTE stipulates that the criminalization of the travels must include only those who own the specific-intent of perpetrating or participating in a terrorist offences and who are committed intentionally and unlawfully[365].

[360] Bilkova V., *op. cit.*, p. 9.
[361] Council of Europe, Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, Council of Europe Treaty Series No. 217 (22 October 2015), preamble.
[362] Council of Europe, Explanatory Report to the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, Council of Europe Treaty Series No. 217 (22 October 2015), para 28.
[363] *Ivi*, para 33.
[364] *Ivi*, para 40.
[365] *Ivi*, para 48.

Moreover, States are encouraged to "establish conditions required by and in line with its constitutional principles"[366] in the implementation of measures prohibiting travelling across the borders. This means that States could resort to other strategies in the context of the border security in order to deny entry into, transit through and departure from their territory[367]. Finally, the provision also envisages that the attempt to travel fits into the criminal offences, whether as the preparatory act or as the attempt to the terrorist offence provided in by Article 1[368]. The last two conducts mirror the Resolution 2178, punishing the direct or indirect intentional financing to the travelling of a person who have recourse to terrorist violence and the organization or the facilitation of the travelling of the individual, covering the planning of itineraries or the assistance in crossing the borders. Lastly, the Additional Protocol fosters the international cooperation among national authorities by exchanging information on the travellers and appointing focal points for the expedited communications, the 24/7 Network for Exchange of Police Information regarding Foreign Terrorist Fighters. It establishes the necessity of the full respect of human rights, rule of law and the principle of proportionality, which prohibits any form of arbitrariness and discriminatory treatment, in the implementation of the State obligations regarding the criminalization of terrorist offences.

Along with the instruments dealing with the criminalization of the terrorist offences, in 2015 the Committee of Ministers elaborated an Action Plan, covering the period 2015 – 2017, which focused on the fight against violent extremism and radicalization leading to terrorism in order to deliver to States recommendations for their measures against terrorism. The Action Plan encouraged to adopt measures concerning education in schools or in prisons in order to prevent individuals from embracing violent extremism and it boosted the creation of a counter-narrative which highlights the drawbacks of the *jihad* and of the ISIL. However, as a consequence of the renovation of the threat posed by ISIL, the Committee of Ministers tasked the CODEXTER to revise the Action Plan and to draw up the Counter-Terrorism Strategy for 2018 – 2022[369]. In the first place, it spurs the cooperation among States and various subnational or intergovernmental organizations which may count on the assistance of the Council of Europe. Besides, it is characterized by three sections, "the three P's", i.e. prevention, prosecution and

[366] Article 4 para 2 of the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, 22 October 2015.
[367] Munoz G. A., *Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism*, European Papers, Vol. 1 No. 1, 2016, p. 350.
[368] Article 4 para 3 of the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, 22 October 2015.
[369] Council of Europe CDCT, Council of Europe Counter-Terrorism Strategy (2018-2022), CM (2018)86-addfinal (4 July 2018).

protection, each corresponding to a list of activities to be implemented by member States, other than the working methods and the expected outcomes for each activity[370].

Firstly, the preventive phase is composed of law enforcement measures to abort the terrorist attacks or the preparation thereof as well as of comprehensive measures addressing the conditions conducive to terrorism, or rather the recruitment, the training or the financing of terrorism. This requires the support of a plurality of players from many sectors of the society which shall work in compliance with the principle of non-discrimination. As regards the best practices, the Strategy suggests preventing and countering public provocation, propaganda, recruitment and training in public places and on the internet through the partnerships with internet service providers which shall be prompted to a responsible conduct in banning the violent contents and in restricting the access to suspected terrorists. In addition, the Council of Europe invites to pose the attention on the "terrorists acting alone"[371] who are more likely to commit a terrorist attacks, thus setting risk indicators to detect them. The second strand concerns the prosecution of suspected terrorists and FTFs which shall be ensured in order to avoid impunity, in conformity with human rights and rule of law. The Strategy urges member States to investigate quickly and efficiently through gathering information from the conflict zones, including forensic evidences during or after the battle, to bring FTFs to justice or from internet and social media platforms, still relying on the international cooperation in the field of evidence collection or mutual legal assistance. The latter represents the response to the transnationality of the terrorist attacks and to the movements of FTFs and it is embodied by the joint investigative teams or by the resort to the principle of prosecute or extradite or even by the transfer of criminal proceedings in third states[372]. Finally, the protection is reserved to citizens and to critical infrastructures and public spaces which constitute the primary targets of the terrorist violence. This treatment could be ensured through de-radicalization or disengagement programmes for vulnerable individuals which are engaged in the path of radicalization or for returnees which shall be reintegrate into the society, as well through the assistance and compensation guaranteed to the victims of terrorism to relieve their suffering[373].

[370] UN Office on Drugs and Crime, *op. cit.*, p. 50.
[371] Council of Europe CDCT, Council of Europe Counter-Terrorism Strategy (2018-2022), CM (2018)86-addfinal (4 July 2018), p. 6.
[372] *Ivi*, p. 9.
[373] This good practice reflects Article 13 of the 2005 Convention for the Prevention on Terrorism which states that *"Each Party shall adopt such measures as may be necessary to protect and support the victims of terrorism that has been committed within its own territory. These measures may include, through the appropriate national schemes and subject to domestic legislation,* inter alia, *financial assistance and compensation for victims of terrorism and their close family members"*.

5. The European Union Counter-Terrorism action after 9/11: the 2002 Framework Decision on Combating Terrorism and the European Arrest Warrant.

Before the 9/11 attack, the strategy of the European Union against terrorism was unremarkable because it was the reflection of the building of the subnational organization occurring in the Nineties. Though, the terrorist attack in 2001 ignited a harsh response from the European Union which implemented the Resolution 1373/2001 through three measures: the Framework Decision on Combating Terrorism (FDCT) intended to harmonize the definition and the sentencing of the terrorism; the Framework Decision on the European Arrest Warrant (EAW) aimed at imposing a new procedure for extradition and the targeted sanctions regime mirrored to the UN 1267/1373 Sanctions regime. They were adopted on 13 June 2002 by the European Council without mentioning the Al-Qaeda attack but describing terrorism as "one of the most serious violations of principles"[374] on which EU is founded, namely the respect of human rights, democracy and rule of law. The Framework Decisions are elaborated as an instrument binding upon Member States which are obliged to transpose the obligations contained in these directives into the national law.

First of all, the FDCT encourages Member states to take the necessary measures at the domestic level to make certain international acts terrorist offences by providing a general definition of terrorism, based on three elements, that is the action, the motivation and the context. The acts are listed in the Article 1(1) and include not just the offences comprised in the International Conventions, some of which equipped with a wider scope, but also additional offences as the release of dangerous substances interfering with or disrupting water supply and the threatening to commit such acts[375]. Yet, the key element distinguishing ordinary crimes from terrorism is the motivation, which does not equate to the religious, political or ideological cause but it amounts to the purpose of the perpetrators, namely the intimidation of a population, the unduly compulsion of a government or international organization to perform or abstain from performing a certain action and the destabilization of the national structures[376]. In addition to

[374] EU Framework Decision 2002/475/JHA of 13 June 2002 on Combating Terrorism, para 2 of Preamble.
[375] Murphy C., *EU Counter-Terrorism Law: Pre-Emption and the Rule of Law*, Hart Publishing, 2012, p. 56.
[376] While the first two purposes are already located in the definition of terrorism envisaged by the 1999 Terrorist Financing Convention, the destabilization of the fundamental structures of a state is entirely new. This was the subject of a debate: scholars assuming the reference to the market society against those who believed in the connection with the ideological status quo, and others who considered it as unnecessary, so that the Draft Comprehensive Convention on Terrorism decided to put aside the third purpose. See more in Murphy C., *op. cit*., p. 58 – 59.

the terrorist aim, the offences must be committed in a context in which they "may seriously damage the country or an international organization", pointing out that an actual damage is unnecessary.

Furthermore, the FDCT envisages other offences related to a terrorist group, which is featured as "structured group of more than two persons, established over a period of time and acting in concert to commit terrorist offences"[377]. This means that the group does not necessarily possess a hierarchy or fixed membership but it is crucial the perpetuity of the group which exceeds the mere perpetration of a single act. In this regard, Member States must implement the criminalization of the directing of or the participation in the activities of such a group[378]: on one hand, directing is not specified in the FDCT, so that it criminalizes all kinds of directions, whether lawful or unaware of the illegal activities of the group[379]. On the other hand, participation is defined as the supply of information or material resources and the financing of the activities when the individual is fully aware of the criminal activities of the terrorist group. In parallel, the FDCT provides three offences linked to terrorist activities, i.e. aggravated theft, extortion and drawing up false administrative documents with the purpose of committing the acts provided in by Article 1 (1)[380] and urges the penalization of the inciting, aiding or abetting an offence and the attempt at committing an offence referred to in Article 1 (1) or Article 3[381].

It is important to stress the fact that the FDCT requires that the sentences must be effective, proportionate and dissuasive, empowering the Member States to choose the penalties. The latter should necessarily foresee the extradition and they must be heavier than the penalties provided in by the national law for similar crimes without the specific purpose which characterizes the terrorist offences[382]. Though, the Decision establishes binding standards regarding a maximum sentence of fifteen years for directing a terrorist group and eight years for the participation in the activities of such group[383]. Here the principle of the universal regional jurisdiction is enshrined in order to avoid impunity, entailing that a Member State could extend its jurisdiction over crimes committed by its citizens or residents in the territory of another EU country, and over offences committed anywhere in the EU against EU institutions. Finally, the Member

[377] The Framework Decision also gives the definition of the structured group as "*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".*
[378] Article 2 (2) of EU Framework Decision 2002/475/JHA of 13 June 2002 on Combating Terrorism.
[379] Saul B. (2006), *op. cit.*, p. 168.
[380] Article 3 of EU Framework Decision 2002/475/JHA of 13 June 2002 on Combating Terrorism.
[381] *Ivi*, Article 4.
[382] Feinberg M., *op. cit.*, p. 92.
[383] Article 5 (3) of EU Framework Decision 2002/475/JHA of 13 June 2002 on Combating Terrorism.

States could establish their jurisdiction for the offences in Article 1 – 4 in cases in which the extradition or the surrender of the terrorist are not feasible, complying with the principle *aut dedere aut judicare*[384].

In 2008 the EU amended Article 3 and 4 of the 2002 Framework Decision[385], creating three new offences linked to terrorist activities, or rather the public provocation to commit a terrorist offence, the recruitment and the training for terrorism[386]. In all instances, the new line Article 3 (3) elucidates the irrelevance of the nexus between the linked offences and the actual harm resulting from an act of terrorism, implying that the abovementioned terrorist offences could be punished long before the commission of a terrorist act[387]. The amended Article 4 criminalizes the aiding or abetting of a terrorist act, an offence related to a terrorist group or an offence linked to terrorist activities whereas the incitement does not cover the new offences introduced by the amended Article 3. Finally, Member States must prosecute terrorists responsible for attempting to commit a terrorist act and the three original offences related to terrorism as well as the attempt to recruit and to train for terrorism[388].

A significant contribution to the EU counterterrorism system derives from the Framework Decision on the European Arrest Warrant[389] which tackles the issue of the judicial cooperation by simplifying the procedure of extradition in order to ensure the expedited transfer of suspects or convicts, thus replacing the traditional system of extradition embedded in the Council of Europe Conventions with the mutual recognition of arrest warrants issued by the EU member states. This in turn leads to the new practice of surrender. In this regard, the EAW abolishes the principle of dual criminality, which states that an act shall be criminal in both the requesting and extraditing State, since a State could issue a warrant for a person responsible for thirty-two offences listed by Article 2 (2), including terrorism, if they are punished by the national legal systems with a maximum custodial sentence of no less than three years[390]. Therefore, the Framework Decision imposes the form and the content of the warrant which is specified in the annex while it hands over to the member States the ability to set up the conditions in which the

[384] Nesi G., *op. cit.,* p. 217.
[385]Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on Combating Terrorism.
[386] The 2008 Framework Decision traces the 2005 Council of Europe Convention for the Prevention of Terrorism with regard to the description of these offences. See *supra* note 116 and Article 6 – 7 of the 2005 COE Convention.
[387] Geneva Academy, *op. cit.,* p. 46.
[388] Murphy C., *op. cit.*, p. 68.
[389] Article 1 of the Framework Decision defines the EAW as *"a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order".*
[390] Murphy C., *op. cit.*, p. 191.

warrant is adopted. As a matter of fact, there are exemption clauses which constitute the grounds for refusal of extradition. On one hand, there are the mandatory grounds which amount to the amnesty in the executing State, to the principle of *ne bis in idem* and to the minority of the subject of the EAW[391] whereas the optional grounds include the absence of dual criminality for the offences not laid down by the Article 2 (2), the territoriality, pending proceeding in the executing State or limitation. Moreover, the judicial authority could reject the EAW when the issuing State does not provide with various guarantees, *inter alia* the review of the judgment in cases of life imprisonment or the custody in the executing State.

The last action within the counterterrorism framework was embodied by the targeted sanctions regime in order to suppress and prevent the perpetration of terrorist attacks. In the first place, the EU replicated the list drawn up by the 1267 Sanctions Committee, imposing restrictive measures against Taliban, Al-Qaeda and its associated persons and entities, namely the assets freeze and the travel ban[392]. Subsequently, the EU implemented the Resolution 1373 through the creation of a separate sanctions list of individuals and entities properly identified which are subject to the assets freeze and to the prohibition of financial services. The Council is entitled to add in the list persons, groups or entities which are accountable for committing, attempting to commit, facilitating or participating in terrorist acts as well as for directly or indirectly financing terrorist activities[393]. In turn, Member States could punish the circumvention of the sanctions through effective, proportionate and dissuasive penalties[394]. Finally, this regime has primed criticism regarding the potential infringements of the fundamental human rights and freedoms along with the right to *due process* and to presumption of innocence which caused the opening of proceedings before the European Court of Justice[395].

[391] Article 3 of Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States.
[392] Council Common Position 1999/727/CFSP of 15 November 1999 concerning restrictive measures against the Taliban; Council Common Position 2001/154/CFSP of 26 February 2001 concerning additional restrictive measures against the Taliban; Council Regulation 467/2001 of 6 March 2001.
[393] Nesi G., *op. cit*., p. 234.
[394] Article 9 of Council Regulation 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism.
[395] For a detailed analysis on the violation of human rights in fighting terrorism, see Nesi G., *International Cooperation in Counter-Terrorism: The United Nations and Regional Organizations in the Fight against Terrorism*, Aldershot; Burlington, VT: Ashgate, 2006; Murphy C., *EU Counter-Terrorism Law: Pre-Emption and the Rule of Law*, Hart Publishing, 2012; Eckes C., *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions*, Oxford University Press, 2009.

5.1 The problem of Foreign Terrorist Fighters: the EU Counter-Terrorism Strategy and the four strands of work.

The European Union counter-terrorism strategy was completely determined in 2005 after the terrorist bombings in Madrid (March 2004) and London (July 2005) which prompted the cooperation among Member States to strengthen the efforts against terrorism. In November 2005, the European Council adopted the European Union Counter-Terrorism Strategy (EUCTS)[396] which endeavour to enclose several measures into a single framework. The Strategy is a non-binding multidimensional instrument founded on four pillars: "Prevent", "Protect", Pursue" and "Respond" which account for the strategic objectives, together with the essential engagement with international partners. The first strand entails the attention to the roots of radicalization and terrorism recruitment due to the increasing threat stemming from the "home-grown" terrorism within the EU, as testified by the Madrid and London attacks[397]. Given this, the 2005 Strategy for Combating Radicalization and Recruitment to Terrorism appeals "to identify and counter the ways, propaganda and conditions through which people are drawn into terrorism and consider it a legitimate course of action"[398] by annihilating the activities of the terrorist networks, ensuring that the moderate Islamic prevails over the extremist ideology and by promoting human rights, democracy and opportunities to the potential terrorists.

Secondly, the Strategy heads at the sheltering of high-value targets, that is the citizens and infrastructures, through the reduction of their vulnerabilities and the impact of the attacks upon them. This could be accomplished by securing external borders, raising standards in transport security and protecting critical infrastructure (transport, energy, communication networks including the struggle against cyberterrorism). The third pillar revolves around the investigation and prosecution of terrorists and their affiliates across the borders as well as around the destruction of the capacities of terrorists to plan, organize terrorist attacks and to access to funds and other materials. In this sense, the Strategy encourages to facilitate the judicial and police cooperation, to enhance the national competences and particularly to tackle the financing of terrorism. Responding to the attacks represents the fourth objective of the Strategy, in order to handle the aftermath of the attacks and to alleviate the suffers of the victims. Hence, Member States shall improve their capacities in the field of civil protection and crisis management, share

[396] Council of the European Union, European Union Counter-Terrorism Strategy, 14469/4/05 REV 4, 30 November 2005.

[397] Monar J., *Common Threat and Common Response? The European Union's Counter-Terrorism Strategy and its Problems*, Government and Opposition, Vol. 42, No. 3, pp. 292–313, 2007, p. 296.

[398] Council of the European Union, European Union Strategy for Combating Radicalisation and Recruitment to Terrorism, 14781/1/05 REV 1, 24 November 2005, para 4.

best practices on the assistance to the victims and develop risk assessment approaches. Hence, the Strategy suggests revising the EU Community Mechanism for civil protection built after 9/11, crucial to the information exchange and cooperation in case of emergencies, by creating a fund for victims and a specific procedure, the EU emergency and crisis coordination arrangement[399].

5.1.1 Prevent: the Radicalization Awareness Network.

The 2005 Counter-Terrorism Strategy constitutes the foundation for tackling the threat of foreign terrorist fighters since the EU enacted measures provided in by the four pillars and it adopted in March 2015 the EU Regional Strategy on Syria and Iraq as well as the ISIL/Da'esh Threat[400] modelled on this. Indeed, the Council firstly acknowledges the purpose of the strategy in reducing the risks for European countries and the threat to the Middle Eastern stability as well as in defeating ISIL and Al-Nusra and then lays down some priorities for action in the four strands of work. Firstly, the prevention consists in the submission of non-violent alternatives to those who are more prone to travelling to the Syrian war, along with the task of checking the social media, being a platform for online incitement and recruitment, and the cooperation with third Muslim countries which are the primary source of FTFs[401]. In this regard, already in 2011 the European Commission launched the Radicalization Awareness Network (RAN), the key instrument in countering terrorism, organized around Working Groups which are composed of practitioners and local actors who share expertise and good practices. The aim of the RAN is to help elaborate strategies to prevent the radicalization through the collection of initiatives addressing the FTFs, namely the 2016 RAN Collection: Preventing Radicalization to terrorism and violent extremism, which targets the conditions conducive to terrorism, underlying the importance of the dialogue and the education and the 2017 RAN Manual which provides Member States with recommendations to handle the issue of returnees and their families.

[399] Bossong R., *The EU's Mature Counter-Terrorism Policy – A Critical Historical and Functional Assessment,* LSE Challenge Working Paper, June 2008, p. 18.
[400] Council of the European Union, EU Regional Strategy for Syria and Iraq as well as the ISIL/Da'esh threat, 7267/15, 16 March 2015.
[401] Council of the European Union, Outline of the counter-terrorism strategy for Syria and Iraq, with particular focus on foreign fighters, 5369/15, 16 January 2015, para 9.

Later, in June 2014, following the RAN guidelines, the Council revised the 2005 EU Strategy on Preventing Radicalization and Recruitment, which identifies internal and external priority actions, including capacity building, counter-narratives and the promotion of equal opportunities.[402] In addition, the Revised Strategy fosters the coordination with the civil society and the private sector and the development of joint efforts at local, national and international levels, it boosts the research to understand the phenomenon of radicalization and seeks to reintegrate former terrorists[403]. In the same year, the RAN organized a Cities Conference in which policy-makers elaborated a document containing twenty-one good practices to cope with FTFs before, during and after the travel, i.e. the RAN Declaration of Good Practices for Engagement with Foreign Fighters for Prevention, Outreach, Rehabilitation and Reintegration.[404] Indeed, the latter furthers measures to support families of terrorists and individuals at risk of radicalization, but mainly, it establishes the methods and the aims of the engagement approach, in relation to trust-building, content knowledge and organization of implementation[405].

Finally, the EU addresses the radicalization through online initiatives devoted to the spread of counter-narratives, to the interdiction of terrorist content useful for the recruitment and incitement to violence and to the dialogue with internet companies, thus setting up the EU Internet Referral Unit within the EUROPOL in July 2015. The unit is charged with identifying extremist messages on internet and advising Member States on the matter in conjunction with the EU Internet Forum, empowered with improving the means of monitoring and removing the indicted content and with creating effective counter-narratives[406].

---

[402] Royal United Services Institute (RUSI) and Civipol, *Operational Guidelines on the preparation and implementation of EU financed actions specific to countering terrorism and violent extremism in third countries,* Brussels, European Commission, November 2017, p. 16.

[403] Council of the European Union, Revised EU Strategy for Combating Radicalisation and Recruitment to Terrorism, 9956/14, 19 May 2014.

[404] Radicalization Awareness Network, The RAN Declaration of Good Practices for Engagement with Foreign Fighters for Prevention, Outreach, Rehabilitation and Reintegration, November 2013.

[405] Hennessy O., *The Return of Europe's Foreign Fighters*, International Centre for Counter-Terrorism – The Hague, 2 April 2014.

[406] Bakowski P., Puccio L., *Foreign Fighters – Member State response and EU action,* European Parliamentary Research Service, March 2016, p. 5. The Forum is composed of ministers of interior, internet companies and the European Parliament with the purpose of encouraging Internet companies as Facebook, Google and Twitter to contribute directly to counterterrorism by banning the illegal content.

5.1.2 Protect: the Passenger Name Records (PNR) and Schengen Borders Code.

The EU Regional Strategy on Syria and Iraq as well as the ISIL/Da'esh Threat forged the second pillar around the protection of citizens and critical infrastructure by strengthening the aviation security and disrupting the illicit trafficking of conventional and technological weapons[407]. Indeed, the EU Council engaged in detecting the travel of individuals with suspicious purposes, thus implementing several measures which help prevent and detect FTFs before their arrival in the conflict zone. Therefore, in April 2016 the amended directive on the EU Passenger Name Record was adopted, dictating that the airlines are required to provide to Member States with information of passengers, including name, travel dates, itineraries, seats, baggage, contact details and means of payment. On one hand, air carriers bear the responsibility for transferring data on passengers on extra-EU flights (departing or entering from EU), and in certain instances Member States could request the PNR information concerning intra-EU flights[408]. On the other hand, Member States ought to establish the Passenger Information Units, specific entities which could collect and process the data exclusively to identify, investigate and prosecute persons who are involved in terrorist offences or serious crimes[409] and to share them with third countries. This means that the PNR data serve for the identification of FTFs before or after the travel or for the development of risk assessments or even for investigations and prosecutions[410].

In conjunction with the PNR data, in March 2017 the EU Council adopted a Regulation amending the Schengen Borders Code in order to consolidate the external borders checks against all relevant databases. While the checks were normally performed at the external borders on third country nationals for reasons of public order, national security and health, the EU citizens were subject to minimum checks on entry due to their right of free movement[411]. This highlights the necessity of a revision of the Schengen Borders Code to tackle the threat of the FTFs, many of which are EU nationals. Accordingly, the amendment stipulates that Member States must carry out systematic checks against the Schengen Information System (SIS), the INTERPOL's Stolen and Lost Travel Documents (SLTD) and national databases on all

[407] Council of the European Union, EU Regional Strategy for Syria and Iraq as well as the ISIL/Da'esh threat, 7267/15, 16 March 2015, p. 21.
[408] Scherrer A., *op. cit.*, p. 9.
[409] Article 6 (2) of EU Directive 2016/681 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, 27 April 2016.
[410] https://www.consilium.europa.eu/en/policies/fight-against-terrorism/passenger-name-record/. In this regard, the Directive envisages safeguards for the protection of the right to privacy, to the protection of personal data and to non-discrimination, namely the creation of a specific unit dealing with the protection of the data or the awareness of the collection of PNR data by the passengers or the depersonalization after a period of six months.
[411] Scherrer A., *op. cit.*, p. 10.

individuals, whether European or not, in order to detect potential identity fraud. The checks shall be applied at all external borders (air, land and sea ones), both at entry and exit[412]. In this matter, the Commission updated the Practical Handbook for Border Guards (Schengen Handbook) which inserts a list of risk indicators for non-systematic checks used by Member States to better identify the RFTFs. Moreover, in November 2018 the Council reinforced the SIS database contained alerts on FTFs or terrorist suspects which are prohibited to enter and stay in the Schengen area or they are wanted or missing[413]. The SIS is extended to the field of judicial and police cooperation in criminal matters, it introduces new alerts on unknown wanted persons connected to a crime and new checks which allow national authorities to investigate more deeply and it expands the use of facial images, fingerprints, palm prints and DNA data[414].

Finally, in April 2017 the Council revised the 91/477/EEC Directive on the control of the acquisition and possession of weapons[415], prescribing stricter rules on the purchase and the movement of firearms. The amended Directive provides with the traceability of the firearms through their marking and with the deactivation of the firearms which need to be declared and then classified under category C. In addition, the Member States must exempt some individuals from the prohibition of purchasing weapons on strict grounds and they must prevent the civilian use[416].

5.1.3 Prosecute: the EU Directive 2017/541 and the criminalization of the terrorism-related travel.

After the Paris attacks in November 2015, the European Union initiated its overhaul of the 2002 FDCT in order to comply with the obligations stemming from the UN Resolution 2178 which requires the criminalization of the preparatory acts to terrorism. This falls into the third pillar of the EU Regional Strategy on Syria and Iraq as well as the ISIL/Da'esh Threat, the *Pursue*, which is based on three strands: the investigation, prosecution and incarceration of the terrorists;

[412]https://www.consilium.europa.eu/en/press/press-releases/2017/03/07/regulation-reinforce-checks-external-borders/.
[413] Scherrer A., *op. cit.*, p. 10.
[414] Atanassov N., *Revision of the Schengen Information System for law enforcement*, European Parliamentary Research Service, October 2018, p. 6.
[415] Council of the European Union, Directive 62/16 amending Council Directive 91/477/EEC on control of the acquisition and possession of weapons, 29 March 2017.
[416]https://www.consilium.europa.eu/en/press/press-releases/2017/04/25/control-acquisition-possession-weapons/.

the dismantling of the facilitation and recruitment networks and the struggle against the funding sources[417]. In this sense, in March 2017 the Council adopted the Directive 2017/541 on combating terrorism[418] which strengthens the counterterrorism framework and introduces new terrorist offences. The Directive confirms three categories of terrorist conduct: terrorist offences, offences relating to a terrorist group and offences related to terrorist activities. While the first two do not differentiate from the provisions of the 2002 FDCT, the offences related to terrorist activities, which already include the public provocation to commit a terrorist offence, recruitment for terrorism and providing training for terrorism, are widened with four new terrorist offences which are prodromal to the commission of terrorist acts, namely receiving training for terrorism, travelling or organizing and facilitating travelling for the purpose of terrorism and terrorist financing. This implies that a connection may subsist between these offences and the terrorist attacks, even though it is not necessary to prove that an actual terrorist act is committed and there is an actual link with the terrorist offences[419].

Starting from the first terrorist offence, the receiving of training for terrorism is a significant step forward in the European law because even the 2008 Framework Decision failed to criminalize the passive behaviour of the training. This is characterized by the intentional learning of methods, techniques and practical skills beneficial to commit and contribute to commit terrorist acts through meetings with recruiters or through social media and blogs[420] (here the self-learning is covered due to the increasing number of self-radicalised which train through materials on internet). Furthermore, the Directive deals with the relentless flow of FTFs by regulating the travels for the purpose of terrorism and the organization and facilitation of such travels. Indeed, Member States must criminalize two classes of offences, that is the outbound travel to a country other than the country of origin outside the EU territory "for the purpose of committing, or contributing to the commission of, a terrorist offence, 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, or for the purpose of the

[417] Council of the European Union, Outline of the counter-terrorism strategy for Syria and Iraq, with particular focus on foreign fighters, 5369/15, 16 January 2015, p. 5.
[418] EU Directive 2017/541 of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, 31 March 2017.
[419]Redazione Altalex, *Contrasto al terrorismo: la nuova direttiva europea*, Altalex, 6 June 2017, Available at: https://www.altalex.com/documents/news/2017/06/06/in-vigore-la-nuova-direttiva-europea-di-contrasto-al-terrorismo.
[420] Santini S., *L'Unione Europea compie un nuovo passo nel cammino della lotta al Terrorismo: Una prima lettura della Direttiva 2017/541*, Diritto Penale Contemporaneo, 4 luglio 2017, p. 22.

providing or receiving of training"[421] and the inbound travel to the European territory by EU nationals or non-nationals holding the same purposes[422], including the preparatory acts perpetrated by FTFs to entry into the EU. Article 10 constitutes another safeguard against the FTFs, by punishing the acts committed to organize and facilitate the travel of a fighter from and to EU whenever this assistance is rendered for this purpose[423]. The last offence consists in the terrorist financing which amounts to the direct or indirect collection and supply of funds[424] whenever there is the intent and the awareness that these funds are employed to perform the terrorist offences envisaged by the Directive.

In conjunction with the several categories of terrorist offences, the Directive widens the scope of the subsidiary activities, namely aiding and abetting, inciting and attempting to commit an offence. Indeed, aiding and abetting is punishable in relation to all offences but travelling and organizing or facilitating the travel whereas the attempt is extended to all offences except for receiving training and for organizing or facilitating the travel and the incitement is criminalized for all offences, in contrast to the 2002 FDCT which confined the punishment of incitement to some offences, excluding the offences linked to terrorist activities[425]. This means that these ancillary activities must be criminalized as if they were terrorist offences. With regard to penalties, the Directive does not alter the structure of the 2002 Framework Decision, apart from a clause which envisages the protection of children's interests in sentencing when they are the target of the recruitment for terrorism. Finally, the Directive empowered Member States with the implementation of measures of protection assistance and also support services to the victims of terrorism, including psychological support and counselling as well as assistance with the claims of compensation.

---

[421] Article 9 (1) of EU Directive 2017/541 of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, 31 March 2017.
[422] *Ivi*, Article 9 (2).
[423] For the definition of "organization" and "facilitation", see Council of Europe, Explanatory Report to the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, Council of Europe Treaty Series No. 217, 22 October 2015.
[424] Article 1 (1) of the EU Directive 2017/541 describes funds as *"assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit*". In addition, the paragraph 15 of the Preamble urges to encompass in the definition of the financing also "*the sale, acquisition or exchange of a cultural object of archaeological, artistic, historical or scientific interest illegally removed from an area controlled by a terrorist group at the time of the removal*".
[425] Nienartowicz M. J., *A New Chapter in the EU Counterterrorism Policy? The Main Changes Introduced by the Directive 2017/541 on Combating Terrorism*, in Polish Yearbook of International Law, 2017, p. 195.

5.2 The Court of Justice of the European Union: the case of Mostafa Lounani and the denial of refugee status to terrorists.

In the EU counterterrorism framework, a meaningful dowel was put in place by the European Court of Justice (ECJ) which expedites the expulsion procedure for asylum seekers associated to terrorism. Indeed, the ECJ affirms in the case C-473/14 regarding Mostafa Lounani that an application for asylum could be rejected if the asylum seeker participates in the activities of a terrorist organization even though he is not involved in the commission of, incitement to or participation in terrorist acts but merely he takes a direct part in the subsidiary activities to terrorism[426].

In order to understand the process whereby it has come to this judgment, it is better to start exposing the facts. Mostafa Lounani was a Moroccan citizen who left Morocco in 1991 and first headed to Germany where his asylum request was rejected and then travelled to Belgium in 1997 where he was not granted a residence permit. In 2006 he was convicted by the Belgium Criminal Court of participation in the activities of the Moroccan Islamic Combatant Group (MICG), a terrorist group operating in Belgium, in the role of leader of the group and for conspiracy, illegal residence and use of false documents. Indeed, his activities range from "logistical support to a terrorist group by the provision of, inter alia, material resources or information" to "forgery of passports and fraudulent transfer of passports, active participation in the organisation of a network for sending volunteers to Iraq"[427]. In 2010 Mr Lounani submitted an asylum request to Belgium since he feared the persecution in his country of origin due to his jihadist history, though the *Commissaire général aux réfugies et aux apatrides* (CGRA*)* rejected his application under the Article 1F(c) of the Geneva Convention relating to the Status of Refugee[428]. Therefore, Mr Lounani appealed to the *Conseil du Contentieux des étrangers* (Council for asylum and immigration proceedings – CEE) which annulled the decisions of the CGRA inasmuch it did not consider the felonies charged to Mr Lounani serious enough to fit the "acts contrary to the purposes and principles of the United Nations". In addition, the annulment was grounded on the shortage of evidences to proof the participation of Mr Lounani in the terrorist activities which even could not amount to terrorist offences and

[426] Court of Justice of the European Union, Press Release No 9/17, Luxembourg, 31 January 2017. Available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-01/cp170009en.pdf.
[427] ECJ, *Commissaire général aux réfugies et aux apatrides v. Mostafa Lounani*, Judgment (Grand Chamber), Case C-573/14, 31 January 2017, para 30.
[428] Article 1F(c) lays down the limitations to the right to refugee status which does not apply to individuals who *"has been guilty of acts contrary to the purposes and principles of the United Nations".*

on the lack of specific acts committed by the MICG[429]. Subsequently, the CGRA appealed against the decision before the Conseil d'État which stayed the proceeding and referred to the ECJ some preliminary questions, notably whether an applicant can be denied the refugee status on the basis of a conviction of participation in the activities of a terrorist groups without perpetrating a terrorist act first-hand.

Firstly, the ECJ ascertained that Mr Lounani did not personally commit terrorist acts, thus assessing whether the refugee status could be excluded not only to the authors of terrorist acts but also to the material and financial supporters, by figuring out the meaning of the Article 1F(c) of the Geneva Convention relating to the Status of Refugee. In this sense, the Court referred to Resolution 2178/2014 which, as carefully documented above, raised the issue of the *"international networks established by terrorist entities enabling them to move, between States, fighters of all nationalities and the resources to support them"*[430]and required the prevention and criminalization of the recruitment, financing, organization or facilitation of travelling , other than the participation and perpetration of terrorist acts. Accordingly, these offences must fall into the "acts contrary to the purposes and principles of United Nations" and constitute a valid discriminant for the denial of the refugee status[431].

In addition, the Court inquired into the question whether the acts of Mr Lounani fall into the acts contrary to the UN purposes and principles, noting that Mr Lounani provided with logistical support to a terrorist group registered in the UN Sanctions List since 2002, more specifically he ensured the forgery of documents for travel to Iraq. Relying on Resolution 2178/2014 which criminalizes the wilful organization of the travel of individuals who travel to a State other than their State of residence or nationality, for the purpose of the perpetration, planning or preparation of terrorist acts[432], the Court acknowledges this conduct as trigger to the rejection of the refugee status even though a terrorist act is not actually committed. Therefore, the ECJ concluded that acts constituting participation in the activities of a terrorist group justified the exclusion from the refugee status, even though the individual did not commit or attempt to commit a terrorist act[433].

[429] Nardone V., *Il support logistico al terrorismo e le cause di esclusione dello status di rifugiato nel diritto UE. La CGUE sviluppa la sua interpretazione nel caso Lounani*, Osservatorio Costituzionale, Fasc. 3/2017, 19 ottobre 2017, p. 3.
[430] ECJ, *Commissaire général aux réfugies et aux apatrides v. Mostafa Lounani,* cit., para 67.
[431] *Ivi*, para 69.
[432] See *supra* note 65.
[433] ECJ, *Commissaire général aux réfugies et aux apatrides v. Mostafa Lounani,* cit., para 79.

CHAPTER III

National strategies against Foreign Terrorist Fighters: Italy, France and Germany in comparison.

This chapter is devoted to the comparative analysis of three countries within the European context in order to highlight their national strategies against the foreign terrorist fighters who greatly affect their security: Italy, France and Germany. While the presence of Italian foreign terrorist fighters in the conflict zone has been very limited, France and Germany has experienced a high volume of citizens who approached the *jihadist* ideology and among them, around 2,000 French and 800 German were recruited by the ISIL and travelled to the Syrian conflict. In addition, France accounts for the largest number of jihadist terrorist attacks (42) between 2014 and 2018. Nonetheless, the interest is primarily correlated to the legal impact of these events, or rather how the Criminal Code has evolved in order to cope with the terrorist menace and how their preventive systems have been strengthened in order to stem the flow of foreign terrorist fighters and to prevent the on-line and off-line radicalization. On one hand, Italy with its strong legislative measures aligning with the regulations derived from the European Union; on the other hand, France establishing a permanent state of emergency and Germany which is remarkable due to its focus on deradicalization programs.

The section follows a fixed scheme since for each country the focus is firstly located on the repressive system, thus examining the incorporation of the offences within the Criminal Code; then, the administrative measures are inspected, be the expulsion or the special surveillance. Finally, significant jurisprudence are put forward in order to compare the role of the judicial power in each country in the fight against foreign terrorist fighters.

1. Italian counter-terrorism strategy: repression and prevention approach.

1.1 Repression: Article 270-bis and other offences in the Italian Criminal Code.

Before Al-Qaeda and ISIL, Italy has experimented various forms of terrorism related to other ideologies which explain the dense and articulated counter-terrorism system. Indeed, already in 1979 the policy-makers introduced severe punishments and a specific offence, the Article 270-*bis*, to criminalize the association with the aim of terrorism or subverting democracy. In other words, the provision punished the promotion, constitution, organization or direction of associations which perpetrated violent acts with the aim of committing acts of terrorism or subverting democracy[434], sentencing the defendants from seven to fifteen years of detainment. In addition, it envisaged from four to eight years of imprisonment for those who participated in the associations[435]. Here the Article 270-*bis* aimed at preserving the national democratic order, thus excluding the associations which committed violent acts against foreign countries. Accordingly, the associations, which did not pursue the aim of terrorism or subversion of democracy, did not fall into the category provided for by Article 270-*bis* but they were punished for each offence[436].

However, the emergence of a new form of terrorist associations characterized by the operating base in the Italian territory and the aim of terrorism in third countries has exhibited the narrowness of the Article 270-*bis* which was amended by the L. 15 December 2001 No. 438, through which the Italian legislator has transposed the obligations derived from the UN Security Council Resolutions. Along with the L. 438/2001, other legislation was enacted, namely the L. 27 November 2001 No. 415 which applied sanctions against Taliban regime and the L. 14 December 2001 No. 432 on measures against financing of terrorism. The new Article 270-*bis* states that

> *"Chiunque promuove, costituisce, organizza, dirige o finanzia associazioni che si propongono il compimento di atti di violenza con finalità di terrorismo o di eversione dell'ordine democratico è punito con la reclusione da sette a quindici anni.*

[434] The term "subversion" refers to the overthrowing of the Italian democratic order which is defined as the "system of the basic principles fixed by the Italian Constitution to define the structure and the function of the State". See Italian Supreme Court, section VI, 17 April 1996, n. 973.
[435] D.L. 15 December 1979 No. 625, confirmed into L. 6 February 1980 No. 15, concerning Urgent measures for the preservation of the democratic order and the public security.
[436] Palma A., *Terrorismo Internazionale: Risposta dello Stato italiano*, Centro Studi per la Pace, 14 Settembre 2002, p. 10.

Chiunque partecipa a tali associazioni è punito con la reclusione da cinque a dieci anni.

Ai fini della legge penale, la finalità di terrorismo ricorre anche quando gli atti di violenza sono rivolti contro uno Stato estero, un'istituzione o un organismo internazionale.

Nei confronti del condannato è sempre obbligatoria la confisca delle cose che servirono o furono destinate a commettere il reato e delle cose che ne sono il prezzo, il prodotto, il profitto o che ne costituiscono l'impiego"[437].

It provides various innovations, starting with the expansion of the purpose of terrorism to encompass the international terrorism which is strictly distinguished from the aim of subverting the democratic order. This implies that the provision still aims at preserving the Italian constitutional order but it also criminalizes associations which perpetrate terrorist acts against foreign States, institutions and international organizations. In this sense, the protection is awarded to the Italian State in its role of the actor who ensures the international peace and security through the repression of violent acts, in compliance with the international and European obligations[438]. Notwithstanding the amendment, the Article does not include associations with the purpose of subverting the democratic order of a third country since the Italian judiciary could not deal with its political, economic and social system[439].

The Article 270-*bis*, listed as "Associations with the purpose of terrorism including international terrorism or purposes of subversion of the democratic order", deems the objective element of the crime as a plurality of conducts which are intended to the establishment and growth of an association. Some of them were already contained in Article 270 related to the subversive associations, namely the promotion, constitution, organization and direction whereas the innovation refers to the introduction of the financing of terrorism which contributes to the functioning of the association. Therefore, the roles are clear inasmuch the constitution equates to the creation of the association along with the actions to keep it thriving[440]; the direction implies the leadership by dictating the rules and the structure of the association and the organization includes the activities to coordinate and ensure the viability of the association[441]. As regards the financing of terrorism, the Article 270-*bis* aligns to the 1999 International Convention for the Suppression of the Financing of Terrorism and equates

[437] Article 1 of L. 15 November 2001 No. 435, containing urgent provisions for combating international terrorism.
[438] Rosi E., *Terrorismo Internazionale: le nuove norme interne di prevenzione e repressione: profili di diritto penale e sostanziale*, in Dir. Pen. Proc., N. 2, 2002, p. 157.
[439] Simeone L., *I reati associativi*, Maggioli Editore, Ottobre 2015, p. 255.
[440] Italian Supreme Court, Section I, 31 May 1985, n. 11603.
[441] Simeone L., *op. cit.*, p. 257.

financing to the other core activities as opposed to the crime of participation which covers the subsidiary and generic actions, still requiring the actual inclusion in the association at the base of the pyramid[442].

However, Article 270-*bis* is intended to punish the simple establishment of an association whose purpose is the committing of terrorist acts, though the Italian legislator failed to describe the meaning of the association as well as he did not define the purposes of terrorism found in the rubric of the provision. On the other hand, it is clear that the actual execution of terrorist acts is irrelevant to the criminalization of terrorists who are punished for their incorporation in the organizational structure, regardless of the specific role they perform, or for their mere participation[443]. The former requires from seven to fifteen years of imprisonment whereas the latter is reinforced with at least five years to the maximum of ten years. In any case, the provision enforces the confiscation of the fortune of the convict in order to prevent the perpetration of terrorist attacks and to undermine the existence of the association[444].

The L. 438/2001 sets up the offence of the assistance to the members of the association in the new Article 270-*ter* of the Criminal Code. In practice, it is represented by the sustenance, hospitality, means of transport and instruments for communication provided to the components of the terrorist association. This means that whether the support is guaranteed to the whole association, the individual could account for the offence of participation pursuant to Article 270-*bis*[445]. Therefore, the crime holds the generic-intent inasmuch the responsible is willing to provide aid to a member of the terrorist association, with the awareness of his nature, but he does not endorse the purposes of the same association. The *ratio* relies on the criminalization of those individuals who are not related to the association but they ensure an external support to the associations envisaged in Article 270-*bis*[446]. The penalty for the assistance to members of terrorist associations is four year of imprisonment but the provision stipulates an aggravating

[442] The offence of the participation in a terrorist association may also include the hospitality provided to terrorists, the supply of forged documents and the organization in the mosques of fundraising in favour of the FTFs and their families. This is explained by the endorsement to the aims of the associations and by the assistance to the FTFs. See Italian Supreme Court, Section V, 8 October 2015, n. 2651 (2016).
[443] Palma A., *op. cit.*, p. 15.
[444] Rosi E., *op. cit.*, p. 160.
[445] The Article 270-*ter* also differs from the offence of aiding and abetting listed in Article 378 for various reasons, including the assumptions, the nature of the assisted person and the content of the assistance. First of all, the aiding and abetting occurs after the commission of the offence whereas the assistance laid down by Article 270-*ter* is provided before the offence has ceased, thus the terrorist association continues to operate. Besides, the assisted person is not specified in Article 378 as opposed to Article 270-*ter* in which the members of a terrorist association are granted assistance. Lastly, the aiding and abetting could include several non-specific conducts while Article 270-*ter* clarifies the specific conducts amounting to assistance.
[446] Dambruoso S., *op. cit.*, p. 50.

circumstance in the event that the assistance persists. On the other hand, the third paragraph of Article 270-*ter* envisages an exemption for the assistance provided to a close relative.

1.1.1 L. 31/7/2005 No. 155: the notion of acts committed for terrorist purpose and other offences related to terrorist activities.

After the London bombing on 7 July 2005, the Italian legislator followed the emergency approach already tested after the 9/11 attack and drafted the D.L. 27 July 2005 No. 144, immediately converted into L. 31 July 2005 No. 155, on "Urgent measures for the fight against international terrorism". The legislative action fulfilled two objectives, namely the definition of acts committed for terrorist purposes, aligning with the notion of terrorism elaborated at international and European level, and the criminalization of preparatory acts. Indeed, Article 15 of the D.L. 144/2005 established *ex novo* two offences, that is Article 270-*quarter* and 270-*quinquies* in the field of recruitment and training for the purposes of terrorism which are specified by the new Article 270-*sexies*. The offences are characterized by the fact that they are carried out apart from the associations depicted by Article 270-*bis*, thus they are subsidiary offences and they are set aside whether these conducts are ascribable to the offence of association for terrorist purposes and by the fact that they possess a dual specific intent represented by the aim of committing acts of violence or sabotage of essential public services with the purpose of terrorism.

Article 270-*quarter* criminalizes anyone who recruits one or more persons to commit acts of violence or sabotage of essential public services for terrorism purposes, even if directed against a foreign State, an institution or an international organization. The provision reflected the trend of recruitment[447] in Italian territory, directed at identifying, convincing and arming fighters who could perpetrate terrorist attacks and could be dispatched to training camps in the territories governed by ISIL[448]. The offence exists irrespective of the location in which the acts of violence or sabotage occurred, whether in Italy or in foreign territory, and regardless of the fact that the

[447] So far, the Italian Criminal Code provided two provisions concerning the recruitment: Article 244 criminalizes the recruitment of combatants against a foreign State without legal authority such as to put in danger the Italian State whereas Article 288 punishes the recruitment of Italian citizens in the ranks of a foreign State. Lastly, Article 4 of the L. 12 May 1995 No. 210 prohibits the recruitment of mercenaries.

[448] Dalia A. A., *Le nuove norme di contrasto al terrorismo: Commento al Decreto-legge 27 luglio 2005, n. 144*, Giuffrè Editore, 2006, p. 526.

acts are actually committed[449]. In addition, the nature of the recruitment as a deal among the recruiter and the recruit accounts for the criminalization of the attempt to carry out the recruitment. The active agents are constituted by the recruiter and the recruit: while the former is punished with the imprisonment from seven to fifteen years, the latter is devoid of a sanction. This means that the recruit could be punished in accordance with Article 270-*bis* or Article 270-*quinquies* whether he meets the requirements.

On the other hand, Article 270-*quinquies* is modelled upon the 2005 Council of Europe Convention on the Prevention of Terrorism and it indexes the training for acts of terrorism, including international terrorism which punishes from five to ten years anyone who trains or otherwise gives instructions on how to prepare or use explosive materials, firearms, or other weapons, harmful or hazardous chemical or bacteriological substances, and all other techniques or methods to commit terrorist acts. The provision marks a differentiation between the trainer and the person who gives instructions since the training consists of a complex procedure composed of several stages in which the trainer educates to the use and the preparation of weapons and to other techniques while the instruction entails the mere communication of information fundamental to the perpetration of acts of violence[450]. This means that the difference relies on the existence of a direct, effective and constant relation between the trainer and the trained. Accordingly, the trained is provided for the same punishment of the trainer while the recipient of instructions is not penalized under Article 270-*quinquies*[451].

Notwithstanding the aforementioned offences, the D.L. 144/2005 is noteworthy for the incorporation in the Italian Criminal Code of Article 270-*sexies* which tackles the issue of the lack of the definition of terrorism which undermines the work of the jurisprudence by providing the notion of acts committed for terrorist purpose. The latter are defined as

> *"condotte che, per la loro natura o contesto, possono arrecare grave danno ad un Paese o ad un'organizzazione internazionale e sono compiute allo scopo di intimidire la popolazione o costringere i poteri pubblici o un'organizzazione internazionale a compiere o astenersi dal compiere un qualsiasi atto o destabilizzare o distruggere le strutture politiche fondamentali, costituzionali, economiche e sociali di un Paese o di un'organizzazione internazionale, nonché*

[449] *Ivi*, p. 529.
[450] Dalia A. A., *op. cit.*, p. 532.
[451] Santini S., *L'Unione Europea compie un nuovo passo nel cammino della lotta al terrorismo: una prima lettura della direttiva 2017/541*, in Diritto Penale Contemporaneo, 7-8/2017, p. 39.

le altre condotte definite terroristiche o commesse con finalità di terrorismo da convenzioni o altre norme di diritto internazionale vincolanti per l'Italia"[452].

The notion is composed of the definition of the conduct with terrorist purpose corresponding to the 2002 EU Framework Decision on Combating Terrorism but the Italian legislator avoids the listing of conducts likely to be considered terrorists[453] but he determines its features: the objective element is embodied by the serious harm whom the act could cause to a country or international organization due to its nature or the context. It is not necessary that the act produces the serious harm but it sufficient that the act is capable of producing it[454]. On the other hand, the subjective element relies on the threefold specific-intent, namely the intimidation of people, the coercion of public authorities or an international organization to perform, or refrain from performing, any act and the destabilization or the destruction of the fundamental political, constitutional, economic and social structures of a country or international organization. As a result, the differentiation between the purpose of subverting the democratic order and the terrorist purpose loses its force through the absorption of the subversive purpose among the aims of terrorist conducts[455]. In this way, the subversive purpose could be extended to third countries, thus Article 270-*sexies* has implicitly amended Article 270-*bis* which from now on criminalizes also the associations aiming at perpetrating acts of violence against the constitutional order of a foreign State irrespective of its form of government and its concern for international law[456].

The provision also contains a referral to the definitions of terrorism contained in the current and future sources of international law, enabling the direct implementation of future interpretations of terrorism into the domestic law[457]. This clause is meaningful in light of the fight against FTFs inasmuch it surpasses the traditional contraposition between peacetime terrorism and wartime terrorism, stipulating that Article 270-*sexies* also encompasses the terrorist conducts carried out during armed conflicts. Accordingly, the terrorist purpose is displayed in violent acts not just against the civilian population but also against military targets when, *"le peculiari e concrete*

[452] Article 270-sexies of Italian Criminal Code.
[453] Notice that the provision does not specify the violent nature of the conducts which could be inferred from the specific offences contained in the Italian Criminal Code. Indeed, the violence comes expressly or implicitly as "a means of conduct in the achievement of the terrorist purpose". See Valsecchi A., *Brevi osservazioni di diritto penale sostanziale,* Dir. Pen Proc., N. 10/2005, p. 1224 e ss.
[454] Valsecchi A., *op. cit.*, p. 1224.
[455] *Ivi*, p. 1225.
[456] Cerqua L.D., *La nozione di "condotte con finalità di terrorismo" secondo le fonti internazionali e la normativa italiana*, in De Maglie C., Seminara S. (a cura di), Terrorismo internazionale e diritto penale, CEDAM - Padova, 2007, p. 106.
[457] Dalia A. A., *op. cit.*, p. 520.

situazioni fattuali facciano apparire certe ed inevitabili le gravi conseguenze in danno della vita e dell'incolumità fisica dei civili, contribuendo a diffondere nella collettività paura e panico"[458].

1.1.2 L. 17/4/2015 No. 43 and L. 28/7/2016 No. 153: the criminalization of the recruit and the financing to terrorism.

The recent legislative measures arise in the context of the necessity of an emergency response in the aftermath of the terrorist attacks in Europe in order to tackle the continuous flow of FTFs and the increasing phenomenon of the "lone wolves". Thereby, the Italian repressive system is altered to prevent the radicalization of individuals, detached from terrorist organizations, prodromal to the perpetration of violent acts in the Italian territory and to strengthen the sanctions against foreign fighters who travel to the conflict zones to receive the necessary training and then pose a risk in their country of origin once repatriated[459]. In light of this, the Italian legislator enacted the D.L. 18 February 2015 No. 7, converted with amendments by L. 17 April 2015 No. 43, and the L. 28 July 2016 No. 153 which impact on the counterterrorism system through the incorporation of certain new offences, thus adjusting to the latest international obligations embodied by the UN SC Resolution 2178/2014[460]. With respect to the first legislation, the L. 43/2015 modifies Article 270-*quarter* and Article 270-*quinquies* on respectively recruitment and training, and introduces a new offence, namely Article 270-*quarter.1* whereas it does not alter Article 270-*bis* and Article 270-*sexies*.

As seen above, until 2015 Article 270-*quarter* criminalized the recruiter while the recruit was excluded from any punishment. Afterwards, the L. 43/2015 provides a second paragraph which punishes the passive recruitment with the imprisonment from five to eight years. In this sense,

[458] Italian Supreme Court, Section I, 17 January 2007, n. 1072, para 6.4. Examples could be the bombing of a military tank in an open-crowded market or the action of a suicide bomber during the armed conflict.
[459] Colaiocco S., *Prime osservazioni sulle nuove fattispecie antiterrorismo introdotte dal decreto-legge n. 7 del 2015*, Archivio Penale, 1/2015, p. 2
[460] Remember that UN SC Resolution 2178/2014 provides the criminalization of certain conducts committed for terrorist purpose, as stating in para 6: "*(a) their nationals and other individuals who travel or attempt to travel from their territories to a State other than their States of residence or nationality; (b) the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to finance the travel [of foreign terrorist fighters]; (c) the wilful organization, or other facilitation, including acts of recruitment, by their nationals or in their territories, of the travel of 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.* See *supra* note 304.

the conduct of the recruit is defined as *"mettersi seriamente e concretamente a disposizione come milite, e quindi soggiacendo a vincoli di obbedienza gerarchica, per il compimento di atti di terrorismo, pur al di fuori ed a prescindere dalla messa a disposizione con assunzione di un ruolo funzionale all'interno di una compagine associativa, tradizionalmente intesa"*[461], which is expressed by the travel or the attempt to travel to the scenarios in which terrorist attacks occur. This means that the mere consent or the willingness to commit violent acts for terrorist purpose is not sufficient to trigger the application of Article 270-*quarter* but it is necessary the travel as the outcome of the recruitment[462]. There is to say that the provision is auxiliary to the offences of the participation in the association for terrorist purpose (Article 270-*bis*) and the training for terrorist purposes (Article 270-*quinquies*) since the recruitment is deemed as forerunner of the training. Should the existence of a terrorist organization or the previous training be proven, the individual would be accountable for the primary offences.

The L. 43/2015 envisages a new offence strictly linked to the former, Article 270-*quarter.1* which criminalizes the organization of transfers for terrorist purposes. It states that

> *"Fuori dai casi di cui agli articoli 270-bis e 270-quater, chiunque organizza, finanzia o propaganda viaggi in territorio estero finalizzati al compimento delle condotte con finalità di terrorismo di cui all'articolo 270-sexies, è punito con la reclusione da cinque a otto anni".*

This provision concerns a preparatory act, that is the organization, financing or propaganda of travels to other Western countries or to the conflict zones in order to prevent the acquisition of warfare methods such as to commit terrorist acts. However, the FTF who embarks on the transfer or carries out the abovementioned conducts to his advantage is not punished under Article 270-*quarter.1* which applies only to the cases in which the conducts are perpetrated for the benefit of others, criminalized with the imprisonment from five to eight years[463]. In addition, the conduct is represented by the organization, that is the preparation of the logistical supports and the means required to the transfers; the financing is simply the supply of the financial resources to engage in the travel and the propaganda accounts for an indirect incitement inasmuch it encourages individuals to travel to commit violent acts for terrorist purposes[464]. It is required that the travel be headed to a foreign country while it is not necessary that the travel is actually committed for the mere attempt is criminalized. It should be specified that the

[461] Centro Studi Senato, *Dossier del Servizio Studi sull' A.S. n. 1854*, Aprile 2015 n. 204, p. 23.
[462] Battaglia F., *L'attività legislativa italiana di recepimento degli obblighi internazionali in materia di lotta al terrorismo e combattenti stranieri*, in federalismi.it, No. 4, 2015, p.17.
[463] Dambruoso S., *op. cit.*, p. 94.
[464] Fasani F., *Le nuove fattispecie antiterrorismo: una prima lettura*, Dir. Pen. Proc., 8/2015, p. 939.

provision is enforced whether the offences of the associations for terrorist purposes or the recruitment for terrorist purposes do not occur, thus holding a residual nature.

Furthermore, Article 270-*quinquies* is amended in order to establish a specific offence in the field of the training, namely the self-training. So far, the criminal liability was ascribed only to the active and passive training, then the 2015 legislation extends the punishment to the individuals performing acts of terrorism after having acquired, even autonomously, instructions to perform such acts. The reference consists in the lone wolves: these terrorists, disconnected from terrorist organizations, act alone by acquiring information on the use of weapons and explosives, thus executing violent acts. Hence, the provision does not target the individual who merely learns the *know-how* but the acquisition of the expertise represents the precondition to perpetrate conducts with terrorist purposes. Here relies the difference between the trained which is punished due to the training while the person acquiring instructions is accountable whether he carries out conducts finalized to the commission of terrorist acts[465]. Nonetheless, the latter is sanctioned with the same penalty of the trained, that is five from ten years imprisonment. It should be remembered that the second paragraph of Article 270-*quinquies*, introduced by L. 43/2015, provides with an aggravating circumstance up to one third related to the use of computers and electronic systems owing to their ability of disseminating information to a large audience.

The L. 153/2016 performs the ratification of some international Conventions[466] concerning the financing to terrorism and the money laundering for terrorist activities and edits the criminal code through the insertion of two new offences, Article 270-*quinquies.1* and Article 270-*quinquies.2*, respectively the financing of acts with terrorist purposes and the embezzling of money or assets being confiscated in terms of counterterrorism. Article 270-*quinquies.1* punishes from seven to fifteen years anyone collecting or supplying money or assets in order to commit a terrorist act, irrespective of the circumstance that the terrorist offence is committed and money or assets are effectively used. The provision punishes the economic support to international terrorism and it is applied apart from Article 270-*bis* and Article 270-*quarter.1*[467],

[465] Fasani F., *L'impatto della Direttiva antiterrorismo sulla legislazione penale sostanziale italiana*, Dir. Pen. Proc, 1/2018, p. 18.
[466] These are the 2005 COE Convention on Prevention of Terrorism and its 2015 Additional Protocol, the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism, the 2005 COE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism and the 2003 Protocol amending the European Convention on the Suppression of Terrorism.
[467] In this regard, the Italian Criminal Code already criminalizes the financing of terrorism as a constitutive conduct of the offence of association for terrorist purposes (Article 270-*bis*) and the financing to the transfers of foreign

thus the financing is intended to individuals who are not integrated in the ranks of a terrorist organization but to radicalized who aim at committing terrorist acts on their own, in the light of the recent concern for the lone wolves. It is important to stress that the financing is composed of three conducts: the collection implies acquiring the money and assets useful for the perpetration of terrorist activities; the supply means the provision of the assets to third parties while the provision entails that the third party could access the funds[468]. In addition, the second paragraph of Article 270-*quinquies.1* punishes also from 5 to 10 years imprisonment anyone depositing or holding assets in order to finance misconduct having terrorism purpose. It is naturally a milder penalty but the *ratio* is connected to the fact that this conduct facilitates the financing of terrorism[469].

Lastly, the new offence Article 270-*quinquies.2* punishes from two to six years imprisonment and a fine from 3000€ to 150000€ anyone destroying or embezzling money or assets being confiscated to prevent financing of conducts having terrorist purposes. This provision applies to the owner of the assets or to anyone performing the misconduct. It should be noted that here the financing refers not just to the offence provided for by Article 270-*quinquies.1* but also to the offences contained in the other provisions of the Criminal Code[470].

1.1.3 Other offences related to the terrorist activities: the attack and the kidnapping for terrorist purposes and the incitement to terrorism.

For the sake of clarity, it is essential to mention other offences provided for by the Italian Criminal Code. First of all, Article 280 punishes with no less than twenty years of imprisonment those who "attack" or attempt to attack "for terrorist or subversive purposes upon a person's life or integrity"[471]. Though, the punishment depends on the effects (death, very serious or serious injury) and could be aggravated by the circumstance of an attack against "persons exercising functions in the judicial or prison field or exercising law enforcement functions"[472]. The L. 14 February 2003 No. 34 has adopted the Article 280-bis which criminalizes from two

fighters under Article 270-*quarter.1*. Instead, Article 270-*quinquies.1* punishes the financing to all the conducts which pursue terrorist aims.
[468] Dambruoso S., op. cit., p. 129.
[469] Fasani F., *Un nuovo intervento di contrasto al terrorismo internazionale*, Dir. Pen. Proc., 12/2016, p. 1562.
[470] Dambruoso S., *op. cit.*, p. 133.
[471] Article 280 (1) of Italian Criminal Code.
[472] Article 280 (3) of Italian Criminal Code.

to five years of imprisonment anyone who commits any act aimed at destroying third persons' property by using explosives. The aggravating factors are related to the attacks against the institutional venues or to their effects (damage to economy or risk to the public safety)[473]. Both crimes own a multi-offensive character since they are intended to safeguard not only public safety and the constitutional order but also the life and health of the population.

In addition, the abovementioned offences were integrated by Article 280-ter, adopted by the L. 153/2016, which criminalizes acts of nuclear terrorism, thus transposing the obligations resulting from the 2005 International Convention on the Suppression of Nuclear Terrorism. Those who for terrorism purposes procure for themselves or for others nuclear material or fabricate or possess a nuclear weapon are punished with no less than fifteen years imprisonment[474]. The second paragraph provides a more severe punishment with no less than twenty years imprisonment for those who for terrorism purposes make use of radioactive materials or nuclear weapons and for those who damage a nuclear plant in order to cause the discharge of radioactive material[475]. Article 289-bis was added by the L. 18 May 1978 No. 191 after the kidnapping and subsequent murder of Aldo Moro by the Red Brigades and it stipulates from twenty-five to thirty years of imprisonment for those who kidnaps for purposes of terrorism or for subversion of the democratic order. In this case, murder is an aggravating factor which triggers thirty years of imprisonment, whether death is an unintended consequence, or life sentence[476]. In doing so, the Italian legislator marks the difference among kidnapping for terrorism, ordinary kidnapping and kidnapping for ransom.

Furthermore, long before the emergence of the Islamic terrorism, the Italian Criminal Code comprised two provisions concerning the incitement to commit a terrorist offence. Indeed, the general rule contained in Article 414 enshrines the criminalization of the public incitement to commit crimes with up to five years imprisonment. Along with the direct incitement, the third paragraph incorporates the *apologie*, which is defined as the public support to, the justification and the glorification of the crimes such as to amount to indirect incitement[477]. Secondly, Article

[473] Article 280-bis (3), (4) of Italian Criminal Code.
[474] Article 280-ter (1) of Italian Criminal Code.
[475] Notice that the L. 153/2016 was clear about the definitions within the nuclear sphere. Indeed, Article 3 describes radioactive material, nuclear material, uranium enriched in the isotopes 233 or 235, nuclear plant and nuclear weapon. See Bertolesi R., *Ancora nuove norme in materia di terrorismo*, Diritto Penale Contemporaneo, 19 Ottobre 2016.
[476] Article 289-bis (2), (3) of Italian Criminal Code.
[477] The *apologie* has been detected in the conduct of an *Imam* in a reception centre who encouraged the refugees to perpetrate violent acts, praised the terrorist attacks already occurred and threatened those who were not responsive to the incitement. See Italian Supreme Court, Section II, 8 June 2018, n. 26315.

302 represents the specific rule since it punishes from one up to eight years imprisonment anyone who incites another person to commit crimes, including terrorist ones, "for which the law provides for life imprisonment or a prison sentence, if the incitement is unsuccessful, or if the incitement is successful, but the offence is not committed"[478]. This means that the legislation, adopted in compliance with the international obligations, intervened to introduce two aggravating factors: the L. 155/2005 entails an increase in the punishment by half if the direct or indirect incitement under Article 414 are aimed at committing terrorist crimes or crimes against humanity while the L. 43/2015 provides that if the offence is committed through internet or electronic devices, the punishment could be increased by up to one-third if the incitement involves the offences contained in Article 414 and Article 302 and by up to two thirds if it concerns the terrorist crimes and crimes against humanity[479].

Finally, the L. 43/2015 introduced *ex novo* two offences. On one hand, Article 678-bis punishes up to eighteen months imprisonment and up to 1000€ fine anyone introducing or providing, storing, selling or delivering within the national territory, without the legal authority, substances or mixtures that serve as precursors of explosives. On the other hand, those who omit to report the theft or disappearance of substances or mixtures that serve as precursors of explosives are sanctioned up to twelve months imprisonment and up to 371€ fine[480]. In addition, the Law No. 155/2005 deals with the offence of possession of false ID documents, through the incorporation of Article 497-bis which provides from two to five years of imprisonment, penalty exacerbated for those who make fake ID documents from one-third to half. It should not be forgotten at last that the Article 1 of L. 6 February 1980 No. 15 sets out an increase of punishment by half for all the offences carried out for terrorist or subversive purposes apart from the offences in which terrorism constitutes the main element, namely the specific offences contained in Section 270 of the Criminal Code.

[478] Article 302 (1) of Italian Criminal Code. Note that whether the offence is committed following the incitement, the instigator will account for aiding under Article 110 of the Criminal Code.
[479] Nardi V., *La punibilità dell'istigazione nel contrasto al terrorismo internazionale*, Diritto Penale Contemporaneo, 1/2017, p. 124.
[480] Article 679-bis of Italian Criminal Code.

1.2 Prevention: the amendment to the Codice Antimafia and the expulsion of the foreign terrorist fighters.

Along with the criminal measures adopted against the FTFs and the lone wolves in order to bring them to justice, the Italian legislator has reinforced the counterterrorism system, adopting the preventive measures, already imposed on the members of the organized crime. These instruments are directed against individuals, whether nationals or foreigners, who are perceived as a danger inasmuch they are supposed to commit terrorist crimes or carry out preparatory acts. Already in the L. 155/2005, personal preventive measures were introduced to tackle the public incitement to carry out terrorist crimes through the use of Internet and the expulsion was envisaged for foreigners who praised terrorist attacks and committed preparatory acts[481]. However, the L. 43/2015 has refined the preventive regime by amending the *Codice Antimafia* (L.D. 6 September 2011 No. 159) and the Combined text of provisions governing immigration and regulations concerning the status of foreign citizens (*Testo Unico sull'immigrazione*, L.D. 25 July 1998 No. 286).

Article 4 of the 2015 legislation intervenes on the Article 4 para 1 of the *Codice Antimafia* by broadening the plethora of the recipients of the personal preventive measures which could be applied not just to those who perpetrate preparatory acts with terrorist purposes but also to those who commit acts intended to participate in a conflict abroad in the ranks of an organization pursuing terrorist aims[482]. This expansion includes the special surveillance, associated to the compulsory residence or the ban on residence in the place of residence or in the habitual dwelling place, the withdrawal of passports or the suspension of other documents and the patrimonial preventive measures (i.e. the freezing of the assets which are supposed to be used for the financing to terrorism). Therefore, the expatriation accounts for an offence in accordance with Article 75 of the *Codice Antimafia* since it trespasses the restriction measures on the freedom of movement[483]. In this way, the Italian legislator has attempted to halt the travels of the fighters to the conflict zones in order to assist ISIL and its associates.

Secondly, the concern for the terrorist transfers has resulted in the task of the Police Chief to impose upon the beneficiaries of the preventive measures the temporary withdrawal of the

[481] Committee of Experts on Terrorism, *Profiles on Counter-Terrorism Capacity: Italy*, November 2017, p. 7, Available at: https://rm.coe.int/italy-profile-on-counter-terrorism-capacity/168076b45c.
[482] Article 4 para 1 (a) of D.L. 7/2015. The L. 17 October 2017 No. 161 has amended the Article 4 para 1 of the Anti-Mafia Code stipulating that the preventive measures must be imposed on suspects of the terrorist offences who carry out not just preparatory acts but also executive ones.
[483] Balsamo A., *Decreto Antiterrorismo e riforma del sistema delle misure di prevenzione*, Diritto Penale Contemporaneo, 2 Marzo 2015, p. 2.

passport or the suspension of the validity of any other equivalent document for travelling abroad, in anticipation of the enforcement of the measures from the President of the Tribunal, thus preventing the terrorist from fleeing the country in this period of time. The President of the Tribunal could also resort temporarily to the compulsory residence or the ban on residence as long as the preventive measure is deployed[484]. The 2015 reform lays down a new provision in the *Codice Antimafia*, namely Article 75-*bis* which criminalizes the infringement of the travel ban consequent to the application of the abovementioned measure from the Police Chief with the imprisonment from one to five years[485]. Certainly, the target is the foreign fighter, who leaves or attempt to leave the national territory, but also the facilitator of the travel could be punished under Article 75-*bis*[486]. The third revision made by the 2015 reform regards the aggravating circumstance contained in Article 71 of the *Codice Antimafia* which stipulates that an increase in the penalty from one-third to half is provided for the offences committed with terrorist purposes as defined in Article 270-*sexies* when these offences are carried out by the addressee of a personal preventive measure during the application period and up to three years from the termination of the execution[487].

Furthermore, the expulsion of the foreign fighter from the national territory has become a key element of the Italian counter-terrorism, so that the legislation envisages different categories of expulsion in the *Testo Unico sull'immigrazione*: the administrative deportation is issued "for reasons of public order or State security" by the Interior Minister after investigation activities on the dangerousness of the suspect; the L. 155/2005 introduced the deportation of a foreign citizen against whom, in particular, there are *"fondati motivi di ritenere che la sua permanenza nel territorio dello Stato possa in qualsiasi modo agevolare organizzazioni o attività terroristiche, anche internazionale"*[488]. The latter was expanded by the L. 43/2015 in order to tackle the non-Italian aspiring FTFs, providing that the deportation could occur in light of the prevention to terrorism against the foreigners who commit acts intended to participate in a conflict abroad in the ranks of an organization pursuing terrorist aims[489]. Most recently, the D.L. 4 October 2018 No. 113, converted in L. 1 December 2018 No. 132 (*Decreto Sicurezza*)

[484] Clinca S., *Commento al D.L. 7/2015 n. 4: Interventi in materia di misure di prevenzione*, in legislazionepenale.eu, 15 January 2016, p. 10. Available at: http://www.lalegislazionepenale.eu/wp-content/uploads/2016/01/studi_legge4315_art.4-Clinca-terrorismo.pdf.
[485] Article 4 comma 1 (d) of D.L. 7/2015.
[486] Clinca S., *op. cit.*, p. 14.
[487] Dambruoso S., *op. cit.*, p. 175.
[488] Article 3 (1) of the L. 31 July 2005 No. 155.
[489] Marone F., *The Use of Deportation in Counter-Terrorism: Insights from the Italian Case*, ICCT – The Hague, 13 March 2017. Note that the expulsion must apply to foreigners while nationals could not be deported, though a high number of *jihadists* in Italy are first-generation immigrants who do not possess the Italian citizenship.

has stated that FTFs who have previously obtained citizenship through marriage or naturalization could be subject to forfeiting citizenship whether they are convicted of terrorism crimes[490]. Hence, the withdrawal of the nationality covers only foreigners born in Italy or married to an Italian citizen who get a conviction in the previous three years.

1.3 The Supreme Court of Cassation: the interpretation of the associations with the purpose of terrorism including international terrorism under Article 270-bis.

With respect to the Islamic terrorism, the Italian Supreme Court of Cassation has delivered several judgements in order to clarify the meaning of the provisions in the Criminal Code and to extend the scope of applicability such as to incorporate the recent expressions of the *jihad* characterized by the decentralization of the terrorist organizations composed of *jihadists* who perpetrate their criminal program on their own ("lone wolves"). In this context arises a significant decision of the Court aimed at interpreting Article 270-*bis* and at distinguishing between the mere adherence to an extremist ideology and the participation in the terrorist organization. The case concerns three *jihadists* charged with the participation to a terrorist organization pursuant to Article 270-*bis* due to the establishment of terrorist cell within the national territory, the proselytising performed through the diffusion via Internet of propaganda and the training or the self-training for the commission of terrorist acts in Italy[491]. As a result, the Tribunal of Venice issued an order on the pre-trial detention which was appealed before the *Tribunale del Riesame* of Venice which rejected the application. Therefore, the applicants demanded the Court of Cassation annul the order since the Article 270-*bis* does not qualify and their conducts could only amount to the mere adhesion to extremist jihad[492].

The Supreme Court started from the analysis of the jurisprudence with respect to Article 270-*bis* which sets up some constitutive features of the offence, namely the organizational structure,

---

[490] Citino Y., *Sicurezza e stato di diritto nella minaccia dei foreign terrorist fighters*, in dirittifondamentali.it, Fascicolo 2/2019, p. 36.

[491] Italian Supreme Court, Section V, 3 November 2017, n. 50189, para 1.

[492] According to the applicants, their conducts are not liable to represent the offence under Article 270-bis due to the lack of wiretap concerning operations between the applicant and the other components of the terrorist group nor there is the willingness to travel to Syria. In addition, *"non vi sarebbe alcun elemento che provi collegamenti del gruppo e men che meno del ricorrente con esponenti di rilievo del terrorismo internazionale; non vi sarebbero sui profili social dell'indagato incitazioni e concreti atti di proselitismo e propaganda, ma solo pochi post rinvenuti inneggianti alle gesta dell'ISIS; non risultano concrete azioni di addestramento o auto-addestramento alla guerra jihadista".* See Italian Supreme Court, Section V, 3 November 2017, n. 50189, para 1 (3.1).

even rudimentary; a criminal program irrespective of its actual commission; the violence with terrorist purposes and a level of effectiveness such as to perpetrate the criminal program[493]. Hence, the offence is provided *"in presenza di una struttura organizzativa con grado di effettività tale da rendere possibile l'attuazione del programma criminoso, pur non richiedendo la fattispecie, ai fini della sua configurabilità, anche la predisposizione di un programma di azioni terroristiche"*[494]. In addition, the jurisprudence has noted that the Islamic terrorism shows some dynamic and flexible structures, symbolized by a network *("rete")* of *"marcata sporadicità"* which connects *jihadists* pursing terrorist aims recruited on a case-by-case basis, thus unlikely to be categorized within the schemes of the classic terrorism operating in the national territory. Therefore, it is sufficient that a terrorist cell carries out activities supporting the terrorist organization in order that the components of cells are criminalized for the associations with the purpose of terrorism including international terrorism under Article 270-*bis.* In contrast, the Supreme Court observes that the jurisprudence enshrines the anticipation of the threshold of criminal responsibility, at the risk of criminalizing conducts of mere conception or adhesion to an extremist ideology. Therefore, the Supreme Court requires the evaluation of the concrete elements in the individual cases in order to verify the criminal relevance, since the activities of proselyting or indoctrination are not sufficient to the criminal offence under Article 270-*bis*, but the individual cases must highlight an organizational structure, albeit basic, to the commission of terrorist acts[495].

Afterwards, the Supreme Court has examined the conducts of the three applicants in the present case in order to ascertain whether they fit the definition of the criminal offence pursuant to Article 270-bis in the light of the interpretations determined by the abovementioned jurisprudence. Well, several investigative elements persuaded the Supreme Court to believe that the three *jihadists* had established an extremist Islamic cell prepared to the perpetration of terrorist acts in the national territory. Indeed, they lived together in the same house which was transformed into their base of operations, place of worship and meeting place for other *jihadists* participating in the terrorist cells. The Supreme Court has recognized that in the first months of 2017 the three applicants were engaged in various activities, as the training and self-training through the reproduction of video concerning the war techniques or the manufacture of weapons and explosives, the glorification of martyrdom and the attacks against the Western country and

[493] Raimondi M., *Due sentenze della Cassazione in tema di condotta partecipativa a un'associazione terroristica di matrice jihadista e mera adesione ideologica*, Diritto Penale Contemporaneo, 11 Ottobre 2018, para 2.2.
[494] Italian Supreme Court, Section V, 8 October 2015, n. 2651 (dep. 2016).
[495] Raimondi M., *op. cit*., para 2.2.

even the proselyting via social networks[496]. Furthermore, there was a basic division of roles within the terrorist cell which also held the *mens rea*, detected in the conversations among the components on the danger of getting caught, thus accepting the illegality of their actions. Hence, these elements qualify the criminal offence of the association for terrorist purposes for the three applicants established an organized terrorist cells with a high level of effectiveness[497].

Nonetheless, this judgment is noteworthy because it stipulates a new application of Article 270-*bis*, or rather the local extremist cell *"costituisce di per sé un'autonoma e sufficiente struttura idonea a configurare il reato di cui all'art. 270-bis ma realizza la contestata fattispecie di partecipazione all'associazione criminale terroristica di riferimento, denominata ISIS"*[498]. This entails that the three applicants, joining the local *jihadist* cell, have participated in the international terrorist organization of ISIL, through the *"adesione aperta"*. The latter provides the adhesion to a terrorist organization which occurs voluntarily without a formal recognition or through a progressive incorporation of cells or individuals who profess the extremist Islamic ideology and the terrorist aims of the violent actions. In the present case, the membership in a *jihadist* cell could integrate the offence of participation in the terrorist association named ISIL, inasmuch the propaganda of the jihadist ideology, the willingness to perform jihad and to carry out terrorist attacks in Italy or abroad of the components of the local cell equate to the participation envisaged by Article 270-*bis*[499] , without prejudice to the necessity of an effective organizational structure such as to pursue the criminal program for terrorist purposes. In light of this, the appeals of the three *jihadists* are unfounded because their conducts substantiate the participation in a terrorist association under Article 270-bis.

[496] Italian Supreme Court, Section V, 3 November 2017, n. 50189, para 3.3.
[497] *Ibidem.*
[498] *Ivi*, para 3.4.
[499] *Ibidem.*

2. France against terrorism: the permanent state of emergency.

2.1 The criminal counterterrorism framework: Article 421-2-1 and the association of wrongdoing in relation to a terrorist enterprise.

Since the mid-1980s, France has been the target of international terrorist attacks and experienced a massive flow of foreign fighters to the conflict zones to join ISIL and other jihadist groups. Notably, the attack in January 2015 against the headquarters of the satirical magazine *Charlie Hebdo* and the Paris attack in November 2015 committed by individuals who returned to France after being trained in Syria induced the French legislator to implement a pre-emptive approach to countering terrorism. This means that the French criminal justice was strengthened in order to prosecute not just French RFTFs, but also individuals suspected of adherence to the *jihadist* ideology.

First of all, it is important to specify that the French Criminal Code gives a definition of terrorism, identifying the conducts with terrorist purposes (*actes de terrorisme*). Indeed, Article 421-1 enumerates several crimes or other lesser indicatable offences contained in the Criminal Code or in other texts[500] which are liable to become terrorist offences when they are linked to an individual or collective organization *"ayant pour but de troubler gravement l'ordre public par l'intimidation ou la terreur"*[501]. In addition, the subsequent articles envisage other terrorism offences added at a later stage, which could be distinguished between the offences requiring the commission of an act and the offences aimed at the prevention of terrorism, thus dealing with the preparatory acts[502]. Accordingly, the introduction in the atmosphere, soil, subsoil or waters of substances which may jeopardize the human health and the environment (Article 421-2) or the participation in a group for terrorist purposes (Article 421-2-1). The former, the environmental terrorism, is punished with twenty years imprisonment, aggravated by the death of one or more persons which accounts for the life imprisonment[503].

The latter represents the keystone of the French counterterrorism system, i.e. the "*association de malfaiteurs en relation avec une enterprise terroriste" (AMT).* Introduced by the Law on the

[500] Among them, deliberate attacks upon life; deliberate attacks on integrity of the person; abduction, holding of persons against their will; theft, extortion, destruction of and damage to property; offences involving prohibited combat groups and movements; offences involving firearms, explosives or nuclear substance.
[501] Article 421-1 of the French Criminal Code.
[502] Ponseille A., *Les Infractions de prévention, argonautes de la lutte contre le terrorisme*, RDLF No. 26, 2017.
[503] Valiente-Ivañez V. et al., *Legal Analysis of Counter-Radicalisation in a selected European Union Member States Report,* PERICLES, April 2019, p. 67.

suppression of terrorism 96-647 of 22 July 1996 and modelled upon the *"association de malfaiteurs"* under Article 450-1, the provision stipulates that

> *"Constitue également un acte de terrorisme le fait de participer à un groupement formé ou à une entente établie en vue de la préparation, caractérisée par un ou plusieurs faits matériels, d'un des actes de terrorisme mentionnés aux articles précédents"*[504].

It criminalizes the participation in a group which aims at preparing a terrorist act, thus allowing the authorities to intervene before the commission of a crime in order to prevent terrorism. This implies that it is not necessary that the individual carries out the terrorist act nor the terrorist act is actually executed but it is sufficient that the individual is a member of the organization, being aware of its purposes and its criminal plans[505]. Hence, Article 421-2-1 is characterized by three features, that is a group with terrorist purpose; an individual act of participation, which does not necessarily amount to the terrorist act but it could encompass logistical or financial support or any "effective support"[506]; the dual specific-intent of the individual. However, the participation in the AMT does not substantiate in the individual terrorist intention but "in the terrorist aims of the collective association and in the individual knowledge of or adherence to that association"[507].

Traditionally, the AMT was considered as a minor felony (*délit*), punishable by up to ten years and a fine of €225000, turned into a serious felony (*crime*) in 2004 through the differentiation between those who merely participate in the terrorist association punished with the same penalty and those who create or lead the association which are punished with an increased imprisonment of twenty years. In 2006 the participation was raised to twenty years while the leadership of the criminal association was risen to thirty years[508]. Finally, in 2016 the punishment for participation was set at thirty years and 450000€ of fine while the direction and the organization of the group entails the life imprisonment and 500000€ of fine[509].

In this context, in 2012 the French Parliament adopted a legislation which extended the AMT to the acts perpetrated outside of French territory by French citizens or residents in France[510] in

[504] Article 421-2-1 of the French Criminal Code.
[505] Weill S., *French foreign fighters: The engagement of administrative and criminal justice in France*, International Review of the Red Cross, Volume 100 (907-909), 2018, p. 223.
[506] Court of Cassation, Decision No. 13-83.758 (Criminal Chamber), 21 May 2014.
[507] Weill S., *op. cit.*, p. 227.
[508] Human Rights Watch, *Pre-empting Justice. Counterterrorism Laws and Procedures in France*, 2008, p.11.
[509] Article 421-6 of the French Criminal Code, as modified by the Law No. 2016-987 of 21 July 2016.
[510] Article 113-13 of French Criminal Code, as created by Law No. 2012-1432 of 21 December 2012.

order to prosecute the French FTFs[511]. This implies the prosecution of the returning *jihadists* for the acts committed in the Syrian-Iraqi front, thus the participation in the war alongside *jihadist* organizations as well as the training in camps outside France are considered a felony and punished with thirty years of imprisonment. On the other hand, the FTFs who plan the travel to the conflict zone are criminalized according to the AMT with the imprisonment from four to six years while from two to four years of imprisonment is assigned to individuals who provide for logistical support to those who are about to travel to Syria[512].

The 2012 amendment also added a new offence, which is not expressly called as *actes de terrorisme,* that is the recruitment, which consists in offering or promising gifts or other advantages or threatening individuals to participate in a terrorist group or to carry out terrorist acts under Article 421-1 and 421-2[513]. On one hand, the attempt to recruit is sufficient to the emergence of the criminal liability without the necessity of a successful recruitment; on the other hand, the recruited is punished due to its approval to the membership to the group even though he has not committed a specific terrorist act[514]. While the punishment amounts to ten years' imprisonment and 150000€ of fine, an aggravating factor was added in 2017 with regard to the minors, which means that the individual who recruits a minor for the participation in a terrorist group or the preparation of terrorist acts is punished with fifteen years' imprisonment and 250000€ fine. Whether the individual has parental authority over the minor, the court could decide on its partial or total withdrawal[515]

Worth mentioning is the Article 421-2-2 introduced following the 9/11 attacks which criminalizes the financing to terrorism, or rather the collection and the supply of money and assets designed to the perpetration of terrorist acts as defined in Article 421-1. The individual must hold the intention of funding the activities of terrorists and the knowledge of the terrorist aims of the organization.

[511] Previously, these acts could be prosecuted under French criminal law only if they were also punishable offences in the foreign State and if the authorities of that State sent an official report to France. The 2012 legislation has abolished these two requirements.
[512] Weill S., *op. cit.,* p. 231.
[513] Article 421-2-4 states that *"Le fait d'adresser à une personne des offres ou des promesses, de lui proposer des dons, présents ou avantages quelconques, de la menacer ou d'exercer sur elle des pressions afin qu'elle participe à un groupement ou une entente prévu à l'Article 421-2-1 ou qu'elle commette un des actes de terrorisme mentionnés aux Articles 421-1 et 421-2 est puni, même lorsqu'il n'a pas été suivi d'effet, de dix ans d'emprisonnement et de 150 000 € d'amende".*
[514] Valiente-Ivañez V. et al., *op. cit.,* p. 69.
[515] Dambruoso S., *op. cit.,* p. 207.

2.1.1 The 2014 Loi Cazeneuve: the "individual terrorist enterprise" and the incitement to terrorism.

In the subsequent years, the terrorist threat has evolved and the already existing criminal provisions were unable to cope with the increasing number of "lone wolves" and with individuals who act on their own before the emergence of a criminal association. Therefore, the Law No. 2014-1353 of 13 November 2014 (the *Loi Cazeneuve*) provided with the *enterprise terroriste individuelle* which applies to individual terrorist conducts falling into a real criminal plan, even when it is committed abroad[516]. Article 421-2-6 stipulates that

> *"Constitue un acte de terrorisme le fait de préparer la commission d'une des infractions mentionnées au II, dès lors que la préparation de ladite infraction est intentionnellement en relation avec une entreprise individuelle ayant pour but de troubler gravement l'ordre public par l'intimidation ou la terreur".*

The provision criminalizes the individual preparation of *actes de terrorisme*, as contained in Article 421-1 and 421-2, whether the latter purses the purpose of intimidating the government and instilling terror among the population. Though, the *Loi Cazeneuve* extends the notion of *actes de terrorisme* to the commission of preparatory acts, which shall satisfy two conditions: firstly, the *enterprise terroriste individuelle* shall intentionally possess, acquire, attempt to obtain or manufacture objects or substances which may pose a threat to the population. In addition, it is necessary that one of the following acts is committed: the collection of information on persons which the terrorist may pose harm to or on places where he carries out a terrorist action; or the individual has been trained or received instructions in the use of weapons and other form of combat; or even, the *jihadist* habitually checks out public online communication services; or at last, he has travelled to the conflict zones in the ranks of terrorist organizations[517]. The latter represents an important progress in the fight against terrorism since it is now possible to prosecute individuals simply on grounds of staying in Syria or Iraq without the demonstration of the perpetration of terrorist acts. It is important to note that the offence does not require that a terrorist act be actually committed, but it is sufficient that the individual is preparing for its commission. The individual preparation of terrorist acts is punished with 10 years' imprisonment and a fine of 150000€.

[516] Sénat, *Rapport fait au nom de la commission d'enquête (1) sur l'organisation et les moyens de la lutte contre les résaux djihadistes en France et en Europe*, 2 April 2015, Available at: http://www.senat.fr/rap/r14- 388/r14-3881.pdf.
[517] Valiente-Ivañez V. et al., *op. cit.*, p. 69.

Together with the *enterprise terroriste individuelle,* the *Loi Cazeneuve* introduced the offence of public provocation and *apologie* of terrorist acts. The public provocation is composed of two elements, namely the act of direct incitement[518] to the commission of terrorist acts and the public character whereas the *apologie* is the indirect incitement, carried out through the exaltation or glorification of these acts. Both are punished under Article 421-2-5 with five years' imprisonment and 75000€ of fine, aggravated by the use of public online communication services in carrying out the incitement with seven years' imprisonment and 10000€ of fine[519]. In June 2016, the Article 421-2-5 was further broadened with the incorporation of two new offences in the Criminal Code, that is Article 421-2-5-1 and 421-2-5-2, respectively on the transmission of messages inciting to terrorist offences and on the habitual accessing to online public communication services which specifically address the issue of the prevention of the radicalization. The former punishes with five years' imprisonment and 75000€ of fine the conduct of extraction, reproduction and transmission of information which praises the terrorist acts or the obstruction to the procedures for blocking the services[520].

Instead, the latter sanctions the conduct of habitually consulting *jihadist* websites *"mettant à disposition des messages, images ou représentations soit provoquant directement à la commission d'actes de terrorisme, soit faisant l'apologie de ces actes"*[521]. This entails that the access to websites containing messages of jihadist ideology is punished with two years' imprisonment and 30000€ of fine. The provision envisages an exemption for the consultations carried out *"de bonne foi"*, meaning that the consultation of websites is allowed for the trial, the scientific research and for the public information. As discussed later, the provision was abrogated by the *Conseil Constitutionnel* due to the non-conformity with the principles of the Constitution in the field of human rights.

[518] Article 23 of the Freedom of Press Act determines the features of the direct incitement in *"speeches, shouts or threats in public places or meetings, or by means of writings, stamps, drawings, engravings, paintings, emblems, images or any other means of writing, speech or image sold or distributed, offered for sale or exhibited in public places or meetings, either by posters or posters exhibited to the public or by any means of communication to the public by electronic means".*

[519] Article 421-2-5, para 2, of French Criminal Code.

[520] Article 421-2-5-1 of French Criminal Code.

[521] Article 421-2-5-2 of French Criminal Code.

2.2 The radicalization of French administrative measures: the Law No. 2017 – 1510 of 30 October 2017.

Administrative measures targeted at the FTFs were adopted only in 2014 by the French legislator because so far France had chosen the path of the "legislative fever"[522], thus enacting several counter-terrorism laws which amended the Criminal Code. Then, the L. 2014 – 1353 introduced the possibility to issue travel and entry bans against potential and suspected FTFs, which were previously directed to foreigners who represented a serious threat to public order together with the expulsion orders[523]. Indeed, Article 1 stipulates that French nationals could be undergo the administrative interdiction to leave the territory whether there are serious reasons to believe that an individual is planning to travel abroad to participate in terrorist activities, crimes against humanity or war crimes or to take a direct part in the actions of terrorist organizations such as to pose a significant threat against the national security once returned in the French territory. The ban leads to the withdrawal of the passport and other travel documents, though it is applied irrespective of the disposal of identity documents[524]. In addition, the interdiction is valid for six months renewable up to two years and the recipient could be punished with three years' imprisonment and a fine of 45,000 euros whether he leaves or attempts to leave the country in violation of the administrative measure.

While the travel ban could be imposed only upon French nationals, entry bans could be directed to foreigners who are not residing in France or do not find themselves there under Article L213-1 – L212-9 of the *Code de l'entrée et du séjour des étrangers et du droit d'asile*, providing that the EU citizens must represent a serious and real threat while the non-EU citizens must satisfy simply the condition of the serious threat[525]. Moreover, another administrative measure is related to the foreigners, or rather the foreigner who is submitted to house arrest (*assignation à résidence*), after being sentenced to the interdiction from the territory due to acts of terrorism or affected by an expulsion order owing to participation in terrorist activities, is forbidden to have contact with suspected terrorists in order to protect the national security[526].

---

[522] Chalkiadaki V., *The French "War on Terror" in the Post-Charlie Hebdo Era*, The European criminal law associations forum (Eucrim), 2015, p. 31.
[523] Boutin B., *Administrative Measures against Foreign Fighters: In search of limits and safeguards*, ICCT – The Hague, December 2016, p. 10.
[524] Gazzetta C., *Sicurezza, terrorismo e cittadinanza: la nuova legislazione francese antiterrorismo e l'impegno internazionale contro i cd. Foreign Fighters*, in democraziaesicurezza.it, No. 3, 1 Ottobre 2015, p. 171.
[525] Boutin B., *op. cit.*, p. 11. Between 2015 and 2016, 98 foreigners were banned from entering in French territory, 32 of which were EU citizens.
[526] Article L. 563-1 introduced by Law No. 2014 – 1353 of 13 November 2014 reinforcing the provisions relating to the fight against terrorism.

Nonetheless, the turning point is represented by the terrorist attack hitting Paris on 13 November 2015 because the state of emergency was declared by the Law No. 2015-1501 of 20 November 2015, resulting in several administrative measures on surveillance and control issued by the executive without judicial oversight[527]. Among them, the house arrests, the night raids and the closing of religious sites are included: the Ministry of the Interior or the Prefects could prescribe the house arrest of any suspected terrorist or individual connected to terrorism posing a risk to the public order, the searches at any place suspected to be frequented by terrorists, the closing of places of worship and the bans on demonstrations[528]. In addition, the L. 2015-1501 has altered the regulations on the house searches, enabling the law enforcement authorities to acquire the personal data contained in the computing devices and it has updated the house arrest, forcing the terrorist to stay at a place of residence for a maximum daily period of twelve hours and to report to the police up to three times a day[529]. Even though the state of emergency should account for a temporary and urgent measure, it was repeatedly extended until the beginning of 2017. As a matter of fact, in June 2016 the French legislator provided with some administrative measures under regular legislation, apart from the state of emergency[530]. These were focused on the RFTFs who returned to their home country after the participation in the ISIL's terrorist activities and they must be subject to surveillance measures, such as assigned residence, obligation to remain within an area, and reporting requirements[531].

Subsequently, in October 2017 the French legislator enacted a new anti-terrorism package which upheld the measures adopted under the state of emergency, namely the Law No. 2017-1510 of 31 October 2017. Indeed, the *Code de la sécurité intérieure* was enriched with four new chapters, that is the protection areas (*périmètres de protection*), the closing of place of worship, the individual measures of administrative control and supervision (*measures individuelles de contrôle administrative and de surveillance* – commonly called MICAS), visits and seizures. The first section entails the establishment of protection areas around public areas, sporting and cultural events as the concerts which are at risk of terrorism in order to monitor the access and the circulation. The police force is allowed to search persons and vehicles

[527] The state of emergency derived from the Law No. 55-385 of 3 April 1955 which establishes that *"soit en cas de péril imminent résultant d'atteintes graves à l'ordre public, soit en cas d'événements présentant, par leur nature et leur gravité, le caractère de calamité publique"* the Government may announce the state of emergency which triggers the implementation of exceptional and temporary administrative measures. In principle, the latter could waive some human rights obligations in compliance with Article 15 of the European Convention on Human Rights.
[528] Boutin B., *op. cit.*, p. 12 e ss.
[529] Cavino M., *Sécurité, égalité, fraternité. La fragilità costituzionale della Francia (osservazioni a un mese dagli attentati di Parigi*, in Consulta Online, Fasc. III, 14 December 2015, p. 825.
[530] Law No. 2016-731 of 3 June 2016 strengthening the fight against organized crime, terrorism and their financing.
[531] Articles L225-1 to L225-8 of the *Code de la sécurité intérieure*.

attempting to enter into the protection zone and to prohibit the access to individuals who reject to undergo these searches[532]. Secondly, the prevention of acts of terrorism has resulted in the locking of the place of worship, which was previously adopted only under the state of emergency. Hence, the Prefect does not lock the religious places by reason of public order but due to *"des propos qui y sont tenus, des idées ou théories qui y sont diffusées ou des activités qui s'y déroulent, incitent à la discrimination, à la haine, à la violence, à la commission d'actes de terrorisme en France ou à l'étranger, ou font l'apologie de tels agissements ou de tels actes"*[533]. This means that the Prefects could take into consideration the messages and the theories advocated in these places, or the members which attend to the meetings or even the activities organized there, such as to enforce the measure for a maximum of six months and any violations are sanctioned with six months' imprisonment and a fine of 7500€. Furthermore, the third section is represented by the different surveillance measures, notably the house arrest which was commonly used during the state of emergency. The house arrest could be imposed up to one year without the judicial authorization to suspected jihadists, who were not convicted of any crimes or did not travel to the conflict zones, when they comply with two requirements: their behaviour constitutes a threat of "particular gravity" to the national security and their acquaintances includes persons or organizations inciting, facilitating or participating in terrorist acts or they diffuse or adhere to ideologies inciting to the commission of terrorist acts or apology of such acts[534]. The fourth title amounts to the discipline of the visits and seizures applied to the abovementioned *jihadists*, which slightly differ from the ones under the state of emergency: now the Prefect needs the authorization of the judge to search and to seize specific materials useful for the investigations.

Lastly, the French counterterrorism system envisages the denationalization, the *déchéance de nationalité* pursuant to Article 25 of the Civil Code. This states that the individual who has acquired the citizenship through the *ius soli*, marriage or naturalization, could be the target of the *déchéance* on grounds of participation in a terrorist association or commission of *actes of terrorisme*. However, it is necessary that the individual holds the dual citizenship in order to avoid the statelessness, so that the déchéance could not be imposed upon native French[535].

[532] Article L226-1 of the *Code de la sécurité intérieure.*
[533] Article L227-1 of the *Code de la sécurité intérieure.*
[534] Article L228-1 of the *Code de la sécurité intérieure.* On the interpretation of the Article L228-1, see Ministre de l'Interieur, *Rapport du Gouvernement au Parliament sur la mis en œuvre de la loi n° 2017-1510 du 30 octobre 2017 renforçant la sécurité intérieure et la lutte contre le terrorisme*, 1 November 2018, p. 42 e ss.
[535] Cavino M., *op. cit.*, p. 832 e ss.

2.3 The Conseil Constitutionnel and the double illegality of the habitual consultation of jihadist websites.

The incorporation of the Article 421-2-5-2 in the Criminal Code complies with the *ratio* of the anticipation of the threshold of the criminal liability to acts preparatory to acts preparatory to acts of terrorism. As mentioned above, the provision aims at preventing the indoctrination of individuals who may perpetrate terrorist acts through the criminalization of the access to terrorist websites, devoid of the actual commission of any preparatory act. Though, the constitutional review is crucial to mark this Article as unconstitutional since it infringes upon the freedom of communication in a way that is not necessary and proportional. The *Conseil Constitutionnel* (hereafter, the *Conseil*) comes to this conclusion through two judgements which concern Mr. David Pagerie, more simply Mr. David P., young radicalized who was convicted of the offence of habitually accessing terrorist websites under Article 421-2-5-2 in 2016. The *Cour de Cassation* raises a priority matter of constitutionality (*question prioritarie de constitutionnalité,* hereafter QPC) before the *Conseil* regarding the Article 421-2-5-2 modified by the L. 2016-731 of 3 June 2016, pointing out that the latter violates the conditions of necessity, adequacy and proportionality of the restrictions imposed upon the fundamental human rights and freedoms when it punishes the individual who merely checks on *jihadist* websites without committing or attempting to commit a preparatory act[536]. Along with the trespassing of the freedom of communication and opinion due to the lack of the proof that the individual is motivated by an illegal intention in accessing the websites, the applicant claims that the provisions violate other standards, namely the principle of accessibility and intelligibility of the law because of the vagueness of the terms, and the principle of equality among individuals and among the means of access to the content[537], as well as the principle of the presumption of innocence[538].

On the merits, the *Conseil* has examined whether the violation of the freedom of communication is suitable, appropriate and proportional to the object of the provision (that is the prevention of the indoctrination). First of all, the *Conseil* deals with the requirement of the necessity, enumerating the criminal offences and the criminal procedural provisions directed to the prevention of the commission of *actes de terrorisme,* as well as the administrative instruments

[536] Rossi F., *La penalizzazione della propaganda jihadista online in Francia*, Diritto Penale Contemporaneo, 5/2019, p. 146.
[537] In the Article 421-2-5-2, only certain individuals are authorized to check these websites because of their profession and accessing to this content via the Internet is punished while it is allowed the same behaviour via other media. See, *supra*, para 2.1.1.
[538] Conseil Constitutionnel, Decision No. 2016-611 QPC of 10 February 2017, *Mr. David P.* para 2.

to monitor the public communication services inciting to terrorism and to oversee individuals consulting these services. Afterwards, the *Conseil* addresses the requirement of proportionality, stressing that the contested provisions do not require that the individual *"ait la volonté de commettre des actes terroristes ni même la preuve que cette consultation s'accompagne d'une manifestation de l'adhésion à l'idéologie exprimée sur ces services"*[539]. Hence, the simple act of accessing to websites is sufficient, except the cases of information, scientific research and trial. Finally, the *Conseil* has emphasised the uncertainty of "in good faith" because the provision does not criminalize the consultation of individuals moved by illegal motivations. Therefore, the Article 421-2-5-2 of the Criminal Code is declared unconstitutional because the violations of the freedom of communication are not appropriate, suitable and proportional.

Nonetheless, the L. 2017-258 of 28 February 2017 reintroduced the provision, bringing some amendments, especially regarding the criminalization of consultation carried out *"sans motif légitime"* and the adhesion to the ideology expressed on the websites which repeats a formula used in the aforementioned judgment of the *Conseil*. Therefore, M. David P. raises a QPC before the Tribunal of Angers which punished him for the offences under Article 421-2-5-2, claiming that the legislature has adopted once more the offence of habitual consultation of websites, even though it was repealed by the *Conseil*, thus infringing on the authority of the *Conseil*'s decision as *res iudicata*. In addition, the applicant has reiterated the same claims of the Decision 2016-611 QPC, including the principle of equality, the conditions of necessity, appropriacy and proportionality and the principle of intelligibility of the law. On 13 July 2017, the Tribunal of Angers submits the QPC to the Court of Cassation which transmits it to the *Conseil* on 4 October 2017 asking whether the new legislation of 28 February 2017 infringes upon the freedom of communication in an appropriate and proportional way and whether the amendments could lead to the legitimacy of the provision, dismissing the previous judgment[540].

The *Conseil* firstly invokes the jurisprudence on the freedom of communication[541] which stipulates the importance of the online public communications in the exercise of this freedom, thus the individual must freely access to these services[542] and then mentions the power of the legislature to introduce restrictions to the freedom of communication in its fight against terrorism, which must be proportional, suitable and appropriate to the purpose sought.

[539] Decision No. 2016-611 QPC of 10 February 2017, para 14.
[540] Conseil Constitutionnel, Commentary to the Decision No. 2017-682 QPC of 15 December 2017, Mr. David P., p. 10.
[541] See, *inter alia*, Decision No. 2009-580 of 10 June 2009, HADOPI I.
[542] Conseil Constitutionnel, Decision No. 2017-682 QPC of 15 December 2017, *M. David P.,* para 3.

Turning to the merits of the judgement, the *Conseil* has repeated the ideas of the Decision 2016-611 QPC in reference to the requirement of necessity, recalling the numerous criminal offences, investigative powers and administrative measures available to the legislature, including also the new individual measures for supervision and surveillance contained in the L. 2017-1510 of 31 October 2017. Therefore, the administrative and legal authorities are equipped with several instrument to monitor an individual and punish him when the access is associated to the intention of committing a terrorist act, even before the actual commission[543]. As regards the proportionality, the *Conseil* examines the changes adopted by the French legislator, asserting that the inclusion of the *"manifestation de l'adhésion à l'idéologie"* in the provision as a constitutive element is not sufficient to account for the existence of an intention to commit terrorist acts, so that the habitual consultation of terrorist websites or the adhesion to the ideology expressed in these sites could not lead to the criminal liability of the individual since it is not possible *"d'établir à elles seules l'existence d'une volonté de commettre des actes terroristes"*[544]. Moreover, the *Council* stresses the uncertainty of the provisions due to the fact that the terrorist intent is not an essential part of the offence, thus the *"motif légitime"* could not be determined, even because a person adhering to the ideology on the sites is unlikely to represent one of the examples of *"motif légitime"* envisaged in the Article 421-2-5-2[545]. Therefore, the amended provision is unable to overcome the question of legitimacy and it is declared unconstitutional.

[543] Decision No. 2017-682 QPC of 15 December 2017, para 13.
[544] *Ivi*, para 14.
[545] *Ivi*, para 15.

3. Germany against terrorism: punishment and rehabilitation.

3.1 Repression: Section 129a concerning the terrorist organizations and Section 89a against the individual preparatory acts.

Germany has always been engaged in the fight against terrorism, adopting a repressive approach through the criminalization of terrorist-related offences. Indeed, in the Seventies the country had to cope with the threat posed by the Red Army Faction (RAF) which justified the emergency measures and the introduction in the German Criminal Code (*Strafgesetzbuch* – StGB) of specific offences addressing terrorist organizations. It should be noted that the German legal system does not criminalize terrorism *strictu senso* nor it envisages specific terrorist offences but it is focused on the terrorist organizations. This entails that the common serious crimes committed for terrorism are not provided for by the German Criminal Code which, in turn, does not consider the terrorist motivation as an aggravating factor in the sentence[546].

The emergence of the *jihadist* terrorism resulted in the implementation of the instruments already adopted against the "red terrorism", namely Section 129a StGB which punishes whosoever forms or participates in an organisation whose aims or activities are directed at the commission of particularly severe crimes such as murder, genocide, crimes against humanity or war crimes or offences against personal liberty with the imprisonment for a term of between one year and ten years[547]. Along with it, Section 129a StGB criminalizes the establishment of or the participation in an organization aimed at the perpetration of typical offences provided for by Section 129a (2)[548] with the same penalty. However, this prosecution occurs only in the event that the purpose of these acts is

> *"to seriously intimidate the population, to force an authority or an international organisation to act under duress by use of violence or the threat of violence, or to eliminate the basic political, constitutional, economic or social structures of a state or an international organisation or considerably interfere with them in such a way that the effects of this interference may cause considerable damage to the state or the international organisation"*[549].

[546] Valiente-Ivañez V. et al., *op. cit.,* p. 56.
[547] Section 129a (1) of the German Criminal Code.
[548] Among them, causing serious physical or mental harm to another person; computer sabotage, fires, crimes against the environment and crimes involving firearms.
[549] Section 129a (2) of the German Criminal Code.

This means that the leaders and the members of an organization pursuing terrorist aims are criminally liable irrespective of the actual commission of a terrorist attack by the organization, thus the specific-intent is sufficient[550]. Indeed, the components of the terrorist organizations are not criminalized on the basis of their activities, but only due to their affiliation to the organization, thus the penalty follows a principle of progressivity[551]. Likewise, the "threatening organizations" are punished inasmuch their activities pursue the threat to commit the criminal acts contained in Section 129a (2) StGB with the imprisonment from six months to five years. The provision also deals with the supporters and the recruiters of the organization with terrorist aims, thus detaching the conduct of support and recruitment from the offence of participation in a terrorist organization: the former are punished for a term between six months and ten years in case of assistance to the terrorist organizations and up to five years' imprisonment and a fine for the support to the "threatening organizations". On the other hand, the latter are sanctioned with the reclusion from six months to five years whether they recruit associates or supporters for the organizations[552].

In reaction to the 9/11 attack, Germany revised its counter-terrorism legislation in order to upgrade it to the most recent challenges, namely Al-Qaeda and the global *jihad*. Therefore, in August 2002 the German legislator broadened the scope of Section 129a StGB to encompass criminal and terrorist organizations abroad. The new Section 129b StGB distinguishes between the terrorist organizations located within a Member State of the EU, enabling the prosecution of the creation, the membership, the participation, the supporting and the recruiting of members and associates and the ones outside the EU. The latter are prosecuted just in case of the perpetration of the related offences within the territorial scope of the Criminal Code or from a German citizen or resident[553]. These prosecutions require the authorization of the Federal Ministry of Justice which could be granted for a specific case or could be issued for the future cases concerning the foreign terrorist organizations[554]. The penalty ranges from one to ten years and depends on the position of the *jihadist* within the organization and on the type of offence he has committed[555].

---

[550] Mueller T. N., *Preventive detention as a counter-terrorism instrument in Germany*, Crime Law Soc. Change, 2014, 62:323 – 335, p. 330.
[551] Ferrara M., Gatta D., *Lineamenti di counter-terrorism comparato*, Centro Ricerca Sicurezza e Terrorismo, 2018, p. 27.
[552] Section 129a (5) of the German Criminal Code.
[553] Boyne S., *Law, Terrorism, and Social Movements: The Tension between Politics and Security in Germany's Anti-Terrorism Legislation*, Cardozo Journal of International and Comparative Law, Vol. 12 (1), 2004, p. 78.
[554] Section 129b (1) of the German Criminal Code.
[555] Valiente-Ivañez V. et al., *op. cit.*, p. 57.

In 2009 the German counter-terrorism legislation underwent a meaningful development due to the introduction of three new offences, i.e. Section 89a, 89b and 91 StGB, in the light of the criminal liability at early stage and the prevention to terrorism. Indeed, the *Gesetz zur Verfolgung der Vorbereitung schwerer staatsgefährdender Gewalttaten* (Act on the prosecution of the preparation of serious violent offences endangering the State) provided the criminalization of the preparatory acts for the commission of serious violent acts endangering the state. The new Section 89 StGB is very clear in defining the "serious violent acts endangering the state" as an offence against life or personal liberty with terrorist purposes[556]. At the same time, the provision enumerates the preparatory conducts which Section 89a StGB could be applied to, or rather providing or receiving training on, *inter alia*, firearms, explosives or radioactive substances or other substances harmful to health. Here the *ratio* consists of the fight against the training camps in third countries, especially in Iraq, where terrorists are trained in the war techniques, even though it was interpreted widely such as to encompass the attendance of a chemistry class, a course in Arabic or taking lessons in driving school[557].

Moreover, the provision incriminates the handling of weapons and explosives and also covers the procurement of substances which are essential for the creation of explosive devices. In this sense, the German legislator aims at preventing the acquisition of skills which are useful for the commission of serious violent acts. Section 89a StGB does not require the perpetration of the terrorist crime since it is sufficient that the individual puts in place mere prodomal acts, thereby he is sentenced to the imprisonment from six months to ten years or from three months to five years according to the nature of the serious violent act[558]. In addition, the offence envisaged by Section 89a StGB covers also the preparatory conducts taking place abroad against the German constitutional order. Nonetheless, whether the preparation occurs outside the EU, it is necessary that the author is a German national or a foreigner living in Germany or the offence is carried out in the Germany territory or against a German national.

Alongside Section 89a StGB, the 2009 legislation criminalizes the intention of receiving instructions in the commission of a serious violent act through the establishment or the maintenance of a relationship with a terrorist organization[559] which could occur also abroad

[556] Section 89a (1) is modelled upon Section 129a because it requires the existence of the specific-intent, thus the willingness to commit an act for terrorist purposes, namely undermine the continued existence or security of a state or of an international organisation, or to abolish, rob of legal effect or subvert the constitutional principles of the Federal Republic of Germany. See *supra* note 137.
[557] Mueller T. N., *op. cit.*, p. 331.
[558] Valiente-Ivañez V. et al., *op. cit.*, p. 58.
[559] Section 89b of German Criminal Code.

from a German national or resident. The penalty consists of up to three months of imprisonment or a fine and it could mitigate by the minor age of the individual. It is ironic that the relationship could amount to a mere contact to a terrorist group via e-mail and the offence is carried out even if the terrorist group does not provide training or instructions[560]. The third offence is embodied by Section 91 StGB listed as *Anleitung zur Begehung einer schweren staatsgefährdenden Gewalttat* (Instructions for committing serious violent offence endangering state) which criminalizes three types of conducts: the *apologie*, the dissemination of materials to third parties intended to the commission of serious violent offences and to encourage the willingness to carry out other crimes and the acquisition of documents for the preparation of a terrorist act. In any case, anyone who is convicted of public provocation is imprisoned for up to three years or fine, excluding the professional or official duties[561].

The severe challenge constituted by the FTFs which joined ISIL in the war scenario and returned with abilities to carry out terrorist attacks has led the German decision-makers to amend the Section 89a in order to make travelling for terrorist purposes a criminal offence within the preparatory acts. Indeed, the new legislation punishes with the custodial sentence from six months to ten years anyone who leaves his country to receive terrorist training beneficial for perpetrating serious violent acts which jeopardize the state security[562]. The provision also criminalizes the attempt to travel while it is not necessary that the destination is experiencing a conflict due to the evidences that training camps are usually located in accomplice countries.

Finally, the 2015 legislation lays down the new Section 89c on financing to terrorism replacing the current Section 89a (2)(4) which criminalizes only the conducts of collection or supply of "substantial assets" intended to carry out serious violent acts endangering the state. The new provision does not contain a material threshold concerning the assets and it tackles not just the financing to the commission of terrorist acts but also the financing to terrorism i*n toto*[563]. It is required that the contributor holds the double specific-intent inasmuch he is willing to fund the terrorist actions, having the intention or being aware of the designated use of the assets. Lastly, the individual who gives a financial support to the commission of terrorist acts is punished with the imprisonment from six months to ten years.

[560] Mueller T. N., *op. cit*., p. 331.
[561] Section 91 of German Criminal Code.
[562] Section 89b (2a) of German Criminal Code.
[563] Dambruoso S., *op. cit.*, p. 211.

3.2 From the 2015 Identity Card Act and Passport Act to the rehabilitation vis-à-vis the returnees. The case of HAYAT project.

Alongside the criminalization of terrorist offences which allows the German authorities to bring to justice FTFs, since 9/11 attack the Federal Government has envisaged several preventive measures to tackle the phenomenon of terrorism. In 2001, the Security Package I entered into force and prohibited not just the extremist religious associations but also religious communities and philosophical groups pursuing terrorist aims or countering the constitutional order[564]. A year later, the Act on Combating International Terrorism introduced the Security Package II which showed some interesting measures in the field of personal identity and extradition. Indeed, the foreigners could be extradited on the basis of hard evidence on the violent behaviour of the individual posing a threat to the national security and their fingerprints and other personal identity information could be collected by the German agencies[565]. Nonetheless, the threat of the *jihadist* organizations elicited an enhancement of the administrative measures, so that in order to halt the travel of *jihadists* and to hamper the entry of foreign *jihadists* in the Germany territory, relevant anti-terrorism instruments were enacted in June 2015 by the *Gesetz zur Änderung des Personalausweisgesetzes zur Einführung eines Ersatz-Personalausweises und zur Änderung des Passgesetzes*, even though already in 2014 measures have been implemented to reject the application for the identity cards of individuals suspected of connections with the Islamic State[566].

The amended Identity Card Act and Passport Act are aimed at preventing the transfers of the FTFs and at facilitating the procedure of identification in Germany or in third countries. On one hand, the Identity Card Act stipulates that identity documents of individuals posing a serious threat to the national security could be revoked for a period of three years replaced by a substitute document holding a special mark *"Not valid for travel outside of Germany"*[567] which alerts the German and foreign border control authorities in order to prevent the *"broken travel"*, namely the stopover in Schengen countries where the FTFs need only the ID card to travel to the conflict zones[568]. On the other hand, the German authorities could declare passports void

[564] Committee of Experts on Terrorism, *Profiles on Counter-Terrorism Capacity: Germany,* September 2016, p. 6, Available at: https://rm.coe.int/1680641010.
[565] DW, *Second Anti-Terror Package Presented to German Parliament*, 14 December 2001, Available at: https://www.dw.com/en/second-anti-terror-package-presented-to-german-parliament/a-355802-0.
[566] Dambruoso S., *op. cit.*, p. 211.
[567] Section 6a of the *Gesetz zur Änderung des Personalausweisgesetzes zur Einführung eines Ersatz-Personalausweises und zur Änderung des Passgesetzes.*
[568] Dambruoso S., *op. cit.*, p. 212.

and seize them whether the individual is considered as a national security threat or he is convicted of preparation of serious act of violent subversion under Section 89a StGB. In addition, the foreigners could be banned from entry and stay in the German territory through the withdrawal of the residence, the ban on travelling to third countries owing to security matters and the ban on entry due to the threat to the national security[569].

The German counter-terrorism system also includes the expulsion of foreigners from the German territory in accordance with Section 53 of the 2015 *Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet* which argues that the foreign nationals who pose a danger to the public safety and order, the free democratic basic order or other significant interests of the Federal Republic of Germany could be expelled; though, it sets up a differentiation between EU nationals who shall meet the condition of a serious threat to the public safety and order and the asylum seekers or refuges who must be deported only if there are serious grounds for the determination of the foreigner as a threat and the foreigner has been convicted of a serious crime[570].

Finally, following other European countries, in 2019 Germany tackles the issue of German citizenship through amendments to German Nationality Act *(Staatsangehörigkeitsgeset - StAG).* Indeed, the already existing Section 28 StAG establishes that a German national could lose the citizenship whether he enlists with armed forces or a comparable armed organization of a foreign state, thus excluding the responsibility for joining a foreign terrorist militia. Therefore, the 2019 legislation extends the punishment to dual-national citizens who take a direct part in the combat operations of foreign terrorist militias[571]. This "statutory forfeiture"[572] does not apply to *jihadists* who do not reach the legal age, to FTFs who do not possess the dual nationality because of the risk of statelessness and especially it is not retroactive, or rather it could not be imposed upon FTFs who have already fought in the conflict zones and are striving for returning to Germany[573].

---

[569] Gazzetta C., *op. cit.*, p. 161.

[570] Section 53 (3) of the *Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet*.

[571] A foreign terrorist militia is defined in the proposal of the amendment to the Section 28 of the German Nationality Act as *"paramilitary, organized armed group that attempts to eradicate an existing state in violation of international law with the aim of establishing an alternative state or state-like structures"*

[572] Roithmaier K., *Germany and its Returning Foreign Terrorist Fighters: New Loss of Citizenship Law and the Broader German Repatriation Landscape*, 18 April 2019, ICCT – The Hague.

[573] Gesley J., *Germany: Government Proposes Loss of German Citizenship for Foreign Fighters with Dual Citizenship*, Global Legal Monitor, 20 May 2019.

Notwithstanding the several administrative measures, Germany has also prioritized strategies of rehabilitation of the returnees in order to allow them to disengage from the radical activities and to reintegrate into the society. In this regard, in 2011 the HAYAT (Arab term for "life") program was launched by the Centre for Democratic Culture (ZDK) as a counselling program for radicalized individuals or for those who are involved in the path to radicalization and as a centre for assistance for family and friends of the *jihadists*. Indeed, since January 2012 HAYAT cooperates with the German Federal Office for Immigration and Refugee Affairs where a telephone hotline is located which redirects the calls of the highly radicalized cases, i.e. the FTFs, to HAYAT. The latter works on three different levels in the deradicalization process, namely the ideological, pragmatic and affective ones. Firstly, the ideological dimension deals with the de-legitimization of the *jihadist* narratives and the self-evaluation of the individual's past, associated with the creation of counter-narratives through the education of the family itself[574]. The pragmatic level amounts to the assistance to the radicalized individuals in reintegrating in the society through the schooling, training and employment, so that the individual overcomes the social isolation liable to trigger again the radicalization[575]. Moreover, the affective level involves emotional support provided by the family which turns into the new reference group. The family is instructed by HAYAT to the engagement in debates with the radicalized relative, thus accounting for a new group in opposition to the *jihadist* organizations[576].

In practice, HAYAT works this way: a first analysis of the level of individual radicalization in order to determine whether to implement the family counselling or simply the family therapy[577] is followed by an assessment of the motivations of the radicalized individuals in order to determine the appropriate strategy of counselling which also relies on the different circumstances, namely before leaving, during the phase abroad and upon the return. Accordingly, the HAYAT identifies three typologies of FTFs: the one who is about to travel to the conflict zones, thereby HAYAT intervenes in close cooperation with the law enforcement authorities in order to prevent the person from leaving through the diffusion of counter-narratives and the creation of a positive family environment[578]. In addition, HAYAT deals with

[574] Koehler D., *Family Counselling as prevention and intervention tool against "foreign fighters". The German "HAYAT" Program,* Journal EXIT – Deutschland, March 2013, p. 186.
[575] Lister C., *Returning Foreign Fighter: Criminalization or Reintegration?*, Brookings Doha Center, August 2015, p. 10.
[576] Koehler D., *op. cit.*, p. 188.
[577] *Ivi*, p. 191.
[578] *Ivi*, p. 195.

the radicalized individual which has already flee his country of origin, configuring a strategy based on two features: the communication between the family and the relative abroad in order to instil the deradicalization process before the perpetration of terrorist acts and the mediation between the family and the authorities, thus providing for legal assistance[579]. The RFTF is addressed in a different way by HAYAT since he is brought to justice after the return. This means that the program commits to the preservation of a stable affective environment which supports the radicalized and it ensures deradicalization programs in prison[580].

In conclusion, HAYAT represents a program which aims at countering violent extremism and at rehabilitating individuals once returned from the conflict zones. It is important to stress the meaningful role of the family bonds in order to empower the strategies as well as the crucial knowledge of the Salafist movements and ideology from the HAYAT team. In addition, HAYAT stands as a bridge between the FTFs, the family and the authorities, being capable of moderating between the various sides and responding to their necessities.

3.3 The German Federal Court of Justice: the constitutionality of Section 89a of the German Criminal Code and the "serious act of violent subversion".

In 2009 the offence of the preparation of serious violent offence endangering State was incorporated into the German Criminal Code under Section 89a StGB in order to tackle the increasing threat of terrorist attacks in Europe, though the first judgement of the German Federal Court of Justice (*Bundesgerichtshof* – BGH) concerning the constitutionality of Section 89a was issued only in 2014 in a case which involved the conviction of a young man for building a pipe bomb. The BGH detected a slight contrast with the principle of legal certainty and the principle of proportionality, still it considered the section consistent with the dictates of the Constitution whether the individual holds the willingness and the decisiveness to commit serious acts of violence against the national security[581]. In order to understand the considerations of the decision of the BGH, it is better to start from the circumstances of the decision.

[579] Koehler D., *op. cit.*, p. 195.
[580] *Ivi*, p. 196.
[581] Wenin R., *L'addestramento per finalità di terrorismo alla luce delle novità introdotte dal D.L. 7/2015: una riflessione comparata sulle tecniche di descrizione della fattispecie muovendo dalla sentenza del Bundesgerichtshof tedesco StR 243/13*, in Diritto Penale Comparato, 2015, p. 4.

The target of the judgement is represented by the Afghan-born defendant K. who, after receiving the German citizenship in 2009, started to have feeling of hatred towards the Western society and a desire of revenge due to the oppression perpetrated by the Westerners upon the Muslim community. Therefore, he started his path to radicalization through the access to *jihadist* websites, downloading audio and text files from Internet concerning propaganda on the participation to the armed *jihad*, consulting the online magazine "*Al Qaida auf der arabischen Halbinsel"* which gave instructions on how to build a pipe bomb capable of killing up to ten people ("Make a bomb in the kitchen of your Mom")[582].

In 2011 the defendant took the decision of building a pipe bomb; thus, he moved to Frankfurt am Main and started the purchases of the essential substances. The latter were sufficient to manufacture a pipe bomb but he had not yet determined the time and place of deployment . On 13 February 2011, K. accidentally set off an explosion, suffering burns to his face and arms and he was questioned by the police which did not arrest him. After fleeing to Pakistan, in May 2011 the police issued a warrant against him and he was finally arrested in December 2012 when he returned to Germany. The Tribunal (*Landesgericht* – LG) of Frankfurt am Main convicted him of preparation of a serious violent offence endangering the state under Section 89a StGB on grounds of the material seized in his room since *"zumindest billigend in Kauf, die Vorrichtung nach der Herstellung auch in der Öffentlichkeit zum Einsatz zu bringen, dadurch eine unbestimmte Anzahl von Menschen zu töten und somit das Sicherheitsgefühl der Bevölkerung sowie ihr Vertrauen in staatlichen Schutz erheblich zu beeinträchtigen"*[583]. Hence, he was sentenced to three years' imprisonment together with the condemnation pursuant to Section 308 StGB (causing explosion). The defendant appealed against the decision and affirmed that Section 89a StGB was unconstitutional because it infringes upon the principle of legal certainty and the principle of appropriateness.

Firstly, the BGH examined the principle of legal certainty *(Bestimmtheitsgebot)* pursuant to Article 103 (2) GG which stipulates that the criminalization of a conduct requires that the law has been come into force before the commission of such conduct. Along with it, the principle obliges the German legislator to specify the conditions of criminal responsibility in order to allow the accurate determination of the effects and the area of the application of the criminal offences[584]. This means that the BGH shall verify whether the legislation adopting the Section

[582] Bundesgerichtshof, Judgement of 8 May 2014 – 3 StR 243/13, para 2.
[583] Bundesgerichtshof, Judgement of 8 May 2014 – 3 StR 243/13, para 3.
[584] Ohnesorge C., et al., *op. cit.*, p. 635.

89a StGB complied with this principle. In this regard, the BGH affirms that the provision satisfies the requirements of Article 103 (2) GG since the legal definition of the preparatory acts which *"undermine the continued existence or security of a state or of an international organisation, or to abolish, rob of legal effect or subvert the constitutional principles of the Federal Republic of Germany. contains several terms"* is composed of specific terms which could be determined by the case-law, i.e. superior courts decisions, and by the definitions of the Section 92 StGB[585]. In addition, the second paragraph of Section 89 StGB is meaningful for the appropriate interpretation of the provision since it envisages a list of conducts which amount to the preparatory acts.

Subsequently, the BGH approaches the issue of the appropriateness of the provision which includes three elements, namely the legitimate legislative purpose, the suitability *(geeignetheit)* and necessity *(erforderlichkeit)* and the reasonability *(angemessenheit)*. The legislation introduced *ex novo* provisions aimed at prosecuting individuals who are detached from terrorist organizations, apart from the sections already provided for by the Criminal Code[586]. Besides, the legislation has to be suitable and necessary to the objective, though the German legislator holds a wide discretion in implementing legislative measures, so that the BGH could not investigate the constitutionality of the legislation. The legislation must even satisfy the condition of reasonability through the respect of proportionality between the measure and the protected basic right[587]. With regard to the latter, the BGH deeply analyses five aspects of the Section 89a StGB, that is the high custodial sentence, the criminalization of the preparation, the criminal attitude, the state security clause and the *mens rea*. In the first place, the BGH stresses that the severe punishment contained in Section 89a StGB is justified by the relevance of the basic right and the discrepancy among the sanctions (from six months to ten years) is crucial to assess the gravity of each case[588].

Moreover, the criminalization of the preparation of a crime before its actual commission could not be considered as unconstitutional since it is already envisaged by the German Criminal Law according to Section 80 StGB which punishes the preparation of a war of aggression. It must also be said that the Federal Court of Justice in 1970 enshrined that the preparatory acts must be punished in order to prevent the commission of any act jeopardizing the state security[589].

[585] Bundesgerichtshof, Judgement of 8 May 2014 – 3 StR 243/13, para 11.
[586] Bundesgerichtshof, Judgement of 8 May 2014 – 3 StR 243/13, para 16.
[587] Ohnesorge C., et al., *op. cit.*, p. 638.
[588] Wenin R., *op. cit.,* p. 6.
[589] Ohnesorge C., et al., *op. cit.*, p. 640.

Then, the BGH deals with the criminal intention of the terrorist which does not derive from the subjective elements but it is inferred from specific conducts perpetrated by the individual: Section 89a StGB comprises several conducts which trigger the individual *mens rea*. Moving on, the BGH focuses on the conformity of the state security provision which lays down that the terrorist actions must cause harm to the national security or to an international organization or must undermine the constitutional order of the Federal Republic of Germany, modelled on the Section 120 (2) n. 1 GVG (*Gerichtsverfassungsgesetz*) which gives the definition of "state security", so that the provision does not constitute an excessive expansion of the criminal liability[590].

Finally, the BGH affirms that the principle of proportionality is not infringed whether the perpetrator does not elaborate a detailed plan of the stages of the terrorist conduct but it is necessary the terrorist purpose of the preparatory acts and a level of effectiveness such as to ascertain whether the state security is endangered[591]. It is also true that Section 89a StGB criminalizes conducts which does not satisfy such requirement, the *neutrale objecktive Verhaltensweisen,* which are transformed into terrorist offences by the intention of the perpetrator. This does not mean that the provision is unconstitutional for the BGH adopts a restrictive interpretation of the provision, stipulating that the author of preparatory acts must hold the intention to carry out terrorist acts after the preparation[592].

In conclusion, the BGH affirms that the *actus reus* was satisfied since the defendant was preparing a serious act of violent subversion through the purchase of the various parts of the pipe bomb and he was willing to perpetrate a terrorist attack, despite the lack of a schedule. Accordingly, the defendant K. could be prosecuted under Section 89 StGB because the latter proves to be constitutional, satisfying the principles of legal certainty and suitability.

[590] Bundesgerichtshof, Judgement of 8 May 2014 – 3 StR 243/13, para 36.
[591] Wenin R., *op. cit.,* p. 7.
[592] Bundesgerichtshof, Judgement of 8 May 2014 – 3 StR 243/13, para 45.

4. Final remarks.

This chapter has made a detailed analysis on the strategies of Italy, France and Germany stressing their achievements in the field of repression and prevention. In all instances, measures have been enacted in the aftermath of terrorist attacks affecting the Western society in an astonishing way: the 9/11 attack resulted in the reassessment of the already existing counter-terrorism system in order to encompass the international manifestations of terrorism, so as to tackle the extremist organization of Al-Qaida. The subsequent attacks had the consequence of enlarging the regime to incorporate several criminal offences committed for the purpose of terrorism. In particular, the terrorist acts carried out by the adherents of ISIL in the European Union in the last five years changed the narrative through the focus on the prevention, thus inserting criminal offences which anticipates the threshold of the criminal liability to the acts preparatory to terrorism in order to avoid the perpetration of terrorist acts. Notably, the participation and the support to terrorist associations, the recruitment, the training of terrorists and the organization of travels for terrorist purposes. In this sense, in 2016 France criminalized even the habitual access to websites containing messages of *jihadist* ideology, later repealed by a decision of the *Conseil Constitutionnel*. In addition, the menace of "lone wolves" required the incrimination of individual terrorist acts irrespective of the connection to a terrorist organization, thus France has provided with the *enterprise terroriste individuelle*, while Italy and Germany preserved their system of individual acts falling into the provisions concerning the associations with terrorist purposes.

Furthermore, the three countries turned to administrative measures aimed at disrupting the travel of *jihadists*, at hampering the entry of foreign terrorists and at imposing personal preventive measures on individual who are perceived as a danger inasmuch they are supposed to commit terrorist crimes or carry out preparatory acts. On one hand, Italy enhanced the special surveillance and the temporary withdrawal of the identity documents or passports, just as much as Germany replacing these documents with the "terrorist cards", or rather documents which prohibit the travels within the Schengen area by displaying the connection to terrorism. On the other hand, France went further by enforcing the state of emergency for two years which attaches several powers restricting the individual liberties to the law enforcement authorities. Moreover, the three countries have availed of the instrument of the expulsion against the foreigners who are suspected of being *jihadists* without being convicted. Along with it, in 2019 Germany has aligned with France and Italy in taking advantage of the revocation of citizenship without the need of the criminal conviction. However, it must be said that the prevention has

been interpreted only by Germany in the context of the countering violent extremism (CVE), thus implementing rehabilitation programs which are geared to the prevention of the radicalization and to the disengagement of the "returnees" with a view to the reintegration into the society.

Finally, the comparison between the three countries involved the role of the judicial powers in facing the phenomenon of terrorism. Hence, the judiciary has intervened in order to clarify the meaning of the provisions of the Criminal Code so as to conform them to the ever-changing terrorist threat. While the French and German Constitutional Courts delivered decisions on the balance between the fundamental liberties and the security purposes, so far the Italian Constitutional Court remained silent on the counter-terrorism measures, though it significantly ruled on the participation in the terrorist association under Article 270-*bis* by envisaging the participation in ISIL through the membership in a local *jihadist* cell.

In a nutshell, the comparative analysis has demonstrated that, despite the differences in the numbers of foreign terrorist fighters, Italy, France and Germany have undertaken similar measures in order to repress this phenomenon through the prosecution and the prevention of the commission of terrorist acts, so as to line up with the European response and establish a pan-European strategy against terrorism.

Conclusion

It has been the purpose of this dissertation to examine this new phenomenon which has jeopardized the stability of the European countries. Foreign terrorist fighters represent the new face of terrorism and they pose higher threats because they are unpredictable: each European citizen could easily convert to Islam, radicalize through web and social media and travel to conflict zones. So far, the international community has intervened with the goal of crushing ISIL on the battlefield and reducing the numbers of individuals travelling to Syria or the neighbouring countries to fight in the ranks of ISIL. The findings has been significant: the Islamic State has lost its strongholds in Syria and Iraq due to the Western military intervention with the aid of the Kurdish army whereas the number of foreign terrorist fighters departing from their home country has decreased considerably. The latter represents the consequence of the repressive policies enacted at the legislative and administrative level to criminalize the travel for the purpose of terrorism and to prevent the departure and the entry through personal preventive measures. Nonetheless, the menace is still alive but it is merely changing shape: *jihadists* hardly join ISIL in the conflict zone but they remain at home where they set up terrorist cells with the purpose of perpetrating attacks in their country of origin or in the EU soil. Hence, European countries must remain vigilant to the radicalized individuals, to the websites disseminating *jihadist* ideology and to the meeting places where *jihadists* may recruit other individuals.

On one hand, the threat is worsened by the fact that foreign terrorist fighters are usually the by-product of the Western society which marginalises and alienates its most vulnerable citizens, feeling a sense of exclusion. Therefore, there exists the need of domestic policies which tackle the economic instability and the cultural vacuum, namely specific programs of deradicalization. These should encompass measures for the rehabilitation of the parties involved in order to allow them to abandon the extremism and to reintegrate in the society. However, the crucial aim consists in avoiding the spread of these ideologies in the returning society as well as preventing that these fighters are prosecuted and imprisoned where they could continue their effort at radicalization. The targets should be not only the foreign terrorist fighters but also all the individuals who draw closer to *jihadist* ideologies on the web and on the social media.

On the other hand, the recent news of the repatriation of Alice Brignoli[593], imprisoned in the Al-Hawl camp in Syria, after having travelled to the conflict zone in 2015 with her husband, Mohamed Koraichi, has drawn the attention on a paramount problem: the hundreds of foreign terrorist fighters who are stationary in Syria because they were arrested by the Kurdish-led Syrian Democratic Forces (SDF) after the collapse of ISIL. Sources indicate that out of 11,000 detainees, 2,000 are departed from third countries, among them about 800 are European citizens[594]. In this sense, the President of the United States Donald Trump has encouraged the Western countries to take back their ISIS fighters.

At the time of writing, European countries have been reluctant to repatriate and try their nationals due to various factors: first of all, the difficulty in gathering evidences necessary to prosecute these individuals which, in turn, implies the lack of any guarantee with respect to the conviction. In addition, as discussed above, the criminal systems of the European countries provide with too light penalties in comparison to the offences committed for terrorist purposes. Moreover, European countries fear the "blowback effect", which does equate not only to terrorist attacks but also to the activity of recruitment in the view of replenishing the ranks of ISIL. The third factor concerns the risk that prisons, where these foreign terrorist fighters are detained, are transformed into an incubator of radicalization, so as to trigger a new flow of fighters. As a result, the European countries have repatriated some of around 70,000 wives and children of the *jihadists,* despite the fact that the minors could have received terrorist training in the conflict zone.

Therefore, other policies are figured out in order to deal with this mole of individuals who could represent a benefit to the leadership of ISIL in their strive for restoring the Caliphate. Two are the measures under consideration within the European context: the establishment of an international tribunal, on a par with the one set up for the crimes in the former Yugoslavia and Rwanda; or the mandate to the Syrian or Iraq courts to prosecute the foreign terrorist fighters for the offences committed in their territory. The first proposal could be feasible on grounds of jurisdiction, thus being capable of prosecuting all the European citizens; still, the main drawback involves the incrimination of the suspected *jihadists* who could not be convicted of participation in a terrorist association but only of serious crimes, namely genocide, crimes against humanity, or war crimes. Secondly, the recourse to Syrian and Iraqi courts meets the

[593] De Vito L., Pisa M, *Arrestata in Siria italiana che aderì all'Isis, è stata rimpatriata con i figli,* Repubblica, 29 September 2020.
[594] Marone F., *Siria: il problema dei foreign fighters jihadisti,* ISPI, 15 October 2019.

condition of prosecution of individuals in the territory in which they have committed the criminal offences. Though, there is a high chance that the Western *jihadists* are breached of their freedoms, due to the vexations and sham trials which they undergo in Syria and Iraq. Hence, both polices bear more disadvantages than benefits.

Furthermore, foreign terrorist fighters bring up important problems for the constitutional democracies which are struggling with the classic balance between the human rights and the security of the population or the public order. Indeed, there is a great disagreement between the prevention of terrorism and the rule of law which is evident in the emergency measures adopted by France or the strong legislation enacted in Italy and Germany jeopardizing the basic liberties of terrorists, even up to the withdrawal of citizenship. Therefore, there is the necessity to find the adequate balance between these two interests, attempting not to excessively lowering the threshold of the criminal liability in order not to punish individuals who merely sympathize with ISIL or providing with appropriate penalties which do not trespass the human dignity of foreign terrorist fighters.

In conclusion, the international response to the growth of ISIL and to the massive flow of foreign terrorist fighters has proved to be effective, through the high number of convictions of the returnees and the prevention of many others from travelling to the conflict zone. Nonetheless, the problem remains and it is related to the foreign terrorist fighters imprisoned in the detention camps in Syria and in Iraq. The wait-and-see approach of the European Union could prove fatal because the SDF could deliberately release the individuals, thus increasing the national difficulties in detecting and bringing them to justice. They are Western citizens, and as such, the repatriation is the only viable measure because it allows the national authorities to prosecute the culprits and to perform disengagement programs in order to tackle the root of the problem. It is the time that European countries bring foreign terrorist fighters home.

Bibliography

Monographies

Azzam A., *Join the caravan,* 1987.

Bartoli R., *Lotta al Terrorismo Internazionale. Tra Diritto Penale del Nemico "Jus in Bello" del Criminale e Annientamento del Nemico Assoluto*, Giappichelli, Torino, 2008.

Cadin R. et al.., *Contrasto Multilivello al Terrorismo Internazionale e Rispetto dei Diritti Umani*, Giappichelli Editore, Torino, 2012.

Cerqua L.D., *La nozione di "condotte con finalità di terrorismo" secondo le fonti internazionali e la normativa italiana*, in De Maglie C., Seminara S. (a cura di), Terrorismo internazionale e diritto penale, CEDAM - Padova, 2007.

Crawford E., *The Treatment of Combatants and Insurgents Under the Law of Armed Conflict*, Oxford University Press, 2010.

Dalia A. A., *Le nuove norme di contrasto al terrorismo: Commento al Decreto-legge 27 luglio 2005, n. 144*, Giuffrè Editore, 2006.

Dambruoso S., *Jihad. La risposta italiana al terrorismo: le sanzioni e le inchieste giudiziarie*, DIKE Giuridica Editrice, Roma, 2018.

De Guttry A., Capone F., Paulussen C., *Foreign Fighters Under International Law And Beyond*, Springer, February 2016.

Eckes C., *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions*, Oxford University Press, 2009.

Feinberg M., *Sovereignty in the age of Global Terrorism: The Role of International Organizations*, Leiden; Boston: Brill Nijhoff, 2016.

Moghaddam, F. M., *The Staircase to Terrorism*, Psychology of Terrorism, B. M. Bongar, M. Brown, L. E. Beutler, J. N. Breckenridge, P. G. Zimbardo. Oxford University Press, 2007.

Murphy C., *EU Counter-Terrorism Law: Pre-Emption and the Rule of Law*, Hart Publishing, 2012.

Nesi G., *International Cooperation in Counter-Terrorism: The United Nations and Regional Organizations in the Fight against Terrorism*, Aldershot; Burlington, VT: Ashgate, 2006.

Nienartowicz M. J., *A New Chapter in the EU Counterterrorism Policy? The Main Changes Introduced by the Directive 2017/541 on Combating Terrorism*, in Polish Yearbook of International Law, 2017.

Orsini A., *ISIS: i terroristi più fortunati del mondo e tutto ciò che è stato fatto per favorirli*, Milano, Rizzoli, 2016.

Orsini A., Nodes S.J., *Anatomy of the Red Brigades: the religious mind-set of modern terrorists*, Cornell University Press, 2011.

Parida P. K., *Globalization, Relative Deprivation and Terrorism*, SAGE, 2007.

Quadarella L., *Il nuovo terrorismo internazionale come crimine contro l'umanità*, Editoriale Scientifica, Napoli, 2006.

Rabasa A., Benard C., *Eurojihad: Patterns of Islamist Radicalization and Terrorism in Europe*, Cambridge University Press, 2014.

Ronzitti N., *Diritto Internazionale dei Conflitti Armati*, Giappichelli: Torino, 2017.

Saul B., *Defining Terrorism in International Law*, Oxford University Press, 2006.

Saul B., *Research Handbook on International Law and Terrorism*, Cheltenham, UK; Northampton, MA: Edward Elgar, 2014.

Sayad A., *La doppia assenza. Dalle illusioni dell'emigrato alle sofferenze dell'immigrato,* Raffaello Cortina Editore, Milano, 2002.

Silber M.D, Bhatt A., *Radicalization in the West: the Homegrown Threat*, New York City Police Department, 2007. .

Simeone L., *I Reati Associativi*, Maggioli Editore, October 2015.

Sossai M., *La Prevenzione del Terrorismo nel Diritto Internazionale*, Giappichelli Editore – Torino, 2012.

Vidino L., Marone F., Entenmann E., *Fear Thy Neighbor. Radicalization and Jihadist Attacks in the West*, ISPI, June 2017.

Westad O.A., *The Cold War: A world of history,* ALLEN LANE, 2017.

Reports

Atanassov N., *Revision of the Schengen Information System for law enforcement*, European Parliamentary Research Service, October 2018.

Bakowski P., Puccio L., *Foreign Fighters – Member State response and EU action,* European Parliamentary Research Service, March 2016.

Barret R., *Beyond the Caliphate: Foreign Fighter and the Threat of Returnees*, Soufan Center, October 2017.

Boyne S., *Law, Terrorism, and Social Movements: The Tension between Politics and Security in Germany's Anti-Terrorism Legislation*, Cardozo Journal of International and Comparative Law, Vol. 12 (1), 2004.

Centro Studi Senato, *Dossier del Servizio Studi sull' A.S. n. 1854*, Aprile 2015 n. 204.

Chowdhury Fink N. et al., *Addressing the Foreign Terrorist Fighters Phenomenon from a European Union Perspective: UN Security Council Resolution 2178, Legal Issues and Challenges and Opportunities for EU Foreign Security and Development Policy*, Global Center on Cooperative Security, December 2014.

Committee of Experts on Terrorism, *Profiles on Counter-Terrorism Capacity: Germany,* September 2016.

Committee of Experts on Terrorism, *Profiles on Counter-Terrorism Capacity: Italy*, November 2017.

Council of Europe, Explanatory Report to the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, Council of Europe Treaty Series No. 217, 22 October 2015.

Council of Europe, Explanatory Report to the Council of Europe Convention on the Prevention of Terrorism, Council of Europe Treaty Series No. 196, 16 May 2005.

Dworkin A., *Beyond Good And Evil: Why Europe Should Bring Isis Foreign Fighters Home,* European Council on Foreign Relations, 25 October 2019.

Gruppo di lavoro 67° Sessione Ordinaria e 15° Sessione Speciale, *Dal mujahidismo ai foreign fighters. Dinamiche, profili, attori e modelli organizzativi del combattentismo tra il XX e il XXI secolo,* Centro Alti Studi per la Difesa.

Human Rights Watch, *Pre-empting Justice. Counterterrorism Laws and Procedures in France*, 2008.

ICRC, *Commentary on the Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Cambridge, 2016.

ICRC, *How is the Term "Armed Conflict" Defined in International Humanitarian Law?*, Opinion Paper, March 2008.

ICRC, *What is International Humanitarian Law?*, Advisory Service on International Humanitarian Law, 2004.

Krähenmann S., *Foreign Fighters under International Law*, Geneva Academy of International Humanitarian Law and Human Rights, Briefing No. 7, October 2014.

Lister C., *Returning Foreign Fighter: Criminalization or Reintegration?*, Brookings Doha Center, August 2015.

Maggiolini P., *Dal jihad al jihadismo: militanza e lotta armata tra XX e XXI secolo,* in Jihad e Terrorismo: Da al-Qa'ida all'ISIS: storia di un nemico che cambia, a cura di Andrea Plebani, ISPI, 11 maggio 2016.

Meir Amit Intelligence and Terrorism Information Centre, *Foreign Fighters from Western countries in the ranks of the rebel organizations affiliated with Al-Qaeda and the global jihad in Syria*, January 2014.

Melzer N., *Interpretive Guidance on the notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, May 2009.

Ministre de l'Interieur, *Rapport du Gouvernement au Parliament sur la mis en œuvre de la loi n° 2017-1510 du 30 octobre 2017 renforçant la sécurité intérieure et la lutte contre le terrorisme*, 1 November 2018.

Pictet J., *Commentary on the Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952.

Pictet J., *Commentary on the Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958.

Precht T., *Homegrown terrorism and Islamist radicalization in Europe: From conversion to terrorism*, Danish Ministry of Justice, December 2007.

RAN Manual, *Responses to returnees: foreign terrorist fighters and their families,* Radicalization Awareness Network, July 2017.

Royal United Services Institute (RUSI) and Civipol, *Operational Guidelines on the preparation and implementation of EU financed actions specific to countering terrorism and violent extremism in third countries,* Brussels, European Commission, November 2017.

Sandoz Y. et al. (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC/Martinus Nijhoff, Geneva/The Hague, 1987.

Scherrer A., *The return of foreign fighter to EU soil: Ex-post evaluation,* European Parliament Research Service, May 2018.

Sénat of France, *Rapport fait au nom de la commission d'enquête (1) sur l'organisation et les moyens de la lutte contre les résaux djihadistes en France et en Europe*, 2 April 2015.

Soufan Group, *Foreign Fighters: an updated assessment of the flow of foreign fighters into Syria and Iraq*, December 2015.

Scientific Articles

Alì A., *La risposta della comunità internazionale al fenomeno dei Foreign Terrorist Fighters,* La Comunità Internazionale, 2/2015.

Bakircioglu O., *A Socio-legal Analysis of the concept of Jihad*, The International and Comparative Law Quarterly, Vol. 59, No. 2, April 2010, pp. 413-440.

Bakker E., De Graaf B., *Lone Wolves. How to prevent this phenomenon?,* ICCT – The Hague, November 2010.

Bakker E., Paulussen C., Entemann E., *Dealing With European Foreign Fighters In Syria: Governance Challenges & Legal Implications,* ICCT – The Hague, 2013.

Balsamo A., *Decreto Antiterrorismo e riforma del sistema delle misure di prevenzione*, Diritto Penale Contemporaneo, 2 Marzo 2015.

Bartoli R., *Legislazione e prassi in tema di contrasto al Terrorismo Internazionale: un nuovo paradigma emergenziale?,* in Diritto Penale Contemporaneo, 3/2017.

Basileo D., *From Foreign Fighters To Foreign Terrorist Fighters: The Evolution Of Terrorism,* Sicurezza, Terrorismo E Società, Issue I – 5/2017,

Battaglia F., *L'attività legislativa italiana di recepimento degli obblighi internazionali in materia di lotta al terrorismo e combattenti stranieri*, in federalismi.it, No. 4, 2015.

Baxter K., Davidson R., *Foreign Terrorist Fighters: Managing A Twenty-First Century Threat,* Third World Quarterly Volume 37, Issue 8, 2016.

Bennett, N., *One Man's Radical: The Radicalisation Debate and Australian Counterterrorism Policy*, Security Challenges, Vol. 15, No. 1, 2019.

Bertolesi R., *Ancora nuove norme in materia di terrorismo*, Diritto Penale Contemporaneo, 19 Ottobre 2016.

Bilkova V., *Foreign Terrorist Fighters and International Law*, Groningen Journal of International Law, Vol. 6, No. 1, 2018.

Boncio A., *Disfatta ISIS e Foreign fighters di ritorno: il caso italiano*, ISPI, Working Paper N. 66, Ottobre 2017.

Bos W., van Ginkel B., Mehra T., *Capacity-Building Challenges: Identifying Progress and Remaining Gaps in Dealing with Foreign (Terrorist) Fighters,* ICCT – The Hague, May 2018.

Bossong R., *The EU's Mature Counter-Terrorism Policy – A Critical Historical and Functional Assessment*, LSE Challenge Working Paper, June 2008.

Boutin B. et al.*., The Foreign Fighters Phenomenon In The European Union Profiles, Threats & Policies*, ICCT – The Hague, 2016.

Boutin B., *Administrative Measures against Foreign Fighters: In search of limits and safeguards*, ICCT – The Hague, December 2016.

Byman D., *The Homecomings: What Happens When Arab Foreign Fighters In Iraq And Syria Return?*, Studies In Conflict & Terrorism, Volume 38, Issue 8, 2015.

Capone F., *Countering "Foreign Terrorist Fighters": A Critical Appraisal of the Framework Established by the UN Security Council Resolutions*, Italian Yearbook of International Law, 25 (2015).

Capone F., *Countering "Foreign Terrorist Fighters": A Critical Appraisal of the Framework Established by the UN Security Council Resolutions*, Italian Yearbook of International Law, 25 (2015).

Carenzi S., *Il ritorno dei foreign fighters europei: rischi e prospettive,* ISPI, Analysis No. 317, Ottobre 2017.

Cassese A., *The Multifaceted Criminal Notion of Terrorism in International Law*, Journal of International Criminal Justice, 4/2006.

Cavino M., *Sécurité, égalité, fraternité. La fragilità costituzionale della Francia (osservazioni a un mese dagli attentati di Parigi*, in Consulta Online, Fasc. III, 14 December 2015.

Chalkiadaki V., *The French "War on Terror" in the Post-Charlie Hebdo Era*, in EUCRIM - European criminal law associations forum, 1/2015.

Christmann K., *Preventing Religious Radicalization and Violent Extremism: A Systematic Review of Research Evidence,* Youth Justice Board for England and Wales, 2012.

Citino Y., *Sicurezza e stato di diritto nella minaccia dei foreign terrorist fighters,* in dirittifondamentali.it, Fascicolo 2/2019.

Colaiocco S., *Prime osservazioni sulle nuove fattispecie antiterrorismo introdotte dal decreto-legge n. 7 del 2015,* Archivio Penale, 1/2015.

Cragin K.R., *The November 2015 Paris Attacks: the Impact of Foreign Fighter Returnees*, Foreign Policy Research Institute, Spring 2017.

Davis S., *Responding to Foreign Terrorist Fighters: A Risk-based Playbook for States and International Community*, Global Center on Cooperative Security, November 2014.

Donnelly M.G., Sanderson T.M, Fellman Z., *Foreign fighters in history*, Center for Strategic & International Studies, April 2017.

Fallah K., *Corporate actors: the legal status of mercenaries in armed conflict*, International Review of the Red Cross, Volume 88, Number 863, September 2006.

Fasani F., *L'impatto della Direttiva antiterrorismo sulla legislazione penale sostanziale italiana*, Diritto Penale Processuale, 1/2018.

Fasani F., *Le nuove fattispecie antiterrorismo: una prima lettura*, Diritto Penale Processuale., 8/2015.

Fasani F., *Un nuovo intervento di contrasto al terrorismo internazionale*, Diritto Penale Processuale, 12/2016.

Ferrara M., Gatta D., *Lineamenti di counter-terrorism comparato*, Centro Ricerca Sicurezza e Terrorismo, 2018.

Gazzetta C., *Sicurezza, terrorismo e cittadinanza: la nuova legislazione francese antiterrorismo e l'impegno internazionale contro i cd. Foreign Fighters*, in democraziaesicurezza.it, No. 3, 1 Ottobre 2015. .

Hafez M.M, *Jihad after Iraq: Lessons from the Arab Afghans*, Studies in Conflict&Terrorism, 2009.

Hegghammer T., *Global Jihadism after the Iraq War*, Middle East Journal, Vol. 60, No. 1, 2006.

Hegghammer T., *Should I Stay or Should I Go? Explaining Variation in Western Jihadists' Choice between Domestic and Foreign fighting*, American Political Science Review, Vol 107, No 1, February 2013.

Hegghammer T., *The Rise of Muslim Foreign Fighters: Islam and the Globalization of Jihad*, International Security, Vol. 35 No. 3, 2011.

Henry S., *Exploring the "continuous combat function" concept in armed conflicts: Time for an extended application?*, International Review of the Red Cross, 100, pp. 267 – 285, 2018.

Hennessy O., *The Return of Europe's Foreign Fighters*, ICCT– The Hague, 2 April 2014.

Hilpold P., *The evolving right of counter-terrorism: An Analysis of SC Resolution 2249 (2015) in view of some basic contributions in International Law Literature*, QIL, 29 January 2016.

Hilpold P., *The Fight against Terrorism and SC Resolution 2249 (2015): towards a more Hobbesian or a more Kantian International Society?*, Indian Journal of International Law, 20 June 2016.

Hmoud M., *Negotiating the Draft Comprehensive Convention on International Terrorism*, Journal of International Criminal Justice, 4 – 2006.

Jodoin S., *Terrorism as a War Crime*, International Criminal Law Review, 7/2007.

Koehler D., *Family Counselling as prevention and intervention tool against "foreign fighters". The German "HAYAT" Program,* Journal EXIT – Deutschland, March 2013.

Malet D., Hayes R., *Foreign Fighter Returnees: An Indefinite Threat?,* Terrorism And Political Violence, 2018.

Malet D., *Transnational Identity in Civic Conflicts*, Oxford Scholarship Online, 2013.

Malet D., *Why Foreign Fighters? Historical Perspectives and Solutions*, Foreign Policy Research Institute, 2010.

Marone F., *The Use of Deportation in Counter-Terrorism: Insights from the Italian Case*, ICCT – The Hague, 13 March 2017.

Marone F., Olimpo M., *Il problema dei foreign fighters catturati in Siria*, ISPI, 18 febbraio 2019.

Marone F., *Siria: il problema dei foreign fighters jihadisti*, ISPI, 15 October 2019.

Mendelsohn B., *Foreign Fighters – Recent Trends*, Foreign Policy Research Institute, 2011.

Monar J., *Common Threat and Common Response? The European Union's Counter-Terrorism Strategy and its Problems,* Government and Opposition, Vol. 42, No. 3, pp. 292–313, 2007.

Mueller T. N., *Preventive detention as a counter-terrorism instrument in Germany*, Crime Law Soc. Change, 62:323 – 335, 2014.

Munoz G. A., *Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism*, European Papers, Vol. 1 No. 1, 2016.

Nardi V*., La punibilità dell'istigazione nel contrasto al terrorismo internazionale*, Diritto Penale Contemporaneo, 1/2017.

Nardone V., *Il support logistico al terrorismo e le cause di esclusione dello status di rifugiato nel diritto UE. La CGUE sviluppa la sua interpretazione nel caso Lounani*, Osservatorio Costituzionale, Fasc. 3/2017, 19 ottobre 2017.

Neumann P., *The trouble with radicalization*, International Affairs (Royal Institute of International Affairs 1944-), Vol. 89, No. 4, 2013.

Nigro R., *La Risoluzione del Consiglio di Sicurezza delle Nazioni Unite n. 2249 (2015) e la legittimità dell'Uso della Forza contro l'ISIS in base al diritto internazionale*, Diritti Umani e Diritto Internazionale, vol. 10, n. 1, 2016.

Ohlin J.D., *The Combatant's Privilege in Asymmetric and Covert Conflicts*, Yale Journal of International Law, July 2014.

Ohnesorge C., et al., *The Constitutionality of Section 89a of the German Criminal Code and the concept of a serious act of violent subversion: the German Federal Court of Justice, Judgement of 8 May 2014 – 3 STR 243/13*, German Law Journal, Vol. 18 No. 03, 2017.

Orsini A., *Interview with a Terrorist by Vocation: A day among the Diehard Terrorists, Part II*, Studies in Conflict & Terrorism, 2013.

Orsini A., *What Everybody Should Know about Radicalization and the DRIA Model*, Studies in Conflict & Terrorism, 2020.

Palma A., *Terrorismo Internazionale: Risposta dello Stato italiano*, Centro Studi per la Pace, 14 Settembre 2002.

Paulussen C., Pitcher K., *Prosecuting (Potential) Foreign Fighters: Legislative And Practical Challenges*, ICCT – The Hague 8, No. 13, 2018.

Paulussen C., *Repressing The Foreign Fighters Phenomenon And Terrorism In Western Europe: Towards An Effective Response Based On Human Rights*, ICCT– The Hague, 2016.

Peresin A., *Why Women from the West are Joining ISIS*, in Special Issue on Female Migration to ISIS, Volume 56, Issue 1-2, Cambridge University Press, November 2018.

Ponseille A., *Les Infractions de prévention, argonautes de la lutte contre le terrorisme*, RDLF No. 26, 2017.

Raimondi M., *Due sentenze della Cassazione in tema di condotta partecipativa a un'associazione terroristica di matrice jihadista e mera adesione ideologica*, Diritto Penale Contemporaneo, 11 Ottobre 2018.

Ramlan R., Erwinsyahbana T., Hakim N., *The concept of Jihad in Islam*, IOSR Journal of Humanities and Social Science Volume 21 Issue 9 Ver. 7, September 2016.

Reed A., Pohl J., Jegerings M., *The Four Dimensions Of The Foreign Fighter Threat: Making Sense Of An Evolving Phenomenon*, ICCT – The Hague, 2017

Roithmaier K., *Germany And Its Returning Foreign Terrorist Fighters: New Loss Of Citizenship Law And The Broader German Repatriation Landscape*, ICCT – The Hague, 2019.

Rosand E., *The UN-Led Multilateral Institutional Response to Jihadist Terrorism: Is a Global Counterterrorism Body Needed?*, Journal of Conflict and Security Law, Volume 11, Issue 3, 2006.

Rosi E., *Terrorismo Internazionale: le nuove norme interne di prevenzione e repressione: profili di diritto penale e sostanziale*, in Dir. Pen. Proc., N. 2, 2002.

Rossi F., *La penalizzazione della propaganda jihadista online in Francia*, Diritto Penale Contemporaneo, 5/2019.

Rostow N., *Before and After: the Changed UN Response to Terrorism since September 11th*, Cornell International Law Journal, Volume 35, Issue 3, Winter 2002.

Santini S., *L'Unione Europea compie un nuovo passo nel cammino della lotta al terrorismo: una prima lettura della direttiva 2017/541*, in Diritto Penale Contemporaneo, 7-8/2017.

Santini S*., L'Unione Europea compie un nuovo passo nel cammino della lotta al Terrorismo: Una prima lettura della Direttiva 2017/541*, Diritto Penale Contemporaneo, 4 luglio 2017.

Sassòli M., *La dèfinition du terrorisme et le droit international humanitaire*, in Revue Québécoise de droit international, Avril 2007.

Schmid A.P., Tinnes J., *Foreign (Terrorist) Fighters With Is: A European Perspective*, ICCT – The Hague, 2015.

Siddiqi M.I., *Afghan Conflicts and Soviet Intervention – Perception, Reality and Resolution*, GeoJournal, Vol. 18, No. 2, March 1989.

Sinkkonen T., *War on two fronts, the Eu perspective on the foreign terrorist fighters of ISIL*, FIIA Briefing Paper 166, January 2015.

Valiente-Ivañez V. et al., *Legal Analysis of Counter-Radicalisation in a selected European Union Member States Report*, PERICLES, April 2019.

Valsecchi A., *Brevi osservazioni di diritto penale sostanziale,* Diritto Penale Processuale, N. 10, 2005.

Vité S., *Typology of armed conflicts in International Humanitarian Law: Legal Concepts and Actual Situations*, ICRC, Volume 91, Number 873, March 2009.

Vidino L., *European Foreign Fighters In Syria: Dynamics And Responses*, Sage Journals, Volume 13, Issue 2, 2014.

Vierucci L., *Prisoners of War or Protected Persons qua Unlawful Combatants? The Judicial Safeguards to which Guantanamo Bay Detainees are Entitled*, Journal of International Criminal Justice, Oxford University Press, 2003.

Weill S., *French foreign fighters: The engagement of administrative and criminal justice in France*, International Review of the Red Cross, Volume 100 (907-909), 2018.

Wenin R., *L'addestramento per finalità di terrorismo alla luce delle novità introdotte dal D.L. 7/2015: una riflessione comparata sulle tecniche di descrizione della fattispecie muovendo dalla sentenza del Bundesgerichtshof tedesco StR 243/13*, in Diritto Penale Comparato, 2015.

Wiktorowicz Q., *A genealogy of radical Islam*, Studies in Conflict&Terrorism, Volume 28, Issue 2, 2005.

Press Articles

Bremmer I., *The top 5 countries where ISIS gets its foreign recruits,* TIME, April 14, 2017. Available at: https://time.com/4739488/isis-iraq-syria-tunisia-saudi-arabia-russia/.

Clinca S., *Commento al D.L. 7/2015 n. 4: Interventi in materia di misure di prevenzione*, in legislazionepenale.eu, 15 January 2016. Available at: http://www.lalegislazionepenale.eu/wp-content/uploads/2016/01/studi_legge4315_art.4-Clinca-terrorismo.pdf.

De Vito L., Pisa M, *Arrestata in Siria italiana che aderì all'Isis, è stata rimpatriata con i figli,* la Repubblica, 29 September 2020, Available at: https://www.repubblica.it/cronaca/2020/09/29/news/terrorismo_internazionale_arrestata_italiana_in_siria_e_rimpatriata_con_i_figli-268849728/

DW, *Second Anti-Terror Package Presented to German Parliament*, 14 December 2001, Available at: https://www.dw.com/en/second-anti-terror-package-presented-to-german-parliament/a-355802-0.

Gesley J., *Germany: Government Proposes Loss of German Citizenship for Foreign Fighters with Dual Citizenship*, Global Legal Monitor, 20 May 2019. Available at: https://www.loc.gov/law/foreign-news/article/germany-government-proposes-loss-of-german-citizenship-for-foreign-fighters-with-dual-citizenship/.

Katz R., *How do we know ISIS is losing? Now it's asking women to fight",* The Washington Post, November 2, 2017. Available at: https://www.washingtonpost.com/gdpr-consent/?next_url=https%3a%2f%2fwww.washingtonpost.com%2fnews%2fposteverything%2fwp%2f2017%2f11%2f02%2fhow-do-we-know-isis-is-losing-now-its-asking-women-to-fight-for-it%2f.

Mullen J., Haddad M., *"France is at war", President Francois Hollande says after ISIS attack*, CNN, 17 November 2015.

Peters A., *Security Council Resolution 2178 (2014): The "Foreign Terrorist Fighter" as an International Legal Person Part I,* EJIL Talk, 20 November 2014. Available at: https://www.ejiltalk.org/security-council-resolution-2178-2014-the-foreign-terrorist-fighter-as-an-international-legal-person-part-ii/.

Redazione Altalex, *Contrasto al terrorismo: la nuova direttiva europea,* Altalex, 6 June 2017, Available at: https://www.altalex.com/documents/news/2017/06/06/in-vigore-la-nuova-direttiva-europea-di-contrasto-al-terrorismo.

Roy O., *Who are the new jihadis?,* The Guardian, April 13, 2017. Available at: https://www.theguardian.com/news/2017/apr/13/who-are-the-new-jihadis.

Scheinin M., *Back to Post – 9/11 Panic? Security Council Resolution on Foreign Terrorist Fighters*, JUST SECURITY, 23 September 2014. Available at: https://www.justsecurity.org/15407/post-911-panic-security-council-resolution-foreign-terrorist-fighters-scheinin/.

Tucker P., Defense One, *Why Join ISIS? How Fighters Respond When You Ask Them*, The Atlantic, 9 December 2015. Available at: https://www.defenseone.com/threats/2015/12/why-do-people-join-isis-heres-what-they-say-when-you-ask-them/124295/.

Weller M., *Permanent Imminence of Armed Attacks: Resolution 2249 (2015) and the Right to Self Defence against Designated Terrorist Groups*, EJIL Talk!, 25 November 2015. Available at: https://www.ejiltalk.org/permanent-imminence-of-armed-attacks-resolution-2249-2015-and-the-right-to-self-defence-against-designated-terrorist-groups/.

Official Documents

Al-Qaeda's General Command, "On the Relationship of Qaidat al-Jihad and the Islamic State of Iraq and al-Sham," al-Fajr Media, February 2, 2014.

Bundesrat, Gesetz zur Änderung des Personalausweisgesetzes zur Einführung eines Ersatz-Personalausweises und zur Änderung des Passgesetzes, 29 Juni 2015 Nr. 24.

Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in Field, Geneva, 12 August 1949.

Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked of Armed Forces at Sea, Geneva, 12 August 1949.

Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949.

Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949.

Convention respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

Decreto-legge 27 luglio 2005, n. 144, coordinato con la legge di conversione 31 luglio 2005, n. 155 recante Misure urgenti per il contrasto del terrorismo internazionale.

Decreto-legge 18 febbraio 2015, n. 7, coordinato con la legge di conversione 17 aprile 2015, n. 43 recante Misure urgenti per il contrasto del terrorismo, anche di matrice internazionale, nonché proroga delle missioni internazionali delle Forze armate e di polizia, iniziative di cooperazione allo sviluppo e sostegno ai processi di ricostruzione e partecipazione alle iniziative delle Organizzazioni internazionali per il consolidamento dei processi di pace e di stabilizzazione.

Global Counter-Terrorism Forum, Political Declaration, 22 September 2011, New York.

Global Counter-Terrorism Forum, Addendum to the Hague-Marrakech Memorandum on Good Practices for a More Effective Response to the FTF Phenomenon, with a focus on Returning FTFs, 2015.

Global Counter-Terrorism Forum, The Hague – Marrakech Memorandum on Good Practices for a More Effective Response to the FTF Phenomenon, 23 September 2014.

Hedayah and The International Institute for Justice and the Rule of Law, The Malta Principles for Reintegrating Returning Foreign Terrorist Fighters, 2016.

International Convention Against the Taking of Hostages, New York, December 1979.

International Convention for the Suppression of Acts of Nuclear Terrorism, New York, April 2005.

International Convention for the Suppression of Terrorist Bombings, New York, December 1997.

International Convention for the Suppression of the Financing of Terrorism, New York, December 1999;

International Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague, December 1970.

Legge 18 maggio 1978, n. 191, Conversione in legge, con modificazioni, del decreto-legge 21 marzo 1978, n. 59, concernente norme penali e processuali per la prevenzione e la repressione di gravi reati.

Legge 6 febbraio 1980, n. 15 , Conversione in legge, con modificazioni, del decreto-legge 15 dicembre 1979, n. 625, concernente misure urgenti per la tutela dell'ordine democratico e della sicurezza pubblica.

Legge 15 dicembre 2001, n. 438, Conversione in legge, con modificazioni, del decreto-legge 18 ottobre 2001, n. 374, recante disposizioni urgenti per contrastare il terrorismo internazionale.

Legge 28 luglio 2016, n. 153, Norme per il contrasto al terrorismo.

LOI n° 2012-1432 du 21 Décembre 2012 relative à la sécurité et à la lutte contre le terrorisme.

LOI n° 2014-1353 du 13 Novembre 2014 renforçant les dispositions relatives à la lutte contre le terrorisme.

LOI n° 2016-731 du 3 Juin 2016 renforçant la lutte contre le crime organisé, le terrorisme et leur financement, et améliorant l'efficacité et les garanties de la procédure pénale..

LOI n° 2016-987 du 21 Juillet 2016 prorogeant l'application de la loi n° 55-385 du 3 Avril 1955 relative à l'état d'urgence et portant mesures de renforcement de la lutte antiterroriste.

Proclamation 4098 – Afghanistan Day, March 10, 1982.

Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Conflicts (Protocol II), 8 June 1977.

Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

Protocol amending the European Convention on the Suppression of Terrorism, 15 May 2003.

Radicalization Awareness Network, *The RAN Declaration of Good Practices for Engagement with Foreign Fighters for Prevention, Outreach, Rehabilitation and Reintegration*, November 2013.

Rome Statute of the International Criminal Court, 17 July 1998.

EU Documents

Council Common Position 1999/727/CFSP of 15 November 1999 concerning restrictive measures against the Taliban.

Council Common Position 2001/154/CFSP of 26 February 2001 concerning additional restrictive measures against the Taliban.

Council Framework Decision 2002/475/JHA on Combating Terrorism.

Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States.

Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on Combating Terrorism.

Council of the European Union, Directive 62/16 amending Council Directive 91/477/EEC on control of the acquisition and possession of weapons, 29 March 2017.

Council of the European Union, European Union Counter-Terrorism Strategy, 14469/4/05 REV 4, 30 November 2005.

Council of the European Union, European Union Strategy for Combating Radicalisation and Recruitment to Terrorism, 14781/1/05 REV 1, 24 November 2005.

Council of the European Union, Revised EU Strategy for Combating Radicalisation and Recruitment to Terrorism, 9956/14, 19 May 2014.

Council of the European Union, Outline of the counter-terrorism strategy for Syria and Iraq, with particular focus on foreign fighters, 5369/15, 16 January 2015.

Council of the European Union, EU Regional Strategy for Syria and Iraq as well as the ISIL/Da'esh threat, 7267/15, 16 March 2015.

Council Regulation 467/2001 of 6 March 2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect to the Taliban of Afghanistan and repealing Regulation 337/2000.

Council Regulation 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism.

EU Directive 2017/541 of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, 31 March 2017.

UN Documents

UN Counter-Terrorism Executive Directorate, *Analytical Brief: Responding to terrorist threats against soft targets,* 16 September 2019.

UN Doc. A/60/825, *Uniting against terrorism: recommendations for a global counter-terrorism strategy*, 27 April 2006.

UN Doc. A/RES/49/60, 9 December 1994.

UN Doc. A/RES/51/210, 17 December 1996.

UN Doc. A/RES/60/288, *The United Nations Global Counter-Terrorism Strategy*, 8 September 2006.

UN Doc. S/2015/939, 23 December 2015.

UN Doc. S/RES/1054 (1996), 26 April 1996.

UN Doc. S/RES/1070 (1996), 16 August 1996.

UN Doc. S/RES/1267 (1999), 15 October 1999.

UN Doc. S/RES/1368 (2001), 12 September 2001.

UN Doc. S/RES/1373 (2001), 28 September 2001.

UN Doc. S/RES/1390 (2002), 16 January 2002.

UN Doc. S/RES/1988 (2011), 17 June 2011.

UN Doc. S/RES/1989 (2011), 17 June 2011.

UN Doc. S/RES/2170 (2014), 15 August 2014.

UN Doc. S/RES/2178 (2014), 24 September 2014.

UN Doc. S/RES/2249 (2015), 20 November 2015.

UN Doc. S/RES/2368 (2017), 20 July 2017.

UN Doc. S/RES/2396 (2017), 21 December 2017.

UN Doc. S/RES/748 (1992), 21 January 1992.

UN Doc. S/RES/PV.8148 (2017), 21 December 2017.

UN Office of Counter-Terrorism, *Enhancing the Understanding of the Foreign Terrorist Fighters Phenomenon in Syria*, July 2017.

UN Office of the High Commission for Human Rights (OHCHR), *Rule of Terror: Living under ISIS in Syria*, 14 November 2014.

UN Office on Drugs and Crime, *Foreign Terrorist Fighters: Manual for Judicial Training Institutes South-Eastern Europe*, Vienna, 2019.

UN Security Council Counter-Terrorism Committee, *Madrid Guiding Principles,* 28 July 2015.

Judgements

Bundesgerichtshof, Judgement of 8 May 2014 – 3 StR 243/13.

Conseil Constitutionnel, Decision No. 2016-611 QPC of 10 February 2017, *Mr. David P*.

Conseil Constitutionnel, Decision No. 2017-682 QPC of 15 December 2017*, M. David P*.

Court of Cassation of France, Decision No. 13-83.758 (Criminal Chamber), 21 May 2014.

ECJ, *Commissaire général aux réfugies et aux apatrides v. Mostafa Lounani*, Judgment (Grand Chamber), Case C-573/14, 31 January 2017.

ICTY, *Prosecutor v. Dusko Tadic*, Appeals Chamber Case No. IT-94-1-AR-72, 2 October 1996.

ICTY, *Prosecutor v. Dusko Tadic*, Case No. IT – 94 – 1- A, Judgment (Appeals Chamber), 15 July 1999.

ICTY, *Prosecutor v. Dusko Tadic*, No. IT-94-1, Appeals Chamber, Decision on the Defence Motion for the Interlocutory Appeal on Jurisdiction, 2 October 1995.

ICTY, *Prosecutor v. Stanislav Galic*, Judgment (Trial Chamber), IT-98-29-T, 5 December 2003.

ICTY, *The Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995.

ICTY, The *Prosecutor v. Fatmir Limaj*, Judgement, IT-03-66-T, 30 November 2005

Italian Supreme Court, Section I, 31 May 1985, n. 11603.

Italian Supreme Court, section VI, 17 April 1996, n. 973.

Italian Supreme Court, Section I, 17 January 2007, n. 1072.

Italian Supreme Court, Section V, 8 October 2015, n. 2651 (dep. 2016).

Italian Supreme Court, Section V, 3 November 2017, n. 50189.

Italian Supreme Court, Section II, 8 June 2018, n. 26315.

Webliography

https://www.consilium.europa.eu/en/press/press-releases/2017/03/07/regulation-reinforce-checks-external-borders/.

https://www.consilium.europa.eu/en/press/press-releases/2017/04/25/control-acquisition-possession-weapons/.

https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-01/cp170009en.pdf

Summary

"France is at war", thus says Francois Hollande after the Paris attack in November 2015. The target of this statement is not just the Islamic State of Syria and the Levant, commonly known as ISIL but more widely, the foreign terrorist fighters (hitherto FTFs), those individuals who fight for ISIL and then perpetrate attacks against European countries. Hence, the dissertation stems from the interest in deeply understanding this phenomenon which represent a global and unprecedented threat to the international peace and security. It has the purpose of performing a legal analysis among three countries within the European context in order to highlight their national strategies against the FTFs: Italy, France and Germany which in a different way get involved with *jihadists* While the presence of Italian foreign terrorist fighters in the conflict zone has been very limited, France and Germany has experienced a high volume of citizens who approached the *jihadist* ideology and among them, around 2,000 French and 800 German travelled to the Syrian conflict. In addition, France accounts for the largest number of *jihadist* terrorist attacks (42) between 2014 and 2018.

Nonetheless, the interest is mainly related to the legal implications of these events, or rather the evolution of their Criminal Code in the sections devoted to the terrorism and their preventive systems which have been greatly strengthened in order to stem the flow of FTFs and to prevent the on-line and off-line radicalization. The examination brings us to understand the differences and the similarities among these three countries, focusing on the dilemma between human rights, democracy and the security of citizens and posing the question on how to deal with the foreign terrorist fighters who at the moment are still in the conflict zone while ISIL is crumbling down. In order to satisfy the research question, it has been necessary framing the dissertation into three Chapters, giving a comprehensive view on the phenomenon of foreign terrorist fighters.

Foreign terrorist fighters: cultural and legal dimension.

The dissertation opens with the sociological analysis of the foreign terrorist fighters, investigating the historical assumptions of the global *jihadism* which permeates the ideology of the ISIL. The phenomenon refers to combatants who decide to join rebel groups in civil wars in countries different from their own primarily moved by ideology, religion or kinship. It is not

confined to the Islamic State because this mobilization, whether it is Muslim or untied to religion, dates back to the Texas Revolution in 1835 – 1836. It was the Afghan war (1979 – 1992) which produced the new figure of the foreign fighter who perceived the Soviet aggression as a *"call for Jihad"*, entailing that the *jihad* is a duty incumbent upon each Muslim. Nonetheless, the phenomenon has acquired prominence in the last decade due to the expansion of the Islamic State which saw an unprecedented flow of combatants from West to the war scenario. Indeed, the concept of foreign fighters transmutes into the foreign terrorist fighters, defined as individuals who participate in the terrorist activities of Al-Qaeda in the first place and then in the actions of the Islamic State of Iraq and the Levant (ISIL), taking advantage of the terrorism, namely the perpetration, planning and participation in terrorist acts as well as the terrorist training and financing.

Subsequently, there is the need to investigate the motivations moving European citizens to join ISIL, which could not be explained by ethnic and religious links. Western foreign fighters do not fall into a specific category but they include European veterans from the first wave of *jihadism*, converts, young second- or third-generation immigrants and local *jihadists*. However, they do not share the same motivation to fight overseas: some feel empathy for Muslim victims, other adhere to an ideology and still others are inspired by the search for an identity and meaning. In addition, radicalization patterns are explored, that is the process through which a Western individual becomes fascinated by Islam and turns into a terrorist, proving that all the scholars agree on the features of the individual who approaches *jihadism*: he is frustrated with his life; he does not identify with the surrounding society and deprecates the governmental policies. This situation is characterised by an identity crisis which is settled by the Islamist ideology. In this sense, a meaningful model was elaborated by Alessandro Orsini, the DRIA model, where he drew up a new type of terrorist, the "terrorist by vocation" which could be defined as an individual who is willing to sacrifice himself in order to fulfil a spiritual mission. The "terrorist by vocation" embraces the jihadi ideology which produces a radical mental universe based on seven cognitive categories: the radical catastrophism, the waiting for the end, the identification of the evil, the obsession with purification, the obsession with purity, the exaltation of martyrdom or desire to be persecuted, the purification of the means through the end.

Furthermore, the dissertation approaches the status of FTFs under international humanitarian law, due to their participation in an armed conflict, namely the Syrian war. Therefore, an examination of the 1949 Geneva Conventions and the 1977 Additional Protocols was made

necessary since the legal framework to be applied to foreign fighters depends on the type of armed conflict in which they are involved. Hence, on one hand Article 4 of the Geneva Convention II stipulates that an international armed conflict provides with the status of lawful combatants, that is the combatant immunity and the prisoner-of-war status. Combatants cannot be punished for the mere participation in the hostilities and the hostile acts are lawful unless they equated to war crimes. As a matter of fact, FTFs could also fall into the category of civilians who take a direct participation in the hostilities, thus being considered as "unlawful combatants" according to Article 4A (2) of the Geneva Convention III. Accordingly, they are deprived of the combatant immunity and they could be prosecuted for the mere participation in the hostilities under the domestic criminal law.

On the other hand, Article 3 common to the Geneva Conventions states that in a non-international armed conflict, there are not combatants but governmental troops and rebels. The latter do not have the right to intervene in the hostilities, thus they could not be considered as legitimate belligerents entitled to the combatant immunity and to the prisoner-of-war status once they are detained. This means that they could be tried for the mere participation to the hostilities and the acts carried out in the course of the armed conflict are unlawful under the domestic law, even though they are lawful under IHL. Finally, pursuant to Article 47 (2) of the Additional Protocol I, foreign fighters could not be treated as mercenaries in an armed conflict because their participation in the hostilities is motivated by "private gain". Individuals moved by other motives could not be deemed as mercenaries. Therefore, FTFs who are inspired by religion, ideology or kinship do not fall into this category.

Ultimately, Chapter One copes with the terrorist nature of the foreign fighters in an armed conflict. In this respect, it has been reported that IHL forbids acts of terrorism in an armed conflict, envisaging the prohibition of "acts or threats of violence the primary purpose of which is to spread terror among the civilian population" and the generic "acts of terrorism". The prohibition of terrorism under IHL results in its criminalization. Violations of the prohibitions on terrorism entail individual criminal responsibility under customary international law, or rather executors of terrorist acts could be prosecuted by domestic tribunals, foreign courts or by international criminal courts because their acts account for war crimes. In this case the distinction among civilians and combatants does not apply for any person could commit a terrorist act. Consequently, foreign terrorist fighters could be prosecuted for acts of terrorism perpetrated in the Syrian war.

International and European responses to the phenomenon of Foreign Terrorist Fighters.

Chapter Two is devoted to the tabling of the international responses with particular emphasis on the United Nations and European Union resolutions. Generally speaking, what has been pointed out is the meaningful role played by the Security Council in establishing a quasi-legislative counter-terrorism system and the position of the European institutions in laying down a harmonisation of the national criminal codes through binding measures.

In the first place, the UN succeeded in the approval of sectoral Conventions addressing specific violent acts which could be considered as terrorists. Afterwards, in order to cope with the Islamic terrorism, the Security adopted several binding resolutions, namely Resolution 1267/1999, 1373/2001, 2170 – 2178/2014, 2245/2015 and 2396/2017. Resolution 1267 established a sanction regime known as "Al-Qaeda and Taliban Sanctions Regime" which was firstly directed at the Taliban regime due to their territorial, economic and political support to Al-Qaida and then at Al-Qaeda and other individuals or entities associated with them, later applied also against ISIL and its affiliates. Under the regime, asset freeze, arms embargo and the travel ban are enacted. The subsequent Resolution 1373/2001 has been significant due to its legislative character since it imposed on all the States general obligations, detached from a particular conflict or act and unlimited in time. These shall be divided into three categories: criminalization of terrorist financing, incorporation of terrorist acts as well as the acts preparatory to terrorism in the domestic laws as criminal offences, and recommendations on state cooperation.

The threat posed by the Islamic State and by the activities performed by the FTFs engendered the adoption of Resolution 2170 and Resolution 2178 in 2014. The former introduced a new terminology "foreign terrorist fighters" to describe fighters connected to two particular groups, ISIL and Al-Nusra Front (ANF), and to terrorism without giving a definition neither of FTFs nor of terrorism. In addition, the Resolution reflects the trend in the Security Council's legislative role by urging States to take measures to suppress the flow of FTFs and to bring them to justice as well as to prevent the movement of terrorists from and to their countries through border controls, interstate cooperation and information sharing.

The latter goes further in following a holistic approach to this phenomenon since it provides a variety of national measures to address the challenge, namely criminal laws, administrative measures, intelligence operations and preventive strategies, as de-radicalization programs. Though, the meaningful elements of this resolution are embodied by the first definition of the

foreign terrorist fighters and by the States' obligation to criminalize specific offences related to the travel in order to tackle the continuous flow of individuals to the conflict zone, i.e. the travel or attempt to travel to other countries, the wilful provision or collection of funds to finance the travel of foreign terrorist fighters and the wilful organization or facilitation of the travel of these individuals for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training.

It is appropriate to discuss the most recent measures enacted by the Security Council: Resolution 2249/2015 represents a new chapter in the fight against terrorism since it introduces the concept of self-defence against terrorists, circumventing the prohibition of the use of force provided for by the UN Charter, thus each State could invoke its right to self-defence against ISIL. Furthermore, the resolution envisages an additional means of tackling the Islamic State which diverges from the military force, that is the international criminal responsibility of individuals perpetrating terrorist acts. Lastly, Resolution 2396/2017 brings up the issue of the risk associated with the returning foreign terrorist fighters, ordering States to prosecute them and penalize their activities.

Chapter Two continues with a brief digression concerning the soft law instruments against FTFs adopted at the international level through the gathering of experts which provide governments with good practices and recommendations relevant to the drafting of policies. In this regard, in 2014 the Global Counterterrorism Forum (GCTF) introduce Hague-Marrakech Memorandum on Good Practices for a More Effective Response to the FTF phenomenon., with the purpose of facilitating the adoption of a long-term and comprehensive strategy against terrorism. Besides, in 2015 the Madrid Guiding Principles were elaborated within the UN framework in order to draw up recommendations for national authorities which could settle the gaps in the capabilities of the states in implementing the UN resolutions and in developing successful strategies. Instead, in 2016 the Malta Principles for Reintegrating Foreign Terrorist Fighters were launched by the Hedayah Research Centre and the International Institute for Justice and the Rule of Law (IIJ), delivering some non-binding principles, serving as a guidance to the national governments in the elaboration of community-based programmes on the reintegration of the RFTFs.

Moving on to the European level, the dissertation outlines the counter-terrorism framework set up by the Council of Europe which reacted to the Islamic threat, adopting the 2005 Convention on the Prevention of Terrorism. The latter requires Member States to criminalize three

preparatory offences, namely "public provocation to commit a terrorist offence", "recruitment for terrorism" and "training for terrorism", along with aiding and abetting in their perpetration. Coupled with the 2005 Convention, the Council of Europe elaborated a document, the Guidelines on human rights and fight against terrorism, which lays down the States' obligation to protect people within their jurisdiction against terrorist acts and to respect basic human rights in the implementation of measures against terrorists. The adoption of the Security Council Resolution 2178/2014 propelled the Council of Europe to take measures supplementing the 2005 Convention which prevented and stemmed the flow of the FTFs. Hence, the 2015 Additional Protocol to the 2005 Convention, identified the preparatory offences to be criminalized in the participating in an association or group for the purpose of terrorism and receiving training for terrorism, other than the criminal offences of the Resolution 2178/2014. Worth mentioning is the Counter-Terrorism Strategy for 2018 – 2022, characterized by three sections, "the three P's", i.e. prevention, prosecution and protection, each corresponding to a list of activities to be implemented by member States, other than the working methods and the expected outcomes for each activity.

Having considered the counter-terrorist mesures at UN level, it has been necessary to examine the European Union (EU)'s counter-terrorism regime. The first dowel was put by the responses to the 9/11 attack: the Framework Decision on Combating Terrorism (FDCT) intended to harmonize the definition and the sentencing of the terrorism; the Framework Decision on the European Arrest Warrant (EAW) aimed at imposing a new procedure for extradition through the mutual recognition of arrest warrants and the targeted sanctions regime mirrored to the UN 1267/1373 Sanctions regime. The FDCT is noteworthy because it envisaged offences related to a terrorist group, that is the directing of or the participation in the activities of such a group, and offences linked to terrorist activities, or rather the public provocation to commit a terrorist offence, the recruitment and the training for terrorism. Though, the 2005 European Union Counter-Terrorism Strategy is the keystone of the EU counter-terrorism system, founded on four pillars: "Prevent", "Protect", "Pursue" and "Respond" which account for the strategic objectives.

The first strand entailed the attention to the roots of radicalization, through the submission of non-violent alternatives to those who are more prone to travelling to the Syrian war, along with the task of checking the social media, being a platform for online incitement and recruitment. In this sense, in 2011 the European Commission launched the Radicalization Awareness Network (RAN) which elaborates expertise and good practices while in 2015 the EU Internet

Referral Unit within the EUROPOL was charged with identifying extremist messages on internet and advising Member States on the matter in conjunction with the EU Internet Forum, empowered with removing the indicted content and with creating effective counter-narratives. Furthermore, the strategy against the ISIL concerned the sheltering of high-value targets, through securing the external borders, raising standards in transport security and protecting critical infrastructure (transport, energy, communication networks including the struggle against cyberterrorism). Therefore, the 2016 EU Passenger Name Record aimed at detecting FTFs before their arrival in the conflict zone, requiring airlines to provide to Member States with information of passengers, including name, travel dates, itineraries, seats, baggage, contact details and means of payment. In conjunction with the PNR data, in March 2017 the EU Council adopted a Regulation amending the Schengen Borders Code in order to consolidate the external borders checks against all relevant databases.

The third strand was implemented after the Paris attacks in November 2015 since the European Union overhauled the 2002 FDCT with the Directive 2017/541 on combating terrorism which was based on three elements: the investigation, prosecution and incarceration of the terrorists; the dismantling of the facilitation and recruitment networks and the struggle against the funding sources. The Directive confirmed three categories of terrorist conduct: terrorist offences, offences relating to a terrorist group and offences related to terrorist activities, though imposing upon Member States the criminalization of four other offences preparatory to terrorist actions, that is receiving training for terrorism, travelling or organizing and facilitating travelling for the purpose of terrorism and terrorist financing.

In the end of Chapter Two, the jurisprudence of the European Court of Justice could not be ignored inasmuch it enshrines the principle of the denial of refugee status if the asylum seeker participates in the activities of a terrorist organization even though he is not involved in the commission of, incitement to or participation in terrorist acts but merely he takes a direct part in the subsidiary activities to terrorism.

National strategies against Foreign Terrorist Fighters: Italy, France and Germany in comparison.

Chapter Three represents the core of this dissertation because it is consecrated to the legal analysis of the national strategies against the foreign terrorist fighters among three countries:

Italy, France and Germany. The section follows a fixed scheme since for each country the focus is firstly located on the repressive system, thus examining the incorporation of the offences within the Criminal Code; then, the administrative measures are inspected, be the expulsion or the special surveillance. Finally, significant jurisprudence are put forward in order to compare the role of the judicial power in each country in the fight against foreign terrorist fighters.

The comparative legal analysis starts with Italy and its counter-terrorism system revolving around Article 270-*bis*, which was introduced in 2001 and punished the promotion, constitution, organization, direction and financing of associations which perpetrated violent acts with the aim of committing acts of terrorism, including international terrorism, or subverting democracy with imprisonment from seven to fifteen years. Instead, the mere participation in the association is criminalized with the detention from five to ten years. Alongside, there are several criminal offences dealing with specific acts liable to be considered terrorist. First of all, Article 270-*ter* of the Criminal Code sets up the offence of the assistance to the members of the association. The penalty for the assistance to members of terrorist associations is four year of imprisonment but the provision stipulates an aggravating circumstance in the event that the assistance persists.

After the London bombing on 7 July 2005, the Italian legislator established *ex novo* two offences, that is Article 270-*quarter* and 270-*quinquies* in the field of recruitment and training for the purposes of terrorism which are specified by the new Article 270-*sexies*. Article 270-*quarter* criminalizes anyone who recruits one or more persons to commit acts of violence or sabotage of essential public services for terrorism purposes. The active agents are constituted by the recruiter and the recruit: while the former is punished with the imprisonment from seven to fifteen years, the latter was devoid of a sanction until the 2015 legislation which equated the active recruitment with the passive recruitment in the light of the criminalization of FTFs. Article 270-*quinquies* indexes the training for acts of terrorism which punishes from five to ten years anyone who trains or otherwise gives instructions on how to prepare or use weapons and all other techniques to commit terrorist acts. The trained is provided for the same punishment of the trainer while the recipient of instructions was punished with same penalty only in 2015 when the self-training through the acquisition of the information online was criminalized. Article 270-*sexies* defines the conducts likely to be considered terrorists through two elements: the objective element is embodied by the serious harm whom the act could cause to a country or international organization due to its nature or the context while the subjective element relies on the threefold specific-intent, namely the intimidation of people, the coercion of public

authorities or an international organization and the destabilization or the destruction of the constitutional order or structures of a country or an international organization.

In 2015 the Italian legislator aligned with the obligations derived from Resolution 2178/2014, inserting a new offence, Article 270-*quarter.1*, which criminalized the organization, financing or propaganda of transfers for terrorist purposes with the imprisonment from five to eight years. Notwithstanding, the FTF who carries out these conducts to his advantage is not punished under Article 270-*quarter.1* which applies only to the cases in which the conducts are perpetrated for the benefit of others. In 2016, Italy has ratified some international Conventions through Article 270-*quinquies.1* and Article 270-*quinquies.2*, respectively the financing of acts with terrorist purposes and the embezzling of money or assets being confiscated in terms of counterterrorism. Finally, the provisions in the Criminal Code concerning counter-terrorism are complemented by Article 280 which punishes with no less than twenty years of imprisonment those who attack or attempt to attack for terrorist or subversive purposes upon a person's life or integrity; Article 280-ter which criminalizes acts of nuclear terrorism; Article 414 enshrines the criminalization of the public incitement to commit crimes and the *apologie* with up to five years imprisonment while Article 302 represents the specific rule since it punishes from one up to eight years imprisonment anyone who incites another person to commit crimes, including terrorist ones.

Along with the criminal measures adopted against the FTFs in order to bring them to justice, the Italian legislator has adopted the preventive measures, already imposed on the members of the organized crime. In this sense, the preventive regime was refined by amending the *Codice Antimafia* and the *Testo Unico sull'immigrazione*. These instruments are directed against individuals, whether nationals or foreigners, who are perceived as a danger inasmuch they are supposed to commit terrorist crimes or carry out preparatory acts. On one hand, the special surveillance, associated to the compulsory residence or the ban on residence in the place of residence or in the habitual dwelling place, the withdrawal of passports or the suspension of other documents and the patrimonial preventive measures. On the other hand, the expulsion of the foreign fighter from the national territory has become a key element of the Italian counter-terrorism against non-Italian aspiring FTFs, providing that the deportation could occur against the foreigners who commit acts intended to participate in a conflict abroad in the ranks of terrorist organizations. Finally, in 2018 Italian administrative system has introduced the withdrawal of the nationality which covers only foreigners born in Italy or married to an Italian citizen who get a conviction in the previous three years.

To conclude the section devoted to Italy, it has been adequate to investigate a significant judgement of the Italian Supreme Court of Cassation which clarifies the meaning of Article 270-*bis* to extend its scope of applicability such as to incorporate the recent expressions of the *jihad* and to distinguish between the mere adherence to an extremist ideology and the participation in the terrorist organization. After the description of the facts of the judgment, the Court of Cassation concludes with a new application of Article 270-*bis,* that is individuals who join the local *jihadist* cells, participate also in the international terrorist organization of ISIL, through the *"adesione aperta"*.

The comparative legal analysis continues with the examination of the Section of the French Criminal Code dealing with terrorism. First of all, it is important to specify that the French Criminal Code gives a definition of terrorism, identifying the conducts with terrorist purposes (*actes de terrorisme*). Indeed, Article 421-1 enumerates several crimes or other lesser indicatable offences contained in the Criminal Code or in other texts which are liable to become terrorist offences when they are linked to an individual or collective organization *"ayant pour but de troubler gravement l'ordre public par l'intimidation ou la terreur"*. The fulcrum is constituted by Article 421-2-1 i.e. the "*association de malfaiteurs en relation avec une enterprise terroriste"(AMT)* which criminalizes the participation in a group aiming at preparing a terrorist act. Article 421-2-1 is characterized by three features, that is a group with terrorist purpose; an individual act of participation, which does not necessarily amount to the terrorist act but it could encompass logistical or financial support or any "effective support"; the dual specific-intent of the individual. In 2012 the French Parliament adopted a legislation which extended the *AMT* to the acts perpetrated outside of French territory by French citizens or residents in France in order to prosecute the French FTFs for the acts committed in the Syrian-Iraqi front. The punishment for participation was set at thirty years while the direction and the organization of the group entails the life imprisonment. The 2012 legislation also added Article 421-2-4, that is the offence of the recruitment, which consists in offering or promising gifts or other advantages or threatening individuals to participate in a terrorist group or to carry out terrorist acts under Article 421-1 and 421-2. There exists also Article 421-2-2 introduced following the 9/11 attacks which criminalizes the financing to terrorism.

In the subsequent years, the terrorist threat has evolved and the Law No. 2014-1353 of 13 November 2014 (the *Loi Cazeneuve*) provided with the *enterprise terroriste individuelle* under Article 421-2-6 which applies to individual terrorist conducts falling into a real criminal plan, even when it is committed abroad. Hence, the notion of *actes de terrorisme* is extended to the

commission of preparatory acts which is punished with 10 years' imprisonment. In addition, the *Loi Cazeneuve* introduced the offence of public provocation and *apologie* of terrorist acts which are punished under Article 421-2-5 with five years' imprisonment, aggravated by the use of public online communication services in carrying out the incitement with seven years' imprisonment. In June 2016, the Article 421-2-5 was further broadened with the incorporation of two new offences in the Criminal Code, that is Article 421-2-5-1 and 421-2-5-2, respectively on the transmission of messages inciting to terrorist offences and on the habitual accessing to online public communication services which specifically address the issue of the prevention of the radicalization.

Proceeding in the analysis of the administrative measures targeted at the FTFs, in 2014 the French legislator introduced the possibility to issue travel and entry bans against potential and suspected FTFs, which were previously directed to foreigners who represented a serious threat to public order together with the expulsion orders. While the travel ban could be imposed only upon French nationals, entry bans could be directed to foreigners who are not residing in France or do not find themselves there. Nonetheless, the turning point is represented by the terrorist attack hitting Paris on 13 November 2015 since the state of emergency was declared by the Law No. 2015-1501 of 20 November 2015, resulting in several administrative measures on surveillance and control issued by the executive without judicial oversight. Among them, the house arrests, the night raids and the closing of religious sites are included. In October 2017, the state of emergency came to an end and these measures were upheld. Lastly, the French counterterrorism system envisages the denationalization, the *déchéance de nationalité* pursuant to Article 25 of the Civil Code. This states that the individual could be the target of the *déchéance* on grounds of participation in a terrorist association or commission of *actes of terrorisme*. However, it is necessary that the individual holds the dual citizenship in order to avoid the statelessness, so that the déchéance could not be imposed upon native French.

The French judicial power intervened through the constitutional review of Article 421-2-5-2 which was labelled as unconstitutional since it infringes upon the freedom of communication in a way that is not necessary and proportional. Indeed, it violates the conditions of necessity, adequacy and proportionality of the restrictions imposed upon the fundamental human rights and freedoms when it punishes the individual who merely checks on *jihadist* websites without committing or attempting to commit a preparatory act.

Chapter Three concludes with the analysis of the German counter-terrorism system, starting from the provisions of the Criminal Code (*Strafgesetzbuch* – StGB*)*. Firstly, German legal system does not criminalize terrorism *strictu senso* nor it envisages specific terrorist offences but it is focused on the terrorist organizations. This entails that the common serious crimes committed for terrorism are not provided for by the German Criminal Code which, in turn, does not consider the terrorist motivation as an aggravating factor in the sentence. The key provision is Section 129a StGB which punishes whosoever forms or participates in an organisation whose aims or activities are directed at the commission of particularly severe crimes or offences against personal liberty with the imprisonment for a term of between one year and ten years. Along with it, Section 129a StGB criminalizes the establishment of or the participation in an organization aimed at the perpetration of typical offences with the same penalty. In reaction to the 9/11 attack, Germany revised its counter-terrorism legislation and broadened the scope of Section 129a StGB to encompass criminal and terrorist organizations abroad.

In 2009 the German counter-terrorism legislation underwent a meaningful development due to the introduction of three new offences, i.e. Section 89a, 89b and 91 StGB, in the light of the criminal liability at early stage and the prevention to terrorism. Section 89a StGB enumerates the preparatory conducts to be criminalized, such as providing or receiving training on, *inter alia*, firearms, explosives or radioactive substances or other substances harmful to health. This list was extended through the incorporation of travelling for terrorist purposes as a preparatory act. In addition, the preparatory conducts could take place also abroad against the German constitutional order. Nonetheless, whether the preparation occurs outside the EU, it is necessary that the author is a German national or a foreigner living in Germany or the offence is carried out in the Germany territory or against a German national. Section 89b StGB legislation criminalizes the intention of receiving instructions in the commission of a serious violent act through the establishment or the maintenance of a relationship with a terrorist organization which could occur also abroad from a German national or resident. Section 91 StGB criminalizes three types of conducts: the *apologie*, the dissemination of materials to third parties intended to the commission of serious violent offences and to encourage the willingness to carry out other crimes and the acquisition of documents for the preparation of a terrorist act. Finally, the 2015 legislation lays down the new Section 89c on financing to terrorism replacing the current Section 89a (2)(4) which criminalizes only the conducts of collection or supply of "substantial assets" intended to carry out serious violent acts endangering the state.

Alongside the criminalization of terrorist offences which allows the German authorities to bring to justice FTFs, since 9/11 attack the Federal Government has envisaged several preventive measures to tackle the phenomenon of terrorism. In 2014 the amended Identity Card Act and Passport Act were adopted to prevent the transfers of the FTFs and to facilitate the procedure of identification in Germany or in third countries. On one hand, the Identity Card Act stipulates that identity documents of FTFs could be revoked for a period of three years replaced by a substitute document, "the terrorism card". On the other hand, the German authorities could declare passports void and seize them. In addition, the foreigners could be banned from entry and stay in the German territory through the withdrawal of the residence, the ban on travelling to third countries owing to security matters and the ban on entry due to the threat to the national security. The German counter-terrorism system also includes the expulsion of foreigners from the German territory and establishes that a German national who take a direct part in the combat operations of foreign terrorist militias could lose the citizenship. Notwithstanding the several administrative measures, Germany has also prioritized strategies of rehabilitation of the returnees in order to allow them to disengage from the radical activities and to reintegrate into the society. In this regard, in 2011 the HAYAT program was launched as a counselling program for radicalized individuals or for those who are involved in the path to radicalization and as a centre for assistance for family and friends of the *jihadists*.

The judicial power had an important role through the judgement of the German Federal Court of Justice concerning the constitutionality of Section 89a StGB, issued in 2014 in a case which involved the conviction of a young man for building a pipe bomb. The Court detected a slight contrast with the principle of legal certainty and the principle of proportionality, still it considered the section consistent with the dictates of the Constitution whether the individual holds the willingness and the decisiveness to commit serious acts of violence against the national security.

After this detailed analysis, one could affirm that in all instances, measures have been enacted in the aftermath of terrorist attacks affecting the Western society in an astonishing way: the 9/11 attack resulted in the reassessment of the already existing counter-terrorism system in order to encompass the international manifestations of terrorism, so as to tackle the extremist organization of Al-Qaida. The subsequent attacks had the consequence of enlarging the regime to incorporate several criminal offences committed for the purpose of terrorism. Despite the differences in the numbers of foreign terrorist fighters, Italy, France and Germany have undertaken similar measures in order to repress this phenomenon through the prosecution and

the prevention of the commission of terrorist acts, so as to line up with the European response and establish a pan-European strategy against terrorism. Furthermore, the three countries turned to administrative measures aimed at disrupting the travel of *jihadists*, at hampering the entry of foreign terrorists and at imposing personal preventive measures on individual who are perceived as a danger inasmuch they are supposed to commit terrorist crimes or carry out preparatory acts. While the French and German Constitutional Courts delivered decisions on the balance between the fundamental liberties and the security purposes, so far the Italian Constitutional Court remained silent on the counter-terrorism measures

Conclusion

It has been the purpose of this dissertation to examine this new phenomenon which has jeopardized the stability of the European countries. While the international, European and national responses have proved to be effective, through the high number of convictions of the returnees and the prevention of many others from travelling to the conflict zone, other issues arise which require a fast response. First of all, foreign terrorist fighters bring up important problems for the constitutional democracies which are struggling with the classic balance between the human rights and the security of the population or the public order. Therefore, there is the necessity to find the adequate balance between these two interests. Moreover, *jihadists* hardly join ISIL in the conflict zone but they remain at home where they set up terrorist cells with the purpose of perpetrating attacks in their country of origin or in the EU soil. Hence, European countries must remain vigilant to the radicalized individuals, to the websites disseminating *jihadist* ideology and to the meeting places where *jihadists* may recruit other individuals. Finally, the wait-and-see approach of the European Union against foreign terrorist fighters imprisoned in Syria and in Iraq could prove fatal. They are Western citizens, and as such, the repatriation is the only viable measure because it allows the national authorities to prosecute the culprits and to perform disengagement programs in order to tackle the root of the problem. It is the time that European countries bring foreign terrorist fighters home.